Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 179

16 October 2012

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

By Email & Post

Re: **Body Corporate and Community Management Bill 2012**

Honourable members of the Committee,

My wife Helen and I are owners and investors of apartments in the Gold Coast. We also reside in one of them as we spend time every year in the Gold Coast.
We are fully aware of the problems created by the 2011 amendment to the above Act and also of the additional problems existing in respect of the Management Rights there under.

Let us say at the outset that we are very much in favour of the proposed 2012 amendments to the Body Corporate and Community Management Act.

The 2011 amendments have created many problems, maybe some unintended, but nevertheless very undesirable

As a starting point we refer the honourable members to the recent (June 2012) decision of the Queensland Civil and Administrative Tribunal (QCAT) in its Appellate Jurisdiction **in (Mousa v Body Corporate for Q1 CTS 34498 and Anor [2012] QCATA 88 (1 June 2012**).
In that Judgment one can see the problems, confusion and difficulties which arose in the Community by the 2011 amendments.

In our opinion the following are some of the most serious problems of the 2011 amendments.

1. The changes were introduced **without any notice** or at least not adequate notice to the public and most of all not to those that were to be affected by them.
   In Introducing the Bill, in 2010, the then honourable member / minister responsible for its introduction stated that in Queensland there were at that time 39,000 such Strata Schemes. Not a small

number that was trapped by the amendments without having a say in respect thereof.

2 There was **no Community consultation**. The explanatory memorandum and the first and second reading speeches do not refer to any. Nor is there any reference to Consultation in respect of the proposed amendments.

3 There was no opportunity given to the people affected to have a say about the proposed changes

4 There is no evidence of any **research** done to justify the need for the changes nor was there any assessment shown of the consequences that would flow from the implementation of the proposed amendments.

5 The 2011 amendments are a most **undemocratic** piece of legislation. It allows just one lot owner to cause changes to the whole Scheme which would eventually affect the rights of all the other owners who had no say in the changes. It become a **legal battleground and a nightmare** for the thousands of the owners in all the other strata title schemes in Queensland.

6. It has been a very **expensive and stressful exercise** for most owners. The cost to innocent and unwilling owners not only directly but also through their body Corporate who had to be represented before the various courts and tribunals in relation to the changes was unbelievable. Please refer to the case of Dr. Mousa referred to above, in which the Body corporate of Q1 Tower was involved.
We understand it has costed many thousands of dollars.

7 It tried to destroy **the Principles of Democracy** in which the majority should rule and it took away the rights of the majority of owners to decide if they wanted the changes. It only required just any one of them. It introduced a system where it is not the majority who rules but it was the rule of one.
That is the introduction of a **Dictatorial** system in our Democratic society.

8. The costs to the body Corporate and all the owners in the titles scheme have been very substantial.

9. It has caused a chain reaction in the whole apartment blocks in the State in which the applications to change multiplied many fold and **flooded the Tribunals** including QCAT.

10. Apart from the substantial **cost to the State** it has created a legal nightmare and **Jurisdictional Uncertainty**.

11. It has **destroyed the principle of equality and fairness.**
    All owners that have the same rights to the common areas, the facilities and assets, irrespective of the height of their Units should pay the same levies and contributions. One should not expect the higher floors to subsidise the Lower floors.
    On the contrary most of the lower floors are leased and generate income for the Owners.

12. It has created **divisions and animosity** between residents and owners in all the high rise apartments.

13. It has tried to destroy the idea of **Community bond** and harmony and the purpose of the Act which governs the relationship between owners in a strata scheme. The very word Community is to keep the community bond strong and not to create divisions and class warfare.
    It should try Instead to retain and strengthen the bond in the Community.

14. It has introduced **socialist principles and class animosity** amongst residents. It has introduced the principle that those who reside in higher apartments must be rich and thus must subsidise the others in the lower floors. It applied the principle of soak the rich. Yet there is no evidence at all or proof that those who live in the higher apartments are rich.

    One has to read the explanatory note when the Bill was introduced by the honourable PJ Lawlor in 2010 together with the first and second reading speeches of the minister to understand the purpose of the changes. It was an attempt to create a forced re-distribution of wealth.

15. It **detracted the Body corporate committee** from its duties and required additional unproductive work to be performed by it instead of concentrating in the management and the business of the Q1 and other schemes.
    Q1 committee was forced to send notices to all the owners of about 530 apartments. It also had to engage Lawyers at the expense of all owners to represent it before the Adjudicator and QCAT.

16. Above all it has created **confusion and uncertainty** amongst the lot owners and more importantly amongst the **investors** upon whom so much depends for investing in residential property and whose contribution to the economy of Queensland has and continues to be very important.

17. It is a **denial of natural Justice. It** has destroyed the principle of equality and fairness.

We hope that the above submissions may assist the Committee to carry out its duty as assigned to it by the Parliament of Queensland.

Finally, we believe that the Body Corporate and Community Management Act requires further changes and in particular in relation to **Management Rights.**
We know that the justice Department earlier this year had called for submissions which closed on 3 May 2012.
We have made submissions to the Justice Department through our Melbourne Solicitors but to date we have not received any notification of what is happening with that review.

Just in case the Committee considers that review to be relevant to the present inquiry and it may be of assistance, we attach a copy of our submissions which were lodged on 3 May 2012.

Yours faithfully

Leo & Helen Dimos

DIMOS lawyers
since 1967

Our Ref: LD:rdb
Your Ref:

3 May 2012

Management Rights Review
Office of Regulatory Policy
Department of Justice and Attorney-General
Locked Bag 180
CITY EAST QLD 4002

Dear Sirs

RE: MANAGEMENT RIGHTS REVIEW
SUBMISSIONS BY DIMOS LAWYERS

We make the following Submissions and Proposals in relation to the Department's review on Management Rights in Community Title Schemes:

A. <u>The Current Position in Queensland In Relation to Apartments and Units (hereinafter referred to as Apartment) is as follows:</u>

1. From our own investigation and observations the existing system operates under the <u>BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997</u> and the various Modules thereunder.

2. It is grossly unfair and disadvantageous for the Apartment and unit Owners. It is open to exploitation and abuse and creates continuously financial and other problems to the Owners/purchasers and occupiers, of units and Apartments in Queensland. Statistics will show that those people represent a substantial proportion of the population.

   It is an injustice to the people of Queensland. It damages the reputation and the economy of the State,

2. Although we have very good and fair Laws (both State and Federal) throughout our Country for the protection of Consumers, in this instance it seems we have either forgotten or abandoned the people who are suffering under the existing system of Apartment management. It seems the majority of owners are over 40, and of which a large proportion are elderly. Those persons are in urgent need of protection and assistance and they rely on the State for same. They feel forgotten abandoned and exploited.

   It is an injustice to the people of Queensland. In comparison with the other two (2) main States of NEW SOUTH WALES and VICTORIA we are, in this respect, far behind.

3. To put it simply, the system has been grossly abused, it does not work and something must be done about it. It is in urgent need of change.

4. Until recently Queensland was for many a reason not least of which was its excellent whether, a magnet, which attracted a large proportion of interstate elderly who decided to move in and call Queensland Home. Its economy flourished.

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But those people and also other Queenslanders feel abandoned and exploited. They now look to the State for solutions assistance.

5. In particular, the existing system over which there is no Control, allows the Developers of Units and Apartments particularly in Multi-Storey Residential Buildings, to:

   (a) Sell the **Management and Letting** rights of the whole complex very early when only very few apartments have been sold (which gives them control of any voting), at exorbitant goodwill prices.

   (b) It also allows them to set the fees chargeable to the owners very high.

   (c) The Contracts are for very Long terms with numerous long Options for both the Caretaking Manager and Letting Agent

   (d) They do not provide for any review of the fees payable to the Caretaker/manager and Letting Agent.

   (e) They provide only for Increases of fees mostly on an annual basis but there is not any reduction to take into account changing market conditions. An example is the current situation since the GFC which would have resulted in a substantial reduction.

   (f) It does not take into account that this is not a dealing between equals but it assumes it is. This is wrong.

   (g) Such sales and long term contracts are usually to the developer's own subsidiaries and related entities.

6. There is no prohibition which prevents the same person or entity from acting both as Caretaker/manager and as a Letting Agent. In other words, it allows the same person or entity to be constantly in a conflict of int**erest** situation when acting in that dual capacity, to the detriment of the Owners.

7. That way and at the same time the developers bind in the same Contract, all owners current and future for very long time with exorbitant annual fees that have no relationship to market or fair values.

8. Talking about long term contracts, we are aware of a Caretaking and Letting Contract for thirty (30) years in duration with options, although we believe there are also others of substantially long periods**. It is almost a lifetime for some owners.**

9. The system which permits the Developer to sell both the Caretaking/Management rights and Letting Agent rights, is unfair and deprives the Owners and Purchasers of the right to appoint their own managers/caretakers and letting Agent for shorter period and for appropriate fees which would help them to offset the substantial costs of maintaining the Building, and the high and unjustifiable fees they have to pay the caretaker.

10. As for the Contracts themselves which are prepared by and for the benefit of the Developer, since there is no restriction on same, they are very unfair complex and misleading, usually one way and in favour of the Caretaker Manager and Letting Agent.

11. There are no Pro Forma Contracts or at least a set of clauses which are required to be included in the contracts for Caretaking and Letting Agents. Although we do have Federally and in all states including Queensland, set requirements for consumer contracts like the Buying and selling Land, Agencies in Real Estate and in many other instances and consumer Contracts, there is nothing to regulate the situations regarding the appointment of Caretakers Mangers and Letting Agents.

There are even set rules for incorporating a club or other Associations. See the Associations Incorporation Act and Rules of all States including Queensland.

12. The owners/purchasers of Apartments have no right to decide if they Consent to any Assignment of the above agreements. Such right should be reserved only for the Owners themselves at a General or Special meeting (and not for the Committee of the Body Corporate) and even with a reasonably high (say 75%) majority.

13. The Owners should be given adequate time to hold a meeting, either annual or special, to consider if they would consent or reject any proposed assignment. For that purpose, the time should be between 45-60 days. Any less time is not sufficient to permit the necessary investigations to be carried out in relation to any new assignee. Even the current legislation which gives only 21 days to consent to such assignment and transfer is totally insufficient. Even under the current legislation where the Committee may consent to such Assignment they are not given enough time to investigate the proposed assignee nor call a Special meeting of the members to approve such an assignment.

    Such a short time is totally inadequate.

14. Since the owners were not given the right at the start when the appointment was made by the Developer, to choose the caretaker and letting Agent at least they deserve the right to decide who may take over by assignment the Caretaking/management and letting of the apartments in their building.

B. **<u>The consequences of such a system in more detail are as follows:-</u>**

1. The Purchasers have no say in the appointment of the Caretaker/Manager and Letting Agent, since such appointment is made well before all the apartments are sold.

2. After the above contracts are signed, all current (if any) and future buyers have lost all their rights. They have no right to either reject or in any way try to vary or re-negotiate such contracts. This is an unfair deprivation of one's legal and moral rights. It is also very unfair.

3. Since there is no restriction on the caretaker's fees, buyers are stuck with Millions of dollars in payments of fees over which they did not have nor can they thereafter have any say.

4. That distorts the actual price paid/payable for each apartment and affects their value. That restricts also the free sale of the apartments because of their duration of the management contracts and the high fees charged to the manager.

5. Since there is no restriction on the time limit for such contracts, some contracts have an extremely long duration and sometimes go for a period of up to thirty years (30) or maybe even more.

6. Those contracts are designed in such a way by the use of options periods in the contracts so as to give the Caretaker/Manager the right to walk away from the contract at the end of each option period which is usually of between three (3) to five (5) years, without giving a corresponding right to the owner/Purchasers who are thus stuck with the same manager or his assignee for up to say thirty (30) years and in some cases even more.

7. There is no standard form of contract like it is in many other situations, i.e. sale of land, engagement of Agents Solicitors and many other consumer contracts.

8. Without any Restrictions on the fees and charges that the Management and Letting Agents can charge the apartment owner.

9. There is no way or any avenue available to the owners to obtain any form of relief.

It is the working class, the Youth who start life now and the elderly who suffer the most from such a system.

C. <u>We submit that the existing system has the following disadvantages:</u>

1. Discourages investment in residential property and in particular Apartments Units and Flats.

2. Results in lack of available properties for renting, thereby causing rentals to increase disproportionately and is unfair to the renting public, most of whom are elderly and young families.

3. Results in loss of income to the Government and thus restrains its capacity to meet needs of infrastructure and other programs targets.

4. Deprives Renters of Apartments Units and Flats (which are now been rented extensively by Young families and retirees, from the opportunity to rent same. because they are expensive.

5. The additional fees and costs which the Caretakers and Mangers are charging the owners are been pasted on to the tenants who are already struggling to pay.

6. It deprives Owners of Units and flats of the right to manage and control their own property and in practice have no say as to how their assets are run and managed.

7. Most of those owners would prefer to run and manage their own property. However, they are stuck with Caretaking and Letting agreements for a long time. They are trapped in a vicious circle with no way out. Even if some of them wanted to avoid such Agreements in the absence of any Legislative assistance they have no hope in the World to fight the Caretaker and Letting Agents who have an unlimited source of funds.

8. There must be a time limit even in Contracts that have been entered into much earlier in time. A fair time is in our submission not over ten (10) years for contracts that have been entered into before 2000 and less for the ones thereafter. The unit/flat owners should have the right to cancel any existing contract by a simple majority vote on say six (6) months' notice to the caretaker.

9. Since there is only a handful of Caretakers and managers in Queensland, the owners have nowhere to turn. We do not advocate a price control on them but only the right for the owners to cancel the unfair and extremely long contracts.

10. It is unfair and discouraging to the Unit owners both current and prospective, most of whom have and would like to continue investing in Queensland. Most of them are retirees and ordinary people. Others are from other States, who wish to sell their Assets in their home state and to call Queensland HOME. In most cases, they use their only asset mainly Superannuation or their small savings to do that.

11. Caretaking and Management Agreements are Legal Multipage Documents (usually 30 or more pages) which are even for Lawyers difficult to understand. Very few of them could possibly understand the legal jargon and the small prints contained in them.

12. We now leave in a period where the Governments are taking an extensive interest in the protection of the Consumer, and in fact pass regularly laws for their benefit and protection. Both Federal and State Governments are becoming more and more sensitive to the protection of the Consumers and have recently passed laws and regulations for their protection.

13. It is not possible for the Apartment owners to take legal action under Common Law or other forms of Legislation (if any) to vary any existing contracts because of the large financial recourses required to contest any such action. They need the assistance of the State.

Strata Titles Schemes is a system which should be moving and develop with the times and the needs of the People.

14. As things stand now existing caretaking and letting contracts change hands for multimillion dollars. Some are assigned and others change hands by various complex and complicated means. Yet the owners who are the subject of those contracts have no saying in such process. They are powerless to act or stop it. They have no say in it under the present legislative structure. Strata Title Schemes is a progressive and developing system. It must therefore change and improve with the times and the needs of the community.

15. Even some clauses in the legislation relating to Assignments of such contracts are weighted heavily in favour of the Developers and the Managers and letting Agents.

D In Summary therefore the current system is:

(a) Very unfair and unjust.

(b) It deprives the owners of their right to manage and control their property.

(c) It costs them distress and financial pain.

(d) They have to pay high fees to the Caretakers/managers of their property. Most of such fees have no relationship to the market in that they are set well above market to start off with. They are always going up no matter what. They should be subject to review always at least every two (2) to three (3) years.

(e) These agreements provide no relief or any means of review of the fees payable but they have only one way reviews, mainly up.

(f) The management and payment of fees are to people over whose appointment they had no say, and over whom they subsequently have no control.

(g) It devalues properties and makes Apartments and Units in Queensland difficult to sell. A classical example is the current situation. When times are difficult as now Queensland suffers the most in comparison with other states. We would say that one of the reasons is the existing system of apartment management.

(h) It makes the rental payable for leasing such apartments very high. This is a detriment to the people that can only afford to rent and not to buy their own property. They are in the many millions. These people need help.

E. <u>OUR OWN SUBMISSIONS AND PROPOSALS:</u>

By reason of the above, we respectfully put forward the following proposals for your consideration and approval:

1. We respectfully submit that any such change as suggested below may best be achieved with the appropriate and clear Legislative Change as may be necessary to achieve the desired results.

No entry should be permitted into any Contract or other form of binding agreement relating to the appointment of cateratake/manager and letting Agent whilst the developer owns and or controls either directly or indirectly more than 20% of the Apartments and units in the Scheme**.**

Such a change should prohibit the entry into Catering/Management and Letting Agreements until minimum of, or 80% of all apartments in the development have been sold.

2. Such Appointments to require 75% majority of all new apartment owners excluding related parties and Corporations of the developer.

Upon such sale taking place all Caretaking/management and Letting agreements must be approved either by all owners or at least by 75% of them at a Special General Meeting held specifically for the purpose of approving the contracts.

3. Limit the period of the above contracts to not over five (5) years.

Provide that all Caretaking, Management and Letting Agreements, and or any other Agreements and or Contracts which have the effect of binding the Apartment owners or the Body Corporate, should not exceed in time a total of more than five (5) years, inclusive of any and all options, which would have the effect of binding the owners for any period exceeding in total five (5) years.

4. Contracts and Agreements over Five (5) years to be declared void & unenforceable

Declare void and of no effect any contract or other agreement or arrangement which has the effect of making such contracts for any period longer than five (5 years.

5. Separate the Caretaker/Manager from the Letting Agent.

The Caretaking and Managing entity must not be the same as the Letting Agent nor a related entity as defined in the Corporations Act of the developer nor of the Caretaker manager. The letting Agent must be a totally independent entity, and separate from each other.

The Catering/Management and Letting contracts must not be awarded to the same person or corporation or related entity as defined in the Corporations Law. It must be a different and Independent person or legal entity for each of those two.

Better still and to be fair prohibit the Developer from appointing the Letting Agent.

The purpose of this proposition is:

(a) To avoid conflicts of interest which now arise constantly between the caretaker/manager and the letting Agent?

(b) To enhance the interests of the owners and the proper and efficient running of their Buildings.

(c) To give the owners the right and opportunity to choose their own Letting agent by a process of tender.

(d) To provide income for the owners to meet the costs of running and maintaining their building. In these difficult times any extra income would be a most welcome help to them.

(e) There is no doubt the owners prefer to manage and organise the letting of their own properties even through the appointment of a resident or external letting Agent of their own choosing.

(f) To stop the same entity from having an overall control of the whole Building and Development to the exclusion of the Owners.

6. Allow Standard Clauses /conditions in all such Contracts.

Provide certain standard clauses to be included in the Caretaking managing and letting Contracts whose effect should be to achieve the Submissions herein. Provide also for other clauses to be excluded**.**

At the moment we have numerous examples of such cluses required to be in included in various contracts like sale/purchase of real estate, hire purchase, consumer contracts and many other contracts in order to provide fairness and prevent exploitation of people in similar situations.

7. Provide for licensing requirements of Caretakers, Managers and Letting Agents in the title schemes.

A system of licensing all the above persons/entities should be introduced and come into existence very quickly**.** Special rules should be introduced for both of them and with standard clauses.

A system of Audit, Reporting and codes of conduct to be introduced**.**

8. Protect the owners /members of the Body Corporate by legislation.

The entry into, assignment, transfer, amendment or any variation of the above Contracts must be approved by the apartment owners themselves at a Special General Meeting convened for that purpose, with not less than 75% majority.

9. Prohibitions and restriction upon the powers of the management Committee.

(a) The Committee of the Body Corporate shall be prohibited and not have the right or power to approve or sign, under any circumstances, the entry into by it, nor the signing of any Caretaking Management Agreements nor any Assignment or transfer thereof without first obtaining the approval of at least seventy Five (75%) of the Owners of all the Apartments in the Scheme. The Committee should be able to recommend to the members approval only after due consideration and investigation, which should be its obligation to carry out.

Unfortunately the signing of Assignments is happening now to the great disadvantage of the owners. In fact, by signing an assignment the Committee is giving away the rights of the owners .It is a disaster.

(b) Nor should the Committee have the right to forgive any breaches of such contracts without the owners' approval by a special resolution.

(c) The power or right of the Body Corporate Committee to apply for and sign such documents on the grounds of emergency situations (as is happening now) should be taken away from the Committee and reserved for the members only.

The recommendations in this Paragraph must be enshrined in legislation as a restricted issue and should require a unanimous approval by all owners to be overturned at a special general meeting held specifically for such a purpose.

It is necessary for this protection for the owners to be enshrined in legislation.

10. Time to be given to owners for approval to assignment and transfer.

The owners must be given at least 45-60 days to approve any transfer, assignment or variation, of any of the agreements and Contracts referred to in the preceeding clause. At present, the Committee is given only 21 day as is presently provided in the legislation. There

is not sufficient time for the meeting to be called and or for the proper investigation to be made of the proposed transferee Assignee of the contract.

11. All management and catering contracts must not exceed five (5) years inclusive of any options.

(a) Any New contracts entered into after the proposed changes for any period of longer than a five (5) years should be invalid *void ab initio* unenforceable and of no effect. This should be so without any further procedures and hearings. The owners should not have to be dragged into hearings or subjected to any further expenses to prove their rights.

(b) This would stop the threats/exposure of the owners to extensive legal and other fees and costs including the threats of large amounts of damages. The owners do not have the Thousands and even Millions of Dollars at their disposal to fight such legal Actions by caretakers/managers and agents who have at their disposal large sums of money.

(c) The current situation is most unequal and unfair.

12. All existing contracts entered into before the new Legislation deemed to be only for five (5) years.

(a) Any existing catering contracts irrespective of when they were entered into, which are for a period of longer than five (5) years (inclusive of any and all Options) from the date the new rules come into force, must expire and be no longer valid nor enforceable at the expiration of five (5) years for the time the time the new Rules start.

(b) As an alternative to the above at least the members of the body corporate should be given the right to vote at any time and by simple majority that any contract of more than five (5) years to automatically expire within five (5) years from the date of the vote by the members.

That of course would not prevent the entry into a new contract for a period not exceeding five (5) years with the same Caretaker/Manager. That would depend on Price and how satisfied the owners are with the Caretaker.

13. Restrict all New and existing Letting agreements irrespective of when signed or entered into to a period not exceeding two (2) to three (3) years maximum inclusive of all Options.

Since at the moment most contracts are combined into one Caretaking/Management and Letting Agreement instead of being separate and independent of each other they are only for the benefit of the Developers. Such system should no longer be allowed and in any case letting Contracts should not be any longer (with all options) than three (3) years at a time.

Further, in future all Letting Agreements should be subject to and operate only under the provisions of the PROPERTY AGENTS AND MOTOR DEALERS ACT.

14. Assistance to the owners.

Financial assistance should be provided to the owners if they want to challenge or defend their rights. In this respect please refer to the NSW Strata Legislation for your assistance which has such a provision. No apartment owner or Group of owners have the Financial means or capacity to fight any Developer most of whom have almost unlimited capacity and finance.

Therefore even if they are given by legislation the right to contest any existing contract on any ground including on the basis that same is unfair. Misleading oppressive and unjust, they will not be able to exercise such a right for the reasons stated above.

Yours faithfully
DIMOS LAWYERS

Per:

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Principal

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