Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 105

SG & DL Terranova
[redacted]

12 October 2012

The Chairperson
Legal Affairs and Community Safety Committee
Parliament House
Brisbane Qld 4000

Dear Sir/Madam

Re: Our Submission for *Body Corporate and Community Management and Other Legislation Amendment Bill 2012*

Attached is our submission to the Committee about the Body Corporate Amendment Bill 2012.

As owners of a small commercial lot in a mixed-used development that undertook the reversion process in line with the 2011 Amendment, we strongly urge the government to immediately declare the status quo and a moratorium on any further changes. We implore the government to refrain from simply throwing out the 2011 Amendment in its entirety, and to reconsider the reversion process so that the legislation does not force owners of smaller lots into a situation that is financially untenable and grossly inequitable.

This is a very complex matter. Since 2003 it has caused major uncertainty for existing owners and the property market. In our case it has caused extreme fluctuations in body corporate contributions between one year and the next (in the order of $22,000 difference). It has torn apart communities and caused great emotional anguish and financial hardship. There is no simple broad-brush solution.

It is imperative that the amended legislation recognises the different needs of mixed-use developments; gives adjudicators unambiguous principles on which to base decisions about what is just and equitable; and provides a fair and affordable process by which disputes may be settled.

In our case, after a bitter two-year battle within the body corporate, one of the proponents for change referred the matter to QCAT for adjudication. To our dismay, QCAT decided that the lot adjustments should be equal, based on the legislation in force in 2010 and a case (Centrepoint) that was not relevant to a mixed-use building. At the time we did not pursue an appeal through the courts because we were aware of the impending 2011 legislative change.

We urge the government to undertake extensive consultation with all the affected stakeholders, including owners who reside outside Queensland and outside Australia, to fully understand the issues and implications.

We trust that a considered, workable and fair outcome will be the outcome. Five years of hell is enough.

Yours faithfully

Salvatore (Sam) Terranova

Deborah Terranova

Submission to Legal Affairs and Community Safety Committee re:

Body Corporate and Community Management and Other Legislation Amendment Bill 2012

We have always believed that the original body corporate construct at inception was beyond interference and sacrosanct unless there were significant changes in the operation or function of a building. Previously a motion without dissent was required to amend body corporate contribution schedules.

We are the owners of a shop in a heritage building that has been converted into a mixed-use development; the original body corporate was established in 1999. The building consists of six small ground-floor shops, several one and two-bedroom apartments, and three-bedroom penthouse apartments on the upper floors. Recreational amenities are provided for residents, including a pool, sauna, gym, billiard room, and roof-top recreation area. The apartments are serviced by two elevators. Residents have exclusive-use car parking arrangements (parking bays or lock-up garages) and security staff who inter alia monitor vehicular access to the building.

In contrast to the residential apartments, the six shops (5 of which have an area of just 25 square metres) are open only during normal business hours. They can only be accessed directly from the street, they do not require access to the foyer or lifts, do not have parking bays or storage, and do not require or use any recreational amenities.

The body corporate contribution entitlements were originally based on area. Under the original scheme, 247 contribution lot entitlements were distributed between 47 owners. The smallest shops (25 square metres) were allocated 1 lot entitlement and the largest 2 penthouse apartments (307 and 260 square metres) were allocated 9.

This arrangement served the building equitably and harmoniously for ten years. In 2009 two of penthouse owners collaborated in an attempt to bring about a re-distribution of body corporate contribution entitlements in their favour. At the relevant body corporate meeting the motion to adjust the contribution schedule lot entitlements was lost with 15 votes against, 12 votes in favour, and 1 abstention.

Despite this the penthouse owners forced the body corporate to go before QCAT for adjudication. On 13 April 2010 an adjustment order was made by QCAT, based on the *Body Corporate and Community Management Act* in force at the time, and the *Fischer & Others v Body Corporate for Centrepoint* case, which to our dismay required contribution lot entitlements to be distributed equally. No consideration at all was given to the different usage types of the lots, nor to their size, function, volume, location in the building, use and access to amenities. The legislation does not work.

Our shop actually consists of 2 lots on the plan but operates as a single business. The total floor area is 50 square metres (2 X 25m^2). We pay body corporate levies in accordance with the schedule for both lots. As a result of the adjudication the body corporate levies per shop increased from $2,447 per annum to $13,632 per annum, **an increase of 457%.** This was imposed over-night. **The quantum of the increase from one year to the next was a massive $22,370.** The amount equated to **$545.28 per square metre** in body corporate levies alone, which was not sustainable for any small business.

In contrast the penthouse owners' levies were reduced by 33% or $7,333 per annum. Following the adjustment order, one of the instigators immediately sold his apartment and relations between the various lot owners in the building degenerated.

The 2011 Amendment to the legislation provided a remedy, whereby those affected by this opportunistic loophole could request the body corporate to revert to the original schedule of contribution lot entitlements. The process described in the 2011 Amendment was duly followed and in April 2011, the original schedule was reinstated.

Now it appears the 2011 Amendment will be thrown out in its entirety. It seems this will be done **without one iota of public consultation,** on the assumption that all matters adjudicated under the 2003 amendments to the Act (and supported by universal reference to the Centrepoint precedent) are fair. They are not because the legislation is flawed. The Centrepoint case focused upon one phrase in the legislation and determined that *there should be an equality of entitlements*.

The application of legislation is a very complex matter. There are many, many variations to schemes. A hasty, broad-brushed amendment will not provide an effective solution. Indeed, it will add to the woes.

The flip-flop decision-making, impending retrospective amendments to the legislation, and wild fluctuations in individuals' body corporate contributions has torn our previously harmonious community apart and has caused huge personal stress and financial hardship. We are aware of one owner-occupier of a smaller apartment in our building (a retiree on a fixed income) who was forced to sell because she was not able to afford the body corporate contributions following adjudication.

Whichever way the axe falls, there will be winners and losers unless the government considers the broader intentions of the entire legislation and provides a sensible, clear, principles-based approach for adjudicators to determine what is *just and equitable* as the alternative, rather than simply regressing to a former flawed piece of legislation.

These principles should take into account the following:

1. Usage type – shops, offices, commercial car parks, one-bed apartments and penthouses have different usage patterns, perform different functions, require different maintenance schedules, depreciate at different rates.
2. Lot size on title – Area is everything in building costs and maintenance. For example, fire sprinklers and fire alarms have their own sets of legal requirements. Servicing and replacing the fire systems in a three-bedroom top-floor apartment requires significantly more time and materials (eg length of piping, number of sprinkler heads, smoke detectors) than a 25 square metre ground-floor shop.
3. Volumetric size – this has implications for such building services as ducted air conditioning from cooling towers, which in our building cannot be metered by usage.
4. Amenities – it is clear from the nature of amenities provided by the development whether they are primarily for the enjoyment of residents or commercial tenants or both. In our building the residential lot owners are seeking to beautify the roof area for their own enjoyment. The shop-owners, who will obtain no benefit at all, will be required to contribute the exact same amount (several thousand dollars) as those who will benefit.
5. Location of the lot in the building – for example a high-traffic commercial lot on a high floor (tenanted by a government service provider such as Medibank) would cause higher lift maintenance costs, foyer cleaning and replacement costs than a small street-front coffee shop.

If the government believes that *just and equitable* means *equal*, then the same principle should be applied right across other legislation and services, for example motor vehicle registration. Perhaps

the owner of a small four-cylinder Hyundai Getz should pay the same registration as the owner of a V8 Statesman Caprice. One could argue that would be fair because all passenger vehicles have four wheels and therefore create equal wear and tear on the road surface.

Social planners recommend that all socio-economic groups should be included in residential communities and developments. Having all one-bedroom units or all large luxury apartments might make body corporate administration simpler, but is in direct conflict with expert opinion. Supporting diversity of ownership requires legislative recognition that different lot types within the same development have different needs. Fixed incomes such as pensions are just that: fixed. Surely residents who have bought into an existing scheme for all the right reasons deserve certainty, peace of mind, and continuing affordability.

Similarly planning departments promote the value of high-density and mixed-use developments that utilise existing infrastructure (live, work and play).

To support these two planning directions, **the first principle which underpins lot contribution decisions should be that the points of difference are established and recognised**. The default position should not be 'equal', with the onus (and cost) of proving otherwise falling to those who are least able to do so.

The body corporate fiasco has been going on now since 2003. Rather than resolving the situation each successive amendment exacerbates owner uncertainty and drives yet another nail into the coffin of community harmony.

Uncertainty also pervades the already struggling property investment industry. Who, in the current climate, would purchase into a community titles scheme? Not even the most arduous and persistent due diligence will provide any confidence about the future distribution of body corporate expenses, which is a critical component of return on investment.

The government and the legislators need to understand that:

- unit developments do not have similar issues that can be easily resolved without clear and detailed legislation. This is particularly the case with mixed-use developments which combine residential and commercial functions and which are caught up at some stage or another in the succession of body corporate amendments.
- lot owners are not a homogenous group. There are people with wealth, people with debt, people on fixed incomes such as pensioners, investors out to make a buck on capital gains, investors in for the long-haul who are focused on rental income to fund their retirements, residential owner-occupiers, business owner-occupiers, etc.
- individual cases must be able to be determined by a qualified adjudicator on their merits, rather than over-relying on a single appeal decision that locks contributions into being equal unless proven otherwise (where any offered evidence 'otherwise' is ignored).
- party politics should have no place in rectifying this legislation.

The legislation must provide certainty for the development and building industry, and certainty for investors as well as residents. **But, first and foremost, it must be fair** and it must enable decision-makers to make decisions that are fair, rather than decisions that simply comply to flawed and irrelevant legislative provisions.

It must also establish a fair and affordable process by which disputes about body corporate contributions may be settled. We reiterate our opening comments. Original constructs must remain sacrosanct unless all Body Corporate members make a resolution without dissent to change.

The 2012 Bill effectively does nothing but overturn the 2011 Amendment without listening to the long-suffering community of affected lot owners. This, quite frankly, is foolhardy. It will add to the emotional anguish of residents and will be another wet blanket for the property industry.

The government must put a stop to this nonsensical behaviour by **declaring the status quo and a moratorium on further change.**

Then the government must:

- obtain sound and considered legal advice about intended and unintended consequences
- engage competent drafters of legislation who can describe clear, unambiguous, workable processes, and principles to make decisions that are properly equitable
- consult with and listen to all the affected stakeholders, including owners who reside outside Queensland and outside Australia.

When all this is done, Parliament must put party politics aside and ensure all aspects of the problem are addressed BEFORE any amendments to the legislation are passed.