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The Research Director
Legal Affairs and Community Safety Committee
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Dear Committee please table this submission regarding **the 2012 BCCMA Amendment Act.** This submission is in two parts, part 1 being an extension request for public submission time and part 2 being suggested amendments to the Bill.

All Citizens of Queensland have an implied right to know that assets of their appointed Government are placed on risk by embracing this Bill. The range and depth of the Bill's influence is profoundly understated, almost erring to deception and most surprisingly the Bill is insufficiently researched, leading to a number of developments being placed in a virtual legal purgatory with others left to wonder what elements of amalgamation to include and to exclude. This Bill appears as a further complication rather than a solution. It is clear the Bill "mainstreams" COAs (Court Ordered Adjustments) that hitherto may have been regarded as a brazen exercise of power. Government adoption of this position places it at odds with Hi-Rise developers and empowers formation of lot owner class actions targeting culpable entities that have led to Q1 style CSLE debacles. The Bill initiates far-reaching and untested collateral damage for the sole purpose of empowering high value lot owners' ability to set body corporate fees through their appointed actuaries and fails to answer the question of justification for such action. All Citizens (not just unit owners) of Qld will be victims of wasted State funds and a turbulent real estate market in this battle between the developers respecting national standards, high value apartment owners lobbying the government to their point of view and the discriminated remaining owners aiming to sue our Government or Developers. National fee schedule consistency (with other States) is the inevitable solution and the direction that should be the preeminent priority of this Bill. Our citizens should also be made aware of the elevated court resources consumed by mainstreaming COAs and the elevated risk of hitherto unaffected lot owners of residential, commercial and industrial lots becoming a target of said mainstreaming.
In its current form this Bill fails to solve the deeper issue of lot entitlements and introduces elevated risk, uncertainty, community upheaval and cost. It has failed intrinsic justification for introduction and exhibits a critical failure of due diligence.

PREFACE: The LNP had foreshadowed amendments to the 2011 BCCMA Amendment Bill prior to achieving Government earlier this year. The amendments were based upon three main criticisms:

1. Legislation negating valid rulings by the court process.
2. One person having the power to dictate a change of body corporate fees for all.
3. Retrospectivity.

1.) The 2012 Amendment Bill is both hypocritical and incompetent in this respect. Not only does it legislate against current established Court Adjudications, QCAT decisions and

Commissioner's Office adjudications, it proves incompetent, leaving several developments bereft of any valid rulings. The 2012 Bill attempts to re-empower extinguished incompetent adjudications [1].

2.) The argument of the 'power of one' has been handled in an inept manner resulting in transference of stated power from the appellant to the respondent, **the problem has not been corrected it has been reversed.** Correction of the problem would have been easily achieved by requirement of a quorum supporting the reversion motion (as conjoined applicants) rather than just one member. It is clear that in virtually every CTS there will be a majority of owners in favour of reverting to the founding contractual arrangements supported by the original purchase documentation (founding CSLE). By transferring the right ('of a single applicant') to set fees to penthouse (& similar) owners rather than correcting the problem, this Bill is shown to be inept in its objective and discriminatory in nature. It has exacerbated the issue by mainstreaming applications proven to be aberrant with respect to other Australian States.

3.) The argument of retrospectivity is now moot as the 2012 Amendment has itself failed to improve on this element of criticism.

These failures are easily remedied by the Government remaining true to its word and introducing an Amendment Bill rather than what appears as a Rescindment Bill.

PART 1 - Request for extension of time (public submissions- 12 months).

SCOPE: Real Estate Body Corporate/Strata lots in:

- Residential,
- Industrial,
- Office,
- Medical,
- Shop
- Marina developments.

TARGET POPULATION: Owners residing in:

- Qld, N.S.W., Vic, Tas, W.A., S.A., N.T., A.C.T.,
- N.Z.
- Singapore
- Japan
- China
- United Kingdom
- U.S.A.
- Canada
- United Arab Emirates,
- Russia and others.

EXEMPTIONS:

- No exemptions are listed however developments with all lots relatively identical in size, values and fees are not expected to be affected.

JUSTICE: THIS BILL: It is the incumbent responsibility of Government to uphold the integrity of legislation, not destroy it.

THIS BILL IS:

- **highly deceptive, claiming to:**
  - **prevent a single owner from enforcing changes over the whole CTS** however in practice the Bill selectively empowers individual owners of high valued apartments over those of less valued apartments.
  - **Introduce certainty** however it introduces greater uncertainty by:
    - Making all fees of all buildings contestable in court
    - Failing to assert any reference for fees that owners may rely upon
    - Failing to understand that the scope for uncertainty has been extended to ALL Body Corporate developments by this Bill
    - Failing to understand that it reverts many developments to incompetent rulings (enforcing Communities into no-man's land).
    - Purports to be an AMENDMENT BILL however is primarily a Bill of Rescission.

The Bill bludgeons the apartment industry with impending class actions against developers whilst admitting it provides no solution and therefore no certainty for the future.

EFFECTS OF THE BILL MAY INCLUDE:

FINANCIAL:

- Increasing cost of low value lot Body Corporate fees (up to 411% in extreme cases and typically 30 to 70%).
- Reduction of high value lot on-going Body Corporate fees by up to 75% .
- Reduction or increase in value of respective lot (significant windfall gains and losses).
- Almost total failure of value of some lots.
- Failure of certainty for most lots as all fee structures become court contestable.
- Creates windfall and on-going advantage for high value lot owners at the expense of lower value lot owners.

LEGAL:

- Class actions against recent developments. With the Commissioner over-ruling the recently set fee structures there is someone to blame. Was the developer to blame by failing to comply with legislation or was it the Queensland Government for failing to correct the aberrant loophole?
- No-man's land. Many developments would be instructed by this Bill to revert to pre-reversion status thereby re-empowering penthouse owner's orders. Many such orders have subsequently been found incompetent, un-empowered orders
- How does the Attorney General expect to gain the constitutional authority to breathe life into failed, incompetent and extinguished past judgements?

- Section 411 attempts to stem the destruction of developments by prevention of mass amalgamations such as may occur with large numbers of holiday apartment holdings by one company (i.e. Wyndham Holiday Apartments) however appears to fail in two respects:
    - The same destructive affect may be activated by amalgamation and subsequent COA for equalisation (thus failing to achieve the objective).
    - Being discriminatory in reverting some however not all previous amalgamations that have occurred in successive COAs.
- The Bill rides roughshod over the **unanimous agreement** of every owner's body corporate fee obligations as signed for in purchase agreements.

The impact of this Bill is highly understated and unlike a local intersection upgrade, it impacts Local, State, Interstate and International clients. The Bill contains great complexity in its scope and impact upon many facets of industry. To accept a lead time for comment as barely four weeks is indeed a travesty in precedence for our State of Queensland. Please extend this to a commensurate minimum of twelve months during which time solutions to the above issues may be developed.

PART 2 – Amendments. Preface:

The explanatory notes provide no aims, aspirations or outcomes with the exception of addressing what is assumed to be "*the ability to effectively over-turn a lawful order of an independent court, tribunal or specialist adjudicator.*" The competence of said "*lawful orders*" is the issue here and no attempt is evident to determine the veracity of such adjudications that prima-face are the aberrant element in this debate. This Bill builds an edifice of discrimination upon a quagmire of unproven assumptions; 'just and equitable' being one such nebulous legal football. The honourable path is to recall the Bill, deal with the underlying issues and introduce appropriate quantifiable reference terms.

As this Bill is reactionary in nature it is formed against a previous amendment Bill. It is incumbent upon the proposers to demonstrate **a rigorous narrative resulting in a compelling argument** with the **major stakeholders** that has established the need for this Bill. **There is no evidence of the narrative, the consultation nor validation of the argument beyond reference to hearsay.** The complaints of "*some lot owners*" surely **is** a reason to investigate, however:

- the critique of the QLS (Queensland Law Society) could be made equally on both the 2011 and the 2012 Bills
- there is no supporting material behind the referenced stakeholders, once again exhibiting failure of due diligence
- no authority exists in said references, due rigour of confirmation has failed
- the failure to exercise background veracity is not a characteristic the public expects or deserves from an elected Government.

Not only does this Bill fail to exhibit any tangible investigatory process of either the core principle or the opponents to the Bill it replaces. It offers no solution to the central issue

of ongoing community upheaval and successive court actions that will surely result from its **failure to solve the problem of no evaluative/tangible reference for setting of lot entitlements.**

Replacing a current Bill that has inherent veracity from the authority of a virtual vote without dissent (passed by all original purchasers as per purchase documentation) requires something much more cogent than the unfounded assertions within the explanatory notes.

The Bill fails to address the prospect of adherence requirements to nationally acceptable reference material for the courts, adjudicators or victimised lot owners.

The Bill fails to address subjectivity of CSLE apportionment, thereby facilitating further confusion and aberrant determinations by competing forces in industry and law. Failing to secure a tangible basis for such determinations opens the likelihood of:

- class actions against developers from disgruntled owners penalized by a subsequent COA
- declining value of Queensland hi-rise apartments
- developers losing confidence in the Queensland industry and exiting the State.

There is no valid rebuttal of the basis for the Bill it replaces, nor does this Bill suffer any less from the odious assertions of the 2011 Amendment.

This application addresses the explanatory notes rather than the Bill itself as the craftsmanship of legislators is accepted to be the most reliable means to provide a valid outcome.

To achieve greater alignment of outcomes with reasons (page 2 Explanatory Notes) the following suggestions are submitted:

Please note that excerpts from the explanatory notes follow in italicised grey text boxes.

> *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.*

Contrary to assertion, most past adjustments were also lawful rulings, compliant with legislation of the day. The objective issue of this Bill cannot therefore be about being "lawful".

If the issue of this Bill is anything other than to establish and assert authority of the high value cohort applicants over that of low value cohort applicants it is not evident in the legislation.

- The authority of the 2011 Amendment Bill is achieved by all original lot owners confirming their approval of the founding CSLE by their acceptance and agreement as per purchase documentation; the 2012 Bill however has no such authority. The Bill relies on statements of plaintiff employed consultants justifying nationally and

internationally aberrant evaluations that will at some time be overturned by National Standards. To re-assert this temporary and aberrant process is unconscionably irresponsible to both the industry and clients. All elements of Hi-Rise buildings that contain the majority of costs to the Body Corporate are subject to National Standards[2] **The Qld State Government has failed to justify departure from this established practice.**

- The "Notes" have **confused** the **authority** (a virtual vote without dissent) with the **mechanism** (any or all of the original owners) in its criticism of the 2011 reversion Bill. The authority of reversion in the 2011 Bill remains unchallenged and the writers of the "Notes" have attempted to discredit authority by attacking the **mechanism** of such reversion. Has the writer failed his/her obligation of critical thinking or is the justification of the bill misguided? Either conclusion questions the integrity of the Bill.
- The power (authority) of the founding CSLE was clearly attained by a full cohort of original purchasers unanimously agreeing to support the CSLE. The mechanism however to revert to the founding CSLE (via 2011 Amendment) in actuality is in the hands of ANY (not just one) of that cohort. The (2012 Amendment) explanatory notes have re-interpreted the (2011 Amendment) to appear sinister in nature as the authority remains unquestioned. The notes are an over-reaction when clearly adding the requirement of an ordinary motion to pass the reversion is a superior option for clarifying the original intent and re-affirming that more than half the owners must remain in support of the original CSLE for a reversion to justifiably take effect.

The 2011 Bill is written to streamline administration and the objection raised is one of detail not substance. The detail is easily corrected by ensuring that the applicant is conjoined by others in a similar manner to those numbers required to call a meeting or to pass an AGM motion.

<u>Amendment</u>: Reduce the 2012 Amendment Bill (with regard to the CSLE to the following):

"The reversion application must be put to and supported by a general meeting to take effect." This amendment achieves the outcomes required by the "Reasons for the Bill" and ensures that a majority of owners have exercised their vote in support of reversion providing greater legitimacy than either option (2011 or 2012 amendments). Further to this, it avoids considerable disruption otherwise introduced by the 2012 Amendment Bill.

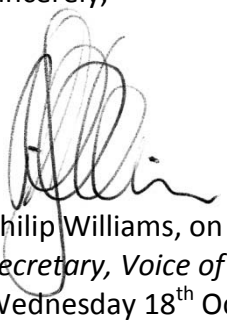
This amendment carries with it the following advantages:

- Chapter 6 of the BCCMA is respected.
- The foreshadowed damage referred to the remaining sectors of the Act is avoided.
- The residential apartment industry is reprieved from the prospects of class action.
- The retrospectivity issue is minimised.

- No claim of favouritism can be sustained.
- The inevitable establishment of National Standards are facilitated.

The Amendment Bill is clearly discrepant to its stated reason for presentation and that discrepancy comes at the cost of unannounced years of collateral damage. The Bill in its current form will introduce an unprecedented dissatisfaction of the Government's claim to independence and integrity. One is left to ask the question, why?

Sincerely,



Philip Williams, on behalf of
Secretary, Voice of Unit Battlers
Wednesday 18th October 2012

[1] The 2012 BCCMA Amendment Act (with Oct 19th cut off public consultation period):
- Attempts to re-empower extinguished illegitimate court actions by reverting to them
- Overrides the legislation that corrected the problem

[2] The 2008 Queensland Building Fire Safety Regulation and the 2011 Qld Work Health & Safety Act regulate the manner in which most **body corporate funds are expended** in care, maintenance and refurbishment of each CTS. The legislation has been re-written and introduced in 2008 and 2011 respectively to **conform to National Standards**. For this Bill to attain legitimacy an argument must be won to support this sudden and aberrant divergence governing how **body corporate funds are raised.**

A result of this Bill's adoption will be that a number of court actions that failed legitimacy over past years **will remain il**legitimate**, however will (by this Bill) become current and once again contestable as a re-initiated illegitimate ruling.**
Most of the effected Bodies Corporate however **currently** comply with existing and proposed regulation.
It is a travesty that the 2012 Bill will unwittingly force many of these Bodies Corporate from compliance to default.

Background:
Numerous bodies corporate have been subject to invalid rulings i.e. "Magic Mountain Apartments 2", "19th Ave" Palm Beach Apartments "Manhattan" of Old Burleigh Road.
The schemes' lot owners all owners agreed to the fee proportions as set in purchase documents at the time. (i.e. A vote without dissent was formed).
High value apartment owners subsequently took their Body Corporate to the District Court and registered adjudications with new payment schedules.

The Body Corporate Committees subsequently failed to seek permission from the members (as required in the Act) for their decisions. The Committee members prevented the Body Corporate from having any say and purported to be acting on its behalf. The Court therefore had no jurisdiction in bringing down decisions it made (see link example below).

Body Corporate Commissioner's Adjudications

http://www.austlii.edu.au/au/cases/qld/QBCCMCmr/2011/511.html
(Please see excerpt of the decision below which has been reaffirmed in 2012 by QCAT)

[26] There is no evidence that the Order of the Court gave effect to the terms of a settlement between the parties, or that the Order of the Court was a Consent Order.
[27] Similarly, there is no evidence of a resolution by the committee to consent to the District Court application, and indeed, I am of the view that the committee could not have agreed to the adjustment because such a decision would be a restricted issue for the committee *under section 42(1)(b) of the Body Corporate and Community Management (Accommodation Module) Regulation 2008* which provides as follows:

42 Restricted issues for committee

(1) A decision is a decision on a restricted issue for the committee if it is a decision-

(a) fixing or changing a contribution to be levied by the body corporate; or

(b) to change rights, privileges or obligations of the owners of lots included in the community titles scheme

Reverting back to these invalid rulings is regression to uncertainty and conjecture rather than reform.

- The (original) schedules were value based schedules that remain a legitimate principle of proportioning contributions **under the current (and proposed amended)** Act.

The 2012 BCCMA Amendment Bill:

- Empowers **invalid** ruling of 2003 onwards
- Invalidates the Reversion Bill of 2011 that corrected such problems.

Some QCAT decisions this Bill aims to invalidate include..

QCAT Decision http://www.austlii.edu.au/au/cases/qld/QCATA/2012/5.html

QCAT Decision
http://www.austlii.edu.au/au/cases/qld/QCATA/2012/6.html

QCAT Decision
http://www.austlii.edu.au/au/cases/qld/QCATA/2012/48.html

QCAT Decision
http://www.austlii.edu.au/au/cases/qld/QCATA/2012/133.html
QCAT Decision
http://www.austlii.edu.au/au/cases/qld/QCATA/2012/134.html