BLURRED LINES OR STARK CONTRASTS: ARE BY-LAWS TO RESTRICT SHORT-TERM HOLIDAY LETTING PERMISSIBLE IN QUEENSLAND COMMUNITY TITLES SCHEMES?

MELISSA POCOCK*

Complex laws regulate the development and management of Queensland community titles schemes. Different legislative regimes co-exist, including the Body Corporate and Community Management Act 1997 (Qld) ('BCCM Act') and its predecessor, the Building Units and Group Titles Act 1980 (Qld) ('BUGT Act'). This article considers by-laws under the BUGT Act regulating short-term holiday letting post the decisions in Fairway Island GTP v Redman [2019] QMC 13 and Redman v The Proprietors – Fairway Island GTP 107328 [2020] QDC 68. It compares the BCCM Act and BUGT Act requirements and argues that similarities in by-law making powers under the two may appear to blur the divisions between them. However, the positions under each Act are in stark contrast, rendering the cases distinguishable for BCCM Act schemes, a desirable outcome. The article also explores arguments in favour of self-regulation, and the governmental response in New South Wales, Victoria and Western Australia.

I INTRODUCTION

Strata and community titling are popular forms of land titling that operate throughout Australia and internationally in various guises. Over a quarter of Australian housing is ordinarily regulated by strata and community title,[1] with the sector's insured value estimated to exceed AUD1.117 trillion.[2]

In Queensland, a scheme may be created with a minimum of two individually-owned lots with shared property[3] that is held in common ownership.[4] A separate entity, a body corporate, is created upon establishment of the scheme,[5] tasked

* PhD, LLB (First Class Honours), B Bus (Accounting); Lecturer, Real Estate and Property Development, Department of Tourism, Sport and Hotel Management, Griffith University, Gold Coast. Thank you to Gian Chung for her research assistance with this article and the initial reviewers for their invaluable feedback.

1 Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016* (Catalogue No 2024.0, 27 June 2017).

2 Hazel Easthope, Sian Thompson and Alastair Sisson, *Australasian Strata Insights 2020* (Report, June 2020) 7.

3 *Body Corporate and Community Management Act 1997* (Qld) ('*BCCM Act*') s 10(2).

4 Ibid s 35(1).

5 Ibid s 10(4).

with management of the common property.[6] Approximately 7% of Queensland's population, comprising 11% of households, reside in the nearly 50,000 schemes in the state.[7] A combination of lifestyle and location, together with planning policies[8] have ensured ongoing growth of the sector, which is expected to continue into the future.[9]

The strata and community titles sector also contributes significantly towards Queensland's tourism industry. Queensland serviced apartment schemes with 15 or more rooms accounted for nearly 77,500 bed spaces and 13.7 million room nights during just the June 2016 quarter.[10] More recently, Tourism Research Australia calculated that total tourism consumption increased by 6.8% between the 2016/17 and 2017/18 years.[11] Further, consumption grew another 6.2% during the 2018/19 year.[12] Total accommodation costs including amounts spent in Queensland serviced apartment schemes are an aspect of consumption. In this regard, accommodation and food service costs accounted for 29 cents in every dollar expended by domestic tourists and 25 cents in every dollar spent by international tourists.[13]

The role that serviced apartment schemes play in the short-term accommodation market is recognised in the objects of the *Body Corporate and Community Management Act 1997* (Qld) ('*BCCM Act*'); 'the tourism potential of community titles schemes' is encouraged.[14] There is no restriction within the *BCCM Act* in relation to the mixing of uses within a scheme, or even within a single building. Rather, schemes are designated under a regulation module which may indicate the purpose of the scheme.[15] Permissible use is determined by the planning scheme

6 Ibid ch 3 pt 1 div 1.

7 Easthope, Thompson and Sisson (n 2) 12; Department of Justice and Attorney-General (Qld), 'BCCM Update' (March 2020) 24 *Common Ground* 6, 7–8 <https://www.publications.qld.gov.au/dataset/bccm-common-ground-e-newsletter/resource/1207a42a-87cf-4126-b38a-5496c5bf27aa>.

8 Hazel Easthope et al, 'How Property Title Impacts Urban Consolidation: A Life Cycle Examination of Multi-title Developments' (2014) 32(3) *Urban Policy and Research* 289, 293; Hazel Easthope and Bill Randolph, 'Governing the Compact City: The Challenges of Apartment Living in Sydney' (Working Paper No 2, City Futures Research Centre, University of New South Wales, September 2008).

9 In November 2014 through January 2015, in parts of 2015 and 2016, and in April 2017, the number of dwellings approved for attached properties exceeded the number of approvals for detached houses in Australia. The number of approved attached dwellings is more volatile than those of detached dwellings, and the slowing of approvals reflects those market conditions: Australian Bureau of Statistics, *Building Approvals, Australia: May 2020* (Catalogue 8731.0, 1 July 2020).

10 Australian Bureau of Statistics, *Tourist Accommodation, Australia* (Catalogue 8635.0, 25 November 2016).

11 Tourism Research Australia, *State Tourism Satellite Accounts 2017–18* (Report, August 2019) 4.

12 Tourism Research Australia, *State Tourism Satellite Accounts 2018–19* (Report, May 2020) 4.

13 Tourism Research Australia, *Tourism Satellite Account: Summary of Key Results 2018–19* (Report, 12 December 2019) 3.

14 *BCCM Act 1997* (Qld) s 4(e).

15 For example, the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ('*Accommodation Module*') section 3(2) specifying that lots must predominantly be 'accommodation lots' for short or long-term letting or use as part of a hotel. The *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) ('*Commercial Module*') section 3(2) requires lots to be used for commercial, retail or industrial purposes. On 29 September 2020, the *Body Corporate and Community Management (Accommodation Module) Regulation 2020* (Qld) and *Body Corporate and Community Management (Commercial Module) Regulation 2020* (Qld) were

and approvals applicable to a site. As a result, holiday letting, long-term rental and occupation by owners may all occur within the same scheme.

The mixing, however, of touristic and residential uses in schemes creates conflict and concern for resident owners and long-term tenants, in particular.[16] It becomes relevant to ask whether schemes should be able to regulate short-term holiday letting ('STHL') within their boundaries. This article considers some of the reasons behind why schemes would seek to self-regulate, and what the governmental response has been in states where self-regulation has been attempted.

Two Queensland decisions made under the *Building Units and Group Titles Act 1980* (Qld) ('*BUGT Act*') are investigated in this article – *Fairway Island GTP v Redman* [2019] QMC 13 ('*Fairway Island*') and *Redman v The Proprietors – Fairway Island GTP 107328* [2020] QDC 68 ('*Fairway Island Appeal*'). On the face of it, there are similarities between the by-law making powers under each statutory regime. Therefore, it is important to determine whether the two decisions are relevant to schemes regulated by the *BCCM Act*. However, the differences between the regimes are key; owners' obligations when acting as body corporate members and their rights as landowners are not equal. This article argues that while it appears the line defining the by-law making powers for schemes has blurred, the position established in *Fairway Island,* reinforced by the *Fairway Island Appeal*, is in stark contrast to what is permissible under the *BCCM Act.* It is argued that this difference, is positive. To reach this conclusion, the article answers the following questions:

1. Why would a scheme seek to self-regulate and what has the governmental response been interstate? Where has this occurred?
2. What are Queensland's statutory regimes for strata and community titles schemes?
3. What by-law making powers do schemes have under the *BUGT Act* and *BCCM Act*?
4. What occurred in Fairway Island GTP 107328?
5. What was decided in *Fairway Island* and the *Fairway Island Appeal*?
6. Are *Fairway Island* and the *Fairway Island Appeal* relevant to an interpretation of the *BCCM Act*'s by-law making powers?

The author has argued elsewhere that Queensland should not adopt the positions favoured in some states,[17] contending instead that regulation of use is properly the jurisdiction of local governments. It is both warranted and important to consider the questions raised in this article. STHL affects schemes throughout Australia and internationally. Self-regulation through by-laws has the potential to affect existing property rights of owners and create long-term issues for both affected owners and schemes. The author posits that such regulation should not be left to a collective of owners who may fundamentally alter established property rights with

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published. The provisions of each of those regulation modules mirror section 3(2) in each of the existing *Accommodation Module* and *Commercial Module*.

16 Melissa Pocock, 'Beware the Double-Edged Sword: When Private Regulation (By-laws) Seeks to Limit Freehold Land Rights (Short-Term Holiday Letting in Multi-owned Properties)' (2019) 93(11) *Australian Law Journal* 951, 951–4 ('Beware the Double-Edged Sword').

17 Ibid 966.

no obligation to obtain the consent of those owners who are immediately affected, nor have regard to the long-term implications of such limitations on use.[18] It is important then that governments consider the policy issues and ongoing impacts on private property rights prior to authorising this curtailing of rights by bodies corporate and owners corporations.

The article concludes with considerations for future reforms by reiterating calls made by the Commercial and Property Law Research Centre for amendment of the *BUGT Act* to render the by-law making powers in each of the *BUGT Act* and *BCCM Act* equal.[19] Doing this will ensure that the overlay of additional restrictions imposed by a body corporate is properly limited, and reflects contemporary expectations for those owners' rights and obligations.[20]

II WHY WOULD A SCHEME SEEK TO SELF-REGULATE AND WHAT HAS THE GOVERNMENTAL RESPONSE BEEN INTERSTATE?

Owners and occupiers of lots neighbouring those let for STHL purposes have raised numerous concerns with the mixing of short and long-term occupation. These concerns relate to amenity, noise, antisocial behaviour such as late night parties, high wear and tear of common areas and shared facilities, parking, rubbish generation and collection, security and safety within schemes,[21] the ability to prevent transient occupation during health crises,[22] impacts on insurance and legal liability,[23] together with the loss of community feel as a result of those itinerant

18 Cathy Sherry, 'How Indefeasible Is Your Strata Title: Unresolved Problems in Strata and Community Title' (2009) 21(2) *Bond Law Review* 157 ('How Indefeasible Is Your Strata Title').

19 Commercial and Property Law Research Centre, 'Consistency between the Body Corporate and Community Management Act 1997 and the Building Units and Group Titles Act 1980' (Property Law Review Issues Paper, Queensland University of Technology, 2017) 16 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0010/534970/qut-issues-paper-consistency-between-bugta-bccma.pdf>.

20 Ibid 29.

21 Legislative Assembly Economics and Industry Standing Committee, Parliament of Western Australia, *Levelling the Playing Field: Managing the Impact of the Rapid Increase of Short-Term Rentals in Western Australia* (Report No 7, 26 September 2019) 59 <https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/42EE6EB7C8AF9C454825847E000FDA9D/$file/SSA%20Report%20-%20FINAL%20-%20Online%20version%20with%20cover.pdf>.

22 Owners Corporation Network, 'Government Reneged on Airbnb Code of Conduct' (Media Release, 3 April 2020) <https://ocn.org.au/wp-content/uploads/2020/04/MR-3April2020-Government-Reneged-on-Airbnb-Code-of-Conduct.pdf>. While speaking with respect to Melbourne's public housing towers, acting Australian Chief Medical Officer Paul Kelly stated that high density buildings 'are vertical cruise ships, in a way': Yara Murray-Atfield, 'Why Melbourne's Public Housing Towers Have "Explosive Potential" for Coronavirus to Spread', *ABC News* (online, 6 July 2020) <https://www.abc.net.au/news/2020-07-06/why-melbourne-locked-down-public-towers-are-a-coronavirus-worry/12423934>.

23 Owners Corporation Network, Submission to Department of Planning and Environment (NSW), *Explanation of Intended Effect: Short-Term Rental Accommodation Planning Framework* (15 November 2018) 9 <https://ocn.org.au/wp-content/uploads/2020/08/OCN-Submission-Short-Term-Rental-Accommodation.pdf>.

occupiers.[24] The introduction of the sharing economy, and online platforms to facilitate peer-to-peer accommodation rental options,[25] have broadened the opportunities for a person to rent all or part of a lot for STHL purposes, seemingly exacerbating concerns of resident owners and long-term tenants. As a result, the impact of allowing touristic uses in schemes which were designed predominantly as residential neighbourhoods has been recognised,[26] and its appropriateness questioned by others.[27] In Queensland, approved uses for properties are regulated by local governments through the planning process. In addition, the *BCCM Act* section 169(1) permits by-laws for a scheme to regulate the use and enjoyment of lots and common property within the scheme. Before answering whether a body corporate is empowered to self-regulate STHL, it is pertinent to question whether they should be able to. Strata Community Association Western Australia board member, Rachel Cosentino, argued in her submissions to the Western Australian Legislative Assembly's Economics and Standing Committee enquiry that

> [t]he danger is that you have basically your neighbourhood dictating what you can and cannot do with your private property. That is, I think, a dangerous precedent and a dangerous concept that potentially undermines proprietary rights. You would not have that in a neighbourhood that was not a strata community – it would not be able to dictate how you use your freestanding home – and yet your neighbours in a strata scheme potentially could.[28]

The argument raised in response was that 'owners "buy" the right to occupy a physical premises and, in so doing, agree to be bound by a set of rules'.[29] The Committee effectively equated strata titled lots with 'lesser' types of property,[30] stating that the by-laws have long been recognised as constraining certain aspects

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24 The owners corporation in *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 63 raised these arguments. In addition, these same concerns were identified in both the Legislative Assembly Committee for Environment and Planning, Parliament of New South Wales, *Adequacy of the Regulation of Short-Term Holiday Letting in New South Wales* (Report No 1/56, October 2016) <https://www.parliament.nsw.gov.au/ladocs/inquiries/1956/Final%20Report%20-%20Adequacy%20of%20the%20Regulation%20of%20Short-Term%20Holiday%20Letting%20in%20New%20South%20Wales.pdf> and the Legislative Council Environment and Planning Committee, Parliament of Victoria, *Inquiry into the Owners Corporations Amendment (Short-Stay Accommodation) Bill 2016* (Report, June 2017) <https://www.parliament.vic.gov.au/446-epc/inquiry-into-the-owners-corporations-amendment-short-stay-accommodation-bill-2016>.

25 Clayton M Christensen and Michael E Raynor, *The Innovator's Solution: Creating and Sustaining Successful Growth* (Harvard Business Review Press, 2003).

26 For example, Robert Angyal and Brendan Edgeworth (eds), 'Conveyancing and Property: Strata Schemes and Short-Term Lettings (Again)' (2018) 92(3) *Australian Law Journal* 163, 164.

27 Owners' representative group, the Owners Corporation Network ('OCN') alleged on its now removed website that influxes of short-term holiday letting tenants may change the character of a residential scheme, affecting amenity for long-term occupants. The OCN went so far as to say, '[o]ur homes are not hotels, and we need a say on short-term stays. It's not the sharing economy if you don't ask, it's simply theft': 'Our Strata Our Choice', *Owners Corporation Network* (Web Page, 5 March 2019) <http://www.ourstrataourchoice.org.au> archived at <https://webarchive.nla.gov.au/awa/20190305051202/https://www.ocn.org.au/ourstrataourchoice>.

28 Legislative Assembly Economics and Industry Standing Committee (n 21) 84, quoting Evidence to Legislative Assembly Economics and Industry Standing Committee, Parliament of Western Australia, Perth, 12 June 2019, 3 (Rachel Cosentino).

29 Legislative Assembly Economics and Industry Standing Committee (n 21) 84.

30 Pocock, 'Beware the Double-Edged Sword' (n 16) 962.

of use, or imposing additional burdens on owners or occupiers.[31] This argument has an element of truth – by-laws do regulate use of lots and common property. However, this overlay of regulation should not denigrate the property to a lesser type of ownership.

There is a need for regulation of STHL in strata and community titles schemes. The impacts on use and enjoyment that neighbouring owners and occupiers experience should not be ignored.[32] The growth of community titles schemes in Queensland and their contribution to the economy, both in terms of tourist spending and in construction sector growth, together with their role as a form of housing for the community must be recognised and appreciated, and a balance struck between competing but legitimate interests to address the respective concerns.[33] That is, 'the right to enjoy one's private property free from unreasonable disturbance from others' must be protected while also allowing 'the right to economically exploit one's property consistent with planning law'.[34]

Organisations calling for schemes to self-regulate are seeking to permit bodies corporate to determine whether STHL should be permissible within the scheme. The weakness, however, in this argument lies with the by-law making power itself. By-laws which effectively limit use to 'residential' purposes, excluding STHL, effectively deprive owners of established proprietary rights for freehold land.[35] The Court of Appeal's decision in *Byrne v Owners of Ceresa River Apartments Strata Plan 55597* ('*Ceresa*'),[36] the Privy Council's decision in *O'Connor v The Proprietors, Strata Plan No 51* ('*Pinnacle*')[37] and the decisions in *Fairway Island* and the *Fairway Island Appeal* disagree with this interpretation. However, Sherry points out that the lack of a requirement for unanimity in the adoption of by-laws can retrospectively divest owners of property interests; how inviolable is an owner's title to their lot if others can impact on those rights without consent?[38] The author has previously reinforced Sherry's point that the capacity to govern activities on private property, without both the need for those activities to affect others and the ordinary controls imposed on democratic governments, is concerning.[39] Impacts on ownership extend beyond the immediate. Future owners' and occupiers' rights will be affected by land use decisions made by a non-democratic, non-consensual, non-unanimous decision of neighbouring owners. The author argues that decisions on land use are local planning issues and should be determined by the entity tasked

31 Legislative Assembly Economics and Industry Standing Committee (n 21) 84.
32 Jim Minifie, *Peer-to-Peer Pressure: Policy for the Sharing Economy* (Report, 2016) 1.
33 Deloitte Access Economics, *Economic Effects of Airbnb in Australia: Australian Capital Territory* (Report, 2017) 8.
34 Cathy Sherry, Submission No 1 to Legislative Council Environment and Planning Committee, Parliament of Victoria, *Inquiry into the Owners Corporations Amendment (Short-Stay Accommodation) Bill 2016* (13 December 2016) 5.
35 Ibid 1.
36 (2017) 51 WAR 304 ('*Ceresa*').
37 [2018] 4 WLR 22 ('*Pinnacle*').
38 Sherry, 'How Indefeasible Is Your Strata Title' (n 18) 165.
39 Pocock, 'Beware the Double-Edged Sword' (n 16) 953, citing Cathy Sherry, 'Land of the Free and Home of the Brave: The Implications of United States Homeowner Association Law for Australian Strata and Community Title' (2014) 23 *Australian Property Law Journal* 94, 99.

with planning functions – local governments – not neighbouring owners.[40] It is acknowledged that there are practicalities associated with STHL that may result in additional concerns for scheme members. Security and access to the scheme land are relevant. Further, the 'community' nature of a scheme must be given weight; however, such arguments must run both ways. Sherry notes:

> It is often said that strata lot owners need to understand that they cannot always do as they please, but that sentiment cuts both ways. Strata owners have to tolerate other people's lawful use of their lots. However, if lots are being used unlawfully, a bylaw prohibiting unlawful use of a lot would be valid, and would direct Tribunals to the correct question: what is the publicly-determined lawful use of the lot? Further in States like New South Wales which allow private enforcement of planning law, lot owners and bodies corporate can follow the Dobrohotoffs' lead and seek a court order restraining the illegal use.[41]

By-laws which deprive owners of their ability to put their lots to otherwise permitted uses should be regarded as repugnant.[42] In this regard, by-laws are typically not required to be passed with unanimous consent of the body corporate, or even approved by those owners affected by their passage. Rather, the majority may impose its will by passing by-laws which, in effect, may strip an owner of a use that was otherwise lawful[43] and a basic tenet of fee simple ownership.

In addition, it is unknown whether there may be long-term implications for owners, both current and future, for example, how limitations on use will affect valuations. The availability of funding and market demand for lots with those restrictions in place may be impacted, especially in circumstances where local governments may deem STHL appropriate for the site,[44] or touristic uses are foreshadowed in the regulation module applicable to the scheme.

Nevertheless, concerns held by resident owners and long-term tenants with respect to STHL occurring within schemes, have led to several attempts by bodies corporate and owners corporations to self-regulate STHL within strata and community titles schemes throughout Australia.

The Western Australian government's response to the issue of STHL was prompted by the Court of Appeal's decision in *Ceresa.* In that case, the Court held that by-laws requiring 'residential' use were valid. This significantly limited the opportunity for owners to rent their units for STHL purposes.[45] The Western Australian Economics and Industry Standing Committee has since published the findings of its report, *Levelling the Playing Field: Managing the Impact of the Rapid Increase of Short-Term Rentals in Western Australia*.[46] The paper concluded that the sector is undergoing rapid change, and growth in the industry is placing traditional accommodation providers

40 Guy Dwyer and Tristan Orgill, 'Living Like a Local or Rampant Tourism: Short-Term Holiday Letting in New South Wales and the Regulation of Sharing by Planning Laws' (2017) 22 *Local Government Law Journal* 3, 3.

41 Cathy Sherry, 'Conveyancing and Property: Airbnb Short-Term Letting in Strata Schemes' (2017) 91(9) *Australian Law Journal* 954, 956–7 (citations omitted) ('Airbnb Short-Term Letting in Strata Schemes').

42 Ibid 956.

43 Ibid.

44 Ibid 955.

45 *Ceresa* (2017) 51 WAR 304.

46 Legislative Assembly Economics and Industry Standing Committee (n 21).

at a disadvantage. In this regard, the regulatory imposts on those traditional providers do not apply to STHL providers, giving them an advantage.[47] Planning instruments are 'dated and inconsistent'[48] and a statewide government response to STHL was recommended as necessary.[49] This could include registration of STHL premises (whether hosted or un-hosted), together with mandating public liability insurance[50] and other minimum requirements to 'level the playing field' with other forms of regulated accommodation.[51] With respect to strata schemes, disclosure and further investigation as to what data should be made publicly available was recommended.[52] In addition, the introduction of model by-laws which allow schemes to self-regulate by authorising or prohibiting STHL within a scheme was recommended.[53] The report acknowledged the complexity added by the amendments to the *Strata Titles Act 1985* (WA) ('*Strata Titles Act*') which took effect on 1 May 2020. Those amendments introduced a requirement that by-laws not be unfairly prejudicial or discriminatory, oppressive or unreasonable.[54] The classification of STHL by-laws as 'governance' or 'conduct' by-laws requires clarification to ensure that the appropriate voting threshold now mandated under the legislation is met. This clarification may be made in the Strata Title Policy and Procedure Guides produced by Western Australia's land information authority, Landgate.[55]

The decisions in *Ceresa* and *Pinnacle* may be contrasted with the position adopted by the Victorian Supreme Court. In *Owners Corporation PS 501391P v Balcombe*[56] ('*Watergate*'), the by-law making powers of Victorian owners corporations were found to be notably narrower than in their counterparts in Western Australia and New South Wales, and different to those in Queensland.[57] The *Owners Corporations Act 2006* (Vic) ('*Owners Corporations Act*') section 138 authorises owners corporations to make rules for the 'control, management, administration, use or enjoyment of the common property or of a lot' in respect of the matters set out in the schedule. The *Owners Corporations Act* schedule 1 section 5.1 extends owners corporations' rule-making powers to the 'change of use of lots'. However, Riordan J determined that Parliament only intended to empower owners corporations to regulate conduct within lots by enforcing the Standard Rules contained in the *Owners Corporations Act*, schedule 2.[58] His

47 Ibid Chair's Foreword.
48 Ibid 74.
49 Ibid 101, 108.
50 Ibid 108.
51 Ibid 95.
52 Ibid 100, 108.
53 Ibid 89.
54 Ibid 84, quoting Strata Community Association (WA), Submission No 127 to Legislative Assembly Economics and Industry Standing Committee, Parliament of Western Australia, *Inquiry into Short-Stay Accommodation*; *Strata Titles Act 1985* (WA) s 46.
55 Landgate, 'Strata Title Policy and Procedure Guides' (Web Page, 10 March 2021) <https://www0.landgate.wa.gov.au/for-individuals/Land-Transactions-toolkit/strata-titles-policy-and-procedure-guides>.
56 (2016) 51 VR 299.
57 *Owners Corporation PS 501391P v Balcombe* (2016) 51 VR 299, 350 [157]–[158] (Riordan J) ('*Watergate*').
58 Ibid 335 [112].

Honour determined that the power in the *Owners Corporations Act* section 138 did not extend to enabling a prohibition of particular uses.[59] Parliament would have used 'clear and unambiguous language' to evince such an intention to grant those more extensive powers, and this was not undertaken.[60] The breadth of prohibitions in the by-law in *Watergate* exceeded the scope of the owners corporation's powers, and as a result, the by-law was regarded ultra vires.[61]

The decision in *Watergate* has since been reinforced through enactment of the *Owners Corporations Amendment (Short-Stay Accommodation) Act 2018* (Vic). This Act amended the *Owners Corporations Act* to:

- establish a complaints and dispute resolution system;[62]
- empower owners corporations to require owners and occupiers to remedy breaches relating to noise and behaviour, safety and security concerns, obstruction of common property and damage to lots, common property or other structures;[63] and
- authorise the Victorian Civil and Administrative Tribunal, in addition to its powers under the *Owners Corporations Act* section 165, to order the prohibition of STHL in a lot or part of a lot[64] and impose civil penalties up to AUD1,100.[65]

By way of contrast, New South Wales has adopted a three-pronged statutory approach to the issue of STHL within schemes, passing the *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018* (NSW). This response includes extension of the by-law making powers of owners corporations to regulate STHL within schemes,[66] the introduction of a statewide Environmental Planning Policy under the *Environmental Planning and Assessment Act 1979* (NSW) and a mandatory code of conduct applicable to industry participants.[67] However, on 3 April 2020, seven days before it was due to come into force, the New South Wales government repealed the proposed Code of Conduct.[68] While the owners' representative body, the Owners Corporation Network, viewed this as a

59 Ibid 303 [1]. See also at 299 providing the by-law which the owners corporation purported to adopt:

> 34 RESTRICTIONS – CONDUCTING TRADE
>
> 34.1 The Proprietor or Occupier of a residential Lot must not use a Lot or the Common Property for any trade, profession or business (other than letting the Lot for residential accommodation to the same party for periods in excess of one month), nor permit any other person to do so, unless:
>
> (a) The person … is a full time resident of the Lot and only operates a home office …
>
> (b) The relevant planning scheme does not prohibit the relevant … business
>
> (c) The Lot owner has obtained all necessary permits …
>
> 34.2 Except for commercial/retail Lots, the Proprietor or Occupier of a residential Lot must not use that Lot or any part of the Common Property for any trade or business nor permit others to do so.

60 Ibid 303 [1].

61 Ibid 338–40 [123].

62 *Owners Corporations Act 2006* (Vic) pt 10 div 1A.

63 Ibid ss 159A(2)(a)–(e), 159D.

64 Ibid ss 159E(1)(a), 169D.

65 Ibid ss 159E(1)(b), 169G.

66 *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018* (NSW) sch 2.

67 *Fair Trading Act 1987* (NSW) pt 4 div 4A.

68 *Fair Trading (Code of Conduct for Short-Term Rental Accommodation Industry) Repeal Regulation 2020* (NSW).

fundamental failing of the government,[69] others have postulated that the withdrawal is likely related to the COVID-19 pandemic. That is, given the government was encouraging people to home isolate to avoid spreading the COVID-19 virus, it did not want to confuse this important message by publishing a code of conduct relating to STHL. Arguably, any legislative response dealing with travel and holidays may have diluted the urgent health message being communicated by the government, which had to take priority in the circumstances.[70] It appears that the New South Wales government still intends to introduce the Code of Conduct; however, it is unknown whether additional changes beyond the former Regulations will occur.[71]

Once the statewide Environmental Planning Policy is adopted, it will standardise the definition of STHL and provide exemptions from the need to obtain development approval for STHL in certain circumstances.[72] An additional *Short-Term Rental Accommodation Fire Safety Standard* is also proposed. Public submissions on the proposals closed on 11 September 2019, but at the time of writing, the framework remains under consideration by the New South Wales government.[73]

In Queensland, there has been no statutory response to the question of STHL. Given one of the objects of the *BCCM Act* is to encourage the potential touristic use of schemes, it is unlikely that a statutory approach mirroring the ability for an owners corporation to adopt by-laws banning STHL in New South Wales and Western Australia will be adopted.

While no legislative response has occurred, the position with respect to schemes regulated by the *BUGT Act* has been determined. The *Fairway Island* decision was touted as the 'great white hope'[74] for owners who object to STHL within schemes. It was upheld on appeal in the *Fairway Island Appeal*. This article seeks to demonstrate the limited application of the cases, reinforcing the principle that under the *BCCM Act*, by-laws cannot limit an owner's ability to rent their lots for STHL purposes.

The confusion created by *Fairway Island* and the *Fairway Island Appeal* and whether the cases have broad application is caused by Queensland's various iterations of strata and community titles legislation, and their continued ap-

69 Owners Corporation Network, 'Government Reneged on Airbnb Code of Conduct' (n 22).

70 Natalie Bryant, Max Newman and Valerie Brewer, 'NSW Introduces New Laws to Regulate Short-Term Rental Accommodation', *Corrs Chambers Westgarth* (Web Page, 16 April 2020) <https://corrs.com.au/insights/nsw-introduces-new-laws-to-regulate-short-term-rental-accommodation>.

71 The Code of Conduct was contained in the *Fair Trading Amendment (Code of Conduct for Short-Term Rental Accommodation Industry) Regulation 2020* (NSW).

72 Department of Planning, Industry and Environment (NSW), *Short Term Rental Accommodation* (Web Page) <https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Short-term-rental-accommodation>.

73 The *Short-Term Rental Accommodation Fire Safety Standard* is due to come into effect on 1 November 2021: Ibid. See also Department of Planning, Industry and Environment (NSW), 'Short-Term Rental Accommodation Fire Safety Standard' (Fact Sheet, April 2021) <https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/Policy-and-legislation/STRA/STRA-Fire-safety-standard-2021-04.pdf?la=en>.

74 'Banning AirBnb and Short-Term Letting: A False Dawn', *Active Law* (Web Page, 8 November 2019) <https://www.activelaw.com.au/banning-airbnb-and-short-term-letting-a-false-dawn/>.

plication to a limited number of schemes. The argument is made throughout this article that there are fundamental differences between the by-law making powers of schemes under the *BUGT Act* and the *BCCM Act*. The next part considers what Queensland's statutory regime is to aid in clarifying the argument that *Fairway Island* and the *Fairway Island Appeal* should not apply when interpreting the by-law making power in the *BCCM Act*.

III WHAT ARE QUEENSLAND'S STATUTORY REGIMES FOR STRATA AND COMMUNITY TITLES SCHEMES?

While strata and community titles legislation was enacted in Queensland as early as 1965, the provisions relevant to the *Fairway Island Appeal* date back to 1980. It was recognised at the time that legislation needed to facilitate the creation of more sophisticated developments than was permitted under the preceding Acts.[75] The *BUGT Act* brought together the legislation facilitating vertical subdivisions within buildings and horizontal reconfigurations of land, but maintained the tradition of distinguishing between them.[76] While the *BUGT Act* was an improvement, overcoming a number of problems with earlier iterations of strata and community titles legislation, it did not enable staged subdivisions. Today this may be perceived as a significant shortcoming; however, staged developments were not the norm at that point.[77] Staged projects were 'novel and unique', and it was decided that the enactment of project specific legislation was the most appropriate approach to test which model worked best, while avoiding general application.[78]

After the successful enactment of project specific legislation for schemes on the Gold Coast,[79] the Queensland government introduced the *Integrated Resort Development Act 1987* (Qld) ('*IRD Act*'). The Act was intended to facilitate the design, approval, construction and management of 'a new generation of complete resort destinations', by creating precincts, with sometimes different tenure types

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75 The Acts in question were the *Building Units Titles Act 1965* (Qld) and the *Group Titles Act 1973* (Qld); Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1980, 2937 (William Lickiss), cited in Commercial and Property Law Research Centre (n 19) 9.

76 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1980, 2937–9 (William Lickiss), cited in Commercial and Property Law Research Centre (n 19) 9–10.

77 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1980, 2939 (William Lickiss), cited in Commercial and Property Law Research Centre (n 19) 10.

78 The first of these project specific Acts was to enable the development of a multi-staged high-rise tower project, the Paradise Centre, in Surfers Paradise. The *Registration of Plans (HSP (Nominees) Pty Ltd) Enabling Act 1980* (Qld) and *Registration of Plans (Stage 2) (HSP (Nominees) Pty Ltd) Enabling Act 1984* (Qld) were passed. The first land development to be constructed over multiple stages was Sanctuary Cove in Hope Island, also on the Gold Coast. To facilitate that development, the *Sanctuary Cove Resort Act 1985* (Qld) was enacted. That Act was project specific, but it was intended as a blueprint for similar developments: Queensland, *Parliamentary Debates*, Legislative Assembly, 17 October 1985, 2190 (Russell Hinze), cited in Commercial and Property Law Research Centre (n 19) 11.

79 The two developments were Paradise Centre in Surfers Paradise, a vertical subdivision, and Sanctuary Cove, a horizontal subdivision.

and uses, linked through private roadways.[80] Integrated resort precincts could then be subdivided into smaller parcels and sub-schemes using both building units plans and group titles plans – vertical and horizontal subdivision plans, respectively. The sub-schemes were then regulated by the *BUGT Act*. Numerous developments throughout Queensland were built under the *IRD Act*.[81]

The *BUGT Act* was reviewed and significant amendments passed in 1994;[82] however, the Act never commenced. It was later abandoned in favour of the introduction of an entirely new framework implemented by the *BCCM Act*.[83]

The statutory system created by the *BCCM Act* is unique. It does away with the distinction between subdivisions of buildings and land, instead creating community titles schemes.[84] The *BCCM Act* acts as an umbrella Act, regulating facets that apply to all schemes under its jurisdiction.[85] A regulation module structure is also created, which tailors management obligations and powers of bodies corporate and their committees to suit the types of schemes registered under them.[86] The legislative system created by the *BCCM Act* specifically overcame the criticisms in the 1994 iteration of the *Building Units and Group Titles Act*.

The *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) (‘*Standard Module*’)[87] is the default module. It is designed predominantly to suit owner occupied residences. Of the 49,821 schemes registered under the *BCCM Act*, 29,700 are regulated by the *Standard Module*.[88]

80 Queensland, *Parliamentary Debates*, Legislative Assembly, 31 March 1987, 1063 (Russell Hinze), quoted in Commercial and Property Law Research Centre (n 19) 11.

81 As distinct to integrated resorts, a further type of mixed-use development was facilitated using separate legislation. The *Mixed Use Development Act 1993* (Qld) was targeted to the development of mixed use schemes involving commercial, residential or industrial uses, rather than resort style developments: Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 1993, 2421 (Terence Mackenroth, Minister for Housing, Local Government and Planning), quoted in Commercial and Property Law Research Centre (n 19) 12. Nine Queensland developments are regulated by the *Mixed Use Development Act*: Commercial and Property Law Research Centre (n 19) 13.

82 *Building Units and Group Titles Act 1994* (Qld).

83 The Act was criticised as being ‘generic’, ‘complex’, ‘difficult to understand’ and ‘being unable to differentiate between a six pack or duplex and a 500 lot resort’: Queensland, *Parliamentary Debates*, Legislative Assembly, 19 October 1995, 475 (Kenneth McElligott, Minister for Lands), discussed in Commercial Property Law Research Centre (n 19) 14; Queensland, *Parliamentary Debates*, Legislative Assembly, 30 April 1997, 1136 (Howard Hobbs, Minister for Natural Resources), cited in Commercial and Property Law Research Centre (n 19) 14.

84 *BCCM Act 1997* (Qld) s 24.

85 This includes establishment of a community titles scheme, lot entitlements and community management statements, creation of layered schemes, termination and amalgamation of schemes, general powers and obligations of bodies corporate including but not limited to by-law making powers, administration matters such as sale of lots within schemes, dispute resolution and transition of schemes from the superseded Acts: Queensland, *Parliamentary Debates*, Legislative Assembly, 30 April 1997, 1136 (Howard Hobbs).

86 The regulation modules include the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) (‘*Standard Module*’), the *Accommodation Module 2008* (Qld), the *Commercial Module 2008* (Qld), the *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) and the *Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2011* (Qld).

87 After 1 March 2021, the *Body Corporate and Community Management (Standard Module) Regulation 2020* (Qld) will commence, replacing the *Standard Module Regulation 2008* (Qld).

88 Department of Justice and Attorney-General (Qld) (n 7) 8.

The choice between adopting the 'owner occupied' module and the 'rental' module, the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ('*Accommodation Module*'),[89] does not, however, depend on approved use. Rather, it is an election made by the original owner at the time the scheme is created.[90]

The transitional provisions of the *BCCM Act* transferred most of the schemes created under the *BUGT Act* to operate under the *BCCM Act*.[91] However, where pre-existing schemes were created under a 'specified Act', that Act continued to apply.[92] Those specified Acts included among others, the *IRD Act* and the *BUGT Act* for sub-schemes created within an integrated resort.[93] As a result, the *BCCM Act* is excluded from applying to a minimum of 580 plans to which the *IRD Act* and *BUGT Act* continue to apply.[94] Significantly, one of those projects is Hope Island Resort on the Gold Coast, of which Fairway Island GTP 107328 is a sub-scheme. That scheme was the subject of the decisions in *Fairway Island* and the *Fairway Island Appeal*. Before considering those cases, this article will first explore what the by-law making powers under the Acts are.

IV WHAT BY-LAW MAKING POWERS DO SCHEMES HAVE UNDER THE *BUGT ACT* AND *BCCM ACT*?

The by-law making powers in the *BUGT Act* are broad. Section 30(2) provides:

> 30(2) Save where otherwise provided … a body corporate, pursuant to a special resolution, *may*, for the purpose of the control, management, administration,

89 Similarly, after 1 March 2021, the applicable module will become the *Body Corporate and Community Management (Accommodation Module) 2020 Regulation* (Qld).

90 If:

(a) the lots in the scheme are predominantly 'accommodation lots'; or

(b) at the time the first community management statement adopting the *Accommodation Module* was recorded it was intended that the lots would be predominantly 'accommodation lots'; or

(c) the lots were formerly 'accommodation lots' but have ceased being 'accommodation lots' and despite that, any community management statements recorded since cessation have continued to note the *Accommodation Module* as applicable,

then the *Accommodation Module* may apply: *Accommodation Module 2008* (Qld) s 3(2). An 'accommodation lot' means a lot that is either leased, let or available for lease or letting on a long- or short-term basis or is part of a hotel: *Accommodation Module 2008* (Qld) s 3(3). For a discussion on the conflicts potentially created as a result of this discretion being exercised by the original owner in respect of caretaking and letting rights for schemes, see Melissa Pocock, '"What about Me? It Isn't Fair": The Mantra of Queensland Bodies Corporate in the Management and Letting Rights Sphere' (2019) 45(3) *Monash University Law Review* 626 ('What about Me?'), and more broadly in relation to the dysfunctionality that original owners may embed by their actions refer to Nicole Renae Johnston, 'An Examination of How Conflicts of Interest Detract from Developers Upholding Governance Responsibilities in the Transition Phase of Multi-owned Developments: A Grounded Theory Approach' (PhD Thesis, Griffith University, 2017) 82–3.

91 *BCCM Act 1997* (Qld) s 325(1).

92 Ibid s 325(2).

93 Ibid s 326.

94 Information provided by Queensland Government, Department of Justice and Attorney-General, Office of Regulatory Policy in January 2017 as disclosed in Commercial and Property Law Research Centre (n 19) 15.

> *use or enjoyment of the lots* and common property the subject of the plan, make by-laws …[95]

The words of the *BCCM Act* section 169 appear, on the face of it, equivalent, with a small but significant exception:

> 169 Content and extent of by laws
>
> (1) The by-laws for a community titles scheme *may only* provide for the following –
>
> …
>
> (b) regulation of, including conditions applying to, the *use and enjoyment* of –
>
> (i) *lots* included in the scheme; and
>
> (ii) *common property*, including utility infrastructure …[96]

The permissive 'may' in the *BUGT Act* creates a broader power than the more limited 'may only' contained in the *BCCM Act*. The restrictions on the powers enunciated in the Acts are also telling. In the *BUGT Act,* the only limitation on the by-law making power is contained in section 30(6), which provides:

> 30(6) No by-law or any amendment of or addition to a by-law shall be capable of operating to *prohibit or restrict* the devolution of a lot or a transfer, *lease*, mortgage or other dealing therewith …[97]

This limitation is in almost identical terms to the restriction contained in both the *Strata Titles Act 1985* (WA) and the Turks and Caicos Island's *Strata Titles Ordinance*,[98] tested in *Ceresa* and *Pinnacle*, respectively. In both those cases, the by-laws prohibiting STHL did not breach the limitation, but rather were regarded as a valid regulation of use.[99]

By way of contrast, the by-law making powers under the *BCCM Act* are distinctly narrower. The *BCCM Act* section 180 provides:

> 180 Limitations for by-laws
>
> (3) If a lot may lawfully be used for residential purposes, the by-laws *can not restrict the type of residential use*.
>
> (4) A by-law can not prevent or restrict a transmission, transfer, mortgage or other dealing with a lot.
>
> *Examples –*
>
> 1 A *by-law can not prevent the owner of a lot from leasing* or mortgaging a lot.
>
> 2 A by-law can not prevent the sale of a lot to a person under or over a particular age.
>
> (5) A *by-law must not discriminate between types of occupiers*.

95 *BUGT Act 1980* (Qld) s 30(2) (emphasis added).

96 *BCCM Act 1997* (Qld) s 169 (emphasis added).

97 *BUGT Act 1980* (Qld) s 30(6) (emphasis added).

98 *Strata Titles Ordinance* (Turks and Caicos Islands, cap 9.04, 2014 rev ed) <https://www.gov.tc/agc/2018-revised-laws>.

99 For a detailed discussion on these cases, see Pocock, 'Beware the Double-Edged Sword' (n 16).

> *Example –*
>
> A by-law can not prevent a tenant from using a pool on the common property
>
> …
>
> (7) A by-law *must not be oppressive or unreasonable*, having regard to the *interests of all owners and occupiers* of lots included in the scheme and the use of the common property for the scheme.[100]

The provisions in the *BCCM Act* are undoubtedly narrower than the *BUGT Act.* However, like in the *BUGT Act,* terms such as 'residential use' are not defined in the *BCCM Act.* This could be critical for interpreting the provisions of the Act, in the same way that it was relevant for the courts in both *Ceresa* and *Pinnacle*. Parts V and VI will now consider the background to Fairway Island GTP 107328 and the decisions in *Fairway Island* and the *Fairway Island Appeal*.

V WHAT OCCURRED IN FAIRWAY ISLAND GTP 107328, HOPE ISLAND RESORT?

Fairway Island GTP 107328 is a luxury enclave of freestanding houses. It is located in the residential precinct of Hope Island Resort, a gated community.[101] Registered in 2008, Fairway Island contains 95 residential parcels of land, 82 of which are waterfront.[102] It is surrounded on three sides by a canal and beyond that, the manicured lawns of Hope Island Golf Course.[103] On the fourth side, a bridge connects the island to the Primary Thoroughfare, the private road linking the precincts within Hope Island Resort.

Two of the houses built on Fairway Island were made available for STHL.

The original by-laws for the scheme included the following:

> 3 Use of Lots
>
> 3.1 Residential Purposes Only
>
> Subject to clause 3.2, each Lot shall be used for *residential purposes* only.
>
> 3.2 Company Exemption …[104]

A motion to add by-law 3.3 was passed at an annual general meeting held on 10 August 2018.[105] By-law 3.3 provided:

> 3.3 Subject to clause 3.1 and 3.2, each proprietor shall not use or permit his lot to be used other than as a *private residence of the proprietor* or for accommodation of the proprietor's guests and visitors.

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100 *BCCM Act 1997* (Qld) s 180 (emphasis added).

101 *Fairway Island GTP v Redman* [2019] QMC 13, [107] (Magistrate Sinclair) ('*Fairway Island*').

102 Group Titles Plan 107328.

103 *Fairway Island* [2019] QMC 13, [107] (Magistrate Sinclair).

104 Ibid [3] (emphasis added).

105 The motion was carried 24 votes to 2.

> Notwithstanding the foregoing, the proprietor *may rent out* his lot from time to time provided that *in no event* shall any individual rental [be] for a period of *less than one (1) month*.[106]

By-law 8.20 was also relevant to the STHL of lots within Fairway Island. It provided:

> 8.20 A Proprietor may be permitted to lease his or her Lot by means of a written lease or rental agreement for *permanent letting* provided that such lease obliges the lessee thereunder to comply with these By-Laws and provided further that the lease be in writing and any Proprietor who shall lease his Lot shall be responsible for ensuring compliance with such lease particularly so far as that lease relates to the By-laws.[107]

Owners Gary Redman and Andrew Murray challenged the validity of the by-laws under the *BUGT Act.* The dispute was initially heard by Referee A Stone, who determined that by-law 3.3 was invalid.[108] On appeal, Magistrate AH Sinclair reheard the evidence and concluded that the by-law had been validly adopted by the body corporate.[109] Redman and Murray appealed Magistrate Sinclair's decision to the District Court. Barlow DCJ upheld Magistrate Sinclair's decision, dismissing the appeal.[110]

VI WHAT WAS DECIDED IN *FAIRWAY ISLAND* AND THE *FAIRWAY ISLAND APPEAL*?

Acting as a tribunal under the *BUGT Act*, Magistrate AH Sinclair reheard the evidence.[111] His Honour allowed the appeal from the decision at first instance, confirming that by-law 3.3 was valid; it represented 'a relaxation of a valid limit on use by-law'.[112] In order to reach his conclusion, Magistrate Sinclair considered the scope of the by-law making power under the *BUGT Act* and the body corporate's capacity to validly adopt a by-law purporting to require minimum durations for leases.

A The Courts' Reasoning

In *Fairway Island*, Magistrate Sinclair concluded that the referee was drawn into error by the owners' focus on the *BUGT Act* section 30(6), rather than giving due consideration to the *BUGT Act* section 30(2). That is, the referee was asked to interpret the validity of the by-law without considering the power to impose

106 *Fairway Island* [2019] QMC 13, [4] (Magistrate Sinclair) (emphasis added).
107 Ibid [6] (emphasis added).
108 *Fairway Island* [2018] QBCCMCmr 564.
109 *Fairway Island* [2019] QMC 13, [13].
110 *Redman v The Proprietors – Fairway Island GTP 107328* [2020] QDC 68 ('*Fairway Island Appeal*').
111 The *BUGT Act 1980* (Qld) section 106 provides that a party to a referee's decision 'may appeal to a tribunal against the order of the referee'. His Honour, Magistrate AH Sinclair, concluded that this power, in combination with the powers of the tribunal in the *BUGT Act* section 107 meant that the appeal was a re-hearing on the evidence in the court's jurisdiction as a tribunal under the *BUGT Act*: *Fairway Island* [2019] QMC 13, [33].
112 *Fairway Island* [2019] QMC 13, [11].

it.[113] The tribunal's role was to answer 'whether Parliament has demonstrated an intent that a [body corporate] has power to regulate in this way and whether it has been properly exercised'.[114] His Honour concluded that the powers in the *BUGT Act* were broad enough to grant a power to regulate the use and enjoyment of a lot by its owner. This included regulating the way the use of a lot could affect other owners and occupiers.[115] Magistrate Sinclair considered that the power in the *BUGT Act* section 30(2) was sufficiently broad to warrant inclusion of the *BUGT Act* section 30(6) to prevent by-laws that interfered with dealings.[116] However, his Honour noted that by-law 3.3 did not breach that limitation.

In order to reach his Honour's determination in *Fairway Island*, Magistrate Sinclair applied the following test propounded by Philippides JA, with whom Bond J agreed, in *The Proprietors – Rosebank GTP 3033 v Locke* ('*Rosebank*'),[117] to make the assessment:

> 1. [First] …
>   (a) Properly construe the provision in context to determine the power to make the by-law
>   (b) Correctly interpret the by-law, not only at face value but as to its true nature in operation
>   (c) Determine whether that by-law is squarely within the ambit of the power granted
> 2. The by-law making power conferred by [the *BUGT Act*] s 30(2) is of a broad nature, as opposed to the power conferred by [*BUGT Act*] s 38
> 3. It requires a clear case before an original by-law was held to be outside power.[118]

In deciding *Rosebank*, McMurdo JA preferred a broader interpretation of the by-law making power, concluding that the *BUGT Act* section 27(3) extended the powers of a body corporate if a by-law covered a legitimate area to be regulated.[119] Magistrate Sinclair considered both tests and concluded that the outcome in *Fairway Island* would not change.[120] Barlow DCJ in the *Fairway Island Appeal* upheld Magistrate Sinclair's determination on this point.[121]

Magistrate Sinclair in *Fairway Island* considered that the physical layout and by-laws of the scheme were relevant when assessing whether the body corporate had exercised its powers in a proper manner. His Honour described the scheme thus:

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113 Ibid [52].
114 Ibid [57].
115 Ibid [58].
116 Ibid [102].
117 [2016] QCA 192 ('*Rosebank*').
118 *Fairway Island* [2019] QMC 13, [36].
119 In this regard, McMurdo JA concluded that there was a sufficient nexus between the by-law making power in the *BUGT Act* section 30(2) and the by-law passed in that case. That is, there is a requirement of an 'undemanding nature' that there be a nexus between the 'use or enjoyment of the lots and common property' as required in the *BUGT Act* section 30(2) and the terms of the by-law: *Rosebank* [2016] QCA 192, [120]–[124].
120 *Fairway Island* [2019] QMC 13, [39].
121 *Fairway Island Appeal* [2020] QDC 68, [21]–[22], [31]–[39].

> [T]he lots are undoubtedly established with a view to privacy and amenity. That much can be gleaned by the presence of a security gate to the entry of a luxury cluster of houses effectively surrounded by a moat and acres of private golf course …[122]

Based on those facts, his Honour concluded that the 'true character'[123] of by-laws 3.1 and 3.3 was to preserve the 'residential character' of the scheme.[124] The author questions whether the same conclusion could as easily be drawn on another scheme where exclusivity and exclusion of outsiders is not so pronounced.

Magistrate Sinclair in *Fairway Island* followed the reasoning in the Privy Council's decision in *Pinnacle*, and pointed out similarities in the legislation between the two jurisdictions.[125] His Honour concluded that a by-law limiting use within a scheme to residential occupation 'is in principle unobjectionable',[126] because STHL is 'by definition not residential'.[127]

The Western Australian Court of Appeal's decision in *Ceresa* also found favour with his Honour,[128] despite there being no provision in the *BUGT Act* equivalent to the *Strata Titles Act 1985* (WA) section 6A.[129] Magistrate Sinclair considered the New South Wales cases cited in *Ceresa* in which restrictions on use were upheld as valid. As in the *BUGT Act*, there is no equivalent to the *Strata Titles Act* section 6A in New South Wales.[130] Following the reasoning in both *Pinnacle*[131] and *Ceresa*, his Honour in *Fairway Island* determined that by-law 3.1 must be interpreted against the broad power granted by the *BUGT Act* section 30(2). Magistrate Sinclair concluded that by-law 3.1 was a valid restriction on use.[132] The District Court in the *Fairway Island Appeal* adopted a slightly different approach, but nevertheless reached the same conclusion. In this regard, Barlow DCJ adopted the definitions of 'residential', 'residential purpose', 'residence' and 'reside' contained in the Macquarie Dictionary.[133] His Honour accepted that despite the definition of 'residential' referring to '(of a hotel, etc)', the key aspects of the definition were

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122 Ibid [107].

123 *Fairway Island* [2019] QMC 13, [108].

124 Ibid [109].

125 Ibid [53]–[56].

126 *Pinnacle* [2018] 4 WLR 22, 25 [16] (Lord Carnwath JSC for the Court), quoted in ibid [54]. The question of whether a body corporate should have such a broad by-law making power was regarded as being of a philosophical nature and outside the tribunal's remit. That is, Magistrate Sinclair regarded the tribunal's role as determining the scope of powers granted by Parliament under the *BUGT Act*, not in assessing the underlying policy reasons for the grant of that power: ibid [57].

127 *Fairway Island* [2019] QMC 13, [117].

128 Ibid [59]–[65].

129 Prior to the section's repeal on 30 April 2020, the *Strata Titles Act 1985* (WA) s 6A provided:

> (1) A restriction under section 6 [which authorises an endorsement to restrict the use to which the parcel or part thereof may be put] may limit the use of the lots by requiring that each lot is to be occupied only, or predominantly, by retired persons.
>
> (2) Nothing in this section or section 6 is to be read as limiting the power of the strata company to make by-laws under section 42 relating to the circumstances in which persons, other than the occupier, may reside in a lot which is subject to a restriction referred to in subsection (1).

130 *Fairway Island* [2019] QMC 13, [66]–[67].

131 *Pinnacle* [2018] 4 WLR 22, 25 [16], 26 [20] (Lord Carnwath JSC for the Court).

132 *Fairway Island* [2019] QMC 13, [103].

133 *Fairway Island Appeal* [2020] QDC 68, [44].

the references to permanent or extended periods of stay.[134] His Honour adopted the courts' decisions in *Ceresa* and *Pinnacle*, stating that although the by-laws were worded differently, their Honours' discussions of the meaning of residential use or residential purposes 'are helpful and their conclusions are correct'.[135]

The minimum time prescribed for leases in by-law 3.3 was then considered in *Fairway Island* to be a relaxation on the limitation in by-law 3.1. Together the two by-laws, which operated in conjunction with by-law 8.20, set out the conditions of an approved lease for the residential use of the properties.[136] It was a relaxation of the requirement to use the lot for '"residential" purposes' rather than a prohibition on STHL.[137] As such, guests of owners could stay in the lot, and leasing of the lot was permitted where the leases were a minimum of one month.[138]

B The Problem with Magistrate Sinclair's Interpretation

Magistrate Sinclair in *Fairway Island* purported to follow the decision in *Ceresa* in assessing the validity of by-law 3.3; however, the conclusion is in direct contradiction to the Court of Appeal's decision. In their Honours' joint judgment, Murphy and Mitchell JJA and Beech J held that while the tribunal in that case appeared to accept residential occupation could not occur until a stated minimum period of time had elapsed (nominated as three months), 'the word "residence" does not itself import a fixed period of occupation'.[139] Their Honours went on to conclude that the prohibition in the by-law must focus on use, rather than setting a minimum period of occupation. Like Magistrate Sinclair, the Privy Council in *Pinnacle* referred to *Ceresa* as an example of prior practice in Australia; however, the Board did not overtly follow the decision reached in it. Their Honours agreed that a by-law which prescribes limitations on STHL is merely a regulation of residential use, rather than a prohibition on leasing.[140] Their Honours did not draw the same distinction made by the Court of Appeal in *Ceresa* by requiring the by-law to focus on use rather than time.[141]

In *Ceresa*, the by-law regarded as validly regulating use in fact made no mention of a minimum timeframe for rental.[142] Their Honours accepted that a

134 Ibid [44].
135 Ibid [45].
136 *Fairway Island* [2019] QMC 13, [65], [99], [108]–[109] (Magistrate Sinclair).
137 Ibid [59].
138 Ibid [111], [123], [128], [130].
139 *Ceresa* (2017) 51 WAR 304, 336 [152].
140 *Pinnacle* [2018] 4 WLR 22, 26 [20] (Lord Carnwath JSC for the Court).
141 *Ceresa* (2017) 51 WAR 304, 336–7 [152] (Murphy, Mitchell JJA and Beech J).
142 The by-law in question was by-law 16, which provided as follows:

> 16. Use of Premises
>
> 16.1 Subject to the Schedule 1 bylaw 16 a proprietor of a residential lot may only use his lot as a residence.
>
> 16.2 Notwithstanding bylaw 16.1 a proprietor of a residential lot may:
>
> 16.2.1 grant occupancy rights in respect of his lot to residential tenants.

Ibid 310 [18], quoting *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2016] WASC 153, [11] (Pritchard J).

person's occupation of a property as their residence would vary on a case-by-case basis. In some circumstances, even occupation on a short-term basis would warrant its classification as the person's permanent abode.[143] In *Fairway Island*, the wording of by-law 3.3 did not follow this approach. That is, the relaxation – 'the proprietor may rent out his lot from time to time' – was subject to the prohibition on 'individual rental for a period of less than one (1) month'.[144]

There was an attempt made by the Owners of Ceresa River Apartments Strata Plan 55597 to impose a minimum timeframe for leases in its by-laws. However, that by-law was invalidly passed and struck out at the trial stage.[145] The Court of Appeal did not at any stage base their Honours' decision in *Ceresa* on that by-law. By way of contrast, and as noted above, the Privy Council in *Pinnacle* was comfortable in allowing such time limitations to apply.[146] Given Magistrate Sinclair's specific acceptance of the interpretation adopted in both *Ceresa* and *Pinnacle*, despite the cases being at odds with each other on that very point, one must question whether his Honour has erred in his interpretation of those cases. Magistrate Sinclair noted in obiter '[i]t is in the public interest that this issue be resolved as soon as possible'[147] as two further decisions of referees dealing with similar by-laws were appealed to the tribunal.[148] The author questions whether Magistrate Sinclair's decision is the clear resolution desired given this point.

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143 *Ceresa* (2017) 51 WAR 304, 336–7 [152] (Murphy, Mitchell JJA and Beech J).

144 For ease of reference, by-laws 3.1, 3.2 and 3.3 are repeated:

> 3 Use of Lots
>
> 3.1 Residential Purposes Only
>
> Subject to clause 3.2, each Lot shall be used for residential purposes.
>
> 3.2 Company exemption …
>
> 3.3 Subject to clause 3.1 and 3.2, each proprietor shall not use or permit his lot to be used other than as a private residence of the proprietor or for accommodation of the proprietor's guests and visitors.
>
> Notwithstanding the foregoing, the proprietor may rent out his lot from time to time provided that in no event shall any individual rental [be] for a period of less than one (1) month

Fairway Island [2019] QMC 13, [3]–[4] (Magistrate Sinclair).

145 That by-law provided as follows:

> 1. Short-term Use
>
> In this by-law the term 'Short-term Use' means the use of a proprietor's Lot for occupancy as short-term temporary or holiday accommodation for periods of less than three (3) months.
>
> Subsequently to the adoption of the by-law no proprietor shall change the use of his or her Lot to use or allow to be used his or her Lot for Short-term use as herein defined or for any commercial use without first obtaining the consent of the Strata Company pursuant to a Special Resolution.

Their Honours confirmed that the trial judge, Pritchard J in *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2016] WASC 153, had dismissed the by-law as being invalid on the basis that the motion to adopt it had not been passed with the necessary resolution: *Ceresa* (2017) 51 WAR 304, 310 [20] (Murphy, Mitchell JJA and Beech J), following *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2016] WASC 153, [15] (Pritchard J).

146 *Pinnacle* [2018] 4 WLR 22, 25 [16], 26 [20] (Lord Carnwath JSC for the Court).

147 *Fairway Island* [2019] QMC 13, [51].

148 *Washingtonia* [2019] QBCCMCmr 7; *Washingtonia* [2019] QBCCMCmr 8 (both decided on 10 January 2019).

Barlow DCJ in the *Fairway Island Appeal* did not affirm Magistrate Sinclair's interpretation of the time requirement imposed in the by-laws. In this regard, while his Honour acknowledged the difficulty of drawing a distinction between STHL and 'a degree of permanence in use as a residence or abode',[149] Barlow DCJ concluded there was a distinction.[150] The distinction, while difficult to draw, was one that the body corporate could make, provided it did so for the purpose of regulating the use and enjoyment of the lots and common property without acting 'capriciously'.[151]

The outcomes in *Fairway Island* and the *Fairway Island Appeal* are perhaps unsurprising having regard to the similarities in the *BUGT Act* provisions and those considered by the courts in both *Pinnacle* and *Ceresa*. However, as noted above, there were fundamental, albeit on the face of it minor, differences between the by-laws in each of the cases. Irrespective of whether the decisions for Fairway Island GTP 107328 were correct, Part VII now considers their application to *BCCM Act* schemes. It is argued throughout this article that the by-law making powers in the *BUGT Act* are broader than those in the *BCCM Act*. In general terms, the *BUGT Act* provisions are more akin to legislation in Western Australia and the Turks and Caicos Islands than those of the *BCCM Act*. Additional distinctions between the two Acts are identified in Part VII. The importance of those differences cannot be underestimated; they demonstrate that *Fairway Island* and the *Fairway Island Appeal* should not be applied to *BCCM Act* schemes.

VII ARE THE *FAIRWAY ISLAND* AND THE *FAIRWAY ISLAND APPEAL* CASES RELEVANT TO AN INTERPRETATION OF THE *BCCM ACT*'S BY-LAW MAKING POWERS?

In this Part, the author argues that *Fairway Island* and the *Fairway Island Appeal* should not be regarded as relevant to the interpretation of the *BCCM Act.* In this regard, while the by-law making powers in each of the *BUGT Act* and *BCCM Act* contain similar terminology, the limitations on those powers differ significantly, and the structure of the two Acts are too dissimilar for the principles gained from the two cases to be transferrable.

Secondly, the application of the *BCCM Act* to schemes configured from freehold land is important.[152] The *BCCM Act* has, as a secondary object, the realisation of the tourism potential of Queensland schemes. It is to be achieved 'without diminishing' owners' rights.[153] When STHL guests are inconsiderate of their neighbours, arguably the rights of those neighbours and the STHL lot owner may come into conflict. While one may be seeking to collect income from tenanting

149 *Fairway Island Appeal* [2020] QDC 68, [46].
150 Ibid [45].
151 Ibid [46].
152 *BCCM Act 1997* (Qld) ss 2, 9.
153 Ibid s 4(c).

the property,[154] if that use interferes with other owners' quiet enjoyment, this is problematic. However, the use of one property for STHL and quiet enjoyment of another are not necessarily mutually exclusive.

Adopting a position in which STHL may be prohibited by neighbouring owners arguably fails to achieve a realisation of the tourism potential of Queensland schemes.[155] A contrary position, however, may be adduced. The *BCCM Act* seeks 'to balance the rights of individuals with the responsibility for self management',[156] and 'provide bodies corporate with the flexibility they need in their operations and dealings'.[157] Magistrate Sinclair's decision in *Fairway Island* strongly reinforced the body corporate's ability under the *BUGT Act* section 30(2) to regulate the use and enjoyment of lots and the common property by imposing conditions on use through minimum terms for leases. Barlow DCJ upheld this aspect of the decision in the *Fairway Island Appeal.* Nevertheless, a move from broader powers in the *BUGT Act* to the narrower ones in the *BCCM Act* suggests that the legislature intended to limit the scope of the by-law making powers, unlike the position accepted for schemes under the *BUGT Act.*

Achieving flexibility in operations and dealings of a body corporate should, arguably, not occur at the expense of 'accommodating future trends',[158] or by a diminution of owners' rights,[159] particularly when as noted above, the *BCCM Act* also seeks to encourage the tourism potential of schemes. These goals are better achieved by regulating the behaviour of short-term tenants and holidaymakers through nuisance related provisions in by-laws, as occurred in Victoria, than purportedly controlling use by mandating a minimum stay. Imposing nuisance provisions in by-laws also ensures equal treatment under the by-laws – a prohibition on excessive late-night noise for example will apply equally to owners, long and short-term tenants.[160] Limiting use through a by-law may have the effect of implementing a 'one-way ratchet',[161] effectively placing a restrictive covenant on use which may 'impair or sterilise the uses that the land can be put to by future generations',[162] negating the flexibility inherent in the legislation. By-laws stringently controlling use and earning potential for lots, may have an unknown impact on valuations. In addition, funding availability for future transactions may potentially be affected, particularly where a local government considers STHL as

154 AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press, 1961) 107, cited in Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) *Harvard Law Review* 621, 663 n 187.
155 *BCCM Act 1997* (Qld) s 4(c).
156 Ibid s 4(a).
157 Ibid s 4(f).
158 Ibid s 4(d).
159 Ibid s 4(c).
160 This also satisfies the requirements of the *BCCM Act 1997* (Qld) s 180(5), which provides that '[a] by-law must not discriminate between types of occupiers'.
161 Michael A Heller, 'The Boundaries of Private Property' (1999) 108(6) *Yale Law Journal* 1163, 1185.
162 Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge, 2017) 55.

an appropriate use for the site.[163] Perhaps more immediately relevant, imposition of by-laws of this nature in a community management statement has the potential to contradict the intention required to apply the *Accommodation Module* to a scheme. In this regard, the *Accommodation Module* may apply to a scheme, where it is intended that the lots would be predominantly 'accommodation lots', leased, let or available for lease or letting on a short or long-term basis. While the *Standard Module* does not contain an equivalent expectation as to leasing of lots, there is certainly no express prohibition on leasing when that module applies.[164]

In *Clissold v Perry*,[165] the High Court determined that to ensure the greatest protection of private property rights, ambiguities in compulsory acquisition legislation must be read in a way which minimises interference with those rights. This decision was affirmed by French CJ in *R & R Fazzolari Pty Ltd v Parramatta City Council*.[166] While both cases related to compulsory acquisition and are, therefore, not necessarily relevant to by-law making powers under the *BCCM Act,* the cases reflect a statutory interpretation principle that has long been applied to legislation interfering with private property rights. It is surprising, in the author's view, that a similar statutory interpretation principle has not been adopted in respect of by-law making powers under strata and community titles legislation, particularly given the right to 'not be arbitrarily deprived of the person's property'.[167] Landowners' rights may be impacted by the 'fourth tier of government' when resolutions may be made by less than a unanimous decision of all owners, and the consent of those impacted is not required.

In relation to the interpretation of the by-law making power under the *BCCM Act*, the Court of Appeal's decision in *Mineralogy Pty Ltd v The Body Corporate for 'The Lakes Coolum'* ('*Mineralogy*')[168] is relevant. The by-law being questioned in that case prohibited construction of dwellings on scheme lots without the committee's prior written consent, which could not be unreasonably withheld.[169] McPherson JA considered the effect of the *BCCM Act* section 131(1)(b)(i), subsequently renumbered to the *BCCM Act* section 169(1)(b)(i).[170] His Honour determined that the court must ask whether regulating the 'use and enjoyment'

163 Sherry, 'Airbnb Short-Term Letting in Strata Schemes' (n 41) 956, discussed in Pocock, 'Beware the Double-Edged Sword' (n 16) 957.

164 *Standard Module 2008* (Qld) s 3.

165 (1904) 1 CLR 363, 376–7 (Griffith CJ, Barton and O'Connor JJ agreeing at 378).

166 (2009) 237 CLR 603*,* 619 [43].

167 *Human Rights Act 2019* (Qld) s 24(2), but noting section 13(1) which authorises the reasonable limitation of human rights under law where it 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' that the limitation is reasonable. In considering the reasonableness of limitations, relevant factors include the nature of the limitation and whether it is 'consistent with a free and democratic society based on human dignity, equality and freedom': at s 13(2)(b); the relationship of the limitation to its purpose and whether the limitation helps achieve the purpose: at s 13(2)(c); whether there are less restrictive means available to achieve the purposes: at s 13(2)(d); and the importance of the right and the limitation and the balance that may be achieved between the two: at ss 13(2)(e)–(g).

168 [2002] 2 Qd R 381 ('*Mineralogy*').

169 Ibid 382 [1] (McPherson JA).

170 Refer to Part IV of this article for the wording of *BCCM Act 1997* (Qld) s 169(1)(b)(i).

of a lot extended to erecting a dwelling on that lot. If yes, the *BCCM Act* section 131(1)(b)(i) (as it was then) would authorise a by-law to regulate construction, the conditions applying to it and the processes for approval.[171]

Like the by-law in *Fairway Island,* the by-law in *Mineralogy* commenced with a prohibition, followed by a relaxation which applied when the conditions set out in it were met. Given this, his Honour also adjudged the distinction between regulation and prohibition, and whether the conditions in the by-law went beyond regulation, into prohibition. The *BCCM Act* section 131(1)(b)(i) (as it was then) permitted 'regulation' of use and enjoyment of lots and common property. It did not extend to the prohibition of activities.[172] The wording is maintained in the renumbered section – the *BCCM Act* section 169(1)(b)(i).

In discussing the inability of a by-law to impose prohibitions, McPherson JA in *Mineralogy* referred to Dixon J's determination in *Swan Hill Corporation v Bradbury*:[173]

> Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or course of conduct to be regulated.[174]

His Honour also favoured Starke J's decision in *City of Brunswick v Stewart*:[175]

> Prima facie, a power to … regulate and restrain a subject matter does not authorize prohibiting it altogether or subject to a discretionary licence or consent … But, as might have been expected, this proposition cannot be universally applied (*Slattery v Naylor* (1888) 13 App Cas 446).[176]

In *Mineralogy*, the 'effect [of the prohibition was] to prevent what is generally accepted as a basic right of a landowner'.[177] If the by-law ended there, McPherson JA would have regarded it as an invalid prohibition, rather than mere regulation.[178] However, it also included a process for approval which facilitated an owner obtaining consent. The requirement that the consent not be unreasonably withheld meant that the discretion given to the body corporate committee to refuse an application was 'not altogether unqualified or unlimited'.[179] The by-law supplied an 'objective standard' upon which applications were to be determined, limiting the 'arbitrary and capricious authority of the Body Corporate Committee'.[180] This

171 *Mineralogy* [2002] 2 Qd R 381, 383 [3].
172 Ibid 384 [8].
173 (1937) 56 CLR 746.
174 *Mineralogy* [2002] 2 Qd R 381, 384 [7], quoting ibid 762 (Dixon J).
175 (1941) 65 CLR 88.
176 *Mineralogy* [2002] 2 Qd R 381, 384 [7], quoting *City of Brunswick v Stewart* (1941) 65 CLR 88, 95 (Starke J).
177 Ibid 384 [9].
178 Ibid 384–5 [9].
179 Ibid 384 [9].
180 Ibid 385–6 [12].

objective standard was attained through both the wording of the by-law, and by providing an opportunity to challenge the decision because of unreasonableness.[181]

Two points of comparison are raised between the interpretation of McPherson JA's decision in *Mineralogy* on the one hand, and *Fairway Island* the *Fairway Island Appeal* and the *BUGT Act* on the other, both of which are discussed below.

A Freehold Rights

The discussion around rights associated with freehold land ownership is relevant.[182] The *BCCM Act* only applies to fee simple community titles schemes.[183] While the power under the *BCCM Act* section 169 is narrower than the *BUGT Act* section 30(2), the expectation that land under the *BCCM Act* enjoys freehold rights is a further important distinction. There is no equivalent requirement for freehold land mandated in schemes regulated by the *BUGT Act* nor the *IRD Act*. Magistrate Sinclair in *Fairway Island* bluntly, although in the author's view incorrectly, highlighted the difference:

> I do not take the view that there is any presumption in the [*BUGT Act*] that the owners of a lot in a body corporate had rights equivalent to freehold. Precisely the opposite is true. If 75% of the owners want to, they can limit the ordinary incidents of title with a by-law.[184]

The New South Wales legislature, by enacting the *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018* (NSW), which permits by-laws prohibiting STHL, has 'reinforced the misnomer that [strata scheme] land is somehow "less than" fee simple, and given different classes of [strata] owners varying rights where some actions are protected, and others are not'.[185] The effect of Magistrate Sinclair's decision in *Fairway Island* is the same: it perpetuates the error that community title living is a poor cousin to that of 'real' real property. Australia, however, is not alone in this view. New Zealand's High Court similarly held:

> The rights of unit owners derive from the terms of the Act, and in particular those which provide for the stratum estate in a unit created under the Act. They do not arise by reference to, or in some way from the common law rights that are associated with the ownership of the fee simple in land; unit owners do not hold fee simple estate. The concept of quiet enjoyment referred to in s 79 is generally associated with the lesser rights of the holder of a leasehold estate. The aphorism 'a man's home is his castle' is therefore not applicable to a unit title development.[186]

These learned judges argued that owners' freehold rights are curtailed simply by a lot's inclusion in a scheme. That is, purchasers of lots within strata and community titles schemes have notice of the by-laws affecting title,[187] and there are specific

181 Ibid.

182 Ibid 384–5 [9].

183 *BCCM Act 1997* (Qld) s 9(2).

184 *Fairway Island* [2019] QMC 13, [81].

185 Pocock, 'Beware the Double-Edged Sword' (n 16) 962.

186 *Wheeldon v Body Corporate 342525* [2016] NZCA 247, [36] (Courtney J for the Court). This case related to building defects and repairs under the *Unit Titles Act 2010* (NZ).

187 In the context of the *BCCM Act 1997* (Qld), mandatory disclosure exists. Where a proposed lot is being sold, the *BCCM Act* section 213(2)(f) requires that the original owner provide to the proposed buyer a copy of the proposed community management statement for the relevant scheme and any schemes it

mechanisms in the various Acts which permit amendment of those by-laws with appropriate resolutions of the body corporate.[188] These additional layers of regulation, in the judges' views, rendered strata and community titles scheme lots a lesser title with fewer freedoms. However, it is unrealistic with respect to any type of real property to believe that it can be the owner's 'sole and despotic dominion'.[189] Nuisance, planning laws and environmental controls all apply. Purchase of a lot within a scheme merely adds a statutory overlay of contractual[190] rights and obligations that attempt to balance the tension between individual and collective rights and interests.[191] The rights of an owner of a freehold lot within a scheme are not lesser than, but merely different to those traditional fee simple rights.[192]

Magistrate Sinclair's statement that an owner of a lot within a *BUGT Act* scheme does not have freehold land rights coloured his Honour's determination that by-law 3.1 was not a prohibition on use because of the relaxations built into it.[193] His Honour regarded the approach of the Court of Appeal in Western Australia in *Ceresa* and the Privy Council in *Pinnacle* respectively, 'was to *first* look at power [sic] of the [body corporate] to regulate a use by an owner to be strictly for "residential" purposes and *then* look at the relaxation of that as an exemption and not the primary purpose of the restriction in the first place'.[194] Their Honours in those cases considered that the by-laws were valid exercises of power.

McPherson JA approached the interpretation of the by-law in *Mineralogy* in the same manner as the courts in *Ceresa* and *Pinnacle*. That is, his Honour first considered whether the purpose of the by-law was to regulate use, and as such within the statutory by-law power enumerated in the *BCCM Act.* The author fundamentally agrees with this approach. However, unlike a question of STHL, the limitations on by-law making powers contained in *BCCM Act* sections 180(3), (4), (5) and (7) were not relevant to determining the validity of the construction by-law in *Mineralogy*. While in the case of STHL, the body corporate would be required to consider whether to restrict 'the type of residential use',[195] the by-law

is a subsidiary of. In respect of existing lots, the Registrar of Titles will record the current community management statement as a notation on the title to the lot: *Land Title Act 1994* (Qld) s 115L(1)(b)(i).

188 *BCCM Act 1997* (Qld) s 62(3)(a); *BUGT Act 1980* (Qld) s 30(2).

189 Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (John Murray, rev ed, 1857) vol 2, 1.

190 Barlow DCJ regarded by-laws as a statutory contract between the body corporate and its members: '[t]hus, as there would be mutual covenants between all parties, the section means that by-laws operate as if they were a contract between them all': *Fairway Island Appeal* [2020] QDC 68, [17] n 16.

191 Thomas Gibbons, 'Body Corporate Rules: Tensions' (2008) 16 *Waikato Law Review* 167, 187.

192 Ibid 186. However, in the context of the broad by-law making powers of New South Wales, Sherry asks how indefeasible a strata lot-owner's title is if the owners corporation may approve by-laws without consent of the affected owners. She relevantly asks,

> [I]s it acceptable that registered proprietors of non-strata titles are guaranteed significant protection through the principle of indefeasibility, while owners of strata title, although also Torrens, may lose valuable interests on the vote of their neighbours, with only a discretionary equitable principle [in this case, fraud on the minority] to save them?

Sherry, 'How Indefeasible Is Your Strata Title' (n 18) 169.

193 *Fairway Island* [2019] QMC 13, [128].

194 Ibid [59] (emphasis in original).

195 *BCCM Act 1997* (Qld) s 180(3).

in *Mineralogy* did not do so. Therefore, it was unnecessary for McPherson JA to determine whether 'the type of residential use' was restricted, if the by-law sought to prohibit or restrict the 'transmission, transfer, mortgage or other dealing with a lot' including the leasing of a lot,[196] or 'discriminate between types of occupiers'.[197] Rather, the by-law in *Mineralogy* raised the more limited question of prohibition versus regulation.

Barlow DCJ approached the *Fairway Island Appeal* from a different perspective. His Honour agreed with Magistrate Sinclair's determination that the by-law was regulatory in nature; however, focussed on 'dealing' as the operative part of the provision. Barlow DCJ looked to the *Land Title Act 1994* (Qld) part 6 for guidance on what agreements may qualify as dealings under the Act. His Honour concluded that easements, covenants, profits à prendre and certain other transactions were dealings. Licences, however, were not dealings under the Act.[198] Owners were not prohibited from registering a lease; the by-laws merely imposed conditions on them.[199] As dealings are effected by registration,[200] a by-law will only breach this requirement if it 'restrict[s] or prohibit[s] the registration of an instrument that would give rise to a dealing affecting a lot'.[201] His Honour went on to conclude that the STHL of the appellants' lots did not give rise to a lease, describing it thus:

> It is the grant of a right to exclusive possession of land for a term (however short) less than that of the grantor. The appellants do not grant leases of their lots. They require tenants to agree to certain terms and conditions, but those agreements would not constitute leases. They are clearly a form of licence to use the property on the stated conditions for the agreed term. They do not grant the tenant exclusive possession and control of the lots: for example they prevent the tenants using the outdoor areas between 10pm and 8am, they prohibit the tenants from having overnight guests and limit the number of day guests permitted, they entitle the owner's manager to enter the lot at any time to ensure compliance with the conditions and they provide for immediate eviction without notice if certain conditions are breached.[202]

Putting aside the latter two features of the 'rental agreements'[203] described by Barlow DCJ, the first three limitations on the occupancy right are arguably equivalent to prohibitions on smoking in or near the lot, or a minimum term for a lease being imposed. They are, it is submitted, 'conditions on such an instrument',[204] which Barlow DCJ regarded as permissible. In relation to his Honour's conclusion that lesser grants of exclusive possession were made than that held by the owner, his Honour considered that the latter two factors, set out above, were key. While Barlow DCJ appears to rely on *Ceresa* as authority for the definition of a lease, the Court in *Ceresa* did not definitively conclude that the arrangement between the owners and their guests in that case were leases. Rather, their Honours merely

196 *BCCM Act 1997* (Qld) ss 180(3), (4).
197 Ibid s 180(5).
198 *Fairway Island Appeal* [2020] QDC 68, [35].
199 Ibid [35].
200 Ibid [36]; *Land Title Act 1994* (Qld) s 64.
201 *Fairway Island Appeal* [2020] QDC 68, [37].
202 Ibid [38] (citations omitted).
203 Ibid.
204 Ibid [37].

proceeded on the assumption that they were. In this respect, the status of bookings made using online platforms has not been conclusively determined. The Airbnb Terms of Service[205] provides that a confirmed booking is 'a limited licence',[206] but the court in *Swan v Uecker*[207] determined that the letting of an entire apartment through Airbnb breached the tenant's obligation not to sub-lease the premises. In that case, Croft J concluded that the tenant intended to grant exclusive possession to her guests because of the wording of the advertisement: 'I am leaving to allow you to have it all to yourself'.[208] The limited timeframe for which tenancies were granted did not preclude the creation of a lease. His Honour referred to both McHugh J's decision in *Western Australia v Ward*[209] and Nettle JA's determination in *Genco v Salter*[210] that a lease may exist 'however short' its term, even for periods of days or hours and concluded that the short-term nature of the Airbnb stay did not preclude the entry into a lease. Based on the substance, not the form of the Airbnb agreement in that case, and having regard to the intention of the parties, his Honour determined that there was a grant of exclusive possession,[211] and a sub-lease created.[212] While the conclusion could be extrapolated, Croft J in *Swan v Uecker* expressly indicated that his Honour's decision was limited to the facts of the particular case.[213]

In the *Fairway Island Appeal*, Barlow DCJ held that the substance of the respondents' 'rental agreement' indicated that no lease had been granted. This meant that the agreements did not fall within the definition of a dealing and as such, were not protected by the limitation on the by-law making power contained in the *BUGT Act* section 30(6). The similarity in the restriction on the by-law making power in the *BCCM Act* section 180(4) and *BUGT Act* section 30(6) may, on the face of it, lend weight to the argument that if a distinction may be drawn between leases and licenses in the protections afforded by the *BCCM Act* section 180(4), Barlow DCJ's decision in the *Fairway Island Appeal* may apply to *BCCM Act* schemes. However, the author argues that this would not be the case. The same conclusion cannot be reached because the *BCCM Act* section 180 imposes additional limitations on the by-law making power.[214] That is, by-laws cannot restrict the type

205 'Terms of Service', *Airbnb* (Web Page, 25 February 2020) archived at <https://web.archive.org/web/20200225073512/https://www.airbnb.com.au/terms>.
206 Ibid cl 8.2.1.
207 (2016) 50 VR 74.
208 Ibid 96 [52], [53].
209 (2002) 213 CLR 1, 222–3.
210 (2013) 46 VR 507, 514 [29].
211 *Swan v Uecker* (2016) 50 VR 74, 85–6 [31].
212 Ibid 103 [75].
213 Ibid 104 [80].
214 In *Body Corporate for Hilton Park CTS 27490 v Robertson* [2018] QCATA 168 ('*Hilton Park Appeal*'), Queensland Civil and Administrative Tribunal Member King-Scott held that a by-law requiring premises be let for 'residential purposes' only and for a minimum of six months was invalidated by the *BCCM Act 1997* (Qld) sections 180(3) and (4). Member King-Scott ruled that particularly where the *Accommodation Module 2008* (Qld) applied to a scheme, STHL was not only anticipated but encouraged. When interpreting the legislation, the approach that gives meaning to the intention of the legislature and best achieves the purpose of the *BCCM Act* must be adopted: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Acts Interpretation Act 1954* (Qld) s

of residential use,[215] nor can they discriminate between types of occupiers.[216] In addition, bodies corporate regulated by the *Accommodation Module*[217] would find it difficult to maintain this type of argument given the express requirement in the module that lots are 'predominantly'[218] leased, let or available for lease or letting on a long- or short-term basis or are part of a hotel.[219] The *Accommodation Module* specifically recognises STHL as a predominant intended use of lots, regardless of whether the agreement authorising that type of occupation is a lease or licence.

The author argues that both Magistrate Sinclair's approach in *Fairway Island* and Barlow DCJ's decision in the *Fairway Island Appeal* highlight the fundamental distinction between regulation and prohibition with respect to a STHL by-law under the *BUGT Act* and the *BCCM Act*. In the *BUGT Act*, the expectation of freehold rights is not a requirement. This, combined with the wide power that by-law 3.1 provided to the body corporate[220] to further regulate STHL, rendered the by-law making power under the *BUGT Act* far broader than under the *BCCM Act*. The restrictions on the by-law making power of a body corporate under the *BCCM Act* would render such a by-law prohibitive, not regulatory, and, it is submitted, would breach the limitations of the by-law making power in the *BCCM Act* section 180. Those factors, together with the recognition of freehold land rights, creates a fundamentally different statutory system under the *BCCM Act* to that contained in the *BUGT Act*. Add to this, the existence of the regulation modules enacted under the *BCCM Act*, particularly the *Accommodation Module*, and there is clear support for the author's argument that *Fairway Island* and the *Fairway Island Appeal* should not be regarded as persuasive so far as an interpretation of the *BCCM Act*'s by-law making powers.

B Reasonableness

The second fundamental difference between the *BCCM Act* and the *BUGT Act* is the requirement in the *BCCM Act* that by-laws 'must not be oppressive or unreasonable, having regard to the interests of *all* owners and occupiers'.[221] The body corporate must, pursuant to the *BCCM Act* section 94, act reasonably when carrying out its functions under the Act and the community management statement. There is no equivalent obligation with respect to reasonableness or a prohibition on oppressive conduct for bodies corporate regulated by the *BUGT Act*. However, all parties in the *Fairway Island Appeal* agreed that at common law a by-law must 'be

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14A. When that approach is taken with respect to a by-law purporting to restrict occupation to 'residential purposes', the *BCCM Act* section 180 makes it clear that this by-law is invalid and *Ceresa* and *Pinnacle* are to be distinguished: *Hilton Park Appeal* [2018] QCATA 168, [74]–[75], [77], [80], [84].

215 *BCCM Act 1997* (Qld) s 180(3).

216 Ibid s 180(5).

217 As at January 2020, there were 4,271 schemes registered under the *Accommodation Module 2008* (Qld): Department of Justice and Attorney-General (Qld) (n 7) 8.

218 *Accommodation Module 2008* (Qld) s 3(2)(a).

219 Ibid s 3(3).

220 Based on the broad powers in the *BUGT Act* and the court's conclusion in *Rosebank* [2016] QCA 192, Magistrate Sinclair considered that by-law 3.1 was itself a source of power, as it was an original by-law: *Fairway Island* [2019] QMC 13, [44].

221 *BCCM Act 1997* (Qld) s 180(7) (emphasis added).

the result of a genuine and real exercise of the power to make it: the power must not have been exercised for a purpose not related (that is, ulterior) to the purpose for which it was conferred on the body corporate'.[222]

In the *Fairway Island Appeal*, the landowner appellants argued that by-law 3.3 was invalid on the grounds that it was unreasonable or oppressive. The appellants noted the agreement to adduce evidence of unreasonableness or oppression only if the tribunal found such argument to be tenable. However, without calling for further evidence, Magistrate Sinclair ruled that the by-law was not unreasonable or oppressive.[223] The appellants argued that this resulted in an absence of procedural fairness because they were unable to admit further evidence to support their case. Barlow DCJ rejected the appellants' argument.[224] His Honour agreed with the argument made by counsel for the body corporate that an opportunity existed to present further evidence and the appellants had not availed themselves of it.[225] Barlow DCJ ruled that Magistrate Sinclair's conclusion that the by-law was not unreasonable or oppressive was evidence of his Honour's conclusion that the argument being mounted by the appellants was not tenable.[226]

Barlow DCJ held that the effect of the by-laws on the appellants' income was irrelevant to determine the reasonableness of the by-laws and the body corporate's actions.[227] Rather, reasonableness is determinable based on 'whether the overall effect of the by-law (that is, what it results in generally) is within the purpose of the legislation (in this case, the control, management, administration, use or enjoyment of the lots and the common property)'.[228] As a result, Barlow DCJ considered that the by-law must not be:

- 'capricious and irrational';
- so disproportionate that a 'reasonable person exercising the power could have devised it';[229] or
- 'so lacking in reasonable proportionality as not to be a real exercise of the power'.[230]

Therefore, the effects of a by-law on an individual owner were not relevant. Rather, his Honour held that one must make an objective assessment having regard

222 *Fairway Island Appeal* [2020] QDC 68, [69]. Barlow DCJ rejected the appellants' submission that the by-law was oppressive, finding no evidence indicating that the motion was approved with an 'illegitimate purpose' in mind, rendering it oppressive: at [84]–[85]. Barlow DCJ addressed the comments made by Magistrate Sinclair that it was 'hard to see how a 75% majority can be said to be oppressive when they simply exercise the powers the legislature has given them for a legitimate purpose', overturning Magistrate Sinclair's reasoning, but maintaining his Honour's conclusion: at [95]–[98], quoting *Fairway Island* [2019] QMC 13, [158]. In this regard, Barlow DCJ indicated that simply achieving a 75% majority did not render the by-law immune from attack as oppressive. Rather, the exercise of the power for a legitimate purpose having regard to the 'objects and effects of the conduct' was the determining factor of whether the by-law was oppressive: *Fairway Island Appeal* [2020] QDC 68, [97].

223 *Fairway Island Appeal* [2020] QDC 68, [54] (Barlow DCJ).

224 Ibid [66].

225 Ibid [58(b)].

226 Ibid [63].

227 Ibid.

228 Ibid.

229 Ibid [70].

230 Ibid.

to the body corporate as a whole. Barlow DCJ considered the test to be such that 'one looks at the statutory purpose of by-laws generally and asks whether the particular by-law is reasonably and proportionately directed toward that purpose: in this case, the use and enjoyment of lots'.[231] In order to determine whether the by-laws reasonably and proportionately dealt with the use and enjoyment of lots, his Honour looked to the explanatory notes to the motion.[232] Those notes indicated, somewhat vaguely, that the by-law was intended to regulate STHL to overcome behavioural complaints regarding holidaymakers.[233] His Honour held that this satisfied the requirements of the common law obligation for reasonableness.[234]

In *Ainsworth v Albrecht*,[235] the High Court adopted the test espoused by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*[236] to interpret the reasonableness requirement in the *BCCM Act* section 94. Their Honours, Bowen CJ and Gummow J concluded that

> the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience … The criterion is an objective one, which requires the court to weigh the nature and extent of the … effect [of the relevant conduct], on the one hand, against the reasons advanced in favour of [it]. All the circumstances of the case must be taken into account.[237]

In *Ainsworth v Albrecht*[238] the High Court considered whether an objection to a motion at the general meeting of a body corporate was reasonable. The motion sought to exclusively allocate airspace immediately adjacent to a lot to facilitate renovations to join two balconies into one larger entertainment space. The renovation would have resulted in both privacy and amenity concerns for the surrounding owners. In a joint judgment by French CJ, Bell, Keane and Gordon JJ, their Honours held that owners were not obliged to exercise reasonableness when voting at a general meeting of the body corporate – the requirement in the *BCCM Act* section 94 only extended to the body corporate as a collective. Nevertheless, it was not unreasonable for an individual owner to oppose a motion when acting in a self-interested manner, where there is a 'reasonable apprehension' that their rights, or the use and enjoyment of their lot, may be adversely impacted as a result of that motion.[239] Owners need not act '"sympathetically or altruistically" towards another owner who is presenting a motion which would diminish theirs, or the body's corporate, property rights'.[240]

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231 Ibid [78].
232 Ibid [80]–[81].
233 Ibid [82].
234 Ibid [83].
235 (2016) 261 CLR 167.
236 (1989) 23 FCR 251.
237 Ibid 263 (Bowen CJ and Gummow J).
238 (2016) 261 CLR 167.
239 Melissa Pocock, 'Discovering Common Ground: Appropriation of Common Property for Exclusive Use and Scheme Terminations Reconsidering *Albrecht v Ainsworth & Ors* [2015] QCA 220' (2016) 35(2) *University of Queensland Law Journal* 393, 396 ('Discovering Common Ground'), discussing *Ainsworth v Albrecht* (2016) 261 CLR 167, 187 [64] (French CJ, Bell, Keane and Gordon JJ).
240 Pocock, 'Discovering Common Ground' (n 239) 398, discussing *Albrecht v Ainsworth* [2015] QCA 220, [57] (McMurdo P).

In *Body Corporate for the Reserve CTS 31561 v Trojan Resorts Pty Ltd* ('*The Reserve*'),[241] Senior Member Stilgoe and Member Collins of the Queensland Civil and Administrative Tribunal Appeals Division considered the implication of a motion being passed at a general meeting that might have contravened the body corporate's obligation to act reasonably under the *BCCM Act* section 94. In that case, the body corporate passed a motion to terminate a contractor's agreement in circumstances where there was a clear breach of the agreement. The Members held that

> [t]he question of reasonable extends beyond whether or not Reserve was entitled to terminate. It extends beyond the bargain that was struck. It requires the body corporate to look at whether taking the action was in the interests of the lot owners.[242]

While this case has no weight as a precedent, its interpretation of the requirement for reasonableness under the *BCCM Act* section 94 is both persuasive (however, the resulting outcome of that case has been criticised)[243] and different from the test Barlow DCJ adopted in the *Fairway Island Appeal*. Assuming the decision in *Ainsworth v Albrecht* as interpreted in *The Reserve* is followed, it could lead us to the conclusion that even if a resolution was passed at a validly convened general meeting, the recording of a new community management statement to implement a by-law limiting use within the scheme to 'residential purposes' may not be a reasonable exercise of the body corporate's powers. This is particularly the case when having regard to the rights and interests of 'all' owners and occupiers, as is required by the *BCCM Act* section 180(7) where one or more of those owners are seeking to use their lots for STHL. It is relevant to reiterate that STHL is a purpose encouraged by the *BCCM Act* and in particular where the *Accommodation Module* applies to the scheme.

VIII CONSIDERATIONS FOR THE FUTURE

This article commenced with a discussion of the popularity of community titles schemes as a development structure within Queensland, predicting that there would be continued growth in the sector. The importance of community titles schemes to the delivery of tourist bed nights in Queensland and the recognition of tourism in the secondary objects of the *BCCM Act* was also highlighted. The mix of touristic and residential uses within schemes was identified as a conflict point, and an ongoing concern for resident owners and long-term tenants alike.[244] On the one hand, the sharing economy and online platforms which facilitate peer-to-peer accommodation rental options have broadened the opportunities for a person to rent all or part of their lot for STHL purposes. However, this has seemingly exacerbated resident owners' and long-term tenants' concerns.[245] It is important to

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241 [2017] QCATA 53.

242 *Body Corporate for the Reserve CTS 31561 v Trojan Resorts Pty Ltd* [2017] QCATA 53, [51] (Senior Member Stilgoe and Member Collins).

243 Pocock, 'What about Me?' (n 90).

244 Pocock, 'Beware the Double-Edged Sword' (n 16) 951–4.

245 'Our Strata Our Choice', *Owners Corporation Network* (Web Page, 5 March 2019) <https://www.ocn.org.au/ourstrataourchoice>, archived at <https://webarchive.nla.gov.au/awa/20190305051202/https://www.

achieve a balance between these oft conflicting positions to ensure that harmony and liveability within our schemes continues.

The author has argued elsewhere that the decisions in *Ceresa* and *Pinnacle* are unlikely to be applicable to the *BCCM Act*.[246] Since that article was published, Barlow DCJ of the District Court in the *Fairway Island Appeal* upheld the decision in *Fairway Island* and reiterated that those cases aid to interpret by-laws made pursuant to the *BUGT Act*. This article has argued that the powers and restrictions relating to the by-law making powers under the *BCCM Act* are sufficiently different to that of the *BUGT Act* to distinguish the decisions in *Fairway Island* and the *Fairway Island Appeal*. There are numerous points in favour of making such a distinction. In addition to the difference in the structure of the two Acts, the *BCCM Act* prioritises freehold land rights and renders invalid by-laws which are oppressive or unreasonable, discriminate between types of occupiers, or otherwise restrict the type of residential use.[247] This narrower by-law making power under the *BCCM Act* is fundamental to distinguishing *Fairway Island* and the *Fairway Island Appeal*. Finally, another major difference between the Acts is the obligation on the body corporate to act reasonably pursuant to the *BCCM Act* section 94. This obligation does not expressly exist in the *BUGT Act*, and while Barlow DCJ acknowledged a common law requirement, it differs from the interpretation adopted by the High Court in *Ainsworth v Albrecht* with respect to the *BCCM Act*.

The legislative iterations of strata and community titles law in Queensland since the 1960s has led to a different regulatory regime applying to some schemes. The number of schemes regulated by the *BCCM Act* is significant compared to those for which the *IRD Act* and *BUGT Act* continue to apply. Nevertheless, the approximate 580 schemes still under the application of the *IRD Act* and the *BUGT Act* should not be left behind.[248] The *BCCM Act* has been updated, the regulation modules adjusted, and two iterations of new modules enacted since 1997 to account for modern challenges and concerns applicable to creation of community titles schemes, their management and liveability. Those schemes still regulated by the *BUGT Act* also have a right to a legislative system which reflects contemporary standards and protects freehold property rights in the same manner that other community titles scheme lots are protected in Queensland. The Commercial and Property Law Research Centre stated:

> The *BUGTA* is no longer considered to be contemporary legislation. It does not reflect best practice standards for body corporate management and it provides a lesser standard of protection for lot owners than what is available under the *BCCM Act*. The specified Acts [as set out in the *BCCM Act* section 326], to the extent that they rely on the *BUGTA*, may also be considered out-of-date.[249]

While the Commercial and Property Law Research Centre concluded that the Queensland government should not replace the *BUGT Act* with the *BCCM Act* at

ocn.org.au/ourstrataourchoice>.

246 Pocock, 'Beware the Double-Edged Sword' (n 16).

247 *BCCM Act 1997* (Qld) ss 180(7), (5) and (3) respectively.

248 Information provided by Queensland Government, Department of Justice and Attorney-General, Office of Regulatory Policy in January 2017 as disclosed in Commercial and Property Law Research Centre (n 19) 15.

249 Commercial and Property Law Research Centre (n 19) 16.

this time,[250] it was recommended that the by-law making powers under the *BUGT Act* should be subject to the same restrictions as the *BCCM Act*.[251]

The current legislative environment in Queensland is unnecessarily complex. Legislative amendment is required in order to simplify the arrangements with respect to the ongoing application of the *BUGT Act* to schemes. However, there are some lessons that may be gleaned from *Fairway Island* and the *Fairway Island Appeal.* While the lines between the *BUGT Act* and *BCCM Act* on the face of it may initially appear blurred, there are strong reasons to retain the stark contrasts between the two Acts. We must not misinterpret the by-law making powers under the *BCCM Act,* eroding the protections granted by the Act to the tens of thousands of Queensland schemes regulated by it. At its broadest, we must limit the persuasiveness of the decisions in *Fairway Island* and the *Fairway Island Appeal* to those historic schemes still operating under the *BUGT Act.*

250 Ibid 8.

251 Commercial and Property Law Research Centre, *Property Law Review Final Recommendations: Consistency between the Body Corporate and Community Management Act 1997 and the Building Units and Group Titles Act 1980* (Report, 2018) 21 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0003/568173/qut-report-bugta-recommendations.pdf>. It must be noted, however, that the report recommended that transitional provisions be implemented to ensure validity of by-laws currently in place under the *BUGT Act* with the proviso that any future amendments to the by-laws would be required to comply with the *BCCM Act 1997* (Qld).