

**Body Corporate & Community
Management & Other
Legislation Amendment Bill 2012
Submission 245**

19 October 2012

Mr Ray Hopper MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

BY EMAIL ONLY TO: lacsc@parliament.qld.gov.au

Dear Mr Hopper

Re: Submission on *Body Corporate and Community Management and Other Legislation Amendment Bill 2012* (“Amendment Bill”)

We act on behalf of Barry Knight Holdings Pty Ltd ACN 009 967 720, the owner of lot 382 in BPA 12830 contained in the Body Corporate for Watkins Medical Centre CTS 11436.

The scheme is made up of 286 lots and common property. There is a 12 storey commercial building (containing commercial lots and car parks) with an adjoining 15 storey car park containing 279 car parks.

The scheme originally had 378 lots, but subsequently in 1983, one lot was re-subdivided into three lots and, in 1993, 95 car park lots (each having a lot entitlement of 9) were amalgamated into one lot, being new lot 382, which is owned by our client.

As a consequence of the amalgamation, the contribution schedule lot entitlements (“CSLE”) for each of the individual lots were aggregated, such that new lot 382 had a CSLE of 855, as the amalgamation took place prior to the commencement of the *Body Corporate and Community Management Act 1997* (BCCM Act”) on 13 July 1997.

Our client made an application to adjust the CSLE in 2006. As a result of the expert’s report, it became apparent that a car park lot disproportionately consumes fewer services than a commercial lot and therefore should be entitled to contribute a lesser percentage of the levies. In addition, the amalgamation of the car park lots did not proportionately increase the effect on the cost of services that the amalgamated lot consumed.

Our client was ultimately successfully in having its CSLE reduced. We **enclose** a copy of the order dated 24 July 2006 of the specialist adjudicator, Dr Gary Bugden OAM (“Adjustment Order”). In particular, we refer you to paragraphs 22, 24, 26 and 27 of his determination.

The passing of the amendments to the BCCM Act in April 2011 allowed any lot owner who was detrimentally affected by an Adjustment Order (no matter how minor) to serve a notice under section 379 of the BCCM Act and the committee of the body corporate was statutorily obliged to reverse the Adjustment Order, subject to the provisions of sections 381 – 384 of the BCCM Act.

Our Ref:RAJ:8325

Shortly after the commencement of the 2011 amendments to the BCCM Act, a lot owner served a notice on the Body Corporate under section 379 of the BCCM Act. The committee of the Body Corporate was then statutorily obliged to change the CSLE back to what they were immediately before the Adjustment Order.

Although our client may have been seen to have received a 'windfall' as a result of the Adjustment Order, it is very clear in these particular circumstances that the CSLE for lot 382 was not 'just and equitable' prior to the Adjustment Order being made.

Whilst our client's levies may have decreased as a result of the Adjustment Order, the difference was spread over a large number of lots, such that there was not a significant increase in the levies for other lot owners. However, as a result of the reversal of the Adjustment Order, our client has suffered a substantial financial detriment.

The table below highlights the inequities that have resulted as a consequence of the 2011 amendments to the BCCM Act and the proposed Amendment Bill.

The original contribution schedule lot entitlements were generally 9 for a car parking lot and ranged between 64 and 304 for other lots, with the one exception – a CSLE of 855 for the lot 382. The aggregate was 11,642.

A selection of the original CSLE was as follows:

Lot No	CSLE	% of aggregate	Levies*
16	9	0.07%	\$425.18
116	182	1.56%	\$8,598.17
119	304	2.61%	\$14,361.79
198	66	0.56%	\$3,118.02
382	855	6.79%	\$40,392.54
Aggregate	11,642		

* Based on a budget of \$550,000.00

The CSLE was adjusted as follows:

Lot No	CSLE	% of aggregate	Levies*
16	10	0.10%	\$551.26
116	113	1.13%	\$6,229.32
119	122	1.22%	\$6,725.46
198	91	0.91%	\$5,016.53
382	90	0.90%	\$4,961.41
Aggregate	9,977		

*Based on a budget of \$550,000.00

Our Ref: RAJ:8325

The comparison from the original CSLE to the adjusted CSLE in dollar terms is as follows:

Lot No	Old levies	New levies	Difference
16	\$425.18	\$551.26	+126.08
116	\$8,598.17	\$6,229.32	-\$2,368.85
119	\$14,361.79	\$6,725.46	-\$7,636.33
198	\$3,118.02	\$5,016.53	+\$1,898.51
382	\$40,392.54	\$4,961.41	-\$35,431.13

The Hon. JP Bleijie in introducing the Amendment Bill stated that: ***"The Government will now look at the broader issues around contribution schedule lot entitlements."*** The Amendment Bill does not deal with the future of lot entitlements. However the Hon. JP Bleijie recognises that there are still many schemes with unfairly set contributions schedule lot entitlements and that an appropriate mechanism needs to be introduced to allow for adjustments. Because of the complexities involved, the Government intends to take its time ***"to get the balance right and is fair to lot owners"***.

We urge the Government to urgently consider the broader issues around CSLE's (including that the same principles should not apply for both residential and commercial schemes. In addition, the constant changing of CSLE's provides no certainty for lot owners and the strata and property industry generally.

Yours sincerely

SUCCESS LAW PTY LTD

Ros Janes (signed)

Ros Janes

Director



Our Ref: RAJ:8325

Office of the Commissioner for Body Corporate and
Community Management

SPECIALIST ADJUDICATION
(Adjustment of Lot Entitlements)

Number: 0222A-2006

Applicant: BARRY KNIGHT HOLDINGS PTY LTD

Respondent: BODY CORPORATE FOR *WATKINS MEDICAL CENTRE*
COMMUNITY TITLES SCHEME 11436

ORDER
24 July 2006

In this matter I order that the contribution lot entitlement schedule in community titles scheme 11436 be adjusted in accordance with the annexed new schedule.



Gary Bugden OAM

Specialist Adjudicator

WATKINS MEDICAL CENTRE CTS 11436

Lot no.	Proposed contribution schedule lot entitlements
Lot 16 in BUP 3733	10
Lot 60 in BUP 3733	10
Lot 61 in BUP 3733	10
Lot 62 in BUP 3733	10
Lot 63 in BUP 3733	10
Lot 64 in BUP 3733	10
Lot 65 in BUP 3733	10
Lot 66 in BUP 3733	10
Lot 67 in BUP 3733	10
Lot 68 in BUP 3733	10
Lot 69 in BUP 3733	10
Lot 70 in BUP 3733	10
Lot 71 in BUP 3733	10
Lot 72 in BUP 3733	10
Lot 73 in BUP 3733	10
Lot 74 in BUP 3733	10
Lot 75 in BUP 3733	10
Lot 76 in BUP 3733	10
Lot 77 in BUP 3733	10
Lot 78 in BUP 3733	10
Lot 116 in BUP 3733	113
Lot 117 in BUP 3733	102
Lot 118 in BUP 3733	96
Lot 119 in BUP 3733	122
Lot 120 in BUP 3733	100
Lot 121 in BUP 3733	91
Lot 122 in BUP 3733	10
Lot 123 in BUP 3733	10
Lot 124 in BUP 3733	10
Lot 125 in BUP 3733	10
Lot 126 in BUP 3733	10
Lot 127 in BUP 3733	10
Lot 128 in BUP 3733	10

Lot 129 in BUP 3733	10
Lot 130 in BUP 3733	10
Lot 131 in BUP 3733	10
Lot 132 in BUP 3733	10
Lot 133 in BUP 3733	10
Lot 134 in BUP 3733	10
Lot 135 in BUP 3733	10
Lot 136 in BUP 3733	10
Lot 137 in BUP 3733	10
Lot 138 in BUP 3733	10
Lot 139 in BUP 3733	10
Lot 140 in BUP 3733	10
Lot 141 in BUP 3733	10
Lot 142 in BUP 3733	10
Lot 143 in BUP 3733	10
Lot 144 in BUP 3733	10
Lot 145 in BUP 3733	10
Lot 146 in BUP 3733	10
Lot 147 in BUP 3733	10
Lot 148 in BUP 3733	10
Lot 149 in BUP 3733	10
Lot 150 in BUP 3733	10
Lot 151 in BUP 3733	10
Lot 152 in BUP 3733	10
Lot 153 in BUP 3733	10
Lot 154 in BUP 3733	10
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Lot 192 in BUP 3733	10
Lot 193 in BUP 3733	10
Lot 194 in BUP 3733	10
Lot 195 in BUP 3733	10
Lot 196 in BUP 3733	98
Lot 197 in BUP 3733	93
Lot 198 in BUP 3733	91
Lot 199 in BUP 3733	98
Lot 200 in BUP 3733	94
Lot 201 in BUP 3733	96
Lot 202 in BUP 3733	93

Lot 203 in BUP 3733	92
Lot 204 in BUP 3733	10
Lot 205 in BUP 3733	10
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Lot 237 in BUP 3733	10
Lot 238 in BUP 3733	10
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Lot 240 in BUP 3733	10
Lot 241 in BUP 3733	94
Lot 242 in BUP 3733	93
Lot 243 in BUP 3733	90
Lot 244 in BUP 3733	98
Lot 245 in BUP 3733	94
Lot 246 in BUP 3733	96
Lot 247 in BUP 3733	93
Lot 248 in BUP 3733	92
Lot 249 in BUP 3733	10
Lot 250 in BUP 3733	10
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Lot 284 in BUP 3733	10
Lot 285 in BUP 3733	10
Lot 286 in BUP 3733	100
Lot 287 in BUP 3733	104
Lot 288 in BUP 3733	98
Lot 289 in BUP 3733	112
Lot 290 in BUP 3733	108
Lot 291 in BUP 3733	10
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Lot 328 in BUP 3733	100
Lot 329 in BUP 3733	104
Lot 330 in BUP 3733	98
Lot 331 in BUP 3733	112
Lot 332 in BUP 3733	108
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Lot 334 in BUP 3733	93
Lot 335 in BUP 3733	91
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Lot 338 in BUP 3733	96
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Lot 341 in BUP 3733	98
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Lot 344 in BUP 3733	98
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Lot 352 in BUP 3733	93
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Lot 359 in BUP 3733	96
Lot 360 in BUP 3733	93
Lot 361 in BUP 3733	92
Lot 362 in BUP 3733	100
Lot 363 in BUP 3733	104
Lot 364 in BUP 3733	98
Lot 365 in BUP 3733	112
Lot 366 in BUP 3733	108
Lot 367 in BUP 3733	100
Lot 368 in BUP 3733	104
Lot 369 in BUP 3733	98
Lot 370 in BUP 3733	94
Lot 371 in BUP 3733	96
Lot 372 in BUP 3733	93
Lot 373 in BUP 3733	92
Lot 374 in BUP 3733	100
Lot 375 in BUP 3733	104
Lot 376 in BUP 3733	98
Lot 377 in BUP 3733	112
Lot 378 in BUP 3733	108
Lot 379 in BRP 5471	105
Lot 380 in BRP 5471	99
Lot 381 in BRP 5471	94
Lot 382 in BPA 12830	90
	9977

THIS and the preceding 7 pages are the annexure to my Order in the matter of Barry Knight Holdings Pty Ltd and Body corporate for Watkins Medical Centre community titles scheme 11436 (Commissioner's Reference No. 0222A-2006) dated 24 July 2006.



Gary Bugden OAM
Specialist Adjudicator

Office of the Commissioner for Body Corporate and
Community Management

SPECIALIST ADJUDICATION
(Adjustment of Lot Entitlements)

Number: 0222A-2006

Applicant: BARRY KNIGHT HOLDINGS PTY LTD

Respondent: BODY CORPORATE FOR ~~WATKINS MEDICAL CENTRE~~
COMMUNITY TITLES SCHEME 11436

DETERMINATION
24 July 2006

Application

1. In this matter the applicant seeks an order under section 48 of the *Body Corporate and Community Management Act 1997* (“**Act**”) adjusting the contribution schedule lot entitlements in community titles scheme 11436 (“**Scheme**”) which is situated at 225 Wickham Terrace, Spring Hill.
2. The applicant is the owner of lot 382 in the Scheme and is entitled to bring this application by virtue of section 48(1) of the Act. The respondent is the body corporate for the Scheme. It is not the respondent by choice, but because section 48(2)(a) of the Act says that “*despite any law or statutory instrument*” the respondent is the body corporate.
3. An owner of a lot in the Scheme can elect to become a respondent to the application by virtue of section 48(2)(b), but in this case no such election has been made. This type of election is to be distinguished from the making of written submissions on the application. Any owner can make a written submission to the Commissioner about the application without electing to become a party to it. In this matter only one owner has chosen to do that.

The Scheme

4. The underlying plan for the Scheme is Building Units Plan No 3733 (“**Plan**”). The Plan was registered and the body corporate constituted under the *Building Units Titles Act 1965-1972*. The Plan originally had 378 lots but lot 345 was re-subdivided into lots 379, 380 and 381 by Building Re-subdivision Plan No 5471 and lots 1 to 15, lots 17 to 59 and lots 79 to 115 were amalgamated into lot 382 on Building Amalgamation Plan No 12830. Lot 382 became a Car Park lot and is the lot owned by the applicant.

5. The Plan and the body corporate were both transitioned to the *Building Units and Group Titles Act 1980* under section 5 of that Act and then subsequently transitioned to the Act (i.e. the 1997 Act) under section 330 of the Act.
6. The original schedule of lot entitlements, as varied by the 2 subsequent plans, remained in tact until 13 July 1997 when the substantive provisions of the Act came into effect. At that time the single schedule of lot entitlements was replaced by 2 identical schedules of lot entitlements, the numerical allocations of which were each identical with the allocations in the original single schedule under the former Acts. These 2 new schedules are know as:
 - Contribution Schedule Lot Entitlements
 - Interest Schedule Lot Entitlements.
7. As previously mentioned, this application is concerned with the contribution schedule lot entitlements. These entitlements determine the –
 - (a) lot owner's share of levies (unless the Act provides for some other basis of sharing particular levies – e.g. levies for insurance premiums); and
 - (b) value of a lot owner's vote on an ordinary resolution if a poll is demanded.
8. The Scheme comprises 2 adjoining buildings. The main building is 12 stories and comprises a medical centre. It includes 76 professional consulting rooms, 3 retail shops, a pathology laboratory and 19 basement car parking spaces. The shops and laboratory are located on the ground floor fronting Wickham Terrace and the basement car parking spaces are accessed from Bartley Street, on the western side of the main building.
9. The secondary building is a 15 story car parking station. It is located at the northern end of the main building and contains 279 car parking spaces for use in conjunction with the main building. Vehicular access to this secondary building is from the northern end further down Bartley Street. A ramp provides access from one building to another.
10. Common property in the main building consists of 2 lifts, internal stairway providing access to all floors, common area toilets on each level, air conditioning system, emergency and general lighting, intercom system, standby generator, pumping equipment, stair pressurization unit, toilet exhaust fans, fire fighting equipment, fire control system, internal garbage chute, rubbish disposal services, a front entrance courtyard and garden planters.
11. Common property in the secondary building consists of a lift servicing all levels, 2 stairways servicing all levels, lighting, parking pylon mechanisms, associated control systems and fire fighting equipment.
12. The Scheme has the services of a caretaker who is engaged as a service contractor by the body corporate. Under the terms of the service agreement the caretaker is required to perform specified daily, weekly and monthly duties relating to all of the common property (i.e. the common property in both buildings).

Contribution schedule lot entitlements

13. The current contribution schedule lot entitlements are generally 9 for a car parking lot and range between 64 and 304 for other lots, with the one exception – an entitlement of 855 for the applicant’s Car Park lot (lot 382). The aggregate is currently 11,642.
14. The new contribution schedule lot entitlements proposed by the applicant are generally 10 for a car parking lot and a range between 91 and 122 for other lots, with the Car Park lot having 90. The proposed new aggregate is 9977.
15. A comparison of the existing and proposed allocations reveals that the new allocations, although clearly not equal, are much closer to a position of equality.
16. The applicant sought on 22 June 2005 to have the body corporate in general meeting agree to the proposed new contribution schedule lot entitlements but a motion to that effect was defeated. This effectively put the applicant in dispute with the body corporate.

Relevant provisions of the Act

17. Section 48(4)(a) of the Act provides in respect of this type of application:

“The order of the court or specialist adjudicator must be consistent with –

 - (a) *if the order is about the contribution schedule – the principle stated in sub-section (5); or*
 - (b) *.....”*
18. Section 48(5) of the Act then provides:

“(5) 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.”
19. Section 49 of the Act then sets out the criteria for deciding just and equitable. It provides:
 - (1) *This section applies if an application is made for an order of the District Court or a specialist adjudicator for the adjustment of a lot entitlement schedule.*
 - (2) *This section sets out matters to which the court or specialist adjudicator may, and may not, have regard for deciding—*
 - (a) *for a contribution schedule—if it is just and equitable in the circumstances for the respective lot entitlements not to be equal; and*
 - (b) *for an interest schedule—if it is just and equitable in the circumstances for the individual lot entitlements to reflect other than the respective market values of the lots.*

- (3) *However, the matters the court or specialist adjudicator may have regard to for deciding a matter mentioned in subsection (2) are not limited to the matters stated in this section.*
- (4) *The court or specialist adjudicator may have regard to—*
- (a) *how the community titles scheme is structured; and*
 - (b) *the nature, features and characteristics of the lots included in the scheme; and*
 - (c) *the purposes for which the lots are used.*
- (5) *The court or specialist adjudicator 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.”

20. Upon first reading, sub-sections (3) and (4) of section 49 raise the possibility of an adjudicator or the District Court taking a range of matters into consideration when determining these applications. However, the decision of the Court of Appeal in *Fischer & Ors v. Body corporate for Centrepoint community titles scheme 7779* [2004] QCA 214 has substantially restricted the matters that may be taken into account. In that case Chesterman J (with whom McPherson JA and Atkinson J agreed) said [at paras. 25 and 26]:

“The submission for the applicants is that this Part of the Act is concerned with the just and equitable distribution of body corporate expenses among apartment owners and that in making an adjustment of a lot entitlement schedule the court must pay regard only to the origin and allocation of body corporate expenditure.

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 insofar 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.”

21. That is not to say that other factors are irrelevant, but rather, in the absence of other factors, the proper test is the demand the respective lots make on the services and amenities provided by the body corporate.
22. In the case of the Scheme, there is an argument that “*the nature, features and characteristics of the lots included in the scheme*” and “*the purposes for which the lots are used*” are relevant to the allocation of contribution schedule lot entitlements. However, an analysis of that relevance leads one to the conclusion that the real issue is the extent to which the respective lots make demand on the services and amenities provided by the body corporate, which is the test identified in the *Centrepont case*.

The evidence

23. In support of the application the applicant has provided an expert’s report prepared by Messrs Linkhorn & Simpson dated 10 May 2005 (“**Report**”). The Report concludes that the current contribution lot entitlement schedule is not just and equitable to all lot owners within the buildings and recommends the new contribution schedule lot entitlements sought by this application.
24. The Report analyses the expenses of the body corporate, ascertained from the body corporate’s administrative fund budget for the 2004/2005 year and a sinking fund forecast prepared by a specialist firm for the 2004/2005 year. It then allocates those expenses to the various lots based on criteria that are considered the most appropriate for the particular type of expense. The various criteria (and lettering) used are:
 - a. Equal sharing of costs by lots (where each lot benefits equally from the expenditure)
 - b. Overall costs (i.e. for both buildings) shared on an area basis
 - c. Secondary building costs (i.e. the parking building) shared on an equal basis
 - d. Secondary building costs (i.e. the parking building) shared on an area basis
 - e. Main building costs (i.e. the medical centre) shared on an equal basis
 - f. Main building costs (i.e. the medical centre) shared on an area basis.
25. Electricity and caretaking expenses, because they related to both buildings combined, had to be first apportioned on a reasonable use basis and insurance costs were omitted because they are recovered by the body corporate based on interest schedule lot entitlements.
26. The Report then allocates each criteria (other than b. which did not receive any allocation) on a percentage basis to the various lots to come up with a recommended new list of contribution schedule lot entitlements based on the extent to which, in the opinion of the experts, the lots draw on the services and amenities provided by the body corporate. I have no reason to doubt the soundness of this methodology and the accuracy of the calculations in the Report.

Findings

27. In this matter I find:

- (a) there is a dispute between the applicant and the body corporate;
- (b) the applicant is entitled to bring this application;
- (c) the contribution schedule lot entitlements in the Scheme are not equal;
- (d) the contribution schedule lot entitlements in the Scheme are not just and equitable within the meaning of section 49 of the Act;
- (e) the contribution schedule lot entitlements proposed in the application are just and equitable within the meaning of section 49 of the Act;
- (f) there is nothing about the Scheme or the way the lots are used that needs to be taken into account in respect of this application, other than matters relating to demand on services and resources provided by the body corporate, being matters already taken into account in the Report; and
- (g) there is nothing about voting entitlements that otherwise impact on the contribution schedule lot entitlements proposed by the application.

28. I therefore propose to make an order adjusting the contribution schedule lot entitlements in the Scheme in the manner requested in the application.



Gary Bugden OAM

Specialist Adjudicator