

Managing property properly

Making fines stick in community schemes

By Anton Kelly

The executives in many sectional title schemes and home owners' associations (HOAs) use fines as a way of discouraging rule breaking by members or residents. At first glance this seems a good way of ensuring that the rules are obeyed but there is an immediate problem with any attempt to fine someone, and that is making sure that the fine is actually paid.

The inadvertent rule breakers are likely to behave once they are aware that they have made some transgression and it has been noticed by the "authorities" in the scheme. On the other hand, a persistent rule breaker is likely to be the kind of person who pushes boundaries anyway and they are unlikely to meekly pay a fine. To be of any use, fines must be enforceable and that means the fining system used in the scheme should be bulletproof. This, in turn, means that it must be entrenched in the governance documentation of the scheme, the constitution or memorandum of incorporation for HOAs or the conduct rules of a sectional title scheme. The second advantage of having the fining system included in the governance documentation is that it means that a large majority of the members tacitly accept it. If they did not, they could change or remove those provisions.

In sectional title schemes, rules need to be reasonable. While there is no similar legislated requirement that applies to HOAs, the provisions of HOA governance documentation must be able to withstand the scrutiny of the courts.

In order to be reasonable and legally binding fines should have a legitimate purpose, which is the enforcement of the scheme's legitimate, rightful interests. Additionally, fines must be for reasonable amounts. That does not mean that they can't be substantial; large fines are acceptable as long as they are proportionate to their purpose.

A fining procedure has to be fairly applied and must include a process for a hearing. A rule or provision allowing executives to impose a fine should state what transgressions are finable and set out the amount of the fine for each type of transgression. The provision should also detail the process of serving the notice and the person's right to be heard before the imposition of the fine.

Suggestions for a fining process:

The executives must serve the person with a written notice pointing out that their conduct breaks a specified rule. This notice should be hand delivered or sent by registered post and contain a clear description of the conduct that transgresses the rule. It must warn the person that if they persist with that conduct, a fine will be imposed. The notice should also include a reference to the rule allowing the fine to be imposed.

If the person persists with the conduct that contravenes the rule, the executives should send a second notice pointing out that the contravention is continuing or has been repeated and inviting

the person to an executive committee meeting at which the person can explain or defend their actions. The notice of this meeting should be long enough for the person to prepare a defence.

At the meeting the person must be allowed to state their side of the matter, call witnesses in their support and cross examine any witnesses the executives might have to the transgression.

Finally, the executives should discuss the evidence in the absence of the person, consider all the circumstances and make a final decision on whether or not to impose the fine.

The communal nature of life and the sharing of property and facilities in HOAs and sectional title schemes inevitably require a certain amount of discipline to be successful. Challengeable sanctions for breaches of that discipline can only be counterproductive rather than assist in the smooth running of the community. Make sure that any fining system in your community works.

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