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Migration Services

Contact: John McDonald
Solicitor: John McDonald
Direct Line: 07 5584 0538
Email: theresas@robs.com.au
Direct Fax No: 07 55381206

Our Ref: JMcD:TS:310454
Your Ref:

Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 195

18 October 2012

Mr. Ray Hopper MP
Chairman
Legal Affairs & Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: lacsc@parliament.qld.gov.au

Dear Sir

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

The writer's response to the above is incorporated in this letter.

Before getting down to the details, I believe the Attorney General and whoever else responsible deserve credit for having the amendments so promptly introduced into Parliament particularly in view of the priorities that must exist due to the general state of finances of Queensland.

I have been able to view the response of the Unit Owners Association Queensland to the above amendments and agree with their submission except for the change that a CMS is no longer required to be attached to a Unit Contract. I will refer to this in detail later in this letter.

We are already seeing people trying to claim credit for the 2012 amendments. Before the 2011 amendments, many experienced practitioners made substantial input to the deliberations without payment and without any need to ask for financial contributions from others to seek an opinion.

I would suggest that many of those submissions turned out to be 2011 amendments should be revisited as I believe quite a number were opposed to those amendments. A list of some of those who made submissions are:

1. Unit Owners Association of Queensland
2. SCA (formerly CTIQ)
3. The Queensland Law Society
4. The Australian College of Community Association Lawyers Inc
5. Association of Residence of Queensland Retirement Villages
6. Leary & Partners, Quantity Surveyors who wrote many reports
7. The Honourable Jan Stuckey lodged a detailed submission and recommended 27 amendments to the 2011 Legislation none of which were accepted.
8. The Security Legislation Committee of Parliament

All of the above were included in the scrutiny of Legislation Committees Report Number 1 of 2011.

I also made submissions directly to the previous Minister commending his courage and recommend that he scrap the whole thing and start again.

In the submission made by the writer on behalf of Mr. & Mrs. Brodie in the *Contessa Condominiums matters number 0294 – 2012* where the adjudicator found that the Order made by the District Court number 383 of 2001 on 14 September 2001 was not "an Adjustment Order" in the meaning of section 378 of the Act. As a consequence that Order may not be pursuant to section 379 be adjusted to reflect the "Preadjustment Order Entitlements". That decision was made on the basis that the Judge ruled that words be removed from the Order that was provided by the parties and he insisted on the words "upon hearing" being removed.

In other grounds in the submission, I stated the following:

The Parliament of the State of Queensland has the power to make laws "for the peace welfare and good government of the colony in all case whatsoever." *((Qld) Constitution Act 1867* section 2. *(Qld) Constitution of Queensland 2001* section 8.)

The amendments to the *Body Corporate and Community Titles Act* that came into force in April 2011 breach the fundamental legislative principles contained in the *Legislative Standards Act 1992.* According to section 23(1)(s) of the *Legislative Standards Act* an explanatory memorandum is required to include in clear and precise language: - a brief assessment of the consistency of the Bill with fundamental legislative principles " and, if it is inconsistent with fundamental legislative principles, the reason for the inconsistency. The explanatory notes to the Body Corporate and Community Management and Other Legislation Amendment Bill of 2010 on page 4 discusses section 4(2)(a) of the *Legislative Standards Act.*

As well I mentioned that the scrutiny of the Legislation Committee of the 53rd Parliament dealt with *Body Corporate and Community Management Act* and other Legislation Amendment Bill of 2010.

The 2011 *BCCM Act* adversely affected the rights and liberties of individuals retrospectively. Before the 2011 Act, Section 48 (5) of the 1997 *BCCM Act* provided as follows:

"For the contribution schedule, the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal." *The Legislative Standard Act 1992* states: - "(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation –

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
(b) is consistent with principles of natural justice; and
(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
(f) provides appropriate protection against self-incrimination; and
(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceedings or prosecution without adequate justification;
(i) provides for the compulsory acquisition of property only with fair compensation; and
(j) has sufficient regard to Aboriginal tradition and Island custom; and
(k) is unambiguous and drafted in a sufficiently clear and precise way"

The adjustments were made on a "just and equitable" basis and to reverse this is offensive to the Queensland Constitution and the Legislative Standard Act.

In *Burnitt Investments Pty Ltd v Body Corporate for St. Andrews Community Titles Scheme 20508* (2002) QDC6 Brabazon QCDCJ said:

"Just and equitable are words of the widest significance and do not limit the jurisdiction of the court. It is a question of fact. Each case must depend upon its own circumstances".

This decision was made before the changes to the 1997 *BCCM Act* which inserted the criteria to which a court or specialist adjudicator may have regard.

The definitive case was the matter of *Fisher v Body Corporate for Centrepoint Community Titles Scheme 7799* (2004) QCA214. Here the Court of Appeal held that the Act is intended to produce a contribution lot entitlements schedule which divides Body Corporate expenses equally except to the extent that the apartments disproportionately give rise to those expenses, or disproportionately consume services.

In this case Chesterman J said:

"*Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except in so far as some apartments can be shown to give rise to particular costs to the Body Corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a Body Corporate to the respective apartments, or their contribution to the costs incurred by the Body Corporate. More general considerations of amenity, value or history are to be disregarded. What is at issue is the "equitable" distribution of the costs*".

To have the capacity to reverse contribution entitlements from entitlements that have been determined as "just and equitable" to any other position must logically lead to the conclusion that the reversal of contribution entitlements that were "just and equitable" must be that they are not "just and equitable".

The Acts Interpretation Act 1954 is to be used if the wording of an Act is not clear as to the meaning. On page 21 of the explanatory notes to the 2011 amendments, the note says "Lot Owners submitting the motion must have been an owner of the lot at the time the Adjustment Order was given effect and, as a result of the Adjustment Order, the proportion of share of contribution schedule lot entitlements for the lot increased".

In an opinion given by the Honourable HT Gibbs as he was and later as Sir Harry Talbot Gibbs the Chief Justice of the High Court of Australia dated 8 March 1954, he stated as follows:

"It may be said at the outset that section 24 AB(3), the subsection with this opinion is mainly concerned, presents very grave difficulties of interpretation.

In fact it contains so many ambiguities that it is almost impossible to construe it and it is impossible to give a really confident opinion about its operation until it has been authoritatively construed by the courts."

Later in a Judgment handed down by the High Court of Australia on 16 November 1983 reference *Deming* Number 456 Pty Ltd and others and the Brisbane Unit Development Corporation Pty Ltd Sir Harry stated as follows:

"It would have been apparent from the nature of this discussion of the questions involved that section 49 creates considerable difficulties of construction and is likely to lead in some cases to inconvenience or injustice. The remedy however lies in the hands of the Legislator".

In the case of *Body Corporate Palm Springs Residence CTS 29467 v JP Paterson Holdings Pty Ltd [2008) QDC* in an appeal to the District Court, Judge McGill DCJ in paragraph 21 of his Judgment referring to part of section 40 of the Act states "I have no idea what the provision means if anything." In a comment to that comment he states this regulation is as incomprehensible as it is over prescriptive.

The matter of ambiguity of statutes was referred to in detail by Mr. KD Dorney QC in delivering his findings in the matter *McKinnon and others the Body Corporate Northbridge CTS 25815 [2008] CCTKL007-8* particularly at page 7 of this Judgment.

There seems to have been major confusion amongst lawyers even experienced practitioners as to the meaning of that section of the *BCCM Act* (section 378). Therefore I consider it reasonable that the Act be amended for clarity.

Another reason the Act requires amendment is to reverse reversals which to the writer seem to have been incorrectly decided. I have looked at a number of these with a view to lodging appeals but it was not possible to appeal and it would appear that the wrong decision was made because the wrong material was put before the adjudicator, QCAT member and or court. There is great difficulty in introducing new material in an appeal. The court generally leaves it to the parties to decide what the matters are that are to be determined.

In recently reading the findings in an English Court of Appeal case, *Hurstanger Limited v Wilson and another [2007]* All ER at page 1118 in allowing an appeal in which virtually new material was introduced in their findings, the Judges made the following comment in the matter:

"Finally I should like to play tribute to the recorder's judgment in this case. It is a model of clarity and deals comprehensively with the various complicated issues he had to decide. He cannot be criticised for the conclusion he reached about secret commissions since on the way the case was argued before him I think he reached the wrong conclusion."

This is my point that wrong decisions were made because the wrong material was placed before the court or tribunal.

The current amendments negating the law section 378 problem will only have the following effect:

(a) 15,000 units are affected
(b) 6,000 units will have levies reduced
(c) 3,000 units in middle floors will not be affected.

(d) 6,000 on lower floors will now be required to pay a just and equitable levy contribution

I have read material being circulated separately by George Friend and Phil Williams. It would appear to me that this material is completely fallacious and gives a very wrong picture of what the position really is.

The search carried out by the Supreme Court Library was unable to locate any commentary or cases in relation to section 4 (2) (i) of the Legislative Standards Act 1992. To be able to reverse a decision that determined contribution entitlements is being "just and equitable" to any other position must logically lead to the conclusion that the reversal is not just and equitable.

In conclusion on this point, the amendments in relation to contribution entitlements should be carried out as in my opinion, section 378 and 379 are unconstitutional and therefore invalid. I believe the 2012 amendments are very clear and attributed to the ability of those drafting same so that the confusions can be finally put to rest.

SUBMISSION RELATING TO PROPOSED CHANGE BY WHICH THE ATTACHMENT OF THE CMS TO THE CONTRACT IS NO LONGER REQUIRED

This part of the proposal has been discussed with several of senior lawyers in this office. The requirement of the attachment of a CMS is one of the few recent changes that has merit. Particularly in relation to the other Disclosure Statements etc. The CMS should be retained.

The principal merit is that the standard contract does not provide for the nature of the property to be described eg. home unit - 2 car spaces, 2 storage spaces, etc. Because of this the buyer does not know what he is contracting to buy (as opposed to the property he has seen) until searches are carried out.

If for example a unit is shown with two car spaces and the CMS only gives one to the buyer, then the buyer is out in the cold.

When the first Building Units Act came into force, contracts use to state what was being bought by setting out for example - lot 200 on BUP 72 together with the right of exclusive use of car space number N.

Before the 1980 Act came into being, the then Attorney General, Honourable Bill Lickiss had a full day seminar at the Gold Coast to discuss the proposed 1980 alterations. One of them was that units could not be sold unless the building was completed and the plan registered. This was because nothing was disclosed in the contract and this was the period when developers were putting management agreements in place without any knowledge of the buyers and the buyers found themselves saddled with a manager and the expensive fees that go with that.

This would have been an instant collapse of unit building particularly on the Gold Coast. At that stage there were little activity in Brisbane and lawyers seem to have no interest in participating in that seminar.

It was my submission that if all matters were disclosed that should solve the problem. This was agreed to and was the start of the contracts providing all information to the buyer. The current contract approved by the REIQ and Queensland Law Society offer no protection whatever to the buyer.

I notice that it has been stated that it is expensive and takes a lot of pages with some CMS's to be attached.

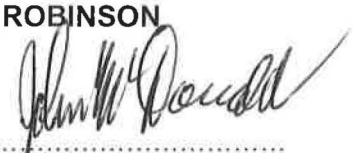
My personal preference would be that all contracts are prepared by solicitors. Most contracts prepared by agents are deficient. I noticed that they are complaining about the costs of photo copying pages of a contract.

The commission charged by agents have not been altered in any way to take into account the inflated prices now paid for property. The other reason I think everything should be disclosed is the reluctance of buyers to pay the costs to have their conveyancing done properly in particular by having a full search of the body corporate records.

BRIEF PROFILE OF JOHN WILLIAM MCDONALD

1. Solicitor of Supreme Court of Queensland and High Court of Australia. Admitted to practice on 13 April 1965.
2. I have practised continually at Surfers Paradise on the Gold Coast since September 1965. The original "*Building Units Act 1965* became operative from 1 July 1965.
3. Notary Public sworn 26 February 1991
4. Law Society approved Arbitrator graded November 1997
5. Elected Fellow of the Australian College of Community Association Lawyers Incorporated 2006.
6. I acted extensively in field of the *Body Corporate and Community Management Act* since inception of the original Act in 1965.
7. Author of the first Management Rights Agreement in Queensland.
8. Author of the Scheme\Arrangement for the individual investment of deposits for "off the plan" unit sales which facilitated the extraordinary growth of the Gold Coast in the early 1980's.
9. Author of the original Project Marketing Agreement for the sale of unit developments.
10. Most recent adjudications involved in advising owners in Contessa Condominiums [2012] QBCCMCmr 288 and Bayview Shores [2012] QBCCMCmr 64 (two of the only three cases that successfully resisted readjustment of the contribution entitlements.
11. Over a number of years providing free legal advice to the Gold Coast Unit Owners Alliance and hotline which was conducted for a number of years by the late Mr. Colin Lamont.
12. First involvement in levy contribution disputes in the late 60's when Peter Connolly QC gave an opinion that a different rate of levies could be charged to the shops on the ground floor of the Paradise Towers. Under the original Act the levies were simply by dividing up all costs amongst the units in proportion to their entitlement. I successfully opposed this opinion and the quite simple provisions of the Building Units Act 1965 prevails.
13. The personal appointee of the Honourable RE Borbidge to a number of committees reviewing various aspects of Body Corporate Law during his tenure as Premier of Queensland.

Yours faithfully
ROBINSON & ROBINSON



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JOHN WILLIAM McDONALD
SOLICITOR