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*Quote in reply*: Property & Development Law Section

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Dear Mr Catlin

**LOT ENTITLEMENTS UNDER THE BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997**

Thank you for providing the Queensland Law Society the opportunity to comment on the Government's consultation proposals for reform of the *Body Corporate and Community Management Act 1997* (BCCMA). The consultation material provided by the Department has been considered by our Property and Development Law Section who have contributed to this response.

As a statement of general principle we support the proposition that body corporate contribution schedule lot entitlements should be as far as possible, fair and certain for lot owners. This does not mean, however, that:

- it is unfair for lot entitlements to be adjusted; or
- merely because lot entitlements have changed for any particular lot owner it is unfair.

It also does not mean that lot owners should be locked into unfair results merely to provide certainty. We propose that there should be fairness between lot owners.

We appreciate that as times change and factors affecting a body corporate also change that there will be some tension between providing fairness to all lot owners and certainty of lot entitlements. In this context we propose that there needs to be an appropriate balance struck between fairness for lot owners holistically and the comfort for individuals brought about by certainty.

In the Society's view the consultation amendment proposals do not achieve this balance.

In our submission we will address:

- setting lot entitlements;
- seeking adjustment of lot entitlements schedules;
- the content and disclosure of documents relating to lot entitlements;
- termination rights associated with disclosure; and
- the application transitional arrangements to existing bodies corporate.

## *1) Setting lot entitlements*

The consultation draft proposes improving fairness and certainty in the initial determination of lot entitlements by replacing the existing principle set out in section 46(7) of the BCCMA for setting the contribution schedule, with a choice of applicable principles.

The three principles proposed for setting contribution schedule lot entitlements are:

- the unimproved value principle (which may only be used for standard format and volumetric lots);
- the equality principle (which may be applied in all cases and is largely the present principle); and
- the relativity principle (which may only be applied for building format lots).

*The Unimproved Value Principle*

The Society has previously expressed concern that unimproved value is not an appropriate sole method for determining contribution schedules. We have said that in our view, using unimproved land value to determine lot entitlements will yield inequitable results as it does not fairly take into account elements of commonality of reliance on shared infrastructure, fixed costs to the body corporate or shared expenses.

Moreover, given that the existing 'unimproved value' methodology under the *Valuation of Land Act 1944* will be replaced by a 'site valuation' methodology (as set out in the *Land Valuation Bill 2010*) the use of this as a deciding principle is inappropriate. The site valuation methodology will apply to all non-rural land (where unimproved value will remain) and is likely to apply to almost all existing and future body corporate schemes. It would be administratively difficult for the Valuer-General to undertake two valuations using different methodologies on scheme land solely for the purpose of determining contribution schedule lot entitlements.

In the Society's view site valuation is not an appropriate methodology to be applied for the determination of contribution schedule lot entitlements as it augments unimproved land value with 'site improvements' as set out in section 23(1) of the *Land Valuation Bill 2010*, which states:

> **23 What are *site improvements***
> (1) ***Site improvements***, to land, means any of the following done to the land**—**
> (a) clearing vegetation on the land;
> (b) picking up and removing stones;
> (c) improving soil fertility or soil structure;
> (d) if the land was contaminated land as defined under the *Environmental Protection Act 1994*— works to manage or remedy the contamination;
> (e) restoring, rehabilitating or improving its surface by filling, grading or levelling, not being irrigation or conservation works;
> (f) reclamation by draining or filling, including retaining walls and other works for the reclamation;
> (g) underground drainage;
> (h) any other works done to the land necessary to improve or prepare it for development.

It would appear to be highly inappropriate for a lot contribution schedule to be decided on the basis of the value of any of these factors. The extent to which picking up and removing stones has been conducted on any particular lot would appear to be an irrelevant consideration in the fair and certain appointment of contribution schedule entitlements.

*Relativity Principle*

The relativity principle sets out that contributions are to be determined with respect to the factors enumerated in proposed section 46A(4) and appears to be a hybrid of the equality principle but with the inclusion of two additional requirements:

- the impact the lots may have on the costs of maintaining the common property; and
- the market value of the lots.

The first consideration is an informed and particularly relevant aspect of determining a fair contribution schedule for all lot owners.

The second consideration, the assessment of market value, is problematic. The Society has previously expressed concern about the use of market value alone to assess lot entitlements as it, like unimproved value, will yield inequitable results as it 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 unfair to apply a metric which would unevenly apportion contributions between identical sized lots based solely on the location of the lot within the development. We have highlighted this result in the scenario of two identical lots on the 24th floor of a building at Surfers Paradise. 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, having a higher market value, according to the application of this consideration must pay contributions in excess of the hinterland facing unit.

In a similar way to the application of site value, market value as a sole consideration for determining lot entitlements loads the result unfairly with irrelevant considerations.

If it is the intention of Government to engineer a scenario where those with greater resources contribute in greater proportion to shared body corporate expenses then surely a model which has regard to the income of the lot owners is more effective than an assessment of the market value of their lot. We apprehend that an income-basis for assessment of contribution schedules would be unacceptable to lot owners and cannot see how an application of the same logic to market value assessment leads to equally unfair results.

Further we note that the term 'market value' is not defined in either the BCCMA or the proposed amendments. 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 imperative. According the actual sale value of two identical lots in identical positions may be quite different and therefore lead to an unsatisfactory basis for the setting of contribution schedule entitlements.

*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:

- 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.

## *2) Seeking adjustment of lot entitlement schedules*

The proposals seek to address the issue of certainty by restricting the ability of a lot owner to seek an adjustment of a lot entitlement schedule. The proposals contemplate:

- permitting the contribution schedule lot entitlements to be changed by a resolution of the body corporate without dissent provided the changed schedule is consistent with one of the enumerated principles discussed above;
- restricting the right of an owner to apply for a specialist adjudicator or QCAT to adjust contribution schedule lot entitlements to those where:
    - a material change has occurred to the body corporate and the owner believes an adjustment is necessary; or
    - the owner believes that the contribution schedule is not consistent with one of the enumerated principles for a scheme commenced after the amendments; and
- permitting an owner to seek a specialist adjudicator or QCAT to adjust the interest schedule consistent with the market value principle.

Additionally, within the transitional arrangements for existing schemes there is a proposal to permit any scheme which has already had an adjustment ordered prior to the commencement of the amendments to have that reversed by the deemed passing of a resolution of the body corporate without dissent on the motion of one affected lot owner. There are significant problems with this proposal which will be addressed under the transitional items heading.

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.

## *3) Content and disclosure of documents relating to lot entitlements*

The proposed amendments require a community management statement (CMS) to state for a scheme which is established after the amendments commence, or after an allowed adjustment is made:

- the relevant principle under which the contribution schedule is decided;
- if the equality principle is the principle used for the contribution schedule and the lots are not equal, why they are not equal; and
- if the relativity principle is the principle used for the contribution schedule, how the principle was applied to show how the individual contributions were decided using it.

Subject to our comments above about having a single principle on which to decide lot entitlements, the Society supports disclosure of this information in the CMS.

The proposed amendments also provide that the disclosure statement given to a proposed buyer of a lot under section 206 of the BCCMA must also include:

- the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot;
- that the annual contributions are based on the contribution schedule lot entitlements; and
- that the contribution schedule lot entitlements are set out in the CMS.

Additionally a copy of the CMS must accompany the disclosure statement and a new CMS must be provided to a buyer within 14 days if a new CMS is recorded for the scheme during the contract period.

Similar information to that included in the section 206 disclosure statement is proposed for the section 213 disclosure statement with respect to a proposed lot in an off the plan development.

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.

## *4) Termination rights associated with disclosure*

The amendments propose a number of new termination rights for buyers of lots in a scheme associated with the above disclosure requirements.

The proposed new section 206B(3) provides that a buyer may cancel a contract of sale for an existing lot if when they are provided with a new CMS they would be materially prejudiced by the change if compelled to complete the contract. The effect of this provision is to provide every buyer of a lot a right to terminate their contract if an adjustment is registered for the contribution schedule and their particular lot's contribution has increased. It is curious that this proposal which is intended to support the certainty of disclosure to a prospective buyer does so by introducing unilateral uncertainty to the sale process for sellers. In our proposal if a single principle such as a '*fairness principle'* were adopted for the determination of the contribution schedule then there would be no need for such a termination right as the imperative of the adjustment process is merely to ensure greater fairness between lot owners.

Proposed section 209A gives a buyer a right of termination if the buyer believes that the contribution schedule lot entitlements are not consistent with the principle upon which they have been decided and that they would be materially prejudiced. This provision is curious as the operative parts of the termination right do not relate to actual inconsistency with the deciding principle and material prejudice but merely the buyer's reasonable belief of these things. Again this would introduce great uncertainty to the sale of existing lots in a body corporate. Additionally, the fetter on termination proposed in section 209A(3) is inconsistent with comparable rights under the *Property Agents and Motor Dealers Act 2000* as it requires a termination within 90 days, but contemplates a longer period as agreed. The same position applies to the proposed section 217A.

The proposed amendments expand the right of termination under section 217 for inaccuracy of the disclosure statement with respect to the sale of a proposed lot for deficiencies with respect to disclosures in the CMS with respect to the contribution schedule principle chosen and how it works. Subject to our comments earlier about having a single deciding principle, the drafting of the proposed sections 217(b)(v) and 217(b)(vi) is very vague as to what is required in order to not have complied with the requirements.

The relevant sections are simply drafted in terms of 'does not contain' or 'does not include' which does not clarify whether the termination right arises when the explanation or details are not provided at all or are insufficient to 'explain' or 'show' as is required.

## 5 ) Application of transitional arrangements to existing bodies corporate.

The issues associated with the proposed transitional provisions related to two general matters:

1. sections relating to dealing with schemes that have or are presently having adjustments of their contribution schedule lot entitlements; and
2. sections that transition existing schemes into the new requirements.

*Previous or Present Adjustments*

The transitional provisions address adjustment proceedings presently on foot and those which have already been decided.

With respect to 'pre-commencement adjustment actions' as defined in section 376 they cease to have effect on commencement and are taken never to have been made and may not be taken any further. These provisions are very concerning as they:

- potentially apply to matters before the courts which are current proceedings and as such fetter the jurisdiction and discretion of the court;
- pose the very real risk that legal costs incurred in any ongoing action, appeal or motion would be thrown away; and
- severely restrict the rights and liberties of individuals in a way which is not necessary to achieve the Government's policy objective.

With respect to the winding back of adjustment of contribution schedule lot entitlements for existing schemes to which adjustment orders apply the Society expresses its significant concern and dismay at the proposals set out in proposed section 380 and 385.

These provisions permit a single affected lot owner to propose a motion that any adjustment order of a court, tribunal or special adjudicator be wound back by resolution of the body corporate which is deemed by the legislation to be passed without dissent. An affected owner may bring such a motion at any time within 3 years of the amendments commencing.

It is presumed that this aspect of the amendments is directed toward providing certainty about contribution schedule entitlements and restoring schemes which had undergone an adjustment back to their initial state. As stated at the beginning of this submission merely because a change has occurred to the contribution schedule does not necessarily mean that the result of the change does not bring fairness between the owners. Many schemes which existed and were composed under previous legislation have been identified as possessing errors in apportionment or an unfair allocation of the contribution schedule. Many of the adjustments sought have been to remedy these defects in the initial scheme design.

This proposal is designed to defeat that rectification work and to restore the initial position which is unfair between the lot owners. That can not be good policy.

The QLS also raises significant concern that a single affected owner may bring a motion. If the policy imperative is to address disadvantage being suffered by a majority of lot owners, or even a significant

minority of lot owners then it would be reasonable for the appropriate threshold to be set at 50% or 35% of affected lot owners supporting such a motion. Permitting one affected owner to undo the careful assessment of what is 'just and equitable' in terms of apportionment is itself visiting unfairness on lot owners.

Additionally, the power of a single lot owner to compel the body corporate to pass a resolution winding back adjustments will likely seek to isolate and stigmatise that owner among their co-owners. This is especially the case in those bodies corporate where a majority of owners will have their contributions increased as a result of the removal of the adjustment.

The Society is also strongly opposed to legislation being used by the Government as the vehicle to deem the result of an exercise of power by a body corporate. The very basis for the existence of a body corporate as an independent entity with the power to make decisions through its body politic is threatened by the use of such a tool by the Government. It is an unnecessary and unwarranted interference with the decision-making of a private entity for legislation to deem a particular outcome of a motion put at a general meeting. Given that the outcome has been deemed the calling of the meeting is otiose and an unnecessary expense for the body corporate.

The net effect of the proposed amendments in Division 4 of the transitional elements is to create a two-tier system of bodies corporate. Those who are established after the commencement will have their contribution schedule lot entitlements governed by a miasma of principles and arrangements and will never be able to have them adjusted unless there is a material change of the body corporate or their complete unanimity among the body corporate. Those established after commencement will be drawn according to the new principles and will be in a far easier position to seek periodic adjustment. We anticipate that this will disincentivise buyers from purchasing in older bodies corporate which have entrenched arrangements that are unfair between the lot owners.

A more sensible alternative in the Society's view is to adopt a single principle for determining contribution lot entitlements and allowing all bodies corporate to undergo the process that we outlined in item 2 to adjust the relevant schedule. We believe that such an approach will bring both fairness and certainty for lot owners.

*Transition of Existing Schemes*

The amendments also deal with transitioning into the new provisions sales of lots or proposed lots in a community titles schemes where a seller has provided a contract and the relevant section 206 or 213 disclosure statement prior to commencement but the contract for sale has not come into existence as of the commencement date.

The model proposed in sections 388 and 389 deem that if the relevant disclosure statement has been provided then a seller must either:

- give the buyer a new disclosure statement which complies with the new requirements; or
- give the buyer a notice stating the matters which have been added as a result of the amendments.

In the context of the sale of a lot this requires a seller to provide to the buyer a copy of the existing community management statement for the scheme.

In the context of the sale of a proposed lot a seller will be required to also re-disclose the community management statement as the amendments proposed to be made to section 66 and correspondingly to section 217 will mean that a buyer of a proposed lot will be entitled to terminate a contract for sale if the

updated CMS is not also disclosed. Section 389 as it is currently drafted does not contemplate this situation. Possibly the legislation might clarify that a scenario to which section 389 applies does not give rise to a right to terminate a contract merely because of a non-compliance of the disclosed CMS in this regard. This is particularly relevant if the basis on which the lot entitlements have been calculated have not changed for the proposed scheme.

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Thank you once more for providing the Queensland Law Society the opportunity to provide its comments on these proposed reforms. 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

Peter Eardley
**President**