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19 April 2022

Dear Committee Secretary

Submission in relation to Part 3 of the Building and Other Legislation Amendment Bill 2022

1. We make this submission in relation to Part 3 of the Building and Other Legislation Amendment Bill 2022 ("**Amending Bill**") on behalf of Bettson Properties Pty Ltd and Tobsta Pty Ltd ("**Oxmar Properties**").

2. The Amending Bill seeks to amend Part 2 of Chapter 8A of the Building Act 1975 ("**Part 2 of Chapter 8A**") that was introduced into the Building Act 1975 by virtue of Division 2 of Part 2 of the Building and Other Legislation Amendment Act 2009 ("**Original Amending Act**").

3. Oxmar Properties submits that the Amending Bill is:

   a contrary to the policy intent of Part 2 of Chapter 8A; and

   b not compliant with fundamental legislative principals because it:

      i. does not have sufficient regard to the rights and liberties of individuals or the institution of Parliament;

      ii. it adversely affects rights and liberties, including of property owners, retrospectively; and

      iii. is not necessary or appropriate.[1]

4. Oxmar Properties is a developer of multiple residential estates in Queensland ("**Oxmar Properties Estates**").

5. Like many other developers in Queensland, to ensure that the development of land in Oxmar Properties Estates maintain development standards, Oxmar Properties requires buyers of land in its estates to agree to be bound by building covenants that set those development standards and require owners of land in its estates to obtain approval to all proposed residential development in its estates ("**Building Covenants**").

[1] *Legislative Standards Act 1992* (Qld) ss 4(2), 4(3)(b), (g).

6. Building Covenants are one form of "relevant instrument" as defined in section 246M of the Building Act 1975.

7. Each owner in each Oxmar Properties Estate agrees to be bound by the Building Covenants for that estate and each owner has an expectation that other owners in that estate will also comply with the development standards set in the Building Covenants.

8. The Building Covenants that relate to each Oxmar Properties Estate are enforceable by both the developer and each owner in each relevant estate as a common law building scheme.[2]

9. The Amending Bill, if passed through Parliament, will have an adverse effect on the rights of Oxmar Properties and owners of land in Oxmar Properties Estates and developers and owners of land in other residential estates in Queensland where common law building schemes are in force.

10. The explanatory notes to the Original Amending Act which introduced Part 2 of Chapter 8A provided as follows:

The "ban the banners" policy aims to stop bodies corporate and developers from restricting the use of sustainable building elements and features. This will be achieved by rendering invalid new covenants and body corporate statements/by-laws which restrict owners or bodies corporate from using selected sustainable and affordable features such as light roof colours, smaller minimum floor areas, fewer bedrooms and bathrooms, types of materials and surface finishes to be used for external walls and roofs, single garages and the appropriate location for solar hot water systems and photovoltaic cells.[3]

and

The purpose of this part is to regulate the effect of particular instruments on stated activities or measures likely to support the sustainability of houses, units and attached enclosed garages associated with houses (class 1a, 2 and 10a buildings).[4]

and

Section 246Q invalidates any restrictions in the design options for building work on a lot to which this part applies to the extent that they restrict:

[2] *Elliston v Reacher* [1908] 2 Ch 374 ('*Elliston*'); *Forestview Nominees Pty Ltd & Silkchime Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 ('*Forestview*'); *Hosking & Anor v Haas & Anor* (No. 2) [2009] NSWSC 1328 ('*Hosking*').
[3] Explanatory Notes, Building and Other Legislation Amendment Bill 2009 (Qld) 2-3.
[4] *Ibid* 23.

- *a person from occupying a class 1a building before landscaping, fencing, driveways or similar work associated with the construction of the building is completed;*
- *the use of a specific material or type of surface finish for the roof or external walls of a house (class 1a) or enclosed garage (class 10a) to a house; or*
- *the location of a solar hot water system or photovoltaic cells.*

A relevant instrument has no force or effect if the restriction merely applies for the purpose of preserving or enhancing the external appearance of the building and prevents a person from installing a solar hot water system or photovoltaic cells on the roof of the building. An example is provided in section 246Q.[5]

and

Section 246S outlines that under a relevant instrument, the consent of an entity, cannot be withheld for an activity merely for the purpose of preserving or enhancing the external appearance of the building. These activities include the occupation of a house (class 1a), the type of material or surface finish for on a roof or external wall of a building and the location and installation of solar hot water systems or photovoltaic cells.[6]

11. It is clear that the Original Amending Act was attempting to strike a balance between the interest of all affected parties. The Amending Bill does not strike such a balance and despite asserting that intent of the Amending Bill is to reflect the policy intent of the Original Amending Act, the Amending Bill goes beyond the policy intent of the Original Amending Act.

12. The explanatory notes to the Amending Bill state that:

The original policy intent of the 'ban the banners' policy was to ensure developer covenants and body corporate by-laws could not inhibit the installation of solar hot water systems or solar panels, including by restricting where the panels or hot water systems could be located, on the roof of a home or garage, solely on the basis of aesthetics. A court decision has affected the efficacy of the provisions, making it necessary to amend the provisions to clarify the original policy intent.

It is proposed that the 'ban the banners' provisions will be amended to clarify the original policy intent for the provisions, so a homeowner may install a solar hot water system or solar panels on the roof, or other external surface, of their home or garage, without regard to aesthetics. This will encourage homeowners to use solar energy.[7]

[5] *Ibid* 26-7.
[6] *Ibid* 27.
[7] Explanatory Notes, Building and Other Legislation Amendment Bill 2022 (Qld) 1-2.

13. What is clear from the explanatory notes of both the Original Amending Act and the Amending Bill, as exemplified in paragraphs 10 and 11 of these submissions, is that the policy intent then and now is to regulate relevant instruments, including Building Covenants, so that neither a developer, nor a body corporate, are entitled to prevent an owner from installing solar panels on the roof of their home or, in the case of a community title lot, the roof of the building in which the lot is situated.

14. Part 2 of Chapter 8A already achieves that policy intent as stated in the explanatory notes to the Original Amending Act and as restated in the explanatory notes to the Amending Bill. The decision of the Court of Appeal of the Supreme Court of Queensland in Bettson Properties Pty Ltd & Anor v Tyler [8] also affirms Part 2 of Chapter 8A achieves the policy intent of the Original Amending Act.

15. The evidence before the Court in Bettson Properties Pty Ltd & Anor v Tyler was that:

    a Pauline Tyler, the respondent, purchased land in a residential estate known as Griffin Crest developed by Oxmar Properties, the appellants;

    b Pursuant to the terms of the contract for the purchase of the subject land by the respondent agreed to be bound by the Building Covenants that related to the Griffin Crest estate;

    c Those Building Covenants required the respondent to obtain consent from Oxmar Properties to the installation of solar panels on the roof of the respondent's dwelling;

    d The respondent, having installed solar panels on the respondents dwelling without first obtaining consent from Oxmar Properties, subsequently sought consent to the installation of the solar panels;

    e Oxmar Properties withheld consent to the installation of the solar panels as originally located but offered to approve the installation of the solar panels in an alternate location on the roof of the respondents dwelling; and

    f The solar panels would be 80% to $85% as efficient in the proposed alternate location and the cost of relocating the solar panels would be $1,567.50.

16. The Court of Appeal held, amongst other things, that:

    The determinative question is instead whether the expression used in sections 246Q and 246S "prevents a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface of the building" comprehends a case in which the result of the restriction (s 246Q) or the withholding of consent (s 246S) is that the photovoltaic cells may be installed

[8] *Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 176 ('*Bettson v Tyler*').

only at a location where they will remain viable but will operate at about 80 per cent of the efficiency that would be achieved if they were instead installed at the proscribed location. The critical word is "prevents". As the primary judge considered, and as is common ground between the parties, "prevents" must bear the same meaning in both sections. At least one of those sections must apply if "prevents" comprehends the result of the application of cl 1.26 in this case and neither section could apply if that result does not amount to prevention.[9]

and

My conclusion is that the word "prevents" in sections 246Q and 246S bears its common primary meaning of "stops from happening", which comprehends cases where the result of the relevant restriction or withholding of consent is that it is impossible, impracticable, or impractical to install a solar hot water system or photovoltaic cells. In my respectful opinion there is no ambiguity in those provisions such as would allow for a construction under which "prevents" comprehends a less significant adverse result such as "less advantageous for the person to install". The sections are therefore not open to a construction under which they operate on the facts of this case.[10]

and ordered, among other things that:

the respondent by herself, and/or her servants, agents or otherwise remove or, at the option of the respondent, relocate the installed solar panels on the roof at 1 Leapai Parade, to the south-eastern side of the roof facing 26 Bettson Boulevard, Griffin in the State of Queensland, more particularly described as Lot 149 on SP 284808[11]*.*

17. Under the Amending Bill relevant instruments that prohibit or restrict the installation of solar infrastructure will only be effective over **common property** and where:

    a it is necessary to preserve structural integrity of the building; or

    b there is insufficient space on the roof of the common property to allow every unit owner to place their own solar infrastructure; or

    c it is necessary to preserve the right to quiet enjoyment of lot owners where the noise from solar hot water pipes is concerned.

18. The Amending Bill offends the stated purpose of Part 2 of Chapter 8A to regulate the effect of particular instruments on stated activities or measures likely to support the sustainability of houses, units and attached enclosed garages associated with houses.

19. Instead of regulating the effect of Building Covenants, the Amending Bill erodes the right of developers and owners alike, to enforce their respective interests in common law building

[9] *Ibid* [17] per Fraser JA (Sofronoff P and Mullins J agreeing).
[10] *Ibid* [28] per Fraser JA (Sofronoff P and Mullins J agreeing).
[11] *Ibid* [30] per Fraser JA (Sofronoff P and Mullins J agreeing).

schemes,[12] inter se, in circumstances where equity has given effect to a common intention between developers and owners agreeing to be bound by and benefit from a mutually enforceable system of Building Covenants.

20. Instead, the Amending Bill could properly reflect the stated policy intent and strike a balance between the interests of affected parties by identifying a maximum acceptable reduction in efficiency resulting from the operation of a relevant instrument.

21. Further, the primary purpose of sections 246Q and 246S of Part 2 of Chapter 8A, as stated in the explanatory notes to the Original Amending Act is to regulate relevant instruments (including Building Covenants) so that they are invalid, to the extent that they restrict the location of a solar hot water system or photovoltaic cells for the purpose of preserving or enhancing the external appearance of the relevant building (on which the hot water system or solar panels) and prevent a person from installing a solar hot water system or photovoltaic cells on the roof of the building.[13]

22. When introducing the Amending Bill to the Parliament the Honourable MP de Brenni told Parliament that:

The Queensland government's 'ban the banners' legislation has always sought to promote the uptake of rooftop solar. It prevented developers and bodies corporate by-laws from placing unreasonable restrictions on where householders may install solar panels. A recent court decision affected the efficacy of those provisions. This bill, however, fixes the uncertainty around the application of the 'ban the banners' provisions and protects home owners from developer covenants restricting where solar panels can be placed. This is a further step in allowing Queenslanders to play their part in realising our collective renewable energy and emissions reduction ambitions.

23. With respect to the Honourable Minister, for the reasons stated above the court decision referred to in the Ministers introduction[14] has not affected the efficacy of Part 2 of Chapter 8A.

24. The Amending Bill is crafted to be retrospective and in a manner that intentionally interferes with a decision of the Court of Appeal of the Supreme Court of Queensland[15].

[12] Explanatory Notes, Building and Other Legislation Amendment Bill 2009.
[13] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at [47].
[14] *Bettson v Tyler* (n 8).
[15] *Ibid*; Explanatory Notes, Building and Other Legislation Amendment Bill 2022 cl 22 and the proposed inclusion of sections 356(3) and 357(3).

25. The Amending Bill is not declaratory, validating, procedural or curative and accordingly there is no justification for it to be retrospective[16].

26. Further, the Amending Bill does not have sufficient regard to, and will adversely, affect rights and liberties of developers and individual owners of land in residential estates where Building Covenants are in force and where those parties currently have the benefit of a building scheme.[17]

27. The Amending Bill will deny developers of the right they currently have to consider applications by owners of land in residential estates that are subject to Building Covenants, for approval to locate solar panels on the roof of their dwelling in circumstances where:

    a to maintain development standards specified in the said Building Covenants for the relevant estate it is appropriate for the developer to require the proposed solar panels to be installed in an alternative location or locations; and

    b when those solar panels are installed in that alternate location, they will maintain their efficacy; and

    c owners of other land within that estate have the benefit of a building scheme entitling them to enforce the standards set out in the Building Covenants for that building scheme and a right to enforce their rights under that building scheme.

28. For the reasons set out above it is submitted that the Part 3 of the Building and Other Legislation Amendment Bill 2022 is not necessary and should be withdrawn. If it is not withdrawn it should be amended so that it is not retrospective and so that it achieves the policy intent of the Original Amended Act without denying the rights of developers and owners of lots in residential estates from protecting the development standards contained in Building Covenants relevant to those residential estates. This could easily be achieved through the identification of a maximum acceptable reduction in efficiency resulting from the operation of a relevant instrument in a definition of the word “prevent”.

Yours faithfully

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[16] Office of Queensland Parliamentary Council, *Principals of Good Legislation – OQPC Guide to FLPs – Retrospectivity*.
[17] *Elliston*; *Forestview*; *Hosking.*