

31 August 2016

Property Law Review
C/-Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
Brisbane Qld 4001

Via Email: propertylawreview@justice.qld.gov.au

Dear Attorney-General

RE: INTERIM REPORT 2016: SELLER DISCLOSURE IN QUEENSLAND

Strata Community Australia (Qld) (SCA (Qld)) thanks the Attorney-General and QUT for inviting comments to Interim Report on Seller Disclosure in Queensland.

SCA (Qld) is a non-profit, professional organisation for bodies corporate, body corporate managers and suppliers of services to the body corporate industry in Queensland. SCA (Qld), through its predecessor CTIQ, was established in 1984 and currently has more than 600 members. SCA (Qld) members administer around 70% of all strata titled properties in Queensland and up to 90% of all professionally managed properties.

The core objectives of SCA (Qld) include:

- representation on body corporate and community title issues to Government;
- educating the general community on strata management and lifting the profile of the profession;
- provision of on-going professional educational development to its members;
- facilitating relationships between members, government, sponsors and suppliers of services; and
- the establishment and maintenance of professional standards of practice for SCA (Qld) members.

SCA (Qld) works closely with the Office of the Commissioner for Body Corporate and Community Management in Queensland and has a well established relationship with other strata sector stakeholders. SCA (Qld) has been consulted with by QUT on this and other Law Review issues.

SCA (Qld) would like to make the following submission in relation to the Interim Report.

Recommendation 8:

Information relevant to community title lots should be provided in the form of a Body Corporate Certificate. This certificate will accompany the seller statement when provided and will replace the disclosure statement required under section 206 of the BCCM Act and the body corporate certificate which is available under section 205 upon request.

SCA (Qld) supports this recommendation however is concerned as to its operation in practice and particularly would like further input into the process of implementation. Some of the concerns of SCA (Qld) are highlighted with respect to some of the further recommendations below.

Recommendation 17:

The body corporate certificate should also include the following additional information:

- **By-laws (including exclusive use by-laws);**
- **Notice of resumption of common property;**
- **Additional Insurance information including the amount of cover, the period of cover and details of any current or outstanding claims made under the policy; and**
- **Information specific to the body corporate such as whether it is involved in litigation (and adjudication), received a show cause or enforcement notice or a notice or order requiring work to be done or money spent in relation to the scheme.**

It is the position of SCA (Qld) that the obligations during a sale should be borne equally by both the buyer and seller. Specifically, SCA (Qld) recommends that the approach of imposing a reasonable standard of disclosure for sellers whilst a principle of “buyer beware”, is the most appropriate and does not impose unnecessary or unrealistic burdens on either of the parties. Furthermore, SCA (Qld) believes that if members are to be responsible for the preparation of the statement, the statement should only contain minimal and easily populated information.

SCA (Qld) believes that it is unnecessary for the Body Corporate Certificate to contain substantive annexures and documents when many documents required to be disclosed are available online. SCA (Qld) notes that information such as the Community Management Statements (which relevantly includes the by-laws of the scheme) is available through a search of the Department of Natural Resources and Mines.

In relation to litigation matters, SCA (Qld) notes that current litigation information is publicly available via search through the e-court system, whilst adjudication and litigation history of the scheme (and any judgments if applicable) are available through searches of free online legal and court databases such as Austlii and the Queensland Supreme Court Library, additionally a BCCM Form 3 may be lodged to obtain copies of Adjudicator’s Orders.

SCA (Qld) is aware of a number of schemes where if all litigation which the Body Corporate was involved in (past and present) was required to be disclosed the disclosure would be voluminous, overly onerous and likely to defeat the purpose of providing relevant quality information to a prospective purchaser.

Consider a medium sized Community Title Scheme (say 20 Lots or more) and the likelihood that at any one point in time the Body Corporate is taking recovery action in relation to unpaid contributions (levies). A reasonably routine matter such as the recovery of modest unpaid contributions is unlikely to have an impact upon a buyer’s purchasing decision where as to be disclosed in the context of a detailed purchaser’s pre-inspection report of Body Corporate records. This is to be contrasted to the same information being provided in a summary Body Corporate disclosure certificate as is now being proposed within this recommendation.

Likewise some Bodies Corporate are exposed to routine litigation by what are effectively vexatious litigants within the ownership group.

In the experience of the members of SCA (Qld) this phenomenon is not uncommon and the adjudication process is often used as a platform for disgruntled owners, or owners with an agenda, to communicate their point or to otherwise obstruct or interfere with the operations of their Body Corporate. Again, SCA (Qld) recommends that careful consideration be given to the extent of disclosure required including to ensure that financial information provided is unlikely to unduly influence a purchaser’s decision when it relates to routine litigation (such as recovery of contributions) or nuisance litigation (which in most cases is ultimately dismissed as frivolous vexatious, misconceived or without substance).

As information of this kind, such as the noted Community Management Statement and litigation history, is readily available, SCA (Qld) believes that the obligation to obtain publically available information should be the responsibility of the buyer. Where information is not publically available but is necessary in disclosure, these documents should be required to be presented in the Body Corporate Certificate.

There are numerous benefits to the approach recommended by the SCA (Qld), most notably in relation to:

- reducing voluminous documents being disclosed;
- reducing preparation time of the statement;
- reducing the costs of preparing a statement; and
- creating a joint approach to disclosure and mutual obligations;

Should it be necessary that disclosure of publically available information is to take place, SCA (Qld) submits that a minimalistic approach should be taken, whereby disclosure is to reference the documents which the buyer is to be aware of and the website or database where documents can be obtained. By doing so, this would maintain fairness in the obligations of both parties and be consistent with the benefits noted above.

However, if the Legislature is determined to have copies of the by-laws to be included in the actual contract, the SCA (Qld) contends that this should be by way of inclusion of the full CMS. By-laws for a Community Title Scheme are not kept separately to the Community Management Statement. The provision of only the by-laws (as opposed to the Community Management Statement which is currently recorded for the scheme as at the time of the production of the Information Certificate) is problematic. There is no statutory requirement for a Body Corporate to hold the by-laws separate to the Community Management Statement and the provision of part of CMS is likely to lead to confusion and/or errors in disclosure.

Accordingly, SCA (Qld) only supports the recommendation that by-laws be provided as part of disclosure if they are provided within the currently recorded Community Management Statement for the relevant Community Title Scheme. However this may result in higher costs to the vendor.

The recommendation to require information specific to the Body Corporate as to whether it is involved in litigation (and adjudication), is concerning to SCA (Qld) as the information required to be provided is limited to current litigation and not decided matters. This could raise issues of sub judice with potential purchasers being privy to legal actions which are yet to be decided in circumstances in which they are not a party to such actions.

Accordingly, SCA Queensland proposes that if details of litigation are to be disclosed then only current litigation involving the current details, which would otherwise be publicly available must be carefully considered.

Recommendation 34:

A statutory disclosure regime comprising a number of statutory warranties, disclosure of a seller statement and body corporate certificate (where applicable) be enacted in Queensland.

As to the proposed Body Corporate Information Certificate within attachment E, SCA Queensland recommends the following amendments:

1. There ought to be inserted a new panel before Part A, which provides details of the Lot and particularly whether the Lot is a building format plan, standard format plan or volumetric format plan. It is recognised that details of the property will be provided in the seller statement as otherwise proposed however the type of survey plan has a significant impact upon matters such as maintenance obligations which will bear upon the purchasing decision of an informed and reasonably well educated purchaser.
2. In the Lot particulars there ought to also be a requirement to disclose if there are any approvals, with continuing conditions, which relate to the installation or erection of an improvement upon the Lot, which the Lot owner or occupier is responsible for. A similar disclosure obligation is contained within Part B, in respect of improvements erected upon the common property.
3. Within Part D of the Body Corporate Certificate the phrase “dispute resolution proceedings” should be limited to current proceedings and consideration ought to be given to whether those proceedings are Chapter 6 proceedings only; that is, proceedings to which the Body Corporate is a party under Chapter 6 of the *Body Corporate and Community Management Act 1997*.
4. Part F of the Body Corporate certificate should be re-worded to reflect the Department of Natural Resources and Mines website where the Community Management Statement for the scheme can be obtained. Provision of an extract of the Community Management Statement will lead to confusion, increase the likelihood of errors being made in disclosure and will result in the loss of the opportunity to provide current and relevant information to a purchaser, in the form of the other information detailed within the currently recorded Community Management Statement; for example within schedule B as to whether there is proposed to be any further progressive development of the Community Title Scheme.
5. That there be no personal liability imposed on Body Corporate members arising from the disclosure incorrect information being disclosed in instances where the members acted in good faith and did not act negligently, for example, undertook due diligence and care to reasonably obtain all information available to the member, SCA (Qld) would, however, support a personal liability to be imposed where the member did not act in good faith or was negligent.

Other Recommendations

SCA (Qld) would like to re-iterate its position recently submitted in the submission “Procedural Issues under the BCCMA” (February 2016) relating to a more satisfactory notification system to a body corporate that a Lot in a body corporate has been sold. Currently the work of recording a sale on the body corporate roll has and is carried out by the Community Title Scheme’s body corporate manager on their behalf and the difficulties that are experienced when a notification is not received under the current and flawed system could be addressed in this review.

Question 58: Should a lot owner’s address for service include an email address in addition to a physical address?

SCA (Qld) supports an amendment to require an email address as part of the owner’s address for service. Changes of address cause widespread problems for the administration of bodies corporate. Owners should be required to keep their details up-to-date (with penalty units for non-compliance). Moreover, the body corporate should be able to recover its reasonable costs of enquiry from the owner as a body corporate debt. Electronic conveyancing should automatically issue a form 8 to the body corporate’s

address for service. Alternatively, the vendor should remain liable for body corporate debts until the purchaser gives the body corporate a Form 8.

SCA (Qld) understands that the proposed seller disclosure regime is not intended to take away from the due diligence requirement of buyers.

FURTHER INFORMATION

SCA (Qld) is happy to send a representative to discuss this submission and the proposed reforms with an appropriate Review Committee representative. In this regard, the Committee may contact:

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Sincerely



Simon Barnard
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