Body Corporate and Community Management

Common Ground Issue 10

Welcome to issue 10 of Common Ground, our first issue for 2013. This year commenced with another round of extreme weather events which again have affected many Queenslanders including many community titles schemes.

In this issue of Common Ground we have included an article containing detailed advice for schemes dealing with flooding and storm damage.

Information Seminars

I am pleased to announce details of the BCCM Office's 2013 body corporate information seminars. The seminar program will be conducted around the State in late May and June 2013.

As well as providing general information about bodies corporate and how to avoid and resolve disputes, the free seminars will also focus on new disclosure requirements on the transfer of lots and debt recovery. Current and prospective owners, occupiers, committee members, and anyone else involved in community titles schemes, are invited to attend.

To register online for a seminar, please go to www.justice.qld.gov.au/bccm and click on the link in the images at the bottom of the main page.

If you can't access the internet, please email the Commissioner's Office on bccm@justice.qld.gov.au or call 07 3227 7899 to register your interest in attending one of the 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. And our knowledgeable Information Service staff can respond to individual queries about the body corporate legislation on free call 1800 060 119 or in writing.

Robert Walker
Commissioner

Seminar dates, times and locations

Date of Seminar	Time	Venue	Address of Venue
Tuesday 14 May 2013	10am–12pm	Kedron Wavell Services Club	375 Hamilton Road, **CHERMSIDE**, 4032
Tuesday 28 May 2013	10am–12pm	Pacific Golf Club	430 Pine Mountain Road, **CARINDALE**, 4152
Tuesday 4 June 2013	10am–12pm	Cairns Holiday Inn	Cnr The Esplanade & Florence Street, **CAIRNS**, 4870
Wednesday 5 June 2013	10am–12pm	Metropole Hotel	81 Palmer Street, **TOWNSVILLE**, 4810
Thursday 6 June 2013	3pm–5pm	Southport Sharks	Cnr Musgrave & Olsen Avenues, **SOUTHPORT**, 4215
Thursday 6 June 2013	7pm–9pm	Southport Sharks	Cnr Musgrave & Olsen Avenues, **SOUTHPORT**, 4215
Monday 17 June 2013	10am–12pm	Maroochy Surf Club	34-36 Alexandra Parade, **MAROOCHYDORE**, 4558

In this issue

1 Community Title Schemes affected by flooding and cyclonic conditions

The BCCM Office extends sympathy to those in community titles schemes who have suffered loss or damage as result of the floods and cyclonic conditions in Queensland.
Lot owners and anyone involved in a body corporate are encouraged to work together and to recognise the stress that others may be experiencing during this difficult time.

Clean-up

Lot owners and occupiers affected by flooding should consider the general flood clean-up options for their own lot and for common property areas. Local authorities such as the Brisbane City Council at www.brisbane.qld.gov.au are providing practical information for residents affected by the extreme weather events.

Damage

Frequently Asked Questions (FAQs) relating to rights and responsibilities where damage has occurred are set out below. You may also wish to refer to the fact sheet titled 'Maintenance' for more detail on maintenance responsibilities and the fact sheet titled 'Insurance' for more details on insurance responsibilities. The fact sheets are available by visiting: www.justice.qld.gov.au/bccm.

Please note that the following information provides a general guide only and does not purport to cover all issues or circumstances that may arise in regards to flooding. The body corporate legislation can be complex and qualifications may apply in different circumstances. The following information does not constitute legal advice. You are encouraged to obtain independent legal or financial advice if you are unsure of how the body corporate legislation applies to your situation.

FAQs:

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.

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. An example of this situation can be viewed on the Austlii website:
www.austlii.edu.au/au/cases/qld/QBCCMCmr/2010/433.html

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

Some government financial assistance may be available, for further information visit:
www.disasterassist.gov.au/queenslandfloods

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. An example of such a case is available by visiting:
www.austlii.edu.au/au/cases/qld/QBCCMCmr/2010/522.html

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 (eg. *Magog (NO. 15) Pty Ltd* v *The Body Corporate for the Moroccan* [2010] QDC 70. Available on the Austlii site mentioned above)

Individual owners also have similar duties in respect of their own units. Therefore, an owner would be prudent 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.

2 Body Corporate and Community Management and Other Legislation Amendment Act 2013

The Queensland Parliament recently passed the *Body Corporate and Community Management and Other Legislation Amendment Act 2013.*

The Act contains a number of important changes to the *Body Corporate and Community Management Act 1997* concerning lot entitlement changes and disclosure requirements on the sale of lots.

Ending the 2011 'reversion process'
The amendments bringing an end to the lot entitlement 'reversion process' established in 2011 are taken to have commenced on 14 September 2012 (the date the amendments were first introduced into the Parliament).

The 2011 amendments to the Act included a 'reversion process' that applied to existing schemes that had, 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' had come under significant criticism by some lot owners and peak legal and stakeholder bodies for allowing a single lot owner the ability to effectively over-turn a lawful order of an independent court, tribunal or specialist adjudicator.

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

Adjusting lot entitlements affected by the 2011 reversion process
The amendments enabling a body corporate affected by a 'reversion process' to reinstate the contribution schedule lot entitlements last decided by a specialist adjudicator, tribunal or court commenced on 27 March 2013.

A lot owner in a scheme affected by a 2011 reversion process 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 the body corporate of the proposal, prior to changing the contribution schedule lot entitlements to re-instate 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.

Also, from 27 March 2013 a body corporate may proceed to register a new community management statement to reflect a lot entitlement adjustment order that was previously unable to be acted on due to the 2011 amendments.

In addition, the amendments clarifying jurisdiction for disputes about changes to lot entitlements decided by resolution without dissent also commenced on 27 March 2013.

Removal of certain disclosure provisions for the sale of lots

The amendments to reduce disclosure requirements and red-tape associated with the sale of lots in a community titles scheme will commence on a date to be set by proclamation.

Those provisions remove the requirement for 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.

They also remove the requirement for a seller of a *proposed* lot to state in the disclosure statement given to proposed buyers:

- the extent to which the annual contributions is 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.

The Act can be viewed at: http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2013/13AC011.pdf

The BCCM Office is developing a factsheet explaining the effect of the *Body Corporate and Community Management and Other Legislation Amendment Act 2013*

3 Pet by-laws

The BCCM Office continues to receive a steady stream of dispute resolution applications relating to the keeping of pets in lots in community titles schemes. The issue in these disputes centres on the application of the scheme's pet by-law. In schemes in which disputes arise the pet by-law tends to take one of two forms. Contested pet by-laws usually either purport to ban pets from the scheme

entirely or provide that a lot owner or occupier shall not, without the written approval of the body corporate, keep an animal on the lot.

The arguments often presented in dispute resolution applications by bodies corporate defending by-laws purporting to ban the keeping of animals are that the scheme has always had a ban on pets, that this position is supported by the majority of owners and a single owner should not be able to interfere with the will of the majority.

There is now a body of decisions both of department adjudicators and of QCAT on appeals from adjudicators' orders which make it clear that such a position is not sustainable.

The law in relation to this issue is stated in *Body Corporate for River City Apartments v McGarvey* [2012] QCATA 47. The essential issue in the case was the validity of a by-law which provided: *An owner or occupier of a Lot must not keep an animal upon their Lot or the common property*.

QCAT recognised the power of the body corporate under s 169(1)(b)(i) of the *Body Corporate and Community Management Act* 1997 (the Act) to make by-laws for the regulation of, including conditions applying to, the use and enjoyment of lots included in the scheme. In that context the tribunal considered the question whether a blanket ban on the keeping of pets can properly be considered as providing for "regulation", as distinct from the prohibition, of the use or enjoyment of lots.

QCAT found a by-law that prohibits altogether the keeping of pets in lots is not a by-law regulating the use or enjoyment of lots, but purports to prohibit a particular use and type of enjoyment altogether. It therefore goes beyond the scope of a valid by-law permitted by section 169 and is invalid.

As noted above the other common formulation for pet by-laws is that an animal cannot be kept without the written approval of the body corporate. Adjudicators refer to this as a permissive by-law and have consistently held that the proper application of this by-law requires the body corporate to consider each application on its merits. Disputes arise regarding permissive pet by-laws when bodies corporate refuse applications to keep pets without providing adequate reasons demonstrating proper consideration of the relevant circumstances.

Warwick Court [2012] QBCCMCmr 550, http://www.austlii.edu.au/au/cases/qld/QBCCMCmr/2012/550.html was such a case. The adjudicator in Warwick Court pointed out that many owners in schemes with a permissive by-law take the by-law to mean pets are not allowed. The adjudicator stated that this is not the case and it is the responsibility of the body corporate administering such a by-law to properly exercise its discretion by considering each application on its merits. The adjudicator went on to say that the primary issue for a body corporate considering a pet application is the likelihood of an adverse impact on common property or any person. Where there are genuine concerns, the imposition of reasonable conditions on keeping the pet may be more reasonable than outright refusal.

For further information about this or any other issue concerning the BCCM Act please contact the BCCM Office Information Service on freecall 1800 060 119 or visit www.justice.qld.gov.au/bccm.

4 Internal Resolution of Body Corporate Disputes

Most readers will be aware that before making an application to the Office of the Commissioner for Body Corporate and Community Management (the BCCM Office) for dispute resolution, a party must attempt to resolve the dispute by internal dispute resolution.

This requirement focuses on supporting relationships within bodies corporate and the effective self-management of community titles schemes.

What is internal resolution?

The Act describes internal dispute resolution as resolution by the parties, using informal processes or the community titles scheme's own processes. Internal dispute resolution includes any reasonable endeavour or step taken to attempt to resolve an issue in dispute

Internal resolution is important because:

- the Act requires it to be attempted in most circumstances
- The Act promotes the responsibility for self management as an inherent aspect of community title living
- It can prevent the escalation of the dispute
- It encourages positive communication which can preserve relationships within community titles schemes
- It can prevent future disputes from occurring, or if they do occur they may be resolved more quickly
- It can be the quickest and most cost effective means of resolving a dispute

What are some examples of internal dispute resolution?

The Act provides three examples of internal dispute resolution processes. These are:

- communication between the parties (talking);
- writing to the committee; and
- presenting a motion for consideration at a general meeting.

If the issue is between one owner and another, the first step to resolving the issue might be to talk to the other owner or occupier to communicate the issue of concern and attempt to resolve the issue together.

If the issue requires a committee or body corporate decision, the first step might be to write a letter to the committee outlining the circumstances of the issue. The committee can then advise of the next step to take, which might simply be committee approval or a more formal step, such as submitting a motion for the next general meeting.

If the issue requires a determination by the body corporate in a general meeting (such as an owner seeking permission for an improvement to common property for the benefit of their lot), it will be necessary to submit the motion to the body corporate for consideration at the next general meeting, prior to making an application with the BCCM Office.

What processes can a body corporate adopt for internal dispute resolution?

Many disputes that reach the BCCM Office could be avoided if the parties in dispute knew who to take their concerns to or how to have their concerns considered by the body corporate.

To assist in this, a body corporate can consider establishing an internal dispute resolution process for its scheme. The body corporate would simply need to pass a motion by ordinary resolution adopting the process. The details of this process would be up to the individual scheme to develop, but may include:

- a communication process where one of the members of the committee is the first contact person for specific concerns
- timeframes indicating how long a committee will take to respond to requests
- the use of informal or formal mediators (at the parties' expense) to attempt to resolve the dispute.

Tips for communicating your concerns

Having a process in place and being knowledgeable in the requirements under the Act are two key strategies in resolving disputes. However, successful conflict resolution also requires communication and interpersonal skills which are important to apply when we are in conflict with another person.

Here are some basic tips for approaching negotiations to resolve a conflict.

- Try to approach the person(s) with whom you feel there is an issue as soon as possible and in a place where everyone will feel relaxed and comfortable.
- Explain to the person(s) clearly and calmly what your concerns are and how the issue impacts on you.
- Before offering suggestions as to how to solve the issue, ask the person(s) what their views are and suggest that they work with you to find a solution.
- Listen to the other person's feedback calmly and try to understand his/her point of view (even if you don't agree).
- Once you have listened to each other's point of view, try to come up with several options to resolve the matter that meet everyone's needs.
- Remember that in most negotiations, some give and take on both sides is required, especially when people disagree about the problem and/or how it should be resolved. Try to include all acceptable options and not just those options that you think would be best for you.

5 Inclusion of material submitted by owners on general meeting or committee meeting agendas

The recent adjudicator's decision in Surfers Beachside [2013] QBCCMCmr 121 dealt with the provisions of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Accommodation Module) regarding submitting motions for consideration at a general meeting of a body corporate.

In Surfers Beachside an owner submitted five motions to be included in the agenda for the scheme's annual general meeting. Each of the five motions commenced with the words, "That the meeting resolves to note that: ……..". The content of the motions collectively comprised 10 typed pages setting out perceived failures in the administration of the body corporate, as well as a containing the committee's responses to 18 questions put it by the owner. It appeared the owner wanted the information to be read and considered by owners before the election of committee members. The owner believed that the motions were required to be included on the agenda for the AGM.

Section 67 of the Accommodation Module provides owners with the right to submit motions for consideration at general meetings. A motion is defined as a formal proposal by a member that the meeting should resolve in certain terms[1].

Any motion submitted by an owner must be included on the next general meeting agenda on which it is practicable to include the motion. Under section 71 of the Accommodation Module, the submitter of a motion is able to give the secretary an explanatory note about the motion, provided the note is not longer than 300 words.

The Adjudicator did not consider that the "motions" submitted by the owner were incorrectly excluded from the agenda of the AGM for the following reasons. Firstly, the Adjudicator did not consider that the items were in fact "motions". In her view, each of the "motions" was not a formal proposal capable of resolution in certain terms. Secondly, while section 67 allows owners to submit motions to general

[1] *Joske's Law and Procedure at Meetings in Australia*, Magner, Eilis S, Lawbook Co. 2007

meetings, in the Adjudicator's view, the inclusion of section 71(1)(a) is clearly designed to limit the amount of material owners can submit in support, or explanation, of their motions. The Adjudicator considered that the "motions" submitted by the owner could have more accurately and succinctly been worded in the following terms: "*That the meeting note the unsatisfactory performance of the current committee/body corporate manager etc*" and the material in support of that statement could have been compiled in an explanatory note, limited in length to no more than 300 words. While a motion worded in that or similar fashion would have been required to be included in the voting papers, with the explanatory note, the Adjudicator did not think it would be unreasonable for a chairperson to rule such a motion out of order on the basis that it is arguably unenforceable because there is no action the Body Corporate can take as a result of voting on the motion. If such a motion was passed, it could not be enforced.

The owner also argued that the "motions" he submitted should have been included in the agenda for a committee meeting.

A lot owner may submit a request or motion in writing for consideration by the committee, although there is no specific legislative right to do so. There is also no legislative obligation on the committee to include such an item on the agenda for a committee meeting, although the committee is required to act reasonably (section 100(5) Act).

In *Surfers Beachside*, the Adjudicator did not consider it was unreasonable for the committee not to include the owner's "motions" on an agenda for a committee meeting. As noted above the "motions" were essentially a lengthy recitation of the owner's views of the administration of the body corporate. There was no formal proposal that could be resolved in certain terms.

The Adjudicator took the view that the owner's chief concern was to communicate his comments about, and views of, the administration of the body corporate to all owners in an effort to influence the way they cast their vote in the election of committee members. There is nothing wrong with this. However, the means attempted by the owner to achieve this were mischievous. He tried to rely on his legislative right to submit motions to be considered by all owners in general meeting and the body corporate's obligation to include those motions on the agenda of the next general meeting at which it was practicable to do so, to in essence, distribute his own propaganda at the expense of the Body Corporate. After this failed, he attempted to achieve the same result by insisting that the committee include his "motions" in an agenda for a committee meeting, which was required to be distributed to all owners (sections 45, 47 Accommodation Module). However, the committee was not legally obliged to include the owner's "motions" on an agenda for a committee meeting.

The adjudicator noted that owners have the ability to distribute propaganda themselves, at their own expense, by writing to all owners, whose addresses for service can be obtained by inspecting the body corporate roll. Subject to any obligations imposed by the general law or by the codes of conduct that are applicable to some parties, there is no specific regulation of general *"propaganda"* or *"electioneering"* material that is sent separately by an interested individual at that individual's own cost. In contrast, the legislation places tight restrictions on what material may accompany the voting papers that the body corporate sends to owners.