

## Instructing a Lawyer Tool Kit<sup>1</sup>

*The Body Corporate and Community Management Act 1997 and the various regulation modules under the Act, contain a number of provisions relevant to what a body corporate needs to do to properly instruct a lawyer to act for the body corporate. This Tool Kit highlights the main issues which need to be considered by a body corporate wishing to instruct a lawyer.*

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<sup>1</sup> This Tool Kit is suitable for use under all Regulation Modules, other than the *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* and the *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011*.

## 1. Importance

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The *Body Corporate and Community Management Act 1997* (“Act”) and the various regulation modules under the Act contain a number of provisions relevant to what a body corporate needs to do to properly instruct a lawyer to act for the body corporate. If the lawyer is not properly instructed the consequences can include:

- (a) the body corporate manager, committee member or owner purporting to instruct the lawyer on behalf of the body corporate may incur a personal liability for the lawyer’s fees;
- (b) legal proceedings commenced by the lawyer may be held to have not been properly authorised; and
- (c) other action taken by the lawyer on behalf of the body corporate may not be effective.

This Tool Kit will highlight the main issues which need to be considered by a body corporate wishing to instruct a lawyer. Where the issues differ between the various regulation modules, the differences will be highlighted.

## 2. The issues

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The issues which need to be considered are:

- How should the decision be made?
- Is the decision reasonable?
- Who should deal with the lawyer?
- What should the lawyer tell the body corporate?
- Should there be an agreement with the lawyer?
- Payments on account of legal fees and disbursements.
- Rights about legal bills.

## 3. How should the decision be made?

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Unless the committee can legally make the decision to instruct the lawyer, that decision will need to be made by a general meeting.

### ***Restricted issues***

Any decision the committee makes is legally a decision of the body corporate, provided the decision does not involve a “*restricted issue*”.<sup>2</sup> For all bodies corporate (irrespective of the regulation module under which they operate)<sup>3</sup> a restricted issue includes:

- (a) an issue reserved for decision by a general meeting;
- (b) a decision to start a proceeding, other than –
  - (i) a proceeding to recover a liquidated debt against the owner of a lot;

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<sup>2</sup> Section 100(1) of the Act.

<sup>3</sup> Excluding the two-lot scheme module.

- (ii) a counterclaim, third party proceeding or other proceeding in relation to a proceeding to which the body corporate is already a party;
- (iii) a proceeding for certain offences under the Act; or
- (iv) a “prescribed proceeding”.

### ***Prescribed proceedings***

A “prescribed proceeding” includes:

- (a) a proceeding, including a proceeding for an adjudicator’s order, under chapter 6 of the Act;
- (b) a proceeding to enforce an adjudication order; and
- (c) an appeal against an adjudicator’s order.

### ***Committee spending limit***

Any decision of the committee involving the spending of money must not involve spending above the “*relevant limit for committee spending*”. That limit is:

- (a) the limit last set by ordinary resolution of the body corporate; or
- (b) if no limit is set, an amount worked out by multiplying \$200.00 by –
  - (i) for a principal scheme in a layered arrangement – the number of layered lots for the scheme; or
  - (ii) for other schemes – the number of lots included in the scheme.

The limit has no application to a body corporate regulated under the Commercial Module.

If proposed spending is above the limit it can only be undertaken by the committee if:

- it is specifically authorised by ordinary resolution of the body corporate;
- the owners of all lots have given written consent;
- an adjudicator authorizes the spending in an emergency;
- the spending is necessary to comply with certain orders specified in the Module<sup>4</sup>; or
- in the case of the Small Schemes Module only, the spending is for the payment of an account of a routine, administrative nature.

The spending limit cannot be circumvented by breaking a single project into a series of proposals.

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<sup>4</sup> Section 151(d) of the Standard Module; section 149(d) of the Accommodation Module and section 85(d) of the Small Schemes Module.

### ***Major spending***

Where the spending is “*major spending*”, additional restrictions apply, unless the body corporate is regulated by the Commercial Module.<sup>5</sup> Major spending is spending above:

- (a) the limit last set by ordinary resolution of the body corporate; or
- (b) if no limit is set, an amount worked out by multiplying \$1,100.00 by –
  - (i) for a principal scheme in a layered arrangement – the number of layered lots for the scheme; or
  - (ii) for other schemes – the number of lots included in the scheme.

To undertake major spending 2 quotations are required for the general meeting approval, unless it is impractical to do so; in which event a single quotation will suffice.

If a proposal to engage a lawyer does not involve a fixed fee, there may be an argument in the case of some legal work that the nature of the work, the background to the matter and the difficulty in obtaining a meaningful fee estimate makes it impractical to obtain 2 “quotations” within the meaning of the law.

### ***Commencement of legal proceedings***

A body corporate (irrespective of its regulating module) must not commence a legal proceeding (other than a “*prescribed proceeding*”) unless it is authorised by:

- (a) in the case of a two-lot scheme – a lot owner agreement; or
- (b) otherwise – special resolution of the body corporate.<sup>6</sup>

A “*prescribed proceeding*” is:

- (a) a proceeding to recover a liquidated debt (e.g. levy arrears) against the owner of a lot;
- (b) a counterclaim, third party proceeding or other proceeding in relation to a proceeding to which the body corporate is already a party;
- (c) a proceeding for an offence under Chapter 3, Part 5, Division 4 of the Act; or
- (d) a proceeding, including a proceeding for an adjudicator’s order or an appeal against an adjudicator’s order, under Chapter 6 of the Act.

It is important to note that an application to the Commissioner’s Office for an Adjudicator’s order is not caught by this restriction, nor is an appeal to QCAT from an order made by an Adjudicator. However, the commencement of a prescribed proceeding will still need to be authorised by a general meeting or committee resolution, depending on the applicable spending limit.

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<sup>5</sup> Sections 152 and 153 of the Standard Module; sections 150 and 151 of the Accommodation Module and sections 86 and 87 of the Small Schemes Module.

<sup>6</sup> Section 312 of the Act.

**Form A** sets out the wording of a motion for a committee resolution authorising the commencement of a prescribed proceeding while **Form B** is a similar motion for use where general meeting approval is required by special resolution.

#### **4. Is the decision reasonable?**

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Both the body corporate in general meeting and the committee are required by the Act to “act reasonably” in the performance of their functions.<sup>7</sup> Therefore, when a decision is made to engage a lawyer consideration should be given to whether that is a reasonable thing for the body corporate to do under all the circumstances. If the action is likely to impose an obligation on a lot owner to pay for the lawyer (e.g. if levy arrears are being recovered), then consideration should be given to alternatives that may resolve the problem (e.g. the levy arrears being paid). It is therefore likely that a “standing authority” in the minutes which automatically authorises the instruction of a lawyer to recover levy arrears may be unreasonable if other less expensive options are available in the circumstances.

#### **5. What the lawyer should tell the body corporate**

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If the cost of the legal work is unlikely to exceed \$1,500.00 (excluding disbursements and GST) then the lawyer is entitled to take instructions and proceed with the work without providing any estimate of the likely costs. If that amount is likely to be exceeded, the solicitor must furnish an estimate of the likely costs, as well as make disclosure to the body corporate of a range of information. This commonly takes the form of a letter accompanied by a consumer warning document provided by the Queensland Law Society.

#### **6. Should there be an agreement with the lawyer?**

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Engagements of lawyers are usually evidenced by a “costs agreement” which complies with the *Legal Profession Act 2007*. A costs agreement is not essential and in the case of small matters lawyers often choose not to require a costs agreement. If the matter does not involve Court proceedings and the costs are likely to exceed \$1,500.00 the lawyer may ask to enter into a short-form costs agreement. However, if the matter involves litigation the lawyer will usually require a comprehensive costs agreement which will be accompanied by very detailed disclosure of the likely legal fees and disbursements.

#### **7. Payment on account of legal fees and disbursements**

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Most law firms require clients to pay an amount of money into their trust account as security for likely legal costs. That money remains the property of the body corporate until the law firm issues an invoice for the legal work undertaken. Despite that, payment of the money should be authorised by a resolution of the committee. Because the money being paid is not being “spent” it is unlikely to be caught by the spending or major spending limit restrictions. However, if the payment is accompanied by any form of pre-approval to transfer funds in satisfaction of legal costs when invoiced, then those spending limits would apply. That is, the spending limit restrictions would apply to any authority to the law firm to apply the funds towards payment of an invoice.

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<sup>7</sup> Sections 94(2) 100(5) of the Act.

## 8. Rights about legal bills

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If a body corporate is unhappy about a law firm's legal bill it may:

- (a) request an itemised bill (if the bill provided has not already been itemised);
- (b) contact the law firm and discuss the concerns;
- (c) have the costs assessed; or
- (d) apply to set aside the costs agreement.

There is a 'fact sheet' entitled "*Your right to challenge legal costs*". A body corporate can obtain a copy of that sheet from the law firm or from the Queensland Law Society.

***You can use the Check List (Form C) to make sure the body corporate has considered everything it needs to consider when instructing a lawyer.***



## Form A

### Committee Resolution

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**RESOLVED THAT** the body corporate instruct [*name of law firm*] to [*describe the work to be undertaken*] in accordance with its letter dated [*insert date*] and the fee proposal and costs agreement attached to that letter (copies of which were tabled at this meeting),

**AND THAT:**

- (a) the Chairperson, [*name*], be authorised to communicate with, and issue instructions on behalf of the body corporate to, that law firm; and
- (b) an amount of \$[*insert amount*] be paid into that firm's trust account as security for its costs and fees in the matter.

## Form B

### Motion for General Meeting Resolution

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#### Motion for Special Resolution (Proposed by the Committee)

THAT the body corporate pursuant to section 312(1)(b) of the Body Corporate and Community Management Act 1997:

- (a) accept [*name of law firm*]'s estimated fee proposal of \$[*insert*] to \$[*insert*] (Incl of GST);
- (b) note that it is impractical to obtain another quotation due to the complexity of the matter and current time constraints; \*
- (c) instruct [*name of law firm*] to [*describe the work to be undertaken*] in accordance with its letter dated [*insert date*] and the fee proposal and costs agreement attached to that letter (copies of which were tabled at this meeting);
- (d) authorises the Chairperson to monitor the progress of the matter on behalf of the body corporate and to issue periodic instructions to the solicitors; \* and
- (e) pay an amount of \$[*insert amount*] into that firm's trust account as security for its costs and fees in the matter. \*

*\*delete as necessary*



## Form C

### Check List

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Item	Task	Response*		Notes
		Yes	No	
1	Do the instructions involve the commencement of a proceeding?			
2	If yes! Are such proceedings a “restricted issue”?			
3	If no! Has committee approval been obtained?			
4	If yes to item 2. Has general meeting approval been obtained?			
5	Will the costs exceed the “relevant limit for committee spending”?			
6	If yes! Has general meeting approval been obtained?			
7	Will the costs exceed the “major spending limit”?			
8	If yes! <ul style="list-style-type: none"><li>• Has general meeting approval been obtained?</li><li>• Were 2 quotations provided, or did an exception to this requirement apply?</li></ul>			
9	Is the decision to instruct a lawyer or commence proceedings reasonable?			
10	Is fee disclosure by the lawyer necessary?			
11	If yes! Has fee disclosure been made?			
12	Has a “costs agreement” been provided?			
13	If no! Would it be advisable to have a costs agreement?			

\* Tick the box which applies and cross any box which does not apply.