



Paying for Top Ups

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A Body Corporate cannot seek or accept a payment of money or another benefit for authorising a letting agent or renewing a letting authorisation.

Enterprising letting agents have manoeuvred around this restriction, contained within section 113 of the Body Corporate & Community Management Act 1997, by paying amounts, or giving benefits to Lot owners instead of the Body Corporate. Granting a letting authorisation or renewing one requires an ordinary resolution at a General Meeting. The practice of giving benefits to Lot owners to vote in favour of the new letting authorisation or the “top up” could be considered as vote buying.

In November of 2016 Adjudicator Trueman had to consider just such an arrangement. In particular, the letting agent was offering Lot owners in the letting pool furniture packages worth \$5,000 (two bedroom unit) or \$3,500 (one bedroom unit) for their “yes” vote.

The Adjudicator determined that the letting agent’s motion, which was passed, was void for contravening section 113.

On appeal to QCAT, almost a year later in October 2017, Member Barlow QC overturned the Adjudicator’s decision.

QCAT had to consider whether the Adjudicator had made a mistake in identifying the relevant law and applying it. Section 113 of the Act

requires that the Body Corporate must not seek or accept the payment of an amount, or the conferral of a benefit for granting an engagement or an extension.

First and most importantly there was simply no evidence that the Body Corporate had received a benefit itself. The benefit had been paid to Lot owners in the letting pool.

Secondly Member Barlow QC could not see any evidence that the Body Corporate had sought a benefit. Particularly, with respect to “seeking” a benefit there was no evidence that the Body Corporate had either sought a benefit for itself, or in this case a benefit for the Lot owners, or just the Lot owners in the letting pool.

While other arguments were raised, including whether section 113 prohibited a Body Corporate from seeking a benefit to be paid to a third party (i.e. the letting pool Lot owners) it was not necessary for QCAT to consider these arguments. Simply put, nothing turned on them because there was no evidence that the Body Corporate had sought any benefit at all.

Paying owners for their vote sets a dangerous precedent. If the practice becomes widespread then there are two likely consequences. The first is

that owners will come to expect a payment. When that occurs the practice will become more prevalent and those costs will need to be absorbed elsewhere in the letting agent’s business. Secondly it is likely that there will be a legislative response to ensure that the original intention behind section 113 is preserved. That is, when exercising their vote in relation to granting or renewing management rights agreements, owners are doing so in a normal commercial context rather than when being in receipt of what could be described as a bribe.

There are better ways to negotiate new agreements or top ups. If you would like to know how then contact Stratum Legal.

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