unit owners association of queensland inc

UNIT OWNERS ASSOCIATION QUEENSLAND - SUBMISSION TO PROPERTY LAW REVIEW - PAPER 1

"In Queensland the legislation that governs bodies corporate changed in 1997. That legislation, by its very name (the Body Corporate and Community Management Act) acknowledges that these structures are more than buildings in which we live, they are communities. They have a role in the fabric of our lives, how we live together, and how we relate to one another." (Tim Sheehan: SSKB)

Preface

1. The Unit Owners Association of Queensland (UOAQ) as the peak representative of unit owners, is pleased to participate in this review and supports the Government decision to conduct this review of the Body Corporate Community Management Act 1997 (BCCMA); understanding that this review is ahead of the 10 year scheduled review, agreeing that the review is urgently needed due to the deficiencies, inadequacies and corruption of the objects of the Act. The UOAQ unashamedly represents the unit owners of Queensland, the sole financial supporters of the Queensland unit industry as outlined below:

- Unit owners purchase the developer's product.
- Unit owners employ the solicitors necessary for contracts, transfers and disputes.
- Unit owners contract with, and pay, Body Corporate Managers.
- Unit owners contract with, and pay, caretaking letting agents.
- Unit owners contract with, and pay, the numerous tradesmen required to maintain the buildings and services.
- Unit owners pay the cost of mandatory inspections: e.g. fire safety reports, workplace health and safety reports, swimming pool compliance reports and sinking fund analysis reports.
- Unit owners pay the building and common property insurance.
- Unit owners pay the local council rates, the water rates and consumption and the electricity supply charges and consumption.
- Unit owners pay local council loadings on rates such as height in building taxes and rented unit taxes.
- Unit owners support the Queensland economy by provision of residences to workers and employees of industry and commerce.
- Unit owners support the Queensland tourism industry by provision of accommodation to tourists.
- Unit owners support the Queensland Government policy of high density urban redevelopment.

2. The UOAQ submits that the unit owners are more financially committed to the success of their investment than any other stakeholder.

3. Notwithstanding this total and sole financial support of the Queensland unit industry, the unit owners are discriminated against by the BCCMA contrary to the object of the Act:

(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;

4. The facts are that the unit owners are disempowered by the provisions of the BCCMA and are being deprived of adequate return on investment to allow upkeep and maintenance of their units and buildings. This situation is causing accelerated depreciation of buildings and lower standards of accommodation for tourists and degraded living standards in Queensland unit buildings and complexes.

5. The UOAQ while supporting the review has expressed concern that the scope of the review is inadequate to address the primary problems of the unit industry in Queensland. That is: twenty five year contracts and 5.5 times goodwill derived there from. These concerns have been addressed to the Department of Justice and Attorney General and indeed to the Attorney General personally.

6. The UOAQ has been advised by Government officers that 25 year Management Rights (MR) contracts are sacrosanct as are perpetual contract extensions. This attitude defeats the purpose of the review and will continue to dis-empower unit owners. 25 year MR contracts are the root cause of escalating levies costs and disputes between caretakers and the owners of the buildings - the individual unit owners and their body corporate. The Justice Department reasoning that MR contracts are too valuable an asset, to the caretaker letting agent, to be regularised in any manner, reverts BCCM management thinking to pre - 2008 when Body Corporate for Palm Springs Residences v J Patterson Holdings Pty Ltd [2008] QDC 300; overruled Adjudicators and Specialist Adjudicators opinions that MR contracts could not be terminated because of the value of the contract.

7. DCJ McGill dispelled this myth at [17] stating*:*

"That paragraph suggests that it is appropriate for an adjudicator or for that matter a court, to approach the resolution of the dispute with a strong preconceived reluctance to arrive at a conclusion unfavourable to the caretaker....."

His Honour continued*:*

"No doubt those consequences would be unpleasant, but the adjudicator did not seem to recognise that there is more to a caretaking agreement than simply a valuable asset for the caretaker; the fundamental purpose of such an agreement is to ensure that appropriate caretaking services are made available to the body corporate, for the benefit of all lot owners."

DCJ McGill concluded:

"What concerns me about this paragraph in particular is that it appears to amount to an admission on the part of the adjudicator that he approached the resolution of the matters in issue between the parties with a preconceived sympathy for the respondent."(Caretaker)

8. With respect, the UOAQ submits that the Department of Justice and Attorney General is falling into the same prejudicial trap in relation to 25 year contracts and the scope of this BCCM review.

9. The UOAQ also directs the attention of the Department of Justice and Attorney General to Community Association DP No 270180 v Arrow (Asset) Management Pty Ltd & Ors [2007] NSWSC 527 with respect to duty of care of developers and sale of MR contracts encumbering the body corporate with future debt.

10. Twenty five year contracts remain the single largest misappropriation of unit owners' funds and if the Government refuses to review this aspect of the BCCMA, the Government is complicit in the misappropriation.

11. The UOAQ sincerely prays that the Government recognises that the existing situation is unsustainable. Caretaking services are on average consuming 35% of the annual budget to help pay **inflated** bank borrowings, to pay 'good will' for Management Rights, that are currently being sold at 5 to 5.5 times annual profit. Body Corporate Management (BCM) services are consuming 15% to 20% of the annual budget, just to administer buildings in accordance with the BCCMA.

Governance

12. To avoid confusion, the Unit Owners Association of Queensland attempted to establish the Queensland University of Technology (QUT) Panel definition of 'Governance'.

The Macquarie Concise Dictionary was consulted and defined:

"Governance n. 1. government; exercise of authority; control. 2. method or system of government or management."

13. The Department of Justice and Attorney - General web site was searched but failed to provide elucidation. The Department was then contacted by e-mail revealing that the Department did not have a definition of 'Governance' and did not have a 'Governance Policy' document.

14. Continuing the search, revealed the Queensland Department of Education and Training (DET) 'Governance Framework' included an explanation of governance as follows:

"Public sector governance covers:

…the set of responsibilities and practices, policies and procedures, exercised by an agency's executive to provide strategic directive, ensure objectives manage risk and use resources responsibly and with accountability. It also encompasses the important role of leadership in ensuring that sound governance practices are instilled throughout an organisation, and the wider responsibility of all public servants to apply governance practices and procedures in their daily work.

Good governance is about both:

- *performance — how an agency uses governance arrangements to contribute to its overall performance and the delivery of goods, services or programs*
- *conformance — how an agency uses governance arrangements to ensure it meets the requirements of the law, regulations, published standards and community expectations of probity, accountability and openness.*

15. The UOAQ then sought to understand how the Body Corporate and Community Management Act 1997 (BCCMA) conformed with these objectives and what other mechanisms were in place for guidance and comparative standards of compliance.

The Legislative Standards Act 1992

16. This Act was considered by the UOAQ to give legislative force to the definitions of "Governance" as quoted above, and the derived UOAQ understanding of the principles that were being implied as the standard for comparison:

4. Meaning of fundamental legislative principles:

(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

Note—Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

(2) The principles include requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—

(a) is within the power that, under an Act or subordinate legislation (the authorising law), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the sub-delegation of a power delegated by an Act only—

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

BCCMA

17. The UOAQ next consulted the BCCMA, Part 2. Section 2. 'Object and achievement of object' and noted with approval that this section of the BCCMA is clear, concise and devoid of splintered contradiction as contained in many sections of the BCCMA and associated Regulations:

2. Primary object

The primary object of this Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

4. Secondary objects

The following are the secondary objects of this Act-

(a) to balance the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes;

(b) to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;

(c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;

(d) to provide a legislative framework accommodating future trends in community titling;

(e) to ensure that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;

(f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;

(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;

(h) to ensure accessibility to information about community titles scheme issues;

(i) to provide an efficient and effective dispute resolution process.

Statement of standards

18. Clearly the concept of 'Governance'; the Legislative Standards Act 1992 and the Objects of the BCCMA are inextricability linked to form one comprehensive standard to which the BCCMA legislation, and implementation of unit administration, must strive to achieve. The UOAQ submits that existing and proposed legislation must be tested against these documents to determine if it meets the required standard.

Governance is omnidirectional

19. The UOAQ views governance as being omnidirectional. That is if unit owners under the BCCMA are to be subjected to governance standards, then the major consumers of unit owners' funds'; for example, caretaker letting agents and BCMs should also be subject to governance standards.

20. Examining caretaker letting agents and their purchase of Management Rights (MR), the UOAQ found that contrary to good business practice, MR purchasers are failing to exercise due diligence over the business they are purchasing. MR goodwill factors are at least twice the cost of small business; borrowings are excessive and based on unrealistic contract duration

expectations. This is because of anticipated contract extensions beyond the stated contract expiry.

Lenders are relying on sections of the BCCMA to guard against MR business failure for example BCCMA s.123 and 126 giving the lender preference over the body corporate and BCCMA s. 146 ensures a minimum 9 year contract when the lender transfers the loan.

The BCCMA fails to consider the situation of the body corporate when terminating a contract. Many MR purchasers fail to understand that a MR contract is a contract and a depreciating asset with a finite life, and Return on Investment (ROI) must be achieved within the life of the contract. This is why many MR owners expect the body corporate to grant contract extensions at no benefit and considerable expense to the unit owners.

21. BCMs usually become involved with the developer when the Community Titles Scheme is being drafted. The BCM can draft the by-laws, the caretaking contract, the letting contract and the BCM contract.

At the first General Meeting the BCM purports to be representing the body corporate, when in fact they have a blatant conflict of interest between the developer and the unit owners. The unit owners, who are usually completely naive as to body corporate law, are deprived of their right to vote by a Power of Attorney to the developer as part of the purchase contract. Thus the developer can ram through whatever he wants, including the incorrect management module and probably a 25 year caretaking contract and 3 year BCM contract; maintenance contracts that are overpriced and supply contracts that include margins to purchase building hardware, for example, the building hot water system. Developers do not purchase the boilers; they leave the body corporate to pay them off by a loading on the price of energy. The same situation can apply to electricity meters for each unit. Ownership is retained by the supplier and if the body corporate wishes to tender for other suppliers, the body corporate or unit owners must purchase the meters. BCMs also receive commissions on work performed for bodies corporate, for example 20% commission for arranging an insurance policy, and at least 10% for arranging tradesmen. This is in addition to charging the body corporate for work performed on a contract plus time basis.

22. The UOAQ recommends that governance standards for original purchase contracts, Caretaker Letting Agents and BCMs be scrutinised in considerable detail to restore standards to the unit industry and reduce costs to unit owners.

EXAMINATION OF PROPOSITIONS POSED BY THE QUT PANEL.

By-laws

23. UOAQ sees the standard by-laws as examples. The variation in size and composition of each body corporate require each scheme to develop its own specific by-laws. Three major impediments to the construction and application of by-laws are:

(a) the by-laws are written under direction of the developer with no input from the eventual owners of the scheme; and

(b) the interpretation of by-laws by lay owners is consistently contrary to the interpretation placed on the by-laws by the Commissioner for Body Corporate adjudicators and Queensland Civil and Administrative Tribunal (QCAT).

(c) any owner can draft a by-law and propose a motion at an AGM to have the CMS amended. If 75% of owners agree, then the by-law is inserted in the CMS.

If the by-law is challenged it is dissected and scrutinised by solicitors, many of whom take delight in finding precedents to discredit the by-law, or if the by-law is correctly drafted, finding precedents to allow committees, caretakers or BCM's to retrospectively correct their transgression of the by-law or legislation.

24. These three factors lead to very expensive disputes between individual owners and/or the body corporate. In reality the 'body corporate' is in some cases the 'committee' comprised of individuals inflicting their own interests on the owners - at the expense of the body corporate. The level of apathy in many schemes (often induced by obstruction by adjudicators and QCAT) is such that many owners are dispirited and no longer care.

An example of how by-laws can be manipulated by QCAT and Adjudicators, notwithstanding Governance, the Legislative Standards Act 1992 and the objects of the BCCMA is as follows:-

Governance standards state:

"conformance — how an agency uses governance arrangements to ensure it meets the requirements of the law, regulations, published standards and community expectations of probity, accountability and openness."

(2) The (Legislative) principles include requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals.

The BCCMA states:

Primary object

The primary object of this Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

Secondary objects

The following are the secondary objects of this Act-

(a) to balance the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes;

(e) to ensure that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;

(f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;

(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;

Pets

25. Notwithstanding the Governance Policy, the Legislative Standards Act and the BCCMA objects, buildings schemes that had no pet by-laws since establishment were over- ruled by Adjudicators decisions quoting the following questionable logic decision, followed by QCAT applying infinite analysis to the meaning of the legislation.

.....”since there is clearly no rational basis upon which it can be said that the keeping of a goldfish in a safe and healthy environment could be a matter which could cause any difficulty to any other owner, yet is the subject of an 'absolute' ban, the conclusion is fairly open that such a by-law is unreasonable.”

26. This decision was then extrapolated to include dogs and cats followed by dogs over 10kg and then to more than one animal per unit.

27. The UOAQ submits that the above is flawed and defective logic. The UOAQ contends that the above seems more unreasonable than the by-law that was ruled by QCAT as ‘unreasonable'. Clearly the responsibility and authority required by good governance, as determined by the Legislative Standards Act and the BCCMA, has been stripped from the entire strata community, particularly any scheme or community where the majority of owners have expressed a clear desire to have a pet free building or scheme.

28. This then raises the subject of ‘democracy’ under the BCCMA. The primary and secondary objectives of the BCCMA are in conflict with the legislation contained in the BCCMA.

The Macquarie Dictionary defines “*Democracy 1. government by the people; a form of government in which the supreme power is vested in the people and exercised by them……”*

The basic definition of democracy in its purest form comes from the Greek language: The term means ‘rule by the people’. But democracy under the Westminster system of government has become to be known as “one vote - one value”, or 50% plus 1 vote rules. This is the system used in all Australian Parliaments and even local government; but when the BCCMA was drafted, democracy, rule by the people, one vote one value, and 50% plus one vote rules, were cast aside in favour of: vote without dissent; majority resolution; special resolution; and, ordinary resolution. Ordinary resolution being the only ‘democratic’ vote.

The ASIC under the Corporations Act 2001 requires only two types of resolution: ordinary resolution and special resolution. There is no reason why the BCCMA should be more complicated.

A resolution without dissent is impossibility and arguably included to prevent a resolution that could be embarrassing to the Government - undemocratic, and contrary to legislative intent.

The difference between a 'special resolution' and a 'majority resolution' is 75% of those voting and 75% of those entitled to vote. A majority resolution is a nonsense given uninterested voters' influence on voting outcomes. The UOAQ objects to 'resolutions without dissent' and 'majority resolutions' on the basis that they are designed to further disenfranchise unit owners.

29. The BCCM Adjudicators and QCAT appear to be in competition with each other trying to find legalistic interpretations of the BCCMA. They have lost sight of the objectives of the Act and have completely ignored the Acts Interpretation Act 1954.

30. Section 14A of the Acts Interpretation Act 1954 states the interpretation of an Act provision that best achieves the purpose of the Act is to be preferred to any other interpretation. This applies to instruments in force under an Act. The purpose of the BCCMA is to provide for flexible and contemporary communally based arrangements by a number of means including by balancing the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes.

But this objective has been ignored in *River City Apartments* [2001] QBCCMCmr 184 (3 May 2011) [4] where QCAT played with semantics of the difference between *regulate* an activity as distinct from *prohibit* the activity completely. While it is questionable that the drafter of the Act differentiated on these interpretations, the point that should have been considered was the democratic right of the owners to determine how their building was run, in this case for many years.

The other factor that must be considered is that the BCCMA was written for interpretation by lay persons as to how to administer their collectively owned building, not for infinite interpretation by legally trained lawyers with little or no experience of close community living.

Car parking:

31. Standard management practice is that responsibility must carry with it commensurate authority. The BCCMA is anaemic relating to any authority of the body corporate to enforce by laws. The usual procedure requires the matter to be taken to the Magistrates Court for an order to be issued before the body corporate can act. Body corporate notices and Adjudicators orders have no other enforcement authority. If possible the Act should provide the body corporate with the responsibility and authority to tow vehicles after issue of a contravention notice.

Smoking:

32. This subject is not confined to tobacco smoke; a problem also exists with barbecues on verandas and patios. Many unit buildings have vertical construction with patios directly above and below each unit. Cooking smells can permeate the best sealed windows and doors. The problem is compounded by the safety aspects of gas cylinders being transported on common property and in elevators. If possible the Act should provide the body corporate with the responsibility and authority to immediately enforce no smoking and no fumes regulations, after issue of a contravention notice.

Overcrowding:

33. Local Council Local Orders and Queensland Fire and Rescue Service Regulations in conjunction with the National Construction Code (NCC) stipulate the number of persons permitted to occupy units. Overcrowding is seldom a problem with permanent residential units and is easily controlled by the Letting Agent or unit owner. The problem arises in short term accommodation units when letting agents fail to enforce the existing regulations while attempting to extract the maximum commission return. Many absentee unit owners are not aware of overcrowding causing increased damage to their unit and the common property.

Enforcement mechanisms:

34. Enforcement of overcrowding regulations is not a problem if the letting agent or unit owners are of a mind to enforce existing regulations. Existing Queensland Police powers are adequate to act on a complaint by a letting agent or unit owner. The body corporate is disempowered by 25 year letting contracts and have little, or no, control over letting agents. Moreover, the Committee or the body corporate is not responsible for control of the letting agent's tenants. **This problem is exasperated by caretaker/letting agents being no longer required to live in the building as introduced by the Property Occupations Act 2014.**

35. If the caretaking/letting agent contract is reduced to 3 years (restoring control to the body corporate) this problem will be considerably reduced.

RECOMMENDATIONS - PART 1

36. Any new example by-laws should be written by the Commissioners adjudicators - as in a dispute they are the first line of interpretation. The example by laws should be incorporated into the Commissioners web site thus making them easier to update.

37. The provision allowing letting agents not to live in the building as contained in the Property Occupations Act 2014 must be deleted.

38. Letting Agent Contracts should be reduced from 25 years to 3 years to restore authority and control to the body corporate.

39. Various sections of the BCCMA allow parties to an application to be represented by an agent (solicitor). These sections apply even if the applicant is not represented, and are being abused by committees to intimidate applicants. Recommend that a committee, or other respondent, may not engage legal representation against an applicant who is not represented.

Termination of community titles scheme

40. The UOAQ recognises the requirement for urban renewal and also the requirement to balance the rights of unit owners holding freehold title to their unit. The current requirement for a resolution without dissent for a vote for termination of a scheme is as impossible and unrealistic as the requirement for any resolution without dissent contained in any part of the legislation.

41. The UOAQ recommends review and consideration of the proposed NSW regulations for 75% agreement of unit owners with safeguards for the accommodation of all unit owners by provision of an equivalent unit in the new development, or compensation to the level of cost of replacing the unit to be acquired.

42. This area is beyond the expertise of the UOAQ

43. The UOAQ supports elimination of all redundant structures and regulations.

44. The UOAQ supports simplification and elimination of duplication of schemes with the associated reduction of structures and costs.

Debt recovery

45. This area of the legislation is a classic example of intended BCCMA regulation being interpreted by Adjudicators and the Courts to the jeopardy of unit owners and bodies corporate. The UOAQ strongly recommend that the intent of the Act and Regulations be given priority over legal interpretation; repugnant as this concept may be to members of the legal fraternity.

The absolute shambles created by Adjudicators and Courts is demonstrated by the following extract from the BCCM Commissioners web site relating to debt recovery:

"Previous orders '3 Parkland Boulevard' and 'Liberty' established that recovery costs and legal fees were considered an 'unliquidated debt' and the body corporate were unable to charge these costs until such time as a court order identifying the costs as 'reasonable recovery costs' had been obtained.

However, more recent decisions of adjudicator's orders have been appealed to the Queensland Civil and Administrative Tribunal which has altered this position. One recent order by Mr Charles Brabazon, QC in '399 Woolcock Street' states as follows:

"[11] Secondly, there is the conclusion of Mr Dorney QC (as he then was) in the Liberty decision.[1] He had to consider the impact of provisions in The Standard

Module similar to those in s 104(3). With reluctance, he accepted the conclusions of an adjudicator in an earlier case, who said that:

…since "recovery costs" must be "pursued" as a "debt", the costs did not become payable by the owner until the body corporate had obtained a judgment or order as to the costs (para9).

[12] As he put it, in para 46 of his reasons:

…recovery costs … are not body corporate debts and are, otherwise … even in the nature of a debt that is deemed to be a debt for the purposes of a statute. The "debt" appears to be one that permits its recovery only as part of a procedure whereby proceedings are brought in some court … of competent jurisdiction.

[13] With respect, that cannot be the meaning of the Act. While there are some difficulties in the words of the statute, as he correctly observed, it is impossible to accept that parliament actually intended that no body corporate had any right to recovery costs, as a body corporate debt, without proceedings in a court or this Tribunal.

[14] The cases mentioned in his reasons do not compel that conclusion. Rather, they emphasise the long standing meaning of recovering money, "as a debt". The expression means that it might be summarily recovered as a fixed amount, rather than as an amount that has to be proved in detail. That is this case – see s 104(1) of the Commercial Module. If contributions are not paid on the due date the body corporate „may recover them as a debt'. That is a provision intended to facilitate the recovery process, and avoid the need to prove an unliquidated claim at greater length.

[15] (Section 50 of the QCAT Act sets out comparable rules for the recovery of "a debt or liquidated demand of money".)

[16] It follows that the new owners of the lots became liable to pay the outstanding amounts for their lots.

[17] The decision in Liberty meant that recovery costs could not be regarded as a "body corporate debt", which is a defined term, unless they were ordered by QCAT or a court. The result has been an inconvenient one. Cases such as "Chelsea" and "Pacific Breeze" show that (see 2009 QBCCMC 386, and 2009, QBCCM 317).

[18] In this case, as the submissions for the Sexton and Browne interests demonstrate those cases have had a considerable impact. Without that impact it will be easier to deal with the actual financial position of a body corporate, and its right to recovery costs.

The full text of the orders and statement of reasons can be found at The Body Corporate for 399 Woolcock Street CTS 34700 v Sexton & Ors [2013] QCATA 55

3 Parkland Boulevard [2007] QBCCMCmr 437 (23 July 2007) Liberty [2008] QBCCMCmr 118 (30 June 2008)

Debt dispute

***46**. The ability for this Office to determine debt disputes or related debt disputes was affected by the amendments to the BCCM Act in 2010. Order reference 0503-2010 "Q1" addresses the effect of the amendments and provides suggestions for owners in an attempt to avoid spiraling recovery costs and penalty interest:*

"If an owner does dispute an amount claimed by the body corporate then the obvious steps for the owner to take to avoid spiraling recovery costs and penalty interest are to:

1. Pay the amount requested;

2. Simultaneously write to the committee seeking clarification of how the amount was calculated and, if there are any special reasons for doing so, requesting that the committee agree to waive penalties and recovery costs (or reinstate discounts); and

3. If necessary, subsequently lodge a chapter 6 application seeking reimbursement of any amounts they had overpaid.

The full text of the order and statement of reasons can be found at Q1 [2010] QBCCMCmr 433 (21 September 2010).

To clarify the jurisdiction of a department adjudicator in relation to a debt dispute the following orders must be noted. Firstly, the Honourable K Cullinane AM QC of the Queensland Civil and Administrative Tribunal stated the following in an appeal of adjudicator's order 0744-2012 'Jargarra Villas':

[5] The Respondent made application to an Adjudicator seeking an order that the claims for the further sums be withdrawn and that the appellant be ordered to produce minutes of meeting where the Body Corporate Management was instructed to take action against the respondent. The Adjudicator made orders in the respondent's favour although the second order made was somewhat different to the order sought.

[6] The appellant has raised the question of the power of the Adjudicator to entertain a claim involving the indebtedness of the respondent.

[7] The relevant provisions are s 229A of the Act and s 143 of the Body Corporate and Community Management (Accommodation Module) Regulation 2008. Section 143 confers on a body corporate a right to recover as a debt any costs reasonably incurred in recovering any contribution overdue.

[8] Section 229A (1) provides for the recovery of moneys the subject of a debt dispute in the Tribunal in a minor civil dispute. Sub-section (3) makes a specific provision about the lack of jurisdiction of an Adjudicator in such matters:

To remove any doubt it is declared that an adjudicator does not have jurisdiction in a debt dispute.

[9] The provision is expressed in quite general terms. It is not limited to a claim to recover the amount of a debt.

[10] In my view it would preclude an Adjudicator from proclaiming on the liability (or lack thereof) of an owner in a debt dispute involving, as here, recovery costs. This is what has happened here.

The full text of the order and statement of reasons can be found at: Body Corporate for Jargarra Villas CTS 19298 v Odalshire Pty Ltd [2013] QCATA 168

Subsequently the following adjudicator's order was issued and concluded the following:

[13] Ms Naismith's illness and subsequent payment plan may amount to special circumstances that make it unreasonable for the committee to have refused to waive penalty interest and recovery costs. However, while even one cent of what the body corporate claims remains unpaid, I do not have jurisdiction to consider whether this committee decision should be overturned.

[14] There is a clear legislative intent that owners pay all amounts claimed by their body corporate by the due date. Given the complexity and unusual nature of the debt recovery provisions, it would seem prudent for any owner who is unable or unwilling to pay an amount claimed by their body corporate to seek independent financial and legal advice.

The full text of the order and statement of reasons can be found at: Mermaid Palms [2013] QBCCMC mr 326 (19 August 2013)"

The most recent decision in this sorry saga was: *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237* [2014] QCA 73; that in summary found that the debt follows the unit ownership.

UOAQ comment. Unit owners should not be required to seek 'financial and legal advice' because of complications of the BCCMA.

GOVERNANCE.

Body Corporate Meetings

47. The BCCMA must keep pace with technology. Electronic records are now a fact of life and all Body Corporate Managers (BCMs) should be required to provide electronic services for meetings, conferencing and voting. All body corporate records should be available to all unit owners via the internet. The cost to unit owners of access could thus be reduced to - nil. Standardisation of BCM computer programs should be a first priority for the Strata Community Association (SCA). Currently when a body corporate changes a BCM, the electronic records may not be compatible with the new BCM programs. Conversion or data re-entry are an unnecessary expense to the body corporate.

The UOAQ considers the existing provisions relating to quorums are adequate.

Voting power of majority lot owners

48. The UOAQ considers the voting powers of majority and minority lot owners are adequate in mature schemes. The voting power of the developer prior to sale of all his lots should be reduced to one representative vote at the first AGM. The practice of developers extending their influence by use of 'Power of Attorney' beyond the 12 months stipulated in the BCCMA should be controlled by the Commissioner scrutinising new building contracts.

Procedural issues

49. i. The UOAQ considers the body corporate seal has become redundant and should be eliminated.

ii. The BCCMA is convoluted and jumbled in prescribing which standard of resolution is required to pass a motion.

50. The following examples from legislation to terminate a caretaking contract are examples:

- BCCMA s.139 (1) requires a secret ballot, ordinary resolution to authorise the issue of a 'code contravention notice'.
- The Body Corporate and Community Management Accommodation Module BCCM (AM) has no such requirement. The committee may under its own initiative issue a ' remedial action notice'.
- BCCMA s.140 (b) (i) requires a majority resolution to require the caretaking letting agent to transfer his contract.
- The BCCM (AM) 129 (3) (c) requires an ordinary resolution for the body corporate to terminate the caretaking letting agent contract.

51. The UOAQ recommends that BCCMA sections 123 to 127 and 130 to 135 and 136 to 149B be repealed and termination of contracts be placed under standard contract law as applies to any small business. For example: Repudiation of contract would become a termination condition.

Recording new community management statement (CMS)

52. BCCMA s55 is headed: "Requirements for motion to change community management statement" but does not detail what type of resolution is required to pass the motion.

- The reader must then troll through the BCCMA to s.62(2) to find that the resolution must be in the form of a resolution without dissent; however, further reading reveals -
- BCCMA s. 62(3) and (4) further qualify the resolution requirements back to a special resolution or an ordinary resolution in some circumstances.

53. Remembering that the BCCMA is purportedly directed at lay unit owners and lay body corporate committees this type of drafting is most confusing. In the

context of the secondary objects of the BCCMA a, e and f the legislation fails to meet the objects and should be amended to allow a body corporate to simply change the CMS by special resolution.

Documentation

54. BCCM (AM) s.77 and BCCM (SM) s 79 appear to be adequate for the documentation to be provided to the body corporate at the first AGM, except for provision of a building maintenance schedule. The sinking fund projections go some way towards scheduled replacement programs, but most committees have no idea as to preventative maintenance requirements such as pump servicing intervals, water, lift, silage sump, hot water circulation or storm water. The only other complaint registered by the UOAQ is that some developers give the documentation to the caretaker letting agent who then refuses to hand the information to the body corporate.

Other issues

55. Previously in this paper the concept of 'Governance', the Legislative Standards Act 1992 and the Objects of the BCCMA were shown to be inextricability linked to form one comprehensive standard to which the BCCMA legislation and implementation of unit administration must strive to achieve. With this concept in mind the UOAQ submit the following for scrutiny by the QUT specialist panel.

BCCM (AM) (3) Application of this regulation....

(1) This regulation is a regulation module for the Act.

(2) For this regulation to apply to a community titles scheme-

> *(a) the lots included in the scheme must be predominantly accommodation lots; or*
>
> *(b) both of the following must apply to the scheme-*
>
> > *(i) the lots included in the scheme are not predominantly accommodation lots;*
> >
> > *(ii) when the first community management statement(which could be the community management statement recorded for the scheme on its establishment) identifying this regulation module applying to the scheme was recorded, the lots included in the scheme <u>were intended</u> to be predominantly accommodation lots; or.....*

56. This legislation places the decision on the correct module for a scheme in the thought process of the developer. The UOAQ submits that this legislation is offensive to the Legislative Standards Act section 4 (3) (k) in that it is ambiguous and not drafted in a sufficiently clear and precise way. Also the legislation fails to meet governance conformance — how an agency uses governance arrangements

to ensure it meets the requirements of the law, regulations, published standards and community expectations of probity, accountability and openness.

57. The outcome of this legislation is that developers are placing class 2 residential buildings in the Accommodation Module with 25 year caretaker letting agent contracts when they should be in the standard module with 10 year contracts.

58. The UOAQ recommends that the building module allocation be aligned with the building National Construction Code classification. Class 2 (long term residential) buildings be standard module and class 3 (short term accommodation) buildings be accommodation module. This proposal will accurately align the NCC intended use of the building with the module and eliminate confusion.

BCCMA section 180(3) Limitations for by-laws

59. *"If a lot may be lawfully used for residential purposes, the by-laws cannot restrict the type of residential use."*

This legislation effectively denies unit owners the right to determine how their building is used; either for permanent residential or transient accommodation- or both. Permanent residential buildings providing community expectations of lifestyle, amenity, safety and health are effectively prohibited by this clause in the BCCMA. Queensland is the only Australian state prohibiting unit buildings for the exclusive use of long term or permanent residents. This legislation is offensive to the legislative standards Act 1992 in that it fails to comply with fundamental legislative principles:

(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to—

> *(a) rights and liberties of individuals; and*
> *(b)-------*

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

> *(a)---------*
> *(b) is consistent with principles of natural justice.....*

This legislation is also offensive to the BCCMA primary object in that it removes flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

> *(a) to balance the rights of individuals with the responsibility for <u>self-management</u> as an inherent aspect of community titles schemes;*

(c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;

(f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;

(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes.

60. The UOAQ recommends in the strongest terms, repeal of BCCMA s 180(3).

Committee governance

61. BCCM (AM) Reg. Section 55 requires full and accurate minutes of a committee meeting. But many minutes cannot be read to convey a full or accurate understanding of the committee meeting. The UOAQ recommends strengthening the requirements of s. 55 by requiring BCMs to rewrite and redistribute minutes that do not comply with the Act at nil cost to body corporate.

62. Disclosure of committee information. A requirement should be placed on all committee members and the BCM to disclose within 7 days of receipt any information that is considered to be of public interest to the body corporate. This will prevent BCM's and Committees working in secret to the possible detriment of the body corporate.

63. Section 54. VOCs are being abused with the full concurrence of the Commissioner's Office and QCAT. (retrospective correction and approval) of committee actions to circumvent the requirements of the Act. Warren v Body Corporate for Buon Vista CTS14325 [2007] QCA 160. When a committee or BCM are allowed to retrospectively correct their non-compliant actions with impunity the authority of the legislation is undermined.

64. Section51 (5) (b) (Attendance at committee meeting by non committee owner) allows the committee to gag any embarrassing questions without explanation as to reasons.

The UOAQ recommends that the Committee should be accountable for its actions and required to minute reasons for refusing to answer questions or applying a gag to questions. This requirement would standardise the requirement with BCCM (AM) s.79 (4) [SM, s81]

65. Many buildings are controlled by committees who form voting blocks, to ensure that they are not removed from office, resulting in detriment to the body corporate.

The UOAQ recommends that at each AGM the two longest serving members of the existing committee become ineligible to nominate for re-election unless the vacancy cannot be filled when they would be eligible to nominate from the floor

of the AGM. This proposal ensures new representation on the committee while retaining experience and expertise.

66. BCCM (AM) s.120 (2) allows a committee to approve a transfer of a caretaking letting contract without reference to a General Meeting. Many caretakers negotiate contract extensions that top-up the contract to 10 or 25 years at a cost to the body corporate of approximately $2,650,000.00 plus CPI increases, for a 25 year contract. The UOAQ recommends that transfer of contracts of this value should only be approved by a General Meeting of the body corporate.

67. The current governance arrangements are totally inadequate; moreover, the current regulation modules are ignored. Therefore, there is no purpose to be served by introducing further new modules until such time as effective enforcement regulations are introduced. Furthermore, the unit industry is already over-regulated to the benefit of all stakeholders - except unit owners.

68. The current issues for large, mixed use, or resort style schemes is that the BCCMA and the associated Regulations do not allow the body corporate to govern their scheme within the objects of the BCCMA. This is difficult to understand when the true facts of the unit industry are considered.

69. The first truth that must be recognised is that the owners of the units in a building collectively own the building and common property. (Not any other stakeholder).

70. The second truth is that the Unit Owners are the only financial contributors to the Queensland unit industry. Every cent that goes into the industry eventually comes from the unit owners pockets. (Not any other stakeholder). This fact is self-evident for residential unit owners; however, investment unit owners also yield their returns to commissions and costs associated with letting their unit. These unit owners are the true supporters of the Queensland tourism accommodation industry. (Not any other stakeholder).

71. The third truth is that unit owners should be entitled to the same democratic rights and liberties in our mutual society. Simply owning a unit should not deprive the person of the same rights as single residential home or investment property owners.

72. The fourth truth is that the BCCMA Part 2 Section 2 defines the Primary Object of the Act, Section 3 defines how the Primary Object is to be achieved and Section 4 defines the Secondary objects of the Act. Noting, that the Primary Object; how the Primary object is to be achieved and, the Secondary objects, are completely silent on Body Corporate Managers and Resident Letting Agents. Nevertheless, persons from these occupations are given rights within the Act that deprive unit owners of their democratic rights as Australian citizens.

73. The Unit Owner's claim for rights is predicated on the belief that the Unit Owners of Queensland have the same rights and liberties as all other building owners in the state of Queensland and the Commonwealth of Australia; however,

- Unit owners are denied the right to employ building caretakers and letting agents on such terms and conditions as the Body Corporate may determine from time to time by democratic vote of the owners in accordance with the contract employment laws of Queensland. (BCCMA s112 and 25 year contracts)
- The Body Corporate is denied the right to determine by democratic vote how their building is used to best preserve the living standards of the owners, considering the amenity, level of health and safety commensurate with community expectations in accordance with human rights and the building laws of Queensland. (BCCMA section 180(3))
- Unit owners are denied the right through their Body Corporate to enter into common law contracts of employment for profit. (BCCMA s 113, 114 & 115) Bodies Corporate must not carry on a Business. (BCCMA s96)
- Unit owners are denied the right to be treated equally and on the same basis of costs for services and rates as single dwelling owners in the same local government area. (Height in building tax. Multiple unit supply charges for single point - water)
- Unit owners are denied the right to be immune from penalties that do not apply equally to all members and contractors of the Body Corporate. (BCCM(AM)S 13 appoints non- voting member but BCCM(AM) s 33 (2)(d) is silent on non-attendance of caretaker)
- Unit owners are denied the right to Adjudicators that are subject to standard rules of the legal profession to give full reasons for decisions and who are subject to review of points of fact and law by their immediate superior or higher authority. (Commissioner's powers)
- Unit owners are denied the right to Body Corporate Managers who are licensed and who have the same liability for accountability and standards of service as financial advisors.(No requirement for trust accounts)
- Unit owners are denied the right to the same contract termination clause as the BCM's they employ. (SCA contract 30 days. BCCMA in accordance with the Act)
- Unit owners are denied the right to legislation that is based on determinable fact. (BCCM (AM) s 3(2)(ii))
- Unit owners are denied the right to be immune from retrospective legislation not complying with the Legislative Standards Act 1992.(BCCMA s137 (2))
- Unit owners are denied the right to first ranking legislative protection of their interests in running and controlling their building. (BCCMA s 123,124,125,126 & 127)

74. The above inequitable situation is now being compounded by the Property Occupations Act 2014:

- Removing the requirement for a Resident Letting Agent to live on-site.

- Allowing Resident Letting Agents to manage more than one building.
- Removing the requirement for a Resident Letting Agent to satisfy the chief executive that they have body corporate approval and that they will live onsite to be eligible for a licence.
- Consolidating and rationalising the licence categories.
- Deregulation of Resident Letting Agent commission rates.

75. Furthermore, SCA claim that:

"the Attorney General was supportive of our recommendation to increase the maximum Body Corporate Manager contract term to 5 years". (Contrary to BCCM (AM) s 116 (1))

FUTURE OF HIGH DENSITY LIVING

76. In addition to the deficiencies of the BCCMA listed above there are two clear issues that are prejudicial to the future of the high density living in Queensland:

1. Twenty five year contracts; and
2. Misuse of class 2 buildings.

Twenty five year contracts

77. Twenty Five year contracts have been addressed earlier in this paper. The Government has the responsibility and authority to correct this injustice. If it has the will, remains to be seen.

Misuse of class 2 buildings

78. The Government policy of in-fill high density unit development, and the ever increasing number of CTS schemes make it imperative that the correct use of class 2 and class 3 buildings be defined, clarified and legislated. This task has been in abeyance since 2006 when the project started by the then Department of Infrastructure and Planning was consigned to the 'too hard' basket.

79. The classification and correct use of class 2 buildings is clearly defined by the history of the Building Code Australia (BCA) {now National Construction Code (NCC)}

"In 1965, the Interstate Standing Committee on Uniform Building Regulations (ISCUBR) was established. ISCUBR was basically an agreement between the State administrations responsible for building regulatory matters to pool their resources for the benefit of all States. ISCUBR's first task was to draft a model technical code for building regulatory purposes. The document was referred to as the "Australian Model Uniform Building Code" (AMUBC), and was first released in the early 1970's.The AMUBC contained proposals for both technical matters and some administrative matters which were based on the then Local Government Act of New

South Wales. The intention was that States could use the AMUBC as a model for their own building regulations. However, variation from the model was considerable, with many States changing the provisions in accordance with their perceptions of local needs.

The Building Code of Australia

80. *In 1980, the Local Government Ministerial Council agreed to the formation of the Australian Building Regulations Coordinating Council (AUBRCC) to supersede ISCUBR. AUBRCC's main task was to continue to develop the AMUBC, which led to the production of the first edition of the Building Code of Australia (BCA) in 1988. The BCA was further refined and a new edition was released in 1990. This edition of the BCA was progressively adopted by States and Territories during the early 1990s. In 1991, the Building Regulation Review Task Force recommended to COAG the establishment of a body to achieve far-reaching national reform. An Inter-government Agreement was signed in April 1994 to establish the Australian Building Codes Board (ABCB). One of the first tasks of the ABCB was to convert the BCA into a more fully performance-based document. The ABCB released the performance-based BCA (BCA96) in October 1996. BCA96 was adopted by the Commonwealth and most states and territories on 1 July 1997, with the remainder adopting it by early 1998."*

81. Much of the early work during 1980 and 1981 concentrated on standardization of the States' understanding of definitions of building use and the subsequent construction standards to achieve the stated objective of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future. Undoubtedly the intent of the first working parties and standardization committees dating from year 1980 was to create simple building classifications to serve the Australian community into the foreseeable future. Class 1 was intended to define a single private residence used either for owner occupation or long term rental. Class 2 was intended to define multiple private residences built above, below or beside another private residence, either for owner occupation or long term rental. Class 3 was intended to define commercial accommodation including hotels, motels, units used for short or long term accommodation, prisons, boarding school accommodation and military barracks or the like while providing flexibility for owners who wished to both rent their accommodation unit and use it for their own holiday accommodation. At that time class 1b did not exist.

82. The class 1b classification was first introduced at Amendment 3 to the BCA 90 (1992), and it was intended for this classification to provide a concession for people to rent out rooms in a house, and for other purposes such as running a bed and breakfast or farm-stay business without having to comply with the more stringent class 3 building requirements (BCA: 1990). The use of class 1a houses for class 1b purposes was envisaged to be controlled by local council zoning or planning laws.

Disability access to class 2 buildings.

83. Effective 15 March 2010 all new class 2 buildings open to the public were required to comply with the access requirements for a person with a disability. However; the access standards for existing class 2 buildings remain unresolved. Also class 2 buildings continue to be constructed with lower fire standards defined in the BCA Fire Specification E2.2a para. 3. (AS 3786). This is clearly unacceptable for class 2 buildings open to public use.

84. The Disability Discrimination Act (DDA) Premises Standards guidelines state in relation to existing class 2 buildings:

"A class 2 building is typically a block of residential flats or apartments. While the Premises Standards do not apply to the internal parts of sole occupancy units (SOU's), they do require that any common areas available for use by all residents be accessible where the SOU's are made available to the public for short-term rent."

85. The scenario established by the Premises Standards introduces a material change of use from private residential to public commercial accommodation. The BCA requires that public buildings comply with BCA fire Specification E2.2a para. 4. (AS 1670). That is a BCA class 3 building that must comply with the DDA.

86. Class 2 buildings are built to BCA Fire Specification E2.2a para. 3. (AS 3786) that is a lower standard permitted only in buildings designed for private residential use. Private residential building by virtue of the type of resident results in long term occupants. Therefore, any class 2 building being operated as commercial accommodation building available to the public for short term rent is in breach of the BCA fire standards even if it does comply with DDA access requirements.

87. If there is confusion as to the intended use of a building, the Building Codes Committee (BCC) and ABCB cannot perform their primary function of defining performance standards during construction to achieve completed building classification and use, thus placing the BCA specifications into question. "The goals of the BCA are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future."

88. The outcomes of lack of clarification of the definition of class 2 buildings are:

- Class 2 buildings continue as fire traps for short term residents not familiar with the building and no escape for persons with a disability.
- New class 2 buildings continue to be approved for class 3 use.
- Hotel / Motel operators are reluctant to build new class 3 buildings to compete in same market against less expensive class 2 buildings.
- There is a growing shortage of class 3 buildings to provide a quality tourist experience.

- The tourist experience is degraded by 'mum & dad amateur operators running class 2 buildings, compared to professional operators of class 3 buildings.
- The availability of class 2 residential units is being depleted by conversion of class 2 buildings to incorrect class 3 use.
- There is a shortage of class 2 residential units in the capital city CBD's.
- Permanent residents in class 2 building have their lifestyle amenity, safety and health degraded by holidaymakers in their building.
- Queensland does not comply with Commonwealth 'Premises Standards' legislation requiring Disability Discrimination Act access standards to all class 2 buildings open to the public. Thus exposing the body corporate to prosecution.

RECOMMENDATION

89. This type of dilemma is not new to the Queensland Government. The Childers and Sandgate backpackers' hostel crisis presented similar problems, and in that case the Government did not resile from its responsibility to bring every accommodation facility into compliance with the law. Understandably, time was required to allow planning and provision for necessary expenditure and this was provided for in the legislation. The UOAQ submit that backpacker's model must be applied to the class 2 building debacle. Having some class 2 buildings forever exempt from complying with the fire safety standards is unacceptable. Fire is not selective as to which building it destroys or whom it kills.

90. As population densities increase (in line with Government policy) the number of persons permanently accommodated in apartment buildings is increasing. These persons have every right to expect accommodation standards that provide the amenity, health and safety equal to private residential houses. They should not be expected to live with noise, and short term renters (strangers) using their recreational facilities such as swimming pools, garden areas and community lounges. The lifestyle expectations of permanent residents and short-term transient holidaying tourists are entirely incompatible. The use of residential buildings for transient short term accommodation creates both a health and safety risk for occupants of the buildings. Permanent residents in residential buildings used for transient accommodation suffer stress, anxiety and social alienation. This situation is a serious health problem for many unit owners who are unable to escape the environment in the building, and cannot afford to sell and relocate.

91. The Australian Building Codes Board (ABCB) public consultation paper on noise levels in buildings, reported that an UK Department of Environment, Transport and Regions' January 2001 document states: *"Noise, at the sort of levels encountered in dwellings, can lead to a wide range of adverse health effects including loss of sleep, stress and high blood pressure. Qualifying the risks*

attributable to exposure to environmental noise and, particularly, neighbour noise is difficult but it is suggested that there are between one and ten deaths per year in the UK (these being suicides or as a result of assaults) attributed to noise from neighbours. The number of less severe problems attributed to noise (such as stress, migraines, etc.) is estimated to be about 10,000 per year." This report further supports the need for dedicated residential class 2 buildings.

92. Currently there is an acute shortage of long term residential rental units in capital cities. If class 2 buildings are used for their correct residential classification, there will be some relief in the residential rental market.

93. The tourism industry will benefit by provision of properly designed and equipped class 3 buildings with staff trained and qualified to enhance the tourism experience. Residents seeking long term or permanent accommodation in class 2 buildings will be provided with buildings and apartments designed and constructed to facilitate the ambiance, privacy, security and environment expected of places of permanent residence.

94. The following statement has been posted on the UOAQ web site for over 12 months. The Queensland strata community must have grave reservations at the state of legislation that applies to their homes and investments when their peak industry body is able to make such alarming claims. If current strata legislation produces such unintended outcomes, it is time to reconsider that legislation to establish appropriate balance to the industry.

TEN REASONS TO BE AWARE - IF YOU INVEST IN A RENTAL UNIT IN QUEENSLAND

1. Return on investment will be 1% or 2% (If you are lucky). Many make a loss.
2. You will not be told the actual gross amount a guest has paid to rent your unit.
3. You will be saddled with a 10 or 25 year escalating management rights contract that is almost impossible to terminate. In some cases the 25 year contract is unlawful.
4. You will be saddled with undisclosed uncontrolled letting commissions (may be 25% of gross rental) on the pretext the commission relates to wholesaling rentals through an associated company of the letting agent.
5. You will be required to contribute to advertising for the letting agent's business.
6. You will be required to pay cleaning costs including a mark up to the letting agent that may double the actual cleaning cost, every time your unit is let.
7. You will be required to pay for maintenance costs to your unit – plus at least 10% mark-up/supervision fee to the letting agent (average letting unit has to be refurbished every 5 years due to tenant damage).
8. You will not have any say in how your building is administered. The Body Corporate and Community Management Act 1997 disadvantages and is biased against unit owners.

9. Queensland local council rates and water rates are excessive (loaded for holiday rental units on the Gold Coast by an additional 125%, $801 to $1800)
10. Any capital gain on units in Queensland is eroded due to the cost of ownership

95. Questions raised by the review (Using review numbering for ease of reference)

1. *Should bodies corporate have the express ability to tow a vehicle that has been parked in a visitor car park in contravention of the by-laws?*

A. Yes, see page 10.

2. *Who should be authorised to initiate towing a vehicle in special circumstances (e.g. a resident manager (where one has been appointed) or a designated member of the committee who lives on-site)?*

A. A manager appointed by the body corporate or designated committee member. A problem may arise when the caretaker claims that the management agreement (generated by the developer) does not include this responsibility. The question highlights the problems of reasonably amending long term management agreements. The body corporate is often left without a reliable instrument to supervise and enforce its rules and by-laws.

3. *What right should a lot owner have to deal with a vehicle parked in their space without permission?*

A. An owner should have the right to have a vehicle parked in their space without permission towed. Prior to undertaking towing, the lot owner should be required to make a reasonable effort to locate the owner of the offending vehicle.

4. *Should the body corporate be liable to pay for the costs of recovering the vehicle and the cost of dispute resolution in the BCCM Commissioner's office if a vehicle is towed away improperly (either in special circumstances or non-urgent circumstances)? What other safeguards should be placed on the body corporate's ability to tow vehicles?*

A. If the vehicle has been parked improperly and the body corporate has not acted unreasonably there should be no recourse against the body corporate. It should be required that the owner of the offending vehicle demonstrate that the body corporate has acted unreasonably.

5. *Should bodies corporate have the right to decide by resolution without dissent, to prohibit pets in the scheme? Why or why not?*

A. Refer to pages 08 to 10 above.

6. *Do you support the existing rules relating to keeping of pets? How should the BCCM Act deal with the issue of pets?*

A. A body corporate should be able to decide by ordinary resolution as to whether it approves pets or conditions for the keeping of pets. Any conditions of approvals should be included in the CMS. Defined body

corporate law determined by owners at General Meeting should not to be rescinded by any adjudicator or court.

7. *Should bodies corporate have an ability to prohibit smoking on a balcony or where a structure is within four metres of another structure on an adjacent lot?*

A. Body corporate law should reflect the changing standards of the community. If public buildings can legislate against smoking, a strata scheme has similar attributes and should be able to determine the right or otherwise to smoke in the building, that would include the internal areas of an owners lot.

8. *If not, how should bodies corporate deal with this issue?*

A. Refer to answer to Q7

9. *If there are reasonable grounds to believe that a lot is overcrowded, should the body corporate have the authority to give consent, on behalf of the lot occupier, for the local council or fire services to investigate the suspected overcrowding?*

A. See pages 10-11 above

10. *Which option do you support and why? If you do not support any of the options, how would you deal with this issue?*

A. See pages 10-11 above

11. *What issues should be covered by the by-laws in schedule 4 of the BCCM Act?*

A. See page 11 above, particularly: "The example by laws should be incorporated into the Commissioners web site thus making them easier to update."

12. *If the by-laws for a scheme are silent about an issue that is covered by the by-laws in schedule 4 of the BCCM Act, should the relevant schedule 4 by-law apply by default?*

A. It seems reasonable that if a scheme does not have any by-laws, the basic by-laws of schedule 4 would apply by default. Should the by-laws of schedule 4 not suit the members of the body corporate, those members can vote to change or amend those by-laws at the next General Meeting.

13. *Should the by-laws for a community titles scheme be deemed to be an agreement signed and sealed by each of the body corporate, owners, occupiers and mortgagees from time to time?*

A. Bodies corporate require by-laws and a flexible means to change any existing by-laws. Developers provide the original by-laws which may be limited to schedule 4 by laws, or more extensive or robust by-laws. In most cases the by-laws are generic and do not reflect the needs of the scheme as the individualities and peculiarities of the scheme have not been tested. As a developer at his will can establish the original by-laws, it is undemocratic that a simple majority of owners cannot establish amendments to the continuing by-laws.

14. *Should Queensland adopt a version of the South Australian Model and allow bodies corporate to fine lot owners and occupiers who, after receiving a contravention notice, continue to breach or fail to comply with the by-laws?*

A. In Queensland where management rights exist, circumstances are different. Caretaker/letting agents exercise considerable control over who rents in the property. In many instances the letting agent condones by-law breaches to gain favour with owners particularly owners in the letting pool. This favour is exercised by the letting agent to obtain support for management agreement extensions and preferred committee nominations. The long term nature of the caretaking agreement enables a letting agent to ignore the enforcement of a committee's instruction leading to disputes between caretaker and committee. These disputes favour the caretaker in their attempts to see more caretaker compliant committees elected.

   A changed relationship between caretaker and owners through their committees is more likely to see by-law breaches addressed. That changed relationship is best addressed by limiting caretaking agreements to 3 years providing committees with the means to exercise appropriate authority over the caretaker, to carry out the needs of the owners of the scheme.

15. *Should bodies corporate have the ability to authorise a resident manager, body corporate manager or a single executive committee member to issue on-the-spot contravention notices to owners and occupiers who contravene or fail to comply with the by-laws?*

A. A flying minute of the committee would have greater authority to an offending party to by-law breaches and is conveniently arranged.

16. *Should the BCCM Act specify a scale of costs for debt recovery actions taken by the body corporate to collect unpaid contributions and penalty interest?*

A. See pages 12-15 above

17. *Aside from legal costs allowable under the UCPR, what items should be included in a scale of costs for debt recovery? Should there be fixed charges for certain items or monetary limits imposed depending upon the size of the debt?*

A. See pages 12-15 above

18. *Should the definition of 'body corporate debt' in the Regulation Modules be amended to specifically include recovery costs and judgments?*

A. See pages 12- 15 above

19. *Should the body corporate have a non-judicial power of sale over a lot when the lot owner has outstanding body corporate debt?*

A. See pages 12-15 above

20. *Should the body corporate debt of a lot owner be a charge on the lot?*

A. See pages 12-15 above

21. *How long should bodies corporate allow unpaid contributions to accrue before taking steps to recover the amounts?*

A. See pages 12-15 above

22. *Are there any reasons why the Regulation Modules should not require lot owners to provide an Australian address for service and maintain the accuracy of the address?*

A. No

23. *Are there any reasons why the BCCM Act and the UCPR should not provide special provisions to assist a body corporate to recover unpaid contributions from lot owners that have not provided an Australian address for service?*

A. No. Furthermore when an Australian address for service is provided and no response is generated, the special provisions could be invoked.

24. *In circumstances where a body corporate has obtained a judgment against a lot owner for unpaid body corporate debt, should the body corporate have a mechanism to garnishee the rental income from the lot to satisfy the judgment by serving the tenant or real estate agent for the lot? Why or why not?*

A. Yes. If an owner is not paying his levies, the body corporate should have as much legislative support to assist to recover outstanding debt.

25. *Should a body corporate be able to voluntary terminate the scheme with less than 100% agreement of lot owners? What percentage should be required?*

A. Yes. Following the NSW recommendations of 75% agreement of lot owners may best suit the Australian situation and contribute to and encourage a possible national standard for voluntary terminations.

26. *What safeguards should be in place for lot owners that do not support the voluntary termination?*

A. Criteria could be established that protect those unsupportive owners. Those criteria could include:

1. That it is just and equitable in the circumstances to consider voluntary termination.
2. The economic necessities of the scheme support voluntary termination.
3. That the financial imperative is not the only defining criteria.
4. That the scheme has reached or is reaching its reasonable life expectancy.

27. *What factors should the District Court consider when deciding whether it is just and equitable to order the termination of a scheme?*

A. Similar factors to the criteria listed in Q26 answer

28. *Should it be possible to terminate schemes that are part of a layered scheme without terminating all layers? What is the best way to achieve this?*

A. Could similar criteria as listed above apply.

29. *What safeguards would need to be put in place if the threshold for scheme termination is reduced?*

A. Safeguards could include criteria as listed above at page 11-12.