

30 June 2022

Mr Michael Shanahan AM
Criminal Procedure Review
Magistrates Court
GPO Box 149
Via Email Criminal-Procedure-R@justice.qld.gov.au

Dear Mr Shanahan AM,

SCA (Qld)

Currently, there are over 500,000 body corporate lots in more than 50,000 community title schemes across Queensland. SCA (Qld) is the peak association supporting Queensland's strata sector, with more than 1,200 individual and corporate members who help oversee, advise and manage assets worth tens of billions of dollars. As the peak body for the strata industry, SCA (Qld) is in the unique position to understand the sector from all angles.

SCA (Qld) is in an enviable position to understand the sector from a broad array of viewpoints owing to its diverse membership. SCA (Qld) represents strata managers, community titles schemes with committee members acting as nominees, lot owners as individuals and service providers to the strata industry including specialist insurers, painting suppliers, energy suppliers, solicitors, accountants, water and plumbing providers, banks, elevator maintenance professionals, cleaning providers, surveyors, valuers, glaziers, IT providers and pool servicing and maintenance providers.

Introduction

SCA (Qld) is pleased to contribute to this review of the *Justices Act 1886* (Qld) ("Justices Act")

Strata law in Queensland is governed primarily by the *Body Corporate and Community Management Act 1997* (Qld) ("BCCMA"). The BCCMA has accompanying regulation modules which are designed to facilitate different kinds of body corporate schemes. The BCCMA provides various mechanisms for issues which arise under the legislation, including but not limited to debt recovery for levies, dispute resolution and by-law enforcement. Some matters can be or are subsequently required (for enforcement provisions) to be handled by a court of competent jurisdiction.

In many, at least initial instances however, the Office of the Commissioner for Body Corporate and Community Management ("Commissioner's Office") has jurisdiction over these matters. Once orders are obtained in the Commissioner's Office and in circumstances where the offending party contravenes the orders, enforcement action must be pursued through a court of competent jurisdiction. The orders of Adjudicators from the Commissioner's Office are legally binding. Enforcement of these orders is done through the Magistrates Court, and it is important to note that there is no alternative to this at present. Accordingly, for aggrieved parties to take enforcement action it must pursue same in the Magistrates Court.

By-Law Enforcement and/or Enforcement of Commissioner's Office Orders

Where the Justices Act affects bodies corporate is in their enforcement of by-laws and Commissioner's Office orders. We expand further below.

By-Laws

By-laws are the community specific rules which govern behaviour and activity within a body corporate scheme. By-laws regulate matters such as use of the common property, parking and the conduct of animals. Other important matters which are often the subject of dispute such as smoking, and nuisance are also the subject of by-laws in many schemes. They are the foundation to how owners and occupiers should behaviour and conduct themselves in the community living.

By-laws and compliance with them are crucial to harmonious community living. Without ready widespread compliance with by-laws and easy enforcement of breaches strata living can be acrimonious and dysfunctional.

It is important for context to have a pragmatic understanding of how by-law enforcement works, and the real-world implications of the system on bodies corporate, their managers and residents.

The process for enforcing a by-law currently involves:

1. issuing a by-law contravention notice – for most managed bodies corporate, this comes with an administrative cost unless a volunteer committee member undertakes this task, and that cost is not recoverable;
2. if the notice is not complied with, making a complaint under the Justices Act for a Magistrate to impose a fine or making a dispute resolution application to the Commissioner's Office.

Commissioner's Office Orders

The second application of the Justices Act in bodies corporate is via the enforcement of Commissioner's Orders. More relevantly, if an offending owner or occupier fail to comply with orders the aggrieved party can file a Complaint and Summons against the offending party pursuant to section 54 of the Justices Act.

Current Complications

If a complaint was made, any fine that is imposed is payable, by default, to the State. Such a complaint must be proven beyond all reasonable doubt, which is a very high evidentiary burden. It is unpalatable for volunteer committee members to be expected to make a complaint, get it sworn and served, prepare and deliver all of the supporting evidence, appear before a Magistrate and advocate the case. It is inevitable that a body corporate would seek legal assistance, and the recoverable costs are limited to the scale in the Justices Act, which is not generous. A body corporate is invariably left significantly out of pocket for having to take such a serious step to ensure compliance with a contravention notice and/or failure to comply with existing Commissioner's Office orders.

Given the by-laws of a scheme are meant to ensure harmonious community living this process is a significant disincentive to compliance processes and therefore, compliance itself. Alternatively, given the matter in dispute had already been tabled and decided upon by an adjudicator of the Commissioner's Office, to then incur the costs of a complaint and summons is an enormous ask of bodies corporate. To ostensibly ask a body corporate, which it is important to note cannot turn a profit, to potentially pay thousands of dollars in legal fees to enforce a relatively run of the mill matter such as regulation of parking is unheard of in any other sector in society.

This is a significant disincentive to enforcement and has rendered the by-laws of most bodies' corporate and Adjudicators orders, in effect, optional. To illustrate the effect of this, consider the following example:

A recent example of the difficulties inherent in the present system of by-law enforcement can be seen in the recent Adjudicators Order in Helensvale Villas [2021] QBCCMCMr 441. The salient facts are:

- The scheme has 32 lots and common property is regulated by the Standard Module.
- The by-laws of the scheme prohibit parking on the common property.
- An occupier of a lot regularly parked their vehicle on common property.

- On 22 January 2020 the committee wrote to the relevant lot occupier asking they cease parking on the common property.
- On 15 April 2020 the committee noted that the occupier of the lot was continuing to park on common property and resolved to issue a Future Contravention notice.
- On 15 May 2020 the body corporate manager again wrote to the lot occupier regarding a parking of vehicles on the common property and issued a Form 11 Notice regarding likely future contravention of a body corporate by-law.
- On 15 July 2020 the committee noted that the occupier of the lot was continuing to park on common property in breach of the contravention Notice.
- On 22 September 2020 the body corporate committee resolved that it authorise the Body Corporate Manager to lodge an Adjudication Application with the Office of the Commissioner for Body Corporate and Community Management for failure by the relevant occupier to comply with the parking by-law.
- An order was made by an Adjudicator obliging the relevant lot occupier to comply with the parking by-law on 20 September 2021.

The above example illustrates how impotent the present regime is.

This farcical and absurd. To be clear- the above process is everything that is required to be done prior to commencing an inevitably expensive enforcement proceeding. Given this impost, there is often a pragmatic case to let slide continuing breaches and/or failure to comply with adjudicators orders rather than be faced with extensive court costs. This means they must raise the significant legal costs imposed upon a body corporate through no fault of their own through levies on owners, which can amount to thousands per lot.

Reform to Private Prosecutions and Costs

Given at present, the abovementioned process is required of bodies corporate to enforce their by-laws and/or adjudicators orders, even the uninitiated can see change is needed. It is unjust and unfair that the quasi-public entity that is a body corporate is treated in a fashion which is analogous to that of a private entity. The scale of costs available to a private entity undertaking a prosecution is extremely limited. This leaves bodies corporate in the unjust and unfortunate circumstances of being significantly out of pocket for simply enforcing the requirements owners have legally and democratically elected to enforce on occupiers of the scheme.

SCA (Qld) is currently working towards reform of the by-law enforcement system under the BCCMA. Whilst the current process remains, we believe that reforms to the Justices Act can help alleviate some of the issues faced by Queensland strata communities, this is especially so given the Justices Act application to the enforcement of adjudicators orders.

There is a fundamental disconnect between the reality of the day-to-day enforcement of these matters and the costs available to a prosecution. There must be changes made.

SCA (Qld) would strongly support the following basic reforms to better support bodies corporate enforce their by-laws and/or adjudicators orders under the mechanisms they currently have available to them:

- The scale of costs available to a party who successfully completes a private prosecution be made more generous.
- That the costs available for a complaint and summons be uncapped and replaced with indemnity costs.

Whilst the reforms we are advocating for are relatively discreet, we believe they are important and the rationale behind them needs to be clearly explained.

Queensland will be increasingly reliant on body corporate schemes to provide housing for a growing population. Ensuring by-laws are complied with will be a key plank of enhancing the lifestyle of Queenslanders now and into the future.



Kristi Kinast
President SCA (Qld)