

Common ground



Body Corporate and Community Management Newsletter

Issue 5

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Note from the Commissioner

I am pleased to introduce myself to *Common Ground* readers as Commissioner for Body Corporate and Community Management, having commenced in the role in April.

I came to the position with some 20 years experience in the Queensland public sector. Most recently I have held the position of Assistant Director, Complaints Services with the Crime and Misconduct Commission. I am a barrister and have also previously worked as a senior legal officer for the Director of Public Prosecutions and the Crime and Misconduct Commission, and have worked with the Dispute Resolution Branch of the Department of Justice and Attorney-General.

As I near the end of my first six months as Commissioner it is gratifying to be able to say that I have found myself in a well functioning organisation delivering excellent service to the community titles industry in Queensland. Confirmation of that view can be found in the information presented below in our 2009-2010 overview. In that regard I acknowledge the efforts of all of the staff of the BCCM Office and I pay particular tribute to Ms Ingrid Rosemann, who very capably acted as Commissioner before me.

I look forward to working with the team here in the Office of the Commissioner for Body Corporate and Community Management (BCCM Office) to continue to deliver the highest standards of service.

Robert Walker
Commissioner

In this issue

- 2009-10 Overview
- Office relocation
- Debt dispute changes
- Significant decisions
- Frequently asked questions
- Only in America

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2009-10 OVERVIEW

The past financial year was another busy and successful year for the Office of the Commissioner for Body Corporate and Community Management (the BCCM Office).

Stakeholders often have questions about what we do, how many disputes we deal with, what the disputes are about and the information and services we deliver to the sector.

This article takes the opportunity to provide readers with an overview of the BCCM Office's services and a summary of our achievements in 2009-10.

Role of the office

The BCCM Office is established under the *Body Corporate and Community Management Act 1997* to provide dispute resolution, information and education services to the community titles sector.

Information services and products

The BCCM Office provides the community with a range of information to help body corporate participants understand their rights and responsibilities. In 2009-10 we continued to provide high quality information products and services such as the new *Body corporate: a guide to community living in Queensland*.

Our information service responded to over 27 000 client contacts in 2009-10, an increase of over 12 per cent from 2008-09. Of these, 47 per cent of callers to the information service were lot owners.

The top five issues for callers were body corporate committees, maintenance and improvements, dispute resolution, general meetings and by-laws.

The information service held a number of free seminars throughout the state during May and June 2010. The seminars, conducted from Cairns to the Gold Coast, were well attended by audiences comprised mainly of lot owners and committee members with a few representatives of body

corporate managers and caretaking service contractors.

This year the seminar topics included body corporate spending focussing on committee spending and major spending, the sustainable housing initiatives which commenced on 1 January 2010 and the conciliation service provided by the BCCM Office.

The sustainable housing initiatives, which were the subject of our February article in *Resort News*, were of particular interest to the seminar audiences. The overall consensus was that bodies corporate need to review their policies about the installation of energy efficient devices such as solar hot water systems and photovoltaic cells.

Interestingly, there have been very few applications concerning disputes over such installations lodged with the BCCM Office since the sustainable housing initiatives came into effect.

Feedback from the seminars was very positive and audiences, particularly those in the northern parts of the state, were pleased to have access to a representative from the BCCM Office during and after the seminars.

Dispute resolution services

With shared decision making and close proximity of owners and occupiers, it is inevitable disputes will arise within bodies corporate from time to time. However, the good news is that in the vast majority of cases, bodies corporate are able to resolve problems without the need for intervention by the BCCM Office. In 2009-10 we received over 1300 dispute resolution applications, an increase of just over four per cent on the applications lodged in 2008-09.

The BCCM Office also resolved over 1300 applications, an increase of more than six per cent on the previous year. Among the top issues in those applications were maintenance, general meeting motions and procedures, pets, by-laws and owner improvements.

Our conciliation service, established in 2006-07 continues to achieve great results.

In 2009-10, 75 per cent of conciliation applications were resolved by agreement and over 89 per cent of conciliation applications did not go on to adjudication, suggesting conciliation effected a lasting resolution of those disputes.

OFFICE RELOCATION

On 26 July 2010 the BCCM Office commenced operating from new offices on level 4 of the Brisbane Magistrates Court at 363 George Street, Brisbane.

All other contact details remain the same and are as follows:

Postal address	GPO Box 1049 Brisbane QLD 4001
Telephone	Toll Free: 1800 060 119 Fax: (07) 3227 8023
Online	Email: bccm@justice.qld.gov.au Web: www.justice.qld.gov.au/bccm

DEBT DISPUTE CHANGES

A recent amendment to the *Body Corporate and Community Management Act 1997* clarifies the jurisdiction of the BCCM Office regarding debt disputes and related disputes.

Prior to 2009 it was considered BCCM Adjudicators had no jurisdiction regarding debt disputes. However a decision in late 2009 called this view into question.

The issue has been addressed in Part 3 of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* which creates section 229A of the *Body Corporate and Community Management Act 1997* (the Act) and amends related provisions. The amending Act was passed on 13 August 2010 and the amendments

commenced operation on 1 September 2010.

Section 229A(7) of the Act provides that a debt dispute means a dispute between a body corporate for a community titles scheme and the owner of a lot included in the scheme about the recovery, by the body corporate from the owner, of a debt under the Act.

It is now made clear in section 229A(3) that an Adjudicator does not have jurisdiction in a debt dispute.

The body corporate may commence a proceeding to recover a debt through the Queensland Civil and Administrative Tribunal (QCAT) or a court of competent jurisdiction.

Under the new section 229A, debt disputes may still be the subject of an application to the BCCM Office for conciliation. However, if, after a conciliation application is made, a proceeding to recover the debt is started in QCAT or a court of competent jurisdiction, the dispute resolution process (conciliation) will end.

It is also important to note the Act now provides that a dispute resolution application which is related to a debt dispute may be rejected by the Commissioner or dismissed by an Adjudicator, if the related debt dispute becomes the subject of a proceeding in QCAT or a court of competent jurisdiction.

For example, a lot owner might lodge an application with the BCCM Office seeking a declaration that penalty interest associated with overdue contributions claimed by the body corporate is unreasonable (BCCM application). At the same time the body corporate might lodge an application with QCAT seeking an order that the owner pay \$500 in overdue contributions and penalty interest. The BCCM application may be rejected if the Commissioner considers that the disputes are connected in a way that makes it inappropriate for the BCCM application to proceed.

SIGNIFICANT DECISIONS

The following are some recent decisions that have relevance to many schemes.

Duty of care to maintain

In *MAGOG (NO. 15) Pty Ltd v. The Body Corporate for the Moroccan* [2010] QDC 70 (5 March 2010) the District Court found that, in addition to a statutory duty (under section 152 of the *Body Corporate and Community Management Act 1997* and the respective provisions of the regulation module) to maintain common property, a Body Corporate is also liable for any foreseeable losses that arise due to a breach of this statutory duty.

In this case a commercial lot suffered damage from water which penetrated the lot because of a failed waterproofing membrane. Leaking occurred over many years and caused a loss of rental income. The court found that the statutory duty arose from the time the first water leak arose and was breached by the Body Corporate failing to take reasonable and diligent action to rectify the leak. The court ordered the Body Corporate to pay damages for repairs to the lots as well as lost rent.

Newton DCJ said [paragraph 82]:

"In my view it is clear from the words of section 152 of the Act and section 109 of the Standard Module that there is an intention disclosed by the legislation for a duty of care to arise. A duty of care is owed by the Body Corporate for the benefit of lot owners and other users of the common property. The defendant had a duty to maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition. The duty to maintain a common property in good condition required the defendant to maintain and manage and control the common property so that water did not leak from the common property into Lot 1. This required the defendant to ensure that there was a waterproofing membrane in the common property above Lot 1 which prevented water from leaking into that lot."

The judge referred [paragraphs 83] to the NSW case of *Seiwa Pty Ltd v The Owner's Strata Plan 35042*, in which it was held that the duty to keep the common property in a 'state of good and serviceable repair' did not impose a duty on the body corporate to use 'reasonable care', to use 'best endeavours' or to 'take reasonable steps', but instead imposed a strict duty to maintain and keep the common property in repair. The court also found that the Body Corporate owed a common law duty to take reasonable care to avoid harm.

The effect of this decision is that a body corporate will be liable for any property damage arising from its failure to maintain common property, as well as any reasonably foreseeable economic loss that occurs. As such, a body corporate should ensure that it meets its statutory obligation to maintain common property in a timely manner.

The test for nuisance

In *Norbury v Hogan* [2010] QCAT (Unreported, Application Number KA007-09, 13 May 2010) the Queensland Civil and Administrative Tribunal discussed the test for nuisance under section 167 of the *Body Corporate and Community Management Act 1997*. In his decision, the president [at paragraphs 13 to 17] considered past judicial interpretation of the phrase "interferes unreasonably" and said:

"What is considered unreasonable depends on the prevailing circumstances in each case but the nuisance, these decisions show, needs to be an inconvenience that materially interferes with the ordinary notions of a 'plain and sober' person, and not merely the 'elegant or dainty' habits of the complainant: See Walter v Selfe (1851) 64 ER 849 at 851. ..."

The nuisance must result in a substantial degree of interference according to what are considered reasonable standards for the enjoyment of those premises: Oldham v Lawson (No 1) (1976) VR 654."

The president went on to say:

“In residential areas, the cases show, the principle of ‘give and take, live and let live’ is customarily applied so that the ‘ordinary and accustomed’ use of premises will not be considered a nuisance, even if some inconvenience to a neighbour is caused.”

The dispute related to the appeal of an adjudicator’s order, regarding the impact of cigarette smoke from a neighbouring balcony where the applicant had presented medical evidence of a particular sensitivity to smoke. The president referred the matter back to the Adjudicator to investigate whether it could be established that the smoke was “... of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity.” [paragraph 28].

Body corporate managers and records

In the decision in *Club Lodge* [2010] QBCCMCmr 223 (24 May 2010), an adjudicator found that contact details collected and retained by a body corporate manager, in the course of providing administrative services to a body corporate under its contract of engagement, were in effect collected for and on behalf of the body corporate. As such they were part of the body corporate’s records and subject to the legislative provisions regarding disclosure.

In this case, the body corporate manager had collected the contact details and alleged to withhold them from the committee on privacy grounds. The Adjudicator found that there was no basis in the body corporate legislation or the Commonwealth *Privacy Act 1988* that prevented the disclosure of these records. The decision also noted that, under *section 318* of the *Body Corporate and Community Management Act 1997* (prevention of contracting out), neither the body corporate nor the body corporate manager could rely on a term of a contract to avoid the legislative obligation to disclose body corporate records.

FREQUENTLY ASKED QUESTIONS

The following are a few of the commonly asked questions of 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. A secret ballot was conducted at our recent annual general meeting. There were a number of votes rejected and I wanted to inspect the ballot papers to confirm the reason for rejection. The body corporate manager has told me the secret ballot papers were sealed after the meeting by the returning officer and that I would need an adjudicator’s order to access them. Is this correct?

A. While the regulations require a returning officer to follow strict provisions when conducting a secret ballot, including opening and separating the ‘particulars’ envelopes from the ‘voting paper’ envelopes, nothing in the regulations or the BCCM Act require the secret ballot material to be sealed after the ballot is completed.

Section 205 of the BCCM Act provides general access to information from the body corporate records for all interested persons. Importantly, section 205(2) provides that the requested information must be given within seven days of receipt of the written request and the fee.

For a scheme operating under the Standard Module regulations, Chapter 9 Part 5 provides in part that, body corporate records include all minutes of general meetings and all associated general meeting material which includes written voting papers, ballot papers and secret voting documentation.

There is a penalty prescribed for failing to follow section 205 which means that proceedings could be commenced in the Magistrates’ Court which could result in the imposition of a fine.

Q. I recently sent a written request to our body corporate manager asking for copies of a number of body corporate documents. In my letter I asked the manager to advise me what the photocopy fees would be and I'd pay them when I collected the copies. He advised the photocopy fees were \$3.50 (7 pages at 50 cents per page) and \$55 for administration fees (the files have to be retrieved from archives). Can they charge me administration fees?

A. There is no provision for a body corporate or a body corporate manager to seek additional fees from the person requesting the photocopy. The application of 'administration' fees has been the subject of a number of dispute resolution applications lodged with the Commissioner's Office.

In order reference 0442-2001 the Adjudicator stated:

"The body corporate is not permitted to impose additional charges or fees on the provision of information to interested persons, or at least is not entitled to seek to recover those fees from such persons. If a manager, or other person, requires the payment of additional fees for the provision of information to interested persons, then this is a matter between the body corporate and the manager or other person providing the information on behalf of the body corporate."

The interested person being provided with the information is only required to pay a fee in accordance with the above quoted section of the standard module; namely .50 cents for each page of a record supplied."

Q. Our manager/caretaker is sending out letters to all owners asking them to vote for particular candidates in the committee election. Can he do this?

A. The dispute resolution service has dealt with a small number of dispute resolution applications where it was claimed lobbying had influenced the vote. In each case the Adjudicator either could not find or was not presented with any evidence to suggest that any lobbying which might have been done

prevented a reasonable person making an informed, valid vote.

The following is a quote from order Broadwater Tower [2008] QBCCMCmr 447 (28 November 2008). The full decision can be viewed at the following link: www.austlii.edu.au/au/cases/qld/QBCCMCmr/2008/447.html

*"Campaigning or **lobbying** is not specifically regulated by the Act or the Standard Module. Even so, this issue has been considered in the adjudication of previous dispute resolution applications. In Ipomoea Court [2007] QBCCMCmr 49 (30 January 2007), the Adjudicator stated: Each lot owner has 21 days' notice of the motions on the agenda. If he or she wishes to find out more about a motion, he or she may contact the proponent of the motion, or the committee. Lot owners may also canvass others to vote for "their" motion, or to vote in a particular way, and lobby before the meeting. In St. Tropez [2007] QBCCMCmr 445 (25 July 2007), the Adjudicator stated: if an owner disputes decisions made by the Committee majority, they should lobby owners to vote against the motions...It is then for owners to decide which approach they prefer. In Liberty [2008] QBCCMCmr 164 (8 May 2008), the Adjudicator stated there is nothing to prevent **lobbying** for the election of certain persons to the committee."*

ONLY IN AMERICA?

Reports of weird or excessive litigation from the Land of the Stars and Stripes often elicits the comment, 'only in America'. This is certainly the first thought that arises when reading the news headline "Florida man spends \$200K to win parking rights for his driveway".

It was alleged that when the man moved into his house in 1997 he was told that it was not against his subdivision's rules to park his utility truck in his driveway. Years later the homeowners' association claimed it did violate the rules and the truck needed to be removed.

A homeowner's association is similar to a principal body corporate in Queensland, with the subdivision association similar to a subsidiary body corporate.

The truck did not fit in the man's garage and so he refused. The homeowners' association then applied to sue him and a two-year court battle began. The man received a court decision in his favour in December 2008 but the homeowners' association appealed it. In March 2010 he won again, with an award of US\$187,000 in legal expenses. It was reported that the matter would end up costing the homeowners' association over US\$300,000.

The take home message from the Florida man's lawyer was that homeowners should be left alone unless it is a very serious issue, and that it made no sense to go to those lengths to prevent someone parking in their driveway.

Is this sort of dispute only likely in the U.S.A? Unfortunately not. The BCCM Office often sees disputes about relatively minor issues being pursued to great lengths by committees, owners and others involved in community titles schemes.

The BCCM Office regularly deal with disputes where some parties seem to lose their perspective about the importance of an issue, or the time and money involved in the fight to be proven 'right'.

Sometimes dissatisfaction with the result of one issue can lead to the escalation of disputes on other matters. Parties' pursuit of a 'principle' seems to distract from achieving an amicable and practical solution.

It is worthwhile for any person involved in a dispute to stop and consider the appropriate way to pursue a matter.

Parties should take into account the various options before pursuing the matter, including their chances of success and whether the outcome they seek warrants the financial and other costs involved.

The earlier in a dispute that parties communicate and negotiate in an open and constructive manner, the better chance they

have of avoiding a situation where significant time, energy and money is spent to the detriment of everyone involved.

To read this story yourself visit:

www.news.com.au/breaking-news/florida-man-spends-200k-to-win-parking-rights-for-his-driveway/story-e6frku0-1225898188531

and

www.myfoxtampabay.com/dpp/news/local/hillsborough/homeowner-wins-right-to-park-truck-in-own-driveway-072810.