

Mahoneys commitment to bodies corporate

Author: Ben Seccombe

Mahoneys has an extensive history of acting for bodies corporate. Our work has included acting for bodies corporate in relation to management rights assignments, debt recovery, common property subdivisions and sales, lot entitlement issues, general disputes, building disputes, the preparation of community management statements and providing general advice in relation to the Body Corporate and Community Management Act and associated legislation. Given our existing strength in this area, we recently made the strategic decision to increase our focus on bodies corporates, and have added some significant capability to our team.



Todd Garsden is a leading body corporate lawyer who has practised entirely in body corporate and strata. Todd is an active member of the Strata Community Association of Queensland (SCA), including a member of their Legislation Panel, and acts extensively for bodies corporate, body corporate managers and unit holders.



Jarrod Clarke is a lawyer who previously spent the past 5 years as a body corporate manager. He is familiar with the challenges body corporate managers face on a day-to-day basis, and has extensive experience assisting bodies corporate with advice and disputes.

Rights over common property

Author: Todd Garsden

There are a number of ways rights over the common property can be obtained. This can relate to spare car parks, storage, rooftops, airspace, extensions and even ceiling voids. The options include:

- purchasing the common property;
- obtaining exclusive use over the common property;
- leasing or licencing the common property; or
- obtaining an occupation authority over the common property.

Each of the options requires different considerations, documentation and approvals.

Purchase

Purchasing part of the common property is the only option that will result in ownership of the area being changed. However, it is probably the most complicated option and requires:

- a resolution without dissent;
- a new survey plan to be prepared and lodged;

- consideration for any lot entitlement adjustments;
- a new CMS to be prepared and lodged;
- stamp duty to be paid;
- town planning consideration and approval;
- mortgagee consent;
- confirmation the body corporate is not carrying on a business; and
- transfer forms and the conveyance of the property.

Exclusive use

The area remains as common property but indefinite rights over the area are granted to a lot in the scheme. Those rights are then regulated by a specific exclusive use by-law that is recorded in the scheme's community management statement.

Exclusive use can only be sought by an owner of a lot in the scheme and requires a new exclusive use plan and a resolution without dissent approving a new by-law.

Lease or licence

A lease or licence is generally useful as a fall back to obtaining exclusive use as it has a lower approval threshold, the right needed over the common property is temporary or is in favour of someone who is not a lot owner.

A special resolution is needed for leases or licences under 10 years for commercial and accommodation modules (3 years for the standard module). Anything longer requires a resolution without dissent.

Occupation authority

An occupation authority is available only to service contractors with an engagement longer than 12 months - such as a resident manager. An occupation authority becomes part of the service contract meaning that if the service contract comes to an end, the occupation authority does as well.

An occupation authority requires an ordinary resolution.

The limits of committee powers

Author: Todd Garsden

The committee will make the majority of the decisions for the body corporate. This is because the committee has the power to make decisions on any issue that is not a "restricted issue".

If a decision is a restricted issue of any of these categories, a general meeting is required for the body corporate to make the decision.

A restricted issue includes:

- Fixing or changing levies.
- Issues that the body corporate has decided need to be made by ordinary resolution.
- Issues that the legislation specifically provides can only be made by resolution without dissent, special resolution, majority resolution or ordinary resolution of the body corporate. Common examples include varying a management rights agreement,

granting exclusive use or spending limit restrictions.

- Commencing proceedings unless it is one of the following:
 - for a liquidated debt against the owner of a lot (for example, levy recovery);
 - one that the body corporate is already a party to (for example, a counterclaim);
 - by-law enforcement; or
 - an application in the Commissioner's Office.
- Payments to committee members unless it is limited to reimbursement of expenses to attend a committee meeting of no more than \$50 (capped to a maximum of \$300 in a 12 month period).
- Changing rights, privileges or obligations of the owners of lots included in the community titles scheme. This category is the "catch all"

and where most of the disputes arise. What constitutes a right, privilege or obligation was considered in Inn Cairns [2011] QBCCMCmr 103 where the adjudicator relevantly provided:

"However, I am also not persuaded that this has changed the "rights" or "privileges" of owners. There is no evidence about the effect of that change of status, for example, that the area will now cost more to maintain, or that the car park will affect other car parks in a negative way. Even if there was, it is the "rights" and "privileges" of owners which are the criteria, and not the effect on the body corporate as owner of the common property. Even if the area was for some reason now going to cost more to maintain, that only affects owners indirectly."

Accordingly, for a decision to be a restricted issue, a specific right, privilege or obligation of owners (not the body corporate) needs to be identified.

Upcoming events

Ben Seccombe and Todd Garsden will be presenting at the SCA Conference in March. Ben will be involved in the great debate and Todd will be presenting on the new regulation modules. We look forward to seeing you at this important industry event.

We will be hosting a lunchtime body corporate manager CPD in our offices on the 20th of March on Dealing with problematic lot owners, Management rights variations, and Building management statements. Contact us at info@mahoneys.com.au if you are interested in attending – please note spaces are limited.

Ben Seccombe will be presenting at the Australian Building Management Accreditation (ABMA) Industry Breakfasts in April where he will be discussing the legal issues to consider when dealing with body corporate building defects. Contact ABMA for event details.



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Meet the team

Ben Seccombe is a Nationally recognised litigator with significant experience advising resident managers and bodies corporate including on contract issues between resident manager and body corporate, by-laws, building and construction (including defect management), statutory compliance and insurance. Ben also has significant experience helping Bodies Corporates terminate and sell body corporate schemes to developers.



**General advice
/ by laws**



**Dispute
resolution**



Assignments



**Amalgamation
/ termination**



**Off plan
(BMS / CMS)**

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