Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 049

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Dear Sirs

SUBMISSION: BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2012

Re: Subdivision 3 Modification of last adjustment order entitlements.
411 Modification for amalgamated lot.

This submission is lodged with concerns regarding ambiguity in the 2012 amendments, as is demonstrated below.
It was my understanding that the legislation had been framed to amongst other things address an issue of amalgamated lots S 411. On referring the matter to a lawyer for advice his response was:

"In reference to your email below, it would seem to me that you would not be affected by proposed section 411, for reason that at the time you had the lots amalgamated you also obtained an order for an adjustment of the Lot Entitlements. That adjustment Order that you obtained would therefore be deemed to be the "last adjustment order".
Therefore, as your amalgamation occurred prior to the "last adjustment order", section 411 would not apply."

Clearly there seems to be confusion or ambiguity regarding the intention of S 411. I have therefore written this submission on the predication that S 411 may apply to the unit owners I represent, and in that circumstance to provide additional clarity on the amalgamation issue that seems to be misunderstood.

1. This amendment seems to have been included, as a consequence of debate regarding owners who amalgamated 2 lots, or more precisely 2 titles, and the suggestion in that debate was that the intent of those owners was to avoid fair levy contributions and payments.
That simplistic view is inaccurate and does not fairly consider the circumstances that prevailed throughout the process of lot entitlement amendments since 2003.
My circumstances demonstrate the issues on behalf of my fellow owners who share similar experience: L Krawczyk, Unit [redacted]. B Johnston, Unit [redacted]. & Dr. M O'Brien, Unit [redacted].

2. Atlantis West was built and completed in 1986.
I purchased my single apartment in Atlantis West from [redacted] in 1993.
[redacted] had purchased the apartment directly from the developer, and her single apartment was sold to [redacted] on 2 titles. In September 1986, [redacted] was granted exclusive use of common property by the body corporate to establish a single entry to her unit providing further evidence that her unit was established and maintained by her as a single unit.

Prior to 2003 there was no disadvantage to an owner in holding CTS property on multi title, as the area of a lot was the dominant precursor in establishing the contribution lot entitlements. Therefore units of equal size had comparable lot entitlements. In 2003 following criticism of developer

generated schedules, legislation was introduced to make contribution lot entitlements more equal, no matter the size of the apartment. With the benefit of the knowledge of what was to come, in that the legislation would be overturned in 2011 and undone again in 2012, it probably would have been prudent to have undertaken amalgamation on the introduction of the 2003 amendments or earlier, which would have avoided the impact of S 411 of the 2012 amendments, as is later demonstrated should be the outcome with Units 190 and 191 of Atlantis West. There had never been an urgency to amalgamate as there had never been an indication from Government that the BCCM Act would be amended to cause such a problem.

3. On the introduction of the 2003 amendments, lot entitlements were to be determined equally unless it was just and equitable that they not be equal.
From this time (2003) an owner of a single apartment held on 2 titles, being subject to a review of contribution lot entitlements, found they would be subject to 2 equal contributions.
To overcome this anomaly, it became necessary for that owner to amalgamate the 2 titles, in order that the contribution lot entitlements of their apartment were determined equally to an equivalent apartment in the scheme. It should be stressed that my lots were, and always have been occupied as a single apartment, and an inspection of the apartment will verify this claim. It is argued that it is not just and equitable that an owner who holds their apartment on 2 titles should be treated differently to an owner with amalgamated titles. Owners who purchased their apartment with 2 titles are being disadvantaged for a convenience of the developer in not amalgamating the titles prior to the original sale.

4. The process to determine the amalgamation was to apply for a specialist adjudicator to be appointed by the Commissioner of Body Corporate and Community Management, to consider an application to amalgamate, and in that eventuality, to determine a revised schedule of contribution lot entitlements. The attributes of such an appointment is that the specialist adjudicator is independent, has specialist expertise and can obtain the support of industry specialists, the likes of Leary and Partners, Quantity Surveyors, who participated to undertake a qualified determination following extensive scrutiny of the facts of the scheme, as demonstrated in:
Notice of the adjudicator's order issued 5 February 2008 reference 0307-2007 – "Atlantis West", as Annexure "A" attached to this submission.
This procedure is precisely the same procedure that the 2011 amendments set aside, and the principle argument in favour of the 2012 amendments, in responding to concerns raised over the power of an individual in a community to effectively over-rule orders of a specialist adjudicator, administrative tribunal or court, as it is considered offensive to basic Australian democracy.

5. It should be noted that there are apartments in Atlantis West that have been subject to amalgamation prior to 2003 that have not been affected by the anomaly referred to above.
Unit 191 was created by amalgamating Units 169 & 170 in 1991.
Unit 192 was created by amalgamating Units 90 & 91 in 1992.
There are some 9 other lots amalgamated by the developer prior to sale as itemised at point 7 of the adjudicators recital issued 5 February 2008
The above lots would not be expected to be affected by S 411, because the amalgamations took place before any adjustment orders were made for the scheme. This demonstrates that the 2012 amendments and in particular S 411, discriminates against some owners, and does not apply to others. It is represented that the law should apply equally in the community, and S 411 should be set aside as it is discriminative.

6. Owners who had amalgamated their lots as a consequence of responding to legislative changes, in order to obtain an equitable and more equal outcome, now find they are being discriminated against. That discrimination is demonstrated in the table below by the expected contribution lot entitlements to be generated as a consequence of the application of S 411 of the 2012 amendments.

COMPARITIVE TABLE OF CONTRIBUTION LOT ENTITLEMENTS (CLE) DURING LEGISLATIVE CHANGES ATLANTIS WEST CTS 8790

UNIT	**CLE PRE 2003**	**CLE 2006 ADJ.**	**CLE 2008 ADJ.**	**CLE Deemed ADJ. 2011 ***	**CLE POST 2012 S411**
Lot 181 Penthouse	678	69	70	678	70
Lot 180 Penthouse	688	69	70	688	70
Lot 179 Sub-penthouse	455	65	67	455	67
Lot 177 Sub-penthouse	475	65	67	475	67
Lot 176 Sub-penthouse	436	65	67	436	67
Lot 174 Sub-penthouse	456	65	67	456	67
Lot 191 amalgamated 1991	464	65	66	464	66
Lot 192 amalgamated 1992	395	65	66	395	66
Lots subject to adjudicator's order issued 5 February 2008					
Lot 103	207+192=399	58+60=118	66	399	118
Lot 118	207+215=422	58+61=119	66	422	119
Lot 145	212+242=454	60+58=118	66	454	118
Lot 165	216+246=462	60+58=118	66	462	118

* Body Corporate advice of reversion of Lot entitlements August 2011 ANNEXURE "B"

This table demonstrates the similarity of the level of lot entitlements of sub-penthouses and large units to units held on 2 titles. It demonstrates that in 2006 the lot entitlement relationship between these units changed as the units held on 2 titles attracted a greater proportion of lot entitlements. The 2008 adjustment restored that lot entitlement equality. In 2011 the lot entitlements were reverted to the developers schedule, and in 2012 to the "last adjustment order" of 5 February 2008, with the ambiguous adjustment for the intended application of S 411.

7. The above 4 lots (103,118,145,165) have been owned by the 4 owners in the long term, some in excess of 20 years, having purchased them as a single dwelling.
The owners have lived in their single apartments and previously saw no good reason to amalgamate the 2 titles they held, until following the introduction of 2003 amendments, and upon an owner seeking adjustment to the contribution schedule lot entitlements in May 2006, when it became clear on the issue of the adjudicator's order that holding 2 titles attracted 2 equal levies to the disadvantage of those owners.
The only means to obtain a more equal and equitable outcome was to amalgamate the titles.
That amalgamation and lot entitlement adjustment was ordered by an independent specialist adjudicator appointed by the Commissioner of Body Corporate and Community Management.

8. Prior to being elected, the Premier Campbell Newman offered to engage in community consultation when considering any legislative change. There has been considerable debate regarding the 2012 BCCM legislation, yet at no time has anyone sought to consult with the 4 Atlantis West owners, adversely impacted by the introduction of S 411, and being likely the only owners in Queensland who undertook the amalgamation option. This option was little known or understood, as when seeking supportive legal advice, a solicitor advised he had taken junior barrister's opinion indicating that amalgamation was not possible. In those circumstances it is highly unlikely that there were others that pursued amalgamation.

9. Under the heading "Reasons for the Bill" in the Explanatory Notes, the following was stated:
"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 of an independent court, tribunal or specialist adjudicator."
That the 2012 amendments have the capacity to over-turn a lawful order of an independent court, tribunal or specialist adjudicator, demonstrates inconsistency with the above statement.

10. The 2012 amendments were introduced to reverse the 2011 amendments that overturned the determinations by a specialist adjudicator, court or tribunal.
It seems ironic that S 411 of the 2012 amendments has been introduced to do the same thing; overturn a specialist adjudicator's order made in 2008, in particular order 0307-2007 – "Atlantis West", that ordered the amalgamation of lots and an adjusted schedule of lot entitlements.

Wayne Stevens
[redacted]
9 October 2012