

Body corporate and covenant arrangements for dwellings with energy efficient features

'Ban the banners' provisions in the *Building Act 1975*

Developers and bodies corporate commonly put in place covenants or by-laws which restricted the installation of solar panels, prohibited certain light roof colours, prohibited the use of reflective energy efficient windows or imposed requirements for minimum floor area, number of bathrooms or building orientation.

Approval or consent was commonly required prior to installation of solar hot water or solar panels. Where the proposed installation was deemed by the developer to affect the aesthetics of the estate, the developer was effectively able to restrict where on the roof the installation was permitted.

These restrictions resulted in homeowners being discouraged from installing energy efficient infrastructure on their roofs, including solar hot water and solar panels.

To promote sustainable and energy efficient infrastructure, in 2010 the Queensland Government introduced amendments to the *Building Act 1975*, known as the 'ban the banners' provisions.

The intent of the 'ban the banners' provisions was to prohibit such restrictions.

Homeowners seeking to use energy efficient roof colours, windows and dwelling design

The 'ban the banners' provisions prevent covenants and body corporate by-laws from prohibiting the use of certain energy efficient roof colours, windows and dwelling design features.

Covenants and body corporate by-laws:

- cannot prohibit:
 - the use of a colour for the roof of a class 1a building or an enclosed class 10a building attached to a class 1a building, if using the colour would achieve a solar absorptance value for the upper surface of the roof of not more than 0.55
 - the use in a prescribed building of a window that is energy efficient
 - the treatment of a window in a prescribed building to ensure the window is energy efficient
- cannot require:
 - a minimum floor area for a class 1a building
 - a minimum frontage where the requirement has the effect of construction of a less energy efficient building
 - a minimum number of bathrooms or bedrooms for a class 1a building
 - a class 1a building or an enclosed class 10a building attached to a class 1a building to be orientated on a parcel of land in a particular way, if orientating the building in the particular way would have the effect of construction of a less energy efficient building
- cannot restrict:
 - the use of a colour for the roof of a class 1a building or an enclosed class 10a building attached to a class 1a building, if using the colour would achieve a solar absorptance value for the upper surface of the roof of not more than 0.55 if use of the colour:



- minimises potential adverse effects on the external appearance of the building; and
- does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building
- the use in a prescribed building of a window that is energy efficient or treating a window in a prescribed building to ensure the window is energy efficient, if the type of window to be used or the treatment:
 - minimises potential adverse effects on the external appearance of the building; and
 - does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building.

Impact of court decision on solar infrastructure

A 2019 decision of the Queensland Court of Appeal affected the efficacy of the original 'ban the banners' provisions for solar hot water system and solar panel installations (solar infrastructure). To restore the original policy intent the 'ban the banners' provisions were amended by the *Building and Other Legislation Amendment Act 2022* (BOLA Act).

The amendments, which came into effect on 10 June 2022, 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.

The amended 'ban the banners' provisions affect class 1 buildings with no common property (detached houses and town houses) and class 2 buildings with common property (apartments) differently.

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

Under the new provisions, homeowners 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, if the surface is not common property.

Homeowners required by a relevant instrument to obtain consent before undertaking building work, including the installation of solar infrastructure, should comply with that requirement to avoid breaching their contractual obligations.

However, the consent cannot be withheld.

Homeowners who previously requested consent from a developer before the new laws came into force and the consent was withheld 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.

Homeowners who ask a developer to give consent, or to reconsider giving consent, and the developer does not give consent within a reasonable time can choose to rely on the amended 'ban the banners' provisions and install the solar infrastructure without consent.

Alternatively, homeowners can 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

Owners of a unit in an apartment building 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 them to obtain consent from the body corporate before installing the infrastructure, 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
- 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
- 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.

Unit owners who asked their 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, 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 ceased to have effect on 10 June 2022, when the new provisions became the law.

What happens when a body corporate withholds or fails to give consent?

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 4-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.

Stage 2 – 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.

For more information, visit qld.gov.au and search 'disputes in a body corporate' or contact the Commissioner's Office on 1800 060 119.

How can a covenant or by-law be found?

The existence of a covenant or by-law can be identified in the property's contract terms or when undertaking the title search for a property. These checks are also typically conducted by a solicitor or conveyancing agent who acts on behalf of the purchaser when buying a property.

Do these laws override a local government planning scheme?

These laws only apply to installations of certain energy efficient features that would otherwise be prohibited or restricted by a covenant or by-law. They do not override local government planning schemes which may require minimum standards to meet the community's expectation for residential areas.

For example, a planning scheme may require minimum setbacks for a house to be built away from the street front and from the boundary of adjacent properties.

It is recommended that property owners check with the relevant local government about any local planning and building requirements.

For more information

For more information about body corporate and covenant arrangements for dwellings with energy efficient features, visit business.qld.gov.au and search 'covenants and body corporate by-laws for sustainability'.