Body Corporate & Community Management & Other Legislation Amendment Bill 2012
Submission 207

The Research Director,
Legal Affairs and Community Safety Committee,
Parliament House,
George Street, BRISBANE QLD 4000

Re: Body Corporate and Community Management and Other legislation Amendment Bill 2012.

Dear Sir / Madam,

I write in support of the above legislation introduced into the Queensland Parliament on Friday, September 14, 2012.

Accordingly, I submit for your Committee's scrutiny my submission. It draws on a number of documents, and the views of respected like minded persons. As an owner affected by the previous Government's April 2011 amendments to the BCCMA, they articulate and represent my position.

What the April 2011 amendments did, was to reinstate the abuses of an era when **Developers** calculated Lot Entitlements to suit their **commercial interests**. An era of rorts enabled by lack of regulation and encouraged by profit motivation.

Prior to the 1997 legislation, developers set a CSLE without regard to the actual cost impact on a building, in terms of maintenance and resource usage and without regard to the abiding principle of fairness. In other words the principle**…."that it be just and equitable for lot entitlements to be equal, except to the extent where it is just and equitable for them not to be equal".**

THE EQUALITY PRINCIPLE.
This was ignored and subsequently some owners were unfairly affected, in that they were required to pay more in Body Corporate fees that bore no relationship to the financial impact on a building. Maintenance, use of resources, all the items that collectively determine the cost of running a complex were not taken into

account.
Simply because of a jig-saw profit type calculation of Lot entitlements---set by the Developer.

These were done in a variety of ways.
In many cases they were based on the **dollar value** of the apartment, taking into account the appearance of, or the view overlooked by the apartment. A method known as “The Relativity Principle”. (This type of calculation prior to 1997 is referred to in the April 2011 Amendments and is still valid).

The over-riding aim was to ensure a quick sale of product, in order to pay down the developer’s bank facility, make a profit and move on to the next project. All sorts of deals were done. Apartments the developer chose to live in, or sell to his mates, would be apportioned a low Lot entitlement, leaving some owners to pick up the short fall in order to run the building at a safe and acceptable functional standard.

All without any reporting requirement to validate the CMS to a statutory authority.

This rort and abuse of privilege was stamped out by the 1997 BCCM legislation. And in case the developer still got it wrong, the Act had appeal provisions to allow owners to make the necessary changes in the future.

The difference between the **Equality Principle** and the **Relativity Principle,** is that the latter primarily takes into account the dollar value of the apartment. Or in other words, by using the Relativity Principle, a lot owner pays maintenance not by equal and equitable share, but effectively by a tax on the value of the apartment.

There is nothing in the legislation to guide the developer as how to "value" the apartment. Nor is there anything in the legislation to consider ongoing and changing values. **This "Relativity**

Principle" is unfair and undesirable. It needs to be thrown out.

The **Equality Principle** relies on actual measurements of every item required to construct a building and therein to maintain that building at a safe and acceptable standard. It also relies on an equal sharing of common areas and facilities. eg.Swimming pools, gymnasium, spa, gardens, lawns, walkways etc.
The sharing of Management fees, Body Corporate Secretarial services.

For example water usage and external painting. Apartments with larger external surfaces, or multiple bathrooms-bedrooms, bigger units, commonly referred to as penthouses, pay proportionally more, based on higher Lot entitlements. **This is fair and equitable**. The calculation of these various amounts were calculated by experts in this area of work and presented to the Court or Specialist Adjudicator for approval to comply with the 1997 BCCM legislation. This type of calculation is referred to in the April 2011 amendment as the Equality Principle and is still valid.

The 1997 legislation also provided a right to appeal for owners. A legal mechanism whereby an owner who felt badly done by, could engage an independent specialist adjudicator or expert (quantity surveyor) to examine a CSLE and make recommendations to a Court, consistent with the Equality Principle.

Parties of both political persuasions agreed that the 1997 legislation was fair and provided the best model to ensure good governance of the complex area of Community Strata Title living.

Many owners exercised their right to appeal and CSLE’s were changed to achieve a fair distribution of costs. In some cases a Court ordered an adjustment of Lot entitlements. In other cases the Court merely ordered that the calculations of an independent arbiter take **effect,** while in a very small number of cases, Body Corporates simply agreed amongst themselves to change the

CMS. **Either way the umpire's decision was accepted.**

The change in CMS's disadvantaged some owners, in that it meant they would have to pay more in B.C. fees. In every case a **proportionate** increase and in most cases a relatively **modes**t increase.
These opponents to the Body Corporate and Community Management and Other legislation Amendment Bill 2012, have attacked the legislation on the grounds that it favors the rich penthouse owners---at the expense of less affluent, smaller unit owners.

Their unhappiness or argument, cannot be sustained on the basis of fairness, as they were not paying a **fair share** in the first place. They were the lucky beneficiaries of the "games developers played".

In reality the changed CMS's were merely brought into compliance, via the Courts or Specialist Adjudicators, with the 1997 BCCM legislation, whereby all lot owners had to be treated equally, unless it was inequitable not to do so. It was these actions to make CMS's comply with the law, that became the catalyst for the April 2011 amendments.

Fast forward to April 2011 and the Labor Government bowed to pressure and introduced amendments to the BCCMA.

Sweeping aside sound legislation that had functioned well for some 14 years and reinstating the abuses of the past. Queensland was taken back to the bad old days of the "white shoe brigade".

Decisions of Courts, legal argument, the work of independent adjudicators, the principle of fairness swept aside.

CMS's were reverted on the request of just **a SINGLE OWNER** without any requirement to provide factual estimates of cost impact. A **single owner** empowered to wield disproportionate

power over the majority.

Adversely affected owners could appeal only on narrow legal grounds, namely the definition of “an adjustment order”.
The right to seek a fair or realistic adjustment of Lot entitlements by way of independent assessment was arbitrarily apportioned on a time frame basis. Pre- 2011 CMS’s were denied this right.
Post -2011 CMS’s allowed this right.

This created two classes of owners; one with the right to appeal to achieve fairness….the other with no such right.
The 2011 Amendments denied owners the natural rights and liberties of individuals.

Labor’s BCCMA amendments were universally condemned by legal bodies, owner associations and cited by the Government’s own Scrutiny Committee, as being not consistent with fundamental legislative principles and potentially in breach of the Queensland Constitution. Here is what organizations said:

Government explanatory notes:
Consistency with Fundamental Legislative Principles
Section 4(2)(a) of the Legislative Standard Act 1992 requires legislation to have ***sufficient regard to the rights and liberties of individuals.*** *Notwithstanding, the proposed amendments to the BCCM Act, will* ***potentially breach the fundamental legislative principle by adversely affecting the rights and liberties of individuals retrospectively.*** *The Bill proposes to remove the ability to apply to a specialist adjudicator, or QCAT for an adjustment of contribution schedule lot entitlements for lots in community titles schemes established prior to the commencement of the Bill. However, schemes established after the commencement of the Bill will be able to seek a specialist adjudicator or QCAT order to adjust contribution schedule lot entitlements,*

*This proposal **does present a possible breach of fundamental legislative principles** in that lot owners in schemes established prior to the commencement of the Bill, will have a **different set of rights** to lot owners in schemes established after the commencement of the Bill.*
It is also acknowledged that the rights of lot owners will be removed, as they will not be permitted to oppose the reversion and that some lot owners who purchased a lot in a scheme after an adjustment order was made, may be adversely affected by a reversion of contribution schedule lot entitlements.

The Qld Law Society.
*The Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (the Bill) **breaches the fundamental Legislative principles contained in the Legislative Standards Act 1992.***
The Society acknowledges that the Bill's Explanatory Memorandum references some of the breaches of fundamental legislative principles.The explanations presented are not in our view reasons for the inconsistency.
*The claim in the Explanatory Memorandum, that certainty for lot owners justifies allowing a reversion of lot entitlements to their value at establishment of the scheme, would seem to have **insufficient regard to the rights and liberties of individuals.***

Qld Unit Owners Association Review:
RESTORATION OF LEGISLATIVE PRINCIPLES & UNIT OWNERS RIGHTS--Unquestionably the Bill as presented – and admitted by the Minister in the Explanatory Notes-

*– is **repugnant to the Legislative Standards Act 1992,***
nor are there plausible explanations for the failures.
Therefore the Bill in its present form should be
*rejected by the Parliament **,** a breach of*
human rights.

The Australian College of Community Association Lawyers.
13 years of settled law to be undone.. a travesty of justice,
unthinkable in a democracy.

JANN STUCKEY. *Minister for Tourism, Major Events,*
Small Business and Commonwealth Games.
"What Labor has presented before us today is abominable and the LNP cannot support it. I shall be moving a number of amendments and I foreshadow that now".

At this point I wish to make it clear that my views parallel those expressed by Mr. Lynton Rose, in his submission, September 26.

They are:

**The April 2011 Amendment allowed for the developer to arbitrarily use either of the principles which were specifically created in the amendment (Equality or Relativity) and apply it in a CMS and the CMS is to state which principle has been applied.

The developer still has cart blanche in setting the CMS model to suit his/her commercial imperatives. **This is not in the interests of all owners.

**The 2011 Amendment has no appeal provision to replace one principle with the other, should lot owners in the future wish to do so. The most lot owners can do is move the number of Lot Entitlements around in the same principle.
This applies only to CMS's that were created after the April 2011 amendments and is still valid.

**Those CMS's that were created prior to the April 2011 amendments have had the appeal provisions removed and this is still valid.

**I reject the view that the developer can summarily make a judgment that cannot be appealed by lot owners in the future.

So you may ask, what is the **difference** between the legislation before and after the April 2011 amendments, other than the forced reversion of the Lot entitlements?

The difference is this and is still valid;

The developer now has a choice to have the CMS comply to the Equality Principle (same as the 1997 legislation) or the Relatively Principle (effectively the same as the legislation prior to 1997). The Relativity Principle seeks to add the "value" of the apartment into the calculation of the Lot Entitlements. **I repeat this provision needs to be repealed.**

All Lot owners with CMS's created prior to April 2011 amendment now have no appeal rights to change the Lot entitlements.

All Lot owners with CMS's created after the April 2011 amendment, have appeal rights to change the Lot entitlements within the selected "Principle" but have no appeal against the selection of the "Principle" by the developer.

The 2012 amendment.

This has put a stop to the reversion process that was created by the April 2011 amendment….and allows those CMS's that were

changed by a Court or Specialist Adjudicator, to be **undone** and **restored** to their **former position**,(prior to the 2011 Amendments) pending enactment of the “2012 BCCM and other Legislation Bill”.

That said….

the timing and procedure provided for in the 2012 amendment needs to be tightened up and simplified with short maximum time frames for Body Corporate Committees to comply.

****Also a requirement for a Body Corp committee to act with minimum delay, to restore the provisions of the previous CMS.**

****Owners adversely affected by the 2011 Amendments should not be required to have to repeat the costly and time consuming exercise, to have a CMS previously approved by a Court, re-calculated and restored to the position prior to the reversion.**

****This should be an automatic process to commence immediately on an owner lodging a request with the Body Corporate Committee, to have the CMS restored to its former position.**

****This process should not require 100% consent of owners….**

****The amendment provisions need to go further by removing the Relativity Principle entirely and to restore appeal provisions for Lot owners with CMS's created both prior to and after the April 2011 amendments.**

Expense Distribution Calculation.

*Manager Fees: Should be Equally shared.
*Pool R&M: Should be Equally shared.

*External Paint: Equitable to areas of external wall per apartment /
*Maintenance common areas: Equally shared.
*Water usage: Equitable to the Number of bedrooms
*Garden R&M: Should be Equally shared

General overview

Overall the 1997 legislation was good legislation.
It treated everyone equally and equitably, had appeal provisions if the developer got it wrong in allocating Lot entitlements. The 2012 amendment legislation needs in simple terms, to restore the 1997 legislation regarding Lot entitlements and appeal provisions.

On analysis, the 1997 BCCM legislation is fair and equitable and should NOT have not been altered the way is was by the April 2011 amendments.
As demonstrated further up in this submission, most commentators and law bodies recognized that point.

I respectfully submit this submission for the Committee's consideration.

Frank Higginson