Unit Owners Association of Queensland Inc. Submission

ON PROPERTY LAW REVIEW – BODY CORPORATE GOVERNANCE ISSUES: BY-LAWS, DEBT RECOVERY AND SCHEME TERMINATION – OPTIONS PAPER RECOMMENDATIONS

3 MAY 2017

Recommendation 1: Towing for breach of parking by-laws

Where a body corporate has adopted appropriate by-laws and erected appropriate signage on the common property, that body corporate should have the express ability to engage a licensed tow truck operator to remove a vehicle parked without the body corporate's consent from the common property:

- at a reasonable time after sufficient notice in the prescribed form has been given in nonurgent circumstances; and
- immediately and without notice when the vehicle is parked in a way that blocks ingress and egress to a lot, the scheme land, fire doors or other critical infrastructure (urgent circumstances).

UOAQ submission:

UOAQ supports Recommendation 1.

Recommendation 2: Delegating the decision to tow in urgent circumstances

Where a body corporate has adopted appropriate by-laws and erected appropriate signage on the common property, that body corporate should be able to delegate decision making authority to:

- a body corporate manager or a resident manager under a service contract; or
- a specified committee member who lives on site,

to decide whether a vehicle is parked on the common property in urgent circumstances, and where urgent circumstances exist, to arrange for the vehicle to be towed from the common property by a licensed tow truck operator.

Where the body corporate decides to delegate this power, the delegation to a body corporate manager or resident manager will be performed under a service contract with the body corporate. If the delegation is to a committee member who lives on site, that delegation will be authorised by a resolution of the body corporate (and not performed under a service contract). The body corporate will remain liable for any loss or damage to the owner or person in control of the towed vehicle and must indemnify the delegate appropriately.

For the avoidance of doubt, implementation of this recommendation will require an exception to the general prohibition on delegation of power by the body corporate.

UOAQ submission:

UOAQ supports Recommendation 2.

The body corporate should be able to delegate decision making authority.

Recommendation 3: Lot owner / occupier's right to tow

The right of a lot owner or occupier to remove a vehicle parked without permission on their lot or in an exclusive use common area allocated to their lot is outside the scope of the BCCM Act.

UOAQ submission:

UOAQ supports the notion that lot owners only should be granted approval.

Recommendation 4: Liability for improper towing

If the body corporate has adopted appropriate by-laws, posted appropriate signage on the common property and towed a vehicle (either as a result of a body corporate decision or a decision by a delegate) following the proper procedure as set out in the legislation, the body corporate will not be liable to the owner or person in control of the vehicle for any loss or damage to the vehicle or any amounts associated with the towing and storage of the vehicle.

A duly authorised service contractor or a committee member acting under a delegation from the body corporate to tow vehicles in urgent circumstances will be acting as an agent of the body corporate when towing vehicles in urgent circumstances.

The onus of proof that the vehicle has been towed in accordance with the proper procedure should at all times remain with the body corporate.

A dispute as to whether the body corporate (or its delegate) has exercised the proper procedure when towing a vehicle must be heard in the appropriate forum.

UOAQ submission:

UOAQ supports Recommendation 4.

The onus of proof that the vehicle has been towed in accordance with the proper procedure should always remain with the body corporate.

Recommendation 5: Pets

A by-law prohibiting the keeping of pets in a lot or on the common property should be enforceable against lot owners and occupiers if:

- the original owner includes the by-law in the schedule of by-laws attached to the first community management statement (CMS) for the scheme; or
- the body corporate adopts the by-law by a resolution without dissent.

Aside from this different threshold required to adopt the by-law, a no pets by-law will be added to the CMS and enforceable in the same way as any other by-law for the scheme. Amending or removing a no pets by-law will also require a resolution without dissent.

For the removal of doubt, the adoption of this recommendation will require a change to the power of

the body corporate to regulate activity so that a prohibition on keeping pets is permissible and not unreasonable or oppressive.

A no pets by-law will not operate retrospectively.

UOAQ submission:

UOAQ supports Recommendation 5 with one exception – the request for resolution without dissent.

The panel appear to assign more authority to the developer, than the subsequent owners of the building.

As stated in the UOAQ submission: "28. This then raises the subject of 'democracy' under the BCCMA. The primary and secondary objectives of the BCCMA conflict with the legislation contained in the BCCMA. The Macquarie Dictionary defines: "Democracy 1. Government by the people; a form of government in which the supreme power is vested in the people and exercised by them" The basic definition of democracy in its purest form comes from the Greek language: The term means "rule by the people." But democracy under the Westminster system of government has become to be known as "one vote - one value", or 50% plus 1 vote rules. This is the system used in all Australian Parliaments and even local government; but when the BCCMA was drafted, democracy, rule by the people, one vote one value, and 50% plus one vote rules, were cast aside in favor of: vote without dissent; majority resolution; special resolution; and, ordinary resolution. Ordinary resolution being the only "democratic" vote.

ASIC under the Corporations Act 2001 requires only two types of resolution: ordinary resolution and special resolution. There is no reason why the BCCMA should be more complicated. A resolution without dissent is an impossibility and arguably included to prevent a resolution that could be embarrassing to the Government - undemocratic, and contrary to legislative intent. The UOAQ objects to 'resolutions without dissent' on the basis that they are designed to further disenfranchise unit owners. They have lost sight of the objectives of the Act and have completely ignored the Acts Interpretation Act 1954.

30. Section 14A of the Acts Interpretation Act 1954 states the interpretation of an Act provision that best achieves the purpose of the Act is to be preferred to any other interpretation. This applies to instruments in force under an Act. The purpose of the BCCMA is to provide for flexible and contemporary communally based arrangements by several means including by balancing the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes.

Resolution without dissent is repugnant to the BCCMA and the Acts Interpretation Act 1954.

Recommendation 6 – Smoking

A by-law prohibiting smoking in an outdoor area that is part of a lot (including balconies, courtyards, etc) or on common property (including common property subject to an exclusive use by-law) should

be enforceable against lot owners and occupiers if:

- the original owner includes the by-law in the schedule of by-laws attached to the first CMS for the scheme; or
- the body corporate adopts the by-law by a resolution without dissent.

Aside from this different threshold required to adopt the by-law, a no smoking by-law will be added to the CMS and enforceable in the same way as any other by-law for the scheme. Amending or removing a no smoking by-law will also require a resolution without dissent.

For the removal of doubt, the adoption of this recommendation will require a change to the power of the body corporate to regulate activity so that prohibition on smoking in an outdoor area that is part of a lot or on common property where that smoke drifts to an adjacent lot is permissible and not unreasonable or oppressive.

UOAQ submission:

UOAQ supports Recommendation 6 with one exception.

UOAQ opposes a requirement to pass such by-law with resolution without dissent.

Currently the BCCM Act requires special resolution for creating new by-laws or amending existing ones. There is already a tri-factor required for such resolution:

(1) At least 75% votes cast in favour; and

(2) No more than 25% of the total number of lots against; and

(3) The total contribution schedule lot entitlements of no votes are not more than 25% of the total contribution schedule lot entitlements for all lots in the scheme.

UOAQ believes that a 'no-smoking' by-law, regulating proven hazard to owners' health, should be treated more favourably, but certainly no more harshly than any other by-law in the scheme.

There is enough scientific evidence proving the harmful effects of second hand smoke to humans, either in the form of smoke drift or smoke seepage. Queensland has already adopted laws regulating exposure to second hand smoke to the public (e.g. smoke free zone on public transport stops, no smoking in cars with children present; blowing smoke into one's face constitutes criminal assault etc.).

Smoke drift and smoke seepage are problems which affects most unit owners. The QUT Panel in its Final Recommendation notes that "*the overwhelming majority*" of the submissions, in fact, 82%, were in support of giving the body corporate the authority to adopt and enforce a 'no smoking' by-law.

It is also noted "*there seems to be very little reason not to allow bodies corporate to pass and enforce a no smoking by-law if that by-law is supported by the body corporate*."

Consequently, the recommendation to impose harsher conditions for such by law to be implemented then does not make sense. The evidence of smoking, second hand smoke drift and seepage being

harmful / a hazard to the public is commonplace, well known and indisputable. There are many scientific studies supporting such position readily available. Considering all the above arguments, it seems unreasonable to give a body corporate the ability to pass a 'no smoking' by law but severely limit its ability to do so by placing the requirement of a vote without dissent.

The OUT Panel appears to assign more authority to the developer than the subsequent owners of the building. It is more likely that the developer will consider broader market conditions and leave as little limitations to prospective owners as possible, since their interest is to realise the highest profit and they have no duty of care to prospective owners when it comes to preventing a health hazard created by smoke drift.

Further, to require vote without dissent for passing a 'no smoking' by-law **is to empower a single owner with a veto power** on the body corporate thus prohibiting the body corporate to regulate the scheme in accordance with current BCCM Act.

The Queensland Parliament has already voted on regulating hazards in community titles schemes. **Section 164 (a)** prohibits the occupier of a lot included in a CTS from use, or permit the use of, the lot of the common property in a way that causes a hazard.

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The occupier of a lot included in a community titles scheme ***must not use, or permit the use of, the lot or the common property in a way that****—*

(a) ***causes*** *a nuisance or* ***hazard****; or*
(b) interferes unreasonably with the use or enjoyment of another lot included in the scheme; or
*(c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property (****emphasis added****).*

For the removal of doubt, UOAQ supports the right of a body corporate to create the 'no smoking' by law as per Recommendation 6 which should be passed by ordinary resolution of the body corporate.

Recommendation 7 – Overcrowding

Where overcrowding of a lot is suspected on reasonable grounds, the body corporate should have the authority to report the matter to the local council or the fire service (a relevant authority).

If the relevant authority is unable to obtain consent from the lot occupier to enter the lot to investigate the overcrowding, the body corporate should be able to approve a resolution giving consent on behalf of the occupier of a lot, for the lot to be inspected by the relevant authority to determine whether the lot is overcrowded.

UOAQ submission:

UOAQ supports Recommendation 7.

The Body Corporate Committee should be the authority to report the matter to the relevant authorities.

Recommendation 8 – Standard by-laws

The BCCM Act should be updated to include example by-laws that cover specific topics including internal dispute resolution, parking and towing, pets and smoking.

The BCCM Act should provide that if a scheme adopts an example by-law then that by-law is valid and enforceable.

UOAQ submission:

UOAQ supports Recommendation 8.

Recommendation 9 – Default application of standard by-laws

There should be no change in the application of the by-laws in schedule 4 of the BCCM Act.

UOAQ submission:

UOAQ supports Recommendation 9.

As UOAQ supports Recommendation 8, it stands that example by-laws are extended and should be applied by default to schemes that have not applied by-laws.

Recommendation 10 – By-laws to form a greater part of pre-purchase disclosure

The by-laws for a scheme should be included in the disclosure regime for every sale of a lot in that scheme. The by-laws for a scheme should be given to each tenant of a lot in a scheme when that tenant enters into a lease of the lot.

The BCCM Act should expressly deem the by-laws to have effect as a binding agreement executed between each of the body corporate, lot owners, tenants and mortgagees from time to time.

UOAQ submission:

UOAQ supports Recommendation 10.

Recommendation 11 – Fines for breach of by-laws

The BCCM Act should allow bodies corporate to issue a fine of up to two penalty units to lot owners and occupiers who continue to breach particular by-laws after receiving a contravention notice.

The ability to issue fines will not be automatic. The body corporate in a general meeting must approve a by-law authorising the imposition of fines for breach of particular by-laws before any fines can be issued.

The fine must be given using a prescribed form and cannot exceed a statutory maximum amount of two penalty units. The fine should be paid to the body corporate.

The accused person must have the ability to dispute the fine through the BCCM Commissioner's office and the onus of proving that the breach occurred will rest with the body corporate.

Fines that are not paid or disputed within 30 days after being issued will become a body corporate debt on the lot, recoverable by the body corporate using the debt recovery mechanisms provided in the BCCM Act for unpaid contributions.

If a fine incurred by a tenant is unpaid, the body corporate may recover the fine from the lot owner. The lot owner may recover the amount from the tenant as a debt.

UOAQ submission:

UOAQ supports Recommendation 11 with the stipulation that the fine has no validity if the action of the Committee is vindictive.

All by-laws must be applied to all owners and occupiers equally, and no owner or occupier can be singled out for attention. An action cannot be taken against one owner or occupier whilst similar conduct is perpetrated by other owners or occupiers in the scheme.

Recommendation 12 – Delegation of enforcement

The body corporate should not be given the ability to delegate a power to issue contravention notices. There should be no change to the current position in this regard.

UOAQ submission:

UOAQ supports Recommendation 12.

UOAQ does not consider on-the-spot contravention notices to be appropriate. Resident managers and body corporate managers can be authorised to supervise the by-laws and house rules. Should an owner or occupier ignore these contractors' advices, they should refer these breaches to the body corporate committee at its next meeting for contravention notice or enforcement attention. Should this committee notice fail having provided 14 days' notice to address the breach, referral to dispute resolution would be required.

Recommendation 13 – Scale of costs

The BCCM Act should provide an itemised scale of costs for debt recovery actions taken by or on behalf of the body corporate to recover unpaid contributions and penalty interest from defaulting lot owners. The scale should apply to debt recovery actions taken prior to the commencement of legal proceedings (if any).

Costs incurred in recovery of body corporate debt after the commencement of legal proceedings should continue to be determined by a court in accordance with its usual procedures. The 'reasonably incurred' test will continue to apply to such applications.

UOAQ submission:

UOAQ supports Recommendation 13.

Recommendation 14 – Items in a scale of costs

The scale of costs should be binding on bodies corporate. The scale should prescribe maximum amounts that can be charged by the body corporate to lot owners for debt recovery items such as:

- arrears notices;
- letters of demand;
- negotiating and monitoring compliance with a payment plan; and
- legal costs.

The amount of the scale and the other items to be included should be determined based on consultation with community titles industry groups and qualified costs assessors.

UOAQ submission:

UOAQ considers that unit owners should be the final approval authority for any scale of costs imposed on other unit owners.

UOAQ also accepts that the body corporate should take advice from its principal advisors on matters of legislation, but that advice should be limited in this matter to legal counsel and the body corporate manager.

UOAQ would have concerns consulting with others described as community titles groups and qualified costs assessors, as this description could include building managers and other vested interests.

Recommendation 15 – Definition of body corporate debt

The definition of 'body corporate debt' should be amended to specifically include recovery costs in accordance with the scale and judgment debts. Recovery costs that are not disputed with the body corporate within 60 days after notice is given to the lot owner will become a body corporate debt on the lot.

The contact details of a mortgagee of a lot must be notified to the body corporate and kept on the body corporate rolls. When a lot owner is issued a demand for a body corporate debt, a copy of the notice must be sent to the mortgagee at the address listed in the body corporate roll.

If the body corporate debt owed by a lot owner relates only to recovery costs that are subject to a dispute which has been lodged with the body corporate, the lot owner should not forfeit the right to vote at a general meeting or to nominate for a committee position.

UOAQ submission:

UOAQ opposes Recommendation 15.

These conditions do not apply to single residential class 1 owners for rates, water accounts or electricity accounts.

Recommendation 16 – Power of sale

There should be no change to the ability of the body corporate to force the sale of a lot for unpaid contributions.

UOAQ submission:

UOAQ supports Recommendation 16.

Recommendation 17 – Body corporate debt to form a charge on the lot

The BCCM Act should provide that unpaid body corporate debt for the lot is a statutory charge on the lot but such charge does not represent an interest in the lot for the purposes of the Land Title Act 1994 (Qld) or the BCCM Act.

The statutory charge for body corporate debt will be lower in priority than charges for unpaid rates and unpaid land tax.

UOAQ submission:

UOAQ supports Recommendation 17.

Recommendation 18 – Debt recovery time

The body corporate should be required to take action to recover unpaid contributions within two months after any contributions have been outstanding for one year.

UOAQ submission:

UOAQ supports Recommendation 18.

Recommendation 19 – Address for service

The Regulation Modules should require all lot owners to provide an address for service that is in Australia.

If an Australian address is not provided or has been determined to be inaccurate, the address for service will be deemed to be the address of the lot.

UOAQ submission:

UOAQ supports Recommendation 19.

Recommendation 20 – Overseas service

It is recommended that the existing rules in relation to the service of originating process to collect unpaid contributions, penalty interest and recovery costs should remain unchanged at this time.

UOAQ submission:

UOAQ supports Recommendation 20.

Recommendation 21 – Garnishee rental income

Where there is a judgment against a lot owner for unpaid contributions, penalty interest and recovery costs, and the lot is generating income from being rented or leased, the body corporate should have a simple method to garnishee the rental income until the judgment has been satisfied.

Where the garnishee order is not directed against the lot owner, it may be directed against an agent of the lot owner (if any) who is receiving rental income on behalf of the lot owner.

UOAQ submission:

UOAQ supports Recommendation 21.

Recommendation 22 – Prescribed procedure for scheme termination

It is recommended that the BCCM Act provide a prescribed procedure for schemes considering scheme termination. The prescribed procedure may include the collection of relevant information and will include the preparation of a termination plan. This will be followed by a vote of the body corporate to approve the termination plan.

Where the body corporate is unable to resolve to approve the termination plan, a lot owner or the body corporate may apply to the District Court for an order approving the termination plan.

UOAQ submission:

UOAQ supports Recommendation 22 if:

- the approval percentage is greater than 80%, and
- any application to the District Court is funded by the body corporate.

75% of the owners in a 4-lot scheme would allow one lot owner to be disenfranchised.

Recommendation 23 – Acquiring relevant information

It is recommended that unless otherwise agreed by a resolution without dissent, a body corporate considering scheme termination should resolve to obtain or assemble the following reports and documents (together, the relevant information):

- a structural engineer's report;
- a quantity surveyor's report;
- a valuation of the total value of the common property and all the lots including the individual value of each lot in the scheme; and
- a draft statement of the assets and liability of the body corporate.

After the relevant information has been obtained or assembled, copies should be given to each lot owner in the scheme. Lot owners should then have at least 90 days to review the relevant information.

UOAQ submission:

UOAQ opposes Recommendation 23.

The reference to "resolution without dissent" should be changed to "ordinary motion", thus providing reasonable access to an approval to acquire relevant information. The relevant information is just the start of this process and owners need to be fully informed of the considerations and debate that is coming forward in their scheme.

Recommendation 24 – Considering the relevant information

At least 90 days after all lot owners have been given copies of the relevant information the body corporate may agree by majority resolution that there are economic reasons for scheme termination as disclosed by the relevant information.

A lot owner who disagrees with the decision of the body corporate that economic reasons for scheme termination exist may dispute the decision using the existing dispute resolution mechanisms in the BCCM Act.

It is recommended that such a dispute be treated as a complex dispute for the purposes of the BCCM Act so that the matter may be resolved by a specialist adjudicator or by the Queensland Civil and Administrative Tribunal (QCAT) in its original jurisdiction.

UOAQ submission:

UOAQ opposes Recommendation 24.

The UOAQ believes the termination of schemes issue is of such complexity and importance, any dispute should go directly to the District Court.

Should disputation occur UOAQ would expect that any appeal should be funded by the body corporate.

This proposal avoids the body corporate funding one side of the dispute and a single unit owner funding the other side of the dispute, plus being additionally exposed to body corporate costs through the lot contribution schedule share of the body corporate expense.

Recommendation 25 – Preparing a termination plan

It is recommended that the body corporate may agree by ordinary resolution to appoint a facilitator to oversee the preparation and development of a collective sales agreement, redevelopment plan or other proposal to terminate the scheme (each a termination plan). Such a plan may be submitted by a person who proposes to acquire the lots in the scheme and developed through a negotiation

process with the body corporate.

Once the termination plan is prepared, the facilitator will send a copy of the plan to all lot owners for consideration. At least 120 days after the termination plan has been given to all lot owners, the body corporate may hold a general meeting to vote on the termination plan.

The proceeds of the termination plan and the assets and liabilities of the body corporate will be allocated among the lot owners in proportion to the relative market value of each lot immediately prior to termination (the value of the lot expressed as a percentage of the total value of all lots in the scheme).

UOAQ submission:

UOAQ supports Recommendation 25.

Recommendation 26 – Approving a termination plan

A termination plan that has been given to lot owners for at least 120 days may be approved by the body corporate in a general meeting by a resolution without dissent. Alternatively, if the relevant information discloses an economic reason for the proposed termination (as agreed by a majority of lot owners), the termination plan may be approved by the body corporate in a general meeting with the support of the owners of at least 75% of the lots in the scheme.

Where the termination plan is approved by the body corporate, the body corporate must give all lot owners notice in the prescribed form stating that the termination plan has been approved and setting out the lot owner's obligations under the termination plan and the right to challenge the decision in the District Court.

Dissenting owners may apply to the District Court to decide whether or not the termination plan should proceed if that application is made within 120 days after the lot owner has been given notice in the prescribed form that the body corporate has approved the termination plan.

UOAQ submission:

See submission to Recommendation 23:

Dissenting owners should be able to apply to the District Court at any time to resolve issues.

The stipulation at Recommendation 22 should also apply in this instance.

Recommendation 27 – Application to the District Court

On application by a lot owner or the body corporate of a scheme to the District Court for an order giving effect to a termination plan that has not been approved by the body corporate:

- the District Court will make a determination as to whether to give effect to the termination plan or not;
- the District Court must be satisfied that the termination plan is just and equitable; and

- the onus to satisfy the District Court that the termination plan is just and equitable will be on the applicant.

On application by a dissenting lot owner against a termination plan approved by the body corporate (if the application is brought within 120 days after the lot owner has been given notice in the prescribed form):

- the District Court will make a determination as to whether to give effect to the termination plan or not;
- the District Court must be satisfied that the termination plan is just and equitable; and
- the onus to satisfy the District Court that the termination plan is just and equitable will be on the body corporate.

After the 120 day period has expired, the administrator of the termination plan approved by the body corporate may bring an action in the District Court requiring a lot owner to comply with the termination plan. On such application the District Court will determine whether the dissenting lot owner's opposition and failure to comply with the termination plan is reasonable in the circumstances and make orders accordingly.

In all circumstances, the District Court will retain the discretion to make an order about costs as the court sees fit.

UOAQ submission:

UOAQ supports Recommendation 27.

The costs should go with the verdict.

Recommendation 28 – Determining 'just and equitable'

The District Court should have reference to the following factors when determining whether a termination plan is just and equitable:

- any structural engineer's report, quantity surveyor's report or valuation prepared for the purposes of scheme termination at the scheme;
- any termination plan, collective sales agreement or redevelopment plan prepared by the person proposing the termination;
- the economic reasons for the termination plan;
- the consequences to lot owners (both individually and as a whole) if the scheme is terminated;
- the consequences to lot owners (both individually and as a whole) if the scheme is not terminated;
- the age and condition of the building or any structures on scheme land;
- sinking fund forecasts and current balance;

- the aggregate market value of individual lots compared to the market value of the scheme as a whole in its highest and best use;
- any other factor specified in the relevant Regulation Module; and
- any other factor the Court decides is relevant.

UOAQ submission:

UOAQ supports Recommendation 28.

UOAQ congratulates the review panel on a creative and imaginative solution to an extremely vexing problem.

Recommendation 29 – Terminating layers of layered schemes

The Department of Justice and Attorney-General should investigate the feasibility of developing a simplified process to allow termination of a community titles scheme without terminating the lots in the scheme.

Such a process would be exercised in appropriate circumstances with the support of the lot owners in the relevant schemes.

UOAQ submission:

UOAQ supports Recommendation 29.