Commissioner Foreword

Welcome to our first newsletter of 2023.

Earlier this month I had the pleasure of attending the Strata Community Association (QLD) (SCA) conference which was held in Cairns. I spoke about significant adjudicator's orders from the past 12 months and touched on the steady growth in community titles schemes. It was a good opportunity for me to listen to and find out about what is impacting body corporate managers and the sector generally. It was great to hear about what they would like to see from our office and the industry in the future.

Our office has welcomed 9 new team members in the past 3 months. We have been focused on their learning and development to ensure that we can continue to effectively meet the potential increased demands created by legislative reforms across the sector

The Palaszczuk Government recently announced further reforms to the Body Corporate and Community Management Act 1997. The proposed reforms can be found at https://statements.qld.gov.au/statements/97183. While there is no timeframe for commencement currently, our office is considering what steps we need to take to support the implementation of the reforms.

A reminder that the rental reforms in relation to minimum housing standards commence on 1 September 2023. Our Information and Community Education Unit are collaborating with the Residential Tenancies Authority to provide you more information about the upcoming amendments. Keep an eye out for a link to our joint webinar which will be available on our webpage renting in a body corporate once it has been uploaded.

Our articles this month focus on some common themes our Information and Community Education Unit are finding our clients asking about. They include proxies versus representatives, spending limits in bodies corporate and entry rights.

Jane Wilson
Commissioner for Body Corporate and Community Management

Proxies versus representatives

If you are unable to attend a body corporate meeting, someone may be able to represent you as your proxy, or as your representative. There are many misconceptions about the differences between a proxy and a representative. Although both involve exercising someone else's voting rights, these terms are *not* interchangeable. While the focus of this article will be a comparison of general meeting proxies and representatives for community titles schemes registered under the Standard and Accommodation Module, we will also touch on the differences between general meeting proxies and committee meeting proxies.

General meeting proxies

An owner can appoint a proxy to represent them at a general meeting by filling out the prescribed form (BCCM Form 6) and giving it to the secretary before the start of the meeting, unless the body corporate has set an earlier time. Aside from a few exceptions, such as a body corporate manager or an associate of a body corporate manager, almost anyone can be appointed as a proxy for a general meeting. For instance, an owner with an investment property could appoint their tenant, or a busy owner could simply appoint a family member or a friend. The proxy holder does not need to be part of the body corporate.

However, there are some important limitations on general meeting proxies to bear in mind. If there are less than 20 lots in the scheme, a person must not hold more than one proxy. For schemes with 20 or more lots, a person must not hold proxies for more than 5% of the total number of lots. Restricting the number of proxies someone can hold is intended to prevent 'proxy farming' and promote a more even distribution of voting power.

General meeting proxies are also barred from voting on certain types of resolutions, including:

- secret ballot motions;
- electing committee members;
- engaging a person as a body corporate manager or a service contractor, or authorising a person as a letting agent;
- voting on a motion where the owner who gave the proxy has already submitted a hard copy or electronic vote on the motion; and
- voting at the general meeting if the owner who gave the proxy is present personally (unless the owner has given their consent).

The proxy giver can also choose the length of the appointment. Depending on what the owner selects in the prescribed form, the appointment can be for a particular meeting, for all general meetings held before a specified date, or for the duration of the body corporate's financial year.

Representatives

Representatives can represent an owner at a general meeting. Unlike general meeting proxies where virtually anyone can be appointed by an owner, the legislation requires a person to fall into a specific category to be a representative – namely, a person acting under the authority of a power of attorney (subject to specified conditions), a guardian, trustee, receiver, or other representative of the lot owner who is authorised to act on behalf of the owner.

To exercise general meeting votes in this capacity, the individual's name will need to be entered on the body corporate's roll as the lot owner's representative. The representative must also provide certain information to the secretary. Specifically, the instrument which gives the individual their representative capacity, or other documentation evidencing this capacity, their residential or business address, and if different, their address for service.

Before the regulation changes, which came into effect in March 2021, a person could act as the representative for an unlimited number of lots under a power of attorney. Due to stakeholder concerns about the strategic use of power of attorney votes at general meetings, the circumstances in which someone can act as a representative under a power of attorney for more than one lot are now limited. Like the limits on the number of proxies someone can hold at a general meeting, restricting the number of lots you can be the representative for when acting under a power of attorney similarly reduces the likelihood of an unfair concentration of voting power. Exceptions exist for owners of multiple lots, family members of the representative, and powers of attorney given to the original owner under sections 211 or 219 of the *Body Corporate and Community Management Act 1997*.

The most significant distinction between a general meeting proxy and a representative is arguably the pool of

matters that can be voted on. Whereas the voting power of a representative at a general meeting essentially mirrors the voting power of regular owners, as discussed earlier, a proxy is unable to vote on various types of resolutions.

Committee meeting proxies

Voting committee members can appoint a proxy to vote on their behalf at a committee meeting by giving the prescribed form (BCCM Form 7) to the secretary before the start of the meeting, or an earlier time set by the body corporate. However, a secretary or treasurer must complete the form and obtain committee approval to appoint a proxy.

While there are very few limitations on who can be appointed as a general meeting proxy, for a committee meeting, a proxy can only be another *voting* committee member. This prevents the appointment of body corporate managers or caretaking service contractors, who are non-voting committee members.

A voting committee member who has been appointed as a proxy can exercise two votes – one vote in their own right, and another in their capacity as proxy. However, a proxy cannot be exercised at a committee meeting if the proxy giver is present personally or by electronic means.

A voting committee member can only be represented by proxy at two committee meetings in the year of the committee's appointment. This is unlike an owner's ability to appoint a proxy for any general meetings held during the body corporate's financial year. Also, while a general meeting proxy form gives owners options about the length of the appointment, a committee meeting proxy automatically ends after the meeting.

By highlighting the key distinctions between general meeting proxies and representatives on the one hand, and between general meeting proxies and committee meeting proxies on the other, we hope that this article has provided clarity on an area of body corporate legislation which can be confusing for stakeholders. It is important to have a solid understanding of the rules surrounding proxies and representatives, as they can influence voting outcomes significantly.

Spending limits

Our Information and Community Education Unit has noticed the terms 'committee spending limit' and 'major spending limit' are increasingly being used interchangeably. While it is true that both terms relate to body corporate spending, they are not the same. In this article we outline key information about both of these spending limits, while also highlighting their distinct functions.

Committee spending limit

The committee spending limit is used to determine how much money a committee can spend.

For example, if a committee obtains a quote for maintenance, a committee resolution will generally be sufficient to approve the work if the cost falls within its spending limit.

It is open to the body corporate to set its own committee spending limit if it wishes. To set the committee spending limit, an ordinary resolution of the body corporate at a general meeting is required. No minimum or maximum limit is prescribed under the legislation.

If no committee spending limit is set by the body corporate, it is calculated by multiplying the number of lots in the scheme by $200 – therefore, in a scheme with eight lots, the relevant limit would be $1,600.

Dividing projects

The legislation prevents committees from breaking up a single project into separate components to bring costs within a committee spending limit.

If a committee is planning to refurbish the communal gym, for example, it may need to replace worn carpets, repair ceiling fans, and repaint walls. As each of these tasks are under the umbrella of the gym renovation project, the committee must look at the cost of the *whole* project rather than the individual proposals that make up the project.

Committee spending that is not permitted

It is important to recognise that, even if the cost of a particular proposal is within a committee spending limit, that alone does not constitute an automatic green light for the committee to authorise the spending – there are other considerations.

Arguably, the most significant of these considerations is whether a body corporate has budgeted for the expense. Essentially, funds should be available before a committee can vote to spend them. If there is not enough in the budget for a particular expense, a special levy can be raised to pay for it at a general meeting by ordinary resolution. Alternatively, the body corporate may consider voting to amend its existing budget at a general meeting.

The legislation also sets out 'restricted issues' for committees. A committee cannot vote on restricted issues, even if they involve spending within the committee spending limit. For instance, where the legislation specifies that an ordinary resolution, special resolution, or a resolution without dissent is required, the committee cannot approve these motions, as they are *general meeting* resolutions.

A clear illustration of this point is the distinction between maintenance and improvements. On the one hand, a committee can authorise a motion about maintenance if the cost is within its spending limit and there is provision in the budget. Conversely, if the motion is about an improvement to common property, the cost of the improvement determines which resolution range it falls into – the higher the cost, the more likely it is to require an ordinary resolution or a special resolution at a general meeting.

You can read more about restricted issues for the committee and improvements on our website.

Spending exceeding the committee spending limit

If the cost of a proposal exceeds a committee's spending limit, it usually needs to be authorised at a general meeting by ordinary resolution. However, there are situations in which a committee can approve spending above its limit without a general meeting. If all owners have given written consent, or the spending is needed to obtain or renew an insurance policy (and is not a restricted issue for the committee), or if spending has been authorised by an adjudicator to meet an emergency, a committee resolution is sufficient.

A committee can also authorise spending exceeding its limit if it is needed to comply with a statutory order or notice given to a body corporate, an adjudicator's order, or the judgment or order of a court.

Major spending limit

In comparison, the major spending limit is *only* used to determine the number of quotes needed when considering a motion. Contrary to common misconceptions, it is not used to determine how much money can be spent.

A body corporate can set its own major spending limit by ordinary resolution at a general meeting. Again, there are no prescribed minimum or maximum major spending limits that can be set. If no major spending limit has been set by a body corporate, it will be the lesser of $1,100 multiplied by the number of lots in the scheme, or $10,000. Therefore, in a scheme with 11 lots, for example, the major spending limit would automatically be $10,000, as it is less than $12,100.

Spending exceeding the major spending limit

If the cost of a proposal exceeds a major spending limit, at least two quotes must be obtained. However, if there are exceptional reasons why it is not practicable to obtain two quotes – for instance, if certain goods can only be obtained from a single source – one quote will be appropriate. The major spending limit needs to be considered when a motion is considered by the committee as well as the body corporate making a decision at a general meeting.

As with the committee spending limit, a body corporate cannot divide a single project into smaller proposals to bring it within the major spending limit. If the cost of the *whole* project exceeds the major spending limit, two quotes are needed.

Where a proposal that exceeds a major spending limit is being considered at a general meeting, copies of the quotes must accompany the meeting notice circulated to owners, or, if the quotes are too large, summaries of the quotes and information about where the complete quotes can be inspected should be provided instead. These proposals should also be listed on the general meeting agenda as a group of same-issue motions, as the two quotes are proposing alternative ways of dealing with the same issue.

We hope that this article has provided clarity on the distinct functions of the committee spending limit and the major spending limit. It is important for bodies corporate to grasp this distinction, as the incorrect application of these spending limits can result in unnecessary disputes.

You can read more about the committee spending limit and the major spending limit on our website.

Entry rights in a community titles scheme

Many residents view their lot as being in a private sphere that is insulated from the rest of the body corporate. Within this sphere, there is naturally an expectation of privacy and freedom from interference. While attempts to breach this private sphere can understandably cause distress, the reality is that a resident in a body corporate does not enjoy the same level of autonomy as the owner of a detached dwelling. Community living means that there are circumstances when the body corporate – or in some cases, another lot owner – can rightfully enter your lot.

The legislation endeavours to strike an appropriate balance between the fundamental right to privacy and the right of entry by placing clear limitations on entry and requiring notice of entry to be provided. This article mainly focuses on the body corporate's power of entry under section 163 of the *Body Corporate and Community Management Act 1997* (the Act). The right to access a lot or common property in situations where a statutory easement exists is also discussed.

Limitations on entry under section 163 of the Act

A body corporate can only exercise the power of entry under section 163 of the Act for a *specified purpose*. Essentially, a body corporate can authorise a person to enter and remain on a lot or an exclusive use area while it is reasonably necessary to either:

- inspect the lot or exclusive use area to find out if work the body corporate is authorised or required to carry out is necessary; or
- to carry out work the body corporate is authorised or required to carry out.

Having clear bounds on the power to enter acts as a safeguard against unnecessary entry into someone's private domain. This has been demonstrated in a number of matters where the entry sought by the body corporate was determined to be outside the scope of section 163 of the Act.

For example, in the Queensland Civil and Administrative Tribunal (QCAT) appeal of *Body Corporate for Grand Pacific Resort CTS 29576 v Cox* [2012] QCATA 14, a body corporate sought entry to a lot to inspect and determine if there were unauthorised internal alterations which required a development approval for the building work. The body corporate also wanted to confirm whether the alterations had breached a by-law.

It was noted that the body corporate "failed to identify to the adjudicator any legal basis for it being entitled or obliged to carry out the works". While reference was made to a by-law requiring body corporate approval to make structural alterations to a lot, the QCAT member remarked that no evidence was provided of any by-law or other powers entitling or obliging the body corporate to rectify unauthorised structural alterations.

In the QCAT appeal of *Penno v Body Corporate for the Oasis – Dunmore CTS 29301* [2019] QCATA 65, the members determined that the body corporate could not enter the lot to do routine work on the adjoining garden beds, as it was not reasonably necessary in the circumstances. The reasonableness requirement arose not only because section 163 of the Act requires the entry to be "reasonably necessary", but also because section 94(2) of the Act requires a body corporate to act reasonably, including in exercising a statutory right or power. The members said that the reasonableness of the entry should therefore be considered "in the context of the law's strong protection of the inviolability of a person's home". It was observed that the gardening was for "merely aesthetic" purposes and that other options for accessing the garden beds were available.

Examples of rightful entry under section 163 of the Act

On the opposite end of the spectrum, there have been multiple decisions confirming the body corporate's right to authorise entry under section 163 of the Act. For instance, in *Skyline Apartments* [2022] QBCCMCmr 142 the adjudicator accepted the body corporate's right to authorise a person to access the lot to find out if the fire door was compliant and, if not compliant, to replace it. Also, in *Ocean Pacifique* [2020] QBCCMCmr 330 it was held that the body corporate could authorise entry to carry out lift upgrades that were approved at an extraordinary general meeting. Similarly, in *Attenborough 4* [2020] QBCCMCmr 120 it was concluded that authorised persons could enter the lot to obtain quotes and carry out repairs to the damaged ceiling.

In *Contessa Condominiums* [2021] QBCCMCmr 443 it was contended that section 163 of the Act does not permit an authorised person to leave something on or attached to the lot for the duration of the works – rather, that it only allows the person and their equipment to remain on a lot while it is necessary to inspect the lot or carry out work. In this case, the respondent was concerned about a mast climber being left attached to the balcony soffit,

between workers' visits. The adjudicator declined to take that "narrow view" of section 163, noting that attaching the mast climber for the duration of the works was reasonably necessary for the body corporate to carry out the work. The adjudicator considered that to find otherwise would frustrate the purpose of the section and also noted that the narrow view would similarly and impracticably require things like abseiler's anchor points and scaffolding to be removed and reinstalled for each visit.

From the mixture of decisions outlined so far, it is apparent that determining when a body corporate can authorise entry, is not always black and white – it depends on the context and circumstances each time.

Including additional information on the notice of entry

If access is reasonably necessary for the purpose of inspecting or carrying out work the body corporate is authorised or required to carry out, the body corporate must give written notice of the intended entry to the owner or, if the owner is not in occupation, to the occupier.

The legislation does not specify what details must be included on the written notice. Rather, section 163 of the Act simply provides that entry must be exercised at a reasonable time at least seven days after written notice of the intended entry has been given.

While the body corporate is not obliged to provide information on the notice about the entry, not doing so increases the likelihood of resistance. To preserve good working relationships and avoid unnecessary conflict, it is recommended that the notice includes information such as the date and time of entry, the reason for entry, the estimated duration and the names of persons authorised to enter.

Consent not required to enter

There is a common misconception that written notice still requires a body corporate to obtain consent to the entry. To clarify, entry by authorised persons under section 163 of the Act is not conditional upon an owner or occupier being agreeable to the entry. Section 163 does not require the body corporate to negotiate about a more suitable time to enter or about the persons authorised to do the inspection or carry out work.

Of course, there is nothing stopping an owner or occupier negotiating with their body corporate to determine if there is any flexibility around the intended entry or to seek further information, and a body corporate must always act reasonably in the circumstances, as noted above. It only becomes problematic when there is a false expectation that the body corporate must work around the owner's or occupier's conditions.

The adjudicator in *Whitecrests by the Sea* [2021] QBCCMCmr 280 summed up this position clearly by emphasising that, in many respects, the right of entry is non-negotiable: "Compliance with an entry notice under section 163 of the Act is not contingent on an owner or occupier's satisfaction with the entry arrangements. The power of entry under section 163 is not conditional on an owner or occupier's consent to the entry. It is a statutory power that the body corporate is entitled to exercise regardless of whether the owner or occupier agrees."

Critically, owners and occupiers must be mindful that it is an offence to obstruct an authorised person who is exercising – or attempting to exercise – the power of entry under section 163 of the Act. Consequently, it is possible for the body corporate to take action in the Magistrates Court.

Notice of entry not required in an emergency

Section 163 of the Act makes it possible for the body corporate to dispense with the normal notice requirements in an emergency. We often receive questions from our clients about what constitutes an emergency in this context.

While there is no clear definition under the Act, orders of adjudicators may provide some guidance on this point.

For example, in the case of *Arila Lodge* [2016] QBCCMCmr 342 the adjudicator accepted that emergency circumstances existed where there was a water leak. The adjudicator remarked that it was their opinion that "any water leak should be addressed promptly to avoid damage". Other key factors such as the "escalation of the leak" over time and possible safety issues arising from water leaking into light fittings were also noted.

It was ultimately determined that only 24 hours' written notice was needed to enter the lot and carry out work in the bathroom to stop the leak.

When a statutory easement may exist

A statutory easement – distinct from the power of entry under section 163 of the Act – entitles the body corporate, or a lot owner, to enter or use a lot or common property in certain circumstances.

A statutory easement may exist for accessing utility services and utility infrastructure, projections such as eaves, awnings or window sills, or a building structure when it is supplying common wall support to another building – to list a few examples. The various types of statutory easements that may exist in a community titles scheme are provided for in Part 6A, Division 5 of the *Land Title Act 1994*.

Limitations on the exercise of rights under a statutory easement

Like the power to enter under section 163 of the Act, there are also limitations on the exercise of rights under a statutory easement. If a statutory easement exists, section 68 of the Act provides that it can only be exercised in a way that does not unreasonably prevent or interfere with the use and enjoyment of a lot or the common property.

Exercising statutory easement rights

Where there is a statutory easement the body corporate can enter a lot – or a lot owner can enter another lot or the common property – to carry out work, provided that it is exercised in accordance with section 68 of the Act.

Alessandra Place [2007] QBCCMCmr 417 involved a duplex scheme where the electricity power board and water meter for Lot 2 were both located on Lot 1. It was held that the owner of Lot 2 was entitled to access the relevant utility infrastructure under a statutory easement, provided it was exercised in line with section 68 of the Act.

Alternatively, in *Edgewater* [2011] QBCCMCmr 230 a lot owner sought to install an air-conditioner on common property – this was declined by the body corporate. The adjudicator noted that the question of whether a statutory easement exists was a relevant consideration in ultimately determining whether the body corporate's decision was reasonable. It was acknowledged that as the air-conditioner is utility infrastructure which provides a utility service, "a statutory easement exists in favour of Lot 31 and against the common property for this infrastructure".

Required notice of entry

As with the right of entry under section 163 of the Act, notice of entry must be given by a lot owner – or by the body corporate – when exercising statutory easement rights, unless it is an emergency. However, while section 163 of the Act requires entry to be exercised at a reasonable time at least seven days after written notice of the intended entry has been given, section 68 of the Act simply provides that reasonable written notice must be given – no timeframe is specified for the notice. What is *reasonable* will always depend on the circumstances.

If a lot owner is the one exercising statutory easement rights, in addition to the requirement to give reasonable written notice to the body corporate, or to an owner or occupier, they must also abide by any security or other arrangements normally in place.

In view of the potentially contentious nature of entry rights, it is critical for all involved to keep the lines of

communication open and avoid escalation wherever possible. There are, perhaps, two key points to bear in mind in these situations. First, a lot is someone's private domain. As the saying goes, your home is your sanctuary. Second, community living means that the right to privacy must sometimes bend to the needs of the body corporate as whole.

Information about entering a lot or exclusive use area and statutory easement rights can also be found on our website.

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