

A BODY CORPORATE'S UNIQUE RIGHTS IN RECOVERING A 'DEBT'

In 2009 the former Queensland Commercial and Consumer Tribunal ("CCT") handed down the decision of the *Body Corporate for Liberty CTS*. This decision essentially held bodies corporate were prevented from recovering reasonable costs (for example, legal costs) associated with attempting to recover a body corporate debt as provided at section 145 of the *Body Corporate and Community Management (Standard Module) Regulations 2008*. Instead, in an instance where costs were incurred in relation to recovering a debt, these costs needed to be recovered separately and were not to be included in the original debt.

The decision also held recovery costs were not to be placed on the levy statement until they were deemed reasonable by a Court of competent jurisdiction.

At the same time the CCT handed down the Liberty Decision, the District Court of Queensland heard the matter of the *Body Corporate for Sunseeker Apartments CTS 618 v Jansen* [2009] QDC162 ("the Sunseeker Decision"). This decision was handed down by Judge Newton of the Southport District Court in February 2009.

It is unfortunate the CCT did not have available to it the Sunseeker decision because there are many determinations contained within the Liberty decision, which when considered in light of Sunseeker decision are simply wrong.

The Sunseeker decision dealt specifically with the former section 97 (1) of the *Body Corporate and Community Management (Accommodation Module) Regulations 2008* ("the Accommodation Module") which shares the same wording as section 145 (1) of the amended *Body Corporate and Community Management (Standard Module) Regulations 2008* (and is recreated in each of the relevant modules) and provided guidance on the proper processes for the body corporate to employ in recovering debts from lot owners.

The Sunseeker decision is very helpful in that it classifies recovery costs as being included in the definition of a "body corporate debt" (see paragraph 16 & 17) and confirms a body corporate's right to place recovery costs on the lot owner's levy statement and recover them as a debt (see page 18).

Further, since the Sunseeker decision, in part because of the Commissioner's Office was never intended to be used to resolve debt disputes, the *Body Corporate and Community Management Act* was amended in April 2011 to remove debt disputes from the Commissioner's Office jurisdiction. Specifically, section 229A of the Act states:
"to remove any doubt, it is declared that an adjudicator does not have jurisdiction in a debt dispute".

The affect of the Sunseeker decision and the amendments to the Act are Adjudicator's no longer have jurisdiction to hear debt disputes. Further, the decision of the Commercial and Consumer Tribunal in the Liberty decision have been over turned as a result of the decision of Judge Newton in the *Body Corporate for Sunseeker Apartments CTS 618 v Jansen* [2009] QDC162 and the doctrine of judicial precedent.

With regards to a body corporate's including recovery costs on a lot's levy statement, , Judge Newton, at paragraph 17 of the Sunseeker decision, clearly reinforces a body corporate's entitlement to place these recovery costs on a levy statement of a lot by stating:
"...the plaintiff may recover such costs as a debt without being required to particularise the details of the costs in the levy notices".

Unfortunately for bodies corporate, the decision of the CCT in Liberty received significant media attention, whereas the Sunseeker decision has gone relatively unnoticed by those not in the legal community. As such many bodies corporate have been given misinformation with regards to unpaid contributions, recovery costs and what they can and cannot include on the levy statement.

The decision of Judge Newton in Sunseeker has been followed by the Magistrates Court since 2009, however, to date unfortunately no decisions have been published for the wider community. In any event, the Sunseeker decision clearly determines the Court's position with regards to the recovery of unpaid contributions and supports the positioning and original intention of the Body Corporate Legislation.