157

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Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 157

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Research Director
Legal Affairs and Community Safety Committee
Parliament House
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By Email: lacsc@parliament.qld.gov.au

Dear Sir/Madam

RE: SUBMISSIONS - BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2012

INTRODUCTION

We advise that we represent some 203 unit owners. These units are generally located on the Queensland Eastern seaboard, stretching from the Queensland/New South Wales border through to townships north of Cairns.

The majority of our clients were adversely affected by the introduction of the *Body Corporate and Community Management and Other Legislation Act 2011* ("*the 2011 Amendments*"). It is also worthy to note that a small proportion of client's were either not affected whatsoever or were in fact advantaged by the *2011 Amendments*, however felt so strongly that they joined together with these owners to seek that the previous adjustment orders be reinstated.

We provide these submissions on behalf of those owners, all of whom essentially support the abolishment of the reversion process introduced by the *2011 Amendments*, and the reinstatement of adjustment orders made by Judges, Adjudicators, and Specialist Adjudicators.

BACKGROUND

Prior to the introduction of the *2011 Amendments*, an owner had the ability to apply to a Specialist Adjudicator or QCAT seeking an adjustment of the contribution schedule lot entitlements (CSLE's) so that they were equal, except to the extent that it is just and equitable for them not to be equal. This was due to the fact that the original owner (the developer) could allocate the CSLE's without having to comply with any underlying principal, or provide an explanation or justification as to why the CSLE's were allocated in a particular manner. This often led to unfair and inequitable allocations of CSLEs'.

In some instances, units were allocated a higher CSLE simply due to the fact that they faced a particular direction, or had premium views, or abutted national parks or golf courses, or were simply located on higher level within a complex. In some instances, developers allocated a lower level of

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CSLE's for units that they, family, friends, or joint venture partners intended to retain after the development was complete.

The fact is that these differences when comparing one unit to the other make no difference to the consumption of body corporate expenses incurred by that unit.

It may well be that a larger apartment, or an apartment on a higher level consumes a higher level of those common body corporate expenses (i.e. - by way of window cleaning, external paint, or lift maintenance). This is precisely why adjustment orders were based on a thorough quantity surveyor report (and sometimes more than one) which identified and quantified the difference in consumption of each unit within a scheme, whether they be larger, on a higher level, or have access to extra facilities.

Therefore, the truth is that these matters (height, size, extra facilities) have been taken into account by the quantity surveyors, which were ultimately the basis of a considered decision by the Judge, Specialist Adjudicator, or QCAT Member.

The introduction of the *2011 Amendments* saw a process where one single owner would simply submit a motion seeking to revert to the pre-adjustment CSLE's, and the body corporate and/or the committee was bound change the CSLE's to the pre-adjustment levels (ie – as they were allocated by the developer). This was despite the fact that a Court, Tribunal or Specialist Adjudicator had determined that such an allocation of CSLE's was unjust and iniquitous. In other words, one single owner with no specific qualification or expertise could unilaterally overturn a well considered decision of a highly qualified Judge or Adjudicator.

It is of no surprise that the *2011 Amendments* were strongly criticised and opposed by many, in particular:

(a) The then Opposition (the Liberal National Party)
(b) The Queensland Law Society
(c) The Unit Owners Association of Queensland
(d) The Labour Governments own Scrutiny of Legislation Committee
(e) The Legal Fraternity in general.

Furthermore, many in the legal fraternity claimed that the *2011 Amendments* breached the *Legislative Standards Act 1992* and the fundamental legislative principals provided within such legislation. In particular, the fact that the *2011 Amendments* removed the right of a unit owner to have any standing whatsoever to be heard in any Court or Tribunal as to whether or not the allocation of the CSLE's within their particular scheme were allocated in a fair and equitable manner or otherwise.

It was therefore alleged that the 2011 amendments breached the Legislatives Standard Act for reason that it:

(a) Was inconsistent with the principals of natural justice; and
(b) The legislation adversely effected the rights and liberties of individuals retrospectively.

Our clients joined together to initially investigate the possibility of challenging the validity of the legislation and a proposed class action was conceived. Subsequently, we were delighted to see a change of Queensland Government, as the LNP had staunchly opposed the 2011 Amendments, and the then opposition Minister citing the legislation as "abominable".

We and those that we represent are now encouraged to see the Newman Government take the courageous initiative to correct this legislation, and see that valid orders provided by Judges, Specialist Adjudicators, and QCAT members stand, and cannot unilaterally be overturned by a single unit owner. Whilst it may not be the "popular" decision, it is the right one.

SUBMISSIONS

1. SUBMISSION IN SUPPORT OF THE BILL (IN PRINCIPAL)

The *Body Corporate and Community Management and other Legislation Amendment Bill 2012 ("the Bill")* rightly removes the reversion process instilled by the *2011 Amendments*, and provides a process to reinstate the adjustment orders made by Judges, Specialist Adjudicators, and QCAT Members. We and our clients commend the Government on the introduction of this Bill and strongly support the underlying principles within the legislation.

It is clear from the submissions already lodged in relation to *the Bill* that there are owners that object to the introduction of *the Bill.* The truth is that it is inevitable that any change in the CSLE's will disadvantage some unit owners, and in this case it is likely that there will be a larger proportion of unit owners that will be adversely affected by the introduction of *the Bill.* In any event, it is imperative to remember any persons disadvantaged by this change to the legislation, and subsequent adjustments to the CSLE's within their scheme, will only be disadvantaged to the extent that the CSLE's will be adjusted to a level that is fair and equitable for **ALL** owners, and as previously determined by a Judge, Specialist Adjudicator, or QCAT Member.

As previously stated above, there is no merit in the submission that an owner should pay more for the common expenses of a body corporate based simply on the units size, view, height, value, neighbours (or lack thereof), or the owner's bank balance. It is however appropriate that an owner should pay for the unit's proportionate consumption of the body corporate expenses. That is a fair and equitable measure, and which has been the basis of the adjustment orders previously made.

It was of course absurd that a single owner with no expertise or qualification could overturn a well considered adjustment order made by a Judge, Specialist Adjudicator, or QCAT Member. It is therefore appropriate that the "reversion process" be undone, and the last adjustment order be reinstated – as is proposed by this Bill.

2. AMENDMENT TO SECTION 376 AND 377

Prior to the introduction of the *2011 Amendments*, there were a number of schemes that had recently obtained an adjustment order, however the body corporate had not yet lodged a new CMS with DERM prior to 14 April 2011. As a consequence, these adjustment orders were deemed to be "*pre-commencement adjustment orders*", under *section 376,* and therefore they were deemed never to have been made.

Therefore, the reinstatement process contained in sub-division 2 of *the Bill* fails to capture and have any effect upon these valid court orders which were subsequently deemed not to have ever been made.

It is clear that the purposes of the provisions contained in the Bill are to ensure that the last adjustment orders are to be reinstated. However, these particular adjustment orders which were deemed never to have been made cannot be reinstated under the current drafting of *the Bill.*

In the circumstances, we submit that the Bill ought to be amended as to ensure that those adjustment orders that were not given effect as a result of *Section 376 and 377* in fact be given effect.

3. TIME FRAMES – REINSTATEMENT PROCESS

As previously stated herein, the introduction process to reinstate the *"Last Adjustment Orders"* is extremely welcome and appropriate. However, there is strong concern with the current drafting of the Bill that a body corporate committee that is not supportive of *the Bill* will have the ability to purposely incur substantial delays to the reinstatement of the last adjustment order. Therefore, we make the following submissions with respect to minor amendments within the Bill which will allow the reinstatement process to be expedited, whilst also affording reasonable time periods for all owners to make submissions and otherwise be heard throughout the process.

(i) Section 403(3)

We note that this provision provides that upon receipt of a request from an owner the committee must within 60 days identify the last adjustment order and give notice to each owner in the scheme. It is submitted that this is an extraordinary lengthy time period in which a committee has to do a rather simple task.

Accordingly, it is submitted that the timeframe of 60 days within this provision be reduced to a period of 30 days to avoid any unnecessary delay in the reinstatement process.

(ii) Section 403(4)

We note that this provision only engages a **"minimum"** timeframe relevant to the "submission period", however, there is not a maximum timeframe. We submit that a maximum timeframe (of say 45 days) should be provided to the "submission period" as to prevent a committee setting in an ordinate timeframe for submissions to be made, and thereby purposely delaying the reinstatement process.

(iii) Section 404(2)

It is noted that there is **no** timeframe applicable to the period in which a committee must decide what modification (if any) is required to be made to the last adjustment order after the submission period has expired. Again, as to avoid committees abusing this process, it is submitted that a maximum time period be applied, and it is in this respect we submit that the period of 14 days is a reasonable period in which a committee is to decide whether any modifications are required to be made to the last adjustment order.

(iv) Section 404(4)

It is noted that this provision allows a committee up to 90 days after making its decision to lodge a request to record a new CMS. Again, it is our opinion that this in an extraordinary lengthy time period which to undertake a relatively simple process.

It is in this respect that we submit that the time period of 90 days within this provision be reduced to a time period of 60 days as to avoid any unnecessary delays to the reinstatement process.

4. STANDING TO SEEK AN ADJUSTMENT

We note that there was strong criticism at the introduction of the *2011 Amendments*, particularly due to the fact that the new provisions created two (2) separate classes of unit owners. It was primarily the introduction of s*47B(2)(a)* that created this division, which only afforded owners within a scheme established after 14 April 2011 the right to apply to QCAT or a specialist adjudicator seeking an adjustment of the CSLE's, whilst owners within schemes established prior to that date have no such right.

Even after the implementation of these new amendments contained in *the Bill*, unit owners in schemes established prior to 14 April 2011 will continue to have no standing to apply to QCAT or a Specialist Adjudicator to seek an adjustment to the contribution lot entitlements.

These provisions are clearly discriminatory and require urgent attention.

Whilst it is noted that you stated within your Explanatory Speech that the government will now look at the broader issues around contribution schedule lot entitlements, the immediate repeal of the offending provision *{s47B(2)(a)}* is a simple process that will provide an immediate removal of the discriminatory affect of the legislation, and provide an equal standing for all unit owners within community titles schemes.

It is submitted that the broader issues relevant to CSLE's can continue to be evaluated and addressed in the future, however the removal of this discriminatory provision will at least provide a level playing field for all owners moving forward.

CONCLUSION

We again commend the government on taking the initiative to address the issues and affects caused by the "reversion process", and the particularly flawed process initiated by the introduction of the *2011 Amendments.*

We respectfully submit that the proposed amendments to *the Bill* as stated herein will further clarify and streamline the process to reinstate the previous adjustment or orders.

We thank you for your consideration of these matters and we will continue to follow this matter with great interest.

Yours faithfully,

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Principal
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