

Body Corporate and Community Management and Other Legislation Amendment Bill 2023

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2 September 2023

Kathryn O'Sullivan
Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lasc@parliament.qld.gov.au

Dear Ms O'Sullivan

Submission on the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 (Qld)

This submission is in relation to the proposed legislation currently before the parliament. In summary, I write in my personal and business capacity as a long-term business owner providing independent pre-purchase Strata Reports, an experienced Strata Search Agent (with qualifications in Strata Management), and as a skilled Legal Researcher. I have a combined knowledge and working experience in both the legal and the strata industries of over 30 years. This submission is also made on behalf of all prospective purchasers in body corporate properties ('the consumer') in relation to the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 ('the Bill').

A. BACKGROUND

Holmes Strata Reports Pty Ltd is a service provider of independent pre-purchase Strata Reports also known in the industry as Due Diligence Body Corporate Record Inspections. Holmes provides in-depth due diligence search services for prospective purchasers of body corporate and/or strata

properties in both NSW and Queensland. The industry of Strata Search Services has been providing independent Strata (Due Diligence) Reports and Disclosure Statements since approximately 1989 or earlier under different format.

For general understanding the following is noted:

Search of the Records (for the Vendor) – Disclosure Statement or Body Corporate Certificate

- A vendor/owner/real estate agent provides a Contract of Sale for the purposes of selling a lot (apartment, unit, villa etc) in a body corporate plan.
- A vendor/owner/real estate agent requisitions a Disclosure Statement for the purposes of providing a snapshot picture of the body corporate plan at the date of sale/listing of the property. This includes basic information including balances of bank accounts, insurance details, levy contributions etc.
- The information disclosed in the Disclosure Statement is 'limited' in nature and does not provide full disclosure to the purchaser.
- A search of the body corporate records is undertaken by an interested party in order to provide the Disclosure Statement.
- The Disclosure Statement is provided for inclusion in the Contract of Sale on behalf of the vendor/owner/real estate agent.
- The Disclosure Statement provides a 'snapshot' view of the current situation of the body corporate plan.

Search of the Records (for the Purchaser) – Due Diligence Records Inspection or Strata Search

- A Due Diligence Strata Report or Records Inspection is 'unlimited' in nature and provides full disclosure to the purchaser.
- A search of the body corporate records is undertaken by an interested party in order to provide an independent pre-purchase Strata Report for the exclusive use of purchaser and/or their legal representative.
- The Strata (Due Diligence) Report provides a comprehensive detailed report (over a 4-5 year period) and includes the past, current and future situation within the body corporate plan.

Proposed Changes to Legislation – Working Group

The REI (Real Estate Industry), the SCA (Strata Management Industry) and other interested parties including the CTL Working Group have and are currently proposing changes to the existing legislation. For ease Holmes will refer to these combined parties (REI, SCA and CTL) collectively as the 'Working Group'.

Submissions have been sought and provided by other interested parties including the Strata Search Agents Association Qld (SSAAQ) and other Strata Search Agents businesses working within the industry providing both Disclosure Statements and Due Diligence Body Corporate Records Inspections (Strata Reports).

The Working Group have and are seeking amendment to the existing legislation particularly in relation to records and information provided in the sale/purchase of body corporate properties as it relates to Disclosure Statements.

Holmes submits the Working Group and/or the legislators have not sought submissions from the persons who are directly affected by the proposed changes to the legislation – the elephant in the room - the consumer or buyers of body corporate properties. As often is the case purchasers/ buyers of strata properties are completely unaware of their legal rights and obligations that ensure the protection of their own interests including the need to undertake their own independent due diligence research prior to purchasing into a body corporate. Holmes submits any legislation or change to the legislation should ensure consumers (purchases of strata properties) are protected or at least given warnings or guidance.

Holmes submits the proposed legislation be considered in light of the following:

B. BODY CORPORATE CERTIFICATES (VENDOR DISCLOSURE STATEMENTS)

The proposed legislative changes have omitted to include any legislation that protects the interests of prospective purchasers. There is a misguided belief by all parties in a property transaction that the 'Disclosure Statement' or 'Body Corporate Certificate' provides FULL disclosure of all the relevant information a buyer needs to make an informed purchasing decision. The Disclosure Statement only provides the minimum requirements to ensure the vendor has provided sufficient information for the purchaser to proceed in the sale.

It is at this point in time Holmes submits the proposed legislative changes has disregarded or falls silent in the next stop in the sale process – the requirement for the purchaser to undertake their own independent due diligence and ensure a thorough examination of the records of the strata plan is undertaken.

Given the fact that in today's world young first home buyers make up a large percentage of purchasers in body corporate schemes and that it is likely to be the biggest purchasing decision of their life (often \$500,000.00+ minimum) the proposed legislative changes does not address the second and most vital step in the purchase – to ensure the purchaser is aware that it is their responsibility to undertake all necessary investigations to ensure the property is suitable for their purposes including a pre-purchase Strata Report and often Building or Pest Report.

Holmes submits the proposed legislative changes are biased towards the vendor to ensure sales proceed smoothly via changes to the Disclosure Statements that offer nil protection to the purchaser.

The proposed legislative changes do not address or acknowledge the purchaser's legal rights and responsibilities. The legal doctrine of 'caveat emptor' or buyer beware prevails at all times regardless of any changes in legislation. The direct obligation is on the purchaser to undertake their own due diligence enquiries. However, the proposed legislative changes make no reference to Due Diligence Strata Reports or the recommendation for purchasers to undertake their own independent investigations.

The proposed legislative changes have sought:

- To transfer the responsibility for the provision of Disclosure Statement services from qualified, experienced, independent Strata Search Agents to Strata/Body Corporate Managers.
- To expand the number of documents/ records to be provided with the Disclosure Statements in an endeavour to be more 'transparent'.
- To legislate that Disclosure Statements are the only step purchasers need to take in making their purchasing decision.

Holmes submits the legislation is misleading to purchasers.

Reliance upon a Disclosure Statement in the property transaction is fraught with danger. Holmes submits the following questions for consideration:

Question 1: If a Disclosure Statement (regardless of who prepares it either the Strata Manager or the Strata Search Agent) does not include Minutes of an Extraordinary General Meeting that took place the day prior when the owners decided to raise a \$1million special levy to replace the roof of the body corporate plan and the prospective buyer did not know about this until after purchasing

who was then required then to raise an additional \$35,000.00 on top of the purchase price who is or will is at fault?

Question 2: If a Disclosure Statement did not provide for example a Cladding Report, Fire Roof, Engineer Report detailing major building defects (as these documents were not filed properly in the body corporate records, or were undertaken a year ago and the search only identified documents within the last 6-12 months) who is at fault?

Question 3: If the Strata/Body Corporate Manager or Assistant did not provide an Engineers /Building/Defect Reports knowing that they would likely result in a loss of the sale for their client (a lot owner within the body corporate they manage) – who is at fault?

There is a clear conflict of interest and a serious dilemma for Strata/Body Corporate Managers not being an independent party in the property transaction. Angry owners/vendor/real estate agents would likely vent their displeasure onto their existing Strata/Body Corporate Manager for the loss of the sale (vendor).

Or in the case if the purchaser/buyer finding out later that a vital document was withheld or not provided which would have influenced their purchasing decision the angry purchaser would then vent their discontent onto their new Strata/Body Corporate Manager for not providing important information prior to the purchase of the property.

The above are simply some of the hundreds of problems of documents/record disclosure relating to sale/purchase of body corporate properties and the need for external parties with no affiliation or relationship with anyone in the transaction to provide a completely independent search of the records.

In the case of home purchases the purchaser simply engages the services of an independent expert for the provision of a Building or Pest Report. The same should simply apply to the strata properties. The purchaser engages the services of an independent expert in the provision of a Body Corporate/Strata Records Inspection or Strata Search.

STRATA SEARCH AGENTS ASSOCIATION (QLD) INC

Holmes Strata Reports and other Strata Search Agents within the Strata Search Agents Association Qld (SAAQ Inc) have a combined 160 years+ experience within the strata / body corporate record searching industry.

The solution is simple.

Holmes submits the following proposed legislative changes to protect all parties including the vendor and the purchaser:

1. Disclosure Statements be provided by the vendor or their authorised representative.
2. Due Diligence Searches or Strata Reports be provided by the purchaser or their authorised representative.
3. Independent Search of the Records for either (1) and (2) above to be undertaken by external qualified professionals chosen and nominated to undertake the service by either the vendor or the purchaser (as is the case with Building and Pest Reports when purchasing homes).
4. The required legislation to ensure all (3) points above.

The consumer (either the vendor or the purchaser) is provided with free choice as to which service provider they choose to engage and further the consumer (the purchaser in particular) makes a free choice as to whether to rely on a Disclosure Statement or to undertake their own Due Diligence Strata Search.

Holmes submits the legislative changes takes away the consumer's choice, offers no information in relation to due diligence searches and effectively removes their protection when purchasing into body corporate plans (particularly those that are problematic, have major building defects or are simply dysfunctional or unfinancial). The purchasers will effectively be buying blindly if the new legislations/bills are passed.

C. STRATA REPORT (PURCHASER DUE DILIGENCE SEARCH)

The former and present proposed changes to the legislation/bills provides no mechanism, protection, warnings, guidelines or recommendations to the purchaser of other legal avenues or alternatives to reliance on Disclosure Statements.

Importantly, the proposed changes to the legislation has omitted completely all reference to Due Diligence Strata Searches or Due Diligence Strata Reports.

Holmes submits the proposed changes to the legislation include a recommendation that either a "due diligence" or "body corporate records inspection" clause be inserted into the Contract of Sale. Such due diligence Strata Search of the Records or due diligence Strata Report provides protection for the purchaser and ensures the buyer is aware of what they are indeed purchasing.

Alternatively Holmes submits the proposed changes to the legislation include reference to the choices that are available for both vendors and purchasers in relation to searching the body corporate records.

CONSUMER CHOICE / BALANCE

Holmes submits that by adopting and providing equal avenues for consumers (both vendors and purchasers) in searching the body corporate records the proposed legislation seeks equanimity and remains impartial in the sale/purchase transaction.

Disclosure Statements on the whole are provided by the vendor or their agents. The new legislative changes propose the Disclosure Statements now be provided by the vendor's body corporate manager. The Body Corporate Manager is affiliated and/or has a direct relationship with the vendor. The Disclosure Statement is likely to be provided by the Body Corporate Manager's Assistant or Office Junior with little to no experience in providing the relevant and/or accurate information upon which the purchaser is to rely on.

Disclosure Statements are 'limited' in nature and provide a purely 'snapshot' view of the body corporate plan at the point of time of the sale.

Alternatively:

Due Diligence Body Corporate Records Inspections or Strata Reports on the whole are provided by the purchaser or their authorised representative 'strata search' independent agents with many year experience in providing the required documentation necessary for the purchaser to make an informed decision.

Due Diligence Strata Reports are 'unlimited' in nature and provide a very comprehensive background including past, present and future history of the body corporate plan (usually over a 4-5 year period).

Holmes submits that providing a balanced approach and giving consumers the choice of whether to obtain a Disclosure Statement or a Due Diligence Strata Report by an independent service provider ensures both the vendor and the purchaser's interests are protected. There can be no external bias or influences in the property transaction. This is particularly vital in the property industry where vast sums of money are dependent on thorough and accurate information provided by an independent professional outside the possible influence of persons affiliated or with vested interests in the sale.

It is for the very reason buyers and sellers have separate independent legal representation to ensure each party's interests are protected at all times.

All members in the SSAAQ are and have been providing independent representation to both vendors and purchasers for over 25+ years. All members of the SSAAQ are able to provide either 1) a Disclosure Statement for the vendor or 2) a Due Diligence Body Corporate Records Inspection or Strata Report for the purchaser.

Holmes requests the legislators consider amending the legislation to include measures to protect the interests of buyers of strata properties as above.

D. ACCESS TO BODY CORPORATE RECORDS

Methods of accessing records

The proposed legislation does not address the various issues strata search agents and other interested parties face when searching body corporate records. At the commencement of the strata/body corporate industry all body corporate records were kept in physical hard copy paper format. Due to changes in technology the proposed legislation should address all out-dated provisions in relation to record keeping requirements.

Today, all body corporate records are held on a computer system usually within a database.

As any number of interested parties may access body corporate records.

There is currently no 'consensus' or uniformity of body corporate record keeping. Strata Search Agents and/or other interested parties are confronted many different software programs (Holmes regularly conducts searches on at least 15-20 different platforms/software programs), is required to find documents with unrecognisable or easily identifiable filenames and is confronted with poor record keeping/filing methods.

Further access to the body corporate records may be via onsite at the body corporate manager's office, via online search/file sharing websites or via paper A4 folders etc. The proposed legislation should address the issues of maintaining or enabling uniformity in body corporate record keeping which is particularly problematic when body corporate records are handed from one body corporate manager to another and there is no ability to upload and transfer files between different databases.

Definition of Interested person

Holmes submits any and all instances within the proposed legislation be amended to include 'search agent' as an interested person who satisfies the body corporate of a proper interest in the records being searched (ie acting on behalf of the either the vendor or the purchaser). The proposed legislation is silent on search agents being an 'interested person' within the definition of the Act.

Place and Date of inspection

Holmes submits the wording 'at a reasonable time and place nominated by the body corporate' be amended to provide more clarity ie within 2 days from the time of request, via electronic access at the body corporate's premises etc.

Cost of obtaining copies of records

Holmes submits the proposed legislation address the lingering piece from old legislation in relation to paper body corporate records. Prior to technology updates strata search agents were required to use the body corporate's photocopier to obtain paper copies of records. A cost per page (\$0.70 cents) fee was naturally charged for use of the body corporate's photocopier. This charge is now completely obsolete.

Now all records are stored by body corporates in electronic format removing the requirement for use of the body corporate's photocopier. However, some body corporate managers via the existing legislation use this loophole to generate revenue for their businesses by forcing strata search agents to print all records using their photocopier or alternatively, adding up the number of pages in the documents and then charging a per-page fee for the provision of electronic copies.

Holmes submits the proposed legislation address issues relating to electronic copies including ability to save documents into a storage device eg USB, email or cloud file storage.

E. BODY CORPORATE MANAGER CODE OF CONDUCT

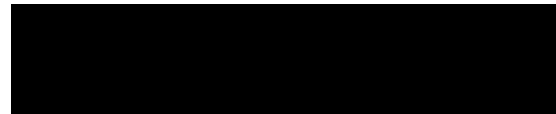
Holmes submits the proposed legislation include additional provisions within the professional Code of Conduct that all body corporate records are required to be kept in good and proper order, such that they may be easily searched and inspected including a clear and concise method (via searchable database) to enable ease of accessing body corporate records and identifying required documents.

F. COMMITTEE HEARING AND CTL WORKING GROUP

Holmes appreciates the Committee's consideration of this submission.

If the Committee has any questions or require clarification of any matters raised by this submission please do not hesitate to contact the writer directly.

Yours sincerely



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