Building and Plumbing Newsflash 602

Positioning of residential solar infrastructure – 'ban the banners'

Purpose

To provide more details in relation to the positioning of residential solar infrastructure ('ban the banners') amendments included in the Building and Other Legislation Amendment Act 2022 (the BOLA Act).

Background

On 25 May 2022, the Building and Other Legislation Amendment Bill 2022 (the Bill) was passed by the Queensland Parliament and on 10 June 2022, the Bill was enacted.

The Bill represents the next step in the Queensland Building Plan and its 2021 update, as it continues to modernise Queensland's building and construction legislation and ensures the regulatory framework continues to meet consumer and industry expectations.

A key amendment of the Bill includes addressing the positioning of residential solar infrastructure, i.e., clarifying the existing 'ban the banners' provisions so that a developer covenant cannot limit where solar panels may be located on the roof of a home.

The original policy intent of the 'ban the banners' policy was to ensure relevant instruments (e.g. developer covenants and body corporate by-laws) could not prohibit or restrict (inhibit) the installation of solar hot water systems or solar panels (solar infrastructure), including where the infrastructure could be located, on the roof of a home or garage, solely on the basis of aesthetics (e.g. because the solar infrastructure would make the home or street less attractive).

The intent was to ensure homeowners could install solar infrastructure on their roof in a location where they could maximise solar energy generation and cost-saving benefits and make the largest contribution possible to the Queensland Government's emissions reduction targets.

Those targets currently include the 50 per cent renewable energy target for Queensland by 2030.

The provisions have been in force since 1 January 2010, but a recent court decision introduced doubt about the policy intent of the provisions.

The amendments are intended to clarify the original policy intent of the provisions.

The amendments affect class 1 buildings (detached houses and town houses) and class 2 buildings (apartments) differently.

As a result of the amendments, there will be no ability to inhibit the installation of solar infrastructure on a roof or other external surface that is not common property.

Any ability to inhibit the installation of solar infrastructure on a roof or other external surface that is common property will be very limited and cannot relate the aesthetic appeal of the building or street.

The amendments will provide relief for any homeowner who has been prevented from installing solar infrastructure, in their preferred location, since the original 'ban the banners' provisions commenced.

Under the new provisions, a homeowner cannot continue to be prevented from installing solar infrastructure in their preferred location on their roof, solely on that basis.

Homeowners seeking to install solar infrastructure on a roof that is not common property

- Under the new provisions, a homeowner seeking to install solar infrastructure on a roof or other external surface of their home or garage will not be affected by a relevant instrument (e.g., a covenant) that inhibits the installation of solar infrastructure, provided the surface is not common property.
- If a homeowner is required by a relevant instrument to obtain consent before undertaking building work, including the installation of solar infrastructure, the homeowner should comply with that requirement to avoid breaching their contractual obligations. However, the consent cannot be withheld.
- If a homeowner has previously requested consent from a developer before the new laws came into force and the consent was withheld, the homeowner should ask the developer to reconsider giving consent.
- Under the new provisions, the developer is not allowed to withhold the consent.
- Any court order or similar constraint that enforced the developer's original refusal to give consent will cease to have effect.
- If a homeowner asks a developer to give consent, or to reconsider giving consent, and the developer does not give consent within a reasonable time, the homeowner can choose to rely on the amended 'ban the banner' provisions and install the solar infrastructure without consent.
- Alternatively, the homeowner could seek a court declaration that it is lawful for them to install the infrastructure. For homes with a value of less than $750,000, the application for a declaration can be made to the District Court of Queensland. For a home with a value of more than $750,000, the application for a declaration can be made to the Supreme Court of Queensland.

Homeowners seeking to install solar infrastructure on a roof that is common property

- If the owner of a unit in an apartment building is seeking to install solar infrastructure on a roof or other external surface that is common property and a relevant instrument (e.g., a body corporate by-law) requires the homeowner to obtain consent from the body corporate before installing the infrastructure, the homeowner should ask for the consent.
- The ability of the body corporate to withhold consent for the installation will be very restricted.
- The body corporate will only be allowed to withhold consent:
    - to the extent necessary to preserve the building's structural integrity; or
    - if there is insufficient space on the roof or other external surface for the owner of each other unit in the building to also install solar infrastructure on the surface; or
    - if the consent relates to a solar hot water system, to the extent necessary to prevent noise from piping associated with the system causing unreasonable interference with a person's use or enjoyment of the building.
- If a unit owner asked the body corporate for consent before the new laws came into force and the consent was withheld solely because the infrastructure would make the building less attractive, the homeowner should ask the body corporate to reconsider giving consent.

- Any court order or similar constraint that enforced the body corporate's original refusal to give consent will cease to have effect.
- If a unit owner asks a body corporate to give consent, or reconsider giving consent, and the body corporate does not decide within a reasonable time, the unit holder can contact the Office of the Commissioner for Body Corporate and Community Management (OCBCCM).
- A unit holder may also contact OCBCCM if the unit owner asks a body corporate to give consent, or reconsider giving consent, and the body corporate decides to withhold the consent.
- The OCBCCM provides a dispute resolution service for matters relating to property that is included within the community title scheme. In broad terms, the OCBCCM has a four stage process for resolving disputes:
    - Stage 1 – Self-resolution – the unit holder should make reasonable attempts to resolve the dispute with the body corporate directly.
    - Stage2 – Conciliation – the unit holder can apply to the OCBCCM for the appointment of a conciliator, an independent third person employed by the Department of Justice and Attorney-General, who will try and help the unit holder and the body corporate resolve the dispute.
    - Stage 3 - Adjudication – if the dispute is not resolved through self-resolution or through conciliation, the unit holder can apply to the OCBCCM for an adjudication of the dispute.
    - Stage 4 – if either the unit holder or the body corporate is dissatisfied with the outcome of the adjudication, it can appeal the decision of the adjudicator to the Queensland Civil and Administrative Tribunal under section 289 of the *Body Corporate and Community Management Act 1997*. However, the appeal can only be on a question of law.

These legislative amendments commenced on assent (i.e., on 10 June 2022).

More information

Information on the Act and explanatory notes, including the Committee's report and Government's response, can be found on:

- the Queensland Government's legislation website
- the Queensland Parliament's website here.

Contact us

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