DEPRIVATION OF HUMAN RIGHTS BY THE QUEENSLAND BODY CORPORATE & COMMUNITY MANAGEMENT ACT 1997

Housing as a human right:-
Governments must do more and society itself must do more to end violations of housing rights, do more to protect the weakest and most vulnerable among us, do more to ensure the basic necessities of life and livelihood for all and do more to find and grasp the most effective means of guaranteeing an adequate place in which people can live in peace, security and dignity.

Commonwealth of Australia National Conference on Homelessness
Council to Homeless Persons
Address by Chris Sidoti, Human Rights Commissioner
4 September 1996

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Universal Declaration of Human Rights 1948

Housing Rights:

• access to adequate housing that enables a person to live with dignity and in peace and security;

• affordable – so that its cost does not threaten other basic needs.

PREVAILING LEGISLATION

The Queensland Government as part of the fundamental framework to protect the rights of the people under the Australian system of Westminster Government has enacted legislation that is binding on all legislators. It is the:-

LEGISLATIVE STANDARDS ACT 1992

4 Meaning of fundamental legislative principles

(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to--

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation--

(a) makes rights and liberties, or obligations, dependent on administrative power – only - if the power is sufficiently defined and **subject to appropriate review; and**

(b) is consistent with **principles of natural justice**;

(c) **********

(d)**********

(e)**********

(f)**********

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h)**********

(i)**********

(j)**********

(k) is unambiguous and drafted in a sufficiently clear and precise way.

In light of this legislation, we now examine the :-

BODY CORPORATE & COMMUNITY MANAGEMENT ACT 1997

The primary objectives of the Body Corporate & Community Management Act 1997 (BCCM A) is to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objectives.

The secondary objectives (in part) state:-

(a) to balance the **rights of individuals with the responsibility** for self management as an inherent aspect of community titles schemes;

(b) to promote economic development by establishing **sufficiently flexible** administrative and management arrangements for community titles schemes;

(c) to ensure that bodies corporate for community titles schemes have **control** of the common property and body corporate assets they are **responsible for managing** on behalf of owners of lots included in the schemes;

(d) to provide an appropriate level of consumer protection for **owners and intending buyers** of lots included in community titles schemes.

A basic premise of management is that **responsibility** must be **commensurate with authority**. You cannot have **responsibility** without **authority –** the two are indivisible.

INTRODUCTION

Many Australians dream of owning an apartment in Queensland, and some 422,000 of them, together with other nationalities, have realised that dream. However, the dream is soured by the realisation of deprivation of human rights by the BCCMA. The 422,000 unit owners in Queensland are deprived of rights available to citizens owning single residential property.

This statement and the preamble to this paper is in no way intended to suggest that the plight of Queensland unit owners is in any way analogous to the situation suffered by millions of homeless and displaced persons around the world. This paper does suggest that in the lucky country, that is Australia, there are inequalities within our privileged society that equate to denial of human rights for those subject to the Queensland Government BCCMA.

The BCCMA purportedly introduced to regulate the Body Corporate industry has been influenced by vested interest developers, building Caretakers and Letting agents and Body Corporate Managers. The Unit Owners, **the only source of funding for the industry**, are financially disadvantaged by a piece of legislative deception that does not comply with the Legislative Standards Act 1992. In that it does not have sufficient regard to--

1. The rights and liberties of individuals; and
2. makes rights and liberties, or obligations, dependent on administrative power without sufficiently defined or subject to appropriate review; and
3. is not consistent with principles of natural justice; and
4. does adversely affect rights and liberties, and imposes obligations, retrospectively; and
5. is ambiguous and is not drafted in a sufficiently clear and precise way.

The BCCMA does not even comply with its own objectives in that it does not provide consumer protection for unit owners, nor does it provide authority commensurate with

responsibility. Furthermore, the Act disregards basic human rights, to Australian community expectations, guaranteed by the Universal Charter of Human Rights.

Management Module and Contract Duration

Twenty Five year Management Rights (MR) contracts are the single largest misappropriation of unit owners funds and the Government refuses to amend this aspect of the BCCMA; therefore, the Government is complicit in the misappropriation.

The UOAQ sincerely prays that the Government recognises that the existing situation is unsustainable . Caretaking services are on average consuming 35% of annual building budgets to help pay inflated bank borrowings, to pay 'good will' for Management Rights, that are currently being sold at 5 to 5.5 times annual profit. Body Corporate Management (BCM) services are consuming 15% to 20% of the annual budget, just to administer buildings in accordance with the BCCMA. Unit owners are being forced out of their homes because they can no longer afford body corporate levies - coupled with local government rates, water and energy costs. The forced displacement of persons from residential units primarily applies to the elderly on fixed incomes. The devastation of their lives is compounded by the cost of selling and purchasing a less expensive residence because at their stage of life, being retired and fixed income, means that there is no opportunity to financially recover from their situation.

The Management Module for a residential/ accommodation building may be either the Standard Module with a maximum 10 year Caretaking/Letting Contract, (a $1M or greater contingent liability to the body corporate) or, the Accommodation Module with a maximum 25 year Caretaking/Letting contract (a contingent 2.5M or greater liability to the body corporate). This contingent liability is incurred by the developer and transferred to the Body Corporate with sale of the units via the contracted Caretaker's salary. The 10 and 25 year contract terms are of themselves contrary to normal established standards and are designed to dis-empower unit owners for the duration of the contract, plus any contract extensions, allowed under the Act. Under the BCCMA the owners of the building (body corporate) are deprived of the right to decide under which management module they want to live, or even if they want a resident caretaker/letting agent. Furthermore, the BCCMA (S112; 113; 114 and 115) precludes the Body Corporate from making any profit from sale of Caretaking/Letting rights for the building that they own. This right is transferred to the developer and the subsequent Caretakers.

The management module to be assigned to the building is allocated by the developer in accordance with s21 of the BCCMA that at first reading appears to be clear; however, there is a small clause in the Accommodation Module (AM) (AM 3(2)(b)(ii)) that states: “the lots included in the scheme were ***intended*** to be predominantly accommodation lots”. This clause is vague and non-definitive and places the legislation in the realm of the developers intent of mind. This makes it impossible for unit owners to take action against a developer who incorrectly classifies a building, as the 25 year Accommodation Module instead of the 10 year Standard Module. Misallocation is common practise to maximise profit from the sale of the Caretaking and Letting agreement. The ambiguous clause in the Accommodation Module is offensive to the legislative Standards Act 1992 s 3(k).

The inequitable situation is perpetuated through lack of legislation defining the responsibility of any Government Department or Agency to monitor and enforce the correct categorisation of buildings and their use. The BCCMA management module to be applied to a building is determined by the developer (original owner) as part of the first community management statement. Naturally the developer will choose the module most advantageous to his purpose, and there is no responsible authority to ensure that the module is within the intent of the legislation or to protect the interests of the eventual unit owners.

BCCM A Section 60 (1) requires a "Local government management statement notation"; but Section 60 (2) states: "In a community management statement notation a local government states only that the local government has noted the community management statement."

The Registrar, under the Land Title Act, records the first community management statement establishing the scheme of management. The Land Title Act 1994 Section 54D allows the Registrar to examine the building management statement for its validity, but there is no obligation on the Registrar to so do.

Thus the two government check points are nothing more than 'all care but no responsibility' effectively depriving unit owners of their human rights of freedom of choice and to be protected by government legislation.

This is distressing to owners because the issue we are addressing is to provide surety to purchasers who wish to live in residential property not affected by short term rental. The desire for quality of residential living accords with basic human rights, and will be an increasing problem as residential unit living increases. A recent Griffith University study (**Residents' Experiences in Condominiums: A Case Study of Australian Apartment Living** Ron Fisher[a] & Ruth Mcphail[a a] Griffith Business School, Gold Coast Campus, Griffith University, QLD, Australia Published online: 09 Apr 2014.) went to great pains to explore the frustration that purchasers experienced clarifying the classification issue, then ultimately finding that short term rentals were introduced into their property. The standard module should provide the means for that surety and restrict management rights agreements to 10 years. However, under Queensland legislation there is no provision for permanent residential buildings providing community expectations of lifestyle, amenity, safety and health. Queensland is the only Australian state not providing unit buildings for the exclusive use of long term or permanent residents.

The Australian Building Codes Board (ABCB) public consultation paper on noise levels in buildings, reported that an UK Department of Environment, Transport and Regions' January 2001 document states:

> *"Noise, at the sort of levels encountered in dwellings, can lead to a wide range of adverse health effects including loss of sleep, stress and high blood pressure. Qualifying the risks attributable to exposure to environmental noise and, particularly, neighbour noise is difficult but it is suggested that there are between one and ten deaths per year in the UK (these being suicides or as a result of assaults) attributed to*

> *noise from neighbours. The number of less severe problems attributed to noise (such as stress, migraines, etc.) is estimated to be about 10,000 per year."*

Furthermore, there is no penalty on the developer for this transgression of the regulation. But the unit owners must pay for 25 years for the Caretaker to amortise the additional cost of buying a 25 year depreciating contract. If perchance a Body Corporate proves that they are under the wrong module (that is the Accommodation Module instead of the Standard Module) the BCCMA stipulates at Section 128 that if the module is changed from Accommodation to Standard, the body corporate is still encumbered with a 25 year contract, not the 10 year contract they should have been under. This is to protect the Caretaker - against the interests of the Unit Owners who have to pay the extra 15 years of contract costs.

The Unit Owners own the building; however, the developer is able to sell the Caretaking and Letting Agreements. BCCMA Section 35 (1) states: "Common property for a community titles scheme is owned by the owners of the lots included in the scheme,…" As the body corporate owns the building they are the persons who should be empowered to sell the Caretaking and Letting rights on terms agreed by democratic vote. The owners may not want a resident caretaker, or a letting agent. The owners may give the letting rights to a person in exchange for him caretaking the building – thus saving the caretaker/letting agent a lot of money by not having to buy the rights and the owners a lot of money by not having to pay the caretaker to enable him to pay the loan to buy the rights.

A NSW Supreme Court Decision **Community Association DP No 270180 v Arrow Asset Management Pty. Ltd. & Ors [2007] NSWSC 527** found that:

> *Developers must not place themselves in a position of conflict **or to profit from** contracts entered into between the Body Corporate and Caretakers, without proper disclosure.*
>
> *Must not act to the detriment of the body corporate.*
>
> *If they do, they breach fiduciary duty and/or common law duty*.

The Queensland Government has ignored this judgement by the New South Wales Supreme Court and continued to discriminate against unit owner in favour of developers.

Building Use and Construction Standards.

Having sold all his units, and received a windfall profit from selling the Caretaking/Letting rights, the developer moves on to his next project. The new owners are left with their units, a caretaking/letting contract on which they were not consulted. A caretaker/letting agent that they did not employ and a 25 year or10 year burden of paying for the depreciating investment of the caretaker/letting agent. A set of by-laws that the owners have to live by, but did not write.

One exclusion on the By-laws is Section 180(3) of the Act that removes the rights of the body corporate to determine if they want a full residential building or a holiday letting building. This denies unit owners the right to live with dignity and in peace and security. Under the BCCMA the building must always be both residential and accommodation. Therefore, a residential building housing predominantly retirees can be invaded by an end of season partying football team, or group of bikies, resulting in a fatal shooting at the building entrance - as occurred at Carmel by the Sea. The BCCMA ensures that the Letting Agent gains the maximum return without consideration for the permanent residents. However, the body corporate remains responsible (AM s108) for managing and maintaining the common property and the building with all the accelerated wear and tear and depreciation caused by holiday makers. In effect the permanent resident owners subsidise the letting pool owners and the Caretaker, because (AM s93(5)) prohibits the body corporate from charging the letting pool owners extra maintenance contributions. The residential unit owners are therefore discriminated against in favour of the letting pool owners and the caretaker.

The BCCMA Section 180 (3) is also contrary to the National Construction Code (NCC) requirements for Class 2 (residential) building use. Prior to amendment of the Disability Discrimination Act (DDA) in 2010 (not being retrospective) Class 2 buildings had (and continue to have) lower fire detection standards, and were not required to comply with the access requirements or facilities of the DDA "***because they are private residential in nature*** *and* ***not considered*** *employment or* ***general public applications****."* (Australian Building Codes Board RD 97/01). The Body Corporate is responsible for ensuring that their building complies with safety standards and the DDA, but this is impossible for a Class 2 building, built prior to 2010, being used under Section 108 as an accommodation building. The building owners are forced by the BCCMA to breach the DDA and Queensland Fire regulations.

The DDA Premises Standards guidelines state in relation to existing class 2 buildings:

> *"A Class 2 building is typically a block of residential flats or apartments. While the Premises Standards do not apply to the internal parts of sole occupancy units (SOU's), they do require that any common areas available for use by all residents be accessible, to persons with a disability, where the SOU's <u>are made available to the public for short-term rent."</u>*

The scenario established by the Premises Standards introduces a 'material change of use' from private residential to public commercial accommodation. The NCC requires that public buildings comply with NCC fire Specification E2.2a para. 4. (AS 1670). That is a NCC Class 3 building that must comply with the DDA.

Class 2 buildings are built to NCC Fire Specification E2.2a para. 3. (AS 3786) that is a lower standard permitted only in buildings designed for private residential use. The private residential building by virtue of the type of resident results in long term occupants. Therefore, any Class 2 building being operated as commercial accommodation building available to the public for short term rent is in breach of the NCC fire standards even if it

does comply with DDA access requirements. Unit owners are denied freedom of choice and are forced by legislation into violation of Federal law.

Contract Termination

If the caretaker/letting agent is found to be dishonest or lazy, normal contract laws do not apply to the contract that was let by the developer, with no input from the owners. The BCCMA and associated Regulations contain a minefield of provisions that make termination almost impossible. Employing solicitors is essential because if the committee make a technical mistake the termination will be dismissed by the BCCM Commissioner's Adjudicator. (In fact, even if they do not make a mistake the Application will probably be dismissed by the Adjudicator because the Adjudicator does not consider it 'just and equitable' for the caretaker to forfeit his business.)

In *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300, his Honour DCJ McGill stated at [4] & [5]:

> *[4] The respondent disputes that the letter was valid to terminate the agreement. If the matter were simply one of contract, that would depend on whether the respondent had neglected to carry out its duty pursuant to the agreement in one or more of the ways specified in the notice, and had not taken all reasonable steps to remedy such neglect within a period of 14 days after that notice was given to it. If those matters had occurred, then the appellant had a right to terminate the agreement, and the purported termination was effective. If the matter were subject to dispute, a court or other body having appropriate jurisdiction could determine as a question of fact whether the circumstances had arisen so that the notice was validly given.*
>
> *[5] Because the matter arises in respect of a caretaking agreement under the Act, the situation is rather more complicated than this, because the Act and the regulation under it contain mechanisms designed to make it difficult for a body corporate to terminate an agreement of this nature.[4]*

[4] This is because property developers who set up these schemes want to be able to sell the management rights for large sums of money, so the rights that are conferred by the body corporate while it is still under the developer's control have to be reasonably secure, otherwise prospective managers will not be willing to pay so much for them.

His Honour continued at [17]:

> *[17] That paragraph suggests that it is appropriate for an adjudicator, or for that matter a court, to approach the resolution of the dispute with a strong preconceived reluctance to arrive at a conclusion unfavourable to the caretaker, because of the consequences to the caretaker of the application failing. No doubt those*

consequences would be unpleasant, but the adjudicator did not seem to recognise that there is more to a caretaking agreement than simply a valuable asset for the caretaker; the fundamental purpose of such an agreement is to ensure that appropriate caretaking services are made available to the body corporate, for the benefit of all the lot owners. It is not immediately apparent to me why lot owners should be saddled with a caretaker who has underperformed for a substantial period of time merely because of a desire to preserve to the caretaker the benefit of the agreement. I would have thought the best way for a caretaker to preserve its valuable asset was to ensure that its obligations under the agreement were properly complied with. If a caretaker has allowed circumstances to arise where the body corporate is entitled to terminate the agreement, that option is available to the body corporate. In any dispute about whether that entitlement has arisen, both parties to the dispute are entitled to an objective determination of the matter, without partiality or prejudgment. What concerns me about this paragraph in particular is that it appears to amount to an admission on the part of the adjudicator that he approached the resolution of the matters in issue between the parties with a preconceived sympathy for the respondent.

Unquestionably DCJ McGill recognised that the BCCM Act is biased against a minority of some 422,000 unit owners, and deprives them of their human right to terminate contracts equally on the same grounds as the majority 2.0 million other home owners in Queensland.

Retrospective Legislation

If the Body Corporate Caretaking contract or Letting Agreement was negotiated so that it contained some lawful, fair and realistic termination provisions, and a unit was purchased under those provisions, the contract is made **retrospectively void**. The termination legislation Division 8 of Part 2, Chapter 3 at s.137 states:-

*"The provision of a letting agent authorisation or service contract **providing for its transfer or termination** are **void** to the extent the provisions are inconsistent with this division."*

This is blatantly contrary to the LEGISLATIVE STANDARDS ACT 1992 - SECT 4 that requires that legislation:

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively;

Legislated Prejudicial Termination and Compensation Rights

When the body corporate wins the litigation for default of code of conduct, under s.138 the letting agent is given a **transfer notice**, but the Caretaker/letting agent, is under the BCCMA, allowed nine months to sell his business before he must vacate the building. But also, in another breach of precedent under contract law, if the contract has less than seven years to run, the body corporate must, under the BCCMA, extend the contract to a minimum of nine years, notwithstanding that there is no such provision in the contract. Thus the caretaker/letting agent who is in default of his contract and has been allowed 9 months to sell, is given a bonus of an extended contract as a reward for his

bad behaviour. If the contract was within its last year or two before expiry, this bonus for breach of code of conduct is worth about $1.0M to the caretaker, being $1.0M that the body corporate must continue to fund by way of the caretaker's salary.

When this provision of the BCCMA was questioned at introduction in 2003, the then Minister stated that the minimum 9 years was required by the banks and financiers to fund the purchase of Caretaking/ Letting contracts. This provision in the legislation ignores the rights of unit owners to equal protection against discrimination.

Furthermore, the Body Corporate can be advised by the Bank that they have an interest in the caretakers business and demand protection under BCCMA s.123 . When s.123 is in effect, the body corporate under BCCMA S.126 cannot terminate the Caretaking contract for 21 days after giving the bank advice of the termination. Also BCCMA s.127 bans the body corporate from entering into any agreement with the bank relating to the contract. Therefore, the bank can install their own caretaker and usurp the body corporate to protect the banks interests before the interests of the body corporate. These provisions extinguish equal protection against discrimination.

Conclusion

In conclusion every unit owner is entitled to ask if it is within the intent of human rights, the Legislative Standards Act 1992 and even the basic law of Natural Justice to:-

* allow a developer to incur a 10 or 25 year liability against the future owners of the building for his own financial benefit and enrichment? (The Supreme Court of NSW does not think so.)

* deny freedom of choice to the owners of the building as to how they control and run their own building?

* be written to require interpretation of a person's state of mind to allow that person to avoid responsibility?

* retrospectively void existing contracts of employment?

* require terms of contract termination that favour the Caretaker's interests over all other owners?

* reward a delinquent caretaker for his breach of contract?

* shield Caretakers and Body Corporate Managers from normal contract law such as repudiation?

Unit owners in Queensland must conclude that the Queensland Government considers the listed injustices to be acceptable and that unit owners and residents are not entitled to the same human rights and standard of living as single residential house owners. The

Queensland Government is clearly depriving unit owners of their 'human rights' and discriminating against unit owners.

G.J. Carroll
[redacted] [redacted]