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LEVY COLLECTION

UNDER THE STRATA SCHEMES MANAGEMENT BILL 2015

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About the Author

Faiyaaz has been in practice since 1995 as a litigation lawyer. His primary focus has been commercial litigation, including debt recovery, personal and company insolvency, strata litigation and building and construction.

He is admitted to the Supreme Courts of NSW, Queensland and as a Barrister and Solicitor to the High Courts of Australia and Fiji.

Faiyaaz obtained his Bachelor of Laws from Queensland University of Technology in 1994 and then completed his graduate diploma in legal practice in 1995 from the same university.

Since completing his studies, he has worked for reputable firms in Queensland, New South Wales and Fiji prior to joining JS Mueller & Co.

Faiyaaz is an experienced litigator with over 17 years experience and is very well respected by his colleagues.

Faiyaaz is of Fijian descent and speaks fluent Native Fijian, Hindi and Urdu.

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Introduction

The New South Wales Government has recently passed the Strata Schemes Management Act 2015 (SSMA 2015) and the Strata Schemes Development Act 2015. The new legislation will commence operation later in 2016.

The Acts are designed to overhaul the way strata schemes will be managed in the future in New South Wales. Consultation in relation to these new changes commenced in 2011 when submissions were invited from key stakeholders in the industry and strata experts. The new legislation is said to reflect community sentiments and the submissions received by the government during the consultation process.

This paper is limited to the consideration of levy recovery under the SSMA 2015. In particular it focuses on some of the important changes proposed in the area of collecting overdue contributions, interest and costs. In this paper contributions will be referred to as levies.

Levy Recovery

- It is settled law that before an owners corporation (OC) can recover outstanding levies it has to levy a contribution to be paid into the Administrative or Sinking Funds of the OC by a lot owner.

Current Position

- Currently the raising of a levy is governed by Section 78 of the Strata Schemes Management Act 1996 (the SSMA).

Section 78 of the SSMA states:-

- (1) *An owners corporation levies a contribution required to be paid to the administrative fund or sinking fund by an owner of a lot by serving on the owner a written notice of the contribution payable.*
- (2) *Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 77) by the owners in shares proportional to the unit entitlements of their respective lots.*
- (3) *If, at the time a person becomes owner of a lot, another person is liable in respect of the lot to pay a contribution, the owner is jointly and severally liable with the other person for the payment of the contribution and interest on the contribution.*

- (4) *A mortgagee or covenant chargee in possession of a lot (whether in person or not) is jointly and severally liable with the owner of the lot:*
- a) *For any regular periodic contributions to the administrative fund or sinking fund together with any interest on those contributions, and*
 - b) *for any other contribution together with interest on that contribution if the mortgagee or covenant chargee has been given written notice of the levy of the contribution.*
- (5) *Subsection (4) does not affect the liability of an owner of a lot for any contribution levied under this section.*
- (6) *Regular periodic contributions to the administrative fund and sinking fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not served on the owner.”*

New Position

- Under the SSMA 2015 the levying of contributions will now be contained in Section 83 which states as follows:-
- (1) *An owners corporation levies a contribution required to be paid to the administrative fund or capital works fund by an owner of a lot by giving the owner written notice of the contribution payable.*
 - (2) *Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 82) by the owners in shares proportional to the unit entitlements of their respective lots.*
 - (3) *Any contribution levied by an owners corporation becomes due and payable to the owners corporation on the date set out in the notice of the contribution. The date must be at least 30 days after the notice is given.*
 - (4) *Regular periodic contributions to the administrative fund and capital works fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not given to the owner.”*

Key differences between Sections 78 -v- 83

- Section 78 at present regulates levying of contributions on owners of lots within a strata scheme and the liability of mortgagees in possession and other persons for such contributions.
- The new Section 83 is in part similar to Section 78 but not entirely.
- Section 83 will now be the new provision which will regulate levying of contributions on owners within a strata scheme. It will no longer be the provision which will also regulate the levying of contributions on persons other than owners such as a mortgagee in possession.

An entirely new provision, namely Section 84, will now regulate the liability of persons other than owners for contributions such as a mortgagee in possession. (See discussion below re: Section 84).

At present there is no requirement under Section 78 that requires a levy notice to specify that a levy will become due and payable 30 days after the levy notice is given. However, Section 80 of the SSMA 1996 enables recovery of outstanding levies at the end of 30 days.

- The new Section 83(3) now specifically states that any contribution becomes due and payable on a date specified in the levy notice which “must be a date at least 30 days after the notice is given”.
- It appears that s83(3) will now require a levy notice to specify a specific date when the levy will become due and payable which must be a date at least 30 days after the notice has been given.

Issuing levy notices

- One issue that is always raised by lot owners in defending a levy claim under the current law is the need for the OC to issue a levy notice.
- In most defended levy collection claim, lot owners would often claim that they did not receive a levy notice and therefore they are not entitled to pay the levy, interest or costs.

- Section 83(4) retains Section 78(6) of the SSMA 1996 and therefore there will be no legal obligation for an OC to issue a levy notice (even though this is done) to an owner under Section 83(4) for ordinary levies.
- If the proposed changes were to require the issuance of a levy notice as a precondition to the collection of an outstanding levy then the process of collecting same would have been cumbersome and time consuming. Luckily from an OC's perspective the new proposed section 83(4) does not require a levy notice to be issued even though all most all strata schemes do issue levy notices to owners.
- The onus therefore under the new regime still remains with the lot owner i.e. it is the owner who has to be proactive and diligent in paying levies even though a levy notice may not have been issued by the OC.

Liability of mortgagees in possession and other persons to pay contributions

- A new Section 84 will now separately deal with a liability of former owners and mortgagees in possession of a lot.
- Section 84 states:
 - 1) *If, at the time a person becomes the owner of a lot, another person is liable to pay a contribution in respect of the lot, the owner is jointly and severally liable with the other person for the payment of the contribution and any interest on the contribution.*
 - (2) *A mortgagee or covenant chargee in possession of a lot is jointly and severally liable with the owner of the lot:*
 - a) *for any regular periodic contributions to the administrative fund or capital works fund together with any interest on those contributions, and*
 - b) *for any other contribution together with interest on that contribution taken to recover unpaid contributions, if the mortgagee or covenant chargee has been given written notice of the levy of the contribution, and*
 - c) *for any costs payable as a debtor in respect of enforcement action to recover unpaid contributions.*

(3) *Subsection (2) does not affect the liability of an owner of a lot for any contribution levied under this section."*

- The liability for other persons to pay contributions under s.84 is the same as that contained in the present Section 78(3), (4) and (5); however, Section 84 goes a step further.
- Section 84(c) states that the mortgagee in possession will be jointly and severally liable "for any costs payable [emphasis added] as a debtor in respect of enforcement action to recover unpaid contributions."
- At present, Section 78 does not say that a mortgagee in possession of a lot is also required to pay costs and expenses incurred in an action to recover outstanding levies, although, levy recovery lawyers always argued that since the mortgagee in possession was in the shoes of the lot owner, therefore, it is obliged to pay such costs of a recovery claim. The mortgagee in possession obviously argued otherwise.
- Section 84(c) now clarifies this dilemma by making sure that a mortgagee in possession is also liable for any recovery expenses for unpaid contributions.

10% Interest

- Section 79(2) of the SSMA 1996, states that if a contribution is not paid at the end of one month after it becomes due and payable, that contribution attracts 10% interest or any other rate if such is prescribed by the regulations.
 - Section 79(2) is retained in the new Section 85(1).
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- **Section 85(1) states:**
- (1) *A contribution, if not paid when it becomes due and payable, bears until paid simple interest at an annual rate of 10% or, if the regulations provide for another rate, that other rate."*
- Section 85 is in two parts. Section 85(1) and (2).

- Section 85(1) – states that a contribution if not paid when it becomes due and payable, bears until paid, simple interest at an annual rate of 10%.
- Section 85(1) omits from it the words “*at the end of one month after*” which is contained presently in section 79(2).
- Instead of keeping these words in Section 85(1) there is now a new Section 85(2) which is a separate provision.
- Section 85(2) states exactly the same thing which is said in the current Section 79(2) but with more clarity that no interest will accrue if the contribution is paid no later than one month after it becomes due and payable.

Waiver of interest on overdue levies

- Presently Section 79(3) states that the owners corporation may by “*special resolution*” decide that no interest will be payable on a contribution. To obtain such a resolution, the legislation requires a general meeting to be requisitioned and a motion carried through at that general meeting to waive the interest in favour of the lot owner who has requested a waiver of interest.
- In the new Section 85(3), it is interesting to observe that a special resolution is no longer necessary. A simple resolution will suffice. In other words the executive committee is able to pass a resolution agreeing to a request for the waiver of interest. The executive committee can convene a meeting and resolve that the OC will waive interest either generally or in a particular case.
- The proposal seems to be making the process of granting a request for the waiver of interest in certain cases, much easier than it is presently.

Discounts

- Similarly the existing Section 79(4) is a provision where a lot owner can request the owners corporation to determine that a person will pay 10% less of a contribution if the person pays the contribution before the due date of the contribution. This request at present can only be approved by the owners corporation at a general meeting and by special resolution.
 - Under the new section 85(4) a special resolution is no longer required.
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- Therefore if a person pays a contribution before it becomes due and payable, the OC, if requested, may give a discount of 10% to that person without any need for the OC to approve such a discount by a special resolution at a general meeting.

Payment Plans

- Under the current SSMA 1996, there is no specific provision or allowance to cater for payment plans for the payment of contributions.
- Even though there is no such requirement allowing the OC to enter into payment plans, a number of strata schemes have been entering into payment plans on an ad hoc basis and in appropriate cases.
- Cases which have proceeded to Court for a recovery action, a number of strata lawyers have used payment plans or instalment orders as a way of settling levy claims. Often a clause will be negotiated for inclusion in the consent orders stating that if the judgment debtor defaults on any instalment then the entire sum, i.e. the entire judgment sum, will become due and payable less any payments made such that the OC can continue with the recovery of the debt.
- Currently, the OC has no legal obligation to accept payment plans. In other words, the existing law treats all owners equally and makes no allowance for owners facing financial stress.
- During the consultation period, it was suggested to the NSW Government that executive committees or agents be given the ability to defer the whole or any part of the levies for a reasonable period on conditions as it thinks fit, or approve a flexible payment plan if an owner is facing genuine financial hardship.
- It was further suggested that if an OC unreasonably refuses any request of deferring payment of contributions or payment plans, then the owner should be able to apply for an appropriate order.
- Payment plans are now reflected in the new section 85(5)-(7) of the SSMA 2015. For the first time the owners corporation will be given a right to enter into payment plans for the payment of overdue contributions, by approving such by a resolution.
- It is important to note that a special resolution is not required for the approval of a payment plan if the OC was minded to enter into one.

- Section 85 further states that the regulations may prescribe the requirements for payment plans. At present, the regulations have not been finalised but they have just been released for discussions.
- Clause 19 of the draft Strata Schemes Management Regulation 2016 provides how a payment plan is to be managed.
- It provides that the owners corporation will have to do the following things in relation to a payment plan:

19 Payment plans for unpaid contributions: section 85 (6) of the Act

- (1) *A payment plan for the payment of overdue contributions is to be in writing and is to contain the following:*
 - (a) *the name of the lot owner and the title details of the lot,*
 - (b) *the address for service of the lot owner,*
 - (c) *the amount of the overdue contributions,*
 - (d) *the amount of any interest payable for the overdue contributions and the way in which it is calculated,*
 - (e) *the schedule of payments for the amounts owing and the period for which the plan applies,*
 - (f) *the manner in which the payments are to be made,*
 - (g) *contact details for a member of the strata committee who is to be responsible for any matters arising in relation to the payment plan,*
 - (h) *a statement that a further plan may be agreed to by the owners corporation by resolution,*
 - (i) *a statement that the existence of the payment plan does not limit any right of the owners corporation to take action to recover the amount of the unpaid contributions.*
 - (2) *The strata committee must give a lot owner who has entered into a payment plan a written statement for each calendar month of the plan that sets out the payments made during that month and the amount of unpaid contributions and interest owing.*
- The regulations do not provide the requirements that will trigger the need for a payment plan.
 - Section 85 further states that a payment plan will not limit the right of the OC to take action to recover the amount of unpaid contributions.

- The suggestion that the OC or the agent be given the authority to defer in whole or in part the levies have not been adopted in the new Act.
 - Some concerns have been raised in relation to payment plans.
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About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.



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