NSW STRATA REFORMS: HOW THE CHANGES WILL AFFECT YOU

By Allison Benson

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While we await a commencement date for the *Strata Schemes Development Act 2015* and its regulations, the majority of the *Strata Schemes Management Act 2015* ('the **Act'**) will come into effect on 30 November 2016. This review builds on my previous article ('The nuts and bolts of the latest strata reforms' (February 2016) 19 *Law Society Journal,* 78) to provide more detail on the changes brought in by the Act now that the *Strata Schemes Management Regulations 2016* have been made.

If you own or live in a strata property, advise clients in respect of strata title property or act for developers, the changes will affect you.

Governance changes clarified

The immediate changes that will affect most people are the changes to how an owners corporation ('**OC'**) is to be managed.

Tenant representatives

Lot owners should be aware that tenants may have a 'role' in the management of their OC. In strata schemes where at least 50 per cent of the lots are leased and notice of the tenancy has been provided to the OC, the OC must convene a tenants meeting to allow eligible tenants (i.e. those tenants the OC has been notified of) to elect a representative to the strata committee (**SC**). However, the SC tenant representative will have no voting rights, cannot put a motion on the meeting agenda, cannot be the Treasurer, Secretary or Chairperson of the OC, and is not counted when considering quorum for SC meetings. They may also be asked to leave meetings when financial matters, levy contributions, recovering unpaid levy contributions and any strata renewal is under discussion or being voted on.

Although tenants may attend general meetings they have similar rights to the tenant representative in SC meetings and, unless they hold a proxy, they have no voting rights.

Snapshot

- Major changes to the management of strata schemes will commence on 30 November 2016.
- The new building defect regime will commence on 1 July 2017.
- Lot owners, potential purchasers, tenants, building managers and developers alike need to prepare for the changes.

Attending and voting at meetings

For both strata committee and OC meetings there is now the potential to attend and vote remotely by either phone or video conference, email or other electronic means, or to hold pre-meeting voting. Not all strata managers will have the ability to provide this service and it will likely increase strata management fees if such facilities are to be provided.

To enable these forms of voting at general meetings or SC meetings, a resolution must first be passed by the OC or SC to authorise the voting method. Consideration should be given to appropriate voting methods and care is needed in drafting the resolution. For instance, do those entitled to vote have sufficient internet access and ability to be able to successfully use a voting website and, if voting by email, should the email address be the address specified by the lot owner on the strata roll, or can it be from any email address? Also note that if pre-meeting electronic voting is enabled in addition to voting at the meeting itself, the notice of meeting will need to contain a statement that the relevant motion may be amended at the meeting, with the consequence that the pre-meeting electronic vote has no effect. Secret ballots are also available if the SC decides the matter is to be a secret ballot or, if at general meeting, at least one-quarter of those present and entitled to vote on the motion (or election) agree to a secret ballot.

Proxies

Restricting the use of proxies was a goal of the reforms. Strata managers, building managers and on-site residential property managers are not entitled to have a proxy vote if it would assist in, or allow them to, obtain a pecuniary interest or monetary benefit. Original owners (ie developers) will generally be restricted from using a proxy vote if the proxy or power of attorney was granted in the contract for sale of land or an ancillary contract.

There is a potential problem in the limit on persons holding proxies. The Act provides that for schemes with up to and including 20 lots a person can hold one proxy vote; if there are 21 lots then the person can hold proxies for no more than 5 per cent of the total number of lots. A common occurrence for general meetings however is for lot owners to provide their proxy to a SC member or the strata manager.

Unfortunately, the Act and Regulations are silent on what to do if a person, such as the Chairperson, receives more than the permitted number of proxies (although the proxy form does provide for an alternate proxy and a statement that the lot owner 'understands' that their proxy will not be allowed to vote on their behalf if they have more than the permitted number of proxies). The only fair means of determining which proxy to use in this instance seems to be to use the first proxy forms received up to the limit. However, does a SC member or strata manager in this situation have a duty to notify a lot owner that their proxy would not count? If they do not, could the aggrieved lot owner take action in NCAT to nullify a resolution on the basis they were 'improperly' denied a vote as only the first proxy form (or first forms up to the 5 per cent limit) were used and otherwise valid proxy forms were not considered? Arguably they could. Worse still would be the case where the Chairperson selects which proxy forms

to utilise. This behaviour could see the Chairperson breach their new statutory duty to carry out their functions for the benefit of the OC and with due care and diligence.

We suggest, out of an abundance of caution, that clients be advised of the new limits (do not simply rely on them to read the proxy form) and to check with their potential proxy before nominating them. SC members or strata managers who receive more than the permitted number of proxies (whether solicited or unsolicited) should consider contacting the person who provided the proxy and advising them that they cannot use their proxy.

Original owners and voting rights

In addition to the restriction on original owners (developers) being unable to hold proxies granted under a sale of land contract or ancillary contract, the Act retains the previous limitation on the voting rights of original owners. This restriction applies when original owners own lots with over 50 per cent of the unit entitlements in the scheme and applies to reduce their voting power by two-thirds. A new restriction which will apply to schemes subject to part 11 of the Act (more on this below) will prevent original owners from voting, or exercising a proxy vote, on matters relating to building defects or their rectification. This is designed to enable OCs to overcome the controlling vote of the original owner early on in the scheme's life.

Property management

Increased documentation to be provided

The Act provides that the original owner must prepare an initial maintenance schedule. This schedule is to include maintenance and inspection schedules for any item on common property where maintenance and inspections are reasonably required to avoid damage or the item failing to function properly. It must include warranties and manufacturers manuals for any systems or equipment referred to in the schedule, as well as the name and contact details of the manufacturer and installer of the item. The schedule must be provided to the OC at least 48 hours prior to the first Annual General Meeting.

In addition the original owner must provide copies of building valuations (if the building is required to be insured), building contracts, service agreements and the most recent BASIX certificate 48 hours prior to the first Annual General Meeting (**AGM**). The potential penalty for not providing these documents remains the same (at 100 penalty units) and it will be interesting to see if specifying the documents required and making it a compulsory agenda item for the first AGM will increase the frequency of documents being provided. The aim is to ensure the OC is informed and able to properly maintain its common property.

Disposal of abandoned goods

The Regulations enable OCs to dispose of goods left on the common property (including motor vehicles) meaning they no longer have to resort to the processes under the *Uncollected Goods Act 1995*. The Regulations provide for a detailed process which is essentially that the OC places a removal notice on the item, waits for a specified period and can then either move and dispose of the goods or, if it is a motor vehicle, it can move it to another place on the common property or to the nearest place it can lawfully be moved (ie the street if there is unrestricted parking). If goods (other than a motor vehicle) are sold, the purchaser obtains good title and the proceeds are paid to the OC. If a motor vehicle is moved, the OC may apply for an order in NCAT for the owner to pay their reasonable costs of doing so. If the goods are rubbish or perishable, the OC need not go through this process but may simply dispose of them.

By-laws

The Regulations provide for model by-laws. It should however be noted that the model by-laws will only apply to new schemes unless they are adopted by special resolution by an OC and that the ability to pass a by-law limiting occupancy has been watered down. The Regulations provide that for the purpose of the two persons to a bedroom limit, close relatives, carers and certain others are exempt. As an example, a married couple, their two children, and two grandparents could live in a one bedroom unit even with a by-law limiting occupancy to two persons per bedroom.

New building defects regime

The notable exception to the 30 November 2016 start date is part 11 of the Act which provides for a new building defect regime. Part 11 commences on 1 July 2017. As a reminder, part 11 will not apply to building work if the contract for the work was entered into prior to 1 July 2017, or the building work commenced prior to 1 July 2017, or if the building work required insurance under part 6 of the *Home Building Act 1989*. This means that the effects of this change will not be seen for quite some time and developers have at least eight months to prepare for the changes.

The Regulations establish that the contract price for the 2 per cent building bond to be paid by developers will include the total amount paid under all applicable contracts as at the date of issue of the occupation certificate. If there is no building contract or the parties to the building contract are related parties, the contract price is to be the price set out in a quantity surveyor's report.

The quantity surveyor must certify that they have inspected the as-built drawings and specifications for the strata plan and that specified costs are included in their report, such as construction and fit out costs, demolition and site preparation, car parking, professional fees and taxes.

The Regulations also establish who can be appointed as a building inspector for the purpose of the statutory inspection regime and what documents must be lodged together with the building bond. When the building bond is able to be claimed or realised is set by the Regulations to be between the second and third year after the date of the occupation certificate. Part of the bond can be used to meet the costs of a statutory inspection or report if the developer is insolvent and the costs have not been paid or the developer is dead, cannot be found or failed to comply with the requirement to appoint a building inspector.

Conclusion

The reforms brought in by the Act and the Regulations are widespread. They will require changes to the process of managing an OC, particularly if the new voting methods are adopted. Some changes will be immediate, such as the new proxy limits, while others will have a longer term effect, such as including the new requirement that a by-law not be harsh, unconscionable or oppressive (discussed in my February 2016 article). As with any new legislation there will undoubtedly be testing of changes by way of litigation. The new dispute resolution system will itself be tested in this process in the next few years. **LSJ**