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2 OCTOBER 2021

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Welcome to the Smart Strata Community Education Seminar discussing committee code of conduct and reasonable decision-making, being delivered by industry legal expert **Juliette Nairn, Partner at OMB Solicitors.**

Housekeeping

- ✓ Mobile phones to silent
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Nicky Lonergan, Managing Director





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Each year Smart Strata holds a seminar series across Queensland, keeping body corporate committees informed and educated on matters of importance.

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Juliette Nairn, Partner

Juliette was admitted as a solicitor in 1993 after obtaining an Honours Degree in Law from Bond University.

Since 1997 Juliette has worked almost exclusively for bodies corporate in a range of transactional and litigation matters.

Juliette and her team deal with levy recovery, assignment of management rights, providing advice on deeds of variation and complex caretaking and letting disputes.



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Presented by

Juliette Nairn
OMB Solicitors

**Committee Code of Conduct and
Reasonable Decision-Making**

Today's Discussion

- **Committee Code of Conduct**

- Code of conduct for committee voting members – *Body Corporate and Community Management Act 1997* (Qld)

- **Reasonable decision-making by committees**

- Changes to regulation modules 2020
- *Viridian* decision
- What is meant by reasonable decision-making?

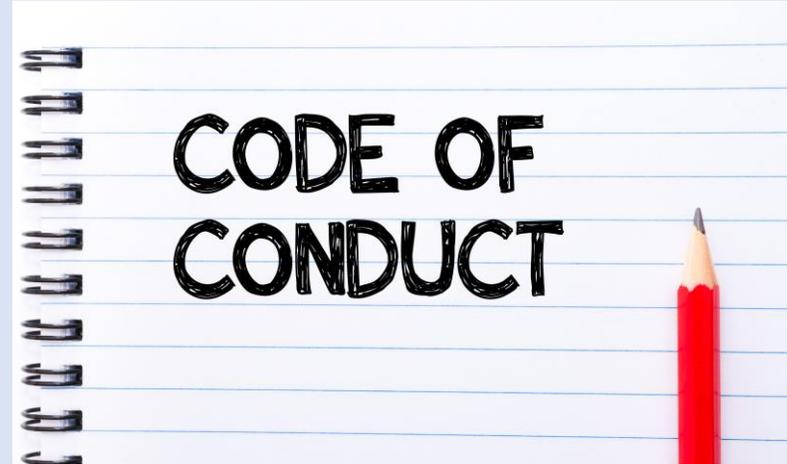
- **Liability**

- Defamation
- Practical steps a committee can take to ensure it makes a reasonable decision

- **Questions?**

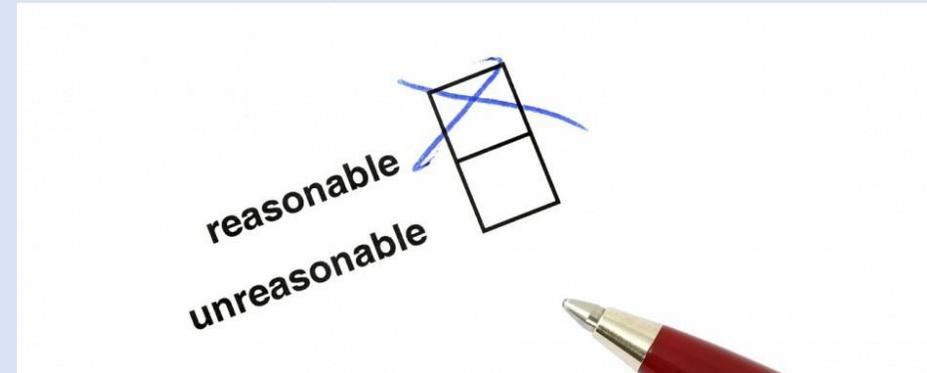
Committee Code of Conduct

- Schedule 1A of the Act
 - Commitment to Acquiring Understanding of Act, including this Code
 - Honesty, Fairness and Confidentiality
 - Acting in Body Corporate's Best Interests
 - Complying with Act and this Code
 - Nuisance
 - Conflict of Interest



Why does the Committee need to act reasonably?

- Section 94 of the Act requires a Body Corporate to “act reasonably” in:
 - administering the common property and Body Corporate assets;
 - enforcing the community management statement; and
 - carrying out the other functions given to the Body Corporate.
- Section 100 of the Act requires a Committee to “act reasonably” in making a decision.



Role of the Committee

Committees make decisions on a number of different matters relating to the administration of a scheme, including (among other things):

- Providing (or denying) consents or approvals, as outlined in the by-laws, such as pet applications, renovations, improvements to lots etc;
- Considering payment plans or requests for discounts or the waiver of penalties from lot owners in respect of body corporate levies; and
- Enforcing breaches of by-laws.



It is recommended that a committee does not simply reject an owner's pet application. Instead, a committee, acting reasonably, should consider each pet application on its merits and impose reasonable conditions in approving the application.

Role of the Committee Continued

What has changed?

- The Standard and Accommodation Modules allow a lot owner to submit a motion for consideration at a committee meeting or be decided outside a committee meeting.
- The committee MUST make a decision as soon as reasonably practicable but within 6 weeks.
- However, the committee is NOT required to decide on a motion if the lot owner:
 - Within the 12-month period before the motion has been submitted, submitted a motion about the same issue or;
 - Has submitted 6 or more motions.



To ensure certainty around motions presented for a vote outside of a committee meeting, the new regulation provides that a motion must be decided **within 21 days of notice** being given of the motion. If not decided after this period, then the motion is taken to have **not** been agreed.

Removal from the committee

- The sanction for a breach of the Code of Conduct for Voting Committee Members is, essentially, removal from office.
- The procedure for removal where there is an allegation of a breach of the Code is in addition to the general power of body corporate members to remove a committee member by ordinary resolution.

Under the existing modules, there are two (2) methods of **removing** a committee member from office, either by:

1. Ordinary resolution; or
2. Issuing a notice of breach of the Code of Conduct (and then a removal by ordinary resolution).

While this process has not changed under the new modules, changes to the regulation modules has made the distinction between the two processes much clearer.

Kjerulf Ainsworth & Ors v Martin Albrecht & Anor [2016] HCA 40

- The leading case on reasonableness in committee decision making is the *Viridian* decision, as appealed to the High Court.
- *Viridian* concerned the Body Corporate's decision to reject a proposal by the lot owner to expand an elevated deck area, and receive an exclusive use right to the corresponding ground area under the deck expansion.
- At first instance, an Adjudicator held that the decision of the of the Body Corporate was unreasonable and made an order allowing the expansion to proceed.
- However, the Body Corporate appealed to QCAT, which overturned the Adjudicator's decision.
- The lot owner then appealed to the Supreme Court, which overturned the QCAT decision, thus reinstating the Adjudicator's first instance decision.
- The Body Corporate then appealed to the High Court of Australia, whereby the HCA upheld the QCAT decision.



Battle of the Balcony:
The *Viridian* decision demonstrates the level of reasonableness and extent of considerations required to make reasonable decisions – remembering that a decision of the committee is also a decision of the body corporate.

The Scarborough Grand [2020] QBCCMCmr70

- In The Scarborough, the applicant sought approval from the Body Corporate for the installation of shutters on its balcony in order to protect the balcony from wind and the sun.
- The application was put to a general meeting for all lot owners to vote on.
- Of the 131 lots in the scheme, only 43 votes were cast.
- The motion was defeated – 13 votes in favour and 30 against.
- As a result, the lot owner sought to have the decision made by the Body Corporate overturned on the basis that the decision was unreasonable because:
 - the explanatory note was biased;
 - some owners had advised they were unaware of the motion; and
 - the building has shutters on the rear balconies which were installed at the time of construction.



The Outcome?

The Adjudicator dismissed the Application on the basis that the committee and other owners carefully considered the proposal and did not automatically reject the proposal by the Applicant.

What does it mean to “act reasonably”?

- In *Viridian*, the High Court confirmed what it means to “act reasonably”.
- The High Court found that, in considering whether the body corporate opposition to the motion requiring resolution without dissent was unreasonable, **it is neither necessary nor desirable to attempt an exhaustive consideration of all the relevant circumstances.**
- The position of the High Court was that the Adjudicator’s role was not to determine whether the outcome of the vote of the EGM achieved a reasonable outcome but whether the opposition to the proposal was unreasonable.

WHAT DOES THIS MEAN?

- If a body corporate can identify any one (1) rational ground affecting the enjoyment of a lot, for opposition to a lot owner’s proposal, an adjudicator should NOT interfere with a body corporate’s opposition.
- It no longer matters whether, on balance, a particular outcome is objectively “better” than another.



“Reasonable decision-making involves an evaluation of the known facts, circumstances and considerations that tend to have a rational bearing on the issue...and...requires that all relevant matters are taken into consideration and irrelevant ones are left out”

The Scarborough Grand [2020]

What practical steps should a Committee take to ensure it acts reasonably?

- Committee members should familiarise themselves with the reasonableness test.
- As set out by the Court in *Viridian*, a committee should ensure that, before making a decision:
 - It has all the necessary information in considering the decision.
 - There is a **rational basis for any objection**, supported by evidence or expert advice if appropriate
 - If the Committee has concerns about a particular matter, then those concerns should be put to the affected owner, and the affected owner be given an opportunity to respond.
 - The Committee's consideration of the matter, and the basis on which the decision was based, is properly and comprehensively recorded (i.e., minuted).

Where a committee is required to make a decision on a controversial or contested matter, it should seek out necessary advice from Body Corporate Manager's and Body Corporate specialist lawyers

Liability and Defamation:

Are Committee members protected?

“A committee member is not civilly liable for an act done or omission made in good faith and without negligence in performing the person’s role as a committee member” – Section 101A BCCM Act

BUT... The Act affords little protection in the event of a defamation claim against a Committee member acting in that capacity.

- Under the Act, bodies corporate and committees are only protected from liability for defamation where:
 1. Defamatory comments are included in the required material for a general meeting of the body corporate under the regulation module applying to the community titles scheme (s 111A (1)(a)-(b) of the Act); AND
 2. The publication was made by the body corporate or the committee, or a member of the committee, other than a member who submitted the motion or explanatory note containing the defamatory matter (s 111A (2)(a)-(b)).



Given the large amount of correspondence circulated within bodies corporate, the risk of potential defamation claims are significant. Committees need to be aware of the material they disseminate to avoid being personally liable for defamation

Summary

- Changes to the Regulation Modules requires a committee to make a (reasonable) decision on a lot owner motion within 6 weeks.
- Once appointed, a committee member is bound by the Code of Conduct, as provided in the Act, and must take “reasonable steps in performing their duties” as a committee member.
- *Viridian* clarified what it means to act reasonably by providing that “... opposition to a proposal that could not, on any rational view, adversely affect the material enjoyment of an opponent’s property rights may be seen to be unreasonable. Opposition prompted by spite, or ill-will, or a desire for attention, may be seen to be unreasonable in the circumstances of a particular case”.
- A committee should consider all the relevant information (or request further information) before making a decision.



A body corporate should seek guidance from an experienced strata lawyer before making a decision on any controversial or contested matter

The End

Question Time

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