30 September 2010

Hon Peter Lawlor MP
Minister for Tourism and Fair Trading
Lot Entitlements Project, Market Place Strategy, Office of Regulatory Policy
Department of Employment, Economic Development and Innovation,
PO Box 15168
CITY EAST QLD 4002

Dear Minister

Body Corporate and Community Management Amendment Bill 2010

I am writing with reference to your letter of 19 August 2010, regarding the proposed changes to the lot entitlement system currently provided under the Body Corporate and Community Management Act 1997.

The Property Council welcomes the introduction of the Body Corporate and Community Management Amendment Bill 2010, which gives consideration to amending the Act to provide a more appropriate and flexible system for the setting and adjustment of lot entitlements in Queensland.

We welcome the fact that the Queensland Government is moving to ensure that there is as much certainty around body corporate costs as possible by introducing a new lot entitlements system.

Retrospective changes to the user-pays system following a successful 2004 court challenge had disastrous consequences for pensioners and low income earners who faced an enormous loss in the value of their unit, due to the imposition of much higher levies.

The 2003 amendments to the above Act also resulted in developers being unable to incorporate a mix of affordable and high-end apartments in the same scheme.

The proposed legislative changes will create a good outcome for the Queensland property industry and unit owners alike. It will enable developers to include affordable housing products in their development schemes, and a fairer system will be put in place. It will also create greater certainty for unit owners that their levies will not change in the future, except in exceptional circumstances.

Unit owners who have previously been prejudiced through so called “penthouse owners” achieving levy reductions as a result of the 2004 court challenge case will be able to return to the cost sharing arrangements which were disclosed to all unit owners when they purchased their lots. The Property Council recognizes that reversal of existing lot entitlements will be a contentious issue.
However, the detriment suffered by a relevant small number of recent buyers of penthouse units will be significantly lower in overall scope than exactly the same sort of detriment that would have been imposed on hundreds of owners of more affordable units if the existing legislation was allowed to remain in place.

The Property Council is, however, very concerned with the draft provisions that would provide additional new rights for buyers to terminate contracts – notwithstanding proper pre-disclosure – where the seller is the original owner. The Property Council fails to see why a buyer should be afforded a further 90 days to terminate a contract after entering into a contract with full disclosure, particularly when estimated budgets and levies are included in the disclosure material. This could very well impact on developers being able to secure “unconditional presales” in a timely manner for construction funding adding additional cost and uncertainty.

We again thank you for taking decisive action to address the impact of the 2003 Amendments to the Body Corporate Community Management Act, and look forward to the introduction of amendments that will bring greater certainty for unit owners, whilst allowing flexibility for developers to include a range of residential products in residential community title schemes.

Yours sincerely,

Wayne Rex
QUEENSLAND PRESIDENT

The Voice of Leadership
Level 3, 232 Adelaide Street, Brisbane Qld 4000 - GPO Box 113, Brisbane Qld 4001
PHONE 07 3225 3000 - FAX 07 3229 9160
www.propertyca.org.au
Draft Body Corporate and Community Management Amendment Bill 2010

A submission prepared by the Property Council of Australia (QLD) on proposed legislative changes to community title scheme arrangements

September 2010
Property Council of Australia – Comments on the draft Body Corporate and Community Management Amendment Bill 2010 – September 2010

A. Executive Summary

(a) The Property Council strongly supports the proposed Bill subject to some suggested changes in non critical areas.

(b) If the Bill is passed, Queensland body corporate law will be significantly improved in the following areas:

(i) Greater certainty for unit owners that their levies will not change in the future except in exceptional circumstances;

(ii) Developers will have far greater capacity to provide a mix of affordable and higher end product in future developments;

(iii) Unit owners who have previously been prejudiced through “penthouse” owners achieving levy reductions as a result of the Centrepoint case will be able to return to the cost sharing arrangements which were disclosed to all unit owners when they purchased their lots.

(iv) The only significant downside of the proposed Bill, which in the Property Council’s view is unavoidable, is that the relatively small number of buyers who purchased “penthouse” units after the units’ levies were reduced as a result of the Centrepoint decision, will potentially suffer a significant levy increase back to the original levy position. The Property Council is of the view that the detriment to be suffered by a relatively small number of these recent buyers of penthouse units will be significantly less in overall scope than exactly the same sort of detriment that would have been imposed on hundreds of owners of more affordable units if the existing legislation was allowed to remain in place.

B. Property Council’s response to draft Bill

1. Property Council’s guiding principles and approach

In reviewing the Bill, the Property Council adopted the following guiding principles and approaches:

(a) The existing Act has created enormous confusion and uncertainty amongst buyers, unit owners and the development industry with respect to body corporate levies. A major objective of the draft Bill is the achievement of certainty with respect to cost sharing arrangements within community title schemes.

(b) The existing Act allowed certain lot owners to undo cost sharing arrangements which had been fully disclosed to them. Elements of the existing legislation had certain objectionable retrospective impacts that needed to be overcome. The Property Council is of the view that except in the most unusual and
manifestly unjust situations, if a levy structure has been disclosed to a buyer, it should not be capable of alteration.

(c) Both government and the development industry would like to have the flexibility to allow for the inclusion of a range of residential products within residential community title schemes. The existing legislation did not properly allow for this due to the requirement that levies should equal for all units unless it was just and equitable for them to be different. The Property Council has sought amendments to the existing legislation to allow for such flexibility.

2. Changes deserving commendation

As stated elsewhere in this submission, the Property Council is strongly supportive of the general thrust of this Bill. Set out below are particular parts of the Bill which the Property Council believes deserves special commendation and support. The fact that other parts of the Bill are not mentioned below does not necessarily mean that the Property Council does not support those other areas.

In summary the Property Council specifically supports the following initiatives contained in the Bill namely:

- That the Bill preserves the option for developers and bodies corporate to continue with the existing "equality principle" (section 46 (7)).

- That the new option for setting contribution schedule lot entitlements referred to as the "relativity principle" allows developers and bodies corporate sufficient flexibility to take into account a whole range of matters in setting up a community title scheme. In particular, the relativity principle allows developers to take into account the market value of the lots in setting body corporate levies. This key initiative will encourage developers to include affordable product in upmarket community title schemes.

- That the Bill strives to achieve certainty by specifying that the contribution schedule requires a resolution without dissent before it can be changed by the body corporate.

3. Changes, which although contentious, warrant support

(a) Perhaps the most contentious provisions in the legislation are incorporated in the new section 380, which in effect, allows owners adversely affected by the "Centrepoint decision" to force the body corporate to revert to the pre-existing contribution lot entitlement schedule. The Bill has been drafted such that other owners and the body corporate are powerless to stop the re-imposition of the pre-existing schedule.

Opponents of these provisions will say that innocent buyers who more recently purchased penthouse units will be forced to pay higher levies which were not disclosed to them. This is an unfortunate outcome, but no less unfortunate than the hundreds of unit owners who were suffering a similar fate under the previous legislation as interpreted by the Centrepoint case.

If this Bill is not enacted, thousands of owners of affordable units will face the prospect of having massive increases in their levies for the benefit of a relatively small number of "penthouse" unit owners.
It should be remembered that under the existing law, a large number of "penthouses" owners have an almost unfettered ability similar to that contained in section 380 to force a re-writing of levies in their favour.

It is the Property Council's view that new section 380 and its associated provisions provides the greater good for the greater number of unit owners as opposed to the existing legislation which provided windfall benefits for a small number of wealthy penthouse owners.

Proposed section 380 can perhaps also be justified on the basis that "penthouses" owners may have greater capacity to bear the imposition of higher levies than pensioners, low income earners and other owners of affordable units who are being badly affected by the existing legislation.

In the circumstances, the Property Council supports the change as being the lesser of two evils, but recommends that the government should give consideration to paying compensation to any penthouse owner who can demonstrate significant financial hardship as a result of the proposed change.

(b) Having supported the matters raised in item 3(a) above, the Property Council obviously supports the provisions contained in proposed section 377 whereby actions that are currently on foot by "penthouses" owners pursuant to the Centrepoint decision should cease to have effect and should be prohibited from having any further action taken on those matters.

Whilst the Property Council is generally of the view that members of the public having commenced legal proceedings should not be subject to legislation of retrospective effect, the special circumstances associated with "penthouses" owners seeking to gain windfall benefits through technical defects in the existing legislation should be prohibited and all actions and claims that are presently are on foot should be rendered ineffective.

4. Parts of the Bill that should not be implemented

(a) As mentioned in our statement of guiding principles in section 1 above, an important outcome of this Bill should be the achievement of certainty and the belief that proper disclosure to buyers should mean that - except in the most unusual circumstances - levies, once disclosed, should not change.

With that guiding principle in mind, the Property Council strongly believes that new sections 209A and 217A should be deleted from the Bill. These sections provide additional new rights for buyers to terminate contracts notwithstanding proper pre-disclosure where the seller is the original owner (both if selling off the plan or an existing lot).

The Property Council fails to see why a buyer should be afforded a further 90 days to terminate a contract after entering into a contract with full disclosure, particularly when estimated budgets and levies are included in the disclosure material. This could very well impact on developers being able to secure "unconditional presales" in a timely manner for construction funding adding additional cost and uncertainty.
(b) The proposed Bill at new section 47B allows for a specialist adjudicator or QCAT to adjust the contribution schedule lot entitlements in various circumstances including where the community title scheme has been affected by material change or where the contribution schedule lot entitlements for lots included in the scheme are not consistent with the "deciding principle" for lot entitlements.

It has been argued by many knowledgeable body corporate commentators that if full disclosure is made to a buyer, the buyer should be taken as having accepted the relative proportion of levies disclosed and should not be able to "wriggle" out of that obligation to the detriment of others. The fact that there may be inequities or non-compliance with certain determining principles in setting the levies should be irrelevant except the most unusual and compelling circumstances (e.g., if a developer were to allocate a unit to a family member or friend with nominal levies).

With every change in the levy allocations, someone is going to have to pay more. The question should be asked as to why someone who receive full disclosure as to the relative proportion of levies payable should be able to achieve a windfall benefit at the expense of another unit owner just because there has been some technical non-compliance with a "deciding principle".

The Property Council would prefer to have a regulatory regime that recognised that disclosure cures almost all "evils" and that unit owners and buyers should take responsibility for the level of levies that were disclosed to them and should not be able to rely on technical non-compliance with the levy setting guidelines to either re-write the levy schedule (to the detriment other lot owners) or to withdraw from "off the plan" sale contracts.

In the Property Council's submission, the provisions relating to adjustment of contribution schedule lot entitlements should be significantly restricted such that the ability to seek an adjustment of the levies where the community title scheme has been affected by a material change should be expressly limited to changes to the scheme that are so substantial that to leave the existing lot entitlement schedule in place would be manifestly/grossly unfair.

In relation to the circumstances giving rise to the capacity to adjust referred to in sections 47B (2), lot owners should only be able to apply for an adjustment of the contribution schedule if the lot entitlements included are inconsistent with the deciding principle in a substantial and material way such that to leave the levy schedule in place would give rise to manifest unfairness to the applicant if the schedule is not changed.

The Property Council also recommends that provisions should be included such that a specialist adjudicator or tribunal hearing such an application should only amend the contribution lot entitlement schedule in exceptional circumstances and should be obliged to take into account the matters which the applicant knew or ought to have known at the time of acquisition.
5. Matters requiring further consideration or investigation

(a) Throughout the proposed Bill, the term “unimproved value” is used. The amended definition section contained in the Bill merely refers to section 46A(1) as follows:

“The unimproved value principle for the deciding contribution schedule lot entitlements for lots included in a community title scheme is the principle that the lot entitlements must be proportionate to the unimproved values of the lots.”

The Property Council has concerns that the unimproved value terminology is one associated with other legislation, particularly legislation relating to the imposition of land tax in Queensland. Recent amendments to land tax legislation have seen a movement from the unimproved value terminology to site valuation terminology.

The Property Council recommends that consideration be given to whether or not this definition is still appropriate having regard to the above.

(b) The proposed new section 380 (and associated provisions) which allow an owner to submit a motion to adjust the contribution levies back to the pre-adjustment order entitlements within 3 years after the commencement of the amending legislation has been designed to allow owners who have been impacted by the Centrepoint provision to revert to the “pre Centrepoint” position.

Concerns have been expressed in some quarters about the fact that these schemes will then continue to be assessed as against the “equality principle” and whether or not there is anything to stop a “penthouse” owner applying after the 3 year period to seek to have the contribution schedule adjusted again in accordance with the equality principle.

The legislation seems unclear at this point. The Property Council submits that consideration should be given to this issue and if there is any risk that re-adjustments to contribution schedule lot entitlements pursuant to section 380 may be attacked at a later date by “penthouse” owners, further protective provisions should be included.