

WELCOME

By Matthew Manz, Partner

Welcome to our very first issue of BodyCorporateOne. As you would no doubt be aware Mahoney Lawyers have a long history in the management rights industry, principally acting for resident managers. Through our involvement in management rights and strata developments, we have a level of expertise unmatched by other firms. What many of you probably don't know is that we also have an extensive history in acting for Bodies Corporate. Our work over the years has included acting for Bodies Corporate in relation to management rights assignments, debt recovery, common property subdivisions and sales, lot entitlement issues, general disputes, the preparation of community management statements and providing general advice in relation to the Body Corporate and Community Management Act and associated legislation.

It has often been said that "Mahoney Lawyers do not act for Bodies Corporate". This is not correct. The only time that we would not act for a Body Corporate is in an action against a resident manager. That is our only self imposed restriction due to our extensive and longstanding involvement as a member of and advisor to the Industry Body, ARAMA. We have though in many instances, because of our experience in and understanding of management rights, helped Bodies Corporate resolve disputes with resident managers thereby avoiding expensive litigation. We believe that most such disputes can be resolved where the solicitor for the Body Corporate has the experience and desire to do so.

We hope that you find the articles in the first of what will become our regular newsletter, informative. Naturally, if you have any queries that relate to the specific articles, or any queries in general, you are more than welcome to contact our office.

UPDATING BY-LAWS

By Amy McKee

At Mahoney Lawyers we are often asked to review and give advice to Bodies Corporate on their by-laws.

In our experience, community management statements often contain by-laws that are outdated, invalid, contrary to the Body Corporate and Community Management Act 1997 and in conflict with the opinions and decisions of the Commissioners Office.

Examples of these sorts of by-laws include:

- a) requiring lot owners to obtain services from a certain service provider;
- b) imposing monetary obligations on lot owners;
- c) allowing the Body Corporate to access lots or exclusive use areas without the correct notice being provided;
- d) pet by-laws which provide a blanket prohibition on pets;
- e) allowing Committees to create "house rules".

In some cases, these discrepancies do not create any problems for the Body Corporate as the owners are unaware that the by-laws are invalid and there is harmony at the scheme. These by-laws will create issues where there are savvy owners or if there is a dispute at the scheme relating to the by-laws.

If a Body Corporate is concerned, Mahoney Lawyers can assist by reviewing and providing written advice on the current by-laws for the scheme. Where required, we can draft new by-laws including the applicable body corporate motions and draft and arrange registration of the new community management statement.

THE TRANSFER FEE

By Matthew Manz, Partner

Despite the rules regarding the "transfer fee" having changed some time ago, it is surprising how many body corporate managers, resident managers (and lawyers) are not aware of those changes. To re-cap, those changes are as follows:-

Previous - the transfer fee was linked to the commencement of the Caretaking and Letting **Agreements** or when a **new option** was added.

New - the fee is linked to the commencement of the caretaker/letting agent at the complex ie when the **caretaker/letting agent** first acquired the management rights. New Agreements or adding options are irrelevant.

Previous - the prescribed period, from the time of the Agreement or adding of the new option, was **3 years**.

New - the prescribed period is **only 2 years** from the time the caretaker/letting agent first acquired the management rights

Previous - the fee was 3% of market value (effectively the business sale price) in year 1, 2% in year 2 and 1% in year 3.

New - 3% in year 1, 2% in year 2.

Previous - the transfer fee was **discretionary**. The Body Corporate **was entitled to seek** it if a caretaker/letting agent sold the business within the prescribed period. It was **not compulsory**.

New - it is **compulsory** and the body corporate **must impose** the transfer fee if the caretaker/letting agent sells the business within the prescribed period.

The **hardship** provisions remain **unchanged**. A body corporate will not be able to impose the fee where the outgoing caretaker/letting agent is selling due to genuine hardship not reasonably foreseen at the date when the caretaker/letting agent first acquired the management rights.



The transfer fee period commences on the date a caretaker/letting agent settles his/her Management Rights purchase. The relevant date when a caretaker/letting agent sells is the date on which the Body Corporate consents to the assignment - so provided that date is more than 2 years after a caretaker/letting agent settles his/her purchase, there will be no transfer fee payable.

PETS AND COMMUNITY TITLES SCHEMES

By Ben Seccombe, Partner

The desire of lot owners to keep pets in community titles schemes has become an increasing source of disharmony in recent years.

Most often, disputes arise where lot owners who believe, or were told, that their particular building was "pet free" cross with other owners who wish to keep a pet (usually a cat or dog) in their lot.

Body Corporate managers need to be aware of the relevant issues relating to pets where the relevant Scheme:

- a) has no by-law relating to pets whatsoever;
- b) has a by-law which imposes a blanket ban on all pets;
- c) has a by-law which invests the Committee with discretion to allow pets upon written application by a particular lot owner.

No By-Laws

If there is no by-law, then there is no restriction on a lot owner obtaining a pet.

This is so even where there is a 'practice' or 'tradition' or 'understanding' that the Scheme is 'pet free'.

In these circumstances, and if there are problems with the pet, the Committee will need to look to the nuisance provisions of the Act for assistance.

Blanket Bans – No Pet By-Laws

It is still common to see by-laws in Community Management Statements which purport to impose a ban on all pets.

The decision in *Tutton, W. & B. v Body Corporate for Pivotal Point Residential CTS 33550* has a significant effect on the rights of lot owners to keep pets in community titles schemes in Queensland.

Tutton was (and remains) good authority for the proposition that a by-law which purports to impose a blanket ban on the keeping of any animal is, prima facie, unreasonable and void as against the Body Corporate and Community Management Act 1997.

The principle which falls from the *Tutton* decision has been referred to as the "Goldfish Principle".

More specifically, if a by-law (concerning the keeping of pets) operates so as to impose an absolute ban on the keeping of a particular pet (such as a goldfish) in circumstances where there is clearly no rational basis upon which it could be said that the keeping of said pet in a safe and healthy environment could be a matter which could cause any difficulty to any other lot owner (yet is the subject of an absolute ban) the conclusion is open that such a by-law is unreasonable.

This principle applies equally to by-laws which limit the ban to a particular animal (provided that there exists breeds or types of that animal which, when kept in a safe and healthy environment, would not cause any difficulty to any other lot owner).

It has been recognised by the QCAT that a by-law which bans all cats and all dogs was also unreasonable and unenforceable.

At the other end of the spectrum, and to use a facetious example, it is likely that a by-law which banned lot owners from keeping elephants as pets would be upheld as reasonable and enforceable.

Discretionary By-Laws

The third common alternative is where a by-law exists which permits pets but only with the written permission of the Body Corporate.

It is common for Committees to believe that they are entitled to enforce informal 'no pets' policies by rejecting any (and every) application for a pet without actually considering it.

That approach does not sit favourably with the Office of the Commissioner for Body Corporate and Community Management.

In recent decisions on this issue, Adjudicators have held that when a body corporate has a discretion to approve the keeping of animals:

- a) it must properly assess each application seeking that approval;
- b) it cannot exclude an animal under this type of by-law as a matter of policy;
- c) it must consider each application on its merits;
- d) it cannot make decisions about allowing animals on a purely arbitrary basis;
- e) it must act based on legitimate reasons when deciding whether or not to allow someone to keep an animal.

Accordingly, Bodies Corporate that simply reject applications for pets for policy reasons will be exposed to a risk of having that decision overturned by the OCBCCM.

Restricting Pets

It remains possible to limit, to a certain extent, pets in community titles schemes.

We are able to advise on tailoring by-laws and application policies for particular schemes to assist in this regard.

The above articles are not a substitute for specific legal advice. Any interested person should seek specific legal advice relevant to their own particular circumstances.