

Common ground

Body Corporate and Community Management Newsletter

Issue 7

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Welcome to the November 2011 edition of *Common Ground*.

This edition includes information on the BCCM Office's 2010-11 performance, as well as articles about insurance, our conciliation service and recent changes to the BCCM Act. It also includes discussion regarding some recent decisions and outlines the responses to some topical questions.

Let me take the opportunity, in this introduction, to make brief mention of the BCCM Office's key services.

Our dispute resolution services, conciliation and adjudication, are explained in detail in fact sheets available on our website at www.justice.qld.gov.au/bccm

The Information Service assists in understanding rights and responsibilities under the BCCM Act. It can't provide legal advice or make judgments or determinations about particular situations. This is sometimes misunderstood by clients who expect the Information Service, to make a "ruling", based on information presented in a letter or email, or over the telephone. Determinations about issues can only be made as part of our dispute resolution process, after appropriate steps have been followed.

In 2010-11, the BCCM Information Service experienced almost 25,000 client contacts while the number of dispute resolution applications received totalled 1375. It is reasonable to conclude that the assistance provided by the Information Service contributes to the resolution of issues within community titles schemes before they escalate to the level requiring the BCCM Office's dispute resolution services.

This highlights both the quality of the BCCM Office's Information Service and the complimentary relationship between the Information Service and the BCCM Office's dispute resolution services.

The Information Service also produces a range of information products and has developed an online assessment tool, available through the website. It also conducts an annual seminar series across the State.

Please enjoy this issue of *Common Ground*. I trust it is of interest to you.

Robert Walker
Commissioner

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2010-11 Overview

The past financial year was another busy and successful year for the Office of the Commissioner for Body Corporate and Community Management (BCCM Office).

We often receive questions about what we do, how many disputes we deal with, common enquiries and the information products and services we deliver to the sector.

This article provides readers with an overview of the BCCM Office's services and a summary of our achievements in the 2010-11 financial year.

Role of the Office

The BCCM Office operates under the *Body Corporate and Community Management Act 1997* and provides dispute resolution, information and education services to the community titles sector.

BCCM achievements

In the past financial year, we continued to provide high quality information products and services to the community to assist body corporate participants to understand their rights and responsibilities.

The BCCM Office responded to about 24,900 client inquiries during the past financial year. While our telephone inquiries decreased, our written inquiries rose by more than 14 per cent. Lot owners accounted for 45 per cent of callers to the BCCM Office.

The top five issues for callers were Body Corporate Committees, maintenance and improvements, dispute resolution, general meetings and by-laws.

The BCCM Office also produced a new fact sheet this year explaining the new lot entitlement arrangements.

BCCM seminars

The BCCM Office held a number of free seminars throughout the state during May 2011. The seminars, conducted from Cairns to the Gold Coast, were well attended by audiences comprised mainly of lot owners and committee members as well as body corporate managers and caretaking service contractors.

This year, the seminars focussed on changes to lot entitlements as a result of the

amendments to the *Body Corporate and Community Management Act 1997* passed on 14 April 2011.

Feedback from the seminars was positive and audiences were pleased to have access to a representative from the BCCM Office during and after the seminars.

Dispute resolution services

With more people moving to Queensland and people living closer to each other than in previous decades, it is inevitable disputes will arise within bodies corporate from time to time. However, the good news is that in the vast majority of cases, bodies corporate are able to resolve problems without the need for intervention by the BCCM Office.

In 2010-11, we received 1375 dispute resolution applications and resolved 1376 applications. More than 89 per cent of adjudication applications were resolved within 60 days of referral to adjudication. Among the top issues in those applications were by-laws on animals and vehicles, general meetings - motions and procedures, financial management including debt recovery, maintenance and improvements.

Our conciliation service, established in 2006, continues to achieve great results. In 2010-11, about 70 per cent of conciliation applications were resolved by agreement and over 90 per cent of conciliation applications did not go on to adjudication, suggesting conciliation effected a lasting resolution of those disputes.

Insurance in Community Titles Schemes

The after-effects of the devastating January floods in Central and South East Queensland and cyclone Yasi in the North are still being felt in some community titles schemes. Of major concern to those schemes where the body corporate is responsible for insuring the building, is making sure appropriate cover is in place.

While issues of insurance costs are beyond the scope of the BCCM Office, we can provide information about the insurance requirements set out in the BCCM Act. The following is general information and the legislation should be consulted as the primary reference.

The Body Corporate and Community Management Act

The BCCM Act and its regulations provide that if one or more lots in a community titles scheme are created under either a building format plan or a volumetric format plan, the body corporate must insure each building for full replacement value. A building format plan of subdivision is a form of subdivision that normally occurs within a building. An example of a scheme established as a building format plan is a multi-level block of residential units.

The body corporate for a community titles scheme created under a standard format plan, where a building on a lot has a common wall with a building on an adjoining lot, must also insure each building for its full replacement value. An example of a scheme established as a standard format plan includes a townhouse complex where each lot includes a building and a backyard or courtyard.

The insurance policy must cover damage and the costs associated with the reinstatement or replacement of insured buildings. These costs must include the cost of taking away debris and the fees of architects and other professional advisers and also provide for the reinstatement of property to its condition when new.

The obligation on the body corporate to have adequate insurance is reinforced by the legislation which provides that at every annual general meeting, the body corporate must consider a motion to review each policy of insurance held by the body corporate. The notice of the annual general meeting, or a note attached to the administrative fund budget being proposed, must include specific details about each policy of insurance including the name of the insurer, the amount of cover and a summary of the type of cover.

Importantly, the notice, or the note, must also include details of the full replacement value for the buildings as stated in the most recent valuation and the date of the valuation. To ensure this, the legislation requires the body corporate to obtain an independent valuation, at least every five years, stating the full replacement value of the building or buildings covered under the insurance policy.

April 2011 amendments to the *Body Corporate and Community Management Act 1997*

Soon after the publication of the last issue of *Common Ground*, The *Body Corporate and Community Management and Other Legislation Amendment Bill 2010* was passed by the Queensland Legislative Assembly .

The Bill amended the *Body Corporate and Community Management Act 1997*.

The key amendments to the Act relate primarily to lot entitlements and two-lot schemes and include:

- enhanced disclosure requirements upon the sale of lots in community titles schemes. The disclosure statement must be accompanied by the community management statement for the scheme.
- setting lot entitlements in new schemes in accordance with the relevant principle. The principles for deciding contribution schedule lot entitlements are the “equality principle” or the “relativity principle”. The principle for determining interest schedule lot entitlements is the “market value principle”.
- full disclosure in the community management statement for new schemes and schemes that adjust lot entitlements of how and why the contribution schedule and the interest schedule are set.
- provision in the Act for “two-lot” schemes. A regulation module for two-lot schemes is under development.

The following rules about adjusting contribution schedule lot entitlements also apply:

- for all schemes, contribution schedule lot entitlements may be adjusted upon the unanimous agreement of all lot owners in a scheme through a resolution without dissent or by agreement of lot owners to redistribute the contribution schedule lot entitlements for the their lots amongst themselves.
- additionally for schemes established after the commencement of the Bill,

contribution schedule lot entitlements may be adjusted upon a determination by a specialist adjudicator or the Queensland Civil and Administrative Tribunal that the contribution schedule lot entitlements are not set in accordance with the relevant principle applying to them.

- in relation to contribution schedule lot entitlements for schemes established prior to commencement of the Bill which have been adjusted by the order of a specialist adjudicator, tribunal or court, there will be an ability to revert the contribution schedule lot entitlements to their position prior to the order.

The key features of the amendments are the subject of a new [fact sheet](#).

Recent decisions

Access to secret ballot papers

The adjudicator in *Paradise Boulevard South* [2011] QBCCMCmr 372 has confirmed the section 205 right of interested persons to inspect body corporate records includes access to secret ballot papers.

The adjudicator said the Commonwealth *Privacy Act 1988* cannot be relied on to refuse access because this does not restrict access "where the use or disclosure is required or authorised by law." Section 205 of the Body Corporate and Community Management Act is a law requiring the disclosure of body corporate records.

Of course, access to secret ballot paper material should not show how individuals voted. This is because the returning officer will, during the vote counting process, separate the voting papers from the envelopes showing the owner's details.

Cheque payments

In *Signature Waterfront Apartments* [2011] QBCCMCmr 384 the adjudicator set out the principle that cheques are effective as payment when they are given. This has the effect that if an owner pays a body corporate for all overdue contributions by cheque immediately prior to a general meeting, the owner would be financial to vote even if the cheque had not yet been cleared.

The decision relied on the High Court's determination in *National Australia Bank Limited v KDS Construction Services Pty Ltd* [1987] HCA 65 that a cheque operates as a conditional payment that is complete at the time the cheque is accepted by the creditor. The debt would revive if the cheque is subsequently dishonoured.

The adjudicator noted that if votes are exercised in reliance on a cheque that is then dishonoured, a body corporate may be entitled to recount voting to exclude those votes. On that basis, a body corporate should consider not immediately implementing meeting decisions where the result could be affected by votes which relied on cheque payments until those cheques are cleared.

Reversing lot entitlement adjustment orders

On 14 April 2011 legislative amendments came into force that include:

1. changes to the basis for setting lot entitlements
2. changes to the procedures for adjusting lot entitlements, and
3. new procedures for reversing earlier adjustment orders.

A [fact sheet](#) *Lot entitlements – 2011 amendments*, details these changes.

The adjudicator in *Q1* [2011] QBCCMCmr 394 considered some of the procedures for reversing earlier adjustment orders and found:

- The only people who can propose the reversal of the adjustment order (under section 379) are those owners who owned a lot when the adjustment order was made and are contributing proportionally more because of the order. The reversal must be proposed within three years of the legislative amendment.
- An adjustment order can be reversed when the body corporate did not consent to the adjustment order.

Frequently Asked Questions

This article provides our responses to three topical frequently asked questions to the BCCM Office's Information Service.

The responses are provided for information only and do not constitute legal advice. As with any matter, general information on the body corporate legislation can be obtained from the Information Service on freecall 1800 060 119. However if you require advice on a specific matter you should consider obtaining advice from a qualified legal practitioner.

Q. I have a townhouse in what I'm told is a standard format plan. There are a number of townhouses in the scheme that have common walls with their neighbours, however mine as well as a number of others is completely freestanding. A committee member has told me that my townhouse is not covered by the body corporate's building insurance and that I have to insure my property privately. Is this correct?

A. Yes. The body corporate in a standard format plan must insure any buildings with common walls. Freestanding or stand-alone buildings (as they are known by the legislation) may be insured individually by the lot owner. However, while the body corporate is not obliged to insure stand-alone buildings, it may establish a voluntary insurance scheme for the owners of the stand-alone buildings. As the name implies, the insurance scheme is voluntary and taking part in the scheme is optional.

Any owner of a stand-alone building who wishes to take part in the scheme must notify the body corporate of the replacement value of their building and will be liable to pay a contribution that is a proportion of the total replacement value of the buildings insured under the voluntary insurance scheme.

Q. After the recent floods we have finally had an electrical inspection. The quote for repairs is well above the committee's spending limit but we need to get the work done as soon as possible to allow tenants back into the building. Rather than delay by calling a general meeting, would the Commissioner give the committee approval to have the work done?

A. The Commissioner cannot give the committee approval however, an adjudicator

has the authority under the dispute resolution provisions of the BCCM Act to make an order about emergency spending. The Commissioner's Office provides Practice Directions which include information about the procedures applying to dispute resolution applications.

The [Practice Direction for emergency expenditure](#) provides that the body corporate (committee) may lodge an application for emergency expenditure. The application must demonstrate a genuine emergency and should include a written quote for the proposed expenditure. If possible multiple quotes are preferable and should specify the expected timeframe for the work.

Q. Our building has a modern fire alarm system which, when activated, automatically alerts Queensland Fire and Rescue Service (QFRS). Unfortunately, if it's a false alarm we cannot advise QFRS and cancel the callout. Our by-laws state that if the owner/occupier of a lot causes a false alarm to be sent and the body corporate is billed for the callout, that the owner/occupier must reimburse the body corporate. Is this legal?

A. The legislation does not specifically address this issue however; there have been a number of adjudicators' orders which have considered similar scenarios. In general, adjudicators have determined that the body corporate has entered into a compulsory agreement with QFRS or another entity to provide a monitoring service for the building. Accordingly, charges for any callout are invoiced to the body corporate.

The QFRS monitoring service is for the benefit of both individual owners/occupiers, and generally for all owners/occupiers of the building. For that reason, adjudicators have concluded that a body corporate can determine how to deal with charges invoiced to it by the QFRS. If it can be determined that the callout was due to the actions of an owner/occupier, it would not be unreasonable for the body corporate to pass on such charges to the relevant owner/occupier. However this could not be achieved through a by-law as section 180(6) of the BCCM Act provides that a by-law (other than an exclusive use by-law) must not impose a monetary liability on the owner or occupier of a lot included in a community titles scheme.

What to expect at conciliation

In the 2010/11 financial year the BCCM Conciliation Services facilitated 523 disputes. That is 43.6 disputes per month, 1.6 disputes per day. So why all the disagreement? Many disputes arise out of poor communication, misinformation or misunderstanding. Some are based on 'principle' and some based on the theory 'it has always been done that way'.

The role of a conciliator is to facilitate a resolution, not to evaluate who is right or wrong. However it could be the case that one of the parties involved in the dispute is at fault and the conciliator will test the expectations of each party and may point out the strengths and weaknesses in your case.

Conciliation sessions generally take up to three hours and evidence of anything said or done during the conciliation process is inadmissible in another proceeding e.g adjudication. This type of confidentiality allows for all parties to talk openly about the issues; it does not prevent you talking to other people away from the session about what occurred or any agreement made.

A conciliator can help you break down the issues into smaller more manageable issues allowing you to deal with them one by one. It can create enough momentum for you to resolve all or just some of the issues in dispute. Sometimes it could be a case of the right offer being made at the wrong time and the conciliator can assist in making the right offer at the right time.

In general, conciliation applications are scheduled for a conciliation session within four weeks from the date they are lodged with the BCCM office. This quick turnaround allows for matters in dispute to be resolved as soon as possible thus returning harmony to your scheme or at least have you on the right path to resolving the problem.

Remember that different opinions can co-exist, it is finding the common ground that really matters.

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