

Stephen Bardsley and Edward Alexander
10 Island Point Avenue
Waterways, Victoria 3195

20th December 2019

To: Tim De La Zilwa (Chairman, Waterways Owners Corporation)

Dear Tim,

Please find the attached letter of the 17th December from Lawyer Mr Anton Block of KCL Law, a recognised authority in matters of Owners Corporation law and a VCAT Mediator. We are aware you should have now received the letter via the Waterways Owners Corporation Secretary, Ms Julie McLean.

Prior to seeking the legal advice provided in the attached letter from KCL Law, you will be aware how on many occasions we requested the Waterways Owners Corporation Committee meet with us to discuss our concerns and complaints, this in the hope of working together to achieve an amicable resolution. Unfortunately, we were advised our complaints would only be considered by your Committee if they were made formally, which we then reluctantly submitted. This was disappointing, as we only wanted to discuss how the Waterways Owners Corporation Committee is legally obligated to follow the Owners Corporation Act 2006, which we believed it was not doing. We appreciate Committee members are not experts in Owners Corporation law, however there was no requirement for your Committee to seek legal advice at this stage, all that was required was for Committee members to familiarise themselves with the Owners Corporation Act 2006, which is clear regarding our complaints, and then meet with us to discuss.

We were disappointed when our formal complaints despite their validity in being supported by the Owners Corporation Act 2006 were dismissed. This after our meeting with the Waterways Owners Corporation Grievance Sub-Committee, a meeting which we remind you only took place after we made you aware of the Committee's obligation to hold such a meeting under the dispute resolution procedure. When the two-man Grievance Sub-Committee then advised no further action was required relative to our complaints we were left with no alternative other than to seek legal advice (as attached). The advice supports our complaints and raises serious concerns regarding the manner in which the Waterways Owners Corporation Committee operates, suggesting how on more than one occasion it has overlooked or failed to abide by the Owners Corporation Act 2006. The legal advice states that such practice by the Waterways Owners Corporation Committee must cease forthwith and that your Committee must comply with the Owners Corporation Act 2006 and all its obligations as clearly laid out.

We take no pleasure in forwarding the legal advice from KCL Law which details how any breach of the Act may result in Committee members being personally liable for costs or losses incurred by the Waterways Owners Corporation, this if acting negligently, or not in good faith, this as pursuant to section 118 of the Act. We also draw your attention to how Owners Corporation Office Bearers insurance is unlikely to provide protection for committee members not acting "in good faith" or without "reasonable belief". This including knowingly authorising, providing or making expenditures on services which are not within the Waterways Owners Corporation rules or are outside the normal function of an Owner's Corporation, this without having first gained the authority to do so as is required under the Owners Corporation Act 2006.

The legal advice we now provide for your attention concerns, but is not limited to alleged breaches of the Act and other matters previously brought to your attention, including those as follows:

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ACTIONS OUTSIDE THE NORMAL FUNCTION OF AN OWNERS CORPORATION

The Waterways Owners Corporation Committee has previously approved, delivered and made expenditures on services including Firework displays, Ice Creams and other services, including those relating to “Community” events which were not within the Waterways Owners Corporation Rules and which are seen as being outside the normal function of an Owner’s Corporation. Legal advice from KCL Law confirms the requirement to follow the Owners Corporation Act 2006 and first obtain the authority to deliver and make expenditures on such services, this by conducting a Special Resolution Ballot of Lot Owners. Whereas at this stage we are not suggesting any restitution or reimbursement be made by the Owners Corporation Committee or its members for expenditures that may have been made without the required authority, it is however now imperative that no further expenditures be made by your Committee without first having obtained the required authorisation.

The legal advice obtained by your Committee from Clements and Co relating to the vote taken at the 2019 AGM to fund a twilight picnic states; ***“Arguably, the motion should still have been put as Special Resolution for the provision of a service as required by section 12 of the Act which applies when a matter is outside the Owners Corporation’s ordinary functions”*** and we certainly agree that arguably it should. Clements however also suggests the better position is that a Special resolution was not required, this on the understanding the Waterways Owners Corporation has the power to manage and administer the use of Common Property. This is of course untrue as there is no Common Property on Waterways.

Clements also notes how Paragraph 14 of the VCAT declaration made by Senior Member Smithers in the hearing ***Flew v Lum (Owners Corporations) [2018] VCAT 1278*** declaring ***“no Special Resolution is required for the OC to fund the maintenance of two fountains and the six water features (without a special resolution being required)”***, was made considering how the VCAT application was narrowed to just the maintenance of the fountains and water features. As you will be aware this was because the Waterways Owners Corporation Committee dropped the proposals to fund the Community Event and Irrigation. You will recall the support for a “Community” event was the lowest for any of the four failed Special Resolutions and so was not even brought to VCAT by the Owners Corporation Committee. The resulting VCAT declaration was therefore in no way concerned with a Community event, but only with the delivery of ***maintenance*** services and was made specifically noting the Waterways Owners Corporation Committee had dropped proposals to fund the Community Event and the Irrigation. On this understanding the VCAT declaration is highly specific, in that it authorises without the requirement for Special Resolution the ***maintenance*** of fountains and water features and was made on the understanding there was no VCAT application or intent to fund a Community Event or Irrigation.

We therefore ask the Waterways Owners Corporation Committee to appreciate the legal advice provided by Clements relative to the vote taken at the 2019 AGM to fund from the budget a Twilight Picnic, to be held on Sunday 1st December, was made on the false assumption the Waterways Owners Corporation has the power to manage and administer common property. Clements advice also appears not to fully consider how Senior Member Smithers made the VCAT declaration that a Special Resolution was not required to maintain the Water Features and Fountains on the understanding proposals to fund Community Events and Irrigation had been dropped, with no expectation they would be reinstated.

We therefore ask that the Waterways Owners Corporation Committee now fully respect the previous Waterways failed Special Resolution for spending on “Community” and also how the VCAT declaration from Senior Member Smithers was made on the understanding the proposals for spending on Community and Irrigation had been dropped. In this regard there must be no future expenditure on “Community” events without authorisation by Special Resolution. Spending on “Community” events and services is known not to be supported by Waterways Lot Owners, this along with any other services which are known to be outside the rules of, or are not normal functions of an Owners Corporation.

REQUIREMENT OF AND CORRECT PROCEDURE FOR SPECIAL RESOLUTION BALLOTS

The attached letter from Lawyer Anton Block notes how the process for submitting a Special Resolution must be followed and how documentation, including the Minutes of the 2019 Waterways Owners Corporation AGM support the view such requirements were overlooked. A show of hands vote as conducted at Waterways Owners Corporation AGM's cannot be determined as resulting in an Interim Resolution without the requirements of the Act having first being followed. As per the attached legal advice, the Act is clear regarding how if a Special Resolution is to be taken at a special or annual general meeting the text of the resolution must be set out in the notice for that meeting and this must be sent to Lot Owners at least 14 days prior. Then to pass a Special Resolution 75% of **all** Lot Owners must be in favour. At a meeting or by ballot the vote in favour of the matter must be **at least 50% of the total lots** and the vote against not more than 25% for the resolution to be passed as an interim Special Resolution.

The text for the Community Event (16.2) and CCTV (17.1) resolutions were not correctly set out in the notice for the AGM, they were each listed only as "to consider" without providing notice that voting for or against them would take place at the AGM. Also as you are aware, never have 50% of Lot Owners attended a Waterways AGM, let alone voted in favour of any resolution. Considering these points, votes conducted at Waterways AGM's should not have been deemed as Interim Resolutions. A Committee conducting votes or ballots without following the requirements of the Act cannot be seen as acting in good faith. As per the attached legal advice, notice is given this is a practice which must now cease.

AUTHORITY OF AN OWNERS CORPORATION TO BRING LEGAL PROCEEDINGS

As per the attached legal advice, under the Act (Section 18) an owners corporation must not bring legal proceedings unless authorised to do so by Special Resolution. It is acknowledged a Special Resolution is not required for an application to VCAT under Part 11 to recover fees and other money or to enforce the rules of the owner's corporation for an alleged breach by a lot owner or occupier. The Waterways VCAT hearings however were not to recover fees or enforce rules relating to any breach; therefore under the requirements of the Act the Waterways Owners Corporation Committee should have first gained the authority to instigate the VCAT hearings, this by a Special Resolution of Waterways Lot Owners. It also again needs to be asked why the Committee has refused to provide documentation relating to the appointment of Lawyers Berrigan Doube for these VCAT hearings, this by claiming legal privilege?

COMMITTEE WITHOLDING DOCUMENTATION

Legal privilege protects the disclosure to a third party of communications between a Lawyer and their client. The Waterways Owners Corporation (all 754 Lot Owners) are collectively the Client (not a third party) and it was their funds which paid for the legal services provided by Berrigan Doube. Therefore any refusal to provide documentation relative to the appointment of legal counsel, which Lot Owners paid for, cannot be seen as showing good faith to them. We appreciate legal privilege might be claimed as we were respondents to the VCAT hearings, we have however been advised such privilege cannot be claimed if other Waterways Lot Owners request documentation. Your Committee in withholding such documentation appears to not be showing the good faith and transparency as may reasonably be expected by Waterways Lot Owners. We therefore again request the Committee provides the documentation relative to the appointment and expenditure on legal counsel at VCAT hearings.

DISMISSAL OF FORMAL COMPLAINTS

The advice from Owners Corporation Lawyer Anton Block of KCL confirms the formal complaints we have submitted, along with other concerns raised, are justified and not frivolous or vexatious. We are therefore concerned as to why on more than one occasion the Committee has thought it necessary to obtain legal advice rather than first meet with us to discuss our complaints. The issue now at hand is how the legal advice received regarding how the Waterways Owners Corporation Committee operates must be addressed. We look forward to your earliest response after your Committee has considered the above-mentioned matters and the attached legal advice provided by Anton Block of KCL Law.

MOVING FORWARD

Please be aware we appreciate how Waterways Owners Corporation Committee members are volunteers who give their time readily to the Waterways Estate. This however does not provide any entitlement to approve, deliver or make expenditures on services which are not within the Waterways Owners Corporation Rules, or which are outside the normal function of an owner's corporation, this without first having obtained the authority to do so by Special Resolution of Waterways Lot Owners.

The Owners Corporation Act 2006 demands a Committee must meet its obligation to act in good faith, this includes following the rules and requirements of the Act itself. We therefore now ask the Committee to carefully consider the requirement for each of its members to familiarise themselves with the Owners Corporation Act 2006, the Waterways Owners Corporation Rules and the entitlements of Waterways Lot Owners, and to commit to these in good faith. Any Committee member unwilling to do so must be considered unsuitable to hold a position on any Owners Corporation Committee. The requirement of an Owners Corporation Committee is to deliver services it can be certain are allowed and desired by Lot Owners, this whilst abiding by the Act and all the rules and regulations required to deliver them.

We act not vexatiously, but only as seriously concerned Waterways Owners Corporation Lot Owners. In this regard we seek assurance from the Waterways Owners Corporation Committee that from this day forward it will familiarise itself with, and act diligently in following the requirements of the Waterways Owners Corporation Rules, the Owners Corporation Act 2006 and the Owners Corporation Rules 2018. Such assurance will go a long way in helping bring this matter to a conclusion, this without the requirement for any further formal complaints, Grievance Sub-Committee meetings, compulsory conferences, mediation, legal advice, future litigation or VCAT hearings.

As always, we remain available to further discuss our concerns with your Committee and respectfully request each of its members, along with the Waterways Owners Corporation Secretary, consider the attached legal advice from KCL Law. We have no objection to you sharing this letter and the attached legal advice "In Toto" on the Waterways "My Community" website, along of course with your response.

Regards

Stephen Bardsley *Ed Alexander*

Stephen Bardsley and Edward Alexander