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Commercial Property

‘Ban the banners’ provisions of the *Buildings Act 1975* - Community Titles Schemes

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Prohibitions and restrictions to support sustainable housing measures under the "ban the banners" provisions of the *Building Act 1975* - Community Titles Schemes

Purpose of "ban the banners"

The *Building and Other Legislation Amendment Act 2009* resulted in amendments to the *Building Act 1975,* which were effective from 1 January 2010.

Among other things, including requiring the mandatory use of a sustainability declaration at the point of sale for houses, townhouses and units, the *Building and Other Legislation Amendment Act 2009* contained provisions which aimed to stop bodies corporate and developers from restricting the use of sustainable and affordable design features such as light coloured roofs, single garages, smaller houses and solar hot water systems.

These provisions are contained in part 2 of chapter 8A of the *Building Act 1975* and are referred to throughout this paper as the Sustainability Provisions. The property industry has labelled the part of this legislation that aims to prevent bodies corporate and developers from restricting certain sustainability and affordable design features as the "ban the banners" legislation.

The rationale for the introduction of the Sustainability Provisions by the State Government was that:

- it would help Queenslanders reduce their carbon footprint by allowing home owners and builders to choose sustainable building features and designs; and

- the new laws would impact positively on housing affordability by allowing owners to choose home sizes and materials that suit their needs, and sustainable building practices would also help reduce ongoing operational energy costs.

However, as outlined below, industry bodies have not welcomed the new laws.

This paper outlines the key terms of the Sustainability Provisions, identifies when the provisions will apply, and gives some examples of how the legislation will work.

Industry objections and resulting amendments

Following the introduction of the Sustainability Provisions, industry bodies (such as the Urban Development Institute of Australia and the Property Council of Australia) rallied against the new laws.

Industry concerns included:

- the restrictions should only apply to a limited range of sustainable housing features such as light coloured roofs (non-reflective), solar hot water and solar panels. Restrictions were placed on too many areas;

- not being able to require construction of a building within a time period will have negative implications (eg speculative purchases by investors with no intention to build);

- land banking (vacant lots within communities not being maintained);

- inability to require completion of landscaping, driveways and fencing would impact on erosion and sediment control in new communities and prevent early completion of landscaping, which ordinarily is an enhancement to the environment and increases the presence of wild life;

- earlier buyers in developments have an expectation that the covenants that apply to them will be enforced in the future and there will be disputes between neighbours;

- restrictions will lead to a detrimental visual impact on dwellings and units and streetscapes; and
- restricting the size of garages to accommodate off-street car parking will increase the parking demands on roadways.

As a result of industry concerns highlighting the negative impacts of the Sustainability Provisions, the Minister for Infrastructure and Planning introduced amendments to the Sustainability Provisions into the Queensland Parliament on 15 April 2010.

The amendments have resulted in the repeal of prohibitions relating to:

- completion time frames for construction;
- number of garages;
- a minimum roof pitch;
- use of specific external surface finishes and materials; and
- completing landscaping, fencing and driveways within a stated period.

The amendments also modified the Sustainability Provisions relating to minimum floor areas and house orientation.

Sustainability Provisions: key terms

The key terms are defined in Section 246M of the *Building Act 1975*. They are:

Relevant instrument

In the context of community titles schemes and other strata developments, the term "relevant instrument" means any of the following:

> *" (b) a building management statement under the... Land Title Act 1994;*
>
> *(c) a community management statement for a community titles scheme under the Body Corporate and Community Management Act 1997, including by-laws in the statement and the provisions of any architectural and landscape code adopted under the statement;*
>
> *(d) a by-law in force for a building units plan or group titles plan under the Building Units and Group Titles Act 1980;*
>
> *(e) a management statement under the South Bank Corporation Act 1989, including by-laws in the statement;*
>
> *(f) a development approval under the South Bank Corporation Act 1989;*
>
> *(g) a development control by-law in force for an approved scheme under the Integrated Resort Development Act 1987;*
>
> *(h) a management statement under the Mixed Use Development Act 1993;*
>
> *(i) development control by-laws, activity by-laws and property by-laws in effect, and made by a community body corporate or precinct body corporate, under the Mixed Use Development Act 1993;*
>
> *(j) a development control by-law or residential zone activities by-law in force, and made by the principal body corporate, under the Sanctuary Cove Resort Act 1985;"*

In relation to the definition of "relevant instrument":

- The definition covers all types of strata arrangements in Queensland.
- The definition does not extend to a development approval under the *Sustainable Planning Act 2009* (or any earlier legislation).
- If a "relevant instrument" (eg a by-law in a CMS) contains a provision which deals with an activity or measure which is regulated by the Sustainability Provisions, then generally speaking the relevant activity or measure will be of no force or effect.

Prescribed building

The Sustainability Provisions apply to a "prescribed building", which is defined to mean:

> *"(a) a class 1a or 2 building; or*
>
> *(b) an enclosed class 10a building attached to a class 1a or 2 building."*

In relation to the definition of "prescribed building":

- Class 1a is a single dwelling being a detached house, one or more attached dwellings, each being a building, separated by fire-resistant wall, including a row house, terrace house, town house or villa unit (Building Code of Australia). This typically covers a detached dwelling, town house and villa unit.
- Class 2 is a building containing two or more sole-occupancy units each being a separate dwelling (*Building Code of Australia*). This typically covers an apartment or unit within a multi-level building.
- Class 10a is a private garage, carport, shed or the like (Building Code of Australia). Note that it must be an "enclosed" structure attached to a class 1a or 2 building.
- The definition is important because the Sustainability Provisions only regulate an activity or measure in respect of a "prescribed building". This means that retail, commercial or industrial buildings are not regulated.
- Certain provisions only apply to a class 1a and/or an enclosed class 10a building attached to a class 1a building (ie. they do not apply to a class 2 building).

There are other definitions of "bathroom", "energy efficient", "solar hot water system" and "treat" contained in Section 246M.

Sustainability Provisions: application

Section 246N of the *Building Act 1975* deals with the application of the Sustainability Provisions to relevant instruments.

In the context of relevant instruments applying to strata arrangements, the effect of Section 246N (subject to one exception) is that the Sustainability Provisions will not apply to regulate certain activity or measures where the relevant instrument was "***made or entered into before 1 January 2010 that is in force or effect*** *for a lot within the meaning of the Land Title Act 1994*".

The exception is that the Sustainability Provisions relating to solar hot water systems and photovoltaic cells will apply regardless of when the relevant instrument was made or entered into (ie they will have retrospective application).

The Explanatory Notes to the *Building and Other Legislation Amendment Bill 2009* indicate that the intention is that the Sustainability Provisions would not apply to a CMS (or any by-law or architectural and landscape code contained in it) or to a BMS which was in effect before 1 January 2010 (subject to the exception referred to above).

There is, however, a difficulty with that outcome being achieved where a new CMS is recorded for a scheme after 1 January 2010.

A CMS cannot be amended. A CMS can only be replaced with a new CMS (see Section 54(1) of the *Body Corporate and Community Management Act 1997*).

Bearing that in mind, the question arises as to when a new CMS is "made or entered into". This will only occur when the new CMS is recorded in the Department of Environment and Resource Management because under Section 115L(3) of the *Land Title Act 1994*, the new CMS only takes effect when it is recorded by the registrar as the CMS for the scheme.

The difficulty is illustrated by the following example:

- A scheme was established in 2009.
- The existing CMS (which was in place before 1 January 2010) contains a provision in the architectural and landscape code (in Schedule D) prohibiting a light coloured roof.
- In June 2010, the body corporate proposes to call and hold an EGM to consent to a new CMS to include a new by-law regulating the keeping of animals on the lot, but otherwise the existing CMS will be unchanged.

The Explanatory Notes suggest that because the by-law was in effect before 1 January 2010, it will remain valid. However, the by-law containing the prohibition in relation to a light coloured roof will be contained in a new CMS (replacing the earlier one). The earlier CMS falls away and has no application whatsoever. In these circumstances, it cannot be said that the new CMS was "made or entered" so as to be in force or effect before 1 January 2010. On that basis, the by-law prohibiting a light coloured roof would be invalid and of no force or effect.

The position in relation to a CMS seems to be as follows:

- If the existing CMS (ie the CMS now applying to the scheme) was in place immediately before 1 January 2010, then the Sustainability Provisions will not apply (subject to the exception mentioned above).
- If a new CMS is recorded on or after 1 January 2010, then it is likely that the Sustainability Provisions will apply to any by-law or any provision of a landscaping and architectural code contained in it.

Sustainability Provisions: how do they work?

The Sustainability Provisions deal with:

- prohibitions on certain activities or measures;
- restrictions on certain activities or measures; and
- regulating when an entity (ie a body corporate or architectural review committee) cannot withhold consent to a certain activity or measure.

In relation to prohibitions or requirements on particular sustainable housing activities or measures that have no force or effect, the table below summarises the provisions:

Prohibitions or requirements that have no force or effect (Section 2460)		
	Applies to	Effect
A provision prohibiting the use of a light coloured roof (ie a colour which achieves a solar absorbance value for the upper surface of the roof of not more than 0.55)	• Detached house/townhouse/villa • Enclosed garage attached to the above	No force or effect
A provision prohibiting energy efficient window or energy efficient window treatment	• Detached house/townhouse/villa • Unit/apartment • Enclosed garage attached to the above	No force or effect
A provision requiring minimum floor area but not minimum frontage unless it has the effect of construction of a less energy efficient building	• Detached house/townhouse/villa	No force or effect
A provision requiring minimum number of bathrooms or bedrooms	• Detached house/townhouse/villa	No force or effect
A provision requiring a building to be orientated on a parcel of land in a particular way if that would have the effect of construction of a less energy efficient building	• Detached house/townhouse/villa • Enclosed garage attached to the above	No force or effect
A provision prohibiting installation of solar hot water system or photovoltaic cells on the roof or other external surface (see note below)	• Detached house/townhouse/villa • Unit/apartment • Enclosed garage attached to the above	No force or effect to the extent the prohibition applies only to enhance or preserve the external appearance of the building (ie prohibition just for the purpose of mere aesthetics will be invalid). There must be some other justification (example of permitted prohibition - installation of solar hot water system with a roof storage tank on a roof might be prohibited because an engineering report shows the system would be too heavy for the roof).

[Note: Under Section 246T, a solar hot water system or photovoltaic cells must not be installed in a way that unreasonably prevents or interferes with a person's use and enjoyment of any part of the building.]

In relation to restrictions on certain sustainable housing activities or measures that have no force or effect, the table below summarises the provisions:

Restrictions that have no force or effect (Section 246P and 246Q)		
	Applies to	Effect
A provision restricting the use of a light coloured roof (ie a colour which achieves a solar absorbance value for the upper surface of the roof of not more than 0.55)	• Detached house/townhouse/villa • Garage attached to the above	No force or effect to the extent that the restriction prevents a person using a light colour if the use of the colour: (a) minimises potential adverse affects on the external appearance of the building; and (b) does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building
A provision restricting energy efficient window or energy efficient window treatment	• Detached house/townhouse/villa • Unit/apartment • Garage attached to the above	No force or effect to the extent that the restriction prevents a person using an energy efficient window or treatment if it: (a) minimises potential adverse affects on the external appearance of the building; and (b) does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building
A provision restricting the location of where a solar hot water system or photovoltaic cells may be installed on the roof or other external surface (see note below)	• Detached house/townhouse/villa • Unit/apartment • Garage attached to the above	No force or effect to the extent that the restriction: (a) applies merely to enhance or preserve the external appearance of the building; and (b) prevents a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface (example of permitted restriction - installation of solar hot water system at a particular location on a roof may be restricted to maximise available space for other systems or to prevent noise from piping associated with the system causing unreasonable interference with a person's use and enjoyment of the building).

[Note: Under Section 246T, a solar hot water system or photovoltaic cells must not be installed in a way that unreasonably prevents or interferes with a person's use and enjoyment of any part of the building.]

In relation to the circumstances where an entity cannot withhold consent to certain sustainable housing activities or measures, the table below summarises the provisions:

When requirement for consent of an entity can not be withheld (Sections 246R and 246S)		
	Applies to	Circumstances in which consent cannot be withheld
Consent required to use a colour for the roof	• Detached house/townhouse/villa • Garage attached to the above	Consent cannot be withheld if use of a colour: (a) achieves a solar absorbance value for the upper surface of the roof of not more than 0.55; and (b) minimises potential adverse effects on the external appearance of the building; and (c) does not unreasonably prevent or interfere with the person's use and enjoyment of the building or another building.
Consent required to use energy efficient window or energy efficient window treatment	• Detached house/townhouse/villa • Unit/apartment • Garage attached to the above	Consent cannot be withheld if the type of window or treatment: (a) minimises potential adverse effects on the external appearance of the building; and (b) does not unreasonably prevent or interfere with the person's use and enjoyment of the building or another building.
Consent required to install a solar hot water system or photovoltaic cells on the roof or other external surface (see Note 1 below)	• Detached house/townhouse/villa • Unit/apartment • Garage attached to the above	Consent cannot be withheld merely to enhance or preserve the external appearance of the building, if withholding the consent prevents a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface.

[Note 1: Under Section 246T, a solar hot water system or photovoltaic cells must not be installed in a way that unreasonably prevents or interferes with a person's use and enjoyment of any part of the building.]

[Note 2: A requirement under section 246R or Section 246S not to withhold consent is deemed to be a requirement under the relevant instrument and applies despite any other provision of the instrument (Sections 246R(4) and 246S(3)).]

Examples

Prohibitions and restrictions regulating sustainable housing activities or measures will normally be found in the by-laws (eg for a community titles scheme, in Schedule C of the CMS) or in any architectural and landscaping code (eg for a community titles scheme, in Schedule D of the CMS).

Some examples:

Building size and site coverage

> "*The minimum floor area is 170m^2 including the living area, lock-up garage and carport if located under the roof line of the dwelling.*"
>
> Comments:
>
> - Minimum floor size requirement is prohibited under Section 2460(1)(c)(i)
> - No force or effect
>
> *"Each dwelling must contain at least three bedrooms and a double lock-up garage."*
>
> Comments:
>
> - Minimum number of bedrooms requirement prohibited under Section 2460(1)(c)(ii)
> - No force or effect
> - Requirement for at least two car storage is not prohibited under the Sustainability Provisions
>
> "*The dwelling must be set back from the front boundary by at least 5m.*"
>
> Comments:
>
> - Under Section 2460(1)(c)(iii) this is an effective requirement provided it does not have the effect of requiring that the building be orientated in a way which has the effect that a less energy efficient building will be constructed

Time period for construction

> "*Construction of the dwelling must be commenced within 12 months from change of ownership from the original owner and completed within 12 months of commencement of construction. Incomplete construction works must not be left for more than three months without work being carried out on them. Landscaping must be completed prior to the occupation of the dwelling (including the completion of landscaping of the front yard).*"
>
> Comments:
>
> - This provision is valid
> - The Sustainability Provisions do not regulate the construction of building, landscaping, fencing or driveways within a stated period or timeframe

Roof colour

> "*Roof colours must be natural and recessive colours such as greys, grey-greens, grey-browns and brown-greens which are sympathetic to the textures of the natural landscape.*"

Comments:

- Likely to be of no force or effect under Section 246P
- Arguably it restricts the use of a light coloured roof and is invalid
- However, the restriction may be valid if the proposal (or design option) minimises the potential adverse affects on the external appearance of the building and does not unreasonably prevent or interfere with a person's use or enjoyment of the building or another building

"*Highly reflective and/or strong, bright colours such as white, purple, red and the like must not be permitted as major roof and wall colour.*"

Comments:

- Restrictions on wall colours are not regulated
- Roof colours are regulated
- To the extent that it deals with a roof colour, the provision may have no force or effect
- However, the restriction may be valid if the proposal (or design option) minimises the potential adverse affect on the external appearance of the building and does not unreasonably prevent or interfere with a person's use or enjoyment of the building or another building (Section 246P(2))

External materials

"*External walls (excluding windows) of any dwelling and garage must be constructed primarily of brick, brick veneer, stone or masonry veneer. Predominantly timber dwellings will not be acceptable.*"

Comments:

- The restriction will be valid
- The Sustainability Provisions will not regulate the materials and finishes for external walls and roofs

Solar heating

"*Solar heating devices must be integrated with the roof design and must not be positioned on the frontage elevation visible from the roadways.*"

Comments:

- This provision does not prohibit solar heating devices but places a restriction on the location
- This provision would be of no force or effect if the restriction applies just for the purpose of enhancing or preserving the external appearance of the building (Section 246Q(2))

Window backings

"*An occupier of a lot must not hang, install, remove or replace any window covering (including, without limitation, curtain, curtain backing, blind, shutter or tinting) unless, in the case of any curtain, the curtain backing is white or unless the colour and design have been approved in writing by the body corporate. In giving such approval, the body corporate shall ensure so far as practicable that all window coverings used in all lots prevent a uniformed appearance when viewed from the common property or any other lot.*"

Comments:

- The objectionable part of this provision is that it regulates "tinting" (ie a treatment to a window)
- "Treat" means apply a colour tint or other substance to the window to reduce solar radiation passing through the window
- The proposal (or design option) may be effective if it minimises the potential adverse affects on the external appearance of the building and does not unreasonably prevent or interfere with a person's use or enjoyment of the building or another building. In that circumstance, the consent requirement can not be withheld (Section 246R(3))

Improvement to lot

"*The occupier of a lot must not, without the approval of the body corporate, paint, re-paint or carry out work to or alter the exterior of the lot or the common property.*"

Comments:

- The by-law could not be applied to bring about a result that would be caught by the Sustainability Provisions
- You would need to look carefully at the proposal (or design option) under consideration to see whether the body corporate could lawfully withhold the consent to the particular proposal (or design option)

Practical implications: review of relevant instruments, local government approvals and building code

Review of relevant instruments

The Sustainability Provisions apply despite what a clause or by-law in a relevant instrument may say about the particular activity or measure.

A body corporate therefore does not have to immediately change the CMS (or BMS) to ensure that it does not offend any prohibition or restriction or impose a consent requirement that is not enforceable.

However:

- under Section 180(8) of the *Body Corporate and Community Management Act 1997*, a by-law must not include a provision that has no force or effect under the *Building Act 1975*, chapter 8A, part 2; and
- under Section 54DA of the *Land Title Act,* a BMS is taken not to be registered to the extent it includes a prohibition, requirement or restriction that has no force or effect under the Sustainability Provisions and the registrar may refuse to register the BMS if it is satisfied that it offends the Sustainability Provisions.

This means that each time a new CMS or BMS is intended to be recorded or registered, the body corporate should ensure that a by-law or clause does not include a provision which offends the Sustainability Provisions.

Any relevant instruments applying to an existing scheme containing "prescribed buildings" (ie a residential scheme) should be reviewed, particularly where further sales are contemplated in a stage development or master planned community. Obviously, in the case of new schemes, proposed relevant instruments should be prepared or reviewed to take into account the application of the Sustainability Provisions.

The review process

The review process would involve the following:

- Review any existing or proposed CMS (or BMS) to identify any provision which may be regulated by the Sustainability Provisions.
- The review would extend to considering any consent requirement imposed under a clause or by-law.
- The review may not require a change to the clause or by-law. Rather, the outcome may be that the body corporate will need to put in place a procedure to be followed when considering an application for consent to a proposal (or design option) to ensure that any decision not to grant consent will not offend the Sustainability Provisions (or at least minimise that risk).
- A more extensive review exercise will be required where the CMS or BMS contains an architectural and landscaping code, as particular clauses will need to be individually assessed to ensure they do not offend the Sustainability Provisions.
- Expert advice from consultants may be required to draft or review a by-law or clause in a way that gives it the best chance of being valid or effective (ie to minimise the risk of a challenge on the basis that the provision offends the Sustainability Provisions).

The review process will be difficult where lots have been sold to buyers and further lots remain to be sold (ie in the case of a master planned community or staged development). There will be two "classes" of buyers - those that purchased before 1 January 2010, and are possibly not subject to the Sustainability Provisions (subject to exception mentioned above), and those that purchased or will purchase on or after 1 January 2010, who will be subject to the Sustainability Provisions.

Problems are likely to arise if some buyers are treated differently to others. There may be a perception by some buyers that they are being treated unfairly when compared to other buyers, or that the body corporate may be acting unreasonably and not in the best interests of all lot owners in adopting a uniform and consistent approach. Additionally, as has been suggested above, the adoption and recording of a new CMS (for each new stage) is likely to mean that the Sustainability Provisions will apply. That being the case, consideration should be given to adopting a consistent approach with all buyers to lessen the likelihood of problems or disputes.

Local governments

Local governments often impose development constraints or restrictions in conditions under a development approval which regulate housing activities or measures.

The definition of "relevant instrument" does not specifically include a reference to a development approval under the *Sustainable Planning Act 2009* (or any earlier legislation). On that basis, the Sustainability Provisions do not apply to a local government planning approval.

However, the reality for a local government is that while it may impose conditions regulating housing activities or measures, developers and bodies corporate cannot now include in relevant instruments (such as a CMS) provisions which offend the Sustainability Provisions.

In other words, a local government should not expect that a developer will be able to replicate development approval conditions in a relevant instrument (or enforce them against lot owners and occupiers) to the extent they offend the Sustainability Provisions.

This represents a practical difficulty for developers where local governments continue to impose conditions regulating housing activities or measures which the developer (or body corporate) cannot in the future enforce.

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Building Code of Australia

While a body corporate may not restrict the installation of certain sustainability features or measures, an owner or occupier must still comply with requirements under the Building Code of Australia.

For more information on the "ban the banners" provisions, please contact HopgoodGanim's Commercial Property team.

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