

## Commissioner Foreword



Welcome to our second quarterly edition of Common Ground for 2022.

It is hard to believe that we are already half-way through 2022. It is a busy time for our Office as many bodies corporate have their end of financial year as 30 June and are getting things ready to call their annual general meetings (AGM). This often results in increased enquiries about procedural issues relating to the holding of the AGM. Information about calling, holding and running AGMs can be found on our [website](#).

It's great to be back in our building after being displaced at the end of February due to the flooding that affected many across South East Queensland. As those that were also affected know fixing flood and water damage can take time.

We are thankful that most of our staff could work from home during this period which resulted in very little disruption to client services.

This month's edition of Common Ground includes 3 articles about caretakers. The Information and Community Education Unit receive many enquiries from our clients about caretakers and their role. Our articles in this edition will help clear up any misconceptions about what a caretaker should be doing and how to resolve any disputes that may arise between the body corporate and caretaker.

Lastly, while recruitment for a new Commissioner takes place I have been asked to act in the role until 30 September 2022. I look forward to meeting with our stakeholders and connecting with some old and new faces.

**Jane Wilson**  
A/Commissioner for Body Corporate and Community Management




## By-laws and caretakers

The role of the caretaker within a body corporate can sometimes cause confusion. As the caretaker is frequently onsite managing the scheme's day-to-day issues, it can fuel the assumption that the scope of their responsibilities is wider than it is. By-law enforcement is one of the tasks residents commonly attribute to caretakers. However, contrary to popular belief, the caretaker is not the 'all-powerful' body corporate sheriff appointed to enforce the scheme's by-laws. In this article we will clarify the avenues available for enforcing by-laws, while highlighting who holds the reins when it comes to body corporate decision-making.

### What is a contravention notice?

A contravention notice is an official warning given to an owner or occupier stating that the body corporate believes they are breaching a by-law. The notice must identify the relevant by-law and how the body corporate believes it is being breached. It should also alert the person that non-compliance with the notice allows the body corporate to lodge a conciliation application through the Office of the Commissioner for Body Corporate and Community Management (BCCM) or commence proceedings in the Magistrates Court.



There are two types of contravention notice:

- the continuing contravention notice ([BCCM Form 10](#))
- the future contravention notice ([BCCM Form 11](#)).

Each notice must contain the information outlined above. The only factor distinguishing the two is that the continuing contravention notice requires the body corporate to set a timeframe for the person to rectify the issue, whereas the future contravention notice requires the person not to repeat the breach.

For example, if someone has been using an area of the common property for about four months to store all the odds and ends from their garage, the body corporate would issue a continuing contravention notice. This is because the breach is ongoing and likely to continue. Alternatively, if someone has hosted a handful of disorderly parties, the body corporate would issue a future contravention notice, as they do not want the previous behaviour to be repeated.

### **What is the caretaker's role in issuing a contravention notice?**

The caretaker has no authority to decide whether to issue a contravention notice, even if it is stipulated in their contract. A caretaker may still be obliged to perform associated tasks such as:

- reporting potential breaches to the committee;
- reminding residents of their responsibilities under the by-laws; or
- sending out the contravention notice following the body corporate's decision to issue it.

The extent of the caretaker's duties to the body corporate regarding by-laws depends on the terms in their engagement.

Only the body corporate can make a decision to issue a contravention notice to an owner or occupier. When we refer to the 'body corporate', this does not mean 'the caretaker' for the scheme. Specifically, the decision to give someone a contravention notice can be made by the committee – who are authorised under the relevant legislation to make decisions on behalf of the body corporate – or lot owners in a general meeting.

### **Reporting potential breaches of by-laws**

Although caretakers do not have the authority to decide to give someone a contravention notice, they can assist the committee to enforce the by-laws. For example, they can notify the committee if they witness a contravention or are advised by another resident that a potential contravention has occurred. They can do this formally by issuing a prescribed notice ([BCCM Form 1](#)) to the committee – drawing attention to the potential breach and giving them an opportunity to issue a contravention notice. Alternatively, they can advise the committee more informally in writing, verbally or via another method agreed to by the committee.

### **Reminding residents of their responsibilities under the by-laws**

There is often a misconception that when the committee is given a Form 1, they are required to issue a contravention notice. Importantly, the committee is not obliged to give someone a contravention notice after receiving a Form 1. The committee must exercise its own judgment and act reasonably in the circumstances when deciding whether to issue a contravention notice.

Instead of issuing a contravention notice, the committee may choose to enforce the by-laws by asking the caretaker to remind residents of their obligations to comply with the by-laws. For example, there may be new tenants who have just moved into the scheme and are not aware that they should not be parking on the common property. Sometimes a friendly reminder is enough to clear up any potential issues.



## **Sending out the contravention notice following the body corporate's decision to issue it**

While a caretaker cannot make the decision to issue a contravention notice, they may be asked by the committee to send out the notice on behalf of the body corporate. It would depend on the wording of the terms of their engagement with the body corporate as to whether or not they can be asked to do it. More often however the body corporate manager is tasked with this duty.

By-laws are in place to regulate the behaviour of residents, as well as their use of the common property and lots. In view of their importance, it is essential that the body corporate or owners and occupiers are under no illusions about the role of caretaker in this process. The confusion simply causes the committee and residents to expend unnecessary time and energy contending with the caretaker instead of taking appropriate action to enforce the by-laws.



## **Caretakers and maintenance responsibilities**

Common property maintenance is a regular source of contention in bodies corporate.

Understandably, it can be frustrating for residents when they see that the common property is not being maintained in good condition. However, often this frustration is mistakenly directed towards the caretaker for the scheme. When speaking to clients, we caution the assumption that *all* common property maintenance is shouldered by the caretaker.

In this article, we will clarify the role of the caretaker and the body corporate concerning maintenance responsibilities and highlight possible ways to help minimise any conflict surrounding this issue.

### **Who is responsible for maintaining the common property?**

The regulations state that the *body corporate* is responsible for maintaining the common property in good condition. It is important to understand that this reference to the 'body corporate' does not mean the caretaker. Notably, the members of the body corporate are all lot owners in the scheme - the caretaker is *not* the body corporate.

The misconception that the caretaker is responsible for all common property maintenance can perhaps be attributed to the fact that in the capacity of a service contractor, the caretaker is engaged to supply services (not including administrative services) to the body corporate for the benefit of the common property. Some examples of these services may include maintaining areas of common property such as gardens, lawns, pools, tennis courts or barbeque areas.

It is vital that residents and committees have a clear understanding of the caretaker's responsibilities. Contrary to common opinion, there is no list of caretaker duties in the body corporate legislation. The scope of the caretaker's duties regarding maintenance is defined by the terms in their contract. The caretaker is not obliged to perform maintenance tasks beyond the terms of their engagement with the body corporate. We regularly encourage residents who contact us with complaints about the caretaker to first access the contract and confirm the responsibilities of the caretaker before acting.

It follows that the responsibility for common property maintenance, that is not covered under the caretaker's contract, falls back to the body corporate. Any common property maintenance that is the body corporate's responsibility, must be approved by either a committee decision (if it is within their spending limit and there is provision in the budget for the expense), or the owners at a general meeting.



## What if the terms of the contract are unclear?

Unfortunately, it is not always as straightforward as checking the terms of the contract to confirm the caretaker's duties. In some cases, an additional layer of confusion is thrown into the mix when the terms of the contract are unclear and open to different interpretations. Grey areas in caretaker contracts naturally trigger conflict, as the caretaker may have a particular understanding of their maintenance responsibilities, while the committee (or residents) may view the terms differently.

The BCCM Office has no jurisdiction to determine contractual disputes. Disagreements about the terms of an engagement may be determined by the Queensland Civil and Administrative Tribunal or by a specialist adjudicator appointed by the Commissioner. Legal advice may also be advisable in contractual matters to have a full understanding of the options available.

In the first instance, it is always preferable for the caretaker and the committee to discuss the matter to try to avoid conflict and resolve the issues. If any amendments are to be made to the caretaking service contractors engagement they must be approved by a motion passed by ordinary resolution at a general meeting.

Poor communication and insufficient information are arguably two of the key factors fuelling misconceptions and conflict. To foster a healthy working relationship between the caretaker and residents, it is imperative that the caretaker's duties concerning maintenance are well-defined. A clear understanding of the caretaker's responsibilities means there is less room for wrong assumptions and unreasonable expectations.

Further information about maintenance issues in a body corporate could be found at: <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/maintenance>



## Caretaker disputes


Body corporate disputes involving caretakers can generate considerable confusion and frustration. Our interactions with clients indicate that further clarification of the options available to resolve caretaker disputes and the legal requirements for termination would be helpful. In this article, we will highlight what the relevant legislation says about terminating an engagement and what steps the committee might consider before things escalate. We will also clarify the role of our office in relation to caretaker disputes.

### Steps to consider when a dispute arises

Disputes often arise between committees and caretakers due to differing expectations, or a misunderstanding about the terms of the caretaker's engagement. Most commonly the scope of their duties.

The first step in trying to resolve any dispute within a body corporate is open communication. Talking through a problem or misunderstanding can go a long way towards ensuring parties are on the same page – especially when it comes to clarifying the expectations around a caretaker's duties.

If communication between the caretaker and the committee are unable to resolve the issues that have arisen, the body corporate may wish to seek independent legal advice to interpret the terms of the contract. It is important for the body corporate to have a full understanding of the terms of the engagement before any further action is taken.



If the body corporate is satisfied that the terms of the engagement are not being fulfilled or that there has been a breach of the code of conduct for caretakers, they may wish to take steps to terminate the contract.

### **Termination by remedial action**

The legislation enables a body corporate to terminate their engagement with a service contractor, or the authorisation of a letting agent, if that person is:

- engaging in misconduct
- grossly negligent in carrying out their functions under the engagement
- not performing their contractual duties
- not complying with the relevant code of conduct or disclosure requirements.

Before moving to terminate on any of these grounds, the body corporate must first issue a remedial action notice. The decision to give the notice must be made by the committee or the lot owners at a general meeting – an owner cannot make this decision. The chief function of the remedial action is to notify the individual and give them an opportunity to remedy the matter.

While we regularly advise clients that the *format* of the notice is an internal matter (as there is no prescribed form), the legislation clearly outlines what information must be included in the notice. The remedial action notice must firstly state that the person has acted in one of the ways listed above and provide details of the person's actions that adequately identify the problem. The notice must also specify a period of not less than 14 days within which the issue is to be rectified, and state that the body corporate can terminate the engagement or authorisation if there is non-compliance within that period.

Although the committee can vote to issue the initial remedial action notice, a committee-level decision is *not* sufficient to terminate the engagement if they believe the notice has not been complied with. An ordinary resolution at a general meeting is required for termination.

### **Other grounds for termination**


As an alternative to termination by remedial action, the body corporate can also terminate a person's engagement as a service contractor or authorisation as a letting agent, by ordinary resolution, if that person commits any one of the several offences listed in the regulations. Such offences include - being convicted of an indictable offence involving fraud; dishonesty or assault; carrying on a business involving the supply of services to the body corporate (or to owners or occupiers of lots) that is contrary to law; or transferring an interest in the engagement or authorisation without approval of the body corporate.

Alternatively, the body corporate can also decide to terminate by ordinary resolution under the terms of the engagement or authorisation, or simply by agreement.

### **Limited involvement of the Office of the Commissioner for Body Corporate**

Clients may not be aware that our office can only play a limited role in caretaker disputes. This is mainly because disputes involving caretakers are often connected to their engagement with the body corporate. To clarify, *contractual matters* concerning - the termination of an engagement or authorisation; a breach of the terms of an engagement or authorisation; the performance of duties under the terms of the engagement or authorisation; or the exercise of rights or powers under the terms of the engagement or authorisation are defined as *complex disputes* under the legislation. This office does not have jurisdiction – via department conciliation or department adjudication – to deal with complex disputes.

According to section 229 of the *Body Corporate and Community Management Act 1997*, applicants seeking to resolve a complex dispute must have the matter determined by a specialist adjudicator or the Queensland Civil



and Administrative Tribunal (QCAT). A specialist adjudicator will typically be someone who has the appropriate legal qualifications, standing and expertise in the relevant area of law. Ultimately, the choice of forum for the dispute is a matter for the applicant. You can read more about complex disputes and the process for specialist adjudication in the practice directions that are available on our [website](#).

For those caretaker disputes where the subject matter is suitable for conciliation or adjudication through this office, the combination of parties is limited to the caretaking service contractor and the body corporate, or a service contractor and the body corporate. Therefore, an owner or an occupier cannot bring a dispute directly against a caretaking service contractor or a service contractor, or vice versa.

While we have outlined the various legislative avenues for termination, practically speaking, the decision to terminate may not be as clear cut. In view of factors such as the likely detriment to the person being terminated, the complexity of contractual issues, and the potential for legal repercussions, we consistently recommend that bodies corporate should seek independent legal advice about their options if they are considering termination.

One point that will arguably be met with little debate is that it is in the best interests of all involved – caretakers, bodies corporate and owners alike – not to get bogged down in the mire of these kinds of disputes. We urge caretakers and bodies corporate to keep the lines of communication open and discuss issues respectfully as they arise, to avoid unnecessary escalation wherever possible.



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