Property Law Review

Faculty of Law | Queensland University of Technology

By email

Dear Sirs

Thank you for inviting our input on behalf the Owners Corporation Network of Australia and the Body Corporate Owners Network, both of which represent community scheme owners. OCN and Body Corporate Owners Network are working together as a key consumer voice to encourage sound governance and to protect rights in community schemes.

Our overarching answer to the whole topic of lot entitlements is that when owners buy into a scheme, they expect that the lot entitlements have been set up fairly. All owners are expecting that they will pay a fair proportion of the costs of administering and maintaining the common property and the buildings in the case of a Building Format Plan.

When schemes have not been set up fairly, there needs to be an objective method of employing independent professionals to reallocate lot entitlements.

Our answers to the Issues Paper questions follow.

Yours sincerely

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# Lot Entitlements Issues Paper - Questions

**1 Should lot entitlements continue to be used to determine a lot owner's contribution to body corporate expenses and liabilities?**

Yes.

The use of Lot Entitlements is standard practice and generally accepted in Australia and internationally as a good method of making sure owners pay a fair proportion of the costs of running the scheme. It is systematic, transparent and easily understood.

**2. What is the most appropriate method for the sharing of expenses within a scheme and why?**

a. **Equal contribution to all expenses;**

Our preferred approach is Option C below, where the Equality Principle is applied to Administrative Fund contributions and floor area applies for contributions to the Sinking Fund.

Here we describe the benefits we perceive in the Equality Principle

The Equality Principle as defined in the Issues Paper is:

> "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.

The Issue Paper goes on to say:

> "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."

Certain expenditures from both the Administrative Fund and Sinking Fund benefit some lots more than others, depending on factors related to size, such as floor area, number of bathrooms, number of windows, number of balconies, number of car spaces, etc. Certain improvements (e.g. replacement of windows) are likely to benefit large lots more than small lots in terms of potential market value.

Many of these factors also have an impact of market value, but market value is not a good proxy for Contribution Schedule Lot Entitlements because current unit values is also influenced by other factors, such as owner renovations inside the lot.

Other differentiating factors are exclusive use and type of use.

b. **Differential contribution (e.g. value or area of the lot);**

No. Our preferred approach is Option C below, where the Equality Principle is applied to Administrative Fund contributions and size is used for contributions to the Sinking Fund.

Market value is the most popular methodology in Australia for allocating lot entitlements. The benefit of using market value is that it is possible to obtain an objective valuation by a certified

valuer. Being objective and a simply single factor means there can be little room for dispute as valuations can be verified.

However, market value is not a perfect indicator for Contribution Schedule Lot Entitlements because current unit value is also influenced by position within the building, views, renovations/improvements carried out by the lot by the lot owner, etc.

Market value does not have a direct proportional relationship with Admin Fund and Sinking Fund expenditure, nor is it a fair determiner of voting power.

The international examples quoted in the Issues Paper use floor area (as a proxy for size) to allocated lot entitlements.

Again, as with using market value, floor area has the benefit of being a simple measure and objective, hence indisputable.

Area of lot alone is too simplistic to be valid indicator. Differences in floor area may or may not have a proportional relationship with body corporate expenditure from the Administrative and Sinking Funds (as outlined in 2(a) above), nor is there any rationale for giving more voting power on basis of simply having more floor area.

If the differential methodology were to be used, we believe developers should be required to state in documents available to purchasers that the contributions have not been set equally and precisely what factors have been used in allocating them differentially

**c. A combination of equal and differential contribution depending upon the nature of the expense;**

Our preferred approach is Option C below, where the Equality Principle is applied to Administrative Fund contributions and size is used to determine contributions to the Sinking Fund. Please refer above to our views on the Equity Principle and differential contributions.

We note that certain Administrative Fund expenditures are clearly appropriately shared equally by all owners, such as the costs of Body Corporate Managers, Caretaking Service Providers and maintenance of common property where all benefit from its use equally (mixed use schemes may have clear differential use of common property).

**d. Another method?** N/A

**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?**

The Equality Principle is the most relevant: “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”. The Equality Principle does not mean that expenses are shared exactly equally.

Examples of factors to be taken into account are listed in 2(a) above.

Ideally developers would be obliged to have lot entitlements approved by a government body such as a specialist adjudicator.**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)?**

Yes, an obligatory core set of factors should apply to allocating lot entitlements.

Making this list an exhaustive list would ensure consistency across all schemes. However an argument could be made to allow for factors (additional to the core factors) to be introduced by and for the specific schemes has a rational in catering to different types of schemes.

Given the range of types of schemes, a well-defined core set of factors could be legislated to apply to all schemes. Additional factors relevant to specific types of schemes (commercial, two lot, etc.) selected by developers or bodies corporate would have to be fair, articulated and transparent and approved under the Equality Principle by the relevant government body, such as a specialist adjudicator or QCAT.

Market value is not an appropriate determining factor for Contributions Schedule Entitlement Units. Market value changes constantly and relativities of market value between lots may change with lot renovations or with, say, a new development next door which changes to the views from lots, etc.

Lot area alone is also not a sufficient criteria.

**Should there only be one factor?**

No, a single factor is unlikely to sufficiently reflect the differential benefits of body corporate expenditure to different types of lots, except in a very simple buildings where, say, there are only two or three types of identical lots.

**b. Specify the factors that *may* be used to determine lot entitlements? (This would be an exhaustive list).**

Please see answer to 2(a) above. However we are not qualified experts and would be interested to see the factors given to the law review team in submissions by professional consultants with actual experience advising on lot entitlements adjustments.

**c. Allow a developer to choose any factor provided the basis for calculation is specified in the community management statement?**

No. It is rational, fair and equitable for the legislation to set a standard core set of criteria, with the option of the developer applying to the relevant government body if they wish to include include additional criteria. In all cases the lot entitlements should be approved by a relevant government body (e.g. specialist adjudicator or the like).

**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)?**

Yes, the developer should be obliged to provide an explanation. This would be helpful to prevent disputes with and amongst owners.

The most transparent approach would be to have the factors listed in the Community Management Statement, and have this required in the legislation.

Please note that the examples listed in this question (water front, park frontage, main road) are relevant to market value and therefore to determining Interest Schedule Lot Entitlements, but these

factors should not be considered relevant to determining Contribution Schedule Lot entitlements, as they have no relationship with body corporate expenditure.

**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?**

As explained above, market value is not a good determiner of Contributions Schedule Lot Entitlements.

However, yes, if market value were to be used as the sole factor, then in would be logical to integrate both the Contribution and Interest schedule into one set of Lot Entitlements.

We support the concept of having two different sets of lot entitlements, particularly in relation to distribution of funds from insurance and termination of schemes, and probably for sinking fund contributions. It follows then that that each of the two schedules must be able to be adjusted if they have been set up unfairly or the scheme changes in some way.

**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?**

This question is somewhat ambiguous. The Issues Paper uses the term "equally" as implying allocated under the Equality Principle and the Issues Paper defines "differential" as meaning "allocate costs to each lot differently based on a particular factor" such as market value or size.

So on that basis, the Equality Principle is by definition not relevant to the Differential methodology.

However, we are not in favour of the Differential methodology as so defined.

The Equality Principle is superior: "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**".**

**Do you support a model where lot owners contribute differently to recurrent expenditure and capital expenditure?**

It is to be noted that differing lots benefit to a lesser and greater extent from expenditure both from the Administrative Fund and Sinking Fund – please refer to answer to Question 2(a).

**a. Option 1 – equal contribution to administrative fund and market value to sinking fund ;**

No

**b. Option 2 – specified factor (e.g. area, use of lot, level in building) for administrative fund and market value for sinking fund.**

The Equality Principle should be used to determine Admin Fund Contributions and Unimproved Value could be used to set Sinking Fund contributions. Current market value is inappropriate as it may be change by renovations done buy lot owners.

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

N/A

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

N/A

**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?**

The Community Management Statement which contains the scheme's Lot Entitlements is included in the Purchase Contract during the sale of a property, so buyers have the ability to see this.

Buyers who have never before owned a property in a community title scheme are unlikely to know about most matters to do with living in a scheme and education about unit entitlements is part of the overall need for education.

At the same time, we submit that a buyer is responsible for carrying out their own due diligence and informing themselves about matters relating to the value of the property for which they are negotiating a purchase price.

**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?**

The Equality Principle is relevant in all cases. The factors to be used for setting Lot Entitlements may differ marginally in different types of schemes. That is why it may make sense for the legislation to require a core set of factors and for developers and body corporates to be given the scope to add additional factors in their application to the relevant government body (specialist adjudicator, QCAT).

In particular, mixed use schemes are full of peril for purchasers of residential units. It is extremely difficult to protect the interests of all classes of owners. There are competing needs and competing purposes that the lots are used for which make establishing relativity in lot entitlements very difficult. When they have been established incorrectly, the bodies corporate have huge problems working with and often unravelling the rules the developer and consultants have put together.

**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?**

A well defined core set of factors will be relevant to all schemes.

Additional factors for differentiation identified by developers or bodies corporate would have to be fair, articulated and transparent and approved by the relevant government body (such as a specialist adjudicator) at time of application.

We suggest that another government priority should be to look at Governance of Large Schemes, particularly Mixed Use Schemes and Principal and subsidiary schemes. We have come across many examples that are difficult to administer and full of ongoing angst.

**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?**

In mixed use schemes it is possible to have extra charges specified in a by-law where specific lots must pay for things such as extra insurance premiums, water usage, grease trap servicing, and the like, where the lot use merits this (e.g. restaurants)

**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?**

Having separate schemes with an overarching Building Management committee and Building Management Statements is a logical approach. However this would need to be catered for in detail in the BCCM Act to ensure fair and transparent processes and decision-making, as well as democratic selection of Building Management committee representatives and other relevant governance matters.

This model is currently in use in some cases in NSW, but democratic Building Management Committee member selection, checks and balances, transparency of finance and communication are not sufficiently prescribed in the NSW legislation.

**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?**

We have been made aware that Building Management Statement systems can be used to prevent residential owners from changing schemes. The BCCM would need to provide detailed prescriptions to ensure these approaches work.

**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?**

Yes, for example in the case of restaurants which have implications for insurance as well as differential use of water, grease trap services, etc. there may be a by-law which allocates extra charges for relevant expenditures.

**16. Do you think that developers should be responsible for setting lot entitlements when establishing new schemes? Why or why not?**

Yes. Developers need to set lot entitlements so purchasers are aware of the implications to their purchase. However it is our view that ideally all lot entitlement schedules should be approved by a relevant government body (such as specialist adjudicator). Factors used to set lot entitlements (including any core factors set by the legislation) should be listed in the Community Management Statement.

**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)?**

The factors used for setting lot entitlements should be listed in the Community Management Statement and this should be required under the legislation.

If market value is used for setting lot entitlements, a valuation by a qualified valuer is a must. However, as the developer has a vested interest to maximise sale prices, it would be appropriate for the valuer to be demonstrably arm's length from the developer and, ideally, lot entitlements would need to be approved by a government body.

**18. What input should lot owners have to the setting of lot entitlements?**

Owners should be able to have a say via their right to put motions on the agenda of general meetings and by voting on relevant motions at general meetings. A requirement for applying for

adjustment should be that a professional valuer or specialist lot consultant has been appointed to determine the allocations.

**Should there be a right for a majority of owners to challenge the basis upon which lot entitlements are allocated?**

No. A vote by a majority of lot owners should be able to recommended adjustment on the basis of valuation by a qualified valuer, but an application to make an adjustment should have to be approved by a relevant government body such as a specialist adjudicator.

**If yes, on what basis should they be challenged (e.g. unreasonable, inequitable, special resolution / without dissent / unanimous)?**

A challenge on the basis of unreasonableness and/or inequity, listing the factors that should be taken into consideration.

By Special Resolution to proceed with obtaining a valuation by a qualified valuer and applying to a relevant government body for approval (an appeal process for aggrieved individual owners would need to be in place)

**What principles or criteria could a court use to determine the new allocation?**

Equality Principle

Core factors set by legislation, such as listed under Question 2(a) above

Any other relevant criteria

**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?**

Yes, yes, yes.

**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?**

This depends on the criteria to be used.

For unimproved market value – a certified valuer

For lot size – a copy of lot title or other certified plan giving evidence of lot area

For Equality Principle factors – quantity surveyor or other specialist

**21. Should there be penalties or sanctions for developers who allocate lot entitlements unreasonably and in ways that do not accord with legislative principles?**

Unreasonable or inappropriately allocated lot entitlements are likely to only come to light if the new body corporate or a new owner lodges an application to re-allocate lot entitlements. This would need to happen within a logical timeframe after the establishment of the scheme (say within the structural warranty period).

If the developer allocated lot entitlements unreasonably, ideally they should be responsible for paying for all costs related to making the change (cost of legal advice, general meetings, registration

of new lot entitlements etc.). As stated in the Issues Paper "In NSW 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."

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

Yes, using the legislatively specified process.

**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)?**

There should be no unique limits. But challenges to the existing allocation would have to be evidenced on the basis of the Equality Principle and the criteria/factors required under the legislation.

While owners are entitled to certainty, they are also entitled to fairness. Unfair allocation of lot entitlements becomes more pronounced and evident as body corporate costs rise. A Gold Coast example is where identical units on the same floor several years ago paid contributions of $2,000 pa versus $4,000 pa. But as costs increased, these same identical units now pay $5,000 and $10,000 pa.

**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?**

Yes, both options are reasonable, as long as the correct processes, including approval by relevant government body is followed.

**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?**

By Special Resolution (an appeal process by aggrieved individual owners would need to be in place).

Resolutions without dissent and unanimous resolutions are nearly impossible to achieve.

**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?**

Yes. Owners should be empowered to protect themselves. It is theoretical possible that a lot owner could be a minority amongst other owners (including the developer who is still an owner) who have vested interests, so it is reasonable for a single lot owner to be allowed to seek an adjustment arguing their case within the ambit of the legislated limits. If their case is inadequate, the specialist adjudicator or QCAT should be able to rule out the application.

This approach is much less expensive than applying to the District Court. The average scheme size is nine (9) so many schemes would not have the capacity to afford expensive legal assistance.

**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?**

Yes. On the principles set out in the new legislation. Also changing circumstances in a scheme – resumptions, material changes of use - can warrant a change in entitlements.

**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?**

Yes.

**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?**

In a new scheme, as there may not be a full contingent of new owners, and the developer may still own some of the lots, it would be reasonable to allow one lot owner (at their own expense) or a simple ordinary resolution to support the application for 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?**

When it comes to Contributions Schedule Lot Entitlements, the changes that are relevant are factors that impact how body corporate expenditure from Admin and Sinking Fund are likely to providing differing potential benefits for individual lots. Such changes may not simply be physical changes. Change of use is an example of a change which may influence impact on body corporate expenditure (e.g. from residential to commercial or resort accommodation, from office to restaurant, from commercial to residential).

Examples can help understanding, but legal wording would need to be carefully written to avoid having examples interpreted as prescriptions.

**31. Do you agree that new schemes should retain the current provisions relating to lot entitlements for amalgamated and subdivided lots?**

No. New provisions in the Act should prevail.

**If not, how should lot amalgamations and subdivisions be treated if lot entitlements are to be adjusted?**

The same factors need to be taken into consideration for amalgamated or subdivided lots as for initial allocation of lot entitlements, to ensure that amalgamated or subdivided lots benefit equitably from body corporate expenditure.

Under the Equality Principle a number of factors need to be taken into consideration that have implications for maintenance costs.

- Size – size has implications for extent of common services/infrastructure for water, electricity, air conditioning, etc. and for extent of boundary walls/floors/ceilings that are adjacent to common property (external walls, ceilings below roofs, floors on bottom floor) and therefore shared with body corporate.
- Number of windows (cleaning, replacement)
- Number of balconies (waterproofing)
- Number of bathrooms / kitchens (proportional allocation of cost of water usage in cases where there is a shared water meter for whole building)
- Exclusive use areas allocated to the lot
- Number of car spaces/garages allocated to the lot
- Use of lot in mixed use schemes (where there may be differential use of common property and common services depending on the type of use.

**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?**

Yes, if needed.

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?**

They should be able to seek equalisation.

**c. Should sub-divided lots be allocated lot entitlements equally to other lots in the scheme on an adjustment order?**

Yes, the Equality Principle should apply and all relevant criteria be considered.

**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?**

Yes

**35. Should adjustment orders consider whether amalgamated lots are being used as separate residences?**

Yes. Increasing the number of residences potentially increases the number of residents, with implications for water usage, wear and tear of common property, etc. Subdividing or amalgamating can also have an impact on market value.

**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?**

No. Decisions should be on a case by case basis and be fully reflective of the legislated principles and processes.

**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)?**

No, a buyer is responsible for finding out about lot entitlements and carrying out due diligence before purchase. The Community Management Statement is appended to the Contract of Sale for the buyer to read and initial. So lack of knowledge should not be allowed as a justification by the new owners.

**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?**

No. A percentage of lots in a new scheme may still be owned by the developer, and new owners in new schemes are often lacking in knowledge and experience about BCCM legislation. Allowing unique by-laws to by-pass the approved lot entitlements is open to potential abuse at the early stages of a scheme.

**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?**

Yes

**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?**

No, unless they are a mortgagee in possession, or a person/entity with power of attorney (in the case of say a deceased estate), or similar.

Normally the mortgagee and other parties do not have a say in other matters that potentially impact the value of the lot (e.g. special levies, capital improvements of the building, renovations by the owner, leasing of roof by telecommunications firms, etc.), so there does not seem any rationale to specially give them a say about lot entitlement matters.

**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?**

No, unless they are a mortgagee in possession, or a person/entity with power of attorney (in the case of say a deceased estate), or similar.

**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?**

Yes, provisions for re-allocation should be in place to facilitate reallocation.

If this is left up to developers and their consultants, we are concerned that the interests of eventual owners, particularly owners of residential units, are likely to be a low priority.

We receive anecdotal evidence of the ongoing difficulties of owners in staged developments. We believe strongly that they, like Mixed Use Schemes, need further legislative prescriptions developed with input by experienced owners. We can put you in contact with owners from staged and mixed use schemes.

In the first instance the potential for re-allocation in a progressive scheme should be made transparent to buyers and owners.

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

Yes. It is the developers who have opted for a staged development and they should bear the costs.

**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?**

The mechanisms should be the same as for any adjustment.

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

Yes, owners in existing schemes should be able to seek reallocation if they have legitimate grounds. As costs rise, existing unfairness is magnified – see example in answer to question 23.

**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?**

No. In this submission, it has been suggested that in new schemes (due to the possibility of ongoing developer ownership of lots), that individual lot owners or body corporate by ordinary resolution should be able to seek adjustment. Whereas for existing schemes, an individual owner (at their own expense) or a Special Resolution at a general meeting of owners would be required (an appeal process for aggrieved individual owners would need to be in place).

**b. Should the current rights be retained?**

Rights for seeking changes/adjustments should be the same for all under the legislation.

**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?**

Yes. The right to seek and at their own expense. But their argument of the case would have to be reasonable under the new criteria.

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

Scheme lot entitlements should remain as they are, but if a body corporate resolves to seek an adjustment, they would have to do so under the new legislated principles and criteria.

To ensure objectivity, our preference is to require seek an adjudicator's order to have QCAT or Specialist Adjudicator review and approve recommended lot entitlements. The adjudicator would be able to dismiss claims that are frivolous or without substance.

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

On the basis outlined in the new legislation.

**a. What type of body corporate resolution should be required to support an application for an adjustment order?**

A Special Resolution (an appeal process for aggrieved individual owners would need to be in place).

**b. Should adjustment be limited to situations where lot entitlements are unreasonable or have become unreasonable?**

The terms unreasonable and inequitable have both been used in the Issues Paper, and both these terms are appropriate.

**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?**

On the basis of any new/current principles

**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?**

When and if a body corporate desires to seek an adjustment, the deciding principles (in line with new/current legislation) should be resolved by Special Resolution at a General Meeting. However, when an application for adjusting lot entitlements is made to a body such as a specialist adjudicator or QCAT, they would have the authority to ensure deciding principles are in alignment with the new legislation.

**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)?**

No, adjustment criteria should be on the basis of the new principles.

This suggested approach is similar to the approach under the Building Code of Australia where changes in regulations generally apply to new developments as well as to upgrading of existing structures (e.g. balcony rail height requirements).

Removing April 2011 rights to revert the reversions would add certainty

**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?**

We suggest change as suggested in the Issues Paper to pre-April 2011 schemes, which would allow deciding principles to be resolved by Special Resolution at a General Meeting and subsequent seeking of adjustment, with the ability to apply to government body for resolution in need.

**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?**

All adjustment processes should be on the basis of the new principles

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

Yes, as outlined in the Issues Paper, but only based on the new principles in the legislation. Once new deciding principles are adopted, adjusting the lot entitlements must follow the protocol of seeking approval from an appropriate government body such as a specialist adjudicator.

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

   By Special Resolution. Resolutions without dissent are too difficult to achieve.

b. **What should happen if an agreement cannot be reached?**

As outlined in the Issues Paper: "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."

c. **How long should schemes have to adopt a deciding principle?**

No time limit. It is possible that an existing committee is apathetic, lacking in skills or have vested interests in the matter, and this may be the case over a longer period of time. Later a more objective committee may wish to take warranted action.

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

Yes

**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?**

No. New provisions for adjusting lot entitlements should apply to all existing schemes and new developments.

However there should be no legal obligation to adjust existing lot entitlements in line with new provisions if the body corporate does not choose to initiate this.

**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?**

Existing schemes should be able to vote to opt-in in principle to new provisions for setting and adjustment of lot entitlements. But if they choose to take action and initiate an adjustment, the new provisions should automatically apply.

If schemes are not wanting to change, there is no rationale in encouraging discussion and possible conflict. Most schemes have been set up fairly and need not be disturbed.

**56. Would your decision to opt in depend on what the new provisions for setting or adjustment of lot entitlements are?**

No doubt this would influence body corporate decisions.

**If yes which option would you chose to opt in:**

**a. Option 1 - equal contribution to all expenses;**

We submit that the Equality Principle should apply.

**b. Option 2 - Differential contribution on basis of**

**(v) Value (vi) Area (vii) Level in building (viii) Other**

**c. Option 3 – combination of equal for administrative fund and market for sinking fund.**

We submit that the Equality Principle should apply to Adminstrative Fund contributions and perhaps unimproved value apply to Sinking Fund contributions. (Change to market value due to renovations to lots by owners that increase market value should not be taken in to account.)

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

No time limit, as per answer of 52(c) above

**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)?**

They should retain the current right to adjust lot entitlements, but will have to do so under the new provisions.

We believe the right to seek adjustment should continue to be available to owners. Unfairness is magnified when body corporate levies increase as much as they have in recent years. Owners may only discover the unfairness after many years. Unfair entitlements mean unsaleable units.

**59. Should BUGTA schemes be subject to the same lot entitlement adjustment principles as existing schemes under BCCM Act?**

Yes

**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)?**

If there are other aspects BUGTA that are required to be maintained, then BUGTA and the specified Acts should be amended with provisions equivalent to any new provisions under the BCCM Act. If there are no other reasons to maintain BUGTA, there could be automatic migration to the BCCM Act.

If the Review recommends transitioning of BUGTA schemes to the BCCM Act, it should not be a matter of 'opting in', but rather a transition timetable should apply for all.

However, schemes currently under BUGTA should not be obliged to change their unit entitlements until such time as they choose to do so under the new provisions.