Yes Biz T/A Body Corporate Assistance
ABN 75-119-082-236
29 Pacific Ave
Miami Qld 4220
Phone (07) 55 54 55 26
www.bcassist.com.au

Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 257

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane Qld 4000
lacsc@parliament.qld.gov.au

Dear Committee please table and consider this submission regarding **the 2012 BCCMA Amendment Act.** This submission is in three parts, 1) Preface, 2) Request for extension of public submission and debate 3) Suggested amendments to the Bill. This submission opposes the 2012 Amendment Bill and addresses the Contribution Schedule Lot Entitlement (CSLE) aspect.

Part 1 Preface:

This is a confused, incompetent and ethically questionable Bill.

Confused: The confusion is epitomised by the Bill's support for some amalgamated apartments to retain minimised (FPV)* contributions, others to be reverted to a sum of the two pre-amalgamated fees and yet all can be re-valued back to a minimised (FPV) contribution via another COA*. This Bill stands for nothing except elevated court costs in this respect.
**(FPV = Fischer Preferred View, COA = Court Ordered Adjustment)*

Incompetent: Many of the 2012 Bill's target developments will be ordered to revert to an incompetent (invalid as determined by QCAT and Commissioner's Office) court ordered adjustment. No progressive evolution toward national standards is evident in this Bill when clearly national standards have recently been applied across the expenditure side of Bodies Corporate (with 2008 Building Fire Safety regulation & 2011 WH&S Act). The Bill ambiguously both supports and rejects the FPV and the explanatory notes admit to no direction for solving the lot entitlements issue. The FPV should be investigated and lot entitlement principles solved prior to any such Bill taking effect.

Ethically questionable: My personal experience confirms that a great proportion of benefactors maintain ethical standards that preclude them taking advantage of this Bill. Respect for the notion of a social contract (formed by founding lot entitlement agreements) is often cited and adherence to codes of ethics (Rotary etc) further distances many citizens from this aspect of the 2012 Amendment Bill. The Newman Government appears to have underestimated the ethical repugnance of this Bill to many high-value lot owners and it is likely that the Bill is destined to become a conspicuous litmus test for social values.

Principle in question:
The Fischer Preferred View (FPV) is a flawed construct based upon the fantasy of unlimited space in Hi-Rise CTS.
Hi-rise CTS however are built to the maximum density required to attain the greatest financial benefit from a site.
The specific density will vary depending on the aspect and location of the site and the trade-off of price vs number of apartments (prestige etc) and of course,
must comply with L.G. development laws.

For budgetary purposes, a hi-rise is a finite space of owner lots as the sole income source to run the whole development. For any given development; the smaller the lots, the lower the fees and conversely the larger the lots, the greater the fees as the bulk of costs are commensurate with the size and height of the development.
A flat development (three levels or less) will generally be much less expensive than a hi-rise and the higher the building, the higher the compliance, maintenance and infrastructure costs.
The body corporate contribution schedule therefore is appropriately proportioned on a combination of Area (M2) and Height (floor level). Coincidentally a high degree of correlation between this method and the (apartment) value principle exists so either method is usually valid.
Gardens and grounds have a proportional value to apartment size and height as enjoyment is primarily gained by the over-view and separation to adjoining developments, not physically trampling over the garden beds. Pools, BBQs & Gym have a valid claim to be costed in proportion to the accommodation capacity of each apartment (whether they use them or not).
How the Fischer preferred View (FPV) was accepted as a standard completely isolated to Queensland says much more about the failings of due diligence in our State than any claimed validity of the precedence itself.

With the confused and contradictory principles evident in this Bill, the only consistent reason for the Bill appears to be its opposition to a previous Government's Bill? This stance is understandable for a party in opposition, however upon gaining the responsibility of governance, a constructive, mature and meaningful approach is assumed to be incumbent upon our leaders.

I have great concern for the loss of confidence in the real estate industry and for the turmoil and suffering of our citizens from the confused values and legal patch-ups that will result from this unfortunate Bill.

"Reasons for the Bill"
The LNP had foreshadowed amendments to the 2011 BCCMA Amendment Bill prior to achieving Government earlier this year. The amendments were based upon three main criticisms as elucidated in the explanatory notes:

1. Legislation negating valid rulings by the court process
2. One person having the power to dictate a change of body corporate fees for all
3. Retrospectivity.

1.) The 2012 Amendment Bill is both hypocritical and incompetent in this respect. Not only does it legislate against current established Court Adjudications, QCAT decisions and Commissioner's Office adjudications, it also proves incompetent, leaving several developments bereft of any valid rulings. The 2012 Bill attempts to re-empower extinguished incompetent adjudications [1].
2.) The argument of the 'power of one' has been handled in an inept manner resulting in transference of stated power from the appellant to the respondent. **The problem has not been corrected, it has been reversed.** Correction of the problem would have been easily achieved by stipulation of a quorum to support the reversion motion (as conjoined applicants) rather than just one member. It is clear that in virtually every CTS, there will be a majority of owners in favour of reverting to the founding contractual arrangements supported by the original purchase documentation (founding CSLE). By transferring the right ('of a single applicant') to set fees to penthouse (& similar) owners rather than correcting the problem, this Bill is shown to be inept in its objective and discriminatory in nature. It has exacerbated the issue by mainstreaming applications proved to be aberrant with respect to other Australian States.
3.) The argument of retrospectivity is now moot as the 2012 Amendment has itself failed to improve on this element of criticism.

These failures are easily remedied by the Government remaining true to its word by introducing an Amendment Bill rather than what appears primarily as a Bill of unjustified and confused opposition.

With regard to Submissions currently on the Website:

Submissions appear to be of the following nature:

1) Complaints of severe financial hardship IF the 2012 Amendment is passed.
2) Complaints of severe financial hardship IF the 2012 Amendment is NOT passed.
3) No understanding that this is a Qld only problem which will in time be corrected by legislation to National Standards that Qld should be progressing towards.

This legislation is both temporary (awaiting National compliance) and disruptive (working in opposition to such standards that Qld must eventually adopt).
National legislation compliance is progressively ascending the authority of aberrant State rulings. The 2008 (Building Fire Safety) and 2011 (Workplace Health & Safety) that govern most cost items in hi-rise accommodation have been re-written to reflect national compliance and the Body Corporate/Strata fee standards will follow.
The 2012 Amendment (by further departure from other state legislation) sets the Queensland Strata industry up for a debilitating shock rather than a smooth transition when national compliance is achieved.
Developers have (in the majority) adhered to national standards as they operate across borders in Australia and the 2012 Amendment Bill will introduce an unhelpful impediment further isolating Qld property and exposing developers to probable litigation in the fees debacle.

Effects of the Bill:

- Isolate Queensland from nationally accepted principles.
- Set the Qld hi-rise industry up for a debilitating future shock upon national compliance.
- Introduce further uncertainty in amalgamations, apartment valuations and setting of fees.
- Force many developments that have been affected by previous COAs into immediate adversarial court proceedings from failure of any valid CSLE to revert to.
- Destabilise many Commercial, Industrial, Retail & Medical facilities.
- Exacerbate homelessness by raising costs and reducing value of the most vulnerable cohort in any hi-rise.
- Elevate Queensland's Court costs, Body Corp costs and legal activity.

Implied liability awaits the Qld Government from successive changes of valuation and homelessness issues; such liability will be measured against the Government's management of the issue. No evidence of fiducial duty to this date exists.
National fee schedule consistency (with other States) is the inevitable solution and the direction that should be the preeminent priority of this Bill.
Qld Citizens should be made aware of the elevated court resources consumed by mainstreaming COAs and the elevated risk of hitherto unaffected lot owners of residential, commercial and industrial lots becoming a target of said mainstreaming.
In its current form, this Bill also fails to solve the deeper issue of lot entitlements and introduces elevated risk, uncertainty, community upheaval and cost. It has failed intrinsic justification for introduction and exhibits a critical failure of due diligence.

Part 2 - Request for extension of time (public submissions- 12 months).

The **scope** of this Bill has been underestimated, I suspect due to the failure to realise the impact of mainstreaming what was hitherto considered a loophole process. This Bill will embolden the 'big players' in all facets of the BCCMA including lots in:

- Residential,
- Industrial,
- Office,
- Medical,
- Shop,
- Marina developments.

The target population is vast and disparate, requiring an extended community consultation period: Owners residing in all states of Australia and numerous overseas locations will be directly affected. Please provide a commensurate time line for all cohorts of all locations to be notified and respond.

Effects of the Bill appear to include:
FINANCIAL:

- Increasing cost of on-going Body Corporate fees (up to 411% in extreme cases and typically 30 to 70%)
- Reduction of on-going Body Corporate fees by up to 75%
- Reduction or increase in value of lots (significant windfall gains and losses)
- Total failure of value of some lots
- Failure of certainty for most lots as all fee structures become endlessly court contestable.
- Creates windfall advantage for high value apartment owners at the expense of lower value lot owners.

LEGAL:

- Class actions against recent developments. With the Commissioner over-ruling the recently set fee structures, there is someone to blame. Was the developer to blame by failing to comply with legislation or was it the Government, for failing to correct the aberrant loophole?
- No-man's land. Many developments are instructed by this Bill to revert to pre-reversion status, thereby re-empowering the penthouse owner's orders. Many such orders have subsequently been found incompetent, un-empowered orders.
- How does the Attorney General expect to gain the constitutional authority to breathe life into extinguished illegitimate judgements?
- Section 411 attempts to stem the destruction of developments this Bill introduces by prevention of mass amalgamations such as may occur with large numbers of holiday apartment holdings by one company (i.e. Wyndham Holiday Apartments), however appears to fail in two respects:
    - The same destructive affect may be activated by amalgamation and subsequent COA for equalisation, thereby failing to achieve the objective.
    - Being discriminatory in reverting some, however not all, previous amalgamations that have occurred in successive COAs.

- The Bill rides roughshod over the **unanimous agreement** of every owner's body corporate fee obligations as signed for in purchase agreements.

The impact of this Bill is highly understated and unlike a local intersection upgrade, it impacts Local, State, Interstate and International clients. The Bill's is complex in its narrow inclusions and exclusions, its scope and impact upon many facets of industry appears untested. To accept a four week lead time for comment is indeed a travesty in precedence for our State of Queensland. Please extend this to a commensurate minimum of twelve months during which time, solutions to the above issues may be developed.

Part 3 – Amendments.

The explanatory notes provide no aims, aspirations or outcomes with the exception of addressing what is assumed to be "*the ability to effectively over-turn a lawful order of an independent court, tribunal or specialist adjudicator.*" The competence of said "*lawful orders*" is the issue here and no attempt is evident to determine the veracity of such adjudications that prima-face are the aberrant elements in this debate. This Bill builds an edifice of discrimination upon a quagmire of unproven assumptions. The honourable path is to recall the Bill and deal with the underlying issues.

This Bill is reactionary in nature as it is formed against a previous amendment Bill. It is incumbent upon the proposers to demonstrate **a rigorous narrative resulting in a compelling argument** with the **major stakeholders** to established the need for this Bill. **There is no evidence of the narrative, the consultation nor validation of the argument beyond reference to hearsay.** The complaints of "*some lot owners*" surely **is** a reason to investigate, however:

- the critique of the QLS (Queensland Law Society) could be made equally on both the 2011 and the 2012 Bills
- there is no supporting material behind the referenced stakeholders, once again exhibiting failure of due diligence
- no authority exists in said references, due rigour of confirmation has failed
- the failure to exercise background veracity is not a characteristic the public expects or deserves from a well mandated Government.

Not only does this Bill fail to exhibit any tangible investigatory process of either the core principle or the opposition to the Bill it replaces; it offers no solution to the core issue of ongoing community upheaval and successive court actions that will surely result from its failure to solve the problem of no evaluative, tangible reference for setting of lot entitlements.

Replacing a current Bill that has inherent veracity from the authority of a virtual vote without dissent (passed by all original purchasers as per purchase documentation) requires something much more cogent than the unfounded assertions within the explanatory notes.

The Bill fails to address the prospect of adherence requirements to nationally acceptable reference material for courts, adjudicators or victimised lot owners.

The Bill fails to address subjectivity of CSLE apportionment, thereby facilitating further confusion and aberrant determinations by competing forces in industry and law. Failing to secure a tangible basis for such determinations opens the likelihood of:

- class actions against developers from disgruntled owners penalized by a subsequent COA
- declining value of hi-rise apartments
- developers losing confidence in the Queensland industry and exiting the State.

There is no valid rebuttal of the basis for the Bill it replaces, nor does this Bill suffer any less from the odious assertions of the 2011 Amendment.

This application addresses the explanatory notes rather than the Bill itself as the craftsmanship of legislators is accepted as the most reliable means to provide a valid outcome.

To achieve greater alignment of outcomes with reasons (page 2 Explanatory Notes), the following suggestions are submitted:
Please refer to following quotation:

> *"The 2011 reversion process has come under significant criticism by some lot owners and peak legal and stakeholder bodies for allowing a single lot owner the ability to effectively over-turn a lawful order of an independent court, tribunal or specialist adjudicator."*

Most past adjustments were also lawful rulings, compliant with legislation of the day. The objective issue of this Bill cannot therefore be about being "lawful".
If the issue of this Bill is anything other than to establish and assert authority of the high value cohort applicants over that of low value cohort applicants, it is not evident in the legislation.

- The authority of the 2011 Amendment Bill is achieved by all original lot owners confirming their approval of the founding CSLE by their acceptance and agreement as per purchase documentation; the 2012 Bill however has no such authority. The Bill relies on statements of plaintiff employed consultants justifying nationally and internationally aberrant evaluations that will at some time be overturned by National Standards. To re-assert this temporary and aberrant process is unconscionably irresponsible to both the industry and clients. All elements of Hi-Rise buildings that contain the majority of costs to the Body Corporate are subject to National Standards[2] **The Qld State Government has failed to justify departure from this otherwise progressive practice.**

- The "Notes" have **confused** the **authority** (a virtual vote without dissent) with the **mechanism** (any or all of the original owners) in its criticism of the 2011 reversion Bill. The authority of reversion in the 2011 Bill remains unchallenged and the writers of the "Notes" have attempted to discredit authority by attacking the **mechanism** of such reversion. Has the writer failed his/her obligation of critical thinking or is the justification of the Bill misguided? Either conclusion questions the integrity of the Bill.
- The power (authority) of the founding CSLE was clearly attained by a full cohort of original purchasers unanimously agreeing to support the CSLE. The 2011 Bill mechanism to revert to the founding CSLE (via 2011 Amendment) is in the hands of ANY (not just one) of that cohort. The (2012 Amendment) explanatory notes have misleadingly re-interpreted the 2011 Amendment to appear sinister in nature, suggesting that only one owner would be in support of reversions. The notes (and Bill) are an inappropriate misjudgement when clearly adding the requirement of an ordinary motion to pass the reversion is a superior option for clarifying the original intent and re-affirming that a majority of owners remain in support of the original CSLE (for a reversion to justifiably take effect).

The 2011 Bill is written in a manner to streamline administration, not apply inappropriate power for a single lot owner. The objection raised by this Bill is one of detail not substance. The detail is easily corrected by ensuring that the applicant is conjoined by others in a similar manner to numbers required to call a meeting or pass an AGM motion.

<u>Amendment</u>: Reduce the 2012 Amendment Bill (with regard to the CSLE to the following):

"The reversion application must be put to and supported by a general meeting to take effect."
This amendment far exceeds the legitimacy of the 2012 Bill and achieves the outcomes required by the "Reasons for the Bill" by ensuring a majority of owners have exercised their vote in support of reversion.

This amendment carries with it the following advantages:

- Chapter 6 of the BCCMA is respected
- The foreshadowed damage referred to the remaining sectors of the Act is avoided
- The residential apartment industry is reprieved from the prospects of class actions
- The retrospectivity issue is minimised
- No claim of favouritism can be sustained
- The inevitable establishment of National Standards are facilitated.

The Amendment Bill is clearly discrepant to its stated reason for presentation and comes at the cost of unannounced years of collateral damage. The Bill in its current form will introduce an unprecedented dissatisfaction of the Government's claim to independence and integrity.

No attempt has been made to alert the REIQ of this Bill's outcomes and thousands of agents are currently selling units under false pretences. This is indeed a new low for regulation standards in Queensland.

Sincerely,

Philip Williams
Director, Body Corporate Assistance
Tuesday 17th October 2012

[1] The 2012 BCCMA Amendment Act (with Oct 19th cut off public consultation period):

- Attempts to re-empower extinguished illegitimate court actions by reverting to them
- Overrides the legislation that corrected the problem.

[2] The 2008 Queensland Building Fire Safety Regulation and the 2011 Qld Work Health & Safety Act regulate the manner in which most **body corporate funds are expended** in care, maintenance and refurbishment of each CTS. The legislation has been re-written and introduced in 2008 and 2011 respectively to **conform to National Standards** of legislation. For this Bill to attain legitimacy, an argument must be won to support this sudden and aberrant divergence governing how **body corporate funds are raised.**