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Common ground

Body Corporate and Community Management Newsletter

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Welcome to the 9th issue of Common Ground – the second edition for 2012.

On 13 July 2012 the Office of the Commissioner for Body Corporate and Community Management (BCCM Office) celebrated its 15th birthday.

As most readers are aware the BCCM Office provides dispute resolution services through conciliation and adjudication, as well as information and education services to the community titles sector in Queensland.

Since it commenced operations on 13 July 1997, the BCCM Office has helped participants in community title schemes resolve more than 16,000 disputes. It has also responded to more than 185,000 inquiries to the information service, developed and published a range of information products, as well as delivered seminars and services to assist those involved, or interested in, community title living to understand their rights and obligations under the *Body Corporate and Community Management Act 1997*.

This is a considerable record of achievement and service to the people of Queensland.

Robert Walker
Commissioner

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Queensland Government

2011-12 OVERVIEW

The 2011-12 financial year was another busy and successful one for BCCM. We provided high quality information products and services to the community, which assisted body corporate participants to understand their rights and responsibilities.

The information service responded to nearly 25,000 client inquiries, 45 per cent of which were from lot owners.

We also noted a significant increase – in excess of 14 per cent – in clients preferring written responses to their queries over telephone contact.

The five most common queries related to committees, maintenance / improvements, dispute resolution, general meetings and by-laws.

The information service produced a fact sheet explaining the new two-lot scheme regulation module. The Commissioner also issued 11 new practice directions for the dispute resolution service.

BCCM held a number of free seminars throughout Queensland in April and May. The seminars, conducted from Cairns to the Gold Coast, were focussed on the new practice directions and the two-lot scheme regulation module. They were well attended by lot owners, committee members, body corporate managers and caretaking service contractors.

Dispute resolution services

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

We received 1,353 dispute resolution applications and resolved 1,396. More than 89 per cent of adjudication applications were resolved within 60 days of referral to adjudication. The most common subject matter for dispute resolution applications were general meeting procedures and motions, maintenance and improvements, by-laws about animals and vehicles, and committee issues.

Our conciliation service, established in 2006, continued to achieve great results. In 2011-12, approximately 65 per cent of conciliation applications were resolved by agreement, and more than 90 per cent of conciliation applications did not go on to adjudication. These figures suggest conciliation contributed to developing a lasting resolution of those disputes.

Our dispute resolution service continued to receive a high number of applications over the year, especially in the latter half. In particular, we recorded our second-highest number of applications ever received in a single month – 146 in March 2012.

We are proud to report feedback from clients shows they have a very high level of satisfaction with our conciliation service. More than 96 per cent of clients stated in post-session feedback that they would recommend conciliation to others for resolution of disputes. The benefits are further demonstrated a 92 per cent success rate for matters resolved at conciliation during the year.

Our adjudicators have achieved an impressive clearance rate for adjudication applications over 2011-2012. Approximately 90 per cent of all adjudication applications were determined within our target of 60 days from referral to adjudication. The number of matters determined outside this timeframe reflects the high number of applications received over the year, the increasing level of complexity of issues raised in them, and the need to request further information or conduct in-depth investigations into such matters.

A Bill to end lot entitlement reversions

A Bill to amend the *Body Corporate and Community Management Act 1997 (the Act)* was introduced to Parliament on 14 September 2012.

In accordance with Standing Order 131 of the Standing Rules and Orders of the Legislative Assembly, the Bill was referred to the Legal Affairs and Community Safety Committee (the Committee) for detailed consideration.

The Committee is due to report back to the Parliament by 22 November 2012.

The Explanatory Notes to the Bill state the principal objectives of the Bill are to:

- remove the requirement for bodies corporate to undertake a process to adjust contribution schedule lot entitlements to reflect the original entitlements prior to any, and all, relevant orders of a court, tribunal or specialist adjudicator;

- establish a process for contribution schedule lot entitlements that were adjusted pursuant to the 2011 reversion process to be changed to reflect the lot entitlements that applied to the scheme prior to the application of the reversion process;

- remove certain disclosure requirements for sellers of lots in community titles schemes; and

- provide jurisdictional consistency for the resolution of disputes about contribution schedule lot entitlement adjustments.

Ending the 2011 'reversion process'

The 2011 amendments to the Act included a 'reversion process' that applied to existing schemes that have, prior to the amendments, been subject to a contribution schedule lot entitlement adjustment order of a specialist adjudicator, tribunal or court. The reversion provisions enabled a lot owner to request the body corporate to revert the contribution schedule lot entitlements to their pre-adjustment settings.

The 'reversion process' has come under significant criticism by some lot owners and peak legal and stakeholder bodies for allowing a single lot owner the ability to effectively overturn a lawful order of an independent court, tribunal or specialist adjudicator.

The Bill removes the ability of a lot owner to force a body corporate to undertake the 'reversion process'.

Adjusting lot entitlements affected by the 2011 reversion process

The Bill provides a new process for dealing with contribution schedule lot entitlements that have been affected by the reversion process introduced in 2011.

A lot owner may submit a request to the committee proposing an adjustment of the contribution schedule lot entitlements to reflect the contribution schedule lot entitlements as they applied prior to the 2011 reversion process.

The committee must undertake a prescribed process to notify and engage the body corporate of the proposal, prior to changing the contribution schedule lot entitlements to reinstate the lot entitlements that applied prior to the reversion process, subject to any adjustments necessary to reflect relevant amalgamations, subdivisions, boundary alterations and any other material changes to the scheme.

Removal of certain disclosure provisions for the sale of lots

The Bill removes the provisions of the Act which require a seller of an *existing* lot to:

- provide a copy of the scheme's CMS with the disclosure statement given to prospective buyers;
- state in the disclosure statement the extent to which the annual contributions is based on the contribution schedule lot entitlements, and interest schedule lot entitlements; and
- state in the disclosure statement that the contribution schedule lot entitlements, and interest schedule lot entitlements are set out in the CMS for the scheme.

The Bill also removes the provisions of the Act which require a seller of a *proposed* lot to state in the disclosure statement given to proposed buyers:

- the extent to which the annual contributions are based on the contribution schedule lot entitlements, and interest schedule lot entitlements; and
- that the contribution schedule lot entitlements, and interest schedule lot entitlements are set out in the proposed CMS for the scheme.

Jurisdiction for particular disputes

The 2011 amendments made specific provision for a body corporate to adjust the contribution schedule lot entitlements for the scheme by resolution without dissent. However, the 2011 amendments did not specifically provide for resolution of disputes about these adjustments by a specialist adjudicator or QCAT. It is inappropriate for these disputes to be resolved by a department adjudicator because of the complex nature of these disputes.

The Bill clarifies that jurisdiction for disputes about adjustments of contribution schedule lot entitlements by resolution without dissent of the body corporate rests with QCAT or a specialist adjudicator.

Disputes about procedural aspects of a general meeting called to consider a motion to adjust the contribution schedule lot entitlements may continue to be resolved by any dispute resolution process under Chapter 6 of the Act, including department adjudication.

Hard flooring in community titles schemes

The issue of noise transference from hard flooring in apartments (like timber and tiles) is a common source of dispute. Even when a resident is using their lot for normal daily activities, inadequate soundproofing under their hard floors can have a significant and frustrating impact on adjacent lots.

Most bodies corporate have a by-law restricting noise likely to interfere with others. Also, *section 167* of the *Body Corporate and Community Management Act 1997* (the Act) similarly prevents an occupier using or permitting the use of a lot or common property in a way that causes a nuisance or hazard or interferes unreasonably with the use or enjoyment of another lot or common property. Some bodies corporate have by-laws placing specific restrictions on hard flooring.

There are a range of factors that adjudicators will consider in a dispute about noise arising from hard flooring. (*Into Ballymore* [2012] QBCCMCmr 166 and *Beau Monde* [2011] QBCCMCmr 548 are examples of the treatment of these issues).

In any dispute alleging 'unreasonable interference' the complainant will bear the onus of presenting objective evidence that the conduct complained of was of such 'volume and frequency' that it would interfere with another resident of 'ordinary sensitivity'. This test was set by the President of the Queensland Civil and Administrative Tribunal in *Norbury v Hogan* [2010] QCATA 027.

In noise disputes, a report by an appropriately qualified acoustic engineer is usually considered necessary to provide such objective evidence.

The Building Code of Australia (BCA) establishes a minimum standard regarding noise transference between lots. The BCA criteria have been consistently held by adjudicators as an appropriate guide to the level of noise transference that is objectively reasonable. However this is considered to be a very low standard. The Australian Association of Acoustical Engineers (AAAE) has a star rating guide, with recommended noise transference standards for 2, 3, 4 and 5 star buildings. The AAAE ratings are seen as complementing the BCA requirements with the acoustic standards that may be expected by occupiers of different standards of accommodation.

Adjudicators consider how acoustic test results compare to the BCA and AAAE levels. They will consider the degree of any divergence with the standards, differences across the apartment, the level of sound insulation under the flooring, and the impact of any noise transference on the complainant.

Other issues to consider include whether any specific by-law requirements regarding hard floors were complied with, and whether the complainants have followed the preliminary procedures for disputes about by-law issues.

If an adjudicator finds unreasonable noise transference, they may require the lot owner to replace the hard floors with carpet or install greater levels of sound insulation under the floor. Less substantial requirements, which any owner involved in such a noise dispute should consider include:

- floor rugs and carpets, with insulated backing, in high traffic areas;
- felt pads under furniture legs;
- soft closers on cupboard doors;
- removing shoes when inside the apartment; and
- minimising noisy activities, such as keeping the volume on TVs and stereos as low as possible and avoiding loud games.

Occupiers who experience noise transference could also investigate whether there is any scope to install sound insulation on their side of the floor, ceiling or wall.

Any apartment owner who is considering replacing their flooring should check their by-laws and ensure adequate soundproofing is installed to avoid any adverse impact on their neighbours. Parties are also encouraged to raise any concerns politely, constructively, and as early as possible.

Attendance at body corporate committee or general meetings by telephone

The issue of attendance at committee or general meetings by telephone has recently been raised with the BCCM Office. While the *Body Corporate and Community Management Act 1997* (the BCCM Act) is silent on the issue, adjudicators have ruled in favour of the practice.

Discussion and voting are the primary activities at body corporate meetings. Many readers would know that there are five separate regulation modules associated with the BCCM Act, and these differ slightly in their regulation of committee and general meetings. For this article I will refer to the Standard Module (SM).

A motion is passed at a meeting of the committee if a majority of voting members present (either personally or by proxy) are in favour of it (SM s52). At general meetings, voting can be conducted by a show of hands, by sending in completed voting papers, or by appointing a proxy or representative (SM s86). In addition, section 86 provides that the body corporate can, by ordinary resolution, decide that voters for a general meeting may record their votes electronically. Electronic voting must be conducted in accordance with the *Electronic Transactions (Queensland) Act 2001*.

The committee plays an important role in the annual administration of the body corporate, and in dealing with any matters that crop up. To facilitate this, the regulations allow committee meetings to be conducted in a less formally structured way than general meetings. For example, the committee can discuss the matters on the agenda before making decisions and even introduce new matters to a meeting even though they do not appear on the agenda.

Committees operating under the Standard Module must have a minimum of three and a maximum of seven voting members. Bodies corporate often find it hard to elect a full committee and members may not always be resident owners. This can result in committee members being unable to physically attend an unexpected meeting where motions must be discussed before taking any action. Under these circumstances the ability to attend via telephone would be beneficial.

A small number of adjudicators' orders have considered the issue of attendance by telephone at committee meetings. In *Chichester Court [2007] QBCCMCmr 684 (13 December 2007)*, the adjudicator, when considering attendance at committee meetings said: 'Subject to the requirements of section 29 of the Standard Module there would seem to be no reason why Committee meetings cannot be conducted by telephone...'

In *O'Quinn Street Apartments [2008] QBCCMCmr 104 (20 March 2008)* the adjudicator said: 'Many small schemes, or schemes where owners are interstate, in fact conduct committee meetings by telephone conference or linking up without being physically present. This Office has never ruled that this practice is unlawful since it is the object of the Act to allow lot owners to manage a scheme in the best way for them, albeit within the framework of the legislation...'

General meetings tend to be more formal and depending on the size of the scheme could have large numbers of voters attending meetings or a large number of non-resident owners. If a voter is not personally in attendance at the meeting they may give their completed voting papers to the secretary or appoint a proxy.

Subject to approval and practical considerations it is also possible to attend a general meeting via telephone. Practical considerations could include the number of lot owners who wanted to attend by telephone and the expense involved. While it may be relatively simple to organise the attendance of one person by telephone, it would be logistically difficult and expensive if, say, 20 individuals wanted to attend the meeting in that way.

The issue of attendance at general meetings by telephone was considered in *Apartments on the Lakes [2010] QBCCMCmr 417 (8 September 2010)*. The adjudicator ordered that a lot owner was entitled to attend committee and general meetings by telephone where practicable for the body corporate and provided that the cost, if any, is met by the owner. In relation to general meetings, the adjudicator said the Applicant should give reasonable notice of their wish to attend the meeting by telephone.

Any lot owner or committee member who wishes to attend committee meetings or general meetings by telephone should approach their committee with their request. Should the owner's or committee member's request be refused they may choose to lodge a dispute resolution application with the Commissioner's Office regarding the matter. If the matter proceeds to adjudication the adjudicator will make an order based on the specific circumstances of each case.