

Our Ref: LGC:23104

10 May 2019

The Grievance Sub-Committee
Waterways Owners Corporation Committee
C/- The Secretary
Ace Body Corporate Consulting
PO Box 5583
MORDIALLOC VIC 3195

By email: secretary@waterways.com.au

Dear Sirs

**Owners Corporation 1 Plan No PS435322B (Waterways)
Owners Corporation Complaints by Stephen and Elizabeth Bardsley**

The Owners Corporation has received two Owners Corporation Complaints from Stephen and Elizabeth Bardsley who own Lot 188 known as 10 Island Point Avenue, Waterways. Our advice is sought as to the matters raised in the Complaints to assist the Owners Corporation in responding.

Each Complaint questions the manner in which the recent annual general meeting of the Owners Corporation was conducted on 3 April 2019 and alleges the invalidity of three of the resolutions that were passed.

The Complaints have been made under Section 152 of the Owners Corporations Act 2006 (the Act) which provides relevantly at Sub-Section (1) as follows:

"A lot owner may make a complaint to the owners corporation about an alleged breach by a lot owner or a manager of an obligation imposed on that person by this Act or the Regulations or the rules of the owners corporation."

Each Complaint names David Geoffrey Flew Chairman of the Waterways Owners Corporation and Julie McLean the Secretary of the Waterways Owners Corporation as the persons who have allegedly conducted the annual general meeting in breach of the provisions of the Act.

Common to both Complaints is the allegation that ballots were conducted at the annual general meeting but the requirements for ballots set out in the Act were not followed and therefore certain resolutions passed should be deemed invalid.

Complaint 1 focuses on two motions namely:

- That the committee survey residents about bringing the Owners Corporation to an end and obtain the required legal advice, and
- That the committee engage with the Neighbourhood Watch group about installing and funding a CCTV system for Waterways.

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Neither motion when moved was carried as a resolution.

Complaint 2 focuses on one motion namely:

- To consider the Owners Corporation funding a twilight picnic event on Sunday 1 December and call for volunteers to organise the event. The event to be funded from the budget.

The motion when moved was carried as a resolution.

A quorum was not present at the annual general meeting and therefore as provided by Section 78 of the Act all resolutions were deemed interim resolutions. The required Notice of Interim Resolutions dated 11 April 2019 has, we are instructed, been sent to members whereby if a notice requiring a special general meeting is not given within 29 days by members representing at least 25% of total lot entitlements, the interim resolutions will become resolutions of the Owners Corporation.

Motions compared with Ballots

It is alleged in both Complaints that ballots were conducted at the annual general meeting which were not in accordance with the requirements of the Act. The Complainants refer to the provisions of the Act concerning ballots. The relevant sections are set out in Division 5 of Part 4 of the Act as follows:

“83. Who can arrange a ballot?”

A ballot of an owners corporation may be arranged by:

- (a) *the chairperson of the owners corporation; or*
- (b) *the secretary of the owners corporation; or*
- (c) *a lot owner nominated by lot owners whose lot entitlements total at least 25% of all lot entitlements for the land affected by the owners corporation; or*
- (d) *the manager of the owners corporation –*
 - (i) *acting on the authority of the committee; or*
 - (ii) *if nominated by lot owners whose lot entitlements total at least 25% of all lot entitlements for the land affected by the owners corporation; or*
 - (iii) *in the absence of a committee.*

84. How can a Ballot be conducted?

A ballot may be conducted by post or by telephone, facsimile, internet or other electronic communication.

85. Notice of ballot

- (1) *The person arranging a ballot must give notice in writing of the ballot to each lot owner at least 14 days before the closing date for the ballot.*

Note: The Electronic Transactions (Victoria) Act 2000 will permit this notice to be given electronically.

- (2) *The notice must include the following –*

- (a) *the closing date for the ballot; and*
- (b) *the ballot document containing the motion, including the text of any resolution to be voted on in the ballot; and*
- (c) *a statement that the lot owner has the right to appoint a proxy.*

86. Resolution by ballot

- (1) *A person may vote in a ballot by completing the ballot form and forwarding it to the secretary of the owners corporation in accordance with the rules of the owners corporation.*
- (2) *A resolution of the owners corporation by ballot is made as follows –*
 - (a) *matters requiring an ordinary resolution must be passed by a majority of the votes returned by the closing date but the number of votes returned must not be less than the number needed for a quorum in accordance with Section 77;*
 - (b) *other matters must be passed by a special resolution or unanimous resolution, as appropriate.*
- (3) *If a ballot is arranged by a person nominated by lot owners, the lot owners must give the owners corporation all information necessary to enable it to keep records of the ballot.”*

We have set out Division 5 of Part 4 of the Act in full in order to emphasise the nature of a ballot from which it is apparent that a ballot is intended to be conducted remotely and not at a general meeting. For example, Section 84 refers to conducting a ballot by post or by telephone, facsimile, the internet or other electronic communication and Section 86 refers to voting in a ballot by completing a ballot form and forwarding it to the secretary of the owners corporation.

That this is the purpose of a ballot is confirmed by Section 90 of the Act which states as follows:

Resolutions of the owners corporation may be made –

- a) *at a meeting; or*
- (b) *by ballot.”*

Accordingly, the very nature of a ballot is such that it cannot be conducted at a general meeting of the owners corporation.

We also refer to Section 92 of the Act which has the heading “Voting at a meeting” which we now set out in full as follows:

- “(1) *Subject to Sub-Section (3), at a meeting, the voting may be by show of hands or in another prescribed manner, unless the meeting resolves otherwise.*
- (2) *All matters other than matters requiring special resolutions and unanimous resolutions must be determined by a simple majority of votes cast at a meeting.*
- (3) *A lot owner present in person or by proxy may, before or after the vote is taken for an ordinary resolution, require that a poll be taken based on one vote for each unit of lot entitlement.*
- (4) *The voting in a poll must be by a written vote.*
- (5) *If a poll is required after the vote is taken, the decision taken on the vote has no effect and the decision on the matter is the decision of the poll.*

- (6) *A person who participates in a meeting by means of tele-conferencing or another prescribed manner is to be taken to be present in person at the meeting.*"

The Notice of annual general meeting which includes the Agenda and also the Minutes of that general meeting state the voting method in Item 4 of the Minutes as follows:

"The voting was by show of cards for all resolutions, one vote per lot. Each eligible lot able to vote was issued with a red voting card and people with additional proxies had the number of votes specified on a yellow card recording the number of proxies held."

We are instructed that this method of voting has been adopted by the Owners Corporation at annual general meetings for at least the last ten years.

We consider that such a voting method is in conformity with the requirements of Section 92 (1) of the Act and may be considered as an alternative voting method adopted by the Owners Corporation.

We, therefore, conclude that ballots by their very nature cannot be conducted at a general meeting and that the voting at the general meeting in question proceeded in the manner required to pass ordinary resolutions. The required procedures for moving motions and putting resolutions to a vote were observed.

We consider that the Complainants in alleging that ballots were required are confusing that remote procedure with the procedure for a poll which can be called for by a member at a general meeting before or after a vote is taken. A poll requires voting papers to be handed out to enable members to record a written vote.

The three disputed motions

That the Owners Corporation fund a twilight picnic event (no fireworks) on Sunday 1st December and call for volunteers to organise the event. The event to be funded from the budget.

This motion was Item 16.2 on the Agenda sent to members prior to the meeting. The resolution was passed 31 votes for, 19 against with no abstentions. The minutes also state: "Note: a sub-committee must be formed and a budget presented to the committee before any agreement to fund is made."

The Complainants refer to what we understand was a postal ballot of the Owners Corporation - which they note was conducted in accordance with the Act with a return date of 18 December 2017- whereby a number of matters were put to members on which to vote by a special resolution including special resolution 3 as follows:

- "(1) *to provide (including entering into agreements to provide) services in respect of the conduct of the Christmas and New Year's Eve community events in the Waterways Estate on Plan of Subdivision No PS435322B (the Community Events Services); and*
- (2) *to delegate to the Owners Corporation committee:*
- (a) *the determination of the most appropriate supplier(s) of the Community Events Services; and*

- (b) *the execution of any document (including by use of the Owners Corporation's common seal) to provide the Community Events Services; and*
- (c) *the doing of anything necessary or convenient to enable the provision of the Community Events Services; and*
- (3) *to fund the Community Events Services through special fees and charges levied on the Owners Corporation's members according to lot liability in amounts and at times to be determined by the Owners Corporation Committee."*

We understand that this special resolution was not passed even as an interim special resolution.

The Complainants object that as the special resolution did not pass the motion to fund a twilight picnic event should not have been put at the recent annual general meeting and cannot replace the failed special resolution pursuant to the postal ballot.

In the context of the provisions of the Act and also the common law concerning meetings procedure, and after taking into account that members of owners corporations change from time to time as lots are sold, it is acceptable and commonly occurs that a resolution concerning a matter if put and not passed may in subsequent years be put again and may then pass even though covering the same ground. In this case, the resolution passed does not have the same scope as the failed special resolution of 18 December 2017. The community event is to be organised by volunteer members in contrast to community events which would have involved a fireworks display open to the public and entering into agreements with commercial operators.

Arguably, the motion should still have been put as a 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.

We note that in the recent proceedings *Flew v Lum (Owners Corporations)* [2018] VCAT 1278 J Smithers, Senior Member decided a special resolution of the Owners Corporation was not required to fund the maintenance of two fountains and six water features not on common property and noted at paragraph 14: "... the OC's decision to drop its proposal to fund the Community Events and Irrigation."

However, having regard to the nature of the Waterways Community, the power of the Owners Corporation to manage and administer the use of common property, and the limited scope of the event for the residents and owners to get together for a Christmas celebration organised by themselves, the better position is that a special resolution was not required.

That the committee survey residents about bringing the Owners Corporation to an end and obtain the required legal advice

There were 20 votes in favour of this motion, 25 against and no abstentions and therefore the motion failed. According to the Minutes of General Meeting the resolution arose from the final item 17 on the Agenda being Questions and General Business.

The item General Business facilitates matters being raised by members not covered by the Agenda for discussion only or if resolutions are passed they should be in relation to routine or minor matters. Here the motion concerned a matter of significance and we refer to the Note of the discussions in the Minutes as follows:

"Winding-up Owners Corporation would take a unanimous resolution or at least a special resolution (75% of owners voting yes) and a VCAT Order to wind the OC up."

The repercussions of such a resolution if passed would be significant but less so as the motion was lost. A unanimous resolution would be required but the reference to a special resolution may have been to the authority required for an application to VCAT for winding up orders.

However, that the resolution failed does not prevent the motion being put again either by a ballot or at a general meeting.

That the committee engage with the Neighbourhood Watch group about installing and funding a CCTV system for Waterways

Votes in favour of this motion were 19, with 24 against and no abstentions and it therefore failed.

This motion was listed specifically under Item 17 Questions and General Business for consideration at the general meeting. There is a note in the Minutes concerning this motion that "CCTV for the three road entrances was discussed, with case for by and against was considered as residents shared their stories."

As this motion was listed on the Agenda, discussed and voted on but not carried we consider that none of the procedures nor the moving of the motion can be questioned.

Final Comments

In the case of each of the Complaints the Complainants refer to the passing of "interim special resolutions". None of the resolutions at the annual general meeting were put as special resolutions nor were other than ordinary resolutions required except arguably with the possible exception of the resolution for the community event.

And we so advise.

Our Standard Costs Disclosure is enclosed.

Yours faithfully
CLEMENTS & CO



Leslie G Clements

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