



**AGENTS LICENSING BOARD OF THE NORTHERN  
TERRITORY**

**REASONS FOR DECISION: BY APPLICATION LYMA  
NGUYEN FOR DISCIPLINARY ACTION AGAINST ELITE  
STRATA MANAGEMENT (NT) PTY LTD AND MARK  
BERNATTEK**

**Applicant:** Lyma Nguyen

**Respondents:** Elite Strata Management (NT) Pty Ltd  
Mark Bernattek

**Date and time of hearing:** Monday 18 August 2025 at 9:45am

**Venue:** Gurrumbuy Room  
Level 6, NT House  
22 Mitchell Street, Darwin

**Reason for Inquiry:** To hold an inquiry pursuant to section 68(4) of the *Agents Licensing Act 1979* to determine if there are grounds for disciplinary action to be taken against Elite Strata Management (NT) Pty Ltd and Mark Bernattek.

**Agents Licensing Board:** Robert Bradshaw, Chairperson  
Dianne Hood, Board Member (alternate)  
Andrew Gray, Board Member (alternate)  
Jake Quinlivan, Board Member

**Representation:** Mark Thomas, Counsel, representing Lyma Nguyen  
  
Claudia Hackett, representing Elite Strata Management (NT) Pty Ltd and Mark Bernattek  
  
Bernadette Raumteen, Counsel Assisting  
  
Kevin Kadirgamar, Department of Trade, Business and Asian Relations, Counsel Assisting

**In attendance:** Lyma Nguyen, applicant  
Mark Bernattek, respondent  
Michelle Milzewski, Business Manager, Elite Strata Management (NT) Pty Ltd, respondent  
Laine Cornish, Senior Board Support Officer, Department of Trade, Business and Asian Relations

## **Introduction**

1. On 9 May 2025, the Agents Licensing Board (the Board) considered an application dated 23 December 2024 by Lyma Nguyen (the applicant) for disciplinary action to be taken against Elite Strata Management (NT) Pty Ltd (Elite), Mark Bernattek, and Anthony Lenz pursuant to section 68(3) of the *Agents Licensing Act 1979* (AL Act). The Board also considered a report from the Registrar concerning the application.
2. In broad terms the application related to a lack of care, skill and diligence concerning the conduct by Elite, Mark Bernattek and Anthony Lenz of an Annual General Meeting (AGM) of a body corporate under the *Unit Titles Act 1975* (the UT Act). The conduct complained about included the preparations for the AGM, the running of the AGM and the aftermath of the AGM.
3. The Board:
  - (a) decided not to hold an inquiry in relation to Anthony Lenz. Anthony Lenz is licensed under the AL Act as a conveyancing agent. His role in the AGM was that of a participant at the AGM. He was not acting as a conveyancing agent. The detailed reasons for that decision have been provided to the applicant.
  - (b) decided to conduct an inquiry concerning Elite and Mark Bernattek (the respondents).

## **Provision of application to respondents**

### ***Elite Strata Management (NT) Pty Ltd***

4. On 14 February 2025, the Department of Trade, Business and Asian Relations (the department) provided Mark Bernattek, as business manager of Elite, a copy of the application and requested a response to the allegations.
5. On 5 March 2025, Barry Seabrook, contacted the department to advise that Mark Bernattek was no longer employed by Elite. Barry Seabrook advised that he would be providing a response on behalf of Elite.
6. On 17 March 2025, Barry Seabrook provided a response on behalf of Elite to the application and its allegations.

### ***Mark Bernattek***

7. On 14 February 2025, the department provided Mark Bernattek with a copy of the application and requested a response to the allegations by 7 March 2025.

8. On 4 March 2025, Mark Bernattek contacted the department, advising he no longer had access to his work emails and requested the application and supporting documents be sent to an alternative email address.
9. On 19 March 2025, Mark Bernattek attended the department's office and provided a USB with his response to the allegations. In his response, Mark Bernattek advised that he does not have access to any relevant correspondence as he terminated employment with Elite Strata Management at the end of January 2025.
10. The Board notes that Mark Bernattek remains as a director of Elite. The Board understands that he has no role in the conduct of Elite's body corporate management business.

### **Licensing status**

11. Elite holds a real estate agents licence valid to 11 September 2028. It has held a licence since 5 September 2018 (excepting for the period 4 September 2023-12 September 2023).
12. Mark Bernattek (body corporate manager) holds an individual's real estate and business agent's licence valid to 10 October 2028. He has held a licence since 11 October 2024. Previously, between that date and 28 March 2000, he was registered as an agents representative.
13. Prior to 11 October 2024 Barry Seabrook was the business manager for Elite.
14. Elite and the body corporate manager are licensed as real estate agents under the AL Act but with a business (it appears) exclusively dealing with body corporate management.

### **Role of Agents Licensing Board**

15. The AL Act regulates the licensing and conduct of real estate agents, business agents, and conveyancers. This Act outlines the requirements and obligations for agents operating in these sectors, including provisions for licensing, conduct, trust accounts, and dispute resolution. Body corporate managers are "real estate agents" for the purposes of the AL Act.
16. Section 64A of the AL Act provides that '[r]egulations may prescribe rules of conduct for real estate agents'. The rules of conduct are set out in Schedule 4 of the Agents Licensing Regulations 1979 (AL Regulations). The Real Estate Institute of the Northern Territory has also published a voluntary code of conduct titled 'Real Estate

Practitioners Code of Conduct' (Code of Conduct). This code was designed to 'set boundaries of acceptable conduct in real estate practice and define minimum standards of behaviour expected' of its members.

17. Section 65 of the AL Act provides that a 'licenced agent must not breach the rules of conduct'. Section 65(4) provides that a company or firm is guilty of a breach of the rules of conduct for agents if: (a) the company or firm is a licensed agent acting on behalf of a client; and (b) a director or employee of the company or firm does an act, or fails to do an act, or attempts to do an act, the doing of, or the failure to do, which would, if the director or employee were a licensed agent, make the director or employee guilty of a breach of the rules of conduct for agents.

### **Disciplinary proceedings**

18. The Board may take disciplinary action against a licensed agent on one or more of the grounds outlined in section 67 of the AL Act. In particular, the Board may take disciplinary action if a licensed agent has been guilty of a breach of the rules of conduct for agents' (section 67(1)(c) of the AL Act). The Board may also take disciplinary action on "any other reasonable ground which in the opinion of the Board, is sufficient to warrant revocation of the licence of the agent" (section 67(1)(m) of the AL Act).
19. Section 68(4) of the AL Act provides that the Board shall hold an inquiry where 'an application for disciplinary action to be taken against a licensed agent is lodged in accordance with this section or the Board considers that there may be grounds under section 67 for disciplinary action to be taken against a licensed agent'.
20. The powers of the Board after the inquiry are outlined in section 68 of the AL Act. It provides:
  - (1) *If, at the conclusion of an inquiry conducted under section 68(4), the Board is satisfied that it is authorised to take disciplinary action against a licensed agent, the Board may do one or more of the following:*
    - (a) *reprimand or caution the agent;*
    - (b) *by written notice, impose a fine not exceeding 50 penalty units on the agent;*
    - (c) *by written notice, suspend the licence of the agent until the expiration of the period, or the fulfilment of a condition, specified in the notice;*
    - (d) *by written notice, revoke the licence of the agent.*

21. The inquiry hearing and process is governed by section 77 of the AL Act. The procedure is at the discretion of the Board, parties may be legally represented, and the Board is not bound by the rules of evidence but may inform itself in such manner as it thinks fit.

### **Details of the alleged conduct**

22. The applicant is the owner of two properties: unit [REDACTED] and unit [REDACTED] of 21 Cavenagh Street, Darwin.

23. Both units are part of Unit Plan 97/23 (Metro) which is managed by Elite. At the time of the application, Mark Bernattek was both Elite's branch manager and the individual responsible for the body corporate management of Metro.

24. As an owner within the unit plan, the applicant is a member of the body corporate for Metro (which is established under and governed by the UT Act and related subordinate legislation).

25. The application includes allegations that the respondents breached the Rules of Conduct by failing to exercise due skill, care and diligence in relation to the conduct of the AGM for Metro. There are numerous components of the complaint as outlined in the next two paragraphs.

### **Application**

26. By documents dated 23 December 2024 and 10 January 2025, the applicant made a written application for disciplinary action to be taken against the respondents. The application contained 10 specific complaints.

27. In summary, the applicant complained about:

- *Complaint 1 - Irregularities in AGM minutes and associated procedures*
- *Complaint 2 – Provision of motions and meeting papers prior to the AGM*
- *Complaint 3 – Uncertainty regarding application of voting entitlements*
- *Complaint 4 – Vote not accurately cast, counted and recorded*
- *Complaint 5 – Objections to motions not reflected in AGM minutes, failure to take into account dissenting votes*

- *Complaint 6 – Lack of consultation with unit owners regarding significant fee increases*
- *Complaint 7 – Decision to remunerate the Chairperson without a properly proposed resolution or vote*
- *Complaint 8 – Conduct of the body corporate Chairperson Anthony Lenz (excluded from consideration at inquiry)*
- *Complaint 9 – Conduct of the Body Corporate Manager and Director, Mr Mark Bernattek*
- *Complaint 10 – Failure to respond to request for further general meeting within required timeframes*

### **Provision of draft inquiry book to applicant and respondents**

28. On 14 July 2025, the applicant and the respondents were provided with a copy of the draft inquiry book (including the matters to be inquired into and relevant documentation to be considered by the Board at inquiry) and asked to provide comment by close of business 28 July 2025.
29. On 2 August 2025, the current branch manager for Elite, Michelle Milzewski contacted the department to provide Elite's submission to the draft inquiry book.
30. On 5 and 6 August 2025, the applicant contacted the department to make further submissions to the draft inquiry book.

### **Rules of Conduct**

31. In this matter the Board is considering whether the body corporate manager and/or Elite has contravened any of following rules of conduct:

*Rule 5: Subject to any other specific rules of conduct, a real estate or business agent must have due regard to and comply with:*

*(a) rules of real estate practice published or approved by the Real Estate Institute of the Northern Territory;*

*Specifically:*

*Resolve disputes in a professional manner.*

*Rule 8: An agent must not breach any provision of the Act or the regulations.*

*Rule 11: An agent must exercise due skill, care and diligence in carrying out the agent's duties on behalf of a client.*

(in this case the client is Metro)

*Rule 12: An agent must exercise due skill, care and diligence when dealing with any person in the course of conducting business as an agent.*

(in this case the applicant is a person in respect of whom due skill, care and diligence must be exercised)

32. In dealing with Rules 11 and 12, the Board can also have regard to whether there has been any breach of the rules of conduct set out in the *Unit Titles (Management Modules) Regulations 2009* (UTMM Regulations), schedule 1, clauses 62-72.

### **General principles**

33. The purpose of disciplinary proceedings is to maintain proper ethical and professional standards, primarily for the protection of the public, but also the protection of the profession.
34. In occupational disciplinary matters, an issue needs to be proven to the reasonable satisfaction of the decision maker, having regard to the seriousness of the allegation made, the inherent unlikelihood of the occurrence of a given description (or the inherent improbability of an explanation) or the gravity of the consequences flowing from a particular finding.

### **Materials before the Board at the hearing**

35. The following materials were considered by the Board:
- Inquiry Book prepared by the department and counsel assisting
  - Evidence at the hearing from Jeff Thomson
  - Evidence at the hearing from Anthony Lenz
  - Evidence at the hearing from the body corporate manager
  - Written submissions from the parties provided after the hearing of 18 August 2025 and in light of the Board's tentative findings regarding the issues identified by counsel assisting. The submissions focussed on issues in respect of which, from the point of view of each party, the Board had made tentative adverse findings.

### **Hearing**

36. As part of its inquiry the Board conducted a hearing on 18 August 2025.

37. The applicant's application dealt with a range of issues. These included failures of the body corporate management, problems with the body corporate committee members, problems with the previous AGM (when Metro was managed by another agent), problems with decisions made by the body corporate and personality issues.
38. Fairly obviously, many of these issues were potentially of no relevance to matters within the jurisdiction of the Board. For the purposes of the Board and the parties working through the issues, counsel assisting produced a document outlining the key facts and what appeared to be the 10 issues that the Board needed to consider. Counsel for the applicant added an additional issue. These issues are discussed in the following paragraphs under the 10 complaints made by the applicant. Some of the complaints dealt with 2 or more of the issues identified by counsel assisting.
39. The issues identified by counsel assisting were as follows:

***Issues relating to complaint 1 (irregularities in AGM minutes and associated procedures) and complaint 2 (provision of motions and meeting papers prior to the AGM)***

Issue 1

*Whether the failure of the respondents to ensure that the agenda and the financial statements were provided at least 14 days prior to the AGM (as required by clause 30(2) of the UTMM Regulations) fell short of the standard of skill, care and diligence required*

Issue 2

*Whether the minutes failing to include a notice setting out the right for a person to call for another meeting in the circumstance where interim resolutions were passed in the absence of a quorum (as required by clause 32(1)(b)(iii) of the UTMM Regulations) fall short of the standard of skill, care and diligence required.*

Issue 3

*Whether the respondents properly considered and responded to requests made by unit owners for another AGM and whether they advised the committee members of their obligations and options.*

Issue 4

*Whether the failure to declare and record conflicts of interests with respect to discussions regarding the swipe card and cleaning services fell short of the required standard of skill, care and diligence*

***Issues related to complaint 3 (application of voting entitlements), complaint 4 (votes not accurately counted and recorded) and complaint 5 (objections to motions not reflected in AGM minutes)***

Issue 5

*Whether the provision (before the AGM) of information on voting entitlements and processes undertaken to the required standard of skill, care and diligence.*

Issue 5A

*Whether there was any proper voting at the AGM and if not, did this fall short of the required standard of skill, care and diligence.*

Issue 6

*Whether the incorrect recording of votes (e.g. relating to the adoption of the budget) and discrepancies in the attendee and proxy lists falls short of the required standard of skill, care and diligence*

***Issues relating to complaint 7 (decision to remunerate the Chairperson without a properly proposed resolution or vote)***

Issue 7

*Whether the decision to remunerate the Chairperson was properly made*

Issue 8

*Whether the decision to remunerate the Chairman was made in contemplation that the Chairperson would be Anthony Lenz, and if so, whether the respondents' failure to ensure that conflicts of interest were declared and recorded in respect of Anthony Lenz at the AGM (November 2024) falls short of the standard of skill, care and diligence required*

Issue 9

*Whether the respondents' failure to ensure that a conflict of interest was declared and recorded in respect of Anthony Lenz at the April 2025 committee meeting falls short of the standard of skill, care and diligence required.*

***Issues relating to complaint 10 (failure to respond to request for further general meeting within required timeframe)***

## Issue 10

*Whether the responses provided to the applicant by the body corporate manager fall short of the required standard of skill, care and diligence.*

40. The Board also identified as additional issue arising from the applicant's complaint 6. It was:

*Whether the failure to consult with the applicant fell short of the required standard of skill, care and diligence<sup>1</sup>. This is also considered to include a complaint about the late provision of key information (e.g. the proposed budget).*

## **Background information about Metro and the AGM**

41. The relevant matters in the application relate mainly to the 2024 AGM – namely the notice given about the meeting, the conduct of the meeting and the handling of matters that arose from the meeting. Some of the key uncontested facts about the AGM are:
- (a) There was not a quorum
  - (b) The applicant did not attend the meeting as she was interstate. The applicant appointed a proxy (Jeff Thompson)
  - (c) The body corporate manager chaired the meeting
  - (d) Metro is comprised of about 120 units with about 52 members attending in person, by zoom or by proxy
  - (e) Metro is a 10storey building with mix of residential and commercial units
42. Under schedule 1, clause 7(1) of the UTMM Regulations the term of a committee member expires "immediately before the election of the committee members at the next annual general meeting". The legislation is ambiguous as to how clause 7(1) applies when there is no quorum for the AGM. For the purposes of this decision, it is assumed that the old committee (and its office holders) continued in office until such time as there were final resolutions arising from the AGM process.

## **Discussion of the complaints**

### ***Complaint 1 - Irregularities in AGM minutes and associated procedures***

43. This complaint was that the respondents failed to conduct the AGM held on 19 November 2024 in line with the requirements of the UTMM Regulations. The complaint

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<sup>1</sup> This issue arises from the applicant's complaint 6. Complaint 6 was not specifically identified in counsel assisting's document but was dealt with by the applicant's lawyer as if it was an issue to be resolved.

identified issues concerning lack of identification of statutory office holders; lack of detail about resolutions; no notice for the purposes of clause 32(1)(b)(iii); minutes are vague, imprecise and lacking in detail; absence of conflict of interest declarations; absence of response to request for a second AGM; and lack of disclosure.

Lack of identification of statutory office holders

44. This was not actively pursued at the hearing.

Notice required by clause 32 (about the rights in respect of a second AGM)<sup>2</sup>

45. Schedule 1, clause 32(1) requires that if there is no quorum at an AGM then:

(a) The AGM can take place but all resolutions are considered to be “interim resolutions”

(b) Within 14 working days of the AGM the secretary of the Unit Plan’s committee must provide to all voting members details of the resolutions, the minutes of the meeting and a notice setting out the effect of clause 32(2) and (3).

46. Schedule 1, clause 32(2) provides that after an AGM for which there was not a quorum a person can, in accordance with clauses 29 and 30, call another general meeting within 29 working days of the original AGM.

47. Schedule 1, clause 32(3) relevantly provides that an interim resolution becomes a resolution of the body corporate 29 working days after the original AGM, in circumstances where a further general meeting is not called.

48. At the beginning of the minutes of the 2024 AGM there was the following “Quorum declaration”:

*“Manager declared quorum was not achieved with only 3013 UEV out of total 9000 UEV represented. All ordinary resolutions passed are therefore interim resolutions for 28 working days. On the 29<sup>th</sup> day if there is no reconvening of the meeting all resolutions will automatically convert to ordinary resolutions ...”*

49. The applicant argued that this declaration in the minutes did not comply with clause 32. The failing was that there was no notification/explanation of the right to call a further meeting. The respondents argued that there was sufficient compliance.

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<sup>22</sup> Issue 2 as identified by counsel assisting

50. Clause 32 is drafted in such a way as to suggest that the minutes and the clause 32(b)(iii) notice are separate documents. However, the drafting also suggests that each resolution is also a separate document.
51. The respondents' representative submitted that the "quorum declaration" did comply with clause 32(1)(b)(iii) in that the clause only requires a statement about the status of the interim resolutions and the option of calling another general meeting – that is, no need to spell out there is an onus on someone to organise a meeting. It was also argued that in any event the secretary (rather than Elite) was responsible for the notice and the applicant had suffered no harm from any deficiency.
52. The Board understands that there was no one in the position of "secretary". Where there is such a situation the Board would expect that the body corporate manager take responsibility. Also, clause 5.1 of the (undated) management agreement<sup>3</sup> between Elite and Metro provides that Elite is delegated, to the full extent permitted by law, with all of the powers of "the executive and ordinary members of the Committee". The Board assumes that the executive members of the Committee include the secretary.
53. The Board considers that the "quorum declaration" mainly deals with the quorum. It does not clearly set out the effect of clause 32(2) and (3). A comprehensive notice would include details of how a further general meeting could be convened. The declaration in the minutes was ambiguous as to whether such a second meeting would occur automatically.

*Finding regarding notice required for the purposes of clause 32 (about the rights in respect of a second AGM)*

54. The Board considers that the Elite has breached rule 12 in that it did not exercise due skill, care and diligence in providing the notice required by clause 32(1)(b)(iii).
55. However, the Board also notes that the applicant was aware of the legal right to call another meeting. This is so because she asked for another meeting. It is not clear if the applicant was actually unaware of the mechanisms in the regulations for calling a meeting.<sup>4</sup>
56. Noting that Elite did try to comply with clause 32(1)(b)(iii) by summarising (albeit imperfectly) the clause in the minutes provided to the applicant the Board finds that the breach is of a relatively minor nature.

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<sup>3</sup> This document was provided as part of the inquiry book. The Board assumes it was in place at the time of the AGM.

<sup>4</sup> The applicant did not give any evidence at the hearing.

57. The Board also notes that the applicant's complaint contained an allegation that the resolutions were not provided as required by clause 32. This claim was not actively pursued at the hearing. In any event it appears to the Board that there is no evidence to suggest that the resolutions (called "motions" in the minutes) are not adequate (aside from the problematic vote numbers - as dealt with later in these reasons).

#### Dealing with conflicts of interest<sup>5</sup>

58. Counsel for the applicant submitted that it is "standard practice" for there to be standing item on the agenda dealing with declarations of conflicts of interest. There was no such item for the agenda for the AGM.
59. At the AGM there were discussions about installing swipe card readers (under the agenda item of "Appointment of contractors") and cleaning (under the heading of "General business").
60. The suggested conflicts of interest relate to the interests/activities of committee members in dealing with swipe cards (Anthony Lenz) and cleaning (Darran Lum).
61. There do not appear to have been any formal papers, proposals or resolutions concerning these issues.

#### Finding regarding conflicts of interest

62. If there were conflicts of interest and failures to disclose, these are matters that are the responsibilities of the persons who should be making the disclosures.
63. Although the body corporate manager said in evidence that he would have attempted to ensure that conflicts were handled appropriately, the Board does not consider that it is the responsibility of a body corporate manager to identify and deal with conflicts of interest of the kind raised by the applicant.
64. Also, to be clear, the Board makes no finding as to whether there were in fact any conflicts or, if there were, whether the members concerned had made an appropriate disclosure.
65. In respect of the swipe cards the Board notes that the issue discussed at the AGM was that of installing swipe card readers rather than the issuing of swipe cards.
66. The Board also notes that the application contained suggested conflicts of interest arising from the fact that a person may have held more than one of the committee's statutory

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<sup>5</sup> Issue 4 as identified by counsel assisting

positions. This issue was not pursued at the hearing. The Board notes that the legislation does not appear to prevent one person holding more than one of the statutory positions.

Did Elite and the body corporate manager breach the rules concerning declaration of conflicts of interest regarding remuneration of the Chairperson<sup>6</sup>

67. No evidence was provided that Elite or the body corporate manager had any significant role in issues concerning remuneration of the Chairperson.
68. At an AGM unit owners vote and discuss having regard to their own interests. There is no need to disclose this obvious fact. In any event, in this case, Anthony Lenz clearly disclosed that he supported payment and the existence of such a payment would be critical in his decision about whether or not to stand for election as Chairperson.

Finding regarding issue of conflict of interest regarding remuneration of the Chairperson

69. The Board finds that there has been no breach of the rules regarding any role of Elite and the body corporate manager in the decision of the AGM that the Anthony Lenz as Chairperson be paid.

Absence of conflict of interest declaration at committee meeting held during April 2025<sup>7</sup>

70. This issue was identified by Counsel assisting at the beginning of the hearing.
71. The Board did not identify any issue with the conduct of the April 2025 committee meeting.
72. The Board also notes that:
  - (a) The body corporate manager had, by the time of this meeting, ceased to be employed by Elite. Accordingly, he could not be responsible for anything that occurred at that meeting.
  - (b) Issues concerning this meeting had not been raised by the time the Board resolved to have an inquiry based on the application made on 23 December 2024.
  - (c) This means that events at that meeting were probably outside of the scope of this inquiry.

Other issues with complaint 1

73. At the hearing and in the complaint issues were raised about the timing of the closing of doors of the meeting room. Presumably the purpose of raising the issue might have been

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<sup>6</sup> Issue 8 as identified by counsel assisting

<sup>7</sup> Issue 9 as identified by counsel assisting

to suggest that some persons might not have been able to attend the meeting. However, there was no evidence that that was the case. The agenda for the meeting stated that the doors would be closed at 5.30pm. Jeff Thompson thought the doors may have closed at 5.06pm. The body corporate manager gave evidence that he had investigated the issue and ascertained that the doors closed about 6pm. The meeting ended at about 7.30pm.

74. Issues were also raised in the complaint about the minutes being vague and imprecise. These issues were not actively pursued at the hearing except to the extent that they were subsumed within other issues (such as incorrect recording of votes and “decisions” such as those relating to the payment of the Chairperson).

### ***Complaint 2 – Provision of motions and meeting papers prior to the AGM***

75. This complaint was to the effect that the respondents failed to provide members with relevant material for the AGM in a timely manner to enable effective consideration and participation. This was said to be in breach of schedule 1, clauses 10, 11 and 14 of the UTMM Regulations.

#### Timing of notice about the AGM<sup>8</sup>

76. Schedule 1, Clause 30(1)(b)(ii) of the UTMM Regulations requires, for Units Plans such as Metro, that the person calling the AGM must give notice of the meeting at least 14 working days before the date of the meeting. This means that notice of the meeting should have been given on or about 30 October 2024. Various documents must also be provided as part of the notice.
77. At the hearing it was not contested that notice was given too late.
78. In an email to the department dated 2 August 2025 (pages 223-234 of the Inquiry book) Elite noted that it issued an initial notice of the meeting of the AGM on 24 October 2024 but that that notice was essentially a “date claimer” because the AGM agenda and meeting papers were not issued until 6 November 2024.
79. Schedule 1, clause 30(3) of the UTTM Regulations provides that the late issue of the agenda and the papers required by clause 30 (namely the financial statement, being the financial record for the previous financial year) does not invalidate the meeting. Rather schedule 1, clause 30(4) provides a right for a voting member of the Units Plan to adjourn

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<sup>8</sup> Issue 1 as identified by counsel assisting

the AGM. This right can be exercised either before or at the AGM. The right was not exercised.

80. The respondents' representative argued that:
- (1) the papers were provided within 14 ordinary days rather than the required 14 working days<sup>9</sup> and that that was an "administrative error". In fact, the papers were first provided on 6 November with the meeting on 19 November. This is only 13 ordinary days taking account of the provisions of the *Interpretation Act 1978*;
  - (2) Under the Regulations the owners had a right to delay the meeting for breach of the notice provisions;
  - (3) Informal notice had been given on 24 October about the meeting (and that this means that in fact the applicant had sufficient knowledge of the date).

#### Finding regarding timing of notice for the AGM

81. The Board finds that Elite failed to exercise due skill, care and diligence by providing the agenda and financial statement about 6 working days after the due date (breach of clause 30(1)(b)(ii)).
82. The applicant did not provide any evidence of any adverse consequences of the delay in providing the agenda and the financial statement.
83. The Board's assessment is that this breach is of a relatively minor nature.
84. The Board notes that any failure to provide the budget with the agenda is not, of itself, a breach of clause 30(1)(b)(ii). For more on this see discussion of Complaint 6.

#### **Complaint 3 – Uncertainty regarding application of voting entitlements**

85. This complaint was that the respondents failed to ensure that voting entitlements were properly applied at the 2024 AGM. This complaint arose out of information provided by Elite concerning whether voting was on the basis of unit entitlements or on number of units owned (one vote per unit).

#### Adequacy of information about voting<sup>10</sup>

86. The voting paper provided for use by persons appointing proxies stated that:

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<sup>9</sup> 'working days' do not include weekends and public holidays

<sup>10</sup> Issue 5 as identified by counsel assisting

*“A motion is passed by Ordinary Resolution if:*

- i. The unit entitlements of the units counted in favour of the motion [to] exceed the unit entitlements of the units counted against it; or*
- ii. Otherwise, the votes counted in favour of the motion are more than the votes counted against the motion”*

87. These words are an attempted summary of section 7(7) of the UT Act. The summary misses some introductory words which make it clear that voting based on unit entitlements only occurs if the relevant management module provides for that kind of voting. The management module for Metro does not provide for that kind of voting.

88. This means that the summary is inaccurate to the extent that it suggests that some ordinary resolutions being considered by Metro are dealt with on the basis of unit entitlements.

89. At the AGM it seems clear that voting occurred on the basis of one vote for each unit.

#### Finding regarding voting information

90. The Board finds that there has been a lack of skill, care and diligence in providing this information about the voting.

91. However, the breach is very minor with no apparent adverse consequences. Anyone reading the information would have realised that it did not make sense. It is plain from the original complaint from the applicant that she had, understandably, trouble interpreting the advice.

#### Other issues regarding voting papers

92. At the hearing the applicant’s lawyer identified that motion 2 was poorly drafted because it was ambiguous. The motion sought that Metro “appoint one of the following plumbers to complete the plumbing upgrades required”. It then asked members to circle the “number preference” with the options being “yes/“no” (Darwin Water/Wigg Plumbing”. The apparent ambiguity is presumably as to whether there were 2 issues – i.e. whether to engage plumbers and, if “yes”, which plumber be appointed.

93. It is not clear why the issue was raised at the hearing given that it was not raised in the application and seems to have caused no particular problems, with the vote being 52/0 in favour of the plumbing and the choice of a particular plumber.

94. Anthony Lenz, in evidence, agreed that the resolution could have been better worded and noted that there was a 30 minute discussion at the meeting and there were discussions about the ambiguity at the meeting.
95. The counsel for the applicant in the written submission raised concerns about the fact that proxies would not be aware of the 12 motions other than the two in respect of which formal papers were provided.
96. The UTMM Regulations are prescriptive. In general terms a body corporate manager is entitled to the assessment that they have used due care, skill and diligence in respect of a particular matter if they comply with the regulations. For better or worse the UTMM Regulations do not require that the details of all proposed ordinary resolutions be provided prior to the meeting.
97. Aside from the late provision of the papers required for the meeting the Board has not identified any other breaches concerning the provision of materials for the meeting.

***Complaint 4 – Vote not accurately cast, counted and recorded***

98. The allegation was there was no formal voting and, to the extent that it did occur, there was at least one inaccuracy in the counting of the votes.

Whether proper votes were taken<sup>11</sup>

99. The applicant claimed that no formal voting occurred at the AGM. This claim was based on information provided to her by her proxy, Jeff Thompson.
100. At the hearing:
  - (a) Jeff Thompson provided evidence that there had been no formal voting;
  - (b) The body corporate manager gave evidence that voting had taken part on the basis that each person with voting rights had been allocated a card with votes taking place by show of hands. He states that he paused after each motion for objections or comments and that the Applicant's proxy did not object. He also indicated that there was an element of "reading the room" especially in the latter part of the meeting. Elite's evidence was that voting took place on all motions and the body corporate manager clearly explained the voting process during the AGM, including how to object or request that abstentions be recorded.

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<sup>11</sup> Issue 5A as identified by counsel for the applicant

101. The Board considers that there was an appropriate voting process. There is some evidence that Jeff Thompson was under a misunderstanding about the status of any activities at the AGM following the declaration at the beginning of the meeting about the lack of a quorum and information provided as to the consequences of such an absence of a quorum. From the evidence Jeff Thomson gave at the hearing it appears that he interpreted the information provided by the body corporate manager about the quorum as meaning that another meeting would be held if there was a request for such a meeting.
102. This means that Jeff Thompson may have thought that motions at the meeting had no significance if anyone wanted to call another meeting. As indicated earlier in these reasons this view was wrong as resolutions of this kind at an AGM are valid unless overruled by a subsequent general meeting with there being no automatic right to such a meeting.
103. Counsel for the applicant discussed the evidence provided by Jeff Thompson. A point made was that the fact that Jeff Thomson (“a solicitor and seasoned AGM participant”) was left confused as to whether or not formal voting was occurring “is indicative that the process was flawed such that whatever voting process might have been applied, it fell short of the standard of skill, care and diligence required”. The Board was not convinced of the validity of this argument. In assessing information flows and understanding of legislative requirements the Board has taken the approach that lawyers have no greater knowledge than other persons.
104. On the balance of probabilities, the Board is of the view that appropriate voting took place.

*Finding regarding whether voting occurred*

105. No breach.

***Complaint 5 – Objections to motions not reflected in AGM minutes, failure to take into account dissenting votes***

106. This complaint was the respondents failed to ensure that the casting and counting of votes were undertaken accurately and in accordance with the legislative requirements, and further, failed to ensure that objections to motions were accurately reflected in the minutes of the AGM.

Adequacy of recording of votes<sup>12</sup>

107. The minutes from the AGM display various oddities regarding the voting. For example, the total number of votes, in terms of votes in favour, votes against and abstentions add up different totals for the various resolutions.
108. As outlined by the applicant:
- (1) some votes record a total of 52 votes (including for, against and abstain), while others record significantly fewer - such as only 26 votes in total for the sinking fund increase — despite there being an estimated 56 to 59 voting parties (including proxies).
  - (2) the attendee and proxy lists include duplicated or conflicting entries (such as unit 33 appearing under both attendees and as a proxy-granting party)
  - (3) while the applicant's voting papers indicated 'no' votes for the sinking fund increase to \$200,000 per year from 1 February 2025, and for the appointment of Darwin Water for plumbing works, the minutes recorded:
    - a. Sinking fund increase: Yes 25 / No 1 / Abstain
    - b. Plumber appointment: Yes 52 / No 0 / Abstain 0
109. Elite and the body corporate manager accept that there were errors.
110. Two minute-takers were used to try to ensure accuracy.
111. Barry Seabrook (from Elite) admitted that there was a recording error regarding one motion (Adoption of the Budget) — only one “No” vote was recorded when two votes should have been recorded, and noted this will be corrected at the next general meeting. The error did not affect the outcome of the vote. At the hearing the branch manager accepted that the figure “25” for the sinking fund increase should have been “52”.
112. The body corporate manager stated that Jeff Thompson later asked for his proxy votes to be changed, but this was refused as inappropriate since minutes must reflect what occurred.

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<sup>12</sup> Issue 6 as identified by counsel assisting

113. The body corporate manager and Jeff Thompson gave evidence that a significant number of Elite's staff were deployed to for the purposes of the meeting. No explanation was provided as to why the voting was not accurately recorded.
114. The Board notes that, for minutes of an AGM for which there was a failure to achieve a quorum, there is an urgency in the distribution of the minutes. They must be provided within 14 working days of the AGM with anyone seeking another meeting having 29 working days from the AGM to call the second general meeting. In this case the minutes were provided on 3 December 2024 (i.e. about 9 working days after the AGM). This mean that anyone seeking a further general meeting had about 20 working days to call a second meeting. The second meeting must also be held within 28 days of the date of the interim resolution (clause 32(3)(b)). The Board also notes the evidence of the body corporate manager that Elite was short staffed and was under some stress to deal with all matters leading up to the Christmas holiday period. This is, to some extent, supported by the emails between the body corporate managers and others in December 2024.
115. No evidence was provided that indicated that the any of the outcomes from the AGM were actually incorrect.
116. Counsel for the applicant submitted that the respondents provided no plausible explanation for the errors.

*Finding regarding adequacy of the recording of votes*

117. The Board considers that Elite and the body corporate manager breached rule 12 in that they failed to exercise due skill, care and diligence in the recording of decisions at the AGM.
118. The Board also notes two other matters in relation to the minutes:
- (a) There is always an opportunity for minutes to be queried (and corrected) following the initial distribution of them;
  - (b) In this case, Elite failed to respond to the errors identified by the applicant her email of 12 December 2024.

***Complaint 6 – Lack of consultation with unit owners regarding significant fee increases***

119. The gist of this complaint was that the respondents failed to consult with owners in relation to the fee increases effected by resolutions made at the 2023 AGM and 2024 AGM.

Failure to consult regarding the budget/late provision of key information about the budget

120. Complaint 6 was to the effect that body corporate manager failed to adequately consult with the applicant concerning increases to the levy she was required to pay consequent on a decision at the AGM that there be an increase in the revenue side of the budget of \$200,000.
121. As worded the complaint also included issues arising from the previous AGM (2023). Given that Elite and the body corporate manager were not involved with Metro in 2023 it follows that 2023 AGM issues are of no relevance to this inquiry.
122. Counsel for the applicant argued that the relatively large impact of the increase in the total size of the levy had such an impact on the applicant that there should have been some personal consultation with the applicant.
123. The income required for the running of a body corporate takes account of income required for operations in the next financial year plus the long term requirements for the body corporate. In some Australian jurisdictions the body corporate is required to maintain two funds, one for current needs and another (sinking fund) for long term maintenance and related issues.
124. Section 36(1) and (2) of the *Unit Titles Act 1975* provides the required income is determined for the body corporate as a whole with, in the absence of a unanimous resolution, the amount payable by individuals being the amount equal to the fraction of the total equal to their unit entitlements divided the total unit entitlements for the body corporate. Other than in exceptional circumstances the body corporate does not impose levies on individuals. The body corporate has no power to vary the respective unit entitlements even if they may seem to operate unfairly.
125. Counsel for the applicant argued that the applicant should have been consulted because she had to pay an unduly large amount of the increase because she owns one of the bigger units with a relatively large unit entitlement.
126. The Board rejects the proposition that there is a requirement for body corporate managers as part of their role in preparing and presenting the budget to consult with individual owners.
127. Counsel for the applicant also argued that the overall increase in the levies could not be justified. Aside from some very broad assessments of the needs of a body corporate such as Metro no meaningful evidence was provided regarding any lack of skill, care or diligence by Elite or the body corporate manager in developing the budget.

128. Elite's response was that the committee, elected by owners annually, develops the draft budget and provides instructions to the body corporate manager. The AGM offers the opportunity for all owners to review and question the proposed budget.
129. Elite argued that significant increases were due to the ageing infrastructure and rising insurance and maintenance costs, which require responsible financial planning.
130. The body corporate manager correctly pointed out that the forum where unit owners determine issues regarding budget is the AGM.
131. The UTTM Regulations do not specify how the budget is determined. Instead, section 36 of the UT Act provides that the body corporate must determine from time to time what will require from owners to discharge expenditure that it might reasonably be expected to incur. This determination can only occur at a general meeting with it usually occurring at the time of the AGM.
132. It is reasonable to expect that the proposed budget would be provided as early as practical to the owners so that they are in a position to appropriately participate at the AGM, especially if they are being represented by proxies.
133. In this case the proposed budget was provided on 6 November 2024. This was some 13 ordinary days before the AGM. At any time during this period the applicant could have sought further information about the budget from the body corporate manager. There is no evidence that the applicant did this.

*Finding regarding the need to consult with the applicant concerning fee increases*

134. No breach regarding failing to directly consult with the applicant.
135. No breach concerning the time of the provision of the proposed budget.

***Complaint 7 – Decision to remunerate the Chairperson without a properly proposed resolution or vote***

136. The complaint was that the respondents failed to provide adequate notice or information in relation to the proposal for the Chairperson to be remunerated. The decision lacked transparency and was not made in the best interests of the body corporate.

Whether decision to remunerate the chairperson was properly made<sup>13</sup>

137. At the AGM there was a discussion about the Chairperson being remunerated at the rate of \$300 per week. At the time of this resolution:
- (a) Anthony Lenz was the past Chairperson and, it seems, the continuing Chairperson until the election of the new Committee was either confirmed or not confirmed in the 29 working days following the AGM;
  - (b) The substantive Chairperson would be appointed by the new Committee sometime after the finalisation of the AGM process. In fact, this did not occur until April 2025;
  - (c) Anthony Lenz indicated that he would not serve as Chairperson unless paid.
138. The applicant's complaint was that the respondents failed to provide adequate notice or information in relation to the proposal for the Chairperson to be remunerated (at \$16,000 per year). The "decision" lacked transparency and was not made in the best interests of the body corporate.
139. All that happened at the AGM was that members "were happy to approve" that the Chairperson be paid. The fact that Anthony Lenz participated in the discussion does not, of itself, mean that this outcome was not appropriate.
140. From the minutes it appears that the possible payment of the Chairperson was an issue raised by Anthony Lenz in the course of discussion about appointment of the committee. There was no formal resolution and no formal decision. The discussion was not initiated by the body corporate manager. His only role was to manage the outcome of the discussion and include a record of it in the minutes of the meeting.
141. Counsel for the applicant submitted that if a Chairperson is to be paid it ought to be the subject of a formal resolution. This is probably correct though there may be an open question as to whether such a payment is a matter for the body corporate at an AGM or the committee. As noted above, there was not actually a formal decision to pay the Chairperson.

Finding regarding payment of the Chairperson

142. No breach.

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<sup>13</sup> Issue 7 as identified by counsel assisting

### ***Complaint 8 – conduct of the body corporate Chairperson Anthony Lenz***

143. Excluded from consideration at inquiry.

### ***Complaint 9 - Conduct of the Body Corporate Manager and Director, Mr Mark Bernattek***

144. The complaint was that Mark Bernattek, in his capacity as Body Corporate Manager, failed to conduct himself in a professional and amicable manner in dealing with the complaints raised by the applicant with respect to the 2024 AGM, and this demonstrated a lack of skill, care and diligence.

Whether the responses provided by the body corporate manager to the applicant fall short of the required standard of skill, care and diligence.<sup>14</sup>

145. On 11 December 2024 the applicant sent an email setting out a range of issues about the AGM. Many of these issues have already been discussed in respect of specific complaints.

146. There was also other correspondence between the applicant and both Anthony Lenz and the body corporate manager.

147. In the case of the Lenz correspondence Anthony Lenz, for reasons unclear, tried to insist that the applicant provide some kind of verification for her claims. The same email was sent back and forth about 5 days with both parties accusing the other of harassment.

148. In the case of the body corporate manager he wrote a lengthy email saying that he would respond in detail, asking the applicant to desist from defamation, explaining why he is a manager, taking offence at the applicant questioning his integrity and conduct, offering to have a “genuine conversation”, suggesting that the main issue for the applicant was the raising of the fees, arguing that Anthony Lenz was the best person for the Chairperson’s job, criticising the applicant’s conduct and saying it is clear that the applicant does not understand the “mechanics of the b/c”. The body corporate manager did not follow up with any further correspondence.

149. There was also evidence from the body corporate manager of an acrimonious telephone conversation between himself and the applicant.

150. The Board notes that Anthony Lenz’s correspondence with the applicant was very unhelpful in dealing with the issues, and that it probably set the tone for the correspondence between the applicant and the body corporate manager.

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<sup>14</sup> Issue 10 as identified by counsel assisting

151. The respondents' representative makes the point that the body corporate manager did offer to circulate the applicant's email of 11 December 2024 to all of the body corporate's members and suggests, as did the manager, that this was an offer made for the purposes of facilitating the applicant obtaining enough support for a further AGM.
152. The submission also makes the point that the applicant was trying to convince the manager to call the meeting. This appears to the Board to be correct.
153. The respondents' representative submitted that the body corporate manager also acted in the best interests of Metro in seeking instructions from the Committee regarding the calling of a second meeting.
154. The respondents' representative also submitted that the applicant displayed in her emails a detailed knowledge of the legislation.
155. Nonetheless it is clear that the body corporate manager did not deal with most of the substantive issues raised by the applicant (including that he did not provide any meaningful information about what the applicant needed to do in order for there to be a second AGM) (for more on this see complaint 11).
156. The body corporate manager should have attempted to address the criticism of the meeting processes and should have provided information about the processes involved in arranging for a second general meeting. More specifically, he should have advised that the chairperson and he were not going to call a meeting and advised that the complainant's main option was that of seeking support from members having 25% of the unit entitlements.

*Finding regarding the response of body corporate manager to the applicant's original complaint*

157. The Board determines that the body corporate manager breached rule 12 in that he did not exercise due skill, care and diligence in dealing with the issues raised by the complainant.
158. In assessing the severity of this breach, the Board takes into account that the complainant was, in fact, aware of the fact that the Chairperson and the body corporate manager did not intend to call a meeting. The manager might also have reasonably expected that one or other of the persons seeking another meeting would have checked the regulations regarding the mechanisms for arranging such a meeting.
159. The Board notes an earlier decision in which it dealt with a body corporate manager who, in the face of offensive behaviour by body corporate members, abandoned the body corporate in the midst of an AGM. The Board found "no breach" saying that was "Entirely understandable" that the manager left the meeting as "no-one has to put up with belligerent

behaviour in the performance of their duties”.<sup>15</sup> This outcome is mentioned in the context that an examination of a person’s relationship with another person does include an examination of the behaviour of the other person.

160. The Board has decided that the answer is “Yes” concerning issues relating to the calling of the second meeting (see complaint 10).

161. The applicant raised many issues in writing to the Chairperson with the body corporate manager being copied into the email. The applicant claims that the body corporate manager failed to conduct himself in a professional and amicable manner in dealing with the complaints raised by the applicant with respect to the 2024 AGM, and this demonstrated a lack of skill, care and diligence.

162. The applicant set out that on 12 December 2024, the body corporate manager sent several emails in response to the applicant’s correspondence of 11 December 2024 and that:

(1) he failed to address the substance of the applicant’s queries and concerns, and queried “Would you be happy for us to disseminate your correspondence to all owners in the interests of transparency (if needed)?”

(2) Shortly thereafter, in a second email sent at 2:57pm the same day, Mark Bernattek provided a lengthy response where he:

- i. Warned the applicant against sharing the content of her own correspondence with others, suggesting that doing so could “give rise to defamation”;
- ii. Described himself as someone of good character and referenced personal values unrelated to the matters raised;
- iii. Stated that he could not “even pay one single member’s wage” from the revenue generated by the complex;
- iv. Asserted that he could have charged the corporation significantly more;
- v. Stated it was “100% in the best interests of all owners to engage and pay more”;
- vi. Expressed personal opinions about the suitability of Anthony Lenz as chairperson;

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<sup>15</sup> Roe v Whittles Body Corporate Management Pty Ltd (24 February 2015)

- vii. Commented on what he perceived to be the applicant's motivations, including suggesting that money may be a factor in her conduct;
  - viii. Referred to profiling the applicant's business and commented that his earlier respect for her had diminished based on her conduct;
  - ix. Expressed personal opinions about lawyers and about the applicant's understanding of body corporate matters, stating "You really don't understand the mechanics of the b/c" and offering to provide education.
163. The applicant considers this correspondence to be unprofessional, condescending, and inappropriate. She contended that it demonstrated a lack of willingness to engage constructively and that the overall tone was inconsistent with the standards expected of a licensed agent managing a body corporate.
164. In her email of 12 December 2024, the applicant identified in red issues regarding which she required a response. These issues are summarised as follows:
- (1) Required copy of the service agreement with Elite: no evidence as to whether this was provided but the issue was not part of the complaint;
  - (2) Request for a second AGM or a special general meeting;
  - (3) Voting requirements relating to whether based on unit entitlements or votes per owner per unit (have they changed and, if so, when and why did that occur);
  - (4) Why, if voting did not occur (as advised by Jeff Thompson) did the minutes reflect the outcome of voting;
  - (5) What is the explanation of the voting number of "52" when some of the votes on individual items did not add up to 52;
  - (6) Requested copy of her ledger (in the context of an objection to the acceptance of the budget"
  - (7) The production of a documents relating to the 2023 AGM.
165. The body corporate manager provided no specific response to most of these issues. Instead the body corporate manager's email of 12 December 2024 focussed on the generality of problems with Metro and the various personal issues and apparent accusations contained in the applicant's email of 12 December 2024.
166. Counsel for the applicant also submitted that the respondents breached the rules concerning the obligations of agents to resolve disputes in a professional manner. The Board notes that most of the "disputes" were between the body corporate manager and the

applicant (and others). In general terms the Board considers that this issue is subsumed into the issue of whether the body corporate manager dealt with the complaint in an appropriate manner.

*Finding regarding responses to the complaints*

167. The Board finds that the body corporate manager breached rule 12 by not responding in a substantive way to the issues raised. Such a response could have dealt with each of the issues or it could have been to indicate that the only way to deal with the issues was another AGM (and advise of what needed to be done to have such a meeting).

***Complaint 10 – Failure to respond to request for further general meeting within required timeframes***

168. The complaint was that the respondents failed to convene a general meeting when requested by the applicant to do so.

*Adequacy of responses to requests for another AGM<sup>16</sup>*

169. Schedule 1, clause 32(2) of the UTMM Regulations provides that following an AGM where there is no quorum “a person may, in accordance with clauses 29 and 30, call a further general meeting within 29 working days after the date of the interim resolution”. This means that, for this matter, any further general meeting had to be called and held by about 2 January 2025.

170. Part of the applicant’s email of 11 December 2024 also contained a request that the body corporate “call and hold a further AGM within the timeframes given by Regulation 32(3)(c) ...”. This email was sent to Anthony Lenz (copied to the body corporate manager). At the time of receiving the email Anthony Lenz was a committee member and was the former Chairperson – arguably continuing in that role pending any second AGM.

171. The applicant considered that the respondents’ failure to convene a general meeting when requested by the applicant may have been a deliberate tactic to allow resolutions to pass without proper engagement with unit proprietors. The application was said to have been made the under “Regulation 29” of the UTMM Regulations (with reference to “Regulation 32(3)(c)”), which the applicant asserted provides that any person entitled to vote may call a further general meeting within 29 working days of an interim resolution being made.

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<sup>16</sup> Issue 3 as identified by counsel assisting

172. No meeting was called as requested and as at 10 January 2025, the applicant had received no formal or substantive response from the respondents.
173. Earlier (6 December 2024):
- (a) Anthony Lenz had sent an email to all members of the committee as in office prior to the AGM discussing issues that had arisen following the AGM. He indicated that he would resign from the committee if the decisions of the AGM are overturned (page 230 of the Inquiry book). He also relayed advice from Elite to the effect that the members of the committee before the AGM would continue as such until after the expiry of the 29 day period;
  - (b) The body corporate manager advised that “they need you [Anthony Lenz as Chairperson] or me or 25% of owners by entitlement values to authorise the meeting to reconvene. I can’t see this happening”.
174. On 11 December 2024 Anthony Lenz provided a copy of the applicant’s email of 11 December 2024 to various persons (Aaron Jone, Darran Lum, Debra Mason, Foix McLachlan, Nigel Walsh, Sarah Seib, Elite (including the body corporate manager and ‘Jemiah’)). Of these persons Sarah Seib, Darran Lum and Aaron Jones were part of the new committee.
175. On 12 December 2024 the body corporate manager sent an email to the members of the (old) committee stating, amongst other things, that he did not “*see a lot of substance in the emails [from the applicant, Jeff Thompson and Robert Welfare], mainly baseless waffle*”. The email went on to discuss the general difficulties in managing Metro and the limited time available to himself and Elite to deal with issues. And, in broad terms, he made the point that it is up to the committee members to step up to the mark and assist Anthony Lenz.
176. On 12 December 2024 Anthony Lenz sent an email to each of the members of the (old) committee asking:
- “Just to clarify, are all the committee of the same opinion as Mark and myself that there is no valid reason for the AGM to need to be reheld”.*
177. Aaron Jones and Darren Lum responded in support of that approach.
178. Anthony Lenz provided no substantive response to the applicant’s request for a second AGM. Nor did the body corporate manager provide a substantive response. However, by 23 December 2024, the applicant was aware (see the next paragraphs) that the body corporate manager did not intend to call another meeting.

179. Jeff Thompson and Robert Welfare also made requests for a further AGM (email of 12 December 2024).
180. The respective responses of the body corporate manager to Jeff Thompson and the applicant can be contrasted. Jeff Thompson was provided with relatively specific advice. It can also be noted that Jeff Thompson's request was written in polite terms whereas the applicant's request was, in places, derogatory.
181. Counsel for the applicant argued there is no evidence that the respondents advised the committee of its obligations or the options concerning the calling of a further meeting. In terms of the emails produced for the inquiry that appears to be correct. The body corporate manager only provided, in email, a very pithy summary of the relevant clause in the regulations. Nonetheless, from Anthony Lenz's email of 12 December 2014, it appears clear that the Chairperson and the committee were quite aware of the issue to be decided – that is, that they had the power to call another AGM.
182. Counsel for the applicant also suggested that the body corporate manager gave inconsistent evidence about the calling of a second meeting. That is, he gave evidence that he would circulate the applicant's complaint (about the AGM) to help her gain 25% support whilst at the same time being personally opposed to the holding of a second AGM. The Board sees no inconsistency between holding a view about an issue whilst at the same time providing information about what someone else might do in order to achieve an opposing outcome.
183. By email also dated 12 December 2024 the body corporate manager advised Jeff Thompson that he would pass on the request for an AGM to the committee whilst stating that *"I don't perceive the committee agreeing"* and that *"Personally I will not agree to authorising it to reconvene. If the chairman agrees that's fine by me"*. The context of the last part of this quote suggests that the body corporate manager would have called a meeting if the "chairman<sup>17</sup>" had agreed.

*Finding regarding request for another meeting*

184. The Board finds that the body corporate manager failed to exercise due skill, care and diligence concerning his lack of a response to the applicant concerning a second AGM.

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<sup>17</sup> Noting that at this time there was no chairperson as the committee had not met following the AGM.

### **Summary of outcomes in terms of the 11 complaints made by the applicant**

185. In summary the Board has found that:

- (1) Paragraph 54 - Elite has breached rule 12 in that it did not exercise due skill, care and diligence in providing the notice required by clause 32(1)(b)(iii) (notice regarding consequences of an AGM with no quorum).
- (2) Paragraph 81 - Elite breached rule 12 in that it did not exercise due skill, care and diligence by providing the agenda and financial statement about 6 working days after the due date (breach of clause 30(1)(b)(ii)).
- (3) Paragraph 117 - Elite and the body corporate manager breached rule 12 in that they failed to exercise due skill, care and diligence in the recording of decisions at the AGM.
- (4) Paragraph 157 - The body corporate manager and Elite breached rule 12 in that the body corporate manager failed to exercise due skill, care and diligence in dealing with the issues raised by the complainant.
- (5) Paragraph 167 - The body corporate manager breached rule 12 by not responding in a substantive way to the issues raised.
- (6) Paragraph 184 - The body corporate manager failed to exercise due skill, care and diligence concerning his lack of a response to the applicant concerning a second AGM.

### **Responsibility of Mark Bernattek for breaches by Elite**

186. Regulation 18 of the Agents Licensing Regulations 1979 provides that:

*“A provision of Part V or XII of the Act or these Regulations that requires a licensed agent to do, or to refrain from doing, an act or to carry out an obligation shall, in the case of a licensed agent which is a company or firm, be read as imposing jointly and severally on:*

*(a) in the case of a company which is a licensed agent – a licensed agent who is a branch manager, employee or director of the company; ...*

*a like requirement to do, or to refrain from doing, the act or to carry out the obligation, as the case may be, in relation to the business of the licensed agent.”*

187. Regulation 18 means that the branch manager is deemed to have also breached any breaches of the Regulations by Elite.

## Penalties

188. The powers of the Board after the inquiry into a licensed agent are outlined in section 68 of the AL Act as follows:

*“68. If, at the conclusion of an inquiry conducted under section 68(4), the Board is satisfied that it is authorised to take disciplinary action against a licensed agent, the Board may do one or more the of the following:*

- (1) reprimand or caution the agent;*
- (2) by written notice, impose a fine not exceeding 50<sup>18</sup> penalty units on the agent;*
- (3) by written notice, suspend the licence of the agent until the expiration of the period, or the fulfilment of a condition, specified in the notice;*
- (4) by written notice, revoke the licence of the agent.”*

189. All the possible penalties are serious for persons in professions and licensed occupations. They all adversely impact on reputation. The outcomes of this matter, including the penalties, will be published as required by section 84A(1) of the AL Act.

190. In previous decisions the Board has outlined some principles or factors for determining the appropriate penalty.<sup>19</sup> These were based principles laid out by the Western Australian State Administrative Tribunal for determining actions to be taken for breaches of occupational codes of practice and laws.<sup>20</sup>

191. Counsel for the applicant and counsel for the respondents both addressed the penalty issue in terms of these principles.

192. Counsel for the applicant argued for a “significant fine” with the fine for the body corporate manager being larger because he has greater influence over the decision maker. The gist of the submission relevant to matters of identified by the Board as being matters of concern are:

- (1) the need for general deterrence to other managers and specific deterrence (for the manager)
- (2) absence of appropriate learning from the experiences

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<sup>18</sup> 50 penalty units is \$9250 for the period 1 July 2024 – 30 June 2025. *Penalty Units Regulations 2010*

<sup>19</sup> See *Salimi v Milgate and Milgate Real Estate*, decision dated 23 January 2024, paragraph 101

<sup>20</sup> *Commissioner for Consumer Protection v Murray [2017] WASAT 137*

- (3) issues about the reliability of the manager
- (4) incompetence regarding compliance with the legislation

193. Counsel for the respondent submitted that the respondents should not be penalised at all due to the absence of harm to the applicant from any errors or breaches of the respondents but if there is to be a penalty it should be no more than a reprimand noting the inherent unlikelihood of the issue recurring and the gravity of the consequences following from a severe penalty. In doing so the representative referred to previous decisions of the Board and other tribunals which emphasise the seriousness of the reprimand penalty for a professional person. The representative also emphasised that the respondents had always tried to act in the best interests of Metro as required by schedule 1, clause 66 of the UTMM Regulations.

194. These 12 principles, along with an assessment of the application of them to the Board's findings in this matter, are:

- *any need to protect the public against further misconduct by the agent.*

The Board's assessment is that most of the breaches were of a relatively minor nature arising out of strained relations between the members of Metro. The Board notes that Elite and the body corporate manager accept there is room for improvement in respect of the procedural breaches/

- *the need to protect the public through general deterrence of other agents from similar conduct.*

The Board's assessment is that problematic conduct of the kind that occurred in this matter should be brought to the general attention of body corporate management.

- *the need to protect the public and maintain public confidence in the profession by reinforcing a high professional standard and denouncing transgressions and thereby articulating the high standards expected of the profession such that, even where there may be no need to deter an agent from repeating the conduct, the conduct is of such a nature that the Tribunal should give an emphatic indication of its disapproval.*

Yes

- *in the case of conduct involving misleading conduct, including dishonesty, whether the public and fellow agents can place reliance on the word of the agent.*

Not applicable.

- *whether the agent has breached any legislation or industry codes of practice or guidelines and whether such a breach was intentional.*

There have been clear breaches of legislation. It is doubtful that the breaches were intentional.

- *whether the agent's conduct demonstrated incompetence, and if so, to what level.*

The problematic conduct does not indicate incompetence

- *whether or not the incident was isolated such that the Tribunal can be satisfied of the agent's worthiness or reliability for the future.*

To the extent that some of the breaches may reflect general practices (e.g. the manner of advising owners about the consequences of a failed AGM) the Board is confident that both Elite and Mark Bernattek will revise their procedures.

- *The agent's disciplinary history*

There have been no other disciplinary matters for either Elite or Mark Bernattek.

- *whether or not the agent understands the error of his or her ways, including an assessment of any remorse and insight (or a lack thereof) shown by the agent, since an agent who fails to understand the significance and consequences of misconduct is a risk to the community.*

The Board does consider that Elite and Mark Bernattek have an understanding of the general nature of the breaches found to have been committed.

- *the desirability of making available to the public any special skills possessed by the agent.*

Not applicable.

- *the agent's circumstances at the time of the conduct and at the time of imposing the sanction. However, the weight given to personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the*

*public interest in the honesty and integrity of real estate sales representatives and in the maintenance of proper standards of real estate sales representative practice.*

The Board is unaware of any personal circumstances other than the end of year work pressures that might suggest that the behaviour was aberrational.

- *any other matters relevant to the agent's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness. In general, mitigating factors such as no previous misconduct or service to the profession are of considerably less significance than in the criminal process because the jurisdiction is protective not punitive.*

The Board considers that some of the respondents' breaches in this matter undermine what is sometimes referred to as "the honour of the profession" or put another way, undermine consumer confidence in the profession. This is so because of matters such as the sloppy recording of voting in the minutes, the failure to specifically address in some meaningful way the issues raised by the applicant and the failure to comply with the strict requirements of the UTMM Regulations. Agents are used in body corporate management for the purposes of, amongst other matters, ensuring unit owners can have some confidence that their body corporate can successfully manage the relatively complicated processes of both complying with the legislation and dealing with the differing perspectives of the various owners.

195. The Board finds that most of the breaches appear to come from systems or organisational problems that are the responsibility of Elite.
196. The Board also found that there is no evidence that the applicant suffered significant (if any) financial damage arising from the breaches. However, the breaches were such that they could potentially have resulted in significant practical problems. In particular the inaccurate recording of the AGM outcomes and the failure to engage with a person asking legitimate issues about the operations of the body corporate. Adequate communication is important in ensuring that problems do not unnecessarily fester.
197. In assessing the penalties to be imposed the Board examined past decisions of the Board.
198. *Liet v Alice Springs Realty Pty Ltd. Henricks and Rowan (24 November 2023)*
  - (1) Unprofessional and abusive communications

- (2) The penalty was \$2355 for the company, caution for Hendriks and \$1570 for Rowan<sup>21</sup>

199. *Ordough and others v Whittles Body Corporate Management* (decision made 5 May 2021)

- (1) Body corporate manager failed to follow correct process in dealing with a dog application
- (2) Body corporate manager failed to what was needed to be done concerning renewal of insurance
- (3) For the breach regarding the dog application the agent received a reprimand. The failing did not affect the eventual outcome concerning the application
- (4) For the breach regarding insurance the agent was fined \$3080<sup>22</sup>. The failing resulted in the building being uninsured for 51 days. This could have been disastrous for the body corporate.

200. *Glazebrook v George & Hucent Pty Ltd, Adam and Kelly*

- (1) Various acts of unprofessional conduct by employees of the agent
- (2) The penalty was a fine of \$6320<sup>23</sup>.

201. *Management Committee Units Plan U2000/083 v Purcell and Gradsha Pty Ltd* (30 May 2014)

- (1) Failure of body corporate manager to provide various records to the committee
- (2) The penalty was a fine of \$750 and requirement to issue a letter of apology.<sup>24</sup>

202. *Butler v Whittles Body Corporate Management* (9 May 2014)

- (1) Inaccurate information provided regarding plumber's report
- (2) The penalty, as imposed by the Local Court on appeal, was a fine.

203. *Arbon v Killner* (17 June 2014)

- (1) Alteration of contract of sale without client's consent
- (2) Failure to ensure client understood contract

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<sup>21</sup> At the time the maximum possible fine was \$7850

<sup>22</sup> At the time the maximum possible fine was \$7700

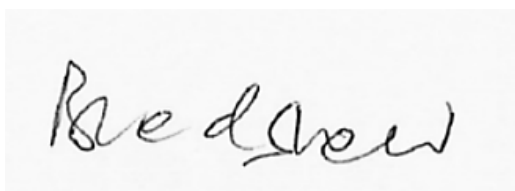
<sup>23</sup> At the time the maximum possible fine was \$7900

<sup>24</sup> for *Consumer Protection v Murray* [2017] WASAT 137

- (3) Adverse outcomes for the client
  - (4) The penalty was a reprimand
204. These decisions suggest that the Board's approach has varied over time with the Board now being more likely to impose a significant fine.
205. Based on these decisions (particularly the one in *Ordough and others v Whittles Body Corporate Management*) and views expressed elsewhere in these reasons concerning the seriousness of the breaches the Board makes the following determinations:
- (1) Mark Bernattek: reprimand and fine of \$1250
  - (2) Elite: reprimand and fine of \$2500.
206. Under section 69(3) of the AL Act, the Board directs Mark Bernattek to make payment of the relevant fine within 60 days of the date of this notice.
207. Under section 69(3) of the AL Act, the Board directs Elite to make payment of the relevant fine within 60 days of the date of this notice.

**Right of review**

208. Section 85(3) of the AL Act provides that an affected person can apply to the Northern Territory Civil and Administrative Tribunal for a review of decisions of the Board.
209. For the purposes of section 85(3), "affected persons" include the applicant, agents and agents representatives affected by the decisions.
210. An application for review must be made within 28 days of the day of notification to an affected person of the decision in this matter.

A handwritten signature in black ink on a light grey background. The signature is written in a cursive, flowing style and appears to read "Bradshaw".

Dated 11 September 2025

Robert Bradshaw

Chairperson (for Agents Licensing Board of the Northern Territory)