

7 August 2009

Ms Ingrid Rosemann  
A/Commissioner for Body Corporate and Community Management  
GPO Box 1049  
BRISBANE QLD 4001

**BY POST AND EMAIL TO:** [bccm@justice.qld.gov.au](mailto:bccm@justice.qld.gov.au)

Dear Ms Rosemann

## **PRACTICE DIRECTIONS**

The Australian College of Community Association Lawyers Inc. ("College") thanks the Commissioner's Office for inviting feedback on its draft practice directions.

The College congratulates the Commissioner's Office in taking this initiative. The College considers that the practice directions will be beneficial to practitioners, owners and others dealing with the dispute resolution process under the *Body Corporate and Community Management Act 1997*.

## **INTRODUCTION**

The College is a not for profit association of specialist lawyers established in 2006.

The principal objects of the College are to –

- establish and administer to the highest standards a system of specialist accreditation for lawyers skilled in the Discipline
- promote the highest standards of professional practice
- facilitate research and dissemination of research materials on all aspects of the Discipline
- foster a collegiate relationship among accredited specialists and other members

- promote public awareness and knowledge of the Discipline, and
- work in a non-political way to improve laws relevant to the Discipline.

The “Discipline” is defined as *“the law and practice associated with Common Interest Subdivisions”*. In turn, *“Common Interest Subdivisions”* are defined as *“the subdivision of land (with or without airspace) into lots and common areas whether or not a body corporate or association is established to administer the common areas, including, without limitation, subdivisions commonly known as strata titles and community titles”*. This includes community titles schemes in Queensland.

One of the objects of the College is “to work with State and Federal governments to ensure that legislation related to the Discipline or having the potential to impact on Associated Persons is relevant, effective and of the highest quality so as to ensure the best possible outcomes for such persons”. “Associated Persons” means persons who live in, work in, or have a legal or equitable interest in all or part of a Common Interest Subdivision development”.

The College has a public interest focus and over time it is expected to build a substantial body of knowledge and skills in this important and expanding area of the law.

## **RESPONSE TO DRAFT PRACTICE DIRECTIONS**

Generally, the College agrees with the content of the draft practice directions. The College makes the following specific comments:

### **1. Practice Direction 8 – Conciliation applications**

The College notes items 7, 8 and 11 of this practice direction. Whilst the conciliator assists the parties in resolving the dispute, rather than making a decision on the merits of the dispute, it should be noted that as the conciliator reads the application prior to conciliation, it creates a perception in the mind of the respondent to the dispute that the conciliator already has a view or already has made up their mind about what the outcome should be. As conciliators are only assisting the parties to reach an outcome to satisfactorily resolve the dispute, this needs to be better emphasised, particularly to respondents.

### **2. Practice Direction 9 – Matters not appropriate for conciliation**

The College notes item 6 of this practice direction and the various factors which may be taken into account when deciding whether a matter is appropriate for conciliation. In particular, reference is made to sub-clause (g) – where there is related legal proceedings arising from the same set of facts in dispute.

The College has seen an increase in applications for both conciliation and adjudication being made in an effort by a party to delay or otherwise stay proceedings in a court of competent jurisdiction, particularly in relation to proceedings for recovery of outstanding levies. The application, on its face, may not necessarily reveal that proceedings are currently on foot.

Once proceedings have commenced, the defendant should not be allowed to later bring an application for either conciliation or adjudication in the Commissioner’s Office. It is suggested that the application form be amended to provide a question along the lines - “Is this or an associated issue currently the subject of proceedings in another court of competent jurisdiction? If so, please provide details.”

### **3. Practice Direction 10 – Preparing for conciliation**

The College notes items 10, 11 and 12 of this practice direction. As the applicant has been able to formally put their position to the conciliator (by way of the application) the perception of the respondent is that he or she is at a disadvantage as the conciliator has read the application and formed a view. Whilst this is not necessarily the case, this perception exists, particularly as no formal response or submission is made by the respondent prior to the conciliation (see item 12) of the practice direction.

In addition, whilst sub-clause (c) of item 10 of the practice direction provides that the parties can prepare by bringing or making available any relevant documents, plans or photographs that might assist, item 11 of the practice direction provides that if the parties have additional information such as photographs or documents, the conciliator may allow this material if they believe it will assist in resolving the dispute. If the respondent brings along material and the conciliator does not allow the additional material, then there is a perception in the mind of the respondent that they are at a disadvantage.

The respondent in the present process perceives there is a bias in favour of the applicant and that they are at a disadvantage in conciliation proceedings. The College is of the view that the process must not only be just and equitable, it must be seen to be just and equitable.

### **4. Practice Direction 21 – Adjudicator's orders**

The College notes item 2 of this practice direction. Whilst the College understands the reasoning why the Commissioner's Office cannot further explain or interpret adjudicator's orders, the Commissioner's Office must remain cognisant of the fact that as the Commissioner's Office is a simple, low cost effective process in which to resolve disputes and that many applicants and respondents are not legally represented, that the order and the statement of reasons must be clear and concise and must not leave any party in doubt about what it means.

## **CONCLUSION**

In conclusion:

1. The College supports the use of practice directions.
2. Consideration should be given to the process of conciliation to ensure that the parties participating perceive it to be a just and equitable process.

## **CONTACT**

Should the Commissioner's Office require further information or input, please contact:

Mail: Nina Psaltis  
General Manager  
Australian College of Community Association Lawyers Inc  
PO Box 182  
Moorooka Qld 4105

Tel: 07 3848 2328  
Fax: 07 3255 8056  
Mobile: 0418 150 557  
E-mail: [enquiries@accal.org.au](mailto:enquiries@accal.org.au) or [ninap@bigpond.net.au](mailto:ninap@bigpond.net.au)

The College looks forward to working with the Commissioner's Office on this and other projects in the future.

Sincerely

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Nina Psaltis  
General Manager