

17 December 2019

Tim De La Zilwa  
Chairman, Waterways Owners Corporation Committee  
c/- Ace Body Corporate Consulting  
2/222 Beach Road  
MORDIALLOC VIC 3195

Dear Sir,

**Our client: Stephen Bardsley and Ed Alexander**  
**Re: The Waterways Estate**

We act for Stephen Bardsley and Ed Alexander being owners of Lots 188 and 186 respectively on plan of subdivision PS435322B, known as The Waterways Estate ("the OC").

We have been provided with various documents including a copy of Senior Member Smithers' decision in *Flew v Lum* (Owners Corporation) [2018] VCAT 1278 ("the VCAT Decision"), the Waterways' newsletter dated 1 December 2019 ("the Newsletter") and the advice letter from Clements & Co dated 10 May 2019.

Our clients raise concerns regarding proposals made by the OC committee to deliver services and make expenditures on items not included in the OC Rules or which are outside the normal function of an owners corporation. It is alleged the OC committee has failed in its obligation to conduct the necessary special resolution ballots required to gain the authority to deliver such services as is required under the *Owners Corporation Act 2006* ("the Act").

In this regard and having considered the VCAT Decision, we do not agree with Clements that a special resolution was not required to authorise the arranging of the Waterways Festival as described in the Newsletter.

Member Smithers concluded that the two fountains and the 6 water features helped to mark the Estate as one of distinct character where the residents take pride in their unique living environment. He also stated that they are additional features which enhance the land occupied by 754 lot owners. As such, expenditure in respect of those items came within the owners corporation's function defined in 4(b)(iii) being:

*"...equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation"*

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Letter to Waterways (v4) - 17.12.19(1196560.1)



We fail to see how this reasoning can extend to arranging and paying for a Festival or indeed any other services not included in the OC Rules or which are outside the normal function of an owners corporation.

Should the OC wish to deliver such services, it must act diligently, in good faith and as required by the Act pass special resolutions pursuant to section 12 of the Act authorising same. We note that when such a ballot took place in 2017, only 34% of lots voted in favour of such a service. In order for such a resolution to pass, it is necessary for 75% of lot entitlements in the OC or 75% of the total votes for all the lots affected by the owners corporation, to authorise it.

Clearly, there is minimal support for provision of such a service and the incurring of such expenditure.

Although our clients are not seeking restitution for any such expenditure at this stage, it is required that the OC and its committee comply with the requirements of the Act whenever proposing the delivery of any services which are outside those allowed under the Waterways Owners Corporation rules and also observe all legal obligations as detailed in the Act and otherwise.

Our clients also refer your attention to the requirements in the Act to pass a special resolution authorising the bringing of legal proceedings except for an application to VCAT to recover fees and other money or to enforce the rules of an owners corporation (section 18).

None of these exceptions were applicable regarding the VCAT Decision, as this did not concern the recovery of fees or the enforcement of rules for a breach by a lot owner or occupier. To the contrary the VCAT hearings concerned the proposed delivery of services which had failed special resolution ballots conducted under the rules.

In the circumstances, our clients are unclear as to how it can be said the OC acted in good faith when instigating VCAT hearings to overturn the decision of Special Resolution Ballots determined by its members and then arranging and paying for legal representation at the VCAT hearing(s) without authorisation to do so by special resolution.

We also refer your attention to section 117 of the Act which provides as follows:

*“A member of a committee or sub-committee of an owners corporation:*

- (a) must act honestly and in good faith in the performance of his or her functions; and*
- (b) must exercise due care and diligence in the performance of his or her function; and*
- (c) must not make improper use of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person.”*

It is a requirement of the Act the OC committee to comply with these obligations at all times.

We also note that a breach of this section by a committee member in circumstances where they are not acting in good faith, can result in that member being personally liable for any costs losses or incurred by the OC pursuant to section 118 of the Act.

In the context of the matters raised in this letter, any future proposal to arrange and pay for services not authorised by the OC's Rules and/or which are outside the ordinary functions of an owners corporation as prescribed in the Act, must be the subject of a special resolution pursuant to section 12 of the Act as required by the Act.

If the OC does not pass the special resolution authorising any such additional services and/or expenditures, then those services and related expenditures must not proceed.

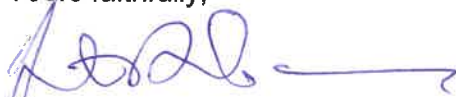
Finally, we note for the attention of the OC committee members that the process for submitting a special resolution to the OC as detailed in the Act must be followed. In particular, we refer your attention to sections 76, 86, 96 and 97 of the Act (although there also other sections which are relevant to special resolutions).

In short these sections requires:

1. If the special resolution is to be voted on by ballot, the ballot must set out the resolution and be open for 14 days;
2. If the special resolution to be voted on at a special or annual general meeting, the text of the special resolution must be set out in the notice of meeting and the notice of meeting must be sent to lot owners at least 14 days prior to the meeting date;
3. A special resolution of an owners corporation is passed:
  - (a) if a ballot or poll is taken, 75% of the total lot entitlements of all the lots affected by the owners corporation support the resolution; or
  - (b) in any other case, 75% of the total votes for all the lots affected by the owners corporation support the resolution.
4. If, at a meeting or by ballot, the vote in favour of a matter requiring a special resolution is **at least 50% of the total votes for all lots** affected by the owners corporation and the vote against the resolution is not more than 25% of those votes, the resolution is to be taken to be passed as an interim special resolution. This becomes a special resolution after 29 days unless lot owners holding at least 25% of lot entitlements petition the secretary of the owners corporation against the resolution.

Documentation including the minutes of the OC 2019 AGM supports our clients' view that on more than one occasion these provisions have been overlooked by the OC and its committee. As required under the Act our clients require that this practice cease forthwith and all requirements of the Act be adhered to.

Yours faithfully,



**Anton Block**

*Principal Lawyer | Accredited Mediator*

**KCL LAW**