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Lot Entitlements Project
Marketplace Strategy
Office of Regulatory Policy
Department of Employment, Economic Development
and Innovation
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Dear Sir/Madam

Submission on draft Body Corporate and Community Management Amendment Bill 2010

We refer to Minister Peter Lawlor's letter of 19 August 2010 regarding the consultation draft of the *Body Corporate and Community Management Amendment Bill 2010* ("Amendment Bill").

The Australian College of Community Association Lawyers Inc. ("College") thanks the Government for inviting the College to make a submission in relation to the consultation draft of the Amendment Bill which proposes to amend the *Body Corporate and Community Management Act 1997* ("BCCM Act").

The College notes that this Amendment Bill has resulted from the Minister's media release on 19 February 2010 and from submissions in relation to the discussion paper "*Sharing Expenses in Community Titles Schemes*" issued in December 2008 about the current system for setting and adjusting contribution schedule lot entitlements, which determine how costs associated with the administration and management of community titles schemes are shared between owners.

INTRODUCTION

The College is a not for profit association of specialist lawyers established in 2006.

The principal objects of the College are to –

- establish and administer to the highest standards a system of specialist accreditation for lawyers skilled in the Discipline;
- promote the highest standards of professional practice;
- facilitate research and dissemination of research materials on all aspects of the Discipline;
- foster a collegiate relationship among accredited specialists and other members;
- promote public awareness and knowledge of the Discipline; and
- work in a non-political way to improve laws relevant to the Discipline.

The "Discipline" is defined as "*the law and practice associated with Common Interest Subdivisions".* In turn*, "Common Interest Subdivisions"* are defined as *"the subdivision of land (with or without airspace) into lots and common areas whether or not a body corporate or association is established to administer the common areas, including, without limitation, subdivisions commonly known as strata titles and community titles."* This includes community titles schemes in Queensland.

One of the objects of the College is "*to work with State and Federal governments to ensure that legislation related to the Discipline or having the potential to impact on Associated Persons is relevant, effective and of the highest quality so as to ensure the best possible outcomes for such persons*". *"Associated Persons" means persons who live in, work in, or have a legal or equitable interest in all or part of a Common Interest Subdivision development".*

The College has a public interest focus and over time it is expected to build a substantial body of knowledge and skills in this important and expanding area of the law.

THE COLLEGE'S LEGISLATIVE ISSUES PAPER

In 2007, after consultation sessions with its members, the College prepared a Legislative Issues Paper ("LIP") setting out its policies on laws relating to the Discipline.

A copy of the LIP is **attached** and this submission is made consistently with those policies.

BACKGROUND AND OVERVIEW

The College notes that the explanatory notes to the Amendment Bill state that the objectives are to –

- provide a new lot entitlement system;
- provide options for setting contribution schedule lot entitlements;
- only allow for a limited ability to adjust the contribution schedule lot entitlements; and
- give lot owners, who were owners in the scheme at the time an adjustment order was made, a right to reverse the order and apply the original contribution schedule lot entitlements prior to the order being made.

Further, the achievement of the objective by making these amendments "... *will ensure that there is as much certainty around body corporate costs as possible, as well as providing more appropriate and flexible principles for setting contribution schedule lot entitlements*".

The College's view is that the Amendment Bill does not achieve this stated objective and, indeed, provides more uncertainty and unfairness by allowing 13 years of settled law to be 'undone' at the behest of just one affected lot owner.

Whilst the College acknowledges that the BCCM Act is not perfect, the College is of the view that the issue of the sharing of body corporate expenses can be remedied in a way that is fair and equitable for all. Limiting or abrogating such long standing and well understood rights is seen by the College as highly undesirable.

The Amendment Bill overturns the long held policy of Government that:

"*The guiding principle for both setting and adjusting the contribution schedule is that it involves the equitable sharing of the costs of operating and maintaining the common property. These costs should be borne in proportion to the benefit, not in proportion to the unit's value. It is not a contribution linked to an ability to pay, but as a payment for services*." – Hon S Robertson (Stretton – ALP) (Minister for Natural Resources and Minister for Mines), second reading speech, 27 February 2003 in relation to amendments to the BCCM Act.

This principle was supported by other members of Parliament and the opposition. The Hon S Robertson further stated:

"*I would like to thank the Deputy Leader of the Opposition, the speakers from the Liberal Party, the Independents and other members of the opposition for their wholehearted support for this legislation. As members opposite have pointed out, along with honourable members from this side of the House, this legislation is incredibly important to the future of Queensland."*

Indeed, at the time of the 2003 amendments, Mr Lawlor stated "*I rise to support the Body Corporate and Community Management and Other Legislation Amendment Bill* " (at page 296).

The Minister in his media release on 19 February 2010 is now stating that the BCCM Act "... *will be changed so there is a better and fairer system for working out shared costs associated with living in an apartment complex or other community titles schemes*". Further he stated: "*This is much needed change. The Act has had a loophole which unfairly allowed some unit owners to get away with paying less than their fair share of body corporate fees at the expense of others*."

Whilst the College accepts that the BCCM Act can be improved in relation to the setting and adjustment of lot entitlements, the College does not agree that there is a loophole in the BCCM Act. The setting of lot entitlements and the adjustment of them has been in place since 1997. Certainly, the Government did not consider there was a loophole in 2003 when amendments were made to the BCCM Act.

The Amendment Bill proposes to revert to the arrangements in place prior to the introduction of the BCCM Act in 1997, that is to the *Building Units and Group Titles Act 1980* ("BUGTA") and further to 'undo' any adjustments (but only those made pursuant to an order) made since 1997.

The Government should not be looking to undertake a fundamental revision or reversal of the general structuring for lot entitlements or policy that currently underlies the legislative intent. However, there are changes that can be made, that in the College's view, will mitigate against the current perceived inequalities arising through the ongoing process of lot entitlement adjustments and the impact of that in certain schemes.

It is important to note that the process of adjusting lot entitlements has been ongoing since the BCCM Act was first introduced in 1997; see section 46(2) of Reprint 1. Accordingly fundamental revision or restructuring will lead to the upsetting of long standing rights and, in all likelihood, confusion and uncertainty in owners and key stakeholders.

The fundamental issue is that body corporate expenses are not taxes imposed by the State, they are instead the means of recovering expenses incurred at the will of the owners, acting collectively. Accordingly, they must be set in a fair and equitable way and must allow for adjustment, where this is not the case.

The College believes that the inequities in the BCCM Act can be remedied to achieve a fair and equitable outcome for all stakeholders. However, the Amendment Bill does not achieve this objective. Rather, in its present form, the Amendment Bill will effect a re-distribution of property rights granted by Parliament in 1997, relied upon for over a decade and, in some cases, upheld in the Tribunals and/or Courts at considerable expense, all without just, or indeed, any, compensation.

The College is of the view that there is a better method of setting the basis for contributions by lot owners which is just and equitable and which removes the perception that 'struggling pensioners occupying small units' are subsidising the 'wealthy penthouse owners'.

ACHIEVING THE OBJECTIVES

The stated objective of the Amendment Bill is to achieve a fairer allocation of cost contribution among owners of lots in community titles schemes in Queensland.

The BCCM Act has been in operation since 1997. The BCCM Act altered the previous lot entitlement regime under BUGTA in 1997 and, in particular, introduced a dual system of lot entitlements – the contribution lot entitlement and the interest schedule lot entitlement. Prior to the introduction of the BCCM Act, lot entitlements had generally been set by reference to a value based principle.

There have been various amendments made to the BCCM Act since its inception that relate to lot entitlements and the ability to adjust lot entitlements.

The current BCCM Act regime for lot entitlements is essentially -

- the interest schedule lot entitlements are set by reference to a value principle; and
- the contribution schedule lot entitlements are set by reference to the principle of equality unless it is just and equitable for there to be a divergence from that principle having regard to the circumstances of the relevant scheme.

The Amendment Bill introduces new principles for the setting of lot entitlements. It is the submission of the College that the introduction of these additional principles does not lead to a significant clarification of the process for establishing and setting lot entitlements or to an improved position in terms of the equity as between owners in schemes when it comes to the payment of scheme costs through their body corporate levies which are tied to the lot entitlement methodology used and adopted at scheme establishment.

The College's view is founded upon the following principles:

1. The BCCM Act has been in operation since 1997 and whilst adjustments have been made to the lot entitlement provisions of the legislation since that time, there is a significant history (almost as long as the operating history under BUGTA) of scheme establishment and lot entitlement setting by reference to principles embodied in the BCCM Act. The proposed changes under the Amendment Bill seek to restore a position in relation to lot entitlements as it was under BUGTA in many respects and, in the College's view, this would be a retrospective and retrograde measure which does not properly reflect the needs of the current development and demographic requirements in respect of community titles schemes.
2. It would be unfair to effectively overturn 13 years of community titles process and methodology in respect of lot entitlements without an extraordinary benefit arising. As the basis of sharing expenses, adjustments to lot entitlements will inevitably lead to re-apportionment of costs; in effect a 'zero sum game' where there will be 'winners and losers'. Accordingly, it is the College's view that radical change should be avoided wherever practicable and that incremental change, as inequities are identified, ought to be preferred.
3. Many old schemes established under BUGTA (or in some cases its predecessor legislation) have already transitioned through to the BCCM Act lot entitlement regime with adjustments being made based on principles in the BCCM Act that are not materially different from the

options proposed under the Amendment Bill. As such, it is difficult to see any justifying rationale for overturning the basis on which these 'old but up to date' schemes have calculated their entitlements.

4. The BCCM Act, in terms of the contribution lot entitlement schedule, already adopts principles on all fours with the proposed equality principle (that is, that contribution entitlement should be equal unless there is a reasonable basis for them not to be equal which justifies a divergence from the equality principle). As the equality principle is an option available for all schemes operating under building format plans or volumetric format plans (which are typically used for higher density multi-level buildings) the proposals in the Amendment Bill will not necessarily lead to any significant change to the basis on which lot entitlements are set under those schemes. In the College's view, this means that the Amendment Bill fails to introduce any new basis to meet its stated objectives being the adoption of a fair and equitable set of principles for the allocation of cost obligations among owners in schemes.

5. The introduction of multiple principles for establishment of the contribution schedule lot entitlement (the equality principle, the relativity principle and the market value principle) are, in many respects, simply reflections of the same process. For example, many of the features of the relativity principle are already utilised in calculating lot entitlements with reference to the equality principle because those same factors are most usually the basis on which a justification can be found for divergence from the principle of strict equality in relation to lot entitlements.

6. The introduction of multiple principles for the setting of lot entitlements does not introduce meaningful flexibility to the establishment of schemes or the development industry as there is little practical guidance in the statement of the principles as to what specific matters or processes should be adopted in establishing lot entitlements – in other words, the principles are all general in nature and rely upon an assessment of those principles in the context of a specific scheme's circumstances. As such, statements of principle do not guarantee or secure alternative or better methodologies or processes for the establishment of lot entitlements or greater certainty for owners and occupiers in schemes.

7. The introduction of a multiple set of principles without specific guidance as to how those principles will dictate end outcomes will create uncertainty for developers in the establishment of schemes and add to the legislative burden in that regard, particularly as these principles become additional matters for pre-contractual disclosure and ultimately flow into potential termination rights for sales contracts.

8. It is imperative that all owners and occupiers have certainty as to the basis on which they are attributed liability for costs in schemes. This is a fundamental aspect of ownership of lots in a scheme and investment of funds in development. Under the Amendment Bill, there is the potential to have multiple and varying basis for which lot entitlements and therefore cost allocations are made. This, in turn, has potential to create significant differentiation between types of community titles product in the marketplace and ultimately this does not add certainty for those seeking to make significant commercial and lifestyle decisions in respect of their investments or potential investments. Given that the community titles format is likely (for planning, demographic and other reasons) to comprise a significant component of new dwelling product (as well as commercial and retail product) to meet increased planning density requirements and more efficient land use requirements, it is imperative that uncertainty not be allowed to impinge upon confidence in this form of product.

In the College's view, it is the question of fairness that needs to be the focus of any methodology for the setting of lot entitlements in community titles schemes.

In the College's submission in response to the Government's consultation paper as to lot entitlements, the College proposed a methodology that embodied this principle of fairness. That proposal involved:

1. Using the contribution schedule lot entitlements as a basis for determining contribution obligations for day to day costs of the management and upkeep of a community titles scheme. Within that scope, an equality principle could be retained with divergence from equality permitted where just and equitable to do so and, in the College's submission, on the basis that divergence was related to hard data (in the form of an expert's report) as to why specific features and characteristics of a scheme justify a divergence from equality.

2. Utilising the interest schedule lot entitlements for not only contribution to insurance costs (as is currently the case) but also for the setting of contributions to the sinking fund for major capital expenditure items under special resolution. The interest schedule lot entitlements are currently set by reference to a perceived market value relationship as between the lots. In the College's view, it is more equitable that the contributions of owners to major capital expenditure and refurbishment items of the scheme be tied to the interest schedule entitlements as this will better correlate with the principle that each owner's underlying interest in the scheme land as a whole is determined by reference to the interest schedule entitlement. It is this same logic that is already utilised in providing for the interest schedule lot entitlement to be the basis for setting contributions for insurance costs. Ultimately, the owners are more likely to benefit in a relative sense from major capital expenditure and refurbishment items in proportion to the value of their lots. This contrasts with contributions to various periodic and recurrent costs the subject of the administrative fund budgets and levies, which in most instances do not need to be reflective of the underlying value of lots in the scheme in terms of the benefits of that expenditure to owners.

Accordingly, the College proposes that a test of fairness be adopted for the setting of lot entitlements and specifically that:

1. The basis for setting contribution schedule lot entitlements should be a fair and equitable allocation of body corporate expenditure as between the owners grounded in an expert's report. In determining what is a fair and equitable allocation, reference should be to an equality principle test that retains the current scope for divergence from equality where justifiable against certain specific matters relating to the scheme. Those matters could, as a statement of principle, include the matters currently listed under the relativity principle definition (apart from market value) in the Amendment Bill.

2. It would be mandatory that for all new schemes:

    (a) An expert's report be obtained and sourced by the developer with a clear requirement that the report address and explain the relevant principles upon which a just and equitable allocation has been made and with reference to the specific features of the scheme and analysis and assessment of expenditure items within the body corporate's budgets.

    (b) The community management statement refer to and explain the basis on which the fair and equitable allocation has been made with reference to the expert's report which would be held and retained with the body corporate's records.

    (c) That owners have an ability to seek a review of the lot entitlements on the grounds that the report on which they were founded is manifestly in error or the scheme has changed in a material way (with exceptions for disclosed progressive development), in which case the body corporate would be required to obtain a review of the report and present the findings of that review to all owners at a general meeting. Only if the further report was manifestly in error would there be scope for any changes to the entitlements to be made. Such a review should be only instigated on one occasion within the first five years of establishment of the scheme and subsequently, lot entitlements should not, other than where the scheme is changed in a fundamental and material way, be open for adjustment or review (other than for material changes to the scheme or progressive development forecast in the community management statement).

In relation to existing schemes, there should be a window for owners to require a review of the basis on which the lot entitlements are set as recorded in the existing community management statement for the scheme. That review would be directed towards obtaining an expert's report to verify whether there is a just and equitable allocation of contribution lot entitlements as between the owners having regard to the equality principles and basis upon which divergence from that equality principle is permissible. There should be a two year window for any such review to be undertaken with the same tests then applying subsequently to limit any further change to lot entitlements.

The Amendment Bill proposes that existing adjustment actions be quarantined and suspended or, in deed, reversed.

In the College's view, the Amendment Bill is deficient in both its methodology approach and in the need to take retrospective action of this nature.

It is not consistent with a statutory regime that relies upon the integrity of voting among members of community titles schemes and the integrity of resolutions past under a stipulated process for there to be deemed a passing of resolutions; let alone for that to occur simply where an owner proposes a motion be put before a meeting. Deeming an approval in this way undermines the integrity of the meeting process established under the BCCM Act and detracts from the effectiveness of the legislation. Further, if the processes proposed by the College (as noted above) for a window of review of entitlements are adopted, there would be no need to provide for a suspension or overturning of existing processes or previous applications and decisions made.

It is procedurally unfair to retrospectively legislate to overturn decisions made following a process that is embodied in the statute and which owners in schemes have utilised in good faith over time. Moreover, many of the decisions in relation to adjustment of entitlements that have been made at Court, Tribunal or Specialist Adjudicator level have resulted in adjustment to entitlements of a basis that is consistent with what is termed the equality principle or indeed which would be considered consistent with the relativity principle. Indeed, it is the College's view having canvassed its members and industry generally that most adjustments result in a consideration of expert reports directed to the very features described in the relativity principle and with reference to a just and equable basis to diverge from an equality position. Given this, there is little justification for usurping previous decisions on lot entitlement adjustments and no justification for seeking to reinstate the lot and title methodology or mechanism under BUGTA given the passage of time and the operation over that time of the BCCM Act.

The transitional provisions of the Amendment Bill are deficient in a number of ways and, in particular, impacts on sales contracts and developments currently under construction or marketing and, in the context of the additional compliance, burden the proposals the Bill embody.

The overriding principles should be that a developer currently involved in selling or marketing a project should not have to adjust its pre-contractual disclosure that it has made in good faith and in compliance with the current BCCM Act and *Land Sales Act* requirements. Any scheme that is the subject of such activity should be able to be established without the need to make any change to community management statements that have already been drawn and disclosed to buyers in those developments. Any subsequent review of those schemes can be undertaken within the window referred to above in this submission for review of schemes on a transitional basis. Further, there should be a statutory recognition that the potential for such a review to be undertaken is not a matter that any buyer under a contract for a proposed or an existing lot in the scheme entered into prior to commencement of the Amendment Bill can raise as a basis for termination or refusal to comply with the terms of that contract.

EXAMPLES OF INEQUITIES IN ARBITRARY REVERSION OF ADJUSTMENT ORDERS

Unfortunately, the underlying principles for reversion only deal with basic and simplistic stereotype situations. There are many and varied situations where, because of a technicality, one owner in a body corporate will get the questionable benefit of a reversion of an adjustment order, but an owner in another body corporate will not. In some cases, the body corporate (as the

deemed respondent) failed to do anything, either because it was not concerned about the outcome or did not wish to spend any money in defending the action. In those cases the applicant had no choice but to obtain an order. These orders will be the subject of a reversion.

In addition, in many cases where there was an order for an adjustment of lot entitlements, the applicant (and usually a minority of other owners) received a benefit (sometimes quite substantial), with the majority of owners being faced with increased levies. However the percentage increase was generally much less because the increase was spread across the majority of owners.

In other cases, on receipt of its own report, the body corporate agreed either internally or by consent order to an adjustment. Those bodies corporate that agreed internally are not subject to a reversion of an adjustment order, whereas those that agreed by consent order are subject to reversion of an adjustment order. Consequently, the Bill could legislate the absurd result that, in effect, because of expediency or costs where one application was settled in a different manner to another, one body corporate will potentially be subject to a reversion of an adjustment order whereas the other body corporate will not.

Some examples of the draconian effect of the reversion of an adjustment order and absurd situations arising are set out at the end of this submission.

RESPONSE TO CONSULTATION DRAFT

Whilst the College does not agree with the underlying policies of the Amendment Bill, it will however, comment on it in its present form.

1. Cost of undoing 13 years of law

One of the policy tools applied to achieve the objective of the Amendment Bill is to, in essence, revert to systems in use before the BCCM Act commenced. The process of reversion is proposed to apply to any contested lot entitlement adjustment.

The College has obtained from the Community Titles Institute of Queensland ("CTIQ") the following statistics to gauge the impact of the process of 'undoing' 13 years of contested adjustments.

- As at 31 December 2009, there were 358,552 lots comprising 38,570 community title schemes in Queensland (the average scheme being 9.29 lots).
- Of those 38,570 schemes 11,663 or 30% comprised more than 6 lots. The 26,907 schemes under 6 lots account for less than half the total number of lots.
- Of the 11,663 schemes with 6 or more lots, at least 350 have undergone a contested review process ("Affected Schemes"). A reasonable estimate of affected lots is 21,500, or approximately 6% of all lots in Queensland.
- Approximately 13.5% of lots in Affected Schemes, or 2900 lots, have changed hands since a contested adjustment.

The CTIQ has informed the College that the estimated cost of reverting to pre-adjustment order schedules under proposed sections 380, 385 & 386 of the Amendment Bill is $5,200.00 per Affected Scheme, based on an average 60 lot scheme. This figure is based on the current costs of obtaining (basic) legal advice, liaising with the body corporate committee, preparing and convening an extraordinary general meeting, preparing a new community management statement and having that statement executed and lodged for recording in the Department of Environment and Resource Management, following which the relevant planning body must be notified and the new contribution schedule lot entitlements must be inputted into the Affected Scheme's management software program.

These costs will have a significant impact on administrative funds, given many schemes have previously outlaid this amount and more to adjust their lot entitlements in recent years.

The estimated cost then to lot owners of the reversion process across Queensland will be approximately $1.82 million. This figure does not include costs thrown away to undertake the contested adjustment process being undone; which process could have occurred at any time in last 13 years.

2. Proposed sections 378 – 386 (Adjustment of contribution schedule lot entitlements for existing schemes to which adjustment order applies)

After an Affected Scheme has undergone reversion to pre-adjustment order entitlements, contribution notices, disclosure statements to buyers and numerous practical processes (both from a legal and administrative/management perspective) will be affected. The Amendment Bill does not adequately consider these practical matters, nor make provision for them.

The College has identified and points out the following practical issues that have not been addressed in the Amendment Bill but will impact all Affected Schemes:

(a) Issuing of section 205 information certificates

Consideration needs to given to the issuing of information certificates with (old & incorrect) contributions being used or those that have been given correctly at the time but are rendered incorrect by a reversion to pre-adjustment order entitlements. This will impact on conveyances where the buyer relies on the section 205 information certificate. The Bill deals with re-disclosure under sections 206 and 213 of the BCCM Act but not section 205.

(b) Start dates

On a reversion to pre-adjustment order entitlements, the new (old) lot entitlements take effect from the recording of the new community management statement containing them (see section 46(1) of the BCCM Act). This will not coincide with the financial year of the body corporate for an Affected Scheme. This will impact on conveyances where an order is made during the period from contract to settlement, with the likelihood of incorrect adjustments being made.

(c) Levy collection

Levies are set at each annual general meeting at a $ rate per contribution schedule lot entitlement. Where adjustments are made pursuant to a reversion order, the $ rate per contribution schedule lot entitlement will change. This simply leaves an opening for a savvy lot owner to include as part of his/her defence that the claim is flawed.

It is also noted that there is a drafting error in section 379 in that it refers to an adjustment order that increased the contribution schedule lot entitlement for the lot, whereas it should refer to an increase in the percentage of the contribution schedule, as the aggregate changed in almost all adjustment orders.

3. New principles (proposed sections 46A and 46B)

To achieve the objective of the Bill, it should provide simplified options for setting lot entitlements and not provide several options to choose from. More options increases choice, but with a concomitant increase in complexity and confusion for lot owners, body corporate managers and developers alike.

The College's first preference is that there ought to be one principle for calculating contribution schedule lot entitlements and one for interest schedule lot entitlements. Interest schedule lot entitlements ought to be calculated on the 'market value' principle. Contribution schedule lot entitlements ought to be calculated on the 'relativity principle' (subject to the deletion of market value as one of the factors for consideration. The 'relativity principle' could, and indeed in the College's experience would, lead to entitlements which are equal in many cases.

In the event, however, that more options are considered essential, then the College recommends one further alternative. Particularly for lots in a standard format plan, the equality principle should be the only principle available for contribution schedule lot entitlements. The unimproved value principle has no correlation to the actual costs incurred by bodies corporate in these schemes.

There is no significant and defensible link between unimproved market value of a lot and the quantum or type of expenses incurred because of that lot in these sorts of schemes. The unimproved value principle would only be relevant if the Government seeks to burden a class of lot owners with a higher share of expenses based on entirely arbitrary criteria that has little correlation to the ultimate value of a lot once improved.

In addition, the recently passed *Land Valuation Bill 2010* now provides for 'site value' to assess land values, rather than 'unimproved value' which potentially introduces further confusion, cost and inequity.

For lots in a building format plan or volumetric format plan, the relativity principle should be the only principle available for contribution schedule lot entitlements. There is no practical need for an equality principle as the relativity principle is sufficiently wide to include equality, where appropriate.

To ensure certainty, the College suggest that developers be subject to a mandatory requirement to provide on establishment of schemes a lot entitlement report (addressed to the body corporate). This report can be made one of the mandatory documents the developer is required to hand over either on establishment of the scheme or at the first annual general meeting of the body corporate.

Such a report would be used to set the contribution schedule lot entitlements in 'off the plan' sales contracts and particularly the first community management statement contained within the disclosure statement preceding them. The report would then provide information for the body corporate as to the basis on which lot entitlements have been established and would also form a 'baseline' for any future application for adjustment under proposed section 47B.

The additional scoping and attention paid to the establishment of lot entitlements that this report will necessitate will improve the process of setting of lot entitlements that are appropriate for schemes. This will benefit both developers at the front end (in terms of further disclosure obligations and mitigating that risk) and those at the back end, who occupy and administer schemes (because there is likely to be more certainty and less agitation as to lot entitlement changes after establishment if there is a solid and demonstrable basis for the setting of the entitlements justified by supporting evidence).

It is felt that such an obligation, while not needing to be part of any additional disclosure regime in connection with the sale of either existing or proposed lots in schemes, will aid and abet the provision of information and establishment of arrangements that are appropriate for schemes. The College notes that in any case most developers of quality will be already undertaking this sort of analysis.

It is submitted that inclusion of the lot entitlement report in pre-contract disclosure is not desirable, given the intended function of the report and the already voluminous nature of pre-contract disclosure documents.

The College has identified the following specific issues in the Amendment Bill:

(a) Section 46A(1) – the unimproved value was set by the Valuer General following establishment of the scheme, yet the developer is being asked to set the value prior to the scheme being established. The Valuer General will now set a 'site value'. Each of the figures will be discordant with the others.

(b) Section 46A(2) – the example given about a commercial scheme relates to insurance which is not applicable to the contribution schedule lot entitlements. A better example would be to

identify where lots in a scheme disproportionately give rise to expense or disproportionately consume services. For example, only certain lots in a scheme being able to connect to an air-conditioning system. Those lots who have the benefit of the air-conditioning system should pay for it and those lots who do not have the benefit of the air-conditioning system should not have to contribute to the cost of the operation and maintenance of the air-conditioning system.

(c) Section 46A(4) – as the contribution schedule lot entitlements is the basis for calculating lot owner's share of levies to pay for the scheme's expenses, then market value should not be a relevant factor in calculating the contribution schedule lot entitlements. It is absurd and inequitable to suggest that the owner of a three bedroom apartment on the sixth floor causes three times as many meeting notices to be sent as the owner of a ground floor single bedroom unit.

(d) Section 46B(2)(a) – clarification is required about establishment of the market value of a lot if it is a subsidiary scheme. A different outcome is achieved if the lots and common property are individually assessed and added together as opposed of assessing the lots and common property as an *en globo* parcel.

4. Amalgamation and subdivision (proposed sections 51B and 51C)

The College is aware of a number of incidences where amalgamation has resulted in a substantial reduction in the contribution entitlement of the lot owner/s concerned. That having been said, it is the College's view that it would be dangerous and misleading to imply from such a reduction that other lot owners in the relevant scheme have either not been consulted or consented to such a reduction, or that such a reduction was not consistent with the policy of the BCCM Act or land tenure rights.

It is not unusual that amalgamation will require, or may involve, either reconfiguration or building work (per the *Sustainable Planning Act 2009 ("*SPA*")*) which may then in turn require body corporate consent before application may be made either under SPA or the scheme's by-laws or development codes within the community management statement. In such an instance the affected lot owners are afforded opportunity to consider and object to amalgamation and its consequences.

Given that the BCCM Act recognises that there is a primacy of proprietary interests (for example, in preventing the by-laws of a scheme restricting dealings with proprietary interests in a lot) it would be dangerous to treat the consequences of the exercise of proprietary rights (to amalgamate lots) on different principles, in relation to the determination of an appropriate lot entitlement for an amalgamated lot, to any other situation where lot entitlements fall to be determined. Additionally, if the College's submission as to distinguishing between contributions to administrative and sinking fund expenditure are accepted, then there will be a mitigation of the cost impacts of any reduction in contribution schedule lot entitlement that may result from an amalgamation. In essence, the legal title to two or more lots may be changed (into one) but their values will, in effect, also be combined.

Amalgamation may however be another instance where it is appropriate for the Government to consider adding examples of where it is just and equitable for unequal contribution entitlements to apply; for example when lots are amalgamated but retain their original use and configuration.

Proposed new sections 51B and 51C of the Amendment Bill do not recognise or facilitate the following issues:

(a) The legitimate staging of a scheme by a developer, for example by progressive subdivision of a 'balance' lot into more lots, common property and another balance lot, until the last stage is completed (section 51B pertains).

(b) The legitimate subdivision by an owner, for example a dual key lot into two separately occupied lots or for separate sale (section 51B pertains).

(c) The legitimate amalgamation of two lots into one living unit, including for example when done in conjunction with building construction work such as the construction of an internal connecting door (section 51C pertains).

Section 51B is inimical to the process of progressive development of scheme land through the progressive subdivision of a balance lot into further lots. The question arises: Is the Government's intent to require a developer to use the process in section 51B (*pro rata* the 'balance lot' entitlements on establishment of a new stage to the new lots) and then undertake a contested adjustment under proposed section 47B on the basis of a 'material change' when each new stage is established? If so, this would provide a significant and costly disincentive to staged development in Queensland, which is a critically important means of developing larger, well planned and co-ordinated schemes, which in many cases comprise a higher percentage of 'affordable' housing.

The same problems are evident in proposed sections 381 and 382 with respect to calculating the pre-adjustment order entitlements for a scheme which must pass a motion under proposed section 385. The question arises: Does the Government intend that every staged subdivision scheme established since 1997 (and also including those schemes that were established under BUGTA and completed under the BCCM Act or are still being completed under the BCCM Act), which has had a contested adjustment, will incur not only the costs of adopting a pre-adjustment lot entitlement schedule, but then have to then obtain a further order after commencement to recognise the addition of new stages as 'material changes' justifying new lot entitlements for the new lots (rather than their *pro rata* share of the balance lot from which they were created)? In essence, will each staged subdivision scheme have to undertake a dispute resolution process to achieve an equitable allocation of internal expenses?

Section 51B should be limited to the subdivision of a lot post establishment of the scheme that is not progressive development, as that concept is already used in the BCCM Act. Section 66(1)(f) of the BCCMA Act already covers the progressive development of a scheme.

5. Disclosure (amendment of section 206A and proposed section 206B)

Section 12 of the Amendment Bill proposes to amend section 206 of the BCCM Act by requiring that the disclosure statement must also be accompanied by a copy of the community management statement for the scheme. This will involve the seller of a lot incurring additional costs in obtaining a copy of the community management statement to be given to the buyer of the lot. It is normal conveyancing practice for the buyer to obtain a copy of the community management statement as part of the usual conveyancing process, and so the new provision will lead to a doubling up of searches, as a prudent buyer would not solely rely on what the seller provides.

At the time the seller provides the disclosure to the buyer, they usually have not appointed a solicitor. The seller may well then look to their body corporate management company (as they do for disclosure information) to obtain a copy of the community management statement.

The CTIQ has informed the College that if a body corporate management company undertakes a search in the Department of Environment and Resource Management for the purpose of providing a copy of the community management statement to the seller to enable it to be attached to the disclosure statement, that cost is estimated to be $112.15 (this includes actual expenses and labour).

The CTIQ has also informed the College that the data it has obtained the Real Estate Institute of Queensland is that 7.9% of the 358,552 lots in Queensland changed hands in the financial year ending 30 June 2010. Assuming similar sales in the future, the total cost to sellers of lots in respect of the amendments to section 206 proposed would be $3.18 million per annum. At an estimated current market rate for legal fees, and including current information certificate fees under section 205, the proposed amendment to section 206 will increase conveyancing costs, statewide, by approximately 19% from $600 to $712.15.

The College suggests that the requirement for the seller to provide a copy of the community management statement to a buyer be removed from section 206 and that the Government liaise with the Queensland Law Society in relation to the conveyancing protocols to ensure that the buyer's solicitor obtains and provides a copy of the community management statement to the buyer.

In relation to section 206B, the College notes that the warranties given by the seller to a buyer under clause 7.4 of the standard REIQ contract for the sale of residential lots in a community titles scheme adequately covers this situation and that there is no need to included a statutory provision. Again, the College suggests that the Government liaise with the Queensland Law Society in relation to this issue.

6. Transitional provisions for off the plan contracts (proposed section 375)

Section 375 has the effect of applying the current regime for calculation of interest schedule lot entitlements for schemes which are established after the commencement but in respect of which contracts of sale have been executed before commencement. In other words, this provision applies to all current 'off the plan' contracts.

Section 375 mirrors the current arrangements within sections 46(8) and 48(7) of the BCCM Act. Particularly, interest schedule lot entitlements for a lot must be calculated having regard to how the scheme is structured, the nature, features and characteristic of lots included in the scheme and the purposes for which the lots are used. After establishment, and on a proposed review of the interest schedule lot entitlements, a specialist adjudicator or the Tribunal may make an order to adjust the interest schedule lot entitlements to reflect the respective market value of the lots at the time of the order, except to the extent that it is just and equitable for the entitlements not to reflect the respective market values of the lots.

Current developer practice is to apply the factors in section 46(8) of the BCCM Act so as to arrive at interest schedule lot entitlements that reflect market value, except in extreme cases where other factors within section 46(8) militate against using market value. This approach also minimizes later disputation between lot owners as the principle for adjustment under current section 48(7) of the BCCM Act is market value.

Proposed section 66(1)(dc) requires for all schemes established after commencement of the Amendment Bill that the community management statement includes a statement as to the basis upon which the interest schedule lot entitlements have been calculated (whether market value or otherwise).

The College suggests that section 66(1)(dc) only apply in respect of schemes established after the commencement which are not caught by proposed section 375. This is because all current 'off the plan' contracts would have been accompanied by a disclosure statement containing a proposed first community management statement (see s 213(2)(e)(i) of the BCCM Act) and after the commencement that first community management will no longer be accurate, on the basis of the information required to be included under proposed section 66(1)(dc)(see s 214(1)(b) of the BCCM Act). Accordingly, re-disclosure would be required under section 214. Even if re-disclosure was not required under section 214 and the new form of first community management statement was recorded the new form of first community management statement would be different to that disclosed to the buyer (see s 217(b)(i) of the BCCM Act).

In both cases of section 214 and section 217 it is then open for a buyer to maintain that they would be materially prejudiced if compelled to complete their contract. It is arguable that no material prejudice arises as the only difference between the currently disclosed community management statement and that required to be disclosed or recorded after commencement of the Amendment Bill is one which includes a description of the method of the calculation of the interest schedule lot entitlement.

This could lead to a spate of adventurous terminations, with the capacity to undermine the stability of the entire community title development sector in Queensland.

The College suggests that a transitional provision be included for proposed section 66(1)(dc) such that it applies to schemes established after the commencement which are not the subject of proposed section 375.

7. Other issues

Section 48(10) of the BCCM Act (to be renumbered to 48(6)) currently provides that following an order, the body corporate must, as quickly as practicable, lodge a request to record a new community management statement reflecting the adjustment ordered. Similar provisions are included in the Amendment Bill (see for example sections 47A(5), 47B(8), 48(6), 51B(4) and 51C(4)).

However, in relation to a reversion of the contribution schedule lot entitlements, section 386(2) provides that the body corporate must lodge a request to record a new community management statement within three months after the body corporate's general meeting. This time frame coincides with section 65 of the BCCM Act.

The College is aware that a number of orders have been made by the Tribunal which include a date by which a community management statement must be recorded, including that it be recorded by a specified date, some of which are impractical to comply with (for example within 14 days). The process to be followed following receipt of an order is that the committee of the body corporate must arrange for the preparation of a community management statement (and this includes instructing a lawyer to undertake the task), passing a resolution to consent to it in accordance with the order, have it executed and then lodged for recording in the Department of Environment and Resource Management.

The College suggests that, for the sake of consistency, the BCCM Act and the Amendment Bill be amended to provide that in all the circumstances where a lot entitlement schedule is being adjusted, it must be recorded within three months after the relevant event. In addition, because it affects levies, it should not take effect until at least the next levy period that has not been billed or at the beginning of the scheme's next financial year to avoid the consequential issues arising out of pro rata adjustments during a levy period.

CONCLUSION

In conclusion, the College submits -

- the Amendment Bill does not add to or improve certainty and fairness;

- that multiple options does not create flexibility, but rather it adds to the complexity and cost of scheme establishment and potentially creates uncertainty in the market place among consumers because of the potential for a range of different cost allocation regimes across different formats and product type in terms of the underlying principles (scheme cost contributions already vary for scheme specific factors); and

- a retrospective reversion and/or to permit unilateral action on the part of a single owner is inconsistent with good policy and legislative practice and creates discriminatory outcomes rather than a balanced and equitable basis for the rights of all stakeholders involved in community titles schemes.

The College cannot support proposed legislation which will have the impact of arbitrarily and inconsistently re-distributing long standing property rights, especially where the evil which Parliament seeks to address may be addressed more simply, and certainly with much lesser impact.

The College commends to the Government the alternate solution proposed. The College volunteers to provide further expert assistance to explore how the alternate solution may be rendered into cogent policy and draft legislation.

If the Government persist with the Amendment Bill, then it must be significantly amended before being voted upon in Parliament. The College has identified many issues for rectification, and for the most part has provided clear solutions or alternatives. Failure to address these concerns will have a significant impact upon the development sector, the multitude of other industries which rely upon it, and most importantly hundreds of thousands of unit owners in Queensland.

MEETING ABOUT ISSUES

In accordance with clause 1.1 of the LIP, the College would also like to meet with the Government about this submission and the proposed reforms. In this regard, the Government may contact:

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The College looks forward to working with the Government on the proposed reforms to BCCM Act.

Sincerely

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EXAMPLES

Case scenario no 1

The scheme is made up of 56 lots and common property. Lots 1 and 2 are commercial lots with lots 3 to 56 being residential lots in a residential tower. Lot 1 is a stand alone lot and lot 2 is a small storage room in the basement of the residential tower.

The owner of lot 1 made an application to the District Court to adjust the contribution schedule lot entitlements. Following negotiations between the body corporate and the owner of lot 1, the matter was settled and a consent order was made by the District Court on the basis that lot owners were given an opportunity to make an application to the Court (within a specified time frame) if they wished to oppose the new contribution schedule lot entitlements. No owner did so.

A selection of the original contribution schedule lot entitlements ("CSLE") were as follows:

Lot No	**CSLE**	**% of aggregate**	**Levies***
1	180	2.82%	$3,385.04
2	25	0.39%	$470.14
9 (lowest)	97	1.52%	$1,824.16
55 (highest)	170	2.66%	$3,196.99
3 – 56 (averaged)	Ranged from 97 to 170 (average 114.37)	1.79% average	$2,150.82
Aggregate	**6,381**		

* Based on a budget of $120,000.00

The CSLE was adjusted as follows:

Lot No	**CSLE**	**% of aggregate**	**Levies***
1	140	1.11%	$1,327.85
2	52	0.41%	$493.20
9 (lowest)	196	1.55%	$1,858.99
55 (highest)	342	2.7%	$3,243.75
3 – 56 (averaged)	Ranged from 196 to 342 (average 230.74)	1.82% average	$2,188.49
Aggregate	**12,652**		

*Based on a budget of $120,000.00

The comparison from the original CSLE to the adjusted CSLE in dollar terms is as follows:

Lot No	**Old levies**	**New levies**	**Difference**
1	$3,385.04	$1,327.85	-$2,057.19
2	$470.14	$493.20	+ $23.06
9	$1,824.16	$1,858.99	+ $34.83
55	$3,196.99	$3,243.75	+ $46.76
3 – 56 (averaged)	$2,150.82	$2,188.49	+ $37.67

As can be seen from the above table, the detriment to the majority of the owners was minimal. However, one owner could now require reverse the situation as it was subject to a consent order, which would significantly impact on the current owner of lot 1.

Case scenario no 2

The scheme is made up of 32 residential lots and common property.

The owner of lots 31 and 32 made an application to the District Court to adjust the contribution schedule lot entitlements. The body corporate gave notice to owners of the application and advised them of their right to elect to be joined as a respondent. No owner chose to do so.

There was a minor change to the contribution schedule lot entitlements between the owner of lot 2 and the applicants which was sorted out among themselves and prior to the hearing.

The body corporate did not appear at the hearing of the matter and an order was made in its absence in accordance with the application, subject to the minor adjustment agreed to with the owner of lot 2.

The original CSLE was as follows:

Lot No	**CSLE**	**% of aggregate**	**Levies***
1	3	2.91%	$4,951.45
2	2	1.94%	$3,300.97
3 - 30	3 each	2.91% each	$4,951.45 each
31	7	6.79%	$11,553.39
32	7	6.79%	$11,553.39
Aggregate	**103**		

* Based on a budget of $170,000.00

The CSLE was adjusted as follows:

Lot No	**CSLE**	**% of aggregate**	**Levies***
1	113	2.79%	$4,751,42
2	90	2.22%	$3,784.31
3 - 30	124 each	2.79% each	$5,213.95 each
31	184	4.55%	$7,736.82
32	184	4.55%	$7,736.82
Aggregate	**4,043**		

*Based on a budget of $170,000.00

The comparison from the original CSLE to the adjusted CSLE in dollar terms is as follows:

Lot No	**Old levies**	**New levies**	**Difference**
1	$4,951.45	$4,751.42	-$200.03
2	$3,300.97	$3,784.31	+ $483.34
3 - 30	$4,951.45 each	$5,213.95 each	+ $262.50 each
31	$11,553.39	$7,736.82	-$3,816.57
32	$11,553.39	$7,736.82	-$3,816.57

As can be seen from the above table, the detriment to the majority of the owners was minimal. However, one owner could now require reversal of the situation, even though at the time of the hearing neither the body corporate nor any owner was interested in defending the application and did not appear on the hearing of the matter. A reversion of the court order would significantly impact on the current owners of lot 31 and 32.

Case scenario no 3

The scheme is made up of 286 lots and common property. There is a 12 storey commercial building (containing commercial lots and car parks) with an adjoining 15 storey car park containing 279 car parks.

The scheme originally had 378 lots, but subsequently in 1983, one lot was re-subdivided into three lots and in 1993, 95 car park lots were amalgamated into one lot, being new lot 382.

The owner of lot 382 made an application for specialist adjudication to adjust the contribution schedule lot entitlements. The body corporate was deemed to be the respondent. An owner can elect to become a respondent, but no such election was made, although one owner did lodge a submission.

The original contribution schedule lot entitlements were generally 9 for a car parking lot and ranged between 64 and 304 for other lots, with the one exception – an entitlement of 855 for the applicant's car park lot (lot 382). The aggregate was 11,642.

A selection of the original CSLE was as follows:

Lot No	**CSLE**	**% of aggregate**	**Levies***
16	9	0.07%	$425.18
116	182	1.56%	$8,598.17
119	304	2.61%	$14,361.79
198	66	0.56%	$3,118.02
382	855	6.79%	$40,392.54
Aggregate	**11,642**		

* Based on a budget of $550,000.00

The CSLE was adjusted as follows:

Lot No	**CSLE**	**% of aggregate**	**Levies***
16	10	0.10%	$551.26
116	113	1.13%	$6,229.32
119	122	1.22%	$6,725.46
198	91	0.91%	$5,016.53
382	90	0.90%	$4,961.41
Aggregate	**9,977**		

*Based on a budget of $550,000.00

The comparison from the original CSLE to the adjusted CSLE in dollar terms is as follows:

Lot No	Old levies	New levies	Difference
16	$425.18	$551.26	+126.08
116	$8,598.17	$6,229.32	-$2,368.85
119	$14,361.79	$6,725.46	-$7,636.33
198	$3,118.02	$5,016.53	+$1,898.51
382	$40,392.54	$4,961.41	-$35,431.13

As a result of the expert's report, it became apparent that a car park lot disproportionately consumes fewer services than a commercial lot and therefore should be entitled to contribute a lesser percentage of the levies. In addition, the amalgamation of the car park lots did not proportionately increase the effect on the cost of services that the amalgamated lot consumed. A reversion of the specialist adjudicator's order would significantly impact on the current owner of lot 382.

Case scenario no 4

The scheme was registered as a group titles plan under BUGTA and is a staged development and continues to be developed today. As it was registered under BUGTA, the balance lot was based on the unimproved capital value. Approximately 30% of the scheme is still to be developed. Accordingly, the developer (as owner of the balance lot) was contributing to the levies in accordance with the unimproved capital value.

An application was made to the Tribunal for an adjustment of the contribution schedule lot entitlements. As a result of that application, a consent order was made (the Body Corporate preferring to have the benefit of an order rather than settling the matter internally) which resulted in the balance lot's contribution schedule lot entitlements being reduced to the same as for each of the developed lots. On completion of each stage, each new developed lot gets a contribution schedule lot entitlement in line with the existing developed lots and the aggregate is increased.

This scheme will be caught by the proposed provisions to reverse an adjustment order. If any owner lodges a motion to reverse the adjustment order, then the balance undeveloped lot will revert to is unimproved capital value, yet that lot does not impact on body corporate expenses, but will be contributing 30% of the budget, which is not insubstantial. The likely outcome will be financial stress on the developer and possible insolvency. If the developer does not pay the levies, then the body corporate will suffer financial stress and special levies will have to be struck to meet its ongoing statutory obligations. This is a lose/lose situation for both parties.

Case scenario no 5

The scheme is made up of 49 lots, 40 lots in a residential tower and 9 three level villas. The residential tower contained a mixture of 2 and 3 bedroom apartments and two penthouses. The application was made to the District Court by the owners of the two penthouses to adjust the contribution schedule lot entitlements.

As a result of the experts' reports, not only was it clear that the contribution schedule lot entitlements for the penthouses ought to be adjusted, but also the contribution schedule lot entitlements for the villas should also be adjusted, given their limited use of the residential tower (eg, no requirement to use the lifts, separate access, etc).

In the interest of retaining harmonious relations within the building and in the spirit of co-operation and negotiation, the body corporate passed a resolution without dissent to adjust the contribution schedule lot entitlements.

The result was that court proceedings were avoided (apart from the making of the initial application), thus retaining harmonious relationships within the scheme and also avoiding substantial court costs.

This scheme will not be caught by a reversion of an adjustment order as no court order was made.