

Body Corporate and Community Management

Common Ground Issue 11

2012–13 Overview

Welcome to issue 11 of *Common Ground*, the BCCM Office's bi-annual e-newsletter for the community titles sector.

We take the opportunity in the Spring/Summer edition of *Common Ground* to reflect on the performance of the BCCM Office in the previous financial year. I am pleased to report the BCCM Office's continuing positive results in the 2012–13 financial year. We continue to provide efficient and effective dispute resolution services and high quality information products and services to Queenslanders.

The information service responded to more than 26,000 client inquiries in 2012–13 both through our telephone information service and by written responses to letters and emails.

Almost 50 percent of our telephone enquiries were from lot owners. The five most common queries related to maintenance and improvements, committees, dispute resolution, general meetings and by-laws.

The information service produced a new fact sheet explaining the amendments to the BCCM Act dealing with lot entitlements and seller disclosure. The information service also held a number of free seminars throughout Queensland in May and June. These well attended seminars, conducted from Cairns to the Gold Coast, focussed on the amendments to the BCCM Act and debt recovery as well as covering a number of general issues.

There has been a slight increase during 2012–13 in the number of dispute resolution applications lodged with the BCCM Office. We received 1373 applications and resolved 1339 which equates to an annual clearance rate of 98%. Pleasingly, the BCCM Office continues to meet or exceed its performance targets.

Robert Walker
Commissioner

In this issue

- Schoolies Season – body corporate management issues
- Debt disputes – a case study
- Approval for body corporate legal expenses
- Leasing in community titles schemes

Schoolies season—body corporate management issues



As we approach the 2013 schoolies season it is timely to revisit the discussion about behaviour management in schemes providing accommodation to the annual influx of school leavers. This is especially important following last year's tragic events involving falls from high-rise balconies both during the schoolies period and earlier in 2012.

Access to balconies

In focussing attention on how to prevent tragic accidents it is important to examine the scope for body corporate action, including whether it is possible to restrict access to balconies.

Under the [Body Corporate and Community Management Act 1997](#) (the Act) a body corporate has control over the common property. However, it cannot unilaterally take action such as locking doors to restrict access to areas within a lot.

By-laws and scheme management

The by-laws for a community titles scheme provide the mechanism under the Act for the body corporate to control and manage the scheme property. The registered by-laws for a scheme can usually be found in Schedule C of the Community Management Statement (CMS) for the scheme.

A body corporate may make 'house rules' to guide the use of common property and amenities such as a pool or tennis court. However, while 'house rules' might provide useful guidance, they are not enforceable unless they are registered as by-laws in the CMS.

The Act places some limits on the scope of by-laws. Importantly a by-law may not discriminate between types of occupiers. This means, for example, that a body corporate cannot prevent a 'schoolie' from using parts of common property that other occupiers are entitled to use and for which there is no exclusive use by-law. A by-law also cannot prevent or restrict a transmission, transfer, mortgage or other dealing with a lot. This means, for example, that the body corporate cannot force an owner to include a condition in a tenancy agreement precluding use of balconies.

The body corporate is nonetheless responsible for enforcing the registered by-laws. The body corporate may give a contravention notice to an owner or occupier where it reasonably believes that the person has contravened a by-law, and where, given the circumstances, it is likely that the contravention will continue or be repeated. The purpose of this notice is to require the person to remedy the contravention. Under Sections 182 and 183 of the Act, the decision to serve a contravention notice can be made by the committee or by the body corporate in a general meeting.

There is no provision in the Act to delegate the enforcement powers to a letting agent. However, the letting agent can report alleged infringements to the body corporate through the completion of a Form 1 by-law contravention notice (available from the BCCM Office or at www.justice.qld.gov.au).

If an owner or occupier does not comply with a contravention notice, the body corporate can lodge a dispute resolution application with the Office of the Commissioner for Body Corporate and Community Management or an application for enforcement procedures with the Magistrates Court.

The body corporate cannot seek to enter a lot merely to see whether the by-laws are being complied with. Under section 163 of the Act a body corporate, or a person authorised by the body corporate, may enter a lot only in order to perform work or find out whether work is necessary. The examples cited for section 163 do not extend to general by-law matters, such as to check the use of balconies.

In light of these limitations it can be a challenge for a body corporate to ensure that all occupiers (including owners, long-term tenants and those on a short-term holiday) can safely enjoy the facilities on offer in the scheme. Balancing the commercial interests of investment owners against the safety interests of persons enjoying the lots and common property can present greater challenges.

An important first step to achieving these goals is to explain to guests the by-laws, facilities, and requirements for behaviour on the scheme as soon as possible, preferably before entering a lease agreement. It should be remembered that an owner who leases their lot has additional options to regulate the use of the lot under the *Residential Tenancies and Rooming Accommodation Act 2008*, beyond those available to the body corporate. The body corporate may wish to put forward a proposal to owners individually about how best to regulate use of balcony areas and ensure safety during schoolies season.

Ultimately, locking balcony doors or including a condition restricting balcony access in a lease agreement is a decision for owners.

Debt disputes—a case study



A recent decision of a BCCM Office Adjudicator examines the BCCM Act provisions and recent appeal decisions about debt disputes. It represents a good case study to assist understanding the jurisdiction of BCCM Office adjudicators in these disputes.

At the heart of the application in *Mermaid Palms [2013] QBCCMmr 326* was the question of whether the body corporate had acted reasonably in refusing to waive penalty interest and recovery costs relating to a body corporate debt resulting from the failure of the applicant to pay body corporate levies on time. The applicant had entered a payment plan but disputed the application of penalty interest, and relied on an understanding that no interest would be sought while there was compliance with the payment plan.

In citing section 229A(3) of the BCCM Act which provides that an adjudicator does not have jurisdiction in a debt dispute, the adjudicator pointed out that the case was not strictly about debt recovery. The applicant was seeking to clarify the amount owing and to challenge the body corporate's decision about the application of penalty interest. However, the adjudicator explained that section 229A(3) is not limited to a claim to recover the amount of a debt and went on to say:

It seems difficult to argue there is no 'debt dispute' if the body corporate is claiming there is an amount outstanding and (the applicant) disputes the amount. Section 229A(3) therefore prevents me from making any declaration of how much (the applicant) owes the body corporate.

The adjudicator pointed to the BCCM Act's provisions for lost discounts, penalty interest and recovery costs as demonstrating a clear legislative intent that owners promptly pay amounts claimed by their body corporate. He also identified the suspension of body corporate voting rights as a further consequence of outstanding contributions.

As the adjudicator in *Mermaid Palms* emphasised, recovery costs can quickly reach extremely high levels. Indeed it is not unusual for recovery costs to reach a level far exceeding the original amount of the disputed debt. The status of recovery costs as a body corporate debt has recently been clarified. Following the 2009 decision in *Body Corporate for Liberty v Alotier Pty Ltd & Ors [2009] CCT KA009-08* the position was that recovery costs must be pursued as a debt and, as such, the costs did not become payable by the owner until the body corporate had obtained a judgment or order as to the costs. However, the recent decision of *Body Corporate for 399 Woolcock Street v Sexton & Ors [2013] QCATA 55* determined that recovery costs are a body corporate debt under the BCCM Act. The Member determining that case found it 'impossible to accept that parliament actually intended that no body corporate had any right to recovery costs, as a body corporate debt, without proceedings in a court or this Tribunal' (at paragraph 13).

The adjudicator in *Mermaid Palms* said:

The practical consequences of the debt recovery provisions require the reverse of normal commercial practice in that owners should pay first and ask questions later.

In summary the adjudicator in *Mermaid Palms* found that while any portion of the amount claimed by the body corporate remained outstanding section 229A(3) of the BCCM Act denied him jurisdiction to determine a dispute about the debt. While the amount remained unpaid, the debt was likely to increase substantially through penalty interest and mounting recovery costs. The ongoing debt also affected other rights of the debtor, including body corporate voting rights. If the claimed amount was paid an adjudicator would have jurisdiction to determine an application regarding the reasonableness of the body corporate decisions concerning the debt.

Approval for body corporate legal expenses



Disputes involving bodies corporate can be very complex and it is not surprising that bodies corporate may seek legal assistance during a dispute. The provisions of the [Body Corporate and Community Management Act 1997](#) (the Act) and its associated Regulations regarding expenditure apply to a body corporate's decision making about engaging legal assistance.

In the dynamic circumstances of a dispute, committees sometimes fail to follow the relevant provisions of the Act which, unfortunately, can lead to further disputes within the body corporate about expenses incurred. The BCCM Office from time to time receives disputes lodged by owners questioning legal expenses incurred on their behalf. This article will discuss managing legal costs and highlight relevant provisions of the Act that bodies corporate should be aware of to ensure compliance with the legislation.

Decision to obtain legal advice

Legal assistance can only be engaged by a body corporate following an appropriate resolution to do so. In some circumstances the committee can make this decision but in many cases the decision must be made by owners in a general meeting. The following legislative provisions apply to this process:

- Section 312 of the Act provides that a special resolution must be passed for the body corporate to start most legal proceedings (except for some proceedings such as enforcing by-laws or recovering liquidated debts).
- The [Standard Module](#) (SM) provides that a specific resolution is needed for the spending of any body corporate funds, even if items are already included in the body corporate's budgets (SM s139(7)).
- Even if money is available in the budgets, owners in a general meeting still need to authorise any spending on a project that will cost more than \$200 per lot with at least two quotations provided for *major spending* (expenditure over \$1,100 per lot or \$10,000, whichever is lesser) (SM s152, s153)..
- Any settlement of litigation affecting the rights, privileges or obligations of owners must be agreed to in a general meeting (SM s42).
- Section 310 of the Act may apply to allow legal representatives who incur fees on instructions from a committee member to recover the fees from the body corporate even if owners have not properly authorised the expenditure.

Committee decisions

Prior to commencing or defending litigation a committee may want preliminary advice about the prospects of success in litigation, the likely costs and timeframe, the potential exposure to the other party's claims and costs, and an amount that may be reasonable as a negotiated settlement. The committee may be able to obtain this advice itself if the legal fees are within budget and within the committee spending limit. Otherwise, the committee will need to call a general meeting or, if the matter is urgent, seek special authorisation of an adjudicator for the associated emergency expenditure.

Decisions by owners

Where litigation is involved, consideration of settlement offers will almost always require decisions of owners in a general meeting.

Complications commonly arise when legal fees exceed the original estimate given. To avoid incurring fees in excess of authority, it may be necessary for committee members to ensure the legal representatives do not incur any fees in excess of the maximum amount of spending approved by owners. If necessary, a court may be asked to grant an adjournment pending a general meeting at which owners could be asked to consider additional expenditure.

Checklist

Committees should consider the following checklist before committing the body corporate to legal expenses:

- Obtain preliminary advice on prospects, exposure and possible settlement.
- Check that money for legal fees is available in budget (otherwise, raise special levy).
- Obtain an estimate for legal fees for the entire litigation (it may be necessary to call a general meeting and obtain two quotations to approve the expenditure).
- Make sure the body corporate formally notifies the legal representative of the maximum amount of spending authorised by body corporate resolution (another meeting will be necessary to approve additional expenditure).
- Make sure settlement offers or agreements are approved by a general meeting.
- Check whether a special resolution is necessary before commencing legal proceedings.
- Most importantly, keep abreast of the litigation and give owners an opportunity to vote on subsequent settlement offers and revised cost estimates.

Leasing in community title schemes



Knowing your legislative responsibilities is critical to making the right decision, and taking the right action, regarding the lease of a residential lot in a community titles scheme. It is also a key to avoiding disputes. Whether you are a body corporate committee member, letting agent, owner or tenant, the Queensland Government has a range of free information sources to help you stay informed and up-to-date about the requirements of:

- the *Body Corporate and Community Management Act 1997* (the BCCM Act)
- the *Property Agents and Motor Dealers Act 2000* (the PAMD Act)
- the *Residential Tenancies and Rooming Accommodation Act 2008* (the RTRA Act).

The Office of the Commissioner for Body Corporate and Community Management provides a free Information Service regarding the BCCM Act and its associated regulation modules. The Information Service can be contacted on freecall 1800 060 119 or by emailing bccm@justice.qld.gov.au. Alternatively, our entire range of information products can be accessed at www.justice.qld.gov.au/bccm.

The Office of Fair Trading has compiled a wide range of information about property management at www.fairtrading.qld.gov.au/property-management.htm. Owners who have leased, or are thinking about leasing, their lot may be particularly interested in learning about the maximum fees for residential and holiday letting, the process to appoint an agent, and the responsibilities of letting agents under the PAMD Act. The Office of Fair Trading is contactable on 13 74 68.

The Residential Tenancies Authority has also made available on its website at www.rta.qld.gov.au/ relevant factsheets and online services for lessors, agents, managers and tenants regarding the provisions of the RTRA Act. The Residential Tenancies Authority can be telephoned directly on 1300 366 311.

Below is a list of some of the responsibilities imposed by the legislation:

Bodies corporate:

- must not prevent a lot owner from leasing a lot
- must ensure that by-laws, and any internal policies, do not discriminate between owner-occupiers and tenants, or between long-stay and short-stay tenants, or between types of occupiers
- cannot restrict the type of residential use of a lot that may lawfully be used for residential purposes
- cannot require the letting agent to provide information on private letting arrangements for individual lots
- cannot require a letting agent or owner to evict a tenant or terminate a lease.

Letting agents:

- must hold an appropriate license under the PAMD Act to carry on a letting agent business
- must carry out their duties in accordance with their authorisation and individual contract agreements with each lot owner;
- must not engage in misconduct, or be grossly negligent, in carrying out their obligations
- must give the tenant a copy of the current body corporate by-laws when the written agreement is given to the tenant for signing
- must comply with the *Code of Conduct for Letting Agents* under Schedule 3 of the BCCM Act
- (dependent upon their license) must comply with the code of conduct in the *Property Agents and Motor Dealers (Restricted Letting Agency Practice Code Of Conduct) Regulation 2001*.

Owners:

- must give written notice to the body corporate of the appointment or termination of a letting agent or real estate agent to lease the lot, including details of the agent
- must give written notice to the body corporate when the lot is leased for a term of six months or more, including details of the tenant/s
- (if an agent has not been appointed) must give the tenant a copy of the current body corporate by-laws when the written agreement is given to the tenant for signing.

Tenants:

- must comply with body corporate by-laws
- must comply with the terms of their lease.

Please note that this list is not exhaustive and that the legislation should be consulted as the primary source.

For more information about any of these responsibilities, please contact the relevant agency referred to above.