

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

B37/2016  
NO. B74/15

BETWEEN

**KJERULF AINSWORTH**  
First Appellant

AND

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**LISA MARTOO**  
Second Appellant

AND

**JOHN MORRIS**  
Third Appellant

AND

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**MARK LANG**  
Fourth Appellant

AND

**JOHN MAINWARING**  
Fifth Appellant

AND

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**MARTIN ALBRECH**  
First Respondent

AND

**BODY CORPORATE FOR VERIDIAN NOSSA RESIDENCES CTS 3404**  
Second Respondent

~~SUBMISSIONS~~  
~~APPELLANTS' SUMMARY OF ARGUMENT~~

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**PART I: Suitability for publication**

1. The Appellants certify that this submission is in a form suitable for publication on the internet.

**Part II: Issues**



2. In deciding, pursuant to s. 276 *Body Corporate and Community Management Act 1997* (Qld) (“the BCCM Act”) whether it is just and equitable to declare that a motion put before a body corporate, which required a resolution without dissent, was not passed because of opposition that was in the circumstances unreasonable, an adjudicator is entitled to make findings of fact and reach his or her own conclusion on the merits of the proposal contained in the motion, rather than determine whether the opposition to the motion was objectively unreasonable.
- 10 3. What was the appropriate test to apply to determine whether the opposition to the motion was, in the circumstances, unreasonable?
4. Whether the Queensland Court of Appeal erred in failing to accept that the adjudicator had erred in law, by asking herself the wrong question, applying the wrong test as to reasonableness, and effectively reversing the onus of proof.

**Part III: *Judiciary Act 1903, section 78B***

5. It is certified that the Appellants have considered whether notice should be given pursuant to section 78B of the *Judiciary Act 1903* and have formed the view that no such notice is required.
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**Part IV: *The judgments***

6. The decision of the Adjudicator of the Queensland Civil and Administrative Tribunal of 2 September 2013 is [2013] QBCCMCMr 351.
  7. The decision of the Appeal Member of the Queensland Civil and Administrative Tribunal of 17 October 2014 is [2014] QCATA 294.
  8. The decision of the Queensland Court of Appeal of 6 November 2015 is [2015] QCA 220.
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**Part V: *Facts***

9. The Viridian Noosa Residences Community Titles Scheme 34034 comprises 23 lots. It was established in 2005. The Appellants and the Respondent are lot owners in the Scheme. The Respondent owns Lot 11 (Unit 14), which is the subject of the dispute. It is a residential complex situated at Noosa in the State of Queensland.
10. The BCCM Act and the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (“the Regulation”) is the relevant and applicable legislation.
- 40 11. Upon establishment and registration of the Scheme, a body corporate for the Scheme was created<sup>1</sup>.

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<sup>1</sup> BCCM Act, s. 30

12. The Viridian Residences was an architectural award winning development. It was the evidence of the scheme architect (the Fifth Appellant) that the residences were designed to intentionally avoid large decks. Instead, the residences were designed with two smaller outdoor balconies.
13. The Community Management Statement for the Scheme, at By-Law 28, applied an Architectural Design and Landscaping Code that was stated to be binding on each owner, and on the Body Corporate<sup>2</sup>. By-Law 3 provided that By-Law 28 and the Architectural Design and Landscaping Code would not be amended, changed, varied or substituted without first obtaining the consent in writing of the Assessing Authority.
14. The Respondent wishes to amalgamate the two balconies forming part of his lot, so as to create one deck on one level, comprising the area of the two existing balconies and the space in between and around them that is currently common property. To achieve that aim, the Respondent requires exclusive use of the common property airspace that lies between the two existing balconies. In the evidence the area of common property involved was estimated at five square metres. The common property is owned by the lot owners in the Scheme as tenants in common<sup>3</sup>.
15. At the annual general meeting of the Body Corporate held on 30 August 2011 a motion was first proposed by the Respondent seeking permission to carry out the work, for exclusive use of the common property<sup>4</sup>, and for necessary consequential changes to the Community Management Statement to afford the Respondent special rights over the common property. The motion was initially stated to have been carried as an ordinary resolution by 8 votes to 7. Following legal correspondence, one of the votes in favour of the motion was disallowed, and the motion was determined to have been lost.
16. At an extraordinary general meeting held on 23 January 2012, the motion was again proposed. It was considered passed by a vote of 10 to 7.
17. The First Appellant challenged the determination of the Body Corporate that a vote by ordinary resolution was sufficient. On 18 June 2012 an adjudicator decided that the resolution was invalid, as the motion was required to be passed by a resolution without dissent<sup>5</sup>. That is the effect of s. 159(2) of the Regulation, which requires such an authorization to the Body Corporate to dispose of an interest in common property<sup>6</sup>. The making of an exclusive use By-Law<sup>7</sup> and an amendment to the Community

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<sup>2</sup> See also Schedule D, clause 2.1

<sup>3</sup> BCCM Act, s. 35(1)

<sup>4</sup> BCCM Act, s. 170

<sup>5</sup> [2012] QBCCMCmr 283

<sup>6</sup> see also BCCM Act, ss. 154 and 157

<sup>7</sup> BCCM Act, s. 171

Management Statement<sup>8</sup> also require a resolution without dissent. Otherwise, the Body Corporate is obliged to administer, manage and control the common property for the benefit of all lot owners<sup>9</sup>.

18. The Respondent's motion was again considered at an extraordinary general meeting of the Body Corporate held on 10 August 2012. The motion was defeated with seven votes in favour, seven votes against, and one abstention.
19. Opponents of the motion included the Respondent's adjoining owner<sup>10</sup>, the scheme architect and five other lot owners.
- 10 20. On 24 September 2012 the Respondent applied<sup>11</sup> to the Office of the Commissioner for Body Corporate and Community Management for an order for dispute resolution. The Commissioner referred the matter for adjudication, under the dispute resolution provisions of the BCCM Act<sup>12</sup>.
21. By s. 269(1) of the BCCM Act, the Adjudicator was obliged to investigate the application to decide whether it would be appropriate to make an order on the application. In doing so, the Adjudicator was obliged to observe natural justice, but was not bound by the rules of evidence<sup>13</sup>.
22. All parties to the proceedings accepted that there was a dispute<sup>14</sup>. The Adjudicator received written submissions from the Respondent and one  
20 other lot owner in support of the Respondent's motion, and written submissions from seven (7) lot owners opposed to the Respondent's motion. Opinion evidence was produced from five independent architects, three supporting the Respondent, and two supporting the opponents (as well as from the Fifth Applicant, the scheme architect). The Adjudicator decided the matter 'on the papers'. She did not inspect the premises.
23. On 2 September 2013 the Adjudicator made orders:
- a. Declaring that the Respondent's motion was not passed because of opposition that was unreasonable in the circumstances;
  - b. That the Respondent's motion is deemed to have been passed;
  - 30 c. Compelling the Body Corporate to register a new Community Management Statement incorporating the amendments proposed by the Respondent, at the Respondent's cost.
24. The order contemplated by paragraph 23(c) has not been carried out and the Community Management Statement remains as it was in 2008.

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<sup>8</sup> BCCM Act, s. 62

<sup>9</sup> BCCM Act, s. 152(1)(a)

<sup>10</sup> Mr Winter and Ms Coyne, who made a submission to the Adjudicator opposing the proposed motion, but who were not a party to this appeal, and was not a party to the proceedings before the Appeal Member of QCAT.

<sup>11</sup> BCCM Act, s. 238. To the extent that the Court of Appeal at Reasons [1] states that the application was made pursuant to s. 275, it is incorrect.

<sup>12</sup> Chapter 6, Parts 8 and 9 of the BCCM

<sup>13</sup> BCCM Act, s. 269(3)

<sup>14</sup> as defined in s. 227 of the BCCM Act

25. The Appellants appealed against the orders of the Adjudicator to the Queensland Civil and Administrative Tribunal. That appeal was limited to a question of law<sup>15</sup>.
26. On 17 October 2014, an Appeal Member of the QCAT allowed the appeal, and set aside the orders of the Adjudicator<sup>16</sup>.
27. On 6 November 2015 the Queensland Court of Appeal<sup>17</sup> granted leave to the Respondent to appeal against the decision of the Appeal Member, allowed the appeal, and ordered that the appeal from the decision of the Adjudicator be dismissed. Again, the appeal was limited to a question of law<sup>18</sup>.
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### **The earlier decisions – history of proceedings**

28. In her reasons for decision, the Adjudicator:
- 28.1. Records, at [3], that the Respondent argued that the objection to his motion was unreasonable because it was “without substance” because, on the facts, what he proposed was objectively minor in scope and effect, utilized only a small volume of airspace which could never be of use by any other owner, will improve the safety and amenity of the deck, was designed by the scheme’s original architect, was consistent with the existing architectural design for the scheme, will not impede the view, aspect, privacy or use and enjoyment of any lot, and will comply with the conditions of approval for the scheme;
- 28.2. Records, at [15], that the owners of the adjacent lot opposed the motion, being concerned that the larger deck area will result in extra noise from larger groups, about their privacy being diminished due to the view from their lot being compromised by persons on the extended deck being in greater proximity to their sight lines, and similarly their internal privacy being reduced;
- 28.3. Sets out, at [16] the content of the submissions of other lot owners;
- 28.4. Noted at [22] that the only issue raised is whether there was something unreasonable in the decision not to pass the motion;
- 28.5. Said, at [28], that the relevant legal obligation is for the body corporate to act reasonably, under s. 94(2) BCCM Act;
- 28.6. Stated, at [29], that if the opposition to the motion was unreasonable in the circumstances, then the resulting body corporate decision not to pass the motion will be unreasonable;
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15 BCCM Act s. 289(2); s. 146 Queensland Civil and Administrative Tribunal Act 2009

16 [2014] QCATA 294

17 McMurdo P. delivered the reasons of the Court; Morrison JA and Martin J concurring

18 s. 150 QCAT Act

28.7. Rejected, at [31] – [33], that the test of reasonableness was in accordance with the *Wednesbury* test<sup>19</sup>;

28.8. At [34] stated:

10 “The authorities consistently relied upon by QCAT and adjudicators conclude that a legislative obligation to act reasonably is satisfied if the decision is objectively reasonable<sup>20</sup> and that the objective test requires a balancing of factors in all the circumstances according to the ordinary meaning of the term ‘reasonable’. The expression ‘reasonable’ should be given a broad, commonsense meaning, and the question is not whether the decision was ‘correct’ but whether it was objectively reasonable<sup>21</sup>

28.9. At [38] stated:

20 “I agree that considering an order of this nature enables an adjudicator to determine the balance between the need to protect the genuine interests of owners and their voting entitlements, and upholding the justifiable position of proponents [in] the face of unfounded or vexatious opposition. I will consider the decision of the Body Corporate in that context.”

28.10. At [40] stated that the views of owners are relevant and significant, however if a decision is objectively unreasonable, it is so even if a majority of owners agree with it;

28.11. At [41] outlined her approach:

30 “I will consider the basis for the proposal and the objections to it, to ascertain whether the opposition to the proposal was unreasonable in the circumstances, and consequently whether the decision of the Body Corporate not to approve the proposal was unreasonable.”

28.12. At [43] – [84] formed her own view as to the validity/reasonableness of the expressed bases of objection to the proposal;

28.13. At [70] – [77] expressly dealt with the issues raised by the adjoining lot owner. At [74] the adjudicator concluded that it would be unreasonable to oppose a proposal that could affect the views or privacy of a lot unless that amounted to an unreasonable interference with the use of the lot. The adjudicator noted that the architects’ views conflicted regarding the impact on privacy and views. The adjudicator resolved this conflict by preferring the views of the architect McKerrell. The adjudicator concluded that

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19 *Associated Provisional Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

20 relying on *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125

21 citing *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 150 ALR 1 at 34, 38

any impact on the privacy of and views from Lot 10 would be minimal, and could be addressed by additional privacy screening;

28.14. At [87] stated:

“On balance I am not satisfied that the Body Corporate acted reasonably in deciding not to pass Motion 1 at the EGM on 10 August 2012. Individual owners may have voted against the motion in good faith, and in genuine reliance on architectural and other advice. However I consider they have relied on irrelevant and unsubstantiated considerations. The most substantive objection is the potential impact on Lot 10, but based on the evidence submitted, I consider that any impact will be so slight that it does not constitute a reasonable basis to refuse the proposal.”

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29. In his reasons for setting aside the orders of the Adjudicator, the appeal member of QCAT:

29.1. Noted at [7] that the Adjudicator heard the matter on the papers, which made it difficult to resolve conflicting factual issues of which there were many;

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29.2. Observed at [21] that the duty of the Body Corporate under s. 94(2) BCCM is to act reasonably, not a duty to make reasonable decisions;

29.3. Stated, at [34], that s. 94 BCCM must be construed in a way that promotes the objects of the Act<sup>22</sup>;

29.4. Applied the reasoning of this Court in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423;

29.5. Set out, at [85], how the application of the principles distilled from *McKinnon* guided a determination of whether a body corporate in general meeting was acting reasonably in rejecting a motion required to be without dissent;

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29.6. Accepted, at [92], that the onus was on the present Respondent to demonstrate that the body corporate had not acted reasonably;

29.7. Considered, at [93] – [94], that the Adjudicator had impermissibly reversed the onus of proof, in requiring a state of satisfaction that the body corporate had acted reasonably, rather than being satisfied by the present Respondent that it had acted unreasonably;

29.8. Considered, at [96], that the balancing exercise undertaken by the Adjudicator engaged a problematic approach to deciding unreasonableness;

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29.9. Considered, eg at [101], that the Adjudicator had asked herself the wrong question under s. 94 BCCM, and also decided whether in her

own view a number of the issues raised by the opponents of the motion were relevant considerations, or were subjective considerations and substituted her own view on the matters raised by the opponents of the motion;

29.10. Concluded, at [105] that the exercise of deciding whether a body corporate has acted unreasonably does not necessarily or even ordinarily require any balancing of competing interests. The appeal member said that to act reasonably in the sense contemplated by s. 94 does not imply even-handedness, a conciliatory approach to a dispute or a recognition of the interests or wishes of others; and

29.11. Noted, at [133], the dispute about the absence of compensation from the present Respondent, and that the Adjudicator had not attempted to deal with that issue, and concluded at [143] that the Adjudicator had erred in failing to conclude that the fact that there was no compensation offered for the rights which were approved was a reasonable basis to oppose its approval

#### Part VI: Argument

30. The reasoning of the Adjudicator and the Appeal member of QCAT are set out in some detail, because, as has already been noted, an appeal from the Adjudicator's decision lay only on a question of law. Similarly, an appeal from the decision of the appeal member of QCAT to the Court of Appeal lay only on a question of law.

31. The Appeal member considered that the Adjudicator had applied the wrong test to determining whether to make an order under s. 276 BCCM Act, and had wrongly reversed the onus of proof in the matter before her. Each of those matters, if the appeal member was correct, was an error of law.

32. It is necessary to have regard to the terms of the statute under consideration in considering what had to be decided by the Adjudicator. Although her decision was based on s. 276 BCCM Act, regard also had to be had to s. 94(2) of the Act.

33. The orders were made pursuant to s. 276 of the BCCM Act, which relevantly provides:

“(1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about

–  
(a) a claimed or anticipated contravention of this Act or the community management statement; or



(b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement

...  
(3) without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.  
..."

34. Item 10 of Schedule 5 to the BCCM Act provides:

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"If satisfied a motion . . . considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is unreasonable – an order giving effect to the motion as proposed, or a variation of the motion as proposed."

35. It is evident from the terms of the first order made by the Adjudicator that she relied upon Item 10 as the basis for making the orders that she did.

36. Section 94 of the BCCM Act relevantly provided:

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"(1) The body corporate for a community titles scheme must –  
(a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme;  
(b) ...  
(c) carry out the other functions given to the body corporate under this Act and the community management statement  
(2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making a decision for the subsection.

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37. In the statute, examples are given for subsection (2) including "not passing a motion after a vote at a general meeting or a committee meeting".

38. Because the Body Corporate could only act as its members directed by their votes at the extraordinary general meeting, neither the Adjudicator nor the Appeal Member<sup>23</sup> drew any distinction between the obligation of the Body Corporate to act reasonably, and the consideration of whether the opposition to the motion was unreasonable (the phrase used in Item 10). However, each accepted that the onus of persuading the Adjudicator of the unreasonableness lay on the proponent of the motion, the present Respondent.

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39. It is submitted that the reasoning of the Court of Appeal in allowing an appeal from the decision of the appeal member of the QCAT, is erroneous in three fundamental respects:

39.1. Its acceptance at [82] that the Adjudicator was required to reach her own conclusion as to the correctness of the decision of the Body Corporate was wrong (Grounds of Appeal 1 and 3). The Adjudicator only had to decide whether the opposition to the

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<sup>23</sup> AAT Reasons [32]; Adjudicator Reasons [26] – [28]

motion was in the circumstances unreasonable, which was the decision of the Appeal Member (Ground of Appeal 2);

39.2. Its application of the test for unreasonableness at [82] was wrong (Ground of Appeal 3);

39.3. Its conclusion at [90] and [92] that the Adjudicator had not erroneously reversed the onus of proof was wrong (Ground of Appeal 4).

40. The critical paragraph in the reasons of the President is [82] which provides:

10            “[The Adjudicator’s] role under s. 276 and Item 10 in Schedule 5  
BCCM Act, consistent with the objects of the BCCM Act and the  
obligation on bodies corporate in carrying out their general  
functions to act reasonably under s. 94 BCCM Act, was to  
determine whether she was satisfied the body corporate did not  
pass the applicant’s motion because of opposition from the  
respondents that was in the circumstances unreasonable. This was  
a question of fact to be determined by objectively considering all  
relevant circumstances: *Commonwealth Bank v Human Rights and  
Equal Opportunity Commission* (1997) 150 ALR 1. What is relevant  
20            in determining reasonableness (or unreasonableness) will vary  
from case to case, depending on the issues raised and the relevant  
material: *Waters v Public Transport Corporation* (1991) 173 CLR  
349 per Brennan J at 379; Deane J at 383-4 and McHugh J at 410-  
11. Contrary to the respondent’s contentions, the adjudicator was  
not limited to determining whether the respondents’ opposition to  
the motion could have been reasonably held. She was required to  
reach her own conclusion after considering all relevant matters.  
This view as to the functions of a specialist adjudicator is  
consistent with the relevant provisions of the BCCM Act and with  
30            the ordinary meaning of “adjudicator” subject to the text and  
context of that Act.”

41. The error lies in the sentence “She was required to reach her own  
conclusion after considering all relevant matters.” The President was  
referring not to a conclusion as to whether the opposition was  
unreasonable, but a conclusion as to the merits of the opposition. The  
sentence appears after the rejection of the present Appellants’ argument  
as to the appropriate test of reasonableness, which is addressed below.  
However the sentence to which specific reference is drawn is not confined to the  
40            question of whether the Adjudicator was only required to consider the  
reasonableness of the opposition. That is evident from the last sentence of the  
extracted paragraph. It is also evident from paragraph [92] of the Reasons where  
the President said, of the Adjudicator:

“She made primary findings of fact, after considering the competing  
material and submissions, that she was not satisfied the specific  
objections raised by the respondents were made out.”

42. Whatever test of reasonableness is applied, it is clear that it was not the function of the Adjudicator to substitute her own decision for that of the Body Corporate<sup>24</sup>. The Adjudicator's function was to decide whether the opposition to the Respondent's motion was unreasonable<sup>25</sup>.
43. It is evident from the reasons of the Adjudicator, as highlighted by the President in that part of paragraph [92] extracted above, that she made findings of fact on the various "grounds" of opposition to the motion. Perhaps the starkest example of this is the Adjudicator's preference of the architectural opinion supporting the Respondent, to that supporting the Applicants<sup>26</sup>.
- 10 44. The way in which the Adjudicator approached the matter is reflected in paragraph [41] of her Reasons:  
"I will consider the basis for the proposal and the objections to it, to ascertain whether the opposition to the proposal was unreasonable in the circumstances, and consequently whether the decision of the Body Corporate not to approve the proposal was unreasonable."
45. The Adjudicator then considered each of the opponents' stated reasons  
20 for opposition and found that they were not made out, or not supported by the evidence that she accepted.
46. Rather, the Adjudicator should have considered whether the opposition to the proposal had a logical and understandable basis, not whether she agreed with it, but for the more limited purpose of deciding whether there were reasonable grounds for the opposition.
47. The Appeal Member determined that by approaching the matter as she did, the Adjudicator applied the incorrect test to the task that she was required to fulfill, and thus erred in law<sup>27</sup>. It is submitted that the Appeal Member was correct in this conclusion, and the Court of Appeal erred in  
30 failing to recognize the error of the Adjudicator. It also erred in concluding that the Appeal Member had not identified the errors of law found by him to exist. The reasons of the Appeal Member do identify the errors of law that he found established.
48. The BCCM Act gives no guidance as to the criteria to be applied in determining reasonableness, or how it is to be adjudged that a body corporate was acting in breach of s. 94(2) BCCM Act.

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24 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 per Hayne J at [54]; Callinan and Heydon JJ at [131]

25 For example *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 150 ALR 1 at 34

26 Adjudicator Reasons [63]

27 AAT Reasons [87]

49. Each of the Adjudicator<sup>28</sup> and the Appeal Member<sup>29</sup> rejected that the test to be applied to determine whether the opposition to the Respondent's motion was unreasonable was that enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>30</sup>. There were authorities going each way at Adjudicator level as to whether *Wednesbury* was the correct test to apply<sup>31</sup>. At Tribunal level, the objective test was considered to apply<sup>32</sup>. The present case is the first occasion on which the Court of Appeal was required to decide the issue.
- 10 50. On appeal to the Court of Appeal, the Appellants contended (and continue to contend) that the appropriate test to be applied was whether a reasonable person could have opposed the motion on the bases identified<sup>33</sup>. This requires a higher level of satisfaction than *Wednesbury* unreasonableness, but still allows for the subjective views of the opponents to be taken into account, and for the Body Corporate's decision to be given some credence, and is still an objective test. That test was rejected by the Court of Appeal in paragraph [82] of the Reasons, set out above.
- 20 51. It is appreciated that the opponents of the motion may have individually had different reasons for their opposition. However, because the motion was required to be passed without dissent, the Adjudicator had to be satisfied that none of the grounds of objection were reasonable.
52. Reasonableness cannot be decided in the abstract, and must take account of the activity being considered. A number of factors support the application of the test advocated by the Appellants to the question of reasonableness on the part of the Body Corporate, and the opponents of the Respondent's motion.
- 30 53. First, as stated, the present case concerns a resolution required to be passed without dissent. There were seven dissentients. Each probably gave more weight to one reason for opposition than others. The Adjudicator stated<sup>34</sup> that the individual lot owners voted against the motion in good faith and in genuine reliance on architectural and other advice. There had been opposition to the Respondent's motion over a prolonged period, and at three meetings of the Body Corporate.
54. At [38] of her Reasons, the Adjudicator said:

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28 Adjudicator Reasons [33]

29 AAT Reasons [44]

30 [1948] 1 KB 223

31 *Zenith* [2007] QBCCM Cmr 115 (objective test); *Boston on Belgrave* [2005] QBCCM Cmr 556 (*Wednesbury* test)

32 *Luadaka v Body Corporate for the Clover Emerald Lakes* [2013] QCAT 183

33 This was the approach taken in *Sirocco Resort* [2006] QBCCM Cmr 426 at [66] and by analogy with *George v Rockett* (1990) 170 CLR 104 at 112

34 Adjudicator Reasons [87]

“I agree that considering an order of this nature enables an adjudicator to determine the balance between the need to protect the genuine interests of owners and their voting entitlements, and upholding the justifiable position of proponents in the face of unfounded or vexatious opposition. I will consider the decision of the Body Corporate in that context.”

- 10 55. No balancing exercise was involved. Each of the lot owners was entitled to vote in his or her own interests. This was recognized by the Appeal Member, as submitted below. The Adjudicator did not find that the opposition to the motion was completely unfounded or vexatious. Yet, the Adjudicator in fact approached the matter as submitted above, by substituting her opinion for that of the Body Corporate. That was impermissible. Such an approach makes a decision of a body corporate merely provisional or tentative, subject to a merits review by an adjudicator, on application by an aggrieved lot owner. That does not sit well with the concept of body corporate management provided for in the BCCM Act, and does not provide the required level of certainty that ought to attach to decisions of a body corporate, particularly those that are
- 20 required to be made without dissent.
56. Secondly, the present case concerns the disposition by the body corporate of individual owners’ property rights. The legislature considered such a step to be sufficiently serious to require a resolution without dissent<sup>35</sup>. To simply ‘balance’ the right of the Respondent to improve his lot, as against the rights of the other owners to retain their (already existing) property rights does not accord sufficient importance to what is being considered.
- 30 57. The Appeal Member correctly considered<sup>36</sup> that one ought not decide the question of reasonableness by engaging in a balancing exercise between the interest of the proponent in improving his lot with the interests of the other lot owners and the scheme as a whole. The Appeal Member correctly stated<sup>37</sup> that to act reasonably in the sense contemplated by s. 94 of the BCCM Act does not imply even- handedness, a conciliatory approach to a dispute or recognition of the interests or wishes of others.
58. Thirdly, the importance of this consideration is heightened by the fact that no offer of compensation was made by the Respondent for the grant of exclusive use of the common property<sup>38</sup>. At CA[93] the President said:
- 40 “As the adjudicator found as a fact that the airspace was of no value to anyone other than the applicant, she did not err in failing to identify the applicant’s omission to offer compensation as a reasonable basis to oppose the motion.”

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35 AAT Reasons [88]; *Katsikalis v Body Corporate for the Centre* [2009] QCA 77

36 AAT Reasons [96] and [105]

37 AAT Reasons [105]

38 The Appeal Member would have imposed a requirement to pay compensation of \$15,000 if that were the only error of law committed by the Adjudicator

59. This passage highlights two errors. The first is further support for the submission earlier made, that the President erroneously considered that it was the function of the Adjudicator to make findings of fact on disputed issues. There was evidence before the Adjudicator from a valuer (for the Appellants) and a real estate agent (for the Respondent) as to the value of the common property under consideration, and of the enhanced value of the Respondent's lot if his proposal was approved. Rather than considering whether it was reasonable to oppose the proposal on the ground that no compensation was offered, when there was some evidentiary support for the common property having value, the Adjudicator simply concluded, on the basis of the evidence that she accepted, that it was not reasonable to oppose the motion on that basis, because the common property was not worth anything to the dispossessed lot owners.
60. The second is a failure to recognize that the failure to offer any compensation for the acquisition of property rights is capable of providing a ground for reasonable opposition to the proposal.
61. In considering the appropriate test to apply to decide whether opposition to a motion was unreasonable, the Appeal Member considered a number of examples, such as the decision of the members of a company to change the company's constitution<sup>39</sup>; whether a landlord's refusal to consent to an assignment of a lease was unreasonable; and contractual obligations to act reasonably. He concluded<sup>40</sup> that deciding whether a body corporate is acting reasonably in refusing to transfer property interests is more closely aligned to the approach taken in those types of cases.
62. The statute here under consideration is quite different from that considered in *Waters v Public Transport Corporation* (1991) 173 CLR 349. In that case, s. 29(2) *Equal Opportunity Act* (Vic.) took certain discrimination outside the operation of the statute if services "cannot reasonably be provided" or could only be provided on more onerous terms than could reasonably be provided to a person not having the impairment. The Court also had to consider s. 17(5)(c) of the Act, which referred to whether a requirement or condition was reasonable. Unsurprisingly, the Court concluded that reasonable meant reasonable in all the circumstances.
63. Each of the members of the Court observed that the question of reasonableness depends very much on the statute in question. As Brennan J observed, at page 378, it is not possible to determine reasonableness in the abstract; it must be determined by reference to the

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<sup>39</sup> *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832' AAT Reasons [70]

<sup>40</sup> AAT Reasons [85]

activity or transaction in which the putative discriminator is engaged<sup>41</sup>. Here, it must be considered in the context of seven lot owners objecting to another lot owner having exclusive use over part of their property for a use with which they do not agree, for various reasons.

64. Importantly, each of the majority members of the Court<sup>42</sup>, held that the views of the opponents (in that case the alleged discriminator) and how the decision would affect them ought also to have been taken into account, including their subjective views.
- 10 65. Nothing in *Commonwealth Bank of Australia v Human Rights and Equal Opportunities Commission* (1997) 150 ALR 1, a decision of the Full Federal Court, supports the approach taken by the Adjudicator, and the Court of Appeal, in this case. Indeed in that decision the relevance of subjective views as being relevant to the determining of the reasonableness of conduct was approved.
66. In *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 the Court was concerned with a challenge to a freedom of information request, and whether reasonable grounds existed for a Minister's certificate to support a claim that the disclosure of the documents would be contrary to public interest. There was no question of the decision maker's state of mind being involved.
- 20 67. At [53] Hayne J said (consistently with what is submitted above at paragraph 32) that the statute must be construed in a way that promotes the objects of the Act. Here, the BCCM Act gives power to the body corporate to act in a number of different circumstances, subject to the requirement, in a limited number of those circumstances, for it to act reasonably. Limited rights of review of body corporate decisions are given, and it would not be in accordance with the legislative regime for decisions of the body corporate, even where it is required to act reasonably, to be subject to a merits review.
- 30 68. As in this case (it is submitted) Hayne J recognized at [54] that the statute did not permit the tribunal to substitute its opinion for that of the decision maker (here the body corporate). There was a particular statutory question: were there reasonable grounds for the claim that the disclosure would be contrary to the public interest. Here there is a statutory question: in refusing to pass the resolution without dissent, did the body corporate act reasonably?
69. Particular reference is made to what Hayne J said at [56]. Applying that reasoning to the present case, it was inappropriate for the Adjudicator to dissect the identified reasons for opposition and attempt to address them

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<sup>41</sup> see also Deane J at 384, Dawson and Toohey J at 394-5 and McHugh J at 410

<sup>42</sup> Mason CJ and Gaudron J expressed a different view on this point

individually. Reliance is also placed on what his Honour said at [59] and [60].

70. At [129] Callinan and Heydon JJ observed that the statute there (as, it is submitted applies to the BCCM Act) provided no mandate for any balancing exercise. Their Honours left open whether an approach consistent with the *Wednesbury* test ought be applied.

71. The Court of Appeal did not consider these matters, no doubt because of its conclusion that it was the function of the Adjudicator to make her own findings and reach her own conclusion, rather than to simply assess the reasonableness of the opposition to the motion. At CA[84] the President said:

“The competing submissions and supporting material in this case, particularly the architectural reports, made the question of unreasonableness difficult to resolve. As the reasons of both the adjudicator and QCATA demonstrate, views as to what was reasonable or unreasonable involved value judgments on which there was room for reasonable differences of opinion, with no opinion being uniquely right . . .

“

72. It is respectfully submitted that had the Court of Appeal applied the correct test, as the Appeal member did, it would have self-evidently found that the opposition to the Respondent’s motion was not unreasonable, as it had a logical and rational basis underpinning it.

73. Indeed, the error in the approach of the Adjudicator and the Court of Appeal can be viewed against the opposition of the owners of the adjoining lot to that of the Respondent. Their opposition was not unfounded or vexatious. The basis of their opposition was set out at paragraph [15] of the Adjudicator’s reasons. It could not be said that those views were objectively unreasonable views for an adjoining owner to have. The Adjudicator resolved whether the opposition of this lot owner was reasonable by preferring one body of architectural opinion to another. Even so, the Adjudicator concluded her reasons at [89] by expressing a view that the Respondent would adhere to a commitment given to install a privacy blade if the adjoining owner requested it.

74. The fact that there was a body of evidence supporting the opposition of the adjoining owner, and a real concern expressed about privacy and noise issues, highlights that their opposition to the motion was reasonable. It was not the Adjudicator’s task to weigh competing architectural opinions and express a preference for one over the other in order to assess whether opposition to the motion was unreasonable.

75. It is evident from a number of paragraphs in the reasons of the Adjudicator that she regarded the present Appellants as carrying the onus of persuading her as to the correctness of their position. It does not seem to be controversial that if, in fact, the Adjudicator did reverse the onus of



proof, that was an error of law, that would have supported the Appeal Member's decision to overturn the orders made by the Adjudicator.

76. The Reasons of the President on this issue are brief. At CA[90] her Honour said that the contention that the Adjudicator applied an incorrect test and reversed the onus is not made out when her reasons are read as a whole. At CA[92] the President recognized that it was for the present Respondent to demonstrate that the opposition to his motion was unreasonable. Her Honour continued, referring to the Adjudicator:

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"In any case, when the adjudicator's reasons are read in their entirety, it is clear that she fully appreciated it was for the applicant to demonstrate the unreasonableness of the respondents' opposition to his motion. She made primary findings of fact, after considering the competing material and submissions, that she was not satisfied the specific objections raised by the respondents were made out. But she did not reverse the onus on the ultimate question. Only after a careful and thorough analysis of all material considerations raised by the respondents and the applicant, was she ultimately persuaded by the applicant that the opposition was unreasonable. Her ultimate finding that she was "not satisfied that the Body Corporate acted reasonably" in not passing the applicant's motion was, in context, a finding by her that the respondents' opposition was based on "irrelevant and unsubstantiated considerations" and so was unreasonable in terms of s. 176 (sic) and Item 10 in Schedule 5. There can be no doubt from her reasons read as a whole that the applicant satisfied her that the opposition to the motion was unreasonable. She did not apply the wrong test or reverse the onus of proof. QCATA erred in finding that the adjudicator applied the wrong test and reversed the onus of proof."

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77. However, on a number of occasions, the reasons of the Adjudicator support a conclusion that she did, indeed, reverse the onus of proof. These were not addressed by the President in her reasons, other than recognizing that fact at the commencement of paragraph [92], and by stating, without descending to any particularity of reasoning, that the "reasons read as a whole" do not support the contention advanced.

78. Paragraph [61] of the Adjudicator's reasons<sup>43</sup> state:

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"Having assessed the material submitted and the competing architectural opinions, I am not satisfied that the opponents of the proposal have demonstrated that the proposed modification materially offends the integrity of the architectural design of the scheme."

79. This plainly points to a reversal of the onus. Paragraphs [46], [51], [66]<sup>44</sup> and [78] of the Adjudicator's reasons were of similar effect.

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<sup>43</sup> referred to at CA [30]

80. The Appeal Member was correct to conclude<sup>45</sup>, as he did, that the Adjudicator had erred in law in reversing the onus. There is no persuasive reasoning by the President that the Appeal Member erred in that regard.
81. The Adjudicator erred in determining whether the body corporate had acted reasonably in refusing to pass the Respondent's motion without dissent. The Adjudicator impermissibly formed her own view as to the reasonableness of the opposition, by making findings based on conflicting evidence, and substituted her decision for that of the body corporate. She also erroneously reversed the onus of proving that the body corporate had not acted reasonably.
- 10 82. The Court of Appeal erred in endorsing the approach of the Adjudicator

**Part VII: Applicable constitutional provisions, statutes, and regulations**

83. Sections 2-4, 62, 94, 152, 269, 275, 276, 289 and Schedule 5 to the *Body Corporate and Community Management Act 1997* (Qld) are attached to this outline
84. Section 159(2) of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* is attached to this outline.
- 20 85. Sections 146 and 150 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) are attached to this outline

**Part VIII: Orders sought**

86. The appellants seek orders in terms of the Amended Notice of Appeal.

**Part VIII: Estimate of time**

- 30 87. The Appellants' counsel estimates that the presentation of the Appellants' oral argument will take not more than two hours.

Dated: 29 June 2016



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<sup>44</sup> CA Reasons [32]

<sup>45</sup> AAT Reasons [93] - [94]



# **Body Corporate and Community Management Act 1997**

**Reprinted as in force on 27 June 2012**

**Reprint No. 6A**

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# Body Corporate and Community Management Act 1997

[as amended by all amendments that commenced on or before 27 June 2012]

**An Act providing for the establishment and administration of  
community titles schemes, and for other purposes**

## Chapter 1 Preliminary

### Part 1 Introduction

#### 1 Short title

This Act may be cited as the *Body Corporate and Community Management Act 1997*.

### Part 2 Object and achievement of object

#### 2 Primary object

The primary object of this Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

[s 3]

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### **3 How primary object is to be achieved**

For the achievement of its primary object, this Act provides for—

- (a) the establishment of community titles schemes; and
- (b) the operation and management of community titles schemes.

### **4 Secondary objects**

The following are the secondary objects of this Act—

- (a) to balance the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes;
- (b) to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;
- (c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;
- (d) to provide a legislative framework accommodating future trends in community titling;
- (e) to ensure that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;
- (f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;
- (g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;

- (h) to ensure accessibility to information about community titles scheme issues;
- (i) to provide an efficient and effective dispute resolution process.

## Part 3 Interpretation

### 5 Dictionary

The dictionary in schedule 6 defines particular words used in this Act.

### 6 Use of certain tags

- (1) In this Act, persons or things are sometimes given identifying tags, for example, a community titles scheme might be given the tag *scheme A*.
- (2) An identifying tag is generally used as a shorthand way of distinguishing one person or thing from another person or thing for a provision or series of provisions in the section or division in which the tag is established and used.
- (3) An identifying tag used for a provision or series of provisions may be used again, but refer to a different person or thing, in another provision or series of provisions.

### 7 Use of illustrations

Schedule 1 contains examples of possible structures of community titles schemes and the accompanying text illustrates the use of various expressions used in this Act.

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**61 Giving copy of community management statement**

- (1) This section applies if any of the following is recorded for a community titles scheme—
  - (a) a community management statement that, under section 60(4), is not endorsed with a community management statement notation;
  - (b) a community management statement containing a lot entitlement for a lot included in the scheme that is different from the lot entitlement for the lot contained in the previous statement recorded for the scheme;
  - (c) a community management statement that, under section 60, is endorsed with a community management statement notation by the urban land development authority.
- (2) The body corporate must give a copy of the statement to—
  - (a) each local government in whose local government area scheme land is located; and
  - (b) if any scheme land is in an urban development area and the urban land development authority has not endorsed the statement under section 60—the authority.
- (3) The copy must be given—
  - (a) for a statement other than a statement to which section 57 applies—within 14 days after the statement is recorded; or
  - (b) for a statement to which section 57 applies—within 14 days after the body corporate receives a copy of the statement under section 57(9).

**62 Body corporate to consent to recording of new statement**

- (1) This section provides for the form of the consent of the body corporate for a community titles scheme to the recording of a new community management statement for the scheme in the place of the existing statement for the scheme.

[s 62]

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- (2) The consent must be in the form of a resolution without dissent.
- (3) However, the consent may be in the form of a special resolution if the difference between the existing statement and the new statement is limited to the following—
  - (a) differences in the by-laws (other than a difference in exclusive use by-laws);
  - (b) the identification of a different regulation module to apply to the scheme.
- (4) The consent to the recording of a new community management statement need not be in the form of a resolution without dissent or special resolution if the new statement is different from the existing statement only to the extent necessary for 1 or more of the following—
  - (a) compliance with a provision of this Act under which the body corporate is required to lodge a request to record a new statement for a purpose stated in the provision;
  - (b) compliance with the order of an adjudicator, the District Court or QCAT made under this Act for the lodging of a request for the recording of the new statement;
  - (c) changing the community titles scheme to give effect to an approved reinstatement process;
  - (d) changing the community titles scheme to reflect a formal acquisition affecting the scheme;
  - (e) recording the details of allocations of common property or body corporate assets made under an exclusive use by-law;
  - (f) implementation of development proposed under the existing statement or under the provisions of a community management statement to which the existing statement is subject;
  - (g) showing the location of a service easement for the community titles scheme by including a services location diagram;



## **Chapter 3      Management of community titles schemes**

### **Part 1            Management structures and arrangements**

#### **Division 1        Body corporate's general functions and powers**

#### **94      Body corporate's general functions**

- (1) The body corporate for a community titles scheme must—
  - (a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
  - (b) enforce the community management statement (including enforcing any by-laws for the scheme in the way provided under this Act); and
  - (c) carry out the other functions given to the body corporate under this Act and the community management statement.
- (2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.

*Examples for subsection (2) of a body corporate making a decision—*

- passing a motion by resolution at a general meeting or a committee meeting
- not passing a motion after a vote at a general meeting or a committee meeting
- owners of lots included in a specified two-lot scheme entering into a lot owner agreement for the scheme (see section 111E(2))

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associate of the manager, who is authorised by the body corporate, by a lot owner agreement, to operate the account.

## **Division 2                    Property management**

### **152    Body corporate's duties about common property etc.**

- (1) The body corporate for a community titles scheme must—
  - (a) administer, manage and control the common property and body corporate assets reasonably and for the benefit of lot owners; and
  - (b) comply with the obligations with regard to common property and body corporate assets imposed under the regulation module applying to the scheme.
- (2) Nothing in this part, or in a regulation made under this part, stops—
  - (a) an item of personal property that is a body corporate asset from becoming part of the common property because of its physical incorporation with common property; or
  - (b) a part of common property from becoming a body corporate asset because of its physical separation from common property.

### **153    Mail box and notice board**

The body corporate for a community titles scheme must comply with the mail box and notice board requirements prescribed under the regulation module applying to the scheme.

[s 269]

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application only if the fee prescribed under a regulation has been paid in the way prescribed under the regulation.

### **269 Investigation by adjudicator**

- (1) The adjudicator must investigate the application to decide whether it would be appropriate to make an order on the application.
- (2) Also, if an agreement is referred to an adjudicator under section 252I(5), the adjudicator may investigate the agreement to decide whether it would be appropriate to make a consent order under section 276(5).
- (3) When investigating the application or agreement, the adjudicator—
  - (a) must observe natural justice; and
  - (b) must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the application or agreement; and
  - (c) is not bound by the rules of evidence.

### **270 Dismissal of applications**

- (1) The adjudicator may make an order dismissing the application if—
  - (a) it appears to the adjudicator that the adjudicator does not have jurisdiction to deal with the application; or
  - (b) the adjudicator is satisfied the dispute should be dealt with in a court or tribunal of competent jurisdiction; or
  - (c) it appears to the adjudicator that the application is frivolous, vexatious, misconceived or without substance; or
  - (d) the applicant fails, without reasonable excuse, to comply with a requirement of the adjudicator under section 271(1); or

- (ii) an outline in the approved form of the appeal rights available under part 11.
- (3) If the order is a declaratory or other order affecting the owners or occupiers of the lots included in the scheme generally, or a particular class of the owners or occupiers, the adjudicator need not give a copy of the order to each owner or occupier individually, but may instead give notice in a way that ensures, as far as reasonably practicable, it comes to the attention of all owners or occupiers or all members of the class.

#### **275 Referral back to commissioner**

When the adjudicator has completed the adjudicator's duties under this part, the adjudicator must refer the application (including any order the adjudicator has made) back to the commissioner.

#### **276 Orders of adjudicators**

- (1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—
  - (a) a claimed or anticipated contravention of this Act or the community management statement; or
  - (b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
  - (c) a claimed or anticipated contractual matter about—
    - (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
    - (ii) the authorisation of a person as a letting agent for a community titles scheme.

[s 277]

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- (2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.
- (3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.
- (4) An order appointing an administrator—
  - (a) may be the only order the adjudicator makes for an application; or
  - (b) may be made to assist the enforcement of another order made for the application.
- (5) If the adjudicator makes a consent order, the order—
  - (a) may include only matters that may be dealt with under this Act; and
  - (b) must not include matters that are inconsistent with this Act or another Act.

**277 Order may be made if person fails to attend to be interviewed**

If an adjudicator considers it just and equitable in the circumstances, the adjudicator may make an order under this part even if a person fails, without reasonable excuse, to comply with a requirement made by the adjudicator under section 271(1)(a)(ii).

**278 Administrator may act for body corporate etc.**

If an adjudicator appoints an administrator to perform obligations of the body corporate, the committee for the body corporate or a member of the committee, anything done by the administrator under the authority given under the order is taken to have been done by the body corporate, committee or member.

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## Part 11 Appeal from adjudicator on question of law

### 288A Definition for pt 11

In this part—

*order*, for an application, includes a decision made under section 242(4)(b) to refuse to waive noncompliance with the time limits stated in section 242 for the application, whether or not the decision is made by an order.

### 289 Right to appeal to appeal tribunal

- (1) This section applies if—
- (a) an application is made under this chapter; and
  - (b) an adjudicator makes an order for the application (other than a consent order); and
  - (c) a person (the *aggrieved person*) is aggrieved by the order; and
  - (d) the aggrieved person is—
    - (i) for an order that is a decision mentioned in section 288A, definition *order*—an applicant; or
    - (ii) for another order—
      - (A) an applicant; or
      - (B) a respondent to the application; or
      - (C) the body corporate for the community titles scheme; or
      - (D) a person who, on an invitation under section 243 or 271(1)(c), made a submission about the application; or
      - (E) an affected person for an application mentioned in section 243A; or

[s 290]

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- (F) a person not otherwise mentioned in this subparagraph against whom the order is made.
- (2) The aggrieved person may appeal to the appeal tribunal, but only on a question of law.

## **290 Appeal**

- (1) An appeal to the appeal tribunal must be started within 6 weeks after the aggrieved person receives a copy of the order appealed against.
- (2) If requested by the principal registrar, the commissioner must send to the principal registrar copies of each of the following—
  - (a) the application for which the adjudicator's order was made;
  - (b) the adjudicator's order;
  - (c) the adjudicator's reasons;
  - (d) other materials in the adjudicator's possession relevant to the order.
- (3) When the appeal is finished, the principal registrar must send to the commissioner a copy of any decision or order of the appeal tribunal.
- (4) The commissioner must forward to the adjudicator all material the adjudicator needs to take any further action for the application, having regard to the decision or order of the appeal tribunal.

## **292 Referral back to commissioner**

When the adjudicator has completed taking further action under this part, the adjudicator must refer all material relating to the application for which the adjudicator's order was made and the decision or order of the appeal tribunal back to the commissioner.

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## Schedule 5      Adjudicator's orders

section 276(3)

- 1 An order requiring the body corporate to lodge a request to record a new community management statement consistent with the statement for which the body corporate gave its consent.
- 2 An order requiring the body corporate to lodge a request to record a new community management statement, regardless of whether the body corporate consents to the recording.
- 3 An order requiring the body corporate to take out insurance or to increase the amount of insurance.
- 4 An order requiring the body corporate to take action under an insurance policy to recover an amount or to have repairs carried out.
- 5 An order requiring the body corporate—
  - (a) to acquire, within a stated time, stated property the adjudicator considers necessary for the use or convenience of the owners or occupiers of lots; or
  - (b) not to acquire stated property, or to dispose of stated common property, within a stated time.
- 6 An order requiring the body corporate to call a general meeting of its members to deal with stated business or to change the date of an annual general meeting.
- 7 An order declaring that a meeting of the committee for the body corporate, or a general meeting of the body corporate, is void for irregularity.
- 8 An order declaring that a resolution purportedly passed at a meeting of the committee for the body corporate, or a general meeting of the body corporate was, at all times void.
- 8A An order declaring that a decision purportedly made by a lot owner agreement was at all times void.



Schedule 5

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- 9 An order declaring that a resolution purportedly passed at a meeting of the committee for the body corporate, or a general meeting of the body corporate, is a valid resolution of the meeting.
- 9A An order declaring that a decision purportedly made by a lot owner agreement is a valid decision of the body corporate.
- 10 If satisfied a motion (other than a motion for reinstatement of scheme land or termination or amalgamation of the scheme) considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is unreasonable—an order giving effect to the motion as proposed, or a variation of the motion as proposed.
- 11 If satisfied a contribution levied on lot owners, or the way it is to be paid, is unreasonable—an order reducing or increasing the contribution to a reasonable amount or providing for its payment in a different way.
- 12 An order requiring the body corporate to have its accounts, or accounts for a stated period, audited by an auditor stated in the order or appointed by the body corporate.
- 13 If satisfied the applicant has been wrongfully denied access to, or a copy of, information or documents—an order requiring the body corporate to give stated information to the applicant, to make particular information available for inspection by the applicant, or to give copies of stated documents to the applicant.
- 14 If satisfied the body corporate has the right to terminate a person's engagement as a body corporate manager or service contractor—an order declaring that the engagement is terminated.
- 15 If satisfied the body corporate does not have the right to terminate a person's engagement as a body corporate manager or service contractor—an order declaring that the engagement is not terminated.
- 16 An order requiring a body corporate manager, letting agent or service contractor to comply with the terms of the person's engagement, including the code of conduct, or authorisation.

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- 17 If satisfied the body corporate's decision about a proposal by the owner of a lot to make improvements on or changes to common property is an unreasonable decision—an order requiring the body corporate—
    - (a) to reject the proposal; or
    - (b) to agree to the proposal; or
    - (c) to ratify the proposal on stated terms.
  - 18 If satisfied an animal is being kept on common property or a lot contrary to the by-laws—an order requiring the person in charge of the animal to remove it and keep it away.
  - 19 If satisfied an animal kept on common property or a lot under the by-laws is causing a nuisance or a hazard or unduly interfering with someone else's peaceful use and enjoyment of another lot or common property—an order requiring the person in charge of the animal—
    - (a) to take stated action to remedy the nuisance, hazard or interference; or
    - (b) to remove the animal and keep it away.
  - 20 If satisfied a by-law is, having regard to the interests of all owners and occupiers of lots included in the scheme, oppressive or unreasonable—an order requiring the body corporate to lodge a request to record a new community management statement—
    - (a) to remove the by-law; and
    - (b) if it is appropriate to restore an earlier by-law, to restore the earlier by-law.
  - 21 If satisfied a by-law is invalid—an order declaring that the by-law is invalid and requiring the body corporate to lodge a request to record a new community management statement to remove the by-law.
  - 22 If satisfied the owner of a lot reasonably requires a licence over part of the common property for the appropriate enjoyment of the lot, and the body corporate has unreasonably refused to give the licence—an order requiring the body corporate to give a licence to the owner on terms (that may

- require a payment or periodic payments to the body corporate) over a stated part of the common property.
- 23 An order appointing an administrator, and authorising the administrator to perform—
- (a) obligations of the body corporate, its committee, or a member of the committee under this Act or the community management statement; or
  - (b) obligations of the body corporate under another Act.
- 24 If satisfied a decision to pass or not pass a motion at a general meeting of the body corporate was unreasonable—an order declaring that a motion was invalid or giving effect to the motion as proposed, or a variation of the motion as proposed.
- 25 If satisfied that a decision made by a lot owner agreement was unreasonable—an order—
- (a) declaring that the decision was at all times void; or
  - (b) giving effect to a variation of the lot owner agreement.
- 26 If satisfied that an owner of a lot included in a specified two-lot scheme was unreasonable in not entering into a lot owner agreement following a request from the owner of the other lot—an order—
- (a) giving effect to the decision proposed by the owner of the other lot; or
  - (b) giving effect to a variation of the decision proposed by the owner of the other lot.

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- (2) The body corporate may maintain a noticeboard for the display of notices and other material of interest to the owners or occupiers of lots in a suitable position on the common property.

**159 Disposal of interest in and leasing or licensing of common property—Act, s 154 [SM, s 161]**

- (1) This section sets out the way and the extent that the body corporate is authorised—
- (a) to sell or otherwise dispose of common property; and
  - (b) to grant or amend a lease or licence over common property.
- (2) The body corporate may—
- (a) if authorised by resolution without dissent—
    - (i) sell or otherwise dispose of part of the common property; or
    - (ii) grant or amend a lease or licence for more than 10 years over part of the common property; and
  - (b) if authorised by special resolution—grant or amend a lease or licence for 10 years or less over part of the common property.
- (3) Also, the body corporate may grant or amend a lease or licence over the whole of the common property if the body corporate is authorised to lease or license the land by—
- (a) for a lease or licence for more than 3 years—a resolution without dissent; and
  - (b) for a lease or licence of 3 years or less—a special resolution.
- (4) Despite subsections (2) and (3), the body corporate may grant or amend a lease or licence over part or the whole of the common property, without the authority of a resolution without dissent or special resolution, if the community management statement provides for the lease or licence.

[s 159]

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- (5) The body corporate must not lease or license common property if—
  - (a) the lease or licence would interfere with access to a lot, or to a part of the common property over which exclusive rights have been given under a by-law; or
  - (b) the common property leased or licensed is land a person has the right to occupy for the person's engagement as a service contractor or authorisation as a letting agent.
- (6) An instrument lodged for registration under the *Land Title Act 1994* to give effect to a transaction under this section must be accompanied by—
  - (a) a certificate under the body corporate's seal certifying the transaction has been authorised as required by this section; and
  - (b) a certificate of the relevant planning body certifying the transaction has been approved or noted as required under the relevant Planning Act; and
  - (c) if the transaction is associated with a reduction in the common property—a request to record a new community management statement for the community titles scheme in the place of the existing statement for the scheme.
- (7) The body corporate may not grant a lease or licence over utility infrastructure that is common property.
- (8) In this section—

*relevant Planning Act* means—

  - (a) if the relevant planning body for the community titles scheme is the local government—the *Sustainable Planning Act 2009*; or
  - (b) if the relevant planning body for the community titles scheme is MEDQ—the *Economic Development Act 2012*.

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- (b) if the tribunal has not been constituted for the appeal—a judicial member.

**146 Deciding appeal on question of law only**

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

- (a) confirm or amend the decision; or
- (b) set aside the decision and substitute its own decision; or
- (c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—
  - (i) with or without the hearing of additional evidence as directed by the appeal tribunal; and
  - (ii) with the other directions the appeal tribunal considers appropriate; or
- (d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

**147 Deciding appeal on question of fact or mixed law and fact**

- (1) This section applies to an appeal before the appeal tribunal against a decision on a question of fact only or a question of mixed law and fact.
- (2) The appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the appeal tribunal.
- (3) In deciding the appeal, the appeal tribunal may—
  - (a) confirm or amend the decision; or
  - (b) set aside the decision and substitute its own decision.

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*Note—*

An enabling Act may provide for appeals to the Court of Appeal against decisions of the tribunal in different circumstances. See, for example, the *Legal Profession Act 2007*, section 468.

**150 Party may appeal—decisions of appeal tribunal**

- (1) A person may appeal to the Court of Appeal against a decision of the appeal tribunal to refuse an application for leave to appeal to the appeal tribunal.
- (2) A party to an appeal under division 1 may appeal to the Court of Appeal against the following decisions of the appeal tribunal in the appeal—
  - (a) a cost-amount decision;
  - (b) the final decision.
- (3) However, an appeal under subsection (1) or (2) may be made—
  - (a) only on a question of law; and
  - (b) only if the party has obtained the court's leave to appeal.

**151 Appealing or applying for leave to appeal**

- (1) This section applies to—
  - (a) an application for the Court of Appeal's leave to appeal to the court against a decision of the tribunal, made under this Act or an enabling Act; or
  - (b) an appeal to the Court of Appeal against a decision of the tribunal, under this Act or an enabling Act.
- (2) The application or appeal must be made—
  - (a) under the *Uniform Civil Procedure Rules 1999*; and
  - (b) within 28 days after the relevant day unless the Court of Appeal orders otherwise.
- (3) In this section—