Department of Justice and Attorney-General

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Common ground

Body Corporate and Community Management Newsletter

Issue 8
April 2012

Welcome to the 8th issue of Common Ground and the first edition for 2012.

This year is shaping up to be a memorable one for the Office of the Commissioner for Body Corporate and Community Management as we mark the 15th anniversary of the creation of the BCCM Office. The commencement of the *Body Corporate and Community Management Act* on 13 July 1997 marked the transition from the Referee's Office under the Building Units and Group Titles Act 1980 to the Commissioner's Office under the *BCCM Act.*

This milestone will provide us opportunities to recognise our considerable achievements in delivering dispute resolution services and an education and information service to the community titles sector.

New practice directions for the dispute resolution service

In early April, I will issue 11 new practice directions for internal dispute resolution and the dispute resolution service. The new practice directions will join the 22 practice directions issued in 2009.

Practice directions may be made by the commissioner pursuant to section 233 of the *Body Corporate and Community Management Act 1997.*

The 11 new practice directions cover a range of issues including internal dispute resolution, debt disputes, the process for seeking authority for alternative insurance arrangements, complex disputes and standing of parties. Once issued, the practice directions will be available on the department's website at www.bccm.qld.gov.au.

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Contact us

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Information seminars

I am pleased to announce details of the BCCM Office's 2012 body corporate information seminars. The seminar program will be conducted around the State in late April and early May 2012.

As well as providing general information about bodies corporate and how to avoid and resolve disputes, the free seminars will also give an overview of the *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (the two-lot module) which commenced on 28 February 2012, and the 11 new practice directions mentioned above. Current and prospective owners, occupiers, committee members, and anyone else involved in community titles schemes, are invited to attend.

Details of the seminars are as follows:

Sunshine Coast *(Maroochydore)*
Date Monday 23 April 2012
Time 10.00 am – 12.00 pm
Venue Maroochy Surf Club,
36 Alexandra Parade

Gold Coast *(Currumbin)*
Date Friday 27 April 2012
Time 10.00 am – 12.00 pm
Venue Currumbin RSL,
Currumbin Creek Road

Cairns
Date Monday 30 April 2012
Time 10.00 am – 12.00 pm
Venue Holiday Inn, Cnr The Esplanade &
Florence Street

Townsville
Date Tuesday 1 May 2012
Time 10.00 am – 12.00 pm
Venue Jupiter's Townsville Hotel,
Sir Leslie Thiess Drive

Brisbane Southside *(Carina)*
Date Thursday 3 May 2012
Time 10.00 am – 12.00 pm
Venue Carina Leagues Club,
1390 Creek Road

Brisbane Northside *(Chermside)*
Date Friday 4 May 2012
Time 10.00 am – 12.00 pm
Venue Kedron Wavell Services Club,
375 Hamilton Road

Please email the Commissioner's Office on bccm@justice.qld.gov.au or call (07) 3227 7899 for more information or to register your interest in attending one of these seminars.

Of course you don't need to wait for a seminar to get more information on body corporate issues. Our website has a wide range of publications and online training modules. Our knowledgeable Information Service staff can also respond to individual queries about the body corporate legislation on free call 1800 060 119 or in writing.

Robert Walker
Commissioner

Recent decisions

Debt recovery

Penalties even when contribution notice not received

The recent QCAT decision of Nut Tree Hill confirms that owners need to be proactive in paying their body corporate contributions. The owner had always paid her contributions on time but was liable to penalties for late payment after she had failed to receive her contribution notice in the mail. QCAT said that it should have occurred to the owner to ask the body corporate why she had not received the notice. (Body Corporate of Nut Tree Hill CTS 27771 v Lilley [2012] QCAT 23).

Similarly, a QCAT appeal decision denied an owner relief from penalties and recovery costs imposed due to late payment of levies (Molier v Body Corporate for Q1 CTS 34498 [2012] QCATA 8). In the original decision (Q1 [2010] QBCCMCmr 433), the adjudicator recognised the significant penalties in terms of lost discounts, penalty interest and indemnity recovery costs showed a very clear legislative intention to motivate owners to promptly pay amounts claimed by their body corporate.

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.

The body corporate should ensure recovery costs are reasonable

The Nut Tree Hill decision above also stated the body corporate should monitor all recovery costs and ensure that any of these costs are reasonably incurred. The body corporate was ultimately prevented from recouping any recovery costs because it had not even phoned the owner to alert her of the arrears before engaging a debt recovery agent and starting to incur significant recovery costs.

Consent of the body corporate to development applications

An owner of a unit in Inn Cairns wanted to apply to the local council for permission to use his unit as a dwelling instead of having it limited to holiday letting. This owner required body corporate consent to make this 'change of use' application to the council, because the area covered by application included the owner's exclusive use carpark. However, the use of the carpark itself was not going to change. QCAT said the committee could provide this consent without the need for a general meeting, because the decision did not change rights, privileges or obligation of owners (Rakaia Pty Ltd v Body Corporate for Inn Cairns).

New regulation module for two-lot schemes

The *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (the Two-lot Module) commenced on 28 February 2012.

The Two-lot Module provides simplified regulations for the management of residential two lot community titles schemes. To achieve this, the module removes some of the more complex arrangements included in the Standard, Accommodation, Commercial and Small Schemes regulation modules (the original modules).

For example, under the Two-lot Module there will not be a committee and there is no requirement for the body corporate to have general meetings. The body corporate, the owners of the two lots operating under the Two-lot Module, simply makes decisions by lot owner agreements. The written lot owner agreements must stipulate the date the agreement was made including details about the matters agreed upon and must be signed by the lot owners.

Lot owners may appoint a representative to act on their behalf. The representative has

the same functions and powers of the lot owner, however, the representative must give the owner of the other lot a copy of the instrument that authorises the representative's capacity.
The financial management of two-lot schemes has also been simplified. The body corporate under the Two-lot Module is not required to formulate and adopt budgets at a general meeting like a body corporate under the other regulation modules, but may decide on agreed body corporate expenses by lot owner agreement. The lot owners, when deciding on an agreed body corporate expense, may also agree on the dates by which any contributions must be paid.

Regardless of which regulation module a scheme operates under, there will be times when a lot owner does not pay a contribution. Under most circumstances, a body corporate committee operating under one of the original modules would commence proceedings to recover the contribution as a debt.

However, under the Two-lot Module, there is no committee.

The Two-lot Module defines a lot owner who fails to pay a contribution as **the defaulting owner** and the lot owner who does pay the contribution as **the contributing owner**.

The Two-lot Module provides that the contributing owner may recover the amount, including any penalty and reasonable costs from the defaulting owner. The contributing owner may start proceedings on behalf of the body corporate to recover the contributions and any prescribed amounts.

Improvements to the common property, whether they are improvements by the body corporate, or a lot owner or even improvements to an exclusive use area may be approved by lot owner agreement.

The body corporate under the Two-lot Module is still responsible for insurance of the common property. Regulations relating to the insurance of building format plans and standard format plans remain the same as for schemes under the original modules. The body corporate of a scheme recorded as a building format plan must insure each building for the full replacement value and the body corporate of a scheme recorded as a standard format plan where a building on one lot has a common wall with a building on an adjoining lot, must insure each building for the full replacement value.

This has been a very brief snapshot of the new Two-lot Module. The Commissioner's Office information service has produced a fact sheet on the Two-lot Module which takes a more extensive look at the regulations. The fact sheet is available at; www.bccm.qld.gov.au and if you have any questions the information service can be contacted on phone 1800 060 119.

Terminating community titles schemes

An issue that has been the subject of musings around the strata and community titles industry across Australia for many years is the termination of schemes. It is a popular subject at industry conferences, and one legal commentator recently described it as the 'trendy' topic for law reform this year. It is important, then, that this debate is founded on a clear understanding of the current legislation.

Modern buildings are considered to have a finite lifespan, particularly when actively used for income-generation like tourist accommodation. In an industry that began in the sixties, some older community titles buildings may be approaching the end of their useful life. So owners may be increasingly faced with the alternatives of rising maintenance costs and decreasing property values, or significant redevelopment.

For some, the option to sell their entire building to a developer, perhaps with the opportunity to buy into the new development, is attractive. For others, the prospect of being pressured to sell their home or significant investment is daunting. Along with those individual considerations, there are broader issues such as sustainable building design, safety, and facilitating higher density buildings consistent with current planning frameworks. There are also questions of whether inadequate maintenance is shortening the lifespan of buildings.

The dissolution of the body corporate and termination of the scheme, whether to allow a redevelopment or not, may be a viable option in some cases. What has been debated for some years is the process of deciding whether a scheme should be terminated.

Should 'majority rules' be sufficient or must everyone agree?

There is concern about the requirement for a resolution without dissent to approve a termination. Some commentators object to a single owner being able to stymie the interests of the majority and even urban renewal for the local area. The process of trying to get everyone to agree can be time-consuming, and so less attractive to developers. There is also concern that buildings are left to fall into disrepair while a termination is contemplated.

Many in the industry point to alternative regimes in other countries, where a majority of 80% for a resolution to terminate is commonly required. Others argue even 80% is too much. Singapore is an oft-cited model. Its threshold is 80% for older buildings and 90% for newer buildings, with a tribunal to safeguard minority rights. However, the Singapore regime has apparently generated considerable dispute.

While there are undoubtedly complex issues involved in the termination debate, it is not clear that there is a full appreciation of the processes currently available in Queensland. *Sections 76 to 81* of the *Body Corporate and Community Management Act 1997* provide for the termination of schemes in Queensland. There are in fact two mechanisms for the termination of a scheme.

The first is that the body corporate resolves to terminate the scheme by a resolution without dissent. The owners and lessees must also enter into an agreement about termination issues, if it is necessary for the effective termination of the scheme.

However, a resolution without dissent is not the only option.

A scheme may also be terminated if the District Court decides it is 'just and equitable' to make a termination order. A body corporate, an owner, or an administrator may apply to the court for a termination order, and the court may take into account the views of owners, local government and any urban land development authority.

There is no legislative limitation on what the court may or may not consider when deciding if a termination is 'just and equitable'. Presumably the court could terminate a scheme notwithstanding the opposition of a minority or one person, or 10% of owners, or 20% of owners, or even more. Rather than an arbitrary threshold, a decision that is 'just and equitable' allows an analysis of the competing interests in the particular circumstances. There is also no requirement to have tried and failed to achieve termination through a general meeting (although if the body corporate was the applicant it would require a special resolution to authorise the proceedings).

The extent to which there are schemes where a majority of owners want to terminate, but are unable to under the current legislation, is unclear. Termination issues are rarely mentioned in dispute resolution applications in the Commissioner's Office. Similarly, enquiries to the Commissioner's Information Service seldom ask about termination (other than in duplexes where the owners are interested in operating independently). Moreover, a search of reported Queensland District Court decisions reveals no cases about attempts to terminate a scheme. So, there is little evidence of a current problem – although by its nature it is one that may increase with time.

Some commentators dislike the prospect of court-ordered termination, presumably because of the time and cost involved. However, it is not evident that a District Court case would necessarily be more difficult than, for example, the multi-stage Singaporean process.

The lack of Queensland termination cases also means there is no case law on when the District Court would consider a termination to be 'just and equitable'. In New South Wales, where the alternative to a unanimous resolution is Supreme Court proceedings, there are apparently few contested terminations and so similarly little case law. Arguably, until the process of court-ordered terminations is properly tested, there is no reason to believe the current legislative provisions are inadequate.

Regardless of the approach to termination and redevelopment, it is important for all community titles schemes – and particularly older schemes – to be proactive in maintenance. This will assist in maximising the longevity of buildings.

The Queensland legislation establishes the maintenance obligations of both owners and bodies corporate. It requires schemes to

have a sinking fund for non-recurrent expenditure including the body corporate's maintenance obligations, and to set contributions based on an assessment of the scheme's predicted non-recurrent expenditure requirements for the following 10 years. The requirement for 10 year planning creates an expectation of independent forecasting that is regularly reviewed.

Of course, the extent to which these provisions ensure that buildings are properly maintained depends on compliance. It is incumbent on all involved with a community titles scheme to ensure maintenance is undertaken and that the sinking funds are adequate. If individuals are concerned about non-compliance in this regard they should take action to challenge their body corporate.

For further information on the legislative provisions regarding termination or maintenance, contact the Commissioner's Office Information Service on freecall 1800 060 119 or www.bccm.qld.gov.au.

Frequently asked questions

Q **The secretary is continually telling the body corporate manager to call committee meetings without asking the other committee members. Can the secretary do this?**

A The simple answer is no. While section 44 of the Standard Module does state that the secretary, or in the secretary's absence the chairperson, may call a committee meeting, there have been a number of adjudicator's decisions that have examined these provisions. In the matter of Sani Villa [2000] QBCCMCmr 491 (28 September 2000) the adjudicator said:

"This section does give the secretary, or in that persons absence, the chairperson, the authority to call a meeting of the committee. However, the section must be interpreted in the context of the role and purpose of the committee, and the role and power of the secretary within the committee.

The committee is the group of individuals entrusted with the day to day operation and management of the body corporate. Although there are certain specified roles within the committee, the committee is not a hierarchal structure, with the secretary at the apex. Rather it is intended to have an egalitarian or democratic structure where the vote of each member of the committee is of equal value. Whilst there are three executive positions within the committee, these positions are not intended to denote power or authority within the committee, but rather, are intended to provide for the functioning of the committee, and the wider operation of the body corporate.

In this context, it is not intended that the secretary have the power or authority to unilaterally declare when meetings of the committee are to be held. Often, the timing of the next committee meeting is discussed at the preceding committee meeting, and members are able to indicate their availability. Alternatively, before calling a meeting of the committee, the secretary should approach fellow committee members to seek consensus as to when a meeting should be held, and if in fact a meeting need be held at all. Additionally, the secretary should seek the submission of agenda items (if any) from other committee members."

Q **After a recent storm, the roof leaked and water entered my unit causing extensive damage. The body corporate has advised me that we are a building format plan and accordingly accepted responsibility for the roof. However, the body corporate has told me that while most of the damage will be covered by the building insurance it won't cover damage to my carpet. They say I should make a claim against my contents insurance. Is this right?**

A The Body Corporate has quite correctly accepted responsibility for the roof and has made a claim to its insurer to repair the damage to your lot. However, the legislation stipulates that body corporate building insurance does not include floor coverings. The question then arises; if the building insurance will not cover the replacement of the carpet can the body corporate insist that the lot

owner make a claim against their own contents insurance?

This particular scenario was the subject of a dispute resolution application lodged with the Commissioner's Office. The adjudicator in Beaumont [2009] QBCCMCmr 240 (29 June 2009) said:

"Certainly owners are responsible for insuring their own property, but that is to indemnify them for damage or loss that is their own responsibility or for which liability cannot be claimed from the person responsible (such as a theft). They are not required to be insured to cover them for damage caused by or which is the responsibility of the Body Corporate….

Therefore, regardless of whether or not the Body Corporate has insurance which covered the relevant event or damage, or whether the applicant had insurance which covered the relevant event or damage, the Body Corporate is responsible for the damage. While the applicant may have chosen to claim under their own contents insurance, this could have had an adverse impact on their claim rating or future premiums. The onus was on the Body Corporate to rectify the damage itself, or pay the applicant for the cost of the rectification. It was an entirely separate matter, beyond the interest or responsibility of the applicant, whether the Body Corporate was able to recover any of the costs of the work."

Q **I've heard from my neighbour that new regulations say we can't have "No pets" by-laws. Can you tell me what the regulations say?**

A There are no new regulations about "no pets" by-laws. What your neighbour may have been referring to are recent decisions made by the Queensland Civil and Administrative Tribunal (QCAT).

A number of appeals to the QCAT have resulted in the tribunal overturning by-laws which had a blanket ban on cats and dogs or by-laws which are seen to be too restrictive. Subsequent to these decisions, adjudicators from this office have determined that by-laws with arbitrary restrictions on the number of pets or that impose blanket bans are unreasonable and have ordered that the by-laws be either removed or changed.
Adjudicator's consider that it is reasonable to require pet owners to obtain committee approval to keep a pet and for the body corporate to apply reasonable conditions on the keeping of pets.

Naturally, if any pet does cause a nuisance to other occupiers then the committee can seek to have it removed from the scheme.

Management Rights Discussion Paper

The Office of Fair Trading has released a discussion paper seeking submissions regarding the current state of management rights in Queensland. Feedback is also sought on the effectiveness of legislative obligations on developers as original scheme owners when establishing management rights. The paper also discusses legislative protections, powers and remedies provided to bodies corporate and their lot owners. Interested individuals and organisations are invited to make a written submission on the discussion paper.

Submit your feedback via:

Email:
managementrightsreview@justice.qld.gov.au

-or-

Mail: Management Rights Review
Office of Regulatory Policy
Department of Justice and Attorney-General
Locked Bag 180
City East QLD 4002

Submissions close 5 pm, Tuesday 8 May 2012.

Further information may be found at http://www.fairtrading.qld.gov.au/management-rights-in-community-title-schemes.htm.