Department of Justice and Attorney-General

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Common ground

Body Corporate and Community Management Newsletter

Issue 6
April 2011

Note from the Commissioner

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

The first quarter of 2011 has been a tough one for many and I would like to take this opportunity to extend our sympathies to those who have suffered loss and property damage due to the flood and cyclone events in Queensland.

Despite the virtual shutdown of the Brisbane CBD during the week of the 11—14 January, BCCM was able to maintain an emergency contact service. Callers with urgent issues were diverted to our mobile telephone service, while routine enquiries were deferred until normal operations were resumed. Sufficient staff were on hand from Friday 14 January to resume business as usual.

BCCM has received 27 applications in relation to flood issues; 13 for adjudicator's orders authorising emergency expenditure for flood damage repairs, and 14 seeking orders to reduce the notice period to call a body corporate general meeting to deal with issues arising from the January floods. On average these applications have been determined in less than four days. We expect to continue to receive flood related applications for some time to come.

Many of the callers to our information service in the weeks after the floods had questions arising from inundation of their schemes. In response to this we have posted information on our website for flood affected community titles schemes.

In this newsletter we've also included information concerning the 'top three' questions we receive through our information service.

I hope you find the information in this newsletter useful.

Robert Walker

Commissioner

In this issue

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Amendments to the Body Corporate and Community Management Act

The Body Corporate and Community Management and Other Legislation Amendment Bill 2010 was passed by the Queensland Legislative Assembly on 6 April 2011.

The Bill contains amendments to 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 factsheet and website content expected to be available in May. They will also be the focus of our annual seminar series to be held in May. (See story on page 7 of this edition.)

Flood and disaster recovery issues

The responses to these frequently asked questions are provided for information only and do not constitute legal advice.

Is the damage covered by insurance?

The body corporate is required to hold property insurance. However, many insurance policies do not cover flood damage. The insurance policy may also require the body corporate to take steps to minimise any damage.

Steps you should consider include:

- checking whether your insurance policy covers damage from major flood events
- contacting your insurer or broker to discuss any damage your property may have sustained
- documenting any damage including photos or videos of any damage; and
- cleaning up your property after the flood to minimise the extent of the damage.

Who will pay when insurance does not cover flooding?

Bodies corporate and their members will need to cover the costs of restoring the scheme to a good and structurally sound condition if the damage is not covered by insurance.

In general, lot owners will need to individually cover the costs of fixing their own lot. Owners will also need to contribute, according to their lot entitlements, for the costs incurred by the body corporate in fixing areas for which the body corporate is legally responsible.

Significant differences in the extent of the body corporate responsibilities occur depending upon whether the lot boundaries are defined by survey pegs (group titles plan/standard format plan) or by the walls of the building (building units plan/building format plan). If the lot boundaries are defined by the walls of the building then the body corporate is likely to be responsible for the exterior of the building and for all doors and windows in those external walls.

The Financial Ombudsman Service (FOS) may be able to assist in relation to issues with insurers. You can contact the FOS on 1300 780 808, visit the FOS website, or email them.

What if the building is no longer structurally sound?

If a building is determined to be structurally unsound and is located within the boundaries of lots that are defined by survey pegs (group titles plan/standard format plan), then individual owners will normally be individually responsible for that part of the building that is within the boundary of their lot. Any common walls will be the responsibility of both adjoining owners.

If separate units are located within building walls that also define the boundaries of the unit (building units plan/building format plan) then the body corporate is likely to be responsible for maintaining the foundations, roof, and load bearing walls in a structurally sound condition.

What if the scheme is so badly damaged it needs to be redeveloped or terminated?

All owners may enter into an agreement to allow for a scheme to be terminated or redeveloped.

If there is even one owner who expresses a reasonable preference in favour of rebuilding the scheme rather than terminating the scheme then all owners must proceed to rebuild the scheme. However, an application may be made to the District Court for a determination that the circumstances are such that it is just and equitable to terminate the scheme despite the objections of some owners.

What if I can't pay the costs of fixing the building?

Any owners who cannot afford to fix their own lots and contribute to the costs of the body corporate fixing common property are obviously in a very difficult situation. This is especially so if these owners cannot sell their lot at a price that covers the amount they have borrowed to purchase the lot.

However, owners should consider the consequences if they are ultimately unable to meet their share of the repair costs. Lot owners may be liable for additional penalties and costs if they do not pay body corporate contributions as they fall due. You can visit the Queensland Body Corporate and Community Management Commissioner (QBCCMC) – Adjudicators Orders web page or the Australian Legal Information Institute (Austlii) website to read an example from the Q1 scheme.

Liabilities could also arise if the failure to undertake repairs contributes to further damage suffered by others.

Depending on the circumstance, some government financial assistance may be available, visit the federal government disaster assist website to learn more.

How long can we take to fix our lots?

The body corporate has a statutory duty to act reasonably and perform certain maintenance duties. The body corporate will be in breach of this statutory duty if it fails to rectify maintenance problems within a reasonable time of becoming aware of the problems. The QBCCMC order from the Amelia Place scheme provides an example.

Some bodies corporate may face difficulties in obtaining qualified tradespersons to perform repairs after significant flood events. It may be prudent for individual owners to take an active interest in assisting their body corporate to fix damage as soon as possible. This would avoid owners subsequently having to contribute to potentially substantial damages payments to anyone who suffered loss as a result of any unreasonable delay in the body corporate performing necessary repairs. The Magog (No. 15) Pty Ltd vs The

Body Corporate for the Moroccan [2010] QDC 70 provides an example.

Individual owners also have similar duties in respect of their own units. Therefore, it would be prudent for an owner to consider whether delays in fixing their own unit will result in someone else suffering loss or damage.

What if I am suffering loss because owners are not fixing the scheme?

Individual owners and the body corporate made up of those owners have statutory maintenance duties for the scheme. If you believe you are suffering loss because these statutory duties are not being complied with then in the first instance you should contact owners or committee members to discuss what action is proposed. There are likely to be some steps that you can take to minimise your loss or to suggest particular maintenance actions that could be taken.

Initially, you should make an application for conciliation. If necessary, you may wish to lodge an application with the BCCM Office. You may also wish to seek independent legal advice.

What if the committee wants to engage tradespersons to perform urgent work but the cost of this work is above the committee spending limit?

If urgent work that is going to cost more than the committee spending limit is required, and there is insufficient time to call a general meeting to authorise the spending, then an application for adjudication can be lodged with the BCCM Office seeking authorisation for the body corporate to engage in emergency expenditure. It is preferable that a copy of a resolution confirming that the majority of committee members support making the application is attached to this application. Ideally, at least two written quotations will also be attached. The BCCM Office will deal with these applications on an urgent basis.

What if the body corporate needs to perform maintenance work but the majority of owners vote against the body corporate performing this work?

If owners vote against the body corporate performing work that you consider to be necessary then you may wish to lodge an application with the BCCM Office seeking to require the body corporate to perform the work. It is preferable that minutes of a meeting showing that owners voted against performing the work is attached. If the work will cost more than the committee spending limit then an adjudication application is likely to be more appropriate than a conciliation application. It is preferable that you provide a detailed description of how you have attempted to resolve the issue and the circumstances of urgency relating to the matter.

Recent decisions – 'Pets and Debts'

Pet by-laws

A by-law prohibiting cats and dogs within a high rise scheme has been overturned recently by the QCAT Appeal Tribunal.[1] Following this decision, adjudicators have subsequently overturned by-laws with arbitrary restrictions on the number of pets[2] or size of pets[3] able to be kept in a unit.

These decisions have a common theme regarding limits on the ability of a body corporate to prohibit the normal residential activity of keeping pets when, in many cases, it would be possible for the pets to be kept in circumstances that did not interfere with other residents' ability to enjoy living in the scheme.

Most recently, in Seachange Retirement Village[4] an adjudicator referred to the above decisions and commented:

> *By-laws that impose blanket bans or arbitrary limits on the keeping of pets are unreasonable.*
>
> *It is reasonable to require pet owners to obtain committee approval to keep a pet and there are numerous reasonable conditions the committee can impose on the keeping of pets to minimise the risk of pets causing a nuisance to residents of a scheme.*
>
> *Ultimately, if the pet does cause a nuisance to other occupiers then it will have to be removed from the scheme.*

Example cases

[1] McKenzie v Body Corporate for Kings Row Centre CTS 11632 [2010] QCATA 57

[2] Vantage [2011] QBCCMCmr 69

[3] Riverside Park [2011] QBCCMCmr 5

[4] Seachange Retirement Village [2011] QBCCMCmr 94

Debt disputes

What are debt disputes?

In a recent decision relating to the Q1 scheme, an adjudicator said that the following were clearly debt disputes that an adjudicator would not determine:

- Claims for overdue contributions, penalties and recovery costs.
- Claims for amounts spent by the body corporate in repairing damage caused by the owner.
- Claims for amounts an owner has agreed to pay for the supply of services by the body corporate to the owner.
- Claims for amounts the body corporate has spent on carrying out work that an owner was obliged to carry out.
- Claims for amounts an owner is required to pay under an exclusive use by-law.

A body corporate can lodge a conciliation application in relation to the claim. However, for an order requiring payment of the amount, the body corporate would need to start a claim in a court or, for amounts of $25,000 or less, in QCAT (Act, 229A)). If the body corporate is including unliquidated recovery costs as part of the claim then owners should pass a special resolution to authorise the proceedings (Act, 312). However, a committee resolution is sufficient if the claim is for a liquidated amount and the anticipated spending by the body corporate in pursuing the claim is below the committee limit.

What are related disputes?

A related dispute to a debt dispute might be:

- An owner challenging the existence of an alleged maintenance obligation related to a claimed debt.
- An owner challenging the reasonableness of a resolution relating to a claimed debt.

An owner affected by a related dispute may want to lodge a conciliation or adjudication application with the BCCM Office. Recent decisions have indicated that adjudicators will determine these related disputes[2] (Vardon Point Apartments [2011]), but that QCAT has no jurisdiction to hear these related disputes where the body corporate had not yet lodged a claim seeking to recover the alleged debt[3] (Randall vs Body Corporate for Runaway Cove Bayside [2011]).

However, any conciliation or adjudication process related to a debt dispute might need to come to an end if the body corporate does lodge a claim seeking recovery of the debt in QCAT and the matters are so closely related that the issues should all be determined together.[4] (Q1 [2010]).

Disputes about levy contributions

The most common debt disputes and related disputes concern outstanding levy contributions. In the Q1 decision[5] the adjudicator recognised the very clear legislative intention to motivate owners to promptly pay amounts claimed by their body corporate or risk very significant penalties in terms of lost discounts, penalty interest and indemnity recovery costs.

The adjudicator said the obvious steps for the owner to take to avoid spiralling recovery costs and penalty interest are to:

1. Pay the amount requested;
2. Simultaneously write to the committee seeking clarification of how the amount was calculated and, if there are any special reasons for doing so, requesting that the committee agree to waive penalties and recovery costs (or reinstate discounts); and
3. If necessary, subsequently lodge a conciliation or adjudication application seeking reimbursement of any amounts they had overpaid.

If the owner cannot pay the disputed amount then an owner could still lodge a conciliation or adjudication application. However, this application could be rejected or dismissed if the body corporate lodged a claim in QCAT or a court seeking payment of the amount in question. Owners who need to sell their unit because they cannot afford to pay their contributions should be aware that significant penalties and recovery costs can be incurred very rapidly. Should owners have financial difficulty, these owners might wish to obtain independent financial and legal advice, seek to borrow enough to pay the contributions, and write to the committee asking for a suspension of recovery action pending the sale of their unit.

Frequently Asked Questions

The following are the top three frequently asked questions we receive at 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. 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 adjudicator's 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 cause of the callout is 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.

New fact sheet – 'Authorising spending'

Each year the body corporate must prepare an administrative and sinking fund budget for consideration at the annual general meeting.

The inclusion of an item of expenditure in an adopted budget is not, of itself, authority for the expenditure. Body corporate expenditure must be authorised by the body corporate, either at a general meeting or by the committee which may authorise expenditure within its authorised limit.

The Commissioner's Office Information Service recently added a new fact sheet to the list of publications available from our website. The fact sheet titled Authorising spending explains the process the committee or the body corporate must follow before spending body corporate funds. The fact sheet also includes a flowchart showing the committee's process for authorising spending and a similar flowchart for body corporate authorisation.

The legislation places an automatic restriction on the amount of spending that may be authorised by a committee. However, the body corporate can decide to change this to any amount that it deems appropriate. For example, the body corporate may decide that the committee should be authorised to spend more than the limit set by the legislation.

The legislated limit is called the 'relevant limit for committee spending'. The Body Corporate and Community Management (Standard Module) Regulation 2008 (the Standard Module) defines this as the amount set as the relevant limit for committee spending by ordinary resolution of the body corporate; or if no amount is set, an amount worked out by multiplying the number of lots in the scheme by $200.

There are similar limits set for spending by the body corporate. This limit is called the 'relevant limit for major spending' and is defined in the Standard Module as the amount set as the relevant limit for major spending by ordinary resolution of the body corporate; or if no amount is set, the lesser of either $1,100 times the number of lots, or $10,000.

If the body corporate is considering a proposal that involves spending above its limit for major spending, then at least two quotes should be obtained.

A body corporate committee may only give effect to a proposal involving spending above the committee's limit if:

- the spending is specifically authorised by ordinary resolution of the body corporate; or
- all lot owners give written consent; or
- an adjudicator authorises emergency expenditure under the dispute resolution provisions of the Body Corporate and Community Management Act 1997.

Improvements to the common property are also subject to spending limits and, depending on the amount, may be authorised by the committee or the body corporate. Again, depending on the total cost, body corporate approval may be given by ordinary resolution or special resolution.

For more information on authorising spending, or to obtain a copy of the fact sheet, call the BCCM office on freecall 1800 060 119, email bccm@justice.qld.gov.au or visit our website

2011 Seminar Series

The BCCM Office's annual seminar series will be held this year in May. Details of the seminars are as follows:

9 May: Holiday Inn 121-123 The Esplanade and Florence Street, Cairns, 10am - 12pm

10 May:Jupiters Townsville Hotel & Casino Sir Leslie Thiess Drive, Townsville 10am-12pm

12 May: Currumbin RSL Currumbin Creek Road, Currumbin 10am-12pm

20 May: Kedron-Wavell Services Club 375 Hamilton Road, Chermside South 10am-12pm

26 May: Carina Leagues Club 1390 Creek Road Carina 10am-12pm

30 May: Maroochy Surf Club 34-36 Alexandra Parade, Cotton Tree, Maroochydore 10am-12pm

This year's seminars will be focusing on the recent amendments to the *Body Corporate and Community Management Act 1997*