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YSP Podcast Transcript: Episode 219. Unpacking QLD's new COVID legislation for body corporates

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Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproerty.com.au.

Amanda Farmer: Hello and welcome. I am Amanda Farmer, your podcast host, here each week helping you make sense of this often confusing world of apartment living, particularly when it comes to the various legal issues we are facing across the country. This week, I'm bringing you my interview with Michael Kleinschmidt. Michael is the founder of Stratum Legal in Queensland. He is also a fellow and a council member of the Australian College of Strata Lawyers. You'll hear him refer to the college as ACSL in the interview. Michael also sits on the legal panel of ARAMA, the Australian Resident Accommodation Managers Association in Queensland. He's involved in the SCA Queensland Professional Standards Committee, and a founding member and director of Strata Owners Queensland, and that is a new group that you will hear me ask Michael about, and if you are an owner in Queensland, you'll definitely want to go and check out that website. So have a close listen.

Michael is a regular article writer, law reformer, and, he says, will speak on strata subjects for anyone if asked nicely. Now, I do serve on the ACSL council, the Australian College of Strata Lawyers council, with Michael, and I know he is tireless when it comes to advocacy in this space, including submissions to government and agitating for important change, particularly in his home jurisdiction of Queensland.

In this chat, we are talking about the new legislation that has been introduced in Queensland to assist body corporates during COVID. Now last week, Episode 218, you will have heard me and Reena Van Aalst summarising the counterpart legislation in New South Wales, and if you've had a listen to Episode 218, what you'll notice straight away is that the Queensland legislation is quite different. I'll let Michael fill you in on the details, but even if you are not in Queensland, it is very interesting to compare how our different legislatures across the country deal with what is really very similar, if not identical situations in our communities.

So let's get stuck into it, my chat with Michael Kleinschmidt. Michael Kleinschmidt, welcome to the show.

Michael Kleinschmidt: Good morning. Thank you very much.

Amanda Farmer: Did I say your name right, Michael?

Michael Kleinschmidt: You did. You did. It's a very uncommon one, unfortunately.

Amanda Farmer: How many people struggle with that one? Every second?

Michael Kleinschmidt: Just about everyone. In fact, I had the pleasure of seeing another Kleinschmidt admitted as a solicitor in Queensland the other day.

There's one every 20 years, so there's three of us at the moment.

Amanda Farmer: Right. Family members, of course.

Michael Kleinschmidt: Yes, no, we're all related in one way or another.

Amanda Farmer: Excellent. Good to hear, plenty of Kleinschmidt's up there in Queensland doing very good work, and nevermore have we needed your good work in Queensland. There's a few things going on keeping you busy.

Michael Kleinschmidt: Yes, there is quite a lot of stuff going on, aside from the dreaded COVID, the C-word. We've been going through quite a lot of legislative reform now for a number of years, and it's all starting to reach

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ahead, which is fantastic. We're starting to see the fruits of that labor come together.

Amanda Farmer: Yes. Well, we are definitely going to get into that, but first let's get the dreaded C-word out of the way, because at the time we're recording this, Queensland is in what I understand to be a unique position around Australia, in that your body corporate legislation actually has been amended. You're not just talking about it, you don't just have draft regulations floating around, or you haven't just been empowered to do it, you've actually done it. You have amended legislation that deals with some of the issues that are affecting your body corporates when it comes to this new world order. Do you want to summarise for me, if you can, if that's possible, some of the big ticket items here that Queensland should be aware of?

Michael Kleinschmidt: This is actually our third piece of COVID legislation, and the earlier 2 took a fairly general approach. Aside from sort of dealing with all the other issues that were going on, there was some facility to relax some procedural and other requirements across a broad range of areas, which did help the body corporate sector a bit. I think that we had a unique window of opportunity, in that a lot of work was being done on our new regulation modules for our Body Corporate Committee Management Act, which meant that both the policy officers and other members of the relevant departments were on top of strata issues to a large extent when COVID came on. We were expecting to receive a draft of our new primary regulation when this all came on. So what we ended up with back on the 25th of May was a new act that amends our Body Corporate Community Management Act. It makes a provision for 5 things that are intended to be useful for body corporate and lot owners.

The first one is to do with sinking funds. In Queensland, we have provisions that require a body corporate to make adequate provision for the replacement of capital items over a 10 year time horizon. So the idea is that if you get a sinking fund analysis done, you can make provision for those things that need to be spent in the next 10 years. That first measure, the way it works is if you have an item of major expenditure in this year's financial budget, during the annual financial year for everybody, corporate is different, but if you have an item that major expenditures such as painting the building, body corporate can come together and cancel that item, and in canceling it, they can then elect to refund the money that has been put aside for that issue in the fund back out to the owners that contributed to it, in the shares that they contributed. So it's meant to get money that someone's put into the sinking fund back to those owners.

Now look, there's a few issues with that, which I'm happy go into afterwards, but that's the first one, so it's pretty targeted, and it's about getting money back into the hands of lot owners. The second one has to do with body corporate levies, or contributions as we call them here in Queensland, and basically, each one of the contributions has a due date for payment, and the next power that's been given to a body corporate committee is to extend that due date up to the end of the financial year of the body corporate. So I don't want to extend it past the financial year, because obviously, deliveries are supposed to be financial year by financial year, and that decision that can be made by a committee can be made for just one lot owner, for example, who's suffering financial hardship or for all lot owners across the board. So basically, it's a deferral of that liability to help with people's cash flow.

The third change, and when I say change, it's important to bear in mind that these 5 things, they all commence on the 25th of May, and they're all going to finish on the 31st of December this year, unless extended. The third thing is that, with respect to what we call penalties, it's actually interest, a body corporate can choose, typically, when they're setting the body corporate levies each financial year to impose interest on unpaid contributions, and basically, during that period from the 25th until the 31st of December, there is no penalties, end of story. So it doesn't matter whether it's a product contribution, which is unpaid and interest is accruing on it, or it's a contribution that pops up during that time period, no interest during that time period, which is a pretty big saving, because that interest rate can be pretty hectic.

That's the third one, and the fourth one is that normally a body corporate, if there's an unpaid contribution, has to commence proceedings within 2 years and 2 months of those contributions fallen due. There's no ifs, buts, or maybes, they've got to do it, and that's reflective of the underlying policy in the legislation, that contributions are exactly that. They're not a tax. They're a share of common expenses. So if someone's not paying their share of common expenses, it's just not fair to everybody else, and so you're obliged to start those recovery proceedings within 2 years and 2 months, but during this time period, that obligation ceases. So you can still choose to sue if you wish to, but you don't have to. So it's another discretionary matter.

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The fifth and final one is to do with the power of bodies corporate to borrow money. In Queensland, we do have a power to borrow. It's pretty tightly regulated, the hurdles are pretty high, but basically, what this change is about is to increase the limits. For example, in an accommodation module scheme in Queensland, you can basically loan money up to \$250 per lot on authority of a special resolution, and that pretty much is effectively increased to \$500 per lot now, under these changes, \$6,000 for small schemes, which is actually pretty generous, because a small scheme, by definition, has to have 6 or less lots in it, so that's a lot more generous, and obviously, it's intended to be so because of the fewer number of lot owners.

So look, the Queensland government's heart was in the right place. The execution leaves a little bit to be desired. Unfortunately, it is a bit of a lawyer's picnic, and I think there's going to be trailing issues arising out of it for some time.

Amanda Farmer: Yes. Well, going back to number one, the items of major expenditure being empowered to elect to refund money that has been paid. Are there any conditions around that? Do we have to have a certain number of owners who are in financial hardship?

Michael Kleinschmidt: No, and that's the issue. It's the fact that basically, the whole point here was to make this really easy for bodies corporate to do, and whilst it's a decision that the body corporate has to make, it's got to be an ordinary resolution of the body corporate, so you do have to go to a meeting, but in terms of criteria around it, no, no. The whole point is to make this easy.

When I started to pull it apart, including for ACSL, what we started to find were issues in relation to things like developers who were still in control of community title schemes, using powers of attorney to pass this sort of motion. One of the most fundamental problems, of course, is that if something is due to be done, and that's important, like lift maintenance, just because you take it out of the budget doesn't mean that it still doesn't need to be done.

Amanda Farmer: Correct.

Michael Kleinschmidt: You end up then having to do it, for example, next year, for safety reasons, and you no longer have the money set aside for that item. The government could have achieved the same outcome by doing different things. For example, they could have put a time horizon on the provision that had to be made, instead of it being 10 years, they're going to drop it back to 5, and refunded any money contributed by owners to maintenance that was due in 5 to 10 years. You see what I mean?

Amanda Farmer: Yes.

Michael Kleinschmidt: Then of course, one of the things that the federal government is looking at is the building construction sector taking work out of the system that needs to be done in the next 6 months is counter productive. It would've been better to take work out of the system due in 5 to 10 years time, allowed people not to have to contribute to that now the next 6 months, gotten money back for them that they've already contributed, which would be quite low, and then take it back to 10 year time horizon next year, so there's plenty of time to get the money back into the team. So just things like that would have been a much better solution.

Amanda Farmer: Yes, and I assume from what you're saying, Michael, that you have the same legal obligation that we have in New South Wales for your body corporates to repair and maintain the common property, and I imagine that is a fairly strict, absolute unavoidable obligation, but if the money ain't there, body corporates are going to be placed in the position of breaching that obligation foreseeably.

Michael Kleinschmidt: Yes, and look, whilst ACSL particularly, and indeed a lot of the big stakeholder groups in Queensland, have an excellent relationship with the various departments, including the office of regulatory policy, one of the issues here is that they're just ... This was all done very, very quickly. I think the bill was introduced on the 21st, and the second reading speech on the 23rd, and then sent it to and commenced on the 25th, so it was all very quick. Just a day or 2 consultation with ACSL, we could have redesigned that issue.

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Another issue around the sinking fund is that the refund only goes to the owners that have contributed that money. Now if you've got painting, which is a major expense in large towers, that's been contributed to over a time scale of seven years, and you've got a lot owner on who's only come in in the last, so let's say, 2 years, they're not getting money refunded to them that a predecessor entitled paid.

Amanda Farmer: Interesting.

Michael Kleinschmidt: Right? If you examine the provision very carefully, when it talks about an owner, an owner of the act is that owner. It's not a predecessor in title. So there's a lot of issues like that. A little bit of extra consultation and forethought could have helped some of those things. I'm quite concerned about how developers could take advantage of these provisions.

Amanda Farmer: Yes. I can see how that concern would arise, and I can also see a number of files crossing your desk arising from confusion and the fallout from this. Looking at the provisions to extend due dates for payments up to the end of a financial year, that's a decision that the committee can make for one lot owner or for all, fair enough, and the provision that removes interest on unpaid contributions full stop until the 31st of December. Yes, interesting. No decision has to be made. That's just what the legislation provides.

Michael Kleinschmidt: Yes. So the penalties interest provision is just, it's enforced, whereas the contribution extension, that one, unlike the sinking fund one, it does have a financial hardship provision around it, but in terms of just extending the due date for a lot owner, financial hardship is taken into account, but instead of extending it for everybody, you don't have to take financial hardship into account, which is sensible, that's good design, because it means that ... Committees usually, when they've got one or two lot owners who are in trouble, it is, I think, an extra ... I like giving bodies corporate and committees tools that they can use in appropriate situations. So that's a good tool, because you can take into account a lot owner's particular circumstances, or alternatively, if everybody's suffering here in Queensland ... I know you have clients in Port Douglas and Cairns and Townsville and Mackay, and there are management roads operators up there, and therefore lot owners who are just suffering terribly. We're coming into their peak season, free to start travel, and they are suffering. So that tool to just extend that due date for everybody is quite useful. Of course, it also presupposes that they're going to generate the money and have the money ready to pay at the end of the financial year, but we'll see how that goes.

Amanda Farmer: Now, if there is no obligation to pursue unpaid contributions, if that obligation has been removed by this legislation, and there is no interest on unpaid contributions, query whether you need to extend the due date, I imagine. Owners may well say even with the due date looming, "*Well, there's no interest, and I'm not going to be pursued in the courts for unpaid contributions, so I'm just not going to pay.*" It almost seems that 3 out of those 5 provisions achieve the same end, perhaps.

Michael Kleinschmidt: Yes, and the missing piece of that puzzle, and I think it's not a whole answer, but it's certainly relevant, is that we also have another incentive in Queensland to facilitate prompt payment. You can put a discount in place, and I think it's up to 20%, so it can be quite significant, and of course, good practice in Queensland around contributions is that you take your budget, it might be a hundred thousand per annum, you gross it up by 20%, you issue your contributions on that basis. So there's people paying on time, they're getting the full discount, and you've still got the money that you need, and the audio is that that discount, if a lot owner doesn't pay it on time, is meant to be a contribution towards the body corporate's costs and inconvenience of not having money when it's ultimately recovered, in addition to the interest, if you charge it.

So where that takes you is into this region of, if you extend, you might extend so as to preserve the discount period so that everyone's on a level footing rather than being penalised by not being able to access the discount. Yeah, your point about if those things are acting in concert, why would you even consider it? Yes, I think, again, it's another tool, and if people want to preserve the discount period, then that's a good way to do it.

Amanda Farmer: Yes. Good point. Well look, hats off to Queensland for moving quickly. It was really middle of March when we, as strata lawyers, started talking about and predicting some of these problems and calling for attention on these issues, and as far as I'm aware, Queensland is the only state to have implemented this level of interference, if

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you like, with our body corporate legislation. Even what is proposed in New South Wales, the new regulation making power that we have inserted into our strata schemes management act, does not go this far, would not and does not empower our legislature to make regulations that would deal with issues in this level of detail. So very interesting to see how this all plays out in Queensland, and particularly, as you say, Michael, when you're also in the middle of, or we're hoping perhaps to come to the end of some fairly significant reforms, generally. Are you able to fill us in on where that's all at in Queensland?

Michael Kleinschmidt: Yes, look, my own reading of the situation was that it was really close as to whether or not we would actually get a new standard module regulation instead of going down the road of dealing with these specific issues, because quite a lot of the stuff that's in that new regulation would alleviate some of the problems that people are currently having. So for example, early on, there was quite a concern about the conduct of meetings, obtaining witness signatures on documents, including because of the necessity still in Queensland to apply body corporate's seal. So those sort of procedural issues were high on the agenda early on during the pandemic, and they were addressed aggressively. Fortunately, we've got a few things in Queensland that enable us to get around that, but the reason that it was touch and go is that I know by some of my interactions with various stakeholder groups and the government that those modules are very well advanced.

So for the benefit of your listeners, our system in Queensland is that we have a primary act and then we have regulation modules underneath them that suit different schemes. So there's an accommodation module scheme for predominantly accommodation complexes. There's a small schemes module for 6 lots or less. There's a specified 2 lot module, which is duplexes, effectively. A commercial module for commercial and industrial buildings. They all have slightly different administrative and procedural requirements, which is, in my view, a really strong feature of our system. The disappointment is that over the years, they've been brought back closer together rather than being way more diverse. In my view, in diversity, there is strength, and if you're better able as a lawyer assisting a developer putting a scheme together to choose a regulation module that suits what you're doing, it's a much better outcome.

In any event, our Act was introduced in '97. We've gone through one set of regulation modules. In Queensland, we've got a 10 year sunset on our regulations, so they expire automatically unless they're renewed. So we went through our '97 reg modules, we've had our 2008 reg modules. They've already been extended once, and they are due to come to an end on the 31st of August. The word is that they will be extended again, simply because, I think this is very prudent, everybody needs to be able to see these new regulation modules and get to know them before they're hit with having to comply with them, and I think it's almost certain that we'll have a really good running period before we'll have them. They'll be finalised, they'll be out, they'll be passed, but their commencement won't be for some months to enable everybody to get up to speed.

Amanda Farmer: Okay, and are we looking at significant changes for people day to day?

Michael Kleinschmidt: Yes. The stuff that I've seen so far really does indicate that where the rubber hits the road on some issues will be a lot easier. So the conduct of meetings, the execution of documents, that sort of stuff. ACSL has been pushing for what I call technology neutrality for some time. I don't think that we're going to achieve that, but I think that we'll get a lot of relaxation. So instead of highly prescriptive processes, you end up with a technology neutral approach, so instead of saying, "You've got to provide notice by letter 21 days in advance of a general meeting," flip that into, "Each lot item must receive notice of a general meeting 21 days before it takes place," and that notice might be by Twitter. Put out an instant notice, and there's no reason not to do it that way, if that's what your scheme wants to do. It's about functionality, from my point of view. We're not going to go that far. It'll be a measured step, but hopefully some of the other things will be fixed up at the same time. They have been working on it for some time, and the process that has been used has been excellent, so I'm quite hopeful for what we'll see.

Amanda Farmer: I think when I was doing my Googling and just trying to be up to speed on where you're at, I saw that the last round of public consultation might've been towards the end of last year. Is there anything on the horizon? I know some of our listeners might be hearing this for the first time that changes are around the corner. Is there still the opportunity to have your say?

Michael Kleinschmidt: Oh yes. It's because of the sunset on the regulation modules. The property law reform process in Queensland has pulled in all sorts of stuff, and not just strata title. So they've been dealing with our traditional property law act, so

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incorporeal hereditaments and other bits and pieces have been pulled in.

Amanda Farmer: Right, interesting concept.

Michael Kleinschmidt: So things like easements of necessity and all that sort of stuff. So it's all been brought in together. Disclosure, our disclosure regime in Queensland, moving it from process equals compliance to sort of more meaningful disclosure. So all that process happening at the same time, but because of the timing with respect to the regulation modules and a few other things that have happened, the reg modules will get changed first. We'll then go through the process of getting the draft act. After some major changes will be made in the draft act, we'll then get some amendments to our regulation modules as a result of that, and then we'll roll over from there. Then we'll start to see some changes to things like similar disclosure and our property law act and all the rest of it. So it will be a multi-stage process.

Amanda Farmer: All right. Well, be sure to stay tuned to that Queenslanders, and I will continue to bring you updates as I can, and certainly at the end of this chat, we'll be letting you know where you can contact Michael to stay up to date as well. I know you produce some regular newsletters and great content, Michael. On that note, actually, you have a set up what I'm going to call a website and a new group specifically directed to owners in Queensland. Tell us a bit about what I understand you're calling Strata Owners Queensland.

Michael Kleinschmidt: Yes, yes, no. A couple of months ago now, myself, Dee Parnell and Chris Evans incorporated a company called Strata Owners Queensland, and of course, we chose the absolute worst time in the world to go about doing that.

Amanda Farmer: Or the best. Or the best.

Michael Kleinschmidt: It's enabled us to have a nice, long sort of run up period. Having looked at what OCN does in New South Wales and seeing that they do an excellent job, and also having some good relationships with people within OCN, it had concerned me for some years that in Queensland, there had been quite a bit of history about strata owners organizations in Queensland, quite concerned with the present state of affairs, and I don't mean to make too light of it, but it's almost like a bit of the Monty Python movie with the People's Front of Judea and the Judean Palestinian Liberation Front, and all of them not getting on with each other and not banding together to resolve their differences and move forward and present an open face to government.

One of the problems that we've had in Queensland, I represent all different stakeholders within strata, whether it's a bank or a management roads operator, a lot owner or a body corporate, whoever, and over the years, I've deliberately done that so as to maintain a sense of balance and proportion, and what I do see, and I think I can comment now, is that when you've got strata organisations, owner organisations in Queensland predicated on the basis that they must destroy another member of the sector, particularly the management road side of things in Queensland, which provides more room nights and accommodation in Queensland than any other form of accommodation provider, by the way. It's literally the heart and soul of our tourism accommodation industry in Queensland, but it's a really bad place to start.

So Dee and Chris and I got together and said, "Look, what can we do?" We incorporated a company, we're still sorting out a few things before we cast out a wide net, we've got our website together so people can start to see who we are, we're starting to populate that with articles and other information. It will be an advocacy group to represent all strata owners in Queensland. So whether you're a commercial lot owner, industrial lot owner, an absentee owner letting out your unit, an owner occupier, it doesn't matter who you are. The audio is if you're a strata owner, this organisation will represent you. We're looking at it to some interesting issues at the moment, but obviously, as the membership grows, we will be in a better position to ramp up our efforts, but at the moment, it's pretty highly targeted with what we do.

There's some really interesting things on the horizon. Insurance in Queensland is a massive problem in some areas, and so one of the things we're actively looking at is some guidance for how bodies corporate can self-insure. In Queensland, the commissioner for body corporate committee management has the power to approve schemes of self-insurance. There are not that many approvals, and so we're going to go down the pathway of having a chat to the commissioner, getting some details, perhaps

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working with an underwriter or an insurance professional and getting some guidelines together for bodies corporate so that they can put it together. If they want to go and ask the commissioner to approve their scheme, it's been put together properly, usually with the assistance of a professional, it's going to have good financial management, all those sort of features to it, because we see that that can help some schemes in a bad place.

There are other issues around that. There's an inquiry going on into insurance in Northern Queensland, some recommendations have been made about that, and I love colleagues in the corporate management sector as I do, and I do love them, their heart's in the right place. It's an unfortunate feature, I think, of the business model at the moment that they're very heavily reliant upon insurance commissions, and to a lawyer, when you're a body corporate manager, so you're acting as an agent of the body corporate usually, you've got a fiduciary relationship, and that means taking insurance commissions from a third party. Even if they're fully disclosed, you can find yourself in a position of irreconcilable conflict, and I think that's not a good thing. It really should be challenged. While I don't want them to forego that income, I would say to most of them that they're not charging enough anyway, that body corporate manager's rights have really not changed over a decade because of the competitive nature of their businesses.

Yes, there's lots of things that can be said by a strata owners group, and they can say it ... When sometimes, for example, the body corporate managers can't say it, or the resident accommodation managers can't say it either, so there's definitely a role, and we'll be reaching out to OCN to establish and maintain a good relationship with them. Our idea is to have a very broad church.

Amanda Farmer: Sounds like an important gap being filled up there in Queensland, Michael, so good on you for getting together with other experienced sector professionals and filling that gap. Do you want to share the details of the website with us? I'm not sure if there's an opportunity there for anyone who heads over to sign up and make sure they're on your list so they get updated as you continue to build out that resource.

Michael Kleinschmidt: Well, I'm dreadfully prepared, because I haven't done my plug. So obviously, it's soq.org.au, and the main thing is joining is free. There is no membership cost. What we're trying to do is to make it as accessible as possible, obviously to get as many people on board as possible. We're very much a volunteer organisation, and whilst we'll be bringing on sponsors, we're very much looking at making sure that the ongoing value proposition is such that people want to join, not necessarily because they've got a sectional interest, they want to do this or they want to do that, but because it's useful to them on a day to day basis and provides value and their voice, so that when they hear us talking to government, they can know and understand that we've got the best interest of strata owners at heart when we're talking to the government.

Amanda Farmer: Excellent. Well, I will make sure that link is in the show notes to this episode. So any strata owners in Queensland can head over and make sure that they check that out and they can be part of Strata Owners Queensland. We will shortly be wrapping up, Michael, so let me know anything that you'd like to add that we haven't got to, and definitely how our listeners can find out more about you.

Michael Kleinschmidt: Oh, I think I've said everything that I think is nice and topical in Queensland at the moment. I do love it up here. There are all sorts of interesting things that happen. Being the most decentralised state, you never cease to be amazed, because you're getting contact with colleagues in Cairns or Townsville, and whilst a lot of things are similar, they do have their own idiosyncrasies and challenges in practice. Anyone wanting to get in contact with me, it's my firm name at Stratum Legal. Don't try and spell Kleinschmidt, just Google Stratum Legal and you'll find me, and I'm always happy to chat.

Amanda Farmer: Excellent. Well, thank you very much for chatting with us today, bringing us up to speed on where we are at in Queensland, at least as of today. Things do change quickly, so we have to bear that in mind. Keep on keeping on up there, Michael. I look forward to maybe one day, maybe 2021, actually catching up again with you in person.

Michael Kleinschmidt: Fabulous, thank you very much.

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