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QUT Review - BCCM
C/- Office of Regulatory Policy
Department of Justice and Attorney-General
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Dear QUT Review

QUT Issues Paper – Procedural Issues under the Body Corporate and Community Management Act 1997

Thank you extending a small extension of time for the Queensland Law Society to provide feedback on the QUT Issues Paper on Body Corporate Matters.

This letter has been written with the assistance of the Queensland Law Society's Property and Development Law Committee.

The committee has not commented on all of the issues raised but has focused on matters it considers are of particular legal significance. Our feedback is therefore provided under the relevant sub-headings utilised in the Issues Paper.

Section 3 – General meeting procedure

3.1.1 Date of the AGM

THE AGM serves an important function by enabling owners to review the financial performance of the body corporate, fix budgets elect the committee and review insurances. That said, the committee is in favour of removing the requirement to apply to an adjudicator to change the financial year for the committee and to enable the body corporate to change the financial year end by ordinary resolution.

However, it should not be possible to continuously extend the financial year end date to avoid or 'put off' an AGM. To safeguard against misuse, it is suggested the body corporate should only be permitted to bring forward the financial year end date, not extend it. The requirement for an adjudicator's order should continue to apply for an extension of financial year end date.

Given its important review function, the committee does not support decoupling the AGM from the end of financial year.

3.2.1 Notice Periods

The committee believes:

- a 14 day notice requirement for both EGMs and AGMs is appropriate;
- a shorter timeframe for EGMs may not allow sufficient time for proper consideration and consultation. An application may be made to an adjudicator to abridge the timeframe in cases of emergency.

3.4.1 Meaning of Voter

The committee believes for the purpose of determining whether a quorum is present, a person who represents multiple lots should be counted as multiple people. However an unfinancial owner should not be counted.

3.4.2 Requirement to hold a second meeting

The committee supports the removal of the requirement for a second meeting.

The committee is aware that it is common for meetings to be adjourned due to lack of a quorum and that this causes inconvenience for those who take the time to attend meetings of the body corporate.

The committee agrees a safeguard is desirable but believes a simpler and quicker means of giving effect to the motions passed at the meeting is desirable. The committee proposes the following:

- the secretary or manager circulates the minutes following the meeting;
- the minutes are accompanied by a notice stating that a quorum was not achieved and allowing owners who did not attend or lodge a voting paper, 7 days to lodge a voting paper;
- the votes are re-tallied at the end of the 7 day period.

The committee also agrees that it should be possible to hold a general meeting on the papers.

3.5.1 Obtaining Quotes

The committee acknowledges that body corporate managers are often appointed for a 12 month term and it is inconvenient and unnecessary to obtain 2 quotes. The committee favours dispensing with the requirement for 2 quotes where an existing body corporate manager is being re-appointed.

3.6.1 Resolution without dissent

A resolution without dissent is currently required for:

- adjustment of entitlements;
- change to exclusive use by-laws;
- reinstatement/use of insurance proceeds;
- scheme termination;
- scheme amalgamation;
- creation of a layered arrangement;
- incurring indebtedness above \$250,000;
- sale or lease of common property for more than 3 years;
- easements or surrenders of easements;
- acquiring land or taking a lease;
- selling a body corporate asset.

The committee agreed that, leaving aside the issues of scheme termination and changes to entitlements which were the subject of earlier discussion papers, lowering the threshold to a special resolution was appropriate. However the requirement in s171(2) for an owner to consent to removal of the benefit of an exclusive use right attaching to the owner's lot should be retained.

The committee also observed that it would be advisable to clarify whether/how these provisions apply to variations to a building management statement to which the body corporate is a party.

3.6.2 Majority resolution

The requirement for a majority resolution to require a manager to 'move on' reflects the requirement under the ASIC class orders which apply to letting agents for schemes operating managed investment schemes. The committee considered it would be undesirable to have a lower threshold for managers who are not subject to the ASIC class orders.

3.6.3. Poll for an ordinary resolution

The committee was generally of the view that polls are rarely used and that one vote for each lot was appropriate. However it was noted that:

- any change to the law in this regard may affect existing rights; and
- the issues surrounding lot entitlements still needs to be resolved.

Section 4 – The committee of the body corporate

4.1.1. Issue – Maximum number of committee members

The committee considered that participation in scheme affairs should be encouraged and that there should be an ability for the body corporate to have more than 7 committee members. However it was noted that, if the legislation were amended so that each person who nominated for the committee was elected, committees may become unworkable and a small group of owners with a particular agenda could band together and form a majority on the committee to frustrate the wishes of the majority. The size of the committee should therefore only be increased above 7 by special resolution.

However, the committee agreed that for a principal scheme it was appropriate for each subsidiary scheme or lot in the scheme to be represented on the committee.

4.2 Part 5 appointments

The committee recognises that, particularly in larger and more complex schemes, committee members may not have the time or the legal and technical expertise to adequately manage the affairs of the scheme. There is a high level of reliance on both the resident manager and the body corporate manager to manage the day to day affairs of the scheme.

The committee agrees that it is desirable for committees to be able to delegate their functions to an appropriately qualified 'management team' with the committee retaining an oversight role (similar to the role of a public company's board of directors in overseeing the management team).

However, the queries whether delegation to a body corporate manager or resident manager is appropriate for the following reasons:

- there are no professional educational requirements for body corporate managers or resident managers. The role of body corporate manager generally involves convening meetings and account keeping. Many lack the necessary skills and expertise to properly undertake delegation of the type referred to;
- each body corporate manager manages a large number of buildings. They are unlikely to have an intimate level of knowledge of each of these buildings and will rely heavily on input from the resident manager. A delegation to a resident manager may therefore in effect end up being a delegation to the resident manager. This may be problematic particularly in schemes where there is conflict between the committee and the resident manager;
- resident managers generally have a long term contractual arrangement with the body corporate and a substantial capital asset tied up with that contract. Unlike a chief executive of a company, it is difficult to replace an underperforming resident manager;
- resident managers have a potential conflict of interest and may be inclined to favour their own interests over those of other owners in the building;

- many committee members have minimal understanding of their responsibilities and rights. Committees may be reluctant to question the manager and practically, the committee's oversight role may be illusory.

The committee therefore believes consideration should be given to creating a new role of chief executive, independent to the engagement of a body corporate manager and the resident manager. Whilst it would be desirable for the chief executive to have building and financial management and experience and an adequate knowledge of the body corporate legislation, it is acknowledged that it would be difficult to mandate particular qualifications in order to qualify for the role.

The chief executive could be delegated all of the committee's powers, subject to any restricted issues determined by the body corporate and his or her appointment should be able to be readily determined by the committee or the body corporate without penalty. The chief executive would be a non-voting member of the committee.

4.3 Eligibility to be a voting member of the committee

Whilst it is acknowledged that resident managers are owners and significant stakeholders in the scheme, the committee understands the current restriction exists because of concerns about the possible undue influence and conflict of interest of the resident manager.

The committee believes the present restriction for resident managers and associates should be retained.

4.5.1. Issue – Difficulty removing committee voting members

The committee believes the process for removal of a committee member is impractical and should be simplified. A majority of committee members should be entitled to remove a committee member for breach of the Code, subject to a right of appeal to an adjudicator or QCAT.

The committee agrees that non-attendance at 3 consecutive meetings without leave (provided those meetings span a reasonable period) should be grounds for removal.

The committee also observed that the Code of Conduct does not expressly exclude a committee member from voting when the committee member has a conflict of interest. This should be clarified.

A committee member who is removed should be ineligible to re-nominate for a fixed period. The committee considers 3 years would be appropriate.

4.5.2. Removing the entire committee

The committee agrees that the body corporate should be able to vote on the removal of the entire committee in a single motion. However, in these circumstances, individual committee members should be entitled to stand for re-election.

4.7.1. Issue – Placing items on the agenda

The committee is not aware of any particular issues with owners being unable to have items included on a committee agenda. In practice, an owner who has a request of the committee writes to the secretary when the issue arises and it is considered at the next committee meeting.

The committee is aware that there may be some delays in having applications such as renovations, pet approvals and assignment of management rights considered. It is reasonable for owners to expect that such applications will be dealt with expeditiously. Most committees deal with these matters by email and voting outside of committee meeting. The committee believes it is reasonable to require committees to act promptly on such requests.

However, the committee is cognisant of the fact that committees are generally made up of unpaid volunteers and thinks it would be unfair to enable other owners to compel the committee to meet more regularly than quarterly.

If the committee is not functioning at all, the committee believes the existing ability for owners to require an EGM to be convened is sufficient and does not support a right for lot owners to compel the committee to hold meetings.

A greater ability to delegate routine committee decisions is a preferable solution.

4.8 Voting outside of committee meeting

The committee does not believe it is necessary or desirable to specify timeframes for VOC motions.

4.10 Appropriate limit

The committee considers that the body corporate is best placed to decide appropriate limits on the committee's expenditure and supports the proposal that the relevant limit for committee expenditure be reviewed and set at each AGM.

The committee considered that for a principal body corporate, the limit should be determined by reference to the number of subsidiary scheme lots and that the definition should be clarified.

4.11.1 Lack of relevant experience

Refer to earlier comments. The committee does not believe this should be restricted to large schemes.

Section 5 – Electronic notices, minutes and voting

5.2. General Meetings / 5.3 Committee Meetings

The committee noted that a paper-based system results in considerable, unnecessary costs for large bodies corporate and is in favour of allowing notices and minutes to be given by email. It also believed it was appropriate to allow notice requirements to be satisfied by making material available on a website, provided notice that the material is available on the website is given.

However, it was noted that there may be some owners who did not have ready access to a computer or an email account so there should be an opt-in requirement (it is suggested the BCCM Form 8 could be amended to allow an owner could to opt in or out at the time of providing details for the roll) and there should be no penalty for owners who choose to receive notices by mail.

5.4 Electronic Voting

The committee was in favour of permitting appropriate forms of electronic voting to be used for those who wished to use it. However there should be no penalty for owners who elect to receive notices by mail.

5.5 Electronic attendance

The committee believes a committee should be permitted to hold committee meetings by telephone or other electronic means readily available to all committee members.

5.6.1. Proxies for general meetings

The committee considers that proxies are still commonly used for committee and general meetings, particularly in circumstances where it is difficult to get a quorum.

Section 6 – First AGM

6.2.1. Issue – Specific documents to be handed over

The committee considers the developer should provide the body corporate with a copy of the development permit conditions applicable for the scheme land.

In addition, the committee believes the developer should give the body corporate:

- an editable version of the CMS;
- an electronic version of exclusive use plans and service location diagrams in the CMS.

Section 7 – Dispute Resolution

7.1 Standing in layered schemes

The committee believes a dispute should include a dispute between a principal body corporate and a subsidiary scheme owner.

7.2.1. Issue – Length of submissions on applications

The committee does not believe it is reasonable or practical to limit the length of submissions in response to an application for adjudication to a statutory maximum number of pages. The length of submissions will depend on the nature of the dispute, the complexity of the matter and the number of issues involved.

As to the provision of a notice of application for adjudication by email, the above comments apply equally.

Section 8 – Miscellaneous Issues

8.1. Body corporate seal

The committee is of the view that:

- there is no need for a body corporate seal;
- any 2 members of the committee would be appropriate);
- the Act should be amended to include provisions similar to s129 of the *Corporations Act 2001* (Cth) to provide protection for those dealing with the body corporate.

8.2 Body corporate seal

There should be an obligation on the body corporate manager (or if none, the body corporate) to give notice of change of address promptly after any change. If amendments are made to the Act to facilitate electronic notices, an email address should also be included.

8.3 Authority to settle legal proceedings

Whilst it is desirable for the committee to have the ability to act promptly and commercially in settling a dispute, the existence of a dispute should not enable the committee to circumvent the limits on the committee's powers under the Act. This would be open to abuse.

The committee believes the level of approval required to settle proceedings should depend on the terms of the proposed settlement (effectively this is the same as would be required to settle a dispute before proceedings were commenced).

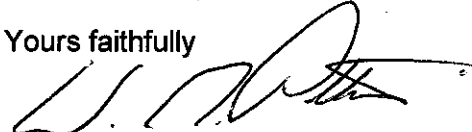
Retail Shop Leases Amendment Bill 2015 (QLD)

For example, if a dispute about access is proposed to be resolved by granting an easement to an adjoining owner, settlement of the dispute should require the relevant level of body corporate resolution for the grant of an easement.

For settlement of a financial dispute, if the committee proposes, as part of the settlement, to forgive an amount which is within the committee's limit for expenditure, the committee should be able to settle the dispute without the need for an EGM.

If you wish to discuss any aspect of this submission please contact our Policy Solicitor, Ms Louise Pennisi, on 3842 5979 or via email on l.pennisi@qls.com.au.

Yours faithfully



Bill Potts
President