Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

Your Ref: Body Corporate and Community Management and Other Legislation Amendment Bill 2012

Our Ref: Property and Development Law Committee

19 October 2012

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

lacsc@parliament.qld.gov.au

Dear Director

BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2012

Thank you for providing the Queensland Law Society with the opportunity to provide comments on the *Body Corporate and Community Management and Other Legislation Amendment Bill 2012* (the Bill).

This letter is written with the assistance of the Property and Development Law Committee of the Queensland Law Society.

Lot entitlements in context

Lot entitlements have historically been used to determine the proportionate share of body corporate expenses to be borne by each lot owner in a community titles scheme. Under the *Building Units and Group Titles Act 1980* ("**BUGTA**"), entitlements for lots in a building format plan (in general terms, apartments) were determined at the discretion of the developer whilst for group title plans (house and land and some duplexes and townhouses) were required to be determined in proportion to the respective unimproved values of the lots.

For most apartment complexes, developers tended to adopt one of two methods of fixing lot entitlements. The first was to make the entitlements for all lots more or less equal. The second common method was to set entitlements according to sale price. Prospective buyers were given disclosure statements prior to entering into a contract which set out their annual contributions although it did not explain how their entitlements had been calculated or how they were relative to other lots in the complex.

The *Body Corporate and Community Management Act 1997* ("**BCCM Act**") introduced the concept of dual entitlements for each lot. The "contribution schedule lot entitlements" were used for determining an owner's contribution to most body corporate expenses whilst "interest schedule lot entitlements" were used to determine, amongst other things, each owner's proportionate interest in the common property and their lot's value for determining rates and taxes. Significantly, the BCCM Act also introduced the ability for owners to request an adjustment of lot entitlements, originally by the District Court. The criteria

to be applied by the Court was what is now known as the "equality principle", that is, all lots should have equal entitlements except to the extent that it was fair and equitable for them not to be.

A number of subsequent court and tribunal decisions gave clarity to the operation of the equality principle. In essence, these recognised that most body corporate expenses were fixed regardless of the size or position of an apartment or the number of occupants (for example, the cost of mailing out notices to owners and other administrative costs). In general therefore, the decided cases seem to have resulted in variances in entitlements of around plus or minus 20%.

In BUGTA schemes where the developer had set lot entitlements based on apartment values, in a number of instances, the owners of high value apartments were able to secure significant reductions in their annual levies through adjustments (Committee members are aware of instances of penthouse owners being able to reduce their annual levies by $40,000 or more). Obviously, this resulted in an increase in the annual levies of other lot owners. Disaffected owners argued that the high value apartment owners had bought knowing what their levies would be and that it was inequitable in the circumstances for entitlements to be adjusted in line with the equality principle. The Society has some sympathy for this view.

The former government agreed this was inequitable and sought to redress the position by enacting the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* (the "**2011 Act**"). Essentially it:

- removed the right to review lot entitlements for existing schemes;
- in most cases, enabled a single owner to have any prior adjustment order automatically overturned without any review of the merits; and
- introduced the ability for developers of new schemes to choose between the equality principle and the relativity principle when setting contribution schedule lot entitlements.

The Society was critical of many of the elements of the *2011 Act* which the Bill is now reversing.

Automatic Reversion

One particular aspect of those amendments the Society raised concern about was the ability for a single lot owner to effectively force the body corporate to reverse the outcome of an adjustment without any consideration of the surrounding circumstances or any right for independent review. In a submission to the Department in September 2010, the Society stated:

> The current proposals will prevent any scheme established prior to the commencement of the amendments from redressing any errors, omissions or unfairness in the way in which their contribution schedule was initially set (in the absence of a material change to the scheme). This is undesirable as, for the sake of certainty, it prevents a body corporate where a single lot owner disagrees from ever making contributions fair between the lot owners.

In particular, Committee members are aware anecdotally of cases where developers had determined lot entitlements to favour an apartment which the developer or family members or relatives intended retaining. The BCCMA Act gave the owners the ability to have an independent tribunal determine entitlements on a fair and equitable basis. The effect of the *2011 Act* was to allow the developer to have the original lot entitlements reinstated without any ability for review of the circumstances.

The Society is also of the view that there would have been many instances where an adjustment order was made because of an inadvertent error made by the developer in setting the entitlements originally, a lack of thought or understanding of the proposed uses of the scheme, or changes to the scheme over time.

The Society therefore supports the immediate repeal of Chapter 8, Part 9, Division 4 and the discontinuance of any incomplete adjustment process pending implementation of a more appropriate mechanism for review.

Seeking a fair adjustment process

The Society acknowledges that the Attorney-General made it clear that the Bill was not intended to introduce a new adjustment procedure or set a fair way to apportion lot entitlements between lot owners. Relevantly the Attorney said in introducing the Bill[1]:

> "Finally, I would like to announce that the government will now look at the broader issues around contribution schedule lot entitlements. We will look to the future. This bill does not deal with that matter—it relates to the immediate problem that we have been left by the former Labor government to deal with—but the government is only too conscious that there are many schemes out there with manifestly unequal lot entitlements. We need a mechanism to provide for adjustments into the future for those schemes with unfairly set contribution schedule lot entitlements. We will now work to look at options with a view to reintroducing an appropriate mechanism for adjustments, but there is some complexity around this issue. Therefore, it is important to take our time to ensure that, whatever mechanism is provided, it attempts to get the balance right and is fair to lot owners."

The Society commends the Government on its expressed intention to set a mechanism which will attempt to get the balance right and be fair to lot owners and appreciates the vexed nature of the issue as any change will inevitably create "winners" and "losers". However, it is the view of the QLS that consideration of the ways to address both a principle of fairness between lot owners and a just mechanism to seek adjustments of lot entitlements would have been very advantageous to include in the Bill. Leaving consideration of these matters to a later date in some respects merely delays equity and (if the Bill is enacted in its present form) may cause some bodies corporate to go through a third revision of their lot entitlements in two years.

The Society proposed such a mechanism in September 2010 when public consideration of reversions to lot entitlement adjustments began. In a submission to the Department made at that time, we raised the possibility of a '*fairness principle*', and said:

> *A Proposal*
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> We propose that a single principle for the assessment of the contribution schedule should be adopted to provide certainty of operation and to provide fairness. We envisage that such a principle might be called the '*fairness principle*' and incorporate elements of proper apportionment of shared infrastructure costs.
>
> Such an approach may involve setting the contribution schedule with regard to all the assessed factors set out in proposed sections 46A(4)(a) to (d). Such an approach would facilitate a range of appropriate values giving greater flexibility to achieve a fair result. One way in which this may be achieved practically under these factors is to:
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> - equitably apportion of all fixed costs to the body corporate, ie the cost of the body corporate manager, holding meetings, administration and other items usually associated with the administration fund; and
> - use a relative apportionment of costs for significant, capital or other costs usually associated with the sinking fund.
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> In adopting such a model it would be prudent for the actual calculation to be disclosed to the buyer when buying a proposed lot.

The Society also went on in that submission to propose a mechanism for seeking adjustments to contribution lot entitlements, by saying:

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[1] *Record of Proceedings, 14 September 2012, available at* http://www.parliament.qld.gov.au/documents/tableOffice/HALnks/120914/Body.pdf

> Subject to the comments above with regard to having a single *fairness principle* for setting contribution schedule entitlements the QLS supports the mechanism set out in proposed section 47A to permit a body corporate to adjust the lot entitlements by resolution without dissent. Likewise, there can be little resistance to permitting interest schedules to be adjusted by the specialist adjudicator or QCAT.
>
> With regard to ability of an owner, in any scheme, to apply for an adjustment of the contribution schedule by either a specialist adjudicator or QCAT there must be an appropriate balancing of providing fairness between lot owners and certainty.
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> ...
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> We propose that an appropriate mechanism for a lot owner in a scheme established prior to or after commencement is to seek adjustment of the contribution schedule is for:
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> - a lot owner to put forward a motion for the contribution schedule to be reviewed at an extraordinary general meeting [EGM] of the body corporate;
> - the body corporate to be obliged to obtain at its own cost an independent expert report which is to be provided to all lot owner with the agenda for the EGM;
> - the EGM to be held and adoption of the contribution schedule proposed by the expert, or as agreed by the lot owners, to be voted upon;
> - if the adjustment is adopted at the EGM without dissent it proceeds as per proposed section 47A;
> - if the adjustment is opposed then any lot owner may seek within two months of the EGM an order of the specialist adjudicator or QCAT to effect an adjustment;
> - the specialist adjudicator or QCAT must consider the content of the expert report presented to the EGM and any other factors relevant to applying the *fairness principle* to the contribution schedule; and
> - a restriction to apply such that a lot owner may not propose a review of the contribution schedule within 3 years of an EGM being held.
>
> It is proposed that such a process would not exclude the operation of proposed section 47B(1) with respect to seeking adjustments following a material change.

Given the extent of previous changes and the passage of time, it may not now be possible to adopt a single principle for lot entitlements for all schemes. At this stage, further change to the existing mechanisms may simply create greater confusion and misunderstanding. A better approach may now be, as far as is possible, to continue the methodology originally adopted by the developer.

In principle, the Society does not oppose the existing scheme which enables the developer to choose an appropriate mechanism for determining contribution schedule entitlements (which is required to be stated in the CMS) and allows owners recourse where the entitlements do not reflect those principles.

This does not deal however with schemes created prior to the enactment of the 2011 Act. In the Society's view, this could be dealt with by allowing an owner in a pre-2011 Act scheme to apply to QCAT for a re-determination of the contribution entitlements based on just and equitable grounds and having regard to all available evidence.

This would include evidence, if any, of how the lot entitlements were determined by the developer originally. If the evidence establishes or it is relatively apparent on the face of the CMS that the lot entitlements for a majority of lots were calculated using a particular methodology, QCAT could determine that the mechanism should continue to be used and apply it in determining any further adjustments. However, QCAT would also be entitled to consider changes in ownership of the lots in the scheme subsequent to any previous lot entitlement adjustment. It could also take into account obvious errors or favouritism of one lot over another.

In most cases, this will be relatively apparent and will avoid the pitfalls of converting a "market value" scheme to an "equality" scheme. Similarly, if the vast majority of owners had bought their lots after the

date of an adjustment to the equality principle, QCAT would be able to determine it was more equitable in the circumstances to continue applying that principle.

QCAT could also take into account the financial impact of a change on residents and their ability to meet any significant change in levies.

Overriding 2011 Act reversions

The second element of the Bill is to enable a single owner to require any completed reversion action taken under the 2011 Act to be reversed.

The Society's 9 February 2011 submission to the then Parliamentary Scrutiny of Legislation Committee on the *Body Corporate and Community Management and Other Legislation Amendment Act 2011,* stated:

> The fetter on the discretion of a body corporate or committee contained in proposed sections 385(4) and (6) and 387(2) and (4) deciding an application to revert lot entitlements to their pre-adjusted state is of significant concern to the Society. These provisions restrict the outcome of a reversion application and in effect make it an offence for a body corporate or committee to decide to reject the application. These provisions do not have sufficient regard to the rights and liabilities of individuals, are inconsistent with the principles of natural justice and are an inappropriate use of criminal sanction.

The Society notes that ss 403 and 404 proposed by the Bill operate in effectively the same way as the provisions of concern in the *2011 Act*, but in reverse.

The Society is therefore opposed to this aspect of the Bill. In the Society's view, this will simply lead to unnecessary costs being incurred and angst within community titles schemes. A better approach, we submit, would be for the government to determine its final approach to the vexed issue of lot entitlement adjustment before allowing any further changes to be made.

Disclosure of Community Management Statements

The Society addressed issues of disclosure of the Community Management Statement (CMS) in its submission in September 2010, and said:

> As a matter of general principle the Society supports the disclosure of relevant information to prospective buyers of real property. The QLS has previously stated its view that making the buyer aware of relevant information about the property they wish to purchase as well as their rights and obligations with respect to that property prior to entering into a contract for sale is the fundamental value that solicitors have to offer to consumers in the conveyancing process.
>
> However, the requirement to disclose the current CMS with a contract for the sale of an existing lot will have a significant practical impact on the sale process and conveyancing practice. Many owners of lots may have difficulty accessing the current appropriate version of the CMS prior to sale except by payment of a fee and search of the land title register. This imposes an additional cost on sellers of units and the provision of such a large document with the sale contract will mean that the use of facsimile will become impractical for contract delivery.
>
> We propose that a similar awareness may be created through requiring all CMS to be easily and freely available to the public on a Government register accessible through a website and for there to be a clear statement within the disclosure documentation directing a prospective buyer to the location of the register to investigate the CMS. This approach would facilitate the delivery of contract documentation for the sale of existing lots and would also assist motivated purchasers of property to access relevant information prior to receiving a contract for sale.

The Society notes that there is useful and valuable information for a purchaser of a lot in a community title scheme in a CMS, not only information about lot entitlements, but also details of the by-laws of the

scheme. In this regard, the Society believes the CMS is a much more useful awareness tool for prospective purchasers than a warning statement.

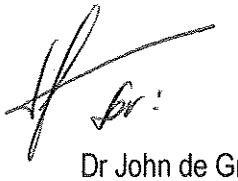
The Society generally advocates a full and co-ordinated seller disclosure regime similar to that operating in other Australian States. However, in members' experience there is a considerable lack of knowledge and non-compliance amongst real estate agents (who generally control the contract formation process without the involvement of a lawyer). This can have drastic consequences for a seller who faces termination of the contract for the non-compliance issues.

The Society therefore supports the removal of the requirement to furnish a CMS at this time.

The Society also supports removal of the explanation in the s206 statement about how levies are determined as this information can be difficult to obtain from the body corporate and is not readily understood.

Thank you for providing the Queensland Law Society the opportunity to provide its comments on the Bill. If you would like to discuss any aspect of this submission please contact our Principal Policy Solicitor, Mr Matt Dunn, on [redacted] or via email on [redacted].

Yours faithfully



Dr John de Groot
President