

Your Ref:

Our Ref: Property and Development Law Committee

19 October 2012

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

lacsc@parliament.qld.gov.au

Dear Director

**BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT
BILL 2012**

Thank you for providing the Queensland Law Society with the opportunity to provide comments on the *Body Corporate and Community Management and Other Legislation Amendment Bill 2012* (the Bill).

This letter is written with the assistance of the Property and Development Law Committee of the Queensland Law Society.

The Society is pleased that a reasonable period of time (a little over a month from tabling of the Bill) has been provided to make comments. The Society commends the Government on setting a reasonable and realistic timeframe for consideration of this legislation after it has been tabled in the House. We note that the Bill was not the subject of consultation with the Society, or the public, prior to being introduced. QLS has previously stated that the best legislative outcomes arise from proper public consultation at an early stage of policy and legislative development. Having said that, we appreciate that Government may have felt it necessary to introduce the Bill without warning to avoid a flood of reversion applications in bodies corporate. The introduction of a well-considered, well publicised and fair adjustment mechanism for all bodies corporate may have avoided any such concern.

While the Society has considered the amendments, this submission is not intended to identify all breaches of fundamental legislative principles or unintended drafting consequences in the Bill.

Lot entitlements in context

The Department of Justice and Attorney-General has published a fact sheet¹ on lot entitlements which sets out in a clear way the purpose of contribution schedule and interest schedule lot entitlements:

What is the purpose of lot entitlements?

Lot entitlements are used for a number of purposes, but they are mostly used to divide body corporate expenses among lot owners. The following is a more specific outline of the purposes of lot entitlements.

The **contribution schedule lot entitlements** are used to calculate:

- a lot owner's share of most body corporate expenses. However, the BCCM Act or regulations may provide that particular expenses, such as building insurance premiums ..., are divided amongst the owners in a different way, and
- the value of a lot owner's vote when voting on an ordinary resolution if a 'poll' is called for

The **interest schedule lot entitlements** are used to calculate:

- each lot owner's share of the common property and body corporate assets if the scheme is terminated (a scheme could be terminated if all the owners of lots in a scheme agreed to dispose of the scheme for the purposes of redevelopment)
- the value of the lot for the purpose of calculating local government rates and charges, and other costs that are calculated on the basis of the value.

The Society acknowledges that there has been much discussion of lot entitlements, especially with respect to this Bill, the amendments made by the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* and arising from changes to lot entitlements effected prior to both pieces of legislation.

The Society notes that contribution schedule lot entitlements should be set in the context of the burden of a lot on the scheme and not on the basis of the personal, domestic or financial circumstances of any particular owner. In this regard contribution schedule lot entitlements may need to incorporate an equal share of fixed costs which all lots enjoy equally (ie administration costs or maintenance of the common pool or gardens) and a proportional share of costs which relate to some lots more than others (ie lift maintenance or external paintwork).

Lot entitlements and the Bill

The Explanatory Notes for the Bill provide that:

The principal policy objectives of the Bill are to amend the *Body Corporate and Community Management Act 1997* (the Act) to:

- remove the requirement for bodies corporate to undertake a process prescribed in Chapter 8, Part 9, Division 4 of the Act (the 2011 reversion process) to adjust contribution schedule lot entitlements to reflect the original entitlements prior to any, and all, relevant orders of a court, tribunal or specialist adjudicator if a lot owner submits a motion requesting such a change (to minimise the number of bodies corporate that may be required to undertake the reversion process, this amendment is proposed to take effect on the date of introduction of the Bill into the Legislative Assembly);
- establish a process for contribution schedule lot entitlements that were adjusted pursuant to the 2011 reversion process to be changed to reflect the lot entitlements that applied to the scheme prior to the application of the reversion process;
- remove unnecessary disclosure requirements imposed on sellers of lots in community titles schemes; and
- provide jurisdictional consistency for the resolution of disputes about contribution schedule lot entitlement adjustments.

¹ Available at http://www.justice.qld.gov.au/data/assets/pdf_file/0010/162595/Lot-entitlements-the-basics.pdf

The Society was critical of many of the elements of the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* which the Bill is now reversing. One particular aspect of those amendments the Society raised concern about was the ability for a single lot owner to effectively force the body corporate to reverse the outcome of an adjustment.

The Society's 9 February 2011 submission to the then Parliamentary Scrutiny of Legislation Committee on the *Body Corporate and Community Management and Other Legislation Amendment Act 2011*, stated:

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.

The Society notes that ss 403 and 404 proposed by the Bill operate in effectively the same way as the provisions of concern in the *Body Corporate and Community Management and Other Legislation Amendment Act 2011*, but in reverse.

Seeking a fair adjustment process

The Society acknowledges that the Attorney-General made it clear that the Bill was not intended to introduce a new adjustment procedure or set a fair way to apportion lot entitlements between lot owners. Relevantly the Attorney said in introducing the Bill²:

"Finally, I would like to announce that the government will now look at the broader issues around contribution schedule lot entitlements. We will look to the future. This bill does not deal with that matter—it relates to the immediate problem that we have been left by the former Labor government to deal with—but the government is only too conscious that there are many schemes out there with manifestly unequal lot entitlements. We need a mechanism to provide for adjustments into the future for those schemes with unfairly set contribution schedule lot entitlements. We will now work to look at options with a view to reintroducing an appropriate mechanism for adjustments, but there is some complexity around this issue. Therefore, it is important to take our time to ensure that, whatever mechanism is provided, it attempts to get the balance right and is fair to lot owners."

The Society commends the Government on intending to set a mechanism which will attempt to get the balance right and be fair to lot owners.

The Society proposed such a mechanism in September 2010 when public consideration of reversions to lot entitlement adjustments began. In a submission to the Department made at that time, we raised the possibility of a '*fairness principle*', and said:

A Proposal

We propose that a single principle for the assessment of the contribution schedule should be adopted to provide certainty of operation and to provide fairness. We envisage that such a principle might be called the '*fairness principle*' and incorporate elements of proper apportionment of shared infrastructure costs.

Such an approach may involve setting the contribution schedule with regard to all the assessed factors set out in proposed sections 46A(4)(a) to (d). Such an approach would facilitate a range of appropriate values giving greater flexibility to achieve a fair result. One way in which this may be achieved practically under these factors is to:

² *Record of Proceedings, 14 September 2012, available at*
<http://www.parliament.qld.gov.au/documents/tableOffice/HALnks/120914/Body.pdf>

- equitably apportion of all fixed costs to the body corporate, ie the cost of the body corporate manager, holding meetings, administration and other items usually associated with the administration fund; and
- use a relative apportionment of costs for significant, capital or other costs usually associated with the sinking fund.

In adopting such a model it would be prudent for the actual calculation to be disclosed to the buyer when buying a proposed lot.

The Society also went on in that submission to propose a mechanism for seeking adjustments to contribution lot entitlements, by saying:

Subject to the comments above with regard to having a single *fairness principle* for setting contribution schedule entitlements the QLS supports the mechanism set out in proposed section 47A to permit a body corporate to adjust the lot entitlements by resolution without dissent. Likewise, there can be little resistance to permitting interest schedules to be adjusted by the specialist adjudicator or QCAT.

With regard to ability of an owner, in any scheme, to apply for an adjustment of the contribution schedule by either a specialist adjudicator or QCAT there must be an appropriate balancing of providing fairness between lot owners and certainty.

The current proposals will prevent any scheme established prior to the commencement of the amendments from redressing any errors, omissions or unfairness in the way in which their contribution schedule was initially set (in the absence of a material change to the scheme). This is undesirable as, for the sake of certainty, it prevents a body corporate where a single lot owner disagrees from ever making contributions fair between the lot owners.

We propose that an appropriate mechanism for a lot owner in a scheme established prior to or after commencement is to seek adjustment of the contribution schedule is for:

- a lot owner to put forward a motion for the contribution schedule to be reviewed at an extraordinary general meeting [EGM] of the body corporate;
- the body corporate to be obliged to obtain at its own cost an independent expert report which is to be provided to all lot owner with the agenda for the EGM;
- the EGM to be held and adoption of the contribution schedule proposed by the expert, or as agreed by the lot owners, to be voted upon;
- if the adjustment is adopted at the EGM without dissent it proceeds as per proposed section 47A;
- if the adjustment is opposed then any lot owner may seek within two months of the EGM an order of the specialist adjudicator or QCAT to effect an adjustment;
- the specialist adjudicator or QCAT must consider the content of the expert report presented to the EGM and any other factors relevant to applying the *fairness principle* to the contribution schedule; and
- a restriction to apply such that a lot owner may not propose a review of the contribution schedule within 3 years of an EGM being held.

It is proposed that such a process would not exclude the operation of proposed section 47B(1) with respect to seeking adjustments following a material change.

It is the view of the QLS that consideration of the ways to address both a principle of fairness between lot owners and a just mechanism to seek adjustments of lot entitlements would have been very advantageous to include in the Bill. Leaving consideration of these matters to a later date in some respects merely delays equity and may cause some bodies corporate to go through a third revision of their lot entitlements in two years.

Disclosure of Community Management Statements

The Society addressed issues of disclosure of the Community Management Statement (CMS) in its submission in September 2010, and said:

As a matter of general principle the Society supports the disclosure of relevant information to prospective buyers of real property. The QLS has previously stated its view that making the buyer aware of relevant information about the property they wish to purchase as well as their rights and obligations with respect to that property prior to entering into a contract for sale is the fundamental value that solicitors have to offer to consumers in the conveyancing process.

However, the requirement to disclose the current CMS with a contract for the sale of an existing lot will have a significant practical impact on the sale process and conveyancing practice. Many owners of lots may have difficulty accessing the current appropriate version of the CMS prior to sale except by payment of a fee and search of the land title register. This imposes an additional cost on sellers of units and the provision of such a large document with the sale contract will mean that the use of facsimile will become impractical for contract delivery.

We propose that a similar awareness may be created through requiring all CMS to be easily and freely available to the public on a Government register accessible through a website and for there to be a clear statement within the disclosure documentation directing a prospective buyer to the location of the register to investigate the CMS. This approach would facilitate the delivery of contract documentation for the sale of existing lots and would also assist motivated purchasers of property to access relevant information prior to receiving a contract for sale.

The Society notes that there is useful and valuable information for a purchaser of a lot in a body corporate within a CMS. While we accept that in the current environment for the formation of residential property sales contracts compliance with the CMS disclosure obligation may not have been as high as would be hoped, there is still much benefit in that document being freely available to buyers. We note that at present a buyer must conduct a search of the Titles Register, at their own cost, to obtain this documentation.

The Society sees the information contained in the CMS to be useful, not only to provide individuals with information about their lot entitlements, but also to provide people with details of the by-laws of the scheme. In this regard, a CMS can be a more powerful awareness tool for prospective purchasers than a warning statement.

With regard to the alteration of the section 206 disclosure statement, the Society notes that these are not always well completed in sales situations. The Society suggests that perhaps a body corporate certificate containing all relevant information, completed by the body corporate manager from the body corporate records, would be a better instrument to be disclosed to buyers at the point of entering into a sale contract.

Thank you for providing the Queensland Law Society the opportunity to provide its comments on the Bill. If you would like to discuss any aspect of this submission please contact our Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully

Dr John de Groot
President