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22 February 2016

The Hon Yvette D'Ath MP
Attorney-General and Minister for Justice
QUT Review - BCCM
C/- Office of Regulatory Policy
Department of Justice and Attorney-General
GPO Box 3111
Brisbane QLD 4001

By email only: QUTreviewBCCM@justice.qld.gov.au

Dear Attorney,

PROPERTY LAW REVIEW ISSUES PAPER – PROCEDURAL ISSUES UNDER THE BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997

1. We refer to the above matter.

PART A - OUR FIRM

2. Slater and Gordon Lawyers is a leading international consumer law firm employing 1,400 people in 80 locations across Australia and 3,800 people across 27 locations in the United Kingdom (**UK**). Slater and Gordon's mission is to give people easier access to world class legal services. The firm provides specialist legal and complementary services in a broad range of areas.

3. Our clients are people throughout Australia and the UK who are in need of a broad range of personal legal services. They want lawyers who are accessible and able to provide expert advice on their legal matters at an affordable price. Our clients come to us for individual legal needs, as well as group actions. They come from all backgrounds and socio-economic circumstances.

4. Our lawyers have unique experience acting for clients in the Body Corporate, Strata and Community Living sector. We are one of the few Australian law firms with a national presence in the space, and pride ourselves on delivering expert advice on Body Corporate and Strata matters at an affordable price.

PART B - OUR SUBMISSION

5. The *Body Corporate and Community Management Act 1997* (Qld) (**the Act**) provides the regulatory framework for buildings within which an ever-growing number of Queenslanders live and work. Any legislation which governs the area will require regular review to ensure it is fit-for purpose, provides the necessary balance between community consensus and individual rights, and meets community expectations.

6. In relation to your most recent Issues Paper dealing with procedural issues under the Act, Slater and Gordon wish to make a number of discrete submissions in respect of some of the issues raised. Our submissions, outlined below, specifically focus on issues of particular concern to current and former clients, and those working in the industry.

Question 19: Is there any reason to keep the requirement for a resolution without dissent? Would it make more sense to replace it, where it is required, with a special resolution (or some higher threshold that is lower than unanimous)?

7. The requirement to obtain a resolution without dissent in some instances is an overly onerous burden placed on a body corporate, and is out of step with the stated objectives of the Act to provide for flexible community based arrangements and self-management. Providing individual lot owners a veto over certain decisions of the body corporate is not in accordance with the community-consensus nature of bodies corporate, and the democratic self-management ideals postulated by the Act.

8. A resolution without dissent requirement may be appropriate where the decision affects the proprietary rights of individuals. However the decisions the subject of the recommendation do not fall into this category, and so the high threshold is not justified.

9. We understand that the position of the peak body for the strata industry, SCA (Qld) Inc, is that no change is required to the resolution without dissent requirement, and the existing process for resolution of a dispute about a proposed resolution, which is enlivened when a motion is not passed unanimously, is adequate. We agree that such disputes can be dealt with in that way, but feel bodies corporate should not be put to the expense of utilising those procedures, or have to suffer the associated delays and uncertainty in the interim.

10. Our submission is minority rights can be adequately protected by the imposition of a special resolution for certain decisions (those presently requiring a resolution without dissent), which, under the Act[1], provides a two-step process which:

    10.1. prevents a veto of majority decision by a small number of lot owners; and

    10.2. protects the minority by providing a layer of protection where the opposition is greater than 25% of the lots.

11. If the onerous requirement for a resolution without dissent is not removed and replaced by a requirement to obtain a special resolution for certain decisions, it is at least desirable to remove it and lower the threshold for decisions which would enable sustainable infrastructure to be incorporated in schemes. For example, if there is a proposal to allow installation of solar panels, water saving devices, wind generators or other sustainable infrastructure, which would increase the value of the scheme, and the longevity and

[1] Section 106, BCCM Act

affordability of living in the scheme for residents, and the proposal requires the exercise of the current resolution without dissent provisions[2], the body corporate should be permitted to agree to such infrastructure without the need for unanimity.

Question 20: If the resolution without dissent is removed, what additional safeguards should be put in place to protect minority interests? For example, should the BCCM Act provide a right for lot owners in the minority to challenge a decision of the body corporate to an adjudicator on grounds other than the reasonableness of the decision?

12. Our opinion is the current ability of an adjudicator to set-aside an unreasonable decision of the body corporate provides sufficient protection for minority lot owners.

13. We do not feel any additional safeguards would better protect minority interests than their ability to challenge a decision on the basis of reasonableness. However, we recognise individual lot owners may have interests which conflict with the interests of the whole, such as in relation to exclusive use of common property. While we feel the decision of a special majority should prevail in most circumstances, it may be appropriate if an additional ground of challenge is added along the lines of that provided for minority shareholders in the *Corporations Act 2001* (Cth)[3] (**the 2001 Act**).

14. An additional ground might take the form of section 232(e) of the 2001 Act, such that a decision of the body corporate which is 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a [lot owner]' would be amendable to being set-aside by an adjudicator.

Question 28: Should a body corporate be able to engage a body corporate manager under a part 5 appointment without the need to hold an EGM?

15. We support a proposed amendment to remove the requirement to hold an EGM for a body corporate to engage a body corporate manager under a part 5 appointment. Further, we believe a body corporate should be permitted to choose, by special resolution if necessary, the option of appointing a body corporate manager under a part 5 appointment in lieu of appointing a committee of the body corporate.

16. We believe it goes to the very heart of self-management and democratic decision making that a body corporate can freely choose whether to have a committee, or to appoint a body corporate manager under a part 5 appointment. In our experience, bodies corporate often struggle to obtain sufficient interest from lot owners willing to serve on a committee, and if such an obstacle presents itself, a body corporate should be free to make alternative arrangements in the form of a part 5 appointment.

Question 29: Should the vote to appoint a body corporate manager under a part 5 appointment require a secret ballot?

17. We do not support the removal of the requirement to hold a secret ballot to appoint a body corporate manager under a part 5 appointment.

18. In the explanatory notes which accompanied the *Body Corporate and Community Management Legislation Amendment Regulation (No.1) 2003* (Explanatory Notes for Subordinate Legislation 2003 No. 263), it was stated:

[2] See, for example, Standard Module ss. 161-162, 166-167
[3] Section 232, Corporations Act 2001 (Cth)

18.1. ‘a significant shift in policy has been made to allow the body corporate to engage a body corporate manager to carry out the functions of the committee and each executive member of the committee. To limit any external influence on the decision to give the engagement, the use of proxies has been excluded and the decision has to be by secret ballot’;

18.2. [with respect to secret voting at general meetings]… ‘owners can become subject to intense lobbying from persons who may have an interest in the outcome of one of the above motions, particularly those that may give rise to a termination or renewal or extension of engagements or authorisations, compulsory secret ballot voting is the most appropriate mechanism for voting on such significant issues’;

18.3. ‘a proxy vote is also prohibited on a motion to be decided by secret ballot, and for general meetings of a principal scheme in a layered arrangement of community title schemes. The restriction on secret ballot voting is appropriate as a motion requiring this form of voting can be emotive or of significance to the administration of the body corporate and it is proper that lot owners should vote on such issues’.

19. We believe the integrity of any vote should be preserved, which necessitates measures to ensure the vote is fully free and fair. This can only be achieved through a secret ballot. Secret ballots are not onerous to conduct, and they protect the free and fair exercise of voting rights by owners.

Question 30: Should a body corporate be able to engage a body corporate manager to perform all of the functions of the committee and still retain a committee?

20. We oppose any proposal which would permit a body corporate to engage a body corporate manager to perform all of the functions of the committee, and still retain a committee.

21. The Act vests in a committee certain powers, responsibilities and protections which are necessary for the efficient functioning of a body corporate, having regard to the community-consensus nature of bodies corporate, and the democratic self-management ideals postulated by the Act.

22. A body corporate can engage a body corporate manager under a part 5 appointment if necessary, but such an arrangement is not, in our view, suited where a committee exists or remains in place. To have both would blur the lines of responsibility, and reduce accountability.

Question 31: If so, should this be limited to bodies corporate with less than a particular number of lots? If yes, how many?

23. We would prefer enlarging the scope of the small schemes module to include all bodies corporate with less than, say, 15 lots and having, as a default position, the appointment of a body corporate manager under a part 5 appointment in such small schemes, with the option for the body corporate to establish a committee as an alternative to replace the part 5 appointee.

24. In our experience, small schemes often struggle to find sufficient numbers of lot owners willing to serve on the committee, or serve in executive roles. This is particularly acute on the Gold Coast, where a large number of lots are owned by interstate and overseas investors.

25. We have also encountered several cases where the body corporate manager is, in-effect, carrying out the role of a committee, but with a non-functioning and absentee committee, in place in name only. Such an arrangement is not presently provided for under the Act, and is, in our submission, outside the expectations set for committees by the Act. It also blurs the lines of responsibility, reduces accountability, and represents an unsatisfactory 'gaming' of the system by bodies corporate to overcome the difficulties associated with forming a committee in small schemes.

Question 72: Should the documents and materials required to be handed over by the original owner at the first AGM expressly include the development approval for the site?

26. We support an amendment requiring the original owner hand over the development approval for the site at the first AGM. In our experience, the task of managing building and maintenance issues, and disputes about lot boundaries, is often hindered by the lack of easy access to development approval and building contract documents. It is often necessary to determine the original state of the scheme, or part of it. Such documents form part of the 'corporate knowledge' of the scheme, and assist in resolving disputes if and when they arise.

Question 73: What other documents should be expressly listed for hand over by the original owner at the first AGM?

27. We also believe the original owner should hand over the following documents at the first AGM:

    27.1. certificate of classification;

    27.2. fire safety plan;

    27.3. the building contract; and

    27.4. any contracts which the body corporate is then a party to.

Question 74: Should disputes about contraventions of the BCCM Act between the body corporate and the original owner be added to the definition of dispute under chapter 6 of the BCCM Act so that the body corporate can take action against the original owner through the BCCM Commissioner's office?

28. We support an amendment to broaden the scope of the dispute resolution provisions along the lines of that proposed. However, sufficient protections would have to be built-in to ensure concurrent litigation is not running in the Commissioner's office and a Court. If concurrent litigation were possible, it would, in our view, prejudice a body corporate's ability to respond to the issues in dispute, disproportionately increase costs for the body corporate, and could become a legitimate strategy for a developer to undermine the ability of the body corporate to obtain a relatively inexpensive, easy and quick resolution to a dispute.

Question 79: Should the legislation limit the length of an application for adjudication to a statutory maximum number of pages?

29. We support limiting the length of applications for adjudication, but not to a statutory maximum number of pages.

30. Rather, we prefer giving the Commissioner's office power to make practice directions or other rules which have the same effect in relation to the length of applications for adjudication.

31. The issue of application size is not only limited to the issue of cost in providing a copy to lot owners. An application which is onerously large can become oppressive to a responding party, and will often increase the costs involved, the length of time to resolution, and may impair the proper functioning of the Commissioner's adjudication role.

32. The Courts have long recognised the necessity for brevity in applications to Court. A reduction in the amount and scope of material leads to a focus on the real issues in dispute, and results in better, easier and quicker resolutions for litigants. In Queensland, the Supreme Court has sought to limit, for example, the length of submissions in *Practice Direction Number 6 of 2004* which provides that 'an outline should usually not exceed four pages[4]'.

33. In Appeal cases, *Practice Direction 2 of 2010* provides:

    33.1. 'if a party wished the Court to consider evidence in an appeal which is not in the record of evidence before the court which made the order subject to appeal the party must file and serve an application to the Court for leave to adduce such evidence. If this material exceeds 20 double-sided A4 pages, the registrar may require the applicant to place it in an indexed supplementary record'; [5]

    33.2. 'unless the court, a judge of appeal or the registrar otherwise directs, a written outline (including any chronology or factual summary) must not exceed 10 pages; it will often be less than 10 paged. If a party is of the opinion that the party's written outline will substantially exceed 10 pages the registrar should be informed. The court may refuse to accept that part of a written outline which exceeds 10 pages'.

34. In all of the circumstances, we feel the Commissioner's office is best placed to decide on any limits to application size.

35. However, if a statutory maximum number of pages is legislated, we feel an adjudicator should be empowered to grant an extension to the number of pages permitted in the interests of justice.

[4] S2(C)
[5] S11(2)

Question 80: Should the applicant be required to pay for the cost of printing and distributing the application to lot owners in the scheme?

36. In our view it is desirable that an applicant for adjudication be required to pay the costs of distributing the application and materials to lot owners in the scheme. The proposal will serve two primary purposes:

    36.1. it will be a countervailing factor against vexatious applications; and

    36.2. it will limit the length of applications, resulting in the relatively inexpensive, easy and quick resolution of a dispute.

Question 81: Should the legislation limit the length of a submission in response to an application for adjudication to a statutory maximum number of pages?

37. Please refer to our response to Question 79.

Question 87: How should the BCCM Act deal with the issue of settling legal proceedings? Should a special resolution be required or should the BCCM Act authorise the chairperson or the committee to decide to settle or discontinue legal proceedings, if that decision is supported by written advice from a solicitor?

38. We are opposed to any alteration to the current position.

39. The consequences of settling or discontinuing legal proceedings can have significant ramifications for a body corporate, and consequently, for all lot owners. The decision to settle or discontinue proceedings should not be delegated to the chairperson or to the committee, even if supported by written advice from a solicitor.

We hope the above is of assistance in undertaking your review of the Act. If we can be of any further assistance, or you require clarification on any of the issues raised, please do not hesitate to contact us at your convenience.

Yours faithfully

David Greene
Associate
SLATER AND GORDON