

19 October 2012

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Research Director  
Legal Affairs and Community Safety Committee  
Parliament House  
George Street  
Brisbane, Qld 4000



Dear Sir/Madam,

**Proposed Amendments to the Body Corporate and Community Management Act**



We write to express the property industry's concerns with some of the amendments proposed to the Body Corporate and Community Management Act (BCCMA).



The issue of lot entitlements is a contentious one and has been a matter of public debate for most of the past decade. The Attorney-General correctly noted in his second reading speech on 14 September, 2012, that any legislative amendments that alter lot entitlements will result in some people paying more, and others paying less in community title schemes. Therefore any changes need to be carefully considered to ensure a fair result is achieved for all stakeholders.



The proposed changes broadly fall into three categories:



1. Those that overturn the reversion process introduced in 2011 and reinstate the most recent decision of an adjudicator.
2. Those that remove requirements for disclosure of unnecessary and complicated information at the point of sale.
3. Those that establish consistency in the resolution of disputes by qualified adjudicators.



The Property Council supports the amendments relating to categories two and three. However, we raise concerns with the implications of those amendments



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that will result in a return to the fees set by the most recent adjudication. It is these amendments that will be discussed in detail in this submission.

In the Property Council's view the proposed amendments add further complexity and confusion to community title scheme arrangements in Queensland. They have the potential to make it more challenging for an owner or potential purchaser to understand the direct impacts on their property.

In addition, it is the Property Council's view the proposed amendments will result in many owners having their body corporate fees increased on the basis of a flawed methodology – the 'equality' principle. As such, overall we do not believe the proposed amendments result in a 'fair' outcome for those who will be impacted by them.

The Property Council is also concerned about the potential direct impact of the amendments on the development industry. In particular that the amendments could:

- Expose developers of buildings constructed between 2003 and 2011 to legal proceedings brought on by owners who have suffered financial loss as a result of a change to their lot entitlements compared to those when they purchased.
- Damage the reputation of the development industry broadly and individual developers specifically as owners and potential purchasers will have lost faith in the upfront work of the developer in setting the levies.
- Increase the uncertainty faced by potential purchasers buying into community title schemes as a result of the goal posts constantly being shifted through legislative changes.

### Consultation

It is noted in the Bill's explanatory notes that no consultation was undertaken in relation to these proposed amendments. As noted above, any amendments that impact body corporate arrangements have a significant direct impact on those affected and therefore should be carefully considered.

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As such, it is extremely disappointing that no consultation with the community or the property industry was undertaken.

### Property Council's core interest in lot entitlements

The Property Council's interest in amendments to the BCCMA affecting lot entitlements largely relate to:

- Ensuring the ability of developers to include a mix of product in their developments, in particular affordable product.
- Ensuring the purchaser has confidence the fees set by the developer will not be subject to change and volatility going forward.

Both of these issues directly affect the viability of a development in its feasibility stage, and its ultimate saleability.

We recognise that the proposed amendments will largely protect new developments from the risk of having their levies restructured provided the scheme is properly established under the 'relativity' principle. The Property Council supports the continuation of the relativity principle for new developments.

However as noted above, changes to existing schemes also have the potential to have a direct impact on the development industry in terms of potential legal costs and reputational damage.

### Understanding adjudication decisions

It is the Property Council's view that the proposed amendments relating to levy disputes within existing schemes that have been subject to a 'reversion' are poorly conceived.

These changes will not just affect residential property, but also the commercial and retail property subject to the legislative change.

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We agree that it is appropriate for all stakeholders to have access to adjudication in circumstances where there is a genuine dispute and that the removal of these provisions by the previous government was a step too far.

However, the proposed amendments will result in affected schemes reverting to the most recent adjudication which would have been determined in line with the 'equality' principle. The Property Council asserts that the application of this principle in these adjudications did not deliver a 'fair' outcome for stakeholders.

It was this lack of fairness that the 2011 amendments attempted to overcome.

To be clear, it is not the Property Council's view that any court, tribunal or adjudicator acted inappropriately, but rather that the legislation prevented the decision maker from arriving at a 'fair' decision. This is because the legislation directed an adjudicator not to consider all relevant information in making a decision. We believe this is a major flaw of the legislation.

Sections 49 [5] and 49[6] of the BCCMA state:

- (5) *The specialist adjudicator or QCAT may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about—*
- (a) the lot entitlement for the subject lot or other lots included in the community titles scheme; or*
  - (b) the purpose for which a lot entitlement is used.*

- (6) *In this section—*
- relevant time means the time the applicant entered into a contract to buy the subject lot.*
  - subject lot means the lot owned by the applicant.*

In our view the inability of the adjudicator to consider these issues prevented the adjudicator reaching a fair outcome for all stakeholders. Sections 49 [5] and 49[6] dismiss the relevance of disclosure at the time of purchase, in contrast to general legal principle which dictates that disclosure is a relevant matter. It is unclear who this provision aims to 'protect'. It appears the only beneficiaries will be those who:

- did not undertake their own personal due diligence at the time of purchase; or

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- sought a 'windfall gain' by purchasing into a scheme they believed they could challenge.

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Beyond the exclusion of disclosure at the point of sale, there are two additional reasons why the Property Council does not support the 'equality' principle as a basis for setting lot entitlements.

Firstly, body corporate levies directly affect the value of the property at the point of sale. In essence, the ongoing cost of the levy is factored into the price paid by the purchaser at the time of sale. Had the levy been significantly different, it is likely that the price paid for the dwelling would also have been different. Therefore any equalisation of levies disregards the fact that the impact of these levies were accounted for in the original sale price.

Secondly, setting levies so that they are more closely linked to the value of the dwelling is appropriate as it reflects the allocation of financial risk/equity within the building.

If an individual owns an apartment that is twice the market value of another apartment in the same scheme, it is reasonable to suggest the owner of the more expensive apartment has greater personal stake in the asset. Therefore they carry more financial risk. This should be reflected in allocation of costs to maintain the asset. Equalisation disperses risk across all owners without reference to their actual stake in the building. This is contrary to accepted financial principles of risk allocation.

### Further changes required to ensure a fair outcome for all stakeholders

For the reasons outlined above, the Property Council does not support the proposed amendments that will reinstate the most recent decision of an adjudicator in circumstances where a reversion has occurred. This simply moves the burden from one group to another with no reference to a 'fair' outcome.

It is the Property Council's position that a better solution would be to establish a more structured and transparent process for dealing with disputes in these circumstances. The Property Council is aligned with the Urban Development

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Institute of Australia (UDIA) position on this matter, with a potential framework aligning with the following seven key criteria:

1. Any completed 2011 reversions should remain in place for the time being (to ensure that there aren't anymore unnecessary changes to lot entitlements unless they have Court approval);
2. The Courts to have jurisdiction over lot entitlement adjustments returned to them in all cases (this overcomes the objection that single lot owners can overturn Court decisions);
3. The offending 2011 provision (Section 379) which allowed for single owners to dismantle Court orders to be removed or cease to apply;
4. The appropriate adjudication body be given the ability to look at all factors in determining what is just and equitable; in particular, the knowledge of, and acceptance by, the lot owner of the particular levy structure at the time of acquisition should be classified as a "significant determining factor" in determining what is just and equitable.
5. The Courts should be granted the power to overcome any abuses by developers (e.g. where the developer has set significantly reduced levies for a penthouse that the developer has retained).
6. The proposed Bill should include a provision recognising that the original owner (i.e. the developer) was not obliged to set levies on an equal basis (this was the law under the BCCM Act 1997 until 2003) and that in the absence of manifestly inequitable or unjust levies being set by the developer, the guiding principle should be that the levies set by the original owner should remain unchanged.
7. The Court in determining what is just and equitable, should be required to look at the equity and fairness of shifting levies from one lot owner or group of lot owners to other lot owners.

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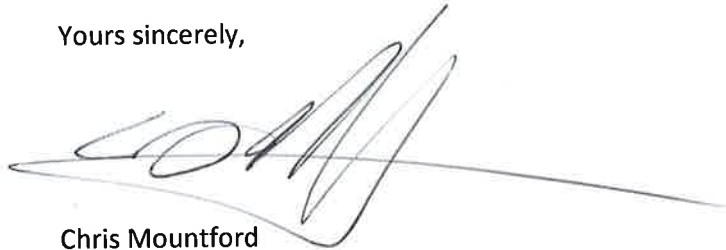
Unfortunately these changes would not alter the fact that some owners would potentially have their fees reset by any change or adjudication. However on balance we believe this approach will deliver the fairest outcomes for all stakeholders.

### Conclusion

The Property Council would welcome the opportunity to discuss our proposed changes in more detail with the Committee.

If you have any further questions about the Property Council or this submission, please do not hesitate to contact me on 07 3225 3000, or [cmountford@propertyoz.com.au](mailto:cmountford@propertyoz.com.au)

Yours sincerely,



Chris Mountford  
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