Body Corporate & Community Management & Other Legislation Amendment Bill 2012
Submission 043

Alan Gill on behalf of
Catherine Gill (owner)

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

SUBMISSION

Body Corporate and Community Management and Other Legislation Amendment Bill 2012 ("BCCMOLA")

I am acting on behalf of my mother, a semi retired 66 year old women, who will be unfairly and adversely impacted if the BCCMOLA Bill is passed.

I refer to this Bill and provide this submission opposing certain elements of it or request the Legal Affairs and Community Safety Committee suggest the Bill be "scrapped" or amendments be made to the Bill to address the unfairness and injustice it will revert the body corporate situation back to.

The BCCMOLA Bill focuses narrowly at the 2011 amendments made to Body Corporate and Community Management Act 1997 (BCCMA), that allow for body corporate entitlements to revert back to their original position from those set in recent years by order of an independent court, tribunal or special adjudicator ("2011 Reversion Process"). However, as I believe it is imperative anyone considering this Bill should be fully aware of the background and history of body corporate entitlements, I have provided a brief practical summary of this in Appendix 1.

1. Executive Summary

I submit and request the Legal Affairs and Community Safety Committee ("LACSC") suggest the part of the Bill that removes and reverses the 2011 reversion process be "scrapped" and/or amendments be included or made to it.

I suggest this on the basis that the reasoning for the Bill (in the Explanatory Notes) and Mr Beijie speech regarding it have too narrow a focus and are inequitable, inconsistent and hypocritical. In additional, the Bill will create unfairness and injustice by effectively reverting the body corporate situation back to the previous unfair and unjust situation that the 2011 reversion process was introduced to address.

I implore the LACSC to, at the very least, suggest changes be made to the Bill to address the unfairness it will create, as lives will be detrimentally affected.

2. Details of My Opposition to the Bill

My first area of opposition/concern surrounds the legislative sections that the BCCMOLA Bill will introduce and remove, which will result in the following (as noted in the Explanatory Notes):

- *removal of the requirement for bodies corporate to undertake a process prescribed in Chapter 8, Part 9, Division 4 of the Act (the 2011 reversion process) to adjust contribution schedule lot entitlements to reflect the original entitlements prior to any, and all, relevant orders of a court, tribunal or specialist adjudicator if a lot owner submits a motion requesting such a change; and*
- *scheduling of lot entitlements that were adjusted pursuant to the 2011 reversion process to be changed to reflect the lot entitlements that applied.*

My second area of opposition/concern is that the Bill, after enacting the above, does not include any new or alternative reasonable means for addressing the unfairness and injustice the body corporate entitlements situation will revert back to.

In simple terms, the Bill "scraps" the 2011 reversion process which was aimed at addressing unfairness and injustice that had inadvertently arisen. In "scrapping" this and returning the body entitlements to the previous position, the Bill does not include any new provisions aimed at resolving the unfairness and injustice the 2011 reversion process targeted.

3. Reasoning Behind My Opposition

Essentially my reasons for opposing certain elements of the Bill and/or suggesting amendments are:

- that the reason for bill is flawed; and
- the outcome of the Bill will be unfair and unjust.

3.1 The reason for the Bill is flawed

From the Explanatory Notes to the BCCMOLA Bill, the reason for the Bill is that *"the 2011 reversion process has come under significant criticism by some lot owners and peak legal and stakeholder bodies for allowing a single lot owner the ability to effectively over-turn a lawful order or an independent court, tribunal or special adjudicator"*.

I also refer to Mr Biejie's speech when introducing the Bill, where he suggests that 2011 reversion process is a *"denial of natural justice and abhorrent in the extreme"* as they allow for one owner to overturn an adjustment order.

I believe both the reason and Mr Biejie's speech are flawed as their focus is too narrow. The Bill and speech focus only on a small part of the body corporate entitlement history, specifically the 2011 reversion process. They do not consider the earlier history (as detailed in Appendix 1 of this submission) and so, do not consider the wider "picture". Specifically, they do not consider that any *"lawful order of an independent court, tribunal or special adjudicator"* that changed the body corporate entitlements from their original position in the first place derived from the unintended

interpretation and application of BCCMA (commonly referred to as a loophole), following the *Fischer v Body Corp for Centrepoint* case (refer to 3.2 for more detail). They also don't appear to consider the change from the original entitlements to the entitlements set by the Commercial and Consumer Tribunal ("CCT") or other adjudicator, was also a result of actions of one owner, which itself was unfair and unjust.

I also believe the reason in the Explanatory Notes and Mr Beijie's speech are further flawed as they appear inequitable, inconsistent and hypocritical.

In the first place, the order to change the entitlements by the CCT (or other adjudicator) resulted from an application by one owner. As the CCT (or other adjudicator) was bound by the precedent established in the *Fischer v Body Corp for Centrepoint* case, there was no (or very limited) discretion available to the CCT. Other owners had no practical means of appeal or opposition as there was no legal basis for an argument to challenge it. Essentially, a single owner had the ability to change the body corporate entitlements from their original position and usually did (provided the application was prepared appropriately).

The reasoning for the Bill and Mr Beijie do not appear to consider this, only the criticism surrounding one lot owner having the ability to overturn an order and change the entitlements back to their original position. Therefore, the reasoning and Mr Biejie's speech seem inequitable and inconsistent. By overlooking this, they appear hypocritical, as they indirectly endorse the ability of one owner to change the entitlement in the first place, but not for one owner to change them back.

Given the above, it appears Mr Beijie's speech is the one that is abhorrent. Being a former lawyer, I expected a more considered outcome and analysis, such that his reasoning would have considered all the facts. In this case, with none of the above even being mentioned, it wouldn't appear so.

In his speech, Mr Beijie compliments an article from Trent Dalton. With respect to this, I have attached an article from Peter Cameron of the Gold Coast Bulletin on January 2010 (Appendix 3), another well respected and well informed journalist – whose article I compliment. I request the LACSA read this article as it provided an excellent article on body corporate fairness and outlines why the 2011 reversion process or similar was required. Issues Mr Beijie seems to have overlooked.

When a wider view is taken, it seems quite reasonable for a single affected owner has the ability to revert the entitlements back to their original position.

As most of the information above is factual and fairly common knowledge, I have not provided any supporting evidence. Should the LACSA require some justification, I can provide copies of a CCT decisions where they detail the *Fischer v Body Corp for Centrepoint* case as the precedential view and discard other arguments (including the decision from my mother's building).

3.2 The outcome of the Bill will be unfair and unjust

If this Bill is passed, body corporate entitlements will remain or can easily be reverted to the entitlements set by order of the CCT (or other adjudicator). The problem is there is unfairness and injustice relating to entitlements set by the CCT (or other adjudicator). The unfairness and injustice relates to the process and amount of change involved in replacing the original entitlements with those set by the CCT (or other adjudicator).

Originally, when an owner bought a unit, they knew the body corporate entitlements of that unit and were essentially bound by them. It is only fair, they should not have been able change the entitlements to their benefit, at the expense of others, by a simple application to the CCT. However, following the outcome of the *Fischer v Body Corp for Centrepoint case,* which resulted in an unintended application of the BCCMA, this is exactly what happened. This was more commonly referred to as a loophole.

To make matters worse, it usually involved millionaire Penthouse owners (or similar) reducing their entitlements significantly at the expense of the lower level smaller units, owned by modest people (sometimes pensioners). The impact was 3 fold on these lower level smaller units: a significant additional body corporate fee burden was imposed; the value of their units fell and their units became harder to sell. The opposing benefits were obtained by the Penthouse (and similar) owners.

As this was not the intent of the BCCMA, the Labor government introduced the 2011 reversion process to address the unfairness and injustice that had been created. As this Bill removes and reverses the 2011 reversion process, it will recreate the same unfairness and injustice that had previously inadvertently arisen.

In his speech, Mr Biejie suggests the 2011 reversion process "reintroduced many of the abuses of the past". Ironically, this Bill does the same in reverting to the abuse by the Penthouse owners (using the prior loophole) at the hands of the lower level smaller units. The difference is that, in the past, owners knew what entitlements they were buying, even though the allocation by the developer may have involved some "abuse". The Penthouse owners should have no complaints by it being reverted back to the original position via the 2011 reversion process – they knew exactly what they were buying at the time!

To give an idea of the numbers involved, my mother owns a one bedroom █ floor unit in a building at Main Beach on the Gold Coast. As a result this Bill, her unit's entitlements will change from 59/10,000 to 101/9,996 - an increase of over 70%. Similar increases will apply to the remaining 15 one bedroom units in her building. On the other hand, the Penthouse's entitlements will fall from 436/10,000 to 161/9,996 – a decrease of over 63%. The 2 sub-penthouses and the manger's residence will also obtain significant benefit, but most owners of the remaining 73 two bedroom apartments will be largely unaffected. In dollar value, the body corporate fees for the one bedroom units will increase by $3,000-$4,000 pa (approx) and the Penthouse owner's will fall by $20,000 -$25,000 pa (approx).

Given my mother is semi retired pensioner with modest income and assets, this will have significant detrimental impact on her life.

When you consider the Penthouse owners knew what lot entitlements were attached to his unit when he bought it, this is morally wrong – so creating unfairness and injustice.

Interestingly, the Explanatory Notes to the Bill acknowledges there will be financial "Winners" and "Losers". It doesn't however note that the "winners" will generally be the multi millionaire penthouse owners (and similar) and the "losers" will generally be the modest living lower income owners from the lower floors. Maybe the Bill should be called the "Reverse Robin Hood Bill", because it effectively results it money being taken from the poor and given to the rich.

My mother's building is not an isolated case. As it is widespread on the Gold Coast, the Bill creates far greater unfairness and injustice than it is attempting to address.

Like above, as most of the information above is factual and fairly common knowledge, I have not provided any supporting evidence. Should the LACSA require some justification, I can provide copies my mother's building entitlement changes and fees. However, to support my argument and position, I have attached the following:

- A copy of an article where Peter Lawlor (Labor Minister) is quoted about the unfairness and the creation of the loophole (Appendix 2);
- A copy of an article from the Gold Coast Bulletin from 2010 which supports my views on the widespread unfairness that resulted from the original change in entitlements (Appendix 3). Obviously, the same principles apply if this Bill reverts to this.

4. Suggestions

Given my opposition, my obvious suggestion is that the part of the Bill that removes and reverses the 2011 reversion process be entirely "scrapped". However, despite the compelling arguments for this (some of which I have detailed in the submission), I understand this is unlikely.

Therefore, I suggest amendments be made or included which address the unfairness and injustice the Bill will create. I have detailed below some of my suggestions which, whilst not perfect, will make the Bill "fairer".

4.1 Suggestion 1 – a different reversion process

If it is considered it is unfair for a single owner to overturn a CCT (or other adjudicator) order, then include in the Bill a new means of reversion to the original entitlement position, which the LNP believe is "fairer".

4.2 Suggestion 2 - time limit on reversion

This suggestion is that the Bill be amended such that no more reversions can occur after a certain date, say the 1 October 2012. However, the reversions that are in process or have occurred should be allowed should remain. It has been well over a year since the 2011 reversion process was introduced, which suggests that it has not

been a priority for owners who have not taken action on it yet. As it was extremely important, we took action on it almost immediately.

This is fairer and will provide some certainty in the interim, whilst the LNP review the whole body corporate legislation – which I understand is already "in process".

4.3 Suggestion 3 – adjust only lots held pre the adjustment order that were significantly affected

This suggestion is that the Bill be amended such that the lots held prior the application to CCT (or adjudicator) and were "significantly affected" remain/revert to their original position, with the balance of the entitlements being allocated proportionally to the "benefiting" lots. For example, if only one unit in a building was owned pre the application to the CCT, then only its entitlements remain at their original position, but others don't. The difference in entitlements is the applied to the penthouse and other "benefiting" units. "Significantly affected" would mean a greater than 10% increase or similar.

4.4 Suggestion 4 – require a "Special Motion", not a committee motion

This suggestion is to amend the Bill such that "special motion" at an annual general meeting of all lots is required to change the entitlement back to those ordered by the CCT (or other adjudicator) – rather than a motion through the body corporate committee. A "special motion" would be a motion that requires a high percentage of votes to pass (e.g. 80-90%). A time limit could also be imposed to stop future reversions to original entitlements (like suggestion 1).

4.5 Suggestion 5 – entitlements change upon sale/transfer

This suggestion is that the Bill be amended such that the lots held prior the application to CCT (or adjudicator) and were "significantly affected" remain at their original position, with the balance of the entitlements being allocated proportionally to the "benefiting" lots (as per Suggestion 2). However, when these units are sold/transferred in the future, the entitlements will change to those in the order of the CCT (or adjudicator).

This provides some certainty and will gradually address the equality in the entitlements.

4.6 Suggestion 5 – allow for compensation to change the entitlement

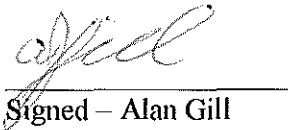
This suggestion is that the Bill be amended such that the lots held prior the application to CCT (or adjudicator) and were "significantly affected" remain at their original position, with the balance of the entitlements being allocated proportionally to the "benefiting" lots (as per Suggestion 2). However, the Bill could include for "benefiting" lots to negotiate a compensation payment to the lots held prior the application to CCT (or adjudicator) to have their entitlement changed from their original position.

5. Submission Closing and Request

Based on the contents of this submission, I therefore request the Legal Affairs and Community Safety Committee report the inequity and inconsistency of the reasoning behind the Bill as well as the unfairness and injustice passing of the this Bill will create. In doing so, I request they either recommend suitable changes to the Bill or "scrapping" of it all together.

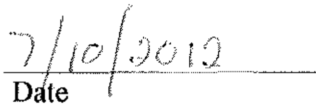
As I understand there is a proposed meeting or forum regarding this Bill I request an invitation to or notification of this. I am also available to attend any other consultation process involved in the Bill. I can be contacted on [redacted], at [redacted] or at the address noted above.

I also note, I am not a lawyer, so please excuse any legal formalities I have missed or overlooked.



Signed – Alan Gill

Signed – Catherine Gill



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APPENDIX 1 – Background and History of Body Corporate Entitlements

Before explaining the reasoning behind my opposition of the BCCMOLA Bill, I believe it is extremely important anyone considering this Bill be fully aware of the background and history of body corporate entitlements. I therefore provide this brief, practical summary.

1. Originally (prior to 1997), the allocation of body corporate entitlements (on which body corporate fees are based) between units was usually determined by the developer of the building. As there was no set methodology required, they were often based on area/size, estimated market values and other numerous factors;
2. As body corporate fees are based on the body corporate entitlements, the allocation of entitlements affected the purchase price of each unit. As the Penthouses and higher floor units were usually the largest and most valuable units in a building, they had a higher body corporate entitlement. Similarly, the lower floor units were usually cheaper and smaller (usually one bedroom units), so they had a smaller body corporate entitlement ;
3. At the time of buying a unit, buyers knew what the body corporate entitlements relating to the unit were the buying were, so they knew what their body corporate fees would be based on. There were limited (if any) opportunities to change allocation of the body corporate entitlements;
4. In 1997, the BCCM was introduced, with later amendments in 2003 and 2007;
5. In 2004, a court case, *Fischer v Body Corp for Centrepoint,* was decided that changed the interpretation and application of the BCCM. This "new" interpretation enabled an owner of unit to this change the body corporate entitlements of a whole building, to effectively make them equal between units;
6. To enact this change, an owner would apply to the CCT (or other adjudicating body), who would then make an "adjustment order" and change the entitlements;
7. This enabled the Penthouse (and similar) owners to reduce their entitlements significantly (some up to 75%), at the expense of other unit owners, usually the one bedrooms units on the ground/lower floors (whose drastically increased);
8. Whilst it was blatantly unfair, the CCT (or other adjudicating body) was obliged to follow the precedent set from *Fischer v Body Corp for Centrepoint* case;
9. From 2004/05 to 2010, numerous buildings entitlements were changed as a result. The impact was 3 fold on the smaller/low floor units – an additional body corporate fee burden was imposed, the value of their units fell and their units became harder to sell. The opposing benefits were obtained by the Penthouse (and similar) owners;
10. As this was never the intent of the BCCM and was extremely unfair, the Labor government (i.e. Peter Lawlor) conducted a review (commencing 2008). The outcome of this review was to introduce the 2011 reversion process;
11. After a few years of oppressive body corporate levies, some of the one bedroom (and similar) unit holders were able to get back to the original body corporate entitlement they bought under and some did; and
12. This BCCMOLA Bill will remove and reverse the 2011 reversion process, such that the entitlements revert to those that were unfairly benefit the Penthouse owners and practically, the smaller/low floor unit owners will have no legal argument to challenge this.

APPENDIX 2

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Government closes body corporate fee loophole

Date: 19 February 2010 - 01:26pm

The Bligh Goverment has today put a stop to millionaire penthouse owners using a loophole that allows them to have their body corporate fees slashed at the expense of smaller unit owners.

After a six-year battle to change the law, Fair Trading Minister Peter Lawlor made the announcement this morning to relieved residents at Sufers Paradise high-rise The Pinnacle.

A penthouse window in the building was allegedly shot out a year ago during a nasty feud over a bid to have the fees of $3 million penthouses halved while fees for the smaller, lower-floor $400,000 units doubled.

"The Body Corporate and Community Management Act 1997 will be changed so there is a better and fairer system for working out shared costs associated with living in an apartment complex or other community titles scheme," Mr Lawlor said.

"This is a much needed change. The Act has had a loophole which unfairly allowed some unit owners to get away with paying less than their fair share of body corporate fees at the expense of others."

"We're putting a stop to this and changing the law so it's fairer for everyone all round."

Mr Lawlor said since the Act was introduced in 1997, lot owners could apply to have their lot entitlements - and thus body corporate fees - reduced at any time.

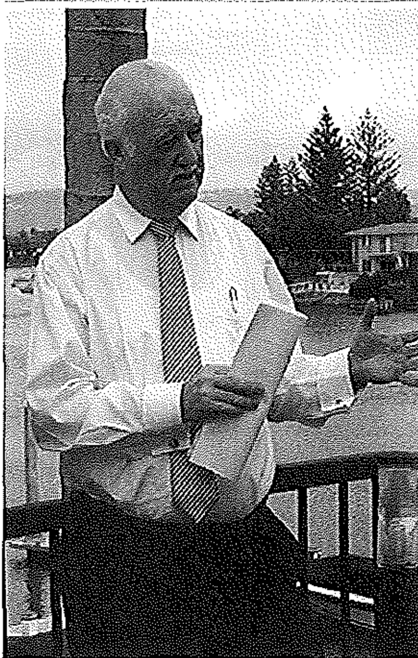
"Penthouse owners, for example, can effectively slash their own body corporate fees, but these costs are merely passed on to others in the complex instead," he said.

"So a ground floor studio owned by a retiree or pensioner would be left paying much more than they had budgeted for when buying the unit - in some cases double and this has forced many unit owners out of their homes."

The Queensland Government will allow those buildings and complexes which had lot entitlement adjustments made, to revert to their original method of dividing body corporate fees when the plan was registered.

Tags: Bligh Goverment, body corporate, Fair Trading Minister Peter Lawlor

Mr Lawlor said since 1997, lot owners could apply to have their lot entitlements - and thus body corporate fees - reduced at any time



Mr Lawlor says the changes will make it fairer for everyone

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Peter Cameron

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Find body corporate fee fairness

Peter Cameron | January 19th, 2010

FINALLY the revolution on body corporate fees and rules is ready to accelerate.

If there is any justice, the first anomaly to be axed will be the loophole which allows luxury penthouse owners to pay the same administration fees as neighbours with small, lowerfloor apartments.

Those listening hardest for any government announcement will be the voters from the Surfers Paradise electorate held by LNP Opposition Leader John-Paul Langbroek.

There are 1.5 million Queenslanders living under body corporate regulations but the largest concentration in the state's 89 electorates is around Surfers Paradise.

Some investors are rorting this section of the Queensland Body Corporate and Community Managers Act (2007) to inflate the value of their larger, penthouse-style, luxury apartments.

Imagine if the Gold Coast City Council charged the same rates for an oceanfront home as the same-sized backstreet block at Labrador.

With some Main Beach area apartment owners up for $20,000 a year in body corporate fees, there is plenty at stake in new legislation.

Especially for the penthouse investors -- applying the Act to lower their body corporate fees can increase the value of each luxury property by hundreds of thousands of dollars.

Trouble is, Widow Jones in the one-bedroom unit at the back of the block at ground level could see the value of her property drop by up to $50,000, thanks to the sudden increase in her body corporate fees.

When management fees for some penthouse owners were halved, the fees for the smaller units doubled.

The Department of Fair Trading has received complaints that these increases for smaller units can run to thousands of dollars per year.

If the Bligh Government sticks to its Labor roots then apartment charges will revert to a formula based on the area of the property.

This formula usually is followed in levying charges for an apartment block's sinking fund. But not for the administration fund which looks after management, upkeep etc.

Annual body corp fees worth $5000 would normally comprise about $3500 in admin fees and $1500 for the sinking fund.

Commercial strata-title property also will be affected if body corporate rules are reformed.

Certainly the body corporate shake-up will appeal to voters fed up with the endless hip-pocket attacks from rate notices, electricity bills, water/sewerage costs. The Gold Coast Bulletin reported yesterday that landlords were dumping higher water costs on tenants.

The body corporate basket case looks worse when you throw in annual wildcards such as Schoolies. Some apartment owners have complained they are pressured by management companies to rent their properties to Schoolies or risk reduced rentals the rest of the year.

When they have sorted that one out, there even are impending changes about window safety in apartments.

Older high-rise windows may face compulsory modification to clearances and heights from the floor to prevent falls, particularly by children.

Southport MP Peter Lawlor championed the need for body corporate law reform before joining the Bligh Cabinet after the March election last year.

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APPENDIX 3

His first step was to block a technicality allowing buyers to to use disclosure provisions to back out of 'off-the plan' strata-title contracts.

With the first anniversary of the election only weeks away, Mr Lawlor has the perfect opportunity to ring in more important changes.

LNP Fair Trading spokesman Ray Stevens told The Bulletin he had received numerous complaints about letting pool management policies involving investor-owned apartments.

"The body corporate business really needs a clean-up," said Mr Stevens.

Public meetings on the Gold Coast from 2008 underlined the depth of legal concerns from apartment owners.

The body corporate jungle already was laden with snares and traps.

What about the millions of dollars in undisclosed rental commissions which were paid year in and year out to management companies?

In some cases, management leases can run for 20 years, giving new owners little say in rental policy etc of their apartment block. Developers virtually can set an apartment management policy in the concrete.

There is little point in the Bligh Government relying on government tribunals to give smaller apartment owners a fair go.

Most applications by penthouse owners to exploit the 2007 management fee loophole are approved.

The real body corporate twist will come if Premier Bligh can be persuaded to make all the loophole decisions null and void.

Retrospective legislation is seldom popular. But body corporate reforms have been flagged for so long that there is ample time for more penthouse owners to apply for management fee relief before any change to the existing legislation.

One solution may be to ensure that all body corporate charging revert to the original formula lodged when the units were constructed and registered.

Many penthouse owners may be hostile if there is a sudden spike in management fees. But Fair Trading Minister Mr Lawlor was adamant from day one that the loophole exploitation was on the nose.

Cleaning it up will be a political winner. Labor voters start to thin out when the lift approaches the penthouse floors.

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Peter Posted On 03:51pm Monday 22nd February
This is not a loop hole Peter Cameron, it was a deliberate ALP policy to provide the unjust policy of equal body corporate fees. A loop hole is the unintended consequence of policy not properly formulated.

greg Posted On 02:34pm Friday 5th February
We have a similar situation in Hobart, 2 bedroom units with panoramic water views actually pay less body corp fees than those of us with only 1 bedroom and water glimpses. How can that be fair? When we ask why... the management just shrugs and says "its always been that way" Our fee is hundreds of dollars more than everyone else's including other 1 bedroom units.. I just dont understand.

John Ligthart Posted On 01:19pm Tuesday 19th January
Your article on Body Corp fees omitted a further anomaly in the legislation which allows owners of adjoining units to put those units on one title and only pay 1 Body Corporate levy as happened in Atlantis West where 4 owners did just that and are now paying virtually the same fees as an owner of a 1 bedroom unit. These joined units have up to 5 bedrooms, 4 bathrooms and toilets yet the misguided legislators seem to think that the repairs etc would be no more than for a 1 bedroom unit. Go Peter.