



Body Corporate & Community
Management & Other
Legislation Amendment Bill 2012
Submission 268

**AUSTRALIAN COLLEGE OF COMMUNITY
ASSOCIATION LAWYERS INC.**

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 refer to your letter of 19 September 2012. The Australian College of Community Association Lawyers Inc. ("College") thanks you for inviting submissions to be considered by the Legal Affairs and Community Safety Committee in relation to the Amendment Bill.

The College notes that this Amendment Bill has arisen from the concerns the Government had to the April 2011 amendments to the *Body Corporate and Community Management Act 1997* ("BCCM Act") which effectively allowed an owner to reverse a decision of the Courts, Tribunals and Specialist Adjudicators in relation to the adjustment of the contribution schedule lot entitlements.

The College congratulates the Government on recognising that the April 2011 amendments drew widespread criticism from all sectors of the strata industry and that it proposes to address the issue of the setting of and adjustment of contribution schedule lot entitlements. However, to simply 'reverse' a bad law, does not resolve the underlying issues concerning the setting and adjustment of contribution schedule lot entitlements.

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INTRODUCTION

The College is a not for profit association of specialist lawyers established in 2006.

The principal objects of the College are to –

- establish and administer to the highest standards a system of specialist accreditation for lawyers skilled in the Discipline
- promote the highest standards of professional practice
- facilitate research and dissemination of research materials on all aspects of the Discipline
- foster a collegiate relationship among accredited specialists and other members
- promote public awareness and knowledge of the Discipline, and
- work in a non-political way to improve laws relevant to the Discipline.

The "Discipline" is defined as *"the law and practice associated with Common Interest Subdivisions"*. In turn, *"Common Interest Subdivisions"* are defined as *"the subdivision of land (with or without airspace) into lots and common areas whether or not a body corporate or association is established to administer the common areas, including, without limitation, subdivisions commonly known as strata titles and community titles"*. This includes community titles schemes in Queensland.

One of the objects of the College is "to work with State and Federal governments to ensure that legislation related to the Discipline or having the potential to impact on Associated Persons is relevant, effective and of the highest quality so as to ensure the best possible outcomes for such persons". "Associated Persons" means persons who live in, work in, or have a legal or equitable interest in all or part of a Common Interest Subdivision development".

The College has a public interest focus and over time it is expected to build a substantial body of knowledge and skills in this important and expanding area of the law.

RESPONSE TO THE AMENDMENT BILL

The College notes that the amendment Bill proposes to do the following -

1. remove the requirement for a body corporate to undertake a lot entitlement reversion process under chapter 8, part 9, division 4 of the BCCM Act (to take effect from 14 September 2012)
2. to halt any lot entitlement reversion not completed by 14 September 2012
3. to establish a process to 'undo' any reversions under the 2011 amendments to the BCCM Act that were completed prior to 14 September 2012
4. remove unnecessary disclosure requirements imposed upon sellers of a lot in a community titles scheme, and
5. provide jurisdictional consistency for the resolution of disputes about contribution schedule lot entitlements.

The College concurs with the substance of items 1, 2, 4 and 5 of the Amendment Bill set out above.

However, the College objects to item 3 to 'undo' any reversion process already undertaken. To simply 'undo the wrong' does not make it right. Whilst an adjustment of the contribution schedule lot entitlements affected many owners, likewise the reversion process also affected many owners.

The College suggests that a moratorium be put on the 'reversal of the reversal' process until such time as the Government looks at the broader issue of the setting of and adjustment of the contribution schedule lot entitlements.

A survey of the College's members reveals that they have been involved in over one hundred reversions. In many instances, there have been 'big winners' and 'big losers', both in relation to an order or the reversal process.

In addition, some bodies corporate have had their lot entitlements adjusted and reversed two or three times in as many years, including overturning the reversion process as a result of a dispute as to whether the original order was an 'adjustment order' or a 'consent order'.

This has led to both widespread uncertainty for any one purchasing a lot in a community titles scheme and also distress to owners who have had to sell or are unable to sell their lot because of increased levies. The College can provide many examples where the adjustment or reversion of the contribution schedule lot entitlements has had a detrimental effect on owners.

An example to highlight the inequities in the present system is where an order was made by the Court to adjust the contribution schedule lot entitlements in a commercial building. Two owners received a major benefit, whereas a number of the smaller lots had their proportion of the contribution schedule lot entitlements significantly increased, in one case from 0.7% to 1.97%, which has resulted in the lot becoming unsaleable as the levies (without other outgoings) amount to 88% of the rental income. In addition, the owner is now substantially in arrears of levies.

NEW METHOD FOR CALCULATING LOT ENTITLEMENTS

The College is of the view that there is a better method of setting the basis for contributions by lot owners which is just and equitable and removes the perception that 'struggling pensioners occupying small units' are subsidising the 'wealthy penthouse owners' than the current system which requires that the contribution schedule lot entitlements must be equal, unless it is just and equitable for them to be something else.

The College suggests that the contribution schedule lot entitlements be the basis for calculating each lot owner's contributions towards the administrative fund and the interest schedule lot entitlement be the basis for calculating each lot owner's contributions towards the sinking fund.

The BCCM Act introduced a dual system of lot entitlements as follows -

- the contribution schedule lot entitlements which is the basis for calculating each lot owner's share of levies and the value of a lot owner's vote on a poll; and
- the interest schedule lot entitlements which is the basis for calculating the lot owner's share of the common property, the lot owner's interest on termination of the scheme and the unimproved value of the lot for rating and taxation purposes.

The administrative fund contains an estimate for the financial year of the body corporate to meet expenses in relation to the cost of maintaining common property and body assets and other expenditure of a recurrent nature. To the extent that recurrent expenditure relates to physical

amenities or common property, it is generally directed towards ensuring the availability of that amenity at a certain standard in any given period and that benefit is really one that applies equally to all owners (irrespective of the extent of use they may make or impact they may have on the relevant facility or amenity). In addition, these recurrent expenses include audit fees, bank charges, secretarial fees, postage and stationery and the like. They are, in essence, administrative fees. Accordingly, in almost all instances these types of expenses should be shared equally as the nature and type of the lot, the size of the lot or the location of the lot in the scheme has no bearing on these types of expenses.

The sinking fund contains an estimate for the financial year of the body corporate for capital expenses plus it also reserves an appropriate proportionate share to meet anticipated major expenditure over the next nine years in relation to costs of a capital or non-recurrent nature and periodic replacement of items of a major capital nature. This non-recurrent expenditure includes painting, replacing windows and doors, replacing the roof, upgrading facilities and refurbishing common property. They are, in essence, expenses of a capital nature and therefore have a direct relationship to the value of each lot and the value of each owner's underlying interest in the scheme which has always been tied to its interest schedule lot entitlement.

Accordingly, the College considers that the most fair and equitable way of dividing up body corporate expenses is as follows:

- Administrative fund – owner's contributions to this expenditure should be based on contribution schedule lot entitlements which are to be equal, unless it is just and equitable for it to be something else.
- Sinking fund – owner's contributions to this expenditure should be based on interest schedule lot entitlements which are to be based on unimproved capital value, unless it is just and equitable for it to be something else.

The College's proposed method does not go against the principles for setting lot entitlements under the BCCM Act. The second reading speech in relation to the 2003 Amendment Act provided:

"The guiding principle for both setting and adjusting the contribution schedule is that it involves the equitable sharing of the costs of operating and maintaining the common property. These costs should be borne in proportion to the benefit, not in proportion to the unit's value. It is not a contribution linked to an ability to pay, but as a payment for services."

Further, an analysis of the various expert's reports which have been relied upon and accepted by the District Court, the Tribunals and Specialist Adjudicators in orders for adjustments of the contribution schedule lot entitlements generally reflect the College's proposition in relation to the dividing up of body corporate expenses.

Transitional arrangements will need to be put in place for existing schemes. The College does not see any particular administrative or restrictive burden being imposed as the insurance reimbursement is based on the interest schedule lot entitlements and further provided an appropriate timeframe is set (e.g., at the next annual general meeting of the body corporate).

MEETING

The College notes that when The Hon. JP Bleijie introduced the Amendment Bill, he stated: *"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"*.

The College would also like to meet with Government about the proposed reforms to contribution schedule lot entitlements. In this regard, you may contact:

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The College looks forward to working with the Government on the proposed reforms to the current system for the setting of and adjustment of the contribution schedule lot entitlements.

CONCLUSION

In conclusion, the College congratulates the Government on recognising that the 2011 Amendments to the BCCM Act were unjust and inequitable, however the College is of the view that to 'reverse the reversal' process is not good law and urges the Government to put a moratorium on the reversal process until a just and equitable system for the setting and adjustment of contribution schedule lot entitlements can be determined.

In this regard, the College's principal and preferred recommendation is to address the different purposes attributed to expenditure from the administrative fund and sinking fund through allocation of the contribution and interest schedule lot entitlements respectively as the basis for owners contributing to that expenditure.

The College looks forward to working closely with Government on this issue.

Sincerely

Nina Psaltis
General Manager