

Body Corporate and Community Management and Other Legislation Amendment Bill 2023

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To: Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane QLD 4000

Via: Email only to LASC@parliament.qld.gov.au

Dear Committee Secretary,

**Re: Body Corporate and Community Management and Other Legislation Amendment Bill 2023
Clause 42 – amendment to Schedule 2, Item 2 of the BCCM Act**

This submission is made by Neil Hope (director) and Dr Dane Weber (senior associate) of Hope Legal Pty Ltd trading as Body Corporate Law Queensland. We are body corporate lawyers in Queensland. We also have multiple academic publications on body corporate law in Queensland, specifically relating to the length and extension of caretaking service contracts¹ and the fiduciary duties owed by persons in a body corporate, including a caretaker.²

Unfortunately, the Bill does not address the uncertainties on the term of management rights agreements, though the Bill does however somewhat address the issue of conflicts of interest. Our submission relates to **Clause 42 of the Bill** which amends Schedule 2 regarding the code of conduct for body corporate managers and caretaking service contractors, specifically to achieve the following:

- including a caretaking service contractor as a person who must not attempt to unfairly influence the outcome of an election for the body corporate committee; and
- requiring both body corporate managers and caretaking service contractors as persons who must not unfairly influence, or attempt to unfairly influence, the outcome of a motion to be decided by the body corporate.

Whilst we support the intention in principle, we think the wording is inadequate as it does very little to address the concerns meant to be remedied by the Bill. We particularly note section 3.10 and final recommendation 29 of the 2017 Government Property Law Review – Final Recommendations, Procedural issues under the Body Corporate and Community Management Act 1997. This section briefly discussed unfair influence and recommended Schedule 2, Item 2 be amended and extended to cover caretakers. However, there was no discussion as to what ‘unfairly influence’ actually meant in practice.

¹ Neil Samuel Hope, Dane Bryce Weber and Maija-Ilona Wilhelmiina Pekkanen, ‘Management Rights Agreements for Body Corporates in Queensland: Must They Expire, or May They Be “Topped Up” Indefinitely?’ (2020) 38 *The Queensland Lawyer* 175 and Neil Samuel Hope and Dane Bryce Weber, ‘The Statutory Life of Caretaking Service Agreements in Body Corporates in Queensland: The Exception to the Freedom of Contract Principle’ (2021) 39 *The Queensland Lawyer* 39.

² Neil Hope and Dane Weber, ‘Fiduciary duties and conflicts of interest in Queensland strata title’ (2022) 30 *Australian Property Law Journal* 63.



Difficulties with the phrase ‘unfairly influence’

Despite the code of conduct in Schedule 2 already preventing body corporate managers from unfairly influencing the election of a committee, there are close to nil in the way of legal decisions about that. From our experience in practice, the problem stems from the financial interests of the caretaker in keeping their agreement in force and the level of control the caretaker exercises as a letting agent for the scheme. This is compounded by the fact that many caretakers are lot owners in the scheme, giving them a statutory right to submit motions and vote as other lot owners are.

First difficulty

The first difficulty is that the phrase has no definition in relation to body corporate law. There are, to our knowledge, no body corporate decisions that define what ‘unfairly influence’ means in the context of the code of conduct. There is the decision in *Springfields Gold Coast* [2015] QBCCMCmr 552 where a body corporate manager put their own quote for an engagement ahead of another cheaper quote, but the motions were set aside on the basis that the body corporate manager did not act with honesty or fairness and did not properly address ‘unfairly influence’.

Second difficulty

The second difficulty is that, if decisions are being unfairly influenced, then attempts by the body corporate to remedy that unfair influence are themselves rendered null by that unfair influence. We frequently encounter matters where the committee are mere mouthpieces of the caretaker, and as the caretaking agreement is with the body corporate, lot owners cannot take action, as the very mechanisms designed to enable a body corporate to terminate an agreement for a breach of the code of conduct are themselves corrupted by that unfair influence.

Third difficulty

The third difficulty is one of evidence. In *Swell Residences* [2009] QBCCMCmr 207, the caretaker controlled over 50% of letting rights in the scheme, and distributed how-to-vote guides and advocated for a different committee. It was alleged by the applicant that this was ‘unfair influence’. However, no-one made a submission that they were unfairly influenced, so there was no proof.

In those circumstances, a lot owner’s financial position is often tied to that of the caretaker as the letting agent for their lot. It is that relation which may lead to the lot owner being unfairly influenced. If a person has been unfairly influenced to vote a certain way, that influence does not disappear simply because someone else is challenging a certain decision on the basis that it was unfairly influenced. The factors that lead a person who was unfairly influenced to vote a certain way are the same factors that lead the person to not give evidence of that unfair influence.

Fourth difficulty

The fourth difficulty is a question about what is ‘unfair’ in the context of a caretaker who owns a lot in the scheme. This is heavily tied to fiduciary duties, which are owed by caretakers by virtue of Schedule 2 Item 4 requiring caretakers to act in the best interests of the body corporate.

Currently, there is no guidance or regulation that balances a person’s right to vote with their obligations under an applicable code of conduct. This is an underdeveloped area which appears to have been left out of the review of the BCCM Act and reports and inquiries into the issue. Of particular note is the inadequacy of the law to balance a caretaker’s duty to act in the best interests of the body corporate with their ability to vote at general meetings, as current body corporate decisions ignore applicable fiduciary duties in favour of a right to vote, even where that right to vote is in contravention of the code of conduct.



Fiduciary duties

It has been said by adjudicators that, as there is a statutory prohibition on committee voting members from voting in conflict of interest at a committee meeting, then that means that a conflict of interest cannot exist elsewhere, such as at a general meeting of the body corporate.³ This position is incorrect. We have previously discussed this at length in our peer reviewed article 'Fiduciary duties and conflicts of interest in Queensland strata title'.⁴

The main relevance of this is that, if a caretaker owns a lot, and is entitled to vote in their own interests, and is entitled to canvass and influence other lot owners' voting like any other lot owner, how can a decision be unfairly influenced? This ties into the fact that the code of conduct preventing conflicts of interest is also of similar practical effect as the proposed amendment to Schedule 2 Item 2: very little. This is of greater importance when a caretaker owns more than one lot, or even owns a majority of lots in a scheme. There are a few cases to highlight the inadequacies of the current Schedule 2 Item 4 and likewise the proposed amendment to Item 2.

In *Ocean Resort Village (No 1)* [2015] QBCCMComr 134, the caretaker owned a majority of lots. For some reason, the caretaker voted against deciding a budget, despite that being a statutory requirement. The motion was set aside on the basis that the body corporate has to set a budget. It was said by lot owners that many lot owners would not vote against the caretaker given their control over the lot owners' letting situation, but all of this was not relevant. The adjudicator at [49] noted that majority ownership was not prohibited and so 'the owner of each lot in a scheme has a right to vote at a general meeting'.

In a similar matter, the caretaker in *Festival Towers* [2010] QBCCMComr 128 encouraged voters to vote for a specific committee, but said 'it was not performing duties under its contract when it sought to encourage voters to vote for a specific committee. It was acting as any owner might.' In any event, Schedule 2 Item 2 of the applicable code of conduct did not cover caretakers in that regard.

The issue here is that the current interpretation of the legislation, in our view, wrongly assumes the supremacy of a lot owner being able to vote above all other considerations. This view wrongly ignores the fact that, pursuant to the code of conduct, caretakers are obliged to act in the best interests of the body corporate.

In our view, the proper interpretation is that a caretaker, as a lot owner, is entitled to vote as any lot owner might, except where their interest as a caretaker conflicts with that of the body corporate, such as voting on motions concerning the caretaker's own engagement and conduct. This is because, by virtue of the level of influence the caretaker has (especially with a 25-year contract), and the obligation to act in the best interests of the body corporate, the caretaker's equitable fiduciary duties not only necessarily override their rights under a statute where the two may conflict, but such equitable fiduciary duties arise by virtue of the wording of the statute itself.

To date, there has only been one decision we are aware of where a conflict of interest was apparent and was considered to be unreasonable, thereby invalidating a motion. This only concerned a majority lot owner who was not a caretaker. This decision was *Teneriffe Hill Apartments* [2005] QBCCMComr 71. In that case, the majority lot owner was suing the body corporate. To engage legal representation, the body corporate had to decide to engage legal representation to defend the proceedings. The majority lot owner voted against it at a general meeting. The decision was overturned. The adjudicator held that the majority lot owner:

³ See *Edgecliffe Apartments* [2021] QBCCMComr 30, [67] citing *Beachfront Towers* [2018] QBCCMComr 531, [51] and *Marrakesh* [2019] QBCCMComr 58, [32].

⁴ Neil Hope and Dane Weber, 'Fiduciary duties and conflicts of interest in Queensland strata title' (2022) 30 *Australian Property Law Journal* 63.



... created a conflict-of-interest situation and it would be unreasonable of the applicant to vote in its own personal interests and prevent the body corporate obtaining proper legal representation ...

It is clear that a person's statutory rights to vote as a lot owner can be set aside where the decision would be unreasonable. Unfortunately, it appears that the current (incorrect) interpretation is that, even where a lot owner has such power, and despite owing an explicit duty to act in the best interests of the body corporate, that specific duty under Schedule 2 Item 4 of the code of conduct is never relevant to those decisions.

Proposed amendment to Schedule 2 Item 2 does not go far enough

Based on the above, we do not think that the proposed amendments to the code of conduct for body corporate managers and caretakers in Schedule 2 Item 2 goes far enough. There are already significant difficulties with (in our view) incorrect interpretation of the law, where conflicts of interests appear to be allowed despite the code of conduct.

Given the difficulties in determining what is truly an 'unfair' influence in those circumstances, we think that the proposed amendments to Schedule 2 Item 2, whilst welcome, will have zero actual effect in practice with no practical way to enforce it. To summarise, we think this because:

- there is little to no consideration of 'unfair influence' in body corporate law and what it actually entails, especially if it now involves caretakers who may also be lot owners;
- the body corporate is the only party to the contract with the caretaker or body corporate manager, and if the body corporate's processes are corrupted by unfair influence, then the very mechanisms to terminate a contract because of unfair influence is itself corrupted by that unfair influence and no remedy can be found;
- the factors that cause a person to be unfairly influenced to vote a certain way are also reasons why that person will not make a submission in relation to any dispute, meaning unfair influence often cannot be proven because that very influence prevents the person unfairly influenced from giving evidence; and
- caretakers are already bound by a fiduciary duty to act in the best interests of the body corporate, but this is currently not being enforced. There is little hope that an additional requirement to not unfairly influence a decision will have any effect in practice without regulation or guidance that balances a person's right to vote with their duties under a code of conduct.

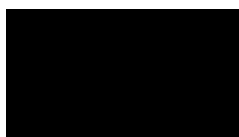
We think that the proposed amendments to Schedule 2 Item 2, whilst welcome, are severely underdeveloped and there has been very little consideration of the practical implementation and consequences of those provisions. Further inquiries must be made in this regard to properly address the items sought to be remedied by the proposed amendments to Schedule 2 Item 2 of the BCCM Act.

Yours faithfully,

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