Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 261

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The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
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BY EMAIL: lacsc@parliament.qld.gov.au

Dear Sir / Madam

SUBMISSION: *BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2012*

We refer to the *Body Corporate and Community Management and other Legislation Amendment Bill 2012* ("Amendment Bill").

Strata Community Australia Qld Limited ("SCA (Qld)") thanks the Committee for inviting submissions in relation to the Amendment Bill.

INTRODUCTION

SCA (Qld) is a non-profit, professional organisation for bodies corporate, community managers and suppliers of services to the body corporate industry in Queensland. SCA (Qld), through its predecessor the CTIQ, was established in 1984 and currently has more than 450 members.

The objectives of SCA (Qld) include -

- representation on body corporate and community title issues to the Government and general community;
- provision of on-going professional education to its members;
- facilitating networking between members, government, sponsors and suppliers of services; and
- the establishment and maintenance of professional standards of practice for SCA (Qld) members.

In 2010, SCA (Qld) prepared a Legislative Issues Paper ("LIP") setting out its policies on laws relating to body corporate management.

RESPONSE TO THE AMENDMENT BILL

The explanatory notes to the Amendment Bill which amends the *Body Corporate and Community Management Act 1997* ("Act") state that the objective of the Bill is to:

- remove the requirement for bodies corporate to undertake a process prescribed in Chapter 8, Part 9, Division 4 of the Act (the 2011 reversion process) to adjust contribution schedule lot entitlements to reflect the original entitlements prior to any, and all, relevant orders of a court, tribunal or specialist adjudicator if a lot owner submits a motion requesting such a change (to minimize the number of bodies corporate that may be required to undertake the reversion process, this amendment is proposed to take effect on the date of introduction of the Bill into the Legislative Assembly);
- establish a process for contribution schedule lot entitlements that were adjusted pursuant to the 2011 reversion process to be changed to reflect the lot entitlements that applied to the scheme prior to the application of the reversion process;
- remove unnecessary disclosure requirements imposed on sellers of lots in community titles schemes; and
- provide jurisdictional consistency for the resolution of disputes about contribution schedule lot entitlement adjustments.

SCA (Qld) has identified four (3) key issues arising under the Bill. These are:

A. Changes to disclosure regime;

B. Deciding Principles; and

C. Reversal of Reversals.

In addition to these issues SCA (Qld) has identified a number of other minor issues, which it considers ought be addressed in the Amendment Bill.

A. Changes to disclosure regime

Section 206 of the BCCM Act currently requires that a disclosure statement, required to be given to a buyer of a community title lot by their seller, must be accompanied by a copy of the CMS for the Scheme. Further, an explanation must be given as to how stated annual contributions have been calculated, by reference to interest and contribution schedule lot entitlements ("Explanation").

Since the 14 April 2011 amendments to the Act, experience has revealed that the provision of the Explanation by a seller, in large part based upon the provision of information by their Body Corporate Manager, represents at worst a minor inconvenience. This is to be contrasted to the benefits of drawing the attention of buyers to the importance of lot entitlements, and the manner in which their share of Body Corporate expenses are calculated. SCA (Qld) supports owner education, provided it does not significantly adversely impact the operation of the (strata) property market, including for example by increasing transaction costs.

The provision of a current CMS has resulted in an increase in transaction costs, typically of approximately $100 per sale. Well represented buyers obtain a copy of the CMS from their solicitors during the purchase process. On this basis there are arguments that provision of a CMS is unnecessary.

Experience however has revealed that provision of a CMS before a purchase has been entered upon has the effect of bringing to the attention of the potential buyer the by-laws of the community titles scheme.

Potential owner-occupiers should be aware of the by-laws to ensure that the by-laws for the Scheme suit their lifestyle; for example as to the keeping of pets. Further, investor owners are obligated to provide a copy of the by-laws to tenants. Early provision of a CMS facilitates these outcomes.

SCA (Qld) has not conducted an analysis of the impact, if any, that provision of the by-laws has had the prevalence of dispute resolution. It is possible that there has been an effect, given the potential increase in awareness of buyers of the by-laws which affect them after they become lot owners. If there was such an effect it would take some time to become apparent; at least as long as the average current period of ownership of community title lots in Queensland. SCA (Qld) recommends that such an analysis be conducted before the CMS disclosure obligation is removed.

If the provision of a CMS before purchase has the effect of decreasing the rate of disputation in community titles schemes then the CMS disclosure obligation ought not, in the view of SCA (Qld) and having regard to the financial and emotional costs of disputation, be removed.

B. Deciding Principles

The Amendment Bill does not propose changes to the adoption of Deciding Principles for determining Contribution and Interest Entitlements for Bodies Corporate.

In SCA (Qld)'s submission on the Bill which effected the 14 April 2011 amendments, it was submitted that:

> *"In essence, it is SCA (Qld)'s view that the policy underlying section 66(1)(d)(i) in the* (previous) *Amendment Bill is correct..."*

SCA (Qld) stands by these submissions and supports the retention of the deciding principles in the Act, subject to the submissions below as to addressing Schemes without an apparent, or equitable and appropriate, deciding principle.

C. Reversal of Reversals

The Act assumes that lot entitlements for all Schemes have been decided in accordance with a deciding principle and, perhaps more significantly, that the deciding principle was appropriate and equitable.

The experience of SCA (Qld) is that there are a large body of Schemes, typically established before 1997, where there is no apparent deciding principle, even after reasonable enquiry and analysis of pertinent documentation (for example a Building Units Plan).

There is a similarly large body of Schemes in which the deciding principle, if apparent, is neither appropriate or fair; for example entitlements determined by an original owner / developer to suit their commercial interests. The passage of time does not render such circumstances fair, appropriate or just.

Adoption of a deciding principle requires the passage of a resolution without dissent; as a change to a CMS otherwise not specifically authorized by a lower level of approval under

section 62 of the Act. Before 14 April 2011 there existed a means to address any inequities arising from a disparity between the contribution schedule lot entitlements for a lot and the principle that the entitlements ought be equal unless it was just and equitable for them not to be. Since 14 April 2011 there has been no means, other than by resolution without dissent, for pre-existing inequities to be addressed. The passage of the Amendment Bill will not address this issue.

In consequence there will exist two classes of Schemes; those which have had their contribution scheduled lot entitlements set or adjusted rationally (by reference to an apparent deciding principle or upon third party review before 14 April 2011) and those which have not. SCA (Qld) regards that position as inequitable. While it was a key feature of the 14 April 2011 amendments, retained by the Amendment Bill, that the means of review of contribution schedule lot entitlements is severally restricted, that restriction entrenches existing inequities in the second class of Schemes.

In the view of SCA (Qld) there ought be means to address such inequities, available to owners in any Scheme, or at least to the owners of lots in the second class of Schemes. To achieve such outcome however a clear rationale for the sharing of expenses must be enunciated, which rationale is appropriate in all cases, and maximizes equity.

It is the submission of SCA (Qld) that this outcome is only achievable where per lot expenses are disaggregated from expenses of a capital nature, at the time of calculation of lot owners respective shares. To put this another way, the costs of per lot expenses such as AGM notices are shared fairly when shared equally. Contra-wise, capital expenses benefit owners in different degrees, most logically in accordance with their interest share of the Scheme. For example if capital improvements are made to Scheme Land, and the Scheme is later terminated, it is the owners interest schedule lot entitlement that determines what share of the land the owner takes.

In the submission of SCA (Qld) the second class Schemes ought have available to them means to address the inequities inherent in their Schemes.

To achieve this we suggest a more fulsome rolling back of the 14 April 2011 amendments. At the least, in the submission of SCA (Qld), the position of lot owners within second class Schemes must be considered and squarely addressed.

In the present instance, such course may lay in a more fulsome rolling back of the 14 April 2011 amendments. At the least, in the submission of SCA (Qld), the position of lot owners within second class Schemes must be considered and squarely addressed.

E. Miscellaneous issues

SCA (Qld) recommends that the following issues be addressed by amendment of the Amendment Bill:

- New section 47AA – As section 242 of the Act does not apply to an application made under this new section, a time limit on the making of an application should be imposed. In the view of SCA (Qld) 3 months is an appropriate time limit.
- New Sections 404(2) and 405(5) – Neither of these sections contain a time limit for the making of a decision (whether by committee or Body Corporate) after receipt of submissions. Accordingly a Committee or Body Corporate, having received submissions, may delay a decision unnecessarily.
- New Sections 404(5) and 405(7) – Neither of these sections provide adequate time for QCAT to make a determination on the substantive issues, in the experience of SCA (Qld) 90 days is insufficient for a decision to be obtained.

FURTHER INFORMATION

SCA (Qld) is happy to send a representative to appear before the Committee regarding this submission and the proposed reforms. In this regard, the Government may contact:

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CONCLUSION

SCA (Qld) appreciates the opportunity to provide this submission to the Committee.

Sincerely

James Freestun

President