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Quote in reply: Property and Development Law Section

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The Research Director
Scrutiny of Legislation Committee
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Dear Research Director

BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2010

The Society writes to raise a number of concerns with respect to the *Body Corporate and Community Management and Other Legislation Amendment Bill 2010* (the Bill) and breaches of the fundamental legislative principles contained in the *Legislative Standards Act 1992*.

According to section 23(1)(f) of the *Legislative Standards Act 1992* an explanatory memorandum is required to include in clear and precise language:

- (f) a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency;

The Society acknowledges that the Bill's Explanatory Memorandum references some of the breaches of fundamental legislative principles contained in the Bill and the explanations provided focus on bringing certainty for owners in existing schemes. The explanations presented are not in our view reasons for the inconsistency.

Reversion of adjusted lot entitlements

The Bill sets out in proposed sections 378 to 390 a mechanism which allows the owner of a lot in a scheme where the contribution schedule lot entitlements have been adjusted by a decision of a court, tribunal or adjudicator to put forward a motion that the lot entitlements for the scheme revert to the original lot entitlements. The amendments require the committee or the body corporate to give effect to the proposed motion by following a set process to decide on the pre-adjustment lot entitlements. Except

in the case of certain changes to the scheme since establishment, the committee or body corporate has no discretion to alter the pre-adjustment lot entitlements to reflect any notion of equity or fairness. This will be despite the fact the original lot entitlements may have been set in an arbitrary manner by the original developer under the pre-1997 legislation.

The claim in the Explanatory Memorandum that certainty for lot owners justifies allowing a reversion of lot entitlements to their value at establishment of the scheme would seem to have insufficient regard to the rights and liberties of individuals who:

- sought adjustments to lot entitlements to remedy unfairness in the initial distribution of contribution lot entitlements set by the developer of the scheme; or
- purchasers who bought into a scheme post adjustment on the basis of the disclosed adjusted lot entitlements. These individuals may be significantly impacted by a reversion of the lot entitlements creating the very situation the Bill seeks to avoid – uncertainty for lot owners. Purchaser's of lots within the scheme post an adjustment of lot entitlements who have purchased on the basis of the current entitlement are detrimentally impacted and just as deserving of protection from an inability to afford their contributions following the reversion.

Insufficient regard is also given to the rights and liberties of individuals as the result of a reversion may be to reinstate:

- pre-adjustment lot entitlements that were inequitable; or
- lot entitlements that are inconsistent with the proposed principles for setting lot entitlements in the Bill.

In both of these scenarios the body corporate is not given discretion or the ability to challenge the reinstatement of these lot entitlements despite obvious unfairness or inequities.

The further explanation presented in the Explanatory Memorandum for the breaching fundamental legislative principles that some purchasers were unaware that their contribution lot entitlements may be adjusted is difficult to accept. Local Government rates, land tax, insurances and utility bills are amongst the other fixed costs of ownership of a lot in a body corporate and are all generally accepted to fluctuate in quantum and method of calculation over time. It is not easy to reconcile why body corporate lot entitlements are in a class apart from these other expenses.

The fetter on the discretion of a body corporate or committee contained in proposed sections 385(4) and (6) and 387(2) and (4) deciding an application to revert lot entitlements to their pre-adjusted state is of significant concern to the Society. These provisions restrict the outcome of a reversion application and in effect make it an offence for a body corporate or committee to decide to reject the application. These provisions do not have sufficient regard to the rights and liabilities of individuals, are inconsistent with the principles of natural justice and are an inappropriate use of criminal sanction.

Inclusion of market value as an element of the *relativity principle* in proposed s 46A(3)

The Society expresses concern about the inclusion of market value as an element of the *relativity principle* in proposed section 46A(3), as not having sufficient regard to the rights and liberties of individuals, creates inequities between lots and is not drafted in a sufficiently clear and precise way.

Setting lot entitlements with regard to market value appears problematic as it yields inequitable results and does not fairly take into account elements of commonality of reliance on shared infrastructure, fixed

costs to the body corporate or shared expenses. It appears to be quite prejudicial to the rights and liberties of individuals to apply a metric which would unevenly apportion contributions between identical sized lots based solely on the location of the lot within a development. Considering the scenario of two identical lots on the 24th floor of a building at Surfers Paradise, where one faces the sea and the other faces the hinterland, both have identical use of shared facilities and add identically to maintenance and other costs. However the unit with the water view, which is in all other respects the same as the hinterland view unit, has a higher market value. Application of the relativity principle based on market value means that the owner of the water view unit must pay more contributions than the owner of the hinterland facing unit even though they add identically to body corporate expenses. Using market value as a sole consideration for determining lot entitlements loads the result unfairly with irrelevant considerations.

It is also not consistent with the rights and liberties of individuals for the legislation to presume that owners of lots with higher market values have more income than owners of more modest lots and are better placed to carry a larger burden of the costs of common expenses for a body corporate.

We further note that the term 'market value' in this context is not drafted in a sufficiently clear and precise way as it is not a term defined in the Bill or the *Body Corporate and Community Management Act 1997*, or other legislation. It is unclear from the drafting whether the relevant market value is to be the actual sale price of a lot when sold or as assessed by a valuer with respect to all other lots at any relevant point in time. Regard to a pure sale value leads to inconsistent results as on initial sale of a scheme the market value of lots fluctuates with the prevailing economic conditions and the developer's financial imperatives.

Removal of rights for existing schemes to adjust or challenge lot entitlements

Under proposed s47B(1) & (2) an existing community title scheme is unable to change the contribution schedule lot entitlements unless there is a material change affecting the lots or unanimous consensus amongst lot owners to change. Again these provisions do not have sufficient regard to the rights and liberties of individuals as this will mean that one lot owner can force the body corporate to revert to the pre-adjustment lot entitlements and there is no right for the body corporate to challenge this reversion or to implement an equitable distribution of lot entitlements unless there is unanimous agreement or a material change in the scheme.

Further the rights and liberties of owners in existing community title schemes will be prejudiced as community title schemes created after commencement of the amendments are able to challenge the consistency of lot entitlements with the relevant deciding principle thereby avoiding inequities. The effect of which may be creation of a two-tier market in community titles schemes where owners of lots in existing schemes which are unable to correct gross inequities are significantly prejudiced in sales potential.

Fetter of QCAT discretion

Under proposed s 47B a lot owner is entitled following a material change to the scheme to apply to QCAT for an adjustment of lot entitlements. According to s 47B(7)(a) & 47B(9) where a deciding principle exists for the scheme QCAT is required to apply that deciding principle and is unable to apply a different deciding principle. This presents a significant fetter on the discretion of QCAT especially where the material change may mean that the original deciding principle is no longer appropriate and cannot be applied in a just and equitable manner to the scheme.

Disclosure of community management statement to buyers

The QLS strongly supports appropriate consumer focussed disclosure to buyers of real property. Material provided to buyers should be presented in a useful and accessible manner. Material that is excessively long and presented as a formal legal document is unlikely to be read or understood by buyers. The proposed amendments to s 206 require the seller of an existing lot to provide a copy of the recorded community management statement (CMS) for the scheme to buyers. The provision of a CMS which may be 50-100 pages long is unlikely to encourage buyers to read the information. The value of providing the CMS in addition to the information already in a disclosure statement is unclear. The disclosure statement will already contain information about lot entitlements for the lot, levies and body corporate assets. The only possible additional useful information in the CMS will be the by-laws. These are located in the middle of the CMS and again are unlikely to be read by the average buyer. Anecdotal evidence in relation to the requirement for a draft CMS to be given to the buyer of a proposed scheme is that buyers rarely read the disclosure documentation given.

Further issues will arise in relation to real estate agents obtaining the current copy of a CMS opening a new right for a buyer to terminate the contract under s 206(6). The knowledge of the seller and their agent about the currency of a CMS is also raised by proposed s 206B which requires a copy of any new CMS to be provided to the buyer within 14 days of it being recorded. There is no statutory obligation on a body corporate following the recording of a CMS to provide a copy of the CMS to all lot owners. This proposed section imposes new obligations and liabilities on the average seller who is unlikely to know when a CMS is recorded and is unable to require the body corporate to inform him or her.

In this regard these provisions are likely to have a serious detrimental effect on the rights and liberties of existing lot owners in a community title scheme as:

- new rights of termination for technical non-compliance are being created; and
- vendors of existing lots may reasonably not become aware of the event which triggers updated disclosure obligations.

New termination rights vague and uncertain

The proposed amendments include a right in s 209A and s 217A for a buyer to terminate the contract if the buyer 'reasonably believes' that the contribution schedule lot entitlements are inconsistent with the deciding principle used to calculate the entitlements. The exact meaning of this phrase is unclear and has the potential to be widely interpreted by a court in the buyer's favour or interpreted narrowly to require the buyer to provide substantial objective evidence, at significant expense, in order to take advantage of the termination right. The drafting is unclear and imprecise and gives rise to too great a level of uncertainty.

The proposed termination right in s 217(b)(v) and (vi) are also unclear and imprecise. The level of detail necessary to 'show' a lay buyer how the contribution schedule lot entitlements were calculated to

calculate the lot entitlements and then whether this is 'explained' appropriately will be very subjective. The same level of detail may be clear to one buyer but unclear to others. When this concerns a right to terminate the contract clarity of the right and when it can be exercised are required.

Statutory voiding of current actions

The Society expresses strong concern that proposed section 377 of the Bill has retrospective application which does not have sufficient regard to the rights and liberties of individuals on the basis of:

- inconsistency with principles of natural justice; and
- adversely affecting rights and liberties retrospectively.

It is highly irregular for the law to void current proceedings as this merely places upon both parties to a pre-commencement adjustment action the burden of wasted legal costs and expert evidence.

It is contrary to principles of natural justice for a current proceeding to be voided by statute and is a denial of procedural fairness to parties engaged in the action.

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Thank you for providing the opportunity for the Queensland Law Society to make its concerns known to the Committee.

Yours faithfully

Bruce Doyle
President