QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Covey Property Pty Ltd v MICDM Pty Ltd* [2020] QCATA 47
PARTIES:	**COVEY PROPERTY PTY LTD** (applicant/appellant) **v** **MICDM PTY LTD** (first respondent) and **BODY CORPORATE FOR BROOKVIEW ESTATE CTS 44287** (second respondent)
APPLICATION NO/S:	APL142-19
MATTER TYPE:	Appeals
DELIVERED ON:	14 April 2020
HEARING DATE:	24 March 2020
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC
ORDERS:	**1. The appeal is dismissed.** **2. The decision of the Adjudicator on 22 May 2019 is confirmed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where an Adjudicator ordered that a body corporate resolution was void– where the appellant submitted the Adjudicator made an error of law – whether a plan of subdivision "affects" a community titles scheme – whether a change in the scheme affects the nature of the development of a scheme to be developed progressively – whether the appellant gave notice of the intended change in the scheme to the body corporate as required - where the Appeal Tribunal confirmed the decision of the Adjudicator on different grounds and dismissed the appeal REAL PROPERTY – STRATA AND RELATED TITLES – VARIATION TERMINATION AND RENEWAL – OTHER MATTERS - changes in

	community titles scheme to be developed progressively - whether a plan of subdivision "affects" a community titles scheme – whether a change in the scheme affects the nature of the development of a scheme to be developed progressively – whether the appellant gave notice as required of the intended change in the scheme to the body corporate
	Body Corporate and Community Management Act 1997 s 29, s 56, s 57, s 62
	Brookview Estate [2018] QBCCMCmr 408
	Jones v Assef [1976] 1 NSWLR 467
	Little v Piccin (1983) 52 LGRA 258
	Stevenson v Stephens [1990] 1 Qd R 575
	Ampol Ltd v Rockdale Municipal Council (1953) 19 LGR 64
APPEARANCES & REPRESENTATION:	
Appellant:	R E O'Sullison of Shand Taylor Lawyers
Respondent:	B W J Kidston, instructed by HopgoodGanim

REASONS FOR DECISION

[1] This is an appeal to the Appeal Tribunal from the decision of an Adjudicator under the *Body Corporate and Community Management Act* 1997 ("the Act") s 289. On 22 May 2019 the Adjudicator ordered that the resolution of the body corporate committee for the second respondent made 19 December 2018 consenting to the recording of a new Community Management Statement ("CMS") for that body corporate was at all times void. That order was made in relation to a dispute referred by the first respondent.

[2] The appeal is only on a question of law. The issue raised by the appellant is as to the correct interpretation of s 57 of the Act. The Adjudicator held that that section did not apply in the circumstances of this matter, which the appellant submits involved an incorrect construction of the section. The appellant conceded that, if the adjudicator's interpretation of s 57 was correct, so was the decision. So the appeal raises, and turns on, a question of law. The second respondent, the body corporate for the scheme, filed a one page submission supporting the appellant, but otherwise did not take part in the appeal.

Background

[3] The scheme for which the second respondent is the body corporate was created by the original owner of the parcel of land, Glen Eden Land Pty Ltd, on 14 December 2012 when the original CMS was registered, providing for 47 residential lots and a development lot,[1] with a further proposed 193 lots. There was some common

[1] This is a term applied to that part of a scheme intended to be developed in the future.

property, and certain facilities for occupiers were to be constructed on part of the development lot, which was presumably to become common property. Further residential lots were created from the developmental lot, 7 in January 2013 and 46 in April 2013, when the number of proposed lots was adjusted to increase the total residential lots on completion to 250.

[4] In August 2013 there was a further subdivision of the development lot, to create new roads, and to carve out a substantial parcel of land which was removed from the scheme and sold to be developed separately by a different developer. The balance of the development lot became lot 4000. It appears that at about this stage some recreation facilities were constructed on part of lot 4000, and a licence to use them was granted to the members of the body corporate.

[5] In September 2015 Glen Eden Land Pty Ltd went into external administration, and in March 2017 the remaining lots owned by it, including lot 4000, were put on the market. Lot 4000 was purchased by the appellant. It wishes to subdivide lot 4000 to create two residential lots from lot 4000, and for the balance of the land to become lot 4001, and to take all of lot 4000 out of the scheme. It has obtained planning approval from the local authority for this. Initially it sought to have a new CMS approved by the body corporate by resolution in general meeting, but the resolution, although carried by a majority was not unopposed, and the first respondent referred a dispute to the Commissioner, which led to an Adjudicator holding that the resolution was void, because a resolution without dissent was required by the Act s 62.[2] At that stage, the appellant did not seek to rely on s 57 of the Act.

Legislation

[6] The Act provides in s 56 as follows:

> (1) A request to record a new community management statement for a community titles scheme must be lodged when a new plan of subdivision affecting the scheme (including affecting a lot in, or the common property for, the scheme) is lodged.
>
> (2) A request to record a new community management statement for a community titles scheme may be lodged, and the new statement may be recorded for the scheme, even though a plan of subdivision is not lodged, if all plans of subdivision relating to the scheme, and the new statement, will still be consistent after the new statement is recorded.

[7] The Adjudicator said that the plan of subdivision lodged by the appellant, plan 303540, was not a "new plan of subdivision affecting the scheme" because what it did was not subdivide land within the scheme, but excised the lot from the scheme. It is difficult to see however how that does not just affect the scheme in a different way. The function of a plan of subdivision is to subdivide land, or at least to change the way land is subdivided, and this land is part of the scheme. Until the new CMS has been lodged, this land remains part of the scheme, even if it is no longer correctly described as lot 4000. As land part of the scheme, it is affected if it is subdivided.

[8] Even if one looks at the effect of the combination of the plan of subdivision and the new CMS, it is difficult to see why the scheme has not been affected. Taking out of the scheme a lot which was part of the scheme seems to me to affect the scheme,

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2 *Brookview Estate* [2018] QBCCMCmr 408.

particularly where it is enough to have affected a lot (lot 4000) which is part of the scheme. It would be inappropriate for the existing CMS to remain unchanged if lot 4000 is cancelled, as the existing CMS provides entitlements for lot 4000, and speaks of what is proposed for lot 4000 in the future.

[9] The explanation offered by the adjudicator, that the plan "affects a development that is to occur alongside the scheme", is correct only if the plan is effective to take this land out of the scheme, which is the very thing that makes a new CMS necessary. I was referred by the appellant to decisions which have generally given a wide meaning to the word "affect" at least in a conveyancing context.[3] Land has been said to be "affected" by a planning scheme just by being within the area to which the planning scheme applies.[4] The first respondent did not particularly seek to defend this part of the reasoning of the adjudicator, and in my opinion, on the true construction of s 56, this survey plan 303540 was one "affecting the scheme". The finding of the Adjudicator to the contrary involved an error of law.

[10] The Act provides in s 57 as follows:

> (1) This section applies—
>
> (a) only to a community titles scheme intended to be developed progressively; and
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> *Examples for paragraph (a)—*
>
> 1 the subdivision of scheme land to create further lots for the scheme or to establish a subsidiary scheme
>
> 2 the excision of a lot from, or the addition of a lot to, scheme land
>
> (b) if the circumstances stated in subsection (2) or (3) also apply to the scheme.
>
> (2) For subsection (1)(b), the circumstances are—
>
> (a) a new plan of subdivision proposed to be lodged for the scheme—
>
> (i) is consistent with all statements about proposed future subdivision contained in the existing community management statement for the scheme; or
>
> (ii) is inconsistent with the existing community management statement only to the extent the development of a stage is to be done out of order; and
>
> (b) the difference between the existing statement and a new community management statement required under section 56(1) is limited to ensuring that, after registration of the new plan of subdivision and recording of the new statement, the scheme's community management statement will—
>
> (i) be consistent with all plans of subdivision for the scheme that are registered under the Land Title Act; and
>
> (ii) contain the statements about proposed future subdivision that are contained in the existing statement, changed only to the extent

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3 *Jones v Assef* [1976] 1 NSWLR 467 at 470, 472 and 477; *Little v Piccin* (1983) 52 LGRA 258 at 274; *Stevenson v Stephens* [1990] 1 Qd R 575.

4 *Ampol Ltd v Rockdale Municipal Council* (1953) 19 LGR 64 at 67.

necessary to take account of the registration of the new plan of subdivision.

(3) Alternatively, for subsection (1)(b), the circumstances are that a new plan of subdivision proposed to be lodged for the development is inconsistent with the existing community management statement for the scheme because the plan changes the scheme in a way that affects the nature of the development or 1 or more stages of the development.

Examples of changes affecting the nature of a development for subsection (3)—

1 A development for a scheme intended to be a resort is changed to a development comprising only standard format lots for residential purposes.

2 A stage of a development comprising standard format lots for residential purposes and a marina is changed to a stage comprising only standard format lots for residential purposes.

(4) For subsection (2)(a)(ii), the development of a stage is done out of order if it is not consistent with the order of the development of the stages stated in a development approval or the existing community management statement for the scheme.

(5) The developer must—

(a) prepare the new community management statement required under section 56(1) for the scheme; and

(b) give the new statement to the body corporate.

(6) The body corporate must, within 30 days after receiving the new statement, endorse its consent on the statement.

Maximum penalty—50 penalty units.

(7) However, if this section applies because of the circumstances stated in subsection (3), the body corporate is not required to endorse its consent on the statement unless—

(a) the developer has—

(i) given the body corporate a notice as required under section 29(2)(a); and

(ii) obtained development approval for the changed scheme; and

(b) the new community management statement is consistent with each development approval for the changed scheme; and

(c) the local government or MEDQ has, under section 60, endorsed a community management statement notation on the new community management statement.

(8) The developer must, within 30 days after receiving the endorsed statement, lodge a request to record the statement.

Maximum penalty for subsection (8)—300 penalty units.

(9) Within 14 days after the new statement is recorded, the developer must give to the body corporate—

(a) a copy of the new statement; and

(b) evidence of its recording.

Maximum penalty for subsection (9)—300 penalty units.

(10) The developer is responsible for the costs of preparing and recording the new community management statement.

[11] It was common ground that subsection 1(a) was satisfied. The appellant did not seek to rely on subsection (2), but relied on subsection (3). This applies when the new plan of subdivision is inconsistent with the existing CMS, but only where the inconsistency arises for a particular reason: a change which affects the nature of the development or one or more stages of the development. The first respondent submitted, and I accept, that the words "the nature of" govern both "the development" and "one or more stages of the development". It is also clear, from the way the term is used in the section, that the term "the development" is a reference to the development of the scheme as a whole.

[12] Essentially, what the Adjudicator decided was that excising the remaining development lot from the scheme was not a change that affected the nature of the development, but one which meant there would be no further development of the scheme. The subsection applied only where the progressive development of the scheme would continue, albeit with some change in the nature of it or a stage of it. A change in the size of the development (by excluding some land from it) without changing its nature does not come within the subsection. That was the interpretation contended for by the first respondent.

[13] The first respondent submitted that this interpretation was consistent with, and indeed necessary to promote, the consumer protection objective of the Act. Section 4(g) of the Act provides that one of the secondary objects of the Act is "to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes." An interpretation that promotes the objectives of the Act is to be preferred. In response, the appellant relied on the presence of the word "flexible" in s 2 of the Act, which states the primary object of the Act.

[14] The first respondent submitted that the consumer protection objective required that the buyers of lots in a scheme who had relied on statements in the then CMS about the future development of the scheme should be entitled to object to changes to the scheme which they saw as adverse to their interests, whereas if s 57 applied they were powerless to object. Unless subsection (3) was given a restricted meaning they would be powerless to resist any change sought by a developer and approved by the local authority, which could consider only planning matters. They would be left with only claims for damages against the developer, which may be of no value if, as here, the relevant developer was insolvent.

[15] The first respondent pointed out that, in the case of this development, certain recreation facilities which had been referred to prominently in the sales literature for lots or proposed lots in the scheme were constructed on land which was part of lot 4000 (now part of lot 4001). It had been referred to as part of the future common property of the scheme, whereas if this land was excised from the scheme that would never be realised. The appellant pointed out that the land in question had never been part of the common property of the scheme, but had always been part of the development lot, and excising the land from the scheme did not deprive the lot owners of any rights in respect of the land that they already had. That is so, but it

would deprive them of an expectation, reasonably held, that in due course they would receive secure rights in respect of those facilities.

[16] The difficulty with this submission is that there is nothing in s 57 to suggest that the operation of subsection (3) in some way turns on such a factor. It is useful to consider the factual implications of particular interpretations of a statutory provision, to see whether they promote the objective of the Act, or are consistent with the general scheme of the Act, or could lead to absurd or unworkable, or (possibly) uncommercial, outcomes, but it is necessary to consider possible outcomes generally, not to focus on the circumstances of this case in interpreting the section. The correct interpretation must be determined first, with its effect on this case then following from that interpretation.

Parliamentary material

[17] Looking at s 57 overall, it is notable that subsection (2) is fairly detailed and specific in its requirements which provide for changes consistent with the existing proposed scheme or inconsistent only in limited ways, whereas subsection (3) is much less specific in its terms. One explanation for this lies in the legislative history of the section. There was no equivalent to s 57 in the Act as passed. It was inserted by the *Body Corporate and Community Management and Other Legislation Amendment Act* 2003 s 18; the same Act inserted s 29.[5] The explanatory note for the bill for the Act said that it was to address issues identified in a review of the Act. When explaining how the policy objectives were to be achieved by the bill, it said inter alia:

> "When a development is to be undertaken in stages, the proposal for the entire development is to be submitted for local government consent. After developing the first stage, if the developer wishes to make changes to subsequent stages, some bodies corporate have sought to prevent the changes, even if preventing such changes would affect the viability of the overall scheme. If a developer only wishes to change the order of the stages, but otherwise remain within the original development consent, the body corporate must consent to the revised community management statement.
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> If the developer proposes to make more substantial changes and a new development application is required, then the body corporate may make submissions to the local government as part of the normal objection process, and, if local government consent is given to the new proposal, the body corporate must consent to the new community management statement."

[18] The note also said, about the insertion of s 29:

> "The new section imposes an obligation on the developer to give notice to the body corporate if any fresh approval is sought. The purpose of the notice requirement is threefold. Firstly it is to allow the body corporate sufficient time to consider its position as an owner who may object to an application under the planning process contained in the *Integrated Planning Act* 1997. Secondly, the notice must also be given to the buyers of proposed lots, as they need to be informed as to whether any change may adversely affect them and therefore their ability to complete the contract to purchase. Thirdly, it puts developers on notice to be honest and open in development proposals and also to be aware of their obligations to the body corporate and future owners of the scheme."

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5 Act 6 of 2003. Section 57 was then numbered 51A, s 29 was then s 30A.

[19] When explaining clause 18 of the bill, which inserted what is now s 57, it said:

> "It is not unheard of for a body corporate to use the community management statement consent provisions as a weapon against an unpopular developer. Similarly, it is common for a developer to be deliberately vague in the disclosures in the community management statement as to the information about the stages of the scheme, to minimise the body corporate's ability to scrutinise the bona fides of the developer's real intentions about the development or to allow the developer to progress the development according to the dictates of the market. In the first instance it is commonly argued that this is done because of the problems that may be encountered with obtaining the body corporate consent. In the second instance vagueness results in the same reaction from the body corporate. The consent provisions are obviously not for any these purposes."

[20] After summarising the proposed operation of subsection (2), the note continued:

> "The compliance requirements in s 51A(7), however, places strict requirements on the developer and requires a number of things to occur before consent must be given by the body corporate.
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> Firstly, the developer must give the body corporate advance notice of any application to the local government for development approval. This is to allow the body corporate the time to prepare and take appropriate action through the planning objection and appeal process under the *Integrated Planning Act* 1997 if it so wishes.
>
> Secondly, development approval must be given for the changes to the scheme.
>
> Thirdly, the new community management statement submitted for approval to the body corporate must be in accordance with the development approval for the changed scheme.
>
> Fourthly, the community management statement must have the local government notation on it.
>
> The consequence is that unless all these requirements are met, the body corporate cannot be compelled to consent to the new community management statement."

[21] Apart from this, there is no particular comment on the intended scope of the proposed subsection (3). Nevertheless, the Explanatory note provides useful background to the mischief intended to be overcome by the provision, and the legislative intention as to the operation of the section.[6] To summarise it bluntly, it was unsatisfactory for bodies corporate to be able to hold up changes to schemes for which developers had obtained planning approval. It was intended that any objections by the body corporate could be heard through the planning process, but once planning approval was given, that was it.

[22] There have subsequently been further amendments to the sections,[7] and they have been renumbered, but there have been no changes of significance to their interpretation. To the extent that these sections are ambiguous, this material provides guidance as to the interpretation best suited to achieve the purpose of the

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6 Indeed, it is in this respect the most helpful Explanatory Note that I can ever recall seeing! Usually they are utterly anodyne.

7 Section 57 was amended by the *Urban Land Development Authority Act* 2007 s 146C and by the E*conomic Development Act* 2012 s 221.

legislation.[8] I have not been referred to any authorities on the operation of s 57, and am not aware of any.

[23] It is apparent that the significant difference between subsections (2) and (3) is the requirement in subsection (7) that, in the case of a change within subsection (3), the developer must have obtained development approval for the changed scheme. That would explain the less precise limitation in subsection (3) on the changes which can come within its scope. So far as the explanatory note discloses, it was intended to cover any change for which the developer could obtain planning approval. That does not in itself justify giving subsection (3) a wide meaning, but it is inconsistent with the proposition that the legislative purpose requires a narrow interpretation of the subsection.

The examples

[24] Another relevant factor in the interpretation of the section is the examples given in subsections (1) and (3).[9] The former are somewhat curious, because on their face they are not examples "for paragraph (a)", not being examples of schemes intended to be developed progressively.[10] Rather they are examples of changes to schemes, and presumably indicate the sort of changes the legislature had in mind as accommodated by the section. If so, the fact that one example is the excision of a lot from scheme land is significant, because that is precisely the change sought to be made here.

[25] The examples to subsection (3) also throw some light on the contemplated scope of the subsection. The first involves the change of a proposed resort to a standard residential development.[11] That strikes me as a fairly significant change. One would expect that a resort would involve recreational facilities and (usually) catering facilities so that it would operate like a hotel. A purchaser of a lot in a scheme which was to be developed as a resort might well feel that a scheme which was to be instead a standard residential development was something quite different. Presumably this change would involve dropping the recreational and any catering facilities, and it would be natural enough to describe such a change as one in the nature of the development.

[26] The same applies to a change from residential lots and a marina to just residential lots, the second example. There is nothing about this example to indicate that it is a change in the nature of a development only if the marina has just been moved into a different stage. If the intention was to limit the example to the marina being moved to a different stage, it would have been easy enough to say so in the example. If this example is read in conjunction with the second example to subsection (1)(a), the subsection would apply if the change involved excising the land proposed for the marina from the scheme. Again, it is not difficult to describe that as a change in the nature of the development.

[27] As well, the relevant limitation in the subsection, "changes the scheme in a way that affects the nature of" the development or a stage or stages of it, is expressed in a broad way. It is not just a change in the nature of the scheme, but a change which

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8 *Acts Interpretation Act* 1954 s 14A(1), s 14B(1), (3)(e).

9 Ibid, s 14D.

10 I assume "progressively" means "in stages over time", rather than anything else.

11 As it happens, this scheme was, at least at one time, marketed as a "resort community", relying on the provision of the recreational facilities as a "private lifestyle club only for residents": Stage 3 Marketing Material annexed to the first respondent's submissions, pages 69, 71.

affects the nature of the scheme. As discussed earlier, the word "affects" can have quite a broad meaning. It could be said that a change in a standard residential scheme from 300 lots to 200 lots does not change the nature of the scheme, but it is more difficult to say that such a change does not "affect" the nature of the scheme. The size of a scheme can be readily enough identified as an aspect of its nature.

[28] There is another feature of the drafting of the section which I consider may tell against giving subsection (3) a narrow interpretation, so as to exclude a change which reduces the proposed size of the scheme. Although it provides for two categories of changes to schemes to be developed progressively, it does not expressly contemplate a third category of changes, those that do not fall within subsections (2) or (3). As a matter of construction, the section just would not apply to them, but there was nothing in the Explanatory Note to suggest that the legislature contemplated a category of changes to schemes being developed progressively where the identified mischief was not to be tackled. The analysis in the note is consistent with all such changes being covered by either subsection (2) or subsection (3), which is consistent with the fact that the limitation in subsection (3) is cast in potentially quite broad terms.[12]

First respondent's submissions

[29] It was submitted for the first respondent that the change proposed by the appellant went beyond a change in the nature of the development, because it reduced the size of the development and removed the recreational facilities from it. As I have pointed out, the test is not a change in the nature, but a change which affects the nature of the development. Further, the test must be applied by comparing the proposed entire scheme as contemplated by the current CMS with the scheme as modified by this change, not by comparing what has already been developed with the result of the proposed change. That follows from the fact that the subsection is expressed to operate by reference to a change in the *scheme*, that is, the completed development.

[30] The first respondent adopted the proposition that the subsection did not contemplate the proposed development being "aborted", but does not identify any basis in the text of the statute or the extraneous material for such a limitation.[13] That analysis is also based on a false comparison, between what is left to be developed of the scheme before and after the change.

[31] It was submitted that such an interpretation did not give effect to the consumer protection objective is s 4(g) of the Act. It may be that s 57 is not strong on consumer protection, but paragraph (g) refers to "an appropriate level of consumer protection", and the Explanatory Note indicates clearly enough that the legislative intent was that the interests of the existing lot owners were to be protected by the planning process, rather than by the restrictive operation of s 62. That amounts to a legislative judgment as to what is an appropriate level of consumer protection.

[32] The first respondent also relied on its submissions before the adjudicator, but they were directed to whether it would be fair and just for this change to be implemented in the circumstances of this scheme. As I have said, the correct interpretation of s 57

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12 I acknowledge however that it could have been done more clearly, by providing simply that subsection (3) applied to any change not within subsection (2). I do not need to decide whether there is or is not a third category of cases, where presumably a resolution without dissent *is* required, only whether, on the correct construction of subsection (3), the present case falls within it.

13 Nor indeed did the adjudicator.

must be decided only by reference to the text of the statute, and to any extraneous material to the extent permitted under the *Acts Interpretation Act* 1954. They were relevant for the adjudicator to the extent that any findings of fact were necessary, but they are not relevant to what I have to decide on an appeal on a question of law.

Conclusion – s 57(3)

[33] In my opinion s 57(3) is not to be given a narrow interpretation, and in particular is not to be given an interpretation which would exclude from its operation a change which had the effect of excising the future development lot from the scheme. Such an interpretation is consistent with the natural reading of the section, the content of the examples given in the section and the content of the Explanatory Note. The Adjudicator interpreted the subsection as subject to a limitation not expressed in or arising from the wording of the subsection, and in doing so erred in law.

[34] The first respondent submitted that there were nevertheless a number of other issues which acted as obstacles to the success of the appellant. These were also generally question of law, as involving the correct interpretation of the relevant provisions of the Act, and it is appropriate that I deal with them also.

Was the appellant the "developer" for the purposes of s 57

[35] The term "developer" is defined in Schedule 6 to the Act as "the original owner or other person responsible for developing the scheme." The term "original owner" it also defined, in the Act s 13, in terms which confine it to Glen Eden Land Pty Ltd. For the appellant to be a "developer" therefore it must be a person responsible for developing the scheme. Reference was made to certain provisions in the CMS, but it is not clear how the meaning of the term in the Act could be expanded (or contracted) in this way from the meaning given by the statutory definition.

[36] The first respondent submitted that the appellant was not a developer for the purpose of s 57 because what it was proposing to do did not involve "development of the scheme", since its intention in making this amendment to the CMS was to prevent any further development of the scheme. The interpretation of the term can be assisted by the way it is used in the Act. Under s 57(5) it is the "developer" that must prepare the new CMS and give it to the body corporate, and under s 57(7) it is the "developer" that must have given the notice required under s 29(2)(a) and obtained development approval for the changed scheme. It is the "developer" that must lodge the request to record the new CMS, and when recorded give a copy to the body corporate with evidence of recording, and pay the costs of the new CMS.

[37] The term is also used in s 29 of the Act. That section, inserted at the same time as s 57, provides:

> (1) This section applies if—
>
> (a) a community titles scheme is intended to be developed progressively; and
>
> (b) the developer intends to change the scheme in a way that, if carried out—
>
> (i) would affect the nature of the development or 1 or more stages of the development; and
>
> (ii) would not be consistent with the current development approval for the scheme.

> (2) The developer must give written notice of the change as required under this section to—
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> (a) the body corporate; and
>
> (b) each person who has entered into a contract with the developer to buy a proposed lot in the scheme.
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> Maximum penalty for subsection (2)—300 penalty units.
>
> (3) The notice must be given at least 30 days before the developer applies for development approval for the changed scheme.

[38] This section speaks of a "developer" who has the intention to change the scheme, and is to apply for development approval for the changed scheme. The section also contemplates that the developer may have entered into contracts to sell proposed lots in the scheme. The reference to such contracts suggests that the sections would apply without difficulty if it was the existing developer who formed the intention to change the scheme in this way. But the term is not confined to the original owner, and therefore logically extends to a successor in title of the original owner. Such a meaning fits the provisions quoted above.

[39] The expression "person responsible for developing the scheme" can be understood in two ways: as the person responsible for developing the current scheme, or as the person responsible for developing the scheme as changed. As the owner of the undeveloped land in the scheme, the appellant and only the appellant can develop the scheme as it stands if it is to be developed in that way. As owner it can take all the steps required of the developer by the Act. The appellant does not intend to do so of course, and s 57 provides a mechanism for changing the scheme, but the logical starting point is the person responsible for developing the scheme if it is not changed, and that is the appellant. On this interpretation, which I consider is the correct one, the appellant is the developer for the purposes of this change.[14]

[40] It may be however that the same would follow if the expression in the definition was to be applied by reference to the scheme as it was to be if changed in the way the developer intended. In effect, this would interpret it as meaning the person promoting the change in the scheme. A difficulty in that interpretation is that it could be seen as circular, but otherwise the appellant would still be the developer, unless the wording of the expression were seen as excluding a change to the scheme such that no further development of the scheme were to be carried out. If the effect of the change were that there was to be no further development of the scheme, it could be argued that there could be no responsibility for developing the scheme in its changed form.

[41] Confining the operation of the provision in this way would exclude the appellant, at least on the current proposal, although if it were recast to leave one of the new residential lots in the scheme the appellant would still be covered, since it would remain responsible for developing the last residential lot in the scheme. Such an outcome would not be absurd, but it would be decidedly odd. It would be difficult to reconcile such a distinction with the general scheme of s 57, or with the exposition in the Explanatory Note. Since I consider the other interpretation of the expression in the definition is the correct one, it is not necessary to resolve this. On

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[14] On this interpretation the owner of the undeveloped land is a developer. It is not necessary for me to consider whether any other entity could also be a developer.

the interpretation of the definition I adopt, the appellant is the developer for the purposes of s 57.

Did the appellant comply with s 57(5), (6), (7) and (8)

[42] The real point of the first respondent here is that the requirements of s 57(7) were not met, because the appellant did not give the body corporate a notice as required by s 29(2)(a). There was a notice given by the appellant to the body corporate, but the first respondent submitted that it did not comply with the requirements of s 29.

[43] The notice was in a letter from the appellant's solicitors to the body corporate dated 13 September 2018,[15] the material part of which was in the following terms:

> Notice is hereby given pursuant to s 29(2)(a) of [the Act] that our client intends to apply to Gladstone Regional Council for development approval to change the Scheme in a way that, if carried out, would affect the nature of the development intended on our client's land.
>
> Our client will apply for development approval for the changed scheme 30 days after the date of this correspondence. Following that approval being granted, our client intends to present the body corporate with a new CMS for the Scheme consistent with the new development approval which must be endorsed within 30 days pursuant to s 57(6) of [the Act].

[44] The appellant submitted that this letter complied with the requirement under s 29(2)(a); the first respondent submitted that it did not. The different positions were based on the interpretation of s 29. The appellant submitted that its obligation was to give notice that it intended to apply to the local authority for approval to change the scheme in a way which fell within s 29(1), and that was what it did. The first respondent submitted that it was not enough to give notice of an intention to apply for "a change" in the scheme, the notice required was notice of the change the developer intended to make to the scheme, for which development approval was to be sought. In response the appellant submitted that the section did not in terms require notice of the details or particulars of the proposed change, and that the development approval process was itself a transparent process through which the body corporate (or lot owners) could obtain details of the change. Neither party referred me to any authorities on s 29, and I am not aware of any.

[45] In my opinion the correct construction of s 29 is that what is required is notice of the particular change that the developer intends to make, rather than just notice of intention to make some change. It is true that the section does not expressly require details or particulars of the change sought, but it does require notice of "the change", that is, the change the developer intends to the scheme, rather than just notice of the fact of the intention to apply after 30 days for development approval for the changed scheme. Read literally, it is the change itself of which notice must be given.

[46] Such an interpretation is consistent with the Explanatory Note, as quoted earlier. The scheme of the relevant amendments proposed in that note was that any objections to the proposed change by the body corporate or its members were to be dealt with under the planning process, that is, on the local authority's consideration of the development approval. The Note attributed three purposes to s 29 in a passage quoted earlier, none of which would be achieved, or achieved properly, without knowledge of the detail of the proposed change.

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[15] Appeal book p 670.

[47] It is also an interpretation with gives effect to the consumer protection object referred to earlier. It is clear enough that the legislative intention was that this was to be provided through the local government approval process, but this was a step required to give proper effect to protection in that way. All the considerations point in the same way, and support an interpretation that s 29 requires notice of the content of the proposed change.

[48] Since the notice in this case provided no detail, it is unnecessary for me to decide how much detail is required by the section, but I expect it would be sufficient detail to enable the notice to fulfil the purposes of the notice as part of the scheme of this part of the Act, as explained in the Explanatory Note. The letter relied on by the appellant did not comply with that requirement of s 29, and it follows that the appellant did not satisfy s 57(7)(a)(i). So s 57(6) did not apply, and the second respondent was not required to endorse its consent on the new CMS submitted by the appellant.

[49] In those circumstances, the appellant was not entitled to rely on s 57. It was not submitted that the purported consent could be effective otherwise; it did not comply with s 62 of the Act. It follows that the actual decision of the adjudicator was correct, although I have arrived at that conclusion by a very different path. It is not apparent to me that there is any way for the appellant to remedy the failure to give the required notice under s 29, apart from starting again with a fresh notice. But if it does comply with the requirements of s 57(7), s 57(6) will apply.

[50] In these circumstances it is not strictly necessary for me to consider two further issues raised in submissions on behalf of the first respondent. I will however say something about them briefly, in case there is another round of this dispute. It was submitted that even if s 57 applied, the action of the Committee of the body corporate was invalid because under s 62 this was a matter for the body corporate in general meeting. That cannot be the correct interpretation of the Act, for two reasons. First, there is a time limit of 30 days within which the consent must be endorsed: s 57(6). Second, it would be absurd and pointless to summon a general meeting of the body corporate in circumstances where it was required by the Act to come to a particular conclusion. Given that, if s 57 were satisfied, the body corporate was obliged to endorse its consent, it also cannot be argued that the decision to comply with the statute was unreasonable.

[51] I also do not need to consider the submission of the first respondent that, because the appellant did not appeal against the earlier decision of the adjudicator (referred to earlier) that the resolution of a general meeting of the body corporate approving the new CMS was invalid as it was not a resolution passed without dissent, the appellant was estopped from submitting in this matter that anything other than a resolution without dissent would be effective to approve this proposed new CMS. I do not think that an issue estoppel can arise from an administrative decision such as the decision of the Adjudicator, but it is clear that s 57 was not in issue in that adjudication, so the real issue is whether an *Anshun* estoppel arises.[16] For what it is worth, in my opinion in this matter it does not. There is nothing to indicate that the appellant was in a position to rely on s 57 at that time, and if not, the issue could not have been raised.

[52] The order of the Appeal Tribunal is that the appeal is dismissed, and the decision of the Adjudicator confirmed.

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[16] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.