

# THE NEW STRATA LAWS - THE GOOD, THE BAD AND THE UGLY

JS Mueller & Co Forum | 31 July 2018



Adrian Mueller | Partner | Senior Lawyer | BCOM LLB FACCAL

# The New Strata Laws: The Background

---

- No major review of strata law since 1996
- Review process began in 2011
- Involved four Ministers for Fair Trading
- Received well over 3,000 submissions during the four-year consultation period.

# The New Strata Laws: The Consultation Process

---

- The consultation involved:
  - online surveys,
  - publicly released discussion and position papers,
  - round tables and focus meetings,
  - comment on the draft exposure bills.
- Key stakeholders that were consulted included:
  - Owners Corporation Network,
  - Strata Community Australia,
  - Real Estate Institute of New South Wales,
  - Housing Industry Association,
  - Master Builders Australia,
  - Urban Taskforce.

# The New Strata Laws: The Objective

---

- Introduce new provisions to address regulatory gaps
- Modernise the provisions in the existing Acts

# The New Strata Laws: The Objective

---

- Strata Schemes Development Act 2015
  - “The most significant reform in this bill is a new process to facilitate the collective sale or renewal of strata schemes.”
  - “This proposed reform deals proactively with the issue of ageing strata schemes and enables strata owners to make collaborative decisions about their strata building.”

# The New Strata Laws: The Objective

---

- Strata Schemes Management Act 2015
  - Modernise the ways schemes are managed
  - Make use of new technologies
    - Skype, teleconferencing or electronic voting
  - Provide greater transparency and accountability for strata managers

# The New Strata Laws: The End Result

---

- More than 90 reforms
- Some good
- Some Bad
- Some downright ugly!

# Meetings (Opt-In Procedures): The Good

---

- Meeting notices can be sent to owners by email
- Votes can be cast electronically before the meeting
- Stakeholders can participate in meetings remotely:
  - Teleconference
  - Videoconference (Skype)
- Secret ballots are allowed



# Meetings (Miscellaneous): The Good

---

- Flexible quorum arrangements – if no quorum, wait half an hour then declare a quorum
- The AGM can be held at any time
- No postal voting
- Anti-proxy farming laws
- Explanatory notes for motions submitted by owners

# Meetings (Minutes): A Mixed Bag

---

- Minutes of general meetings do not have to be given to owners in large strata schemes unless they request the minutes
- But the minutes will need to be included in the notice of the next general meeting that is given to owners who did not previously receive them
- The secretary may convene a meeting at any time.

# Meetings (AGMs): The Bad

---

- AGM's cannot be held by pre-meeting electronic votes
- This is because pre-meeting electronic voting is not permitted for strata committee elections

# Meetings (Miscellaneous): The Bad

---

- Allowing tenants to attend general meetings
  - Tenants' details must be shown on the strata roll
  - Does it ever happen?
- Limiting the number of proxies that can be given or held by an owner of multiple lots
- The AGM notice no longer needs to include complete financial statements:
  - Statement of key financial information is unhelpful

# Unfinancial Owners: The Good

---

- Unfinancial owners are not allowed to:
  - vote at general meetings (old law)
  - be elected onto the strata committee (new law)
  
- A member of the strata committee is not entitled to move a motion or vote if the member:
  - is unfinancial (new law); or
  - was nominated by an owner who is unfinancial (new law).

# Unfinancial Owners: The Bad

---

- The Act introduces a self-reporting system.
- If a committee member is unfinancial they must inform the secretary or chairperson.
- But who is checking to ensure a committee or the owner who nominated them is financial at each committee meeting?
- Unfinancial owners are now allowed to:
  - require motions to be included in the agenda for a general meeting;
  - nominate a candidate for election to the strata committee.

# Conflicts of Interest (Committee Members): The Good

---

- Members of the strata committee need to disclose any pecuniary interest in a matter that creates a conflict of interest.
- Unless the committee otherwise determines a committee member with a conflict of interest:
  - must not be present for any deliberations on the matter; or
  - vote on the matter.

# Conflicts of Interest (Committee Members): The Bad

---

- The conflict of interest rule for committee members only applies if the committee member discloses the conflict
- The committee cannot itself declare the conflict of interest and prevent the committee member voting
- Therefore the new law is limited and flawed



# Conflicts of Interest (Developers): The Good

---

- A developer is not entitled to vote or exercise a proxy vote on a matter concerning building defects

# Conflicts of Interest (Developers): The Bad

---

- The conflict of interest rule for a developer only applies to work covered by Part 11 of the Act.
- This means the rule does not apply to:
  - Any work done under a building contract signed before 1 January 2018 (i.e. most buildings)
  - Residential buildings covered by Home Building Compensation Fund insurance
  - Commercial buildings

# Conflicts of Interest (Developers): The Bad

---

- A person connected with a developer (apart from an owner) cannot be elected to the strata committee unless that connection is first disclosed to the owners corporation before the election

# Developers (Documents): The Good

---

- The developer must now deliver documents to the owners corporation at least 48 hours before the 1<sup>st</sup> AGM.
- These documents must now include:
  - the initial maintenance schedule;
  - all service agreements for utilities;
  - building contracts;
  - BASIX certificates;
  - interim and final defect reports.

# Developers (Documents): The Good

---

- The developer must now prepare an initial maintenance schedule which must include:
  - manuals,
  - warranties,
  - details of the manufacturer or installer for the parts of the building it covers
- This information would be helpful in any building defect claim

# Developers (Voting Rights): The Good

---

- The voting power of a developer who still holds 50% or more of the unit entitlement is reduced by 2/3 on:
  - An election of the strata committee (old law)
  - A motion to appoint a strata manager (new law)
- The voting power of a developer on any motion is reduced by 2/3 if a poll is requested (old law)

# Strata Managers (Transfers): The Good

---

- Transfer of strata management agency agreement can only be approved at a general meeting
- Clarity
- No longer any doubt that the strata committee cannot approve the transfer of a strata manager's agreement

# Strata Managers (Maximum Terms): The Bad

---

- Maximum 3 year term of appointment as a strata manager.
- Why?
- Longer appointments were not common.
- This area did not generate complaints.
- There was no need for this reform.
- No other contractors (apart from building managers) who want to work for an owners corporation are caught by the same prohibition.



# Strata Managers (Goodbye Roll-Overs): The Bad

- End of automatic roll-over regime
- Replaced by:
  - requirement for strata manager to warn of impending expiry of agreement at least 3 months before end of agreement; and
  - right (but not obligation) for strata committee to grant a quarterly extension of appointment
- Opt-in procedure
- Often results in no strata manager between expiry of appointment and AGM

# Strata Managers (who are Owners): The Bad

---

- An owner who is seeking appointment as a strata manager cannot vote or cast a proxy vote on the appointment.
- Why an absolute prohibition?
- Why not allow it with full disclosure?
- No other owners who want to do work for an owners corporation are caught by the same prohibition.

# Strata Managers (Connections with Developers): The Bad

---

- A strata manager connected with a developer cannot be appointed as strata manager for the first 10 years.
- Why an absolute prohibition?
- Why not allow it with full disclosure? This is what occurs after the first 10 years (see section 71)
- No other contractors who want to work for an owners corporation are caught by the same prohibition.

# Strata Managers (Commissions): A Mixed Bag

---

- The strata manager's report as to commissions.
- Was this new law required?
- Did the taking of commissions really generate much complaint?
- A sensible compromise?
  - Strata managers allowed to keep commissions; but
  - Strata managers required to disclose commissions.
- Better than banning commissions outright (as was initially contemplated).

# By-Laws (Renovations): The Good

- Three-tiered approach:
  - Cosmetic work
  - Minor renovations
  - Major renovations
- Streamlined and simplified the renovations approval process
- Enables strata committees to approve minor renovations (which is what the industry wanted)
- Should remove disputes about whether renovations require approval (if not, NCAT can determine those disputes)

# By-Laws (Owners' Consent): The Good

---

- Who needs to consent to a common property rights by-law?
- Owners benefited by common property rights by-law need to consent
- Provides clarity
- Overcomes uncertainty that existed since 2001 (Young's case)

# By-Laws (Compulsory Review): The Good

---

- Compulsory by-law review
- Every owners corporation was required to review its by-laws by 30 November 2017
- Good opportunity to identify by-laws which were:
  - Obsolete
  - Inconsistent
  - Invalid
- Good opportunity to modernise by-laws

# By-Laws (New Rules): The Good

- Harsh, unconscionable or oppressive by-laws are invalid (but did this open a pandoras box?)
- Overcrowding by-laws are now permitted
- Increased penalties for breaching a notice to comply:
  - \$1,100 (first offence)
  - \$2,200 (repeat offence)
  - \$5,500 (overcrowding by-law – first offence)
  - \$11,000 (overcrowding by-law – repeat offence)
- Penalties payable to the owners corporation
- Register by-laws within 6 months



# By-Laws (Consolidation): The Bad

- Compulsory consolidation of by-laws
- Mandatory lodgement of consolidated set of by-laws when registering changes to by-laws
- Exemption where:
  - too onerous to register consolidated set of by-laws; and
  - no more than 5 separate changes to the by-laws are already registered.
- Non-sensical exemption
- Some older strata schemes have hundreds of pages of by-laws
- Many mistakes are being made

# By-Laws (Repealing Common Property Rights By-Laws): The Ugly

---

- Previously any change to a common property rights by-law required the written consent of the owners concerned
- Now (arguably) a common property rights by-law can be repealed without the written consent of any owners
- Section 143(1)

An owners corporation may make a common property rights by-law only with the written consent of each owner on whom the by-law confers rights or special privileges.

# By-Laws (Omissions from Model By-Laws): The Ugly

---

- The model by-laws for new strata schemes are a good set of by-laws
- However there are two glaring omissions from the new model by-laws
- There are no model by-laws concerning:
  - Moving in/out
  - Floor coverings

# By-Laws (Restrictions on Changing the Memorandum): The Ugly

---

- The common property memorandum can prove useful in many strata schemes
- However the scope to amend the memorandum is too limited
- The memorandum can only be amended to omit items that are:
  - lot property
  - the subject of a common property rights by-law

# Levies: The Good

- A special levy can now be raised to the administrative fund or the capital works fund
- The 10 year capital works fund plan cannot be ignored and must be implemented unless there is a good reason not to do so
- A large strata scheme must provide a written explanation for any differences between its capital works fund budget and the 10 year plan
- A mortgagee in possession is now liable for levy recover expenses
- A developer can be ordered by NCAT to pay compensation to the owners corporation for raising inadequate levies during the initial period

# Levies (Patience is not a Virtue): The Debacle

---

- An emergency levy is no longer possible
- There must be a minimum 60 day period after a levy is raised before:
  - Interest accrues on the levy;
  - Owners corporation can recover the levy
- The owners corporation must issue a 21 day notice before recovering any levy:
  - Who can issue the notice? The strata manager or a lawyer or debt collector?
  - What happens if the notice is not issued before legal action is taken?
  - What happens if the notice is defective?

# Levies (Payment Plans): The Debacle

---

- Cannot be approved by the strata committee or strata manager
- Must be approved at a general meeting
- Can only last for up to 12 months
- Do not stop the owners corporation taking legal action to recover overdue levies
- So why bother?

# The Strata Committee (New Powers & Duties): The Good

- The strata committee can fill a casual vacancy in the office of a member of the committee (no longer a need for a general meeting)
- Committee members now owe a statutory duty of care to the owners corporation
- Section 37

It is the duty of each member of a strata committee of an owners corporation to carry out his or her functions for the benefit, so far as practicable, of the owners corporation And with due care and diligence.

- Committee members must disclose conflicts of interest (but what happens if they don't?)



# The Strata Committee (Immunity): The Bad

---

- The members of the strata committee are generally immune from liability (section 260)
- The immunity covers acts done or not done in good faith for the purpose of executing functions of the committee members
- The liability of committee members now attaches to the owners corporation
- So committee members cannot be punished for making poor decisions

# Abandoned Goods & Illegally Parked Vehicles: The Good

---

- An owners corporation now has power to:
  - Dispose of abandoned goods left on common property
  - Move a vehicle unlawfully parked on common property

# Abandoned Goods & Illegally Parked Vehicles: The Bad

---

- An owners corporation cannot recover the costs it incurs to:
  - Dispose of abandoned goods left on common property (without a by-law)
  - Move a vehicle unlawfully parked on common property (without an order by NCAT)
  
- An owners corporation still cannot:
  - Wheel clamp a vehicle (without the owner's consent) – s. 651B Local Government Act 1993
  - Detain a vehicle (where the vehicle owner or driver asks for the vehicle to be released) – s.651C Local Government Act 1993

# Building Bonds and Inspection Reports: A Mixed Bag

---

- A bond and reports are a good idea - BUT
- A 2% bond is insufficient
- The interim and final reports will be completed before some defects manifest
- Why limit the bond to defects included in the interim report only?
- Why exclude many buildings from the bond and inspection report regime?

# Legal Action: Why Bother?

- Any legal action or legal services that will cost more than \$3,000 must be approved at a general meeting
- But if no general meeting approval for legal action is obtained, it does not matter
- Exemptions exist for:
  - Pre-litigation legal advice
  - Levy collection
  - Urgent legal services costing up to \$15,000

# Licences over Common Property: The Bad

---

- Licences granted by an owners corporation to owners over common property had to be approved by special resolution (old law)
- All licences now granted by an owners corporation over common property must be approved by special resolution (new law)
- A licence is merely a permit for someone to enter common property.
- Does this mean that a crane or rock anchor licence must now be approved by special resolution?

# Fair Trading (Mediation): The Bad

---

- Mediation undertaken by NSW Fair Trading is now free.
- An application for mediation is now able to be lodged online or by email.
- Fair Trading is now inundated with mediation applications in strata disputes.
- The waiting time for a mediation has increased from 4 to 8 weeks.

# NCAT: The Good

---

- Abolition of strata adjudications:
  - Opportunity for summary dismissal of hopeless claims
  - Better outcomes
  
- Abolition of requirement for mediation in access disputes



# NCAT: The Good

---

- NCAT's powers have increased
- NCAT now has power to:
  - resolve disputes between neighbouring strata schemes (without the consent of both schemes)
  - terminate committee members
  - prevent the committee make a decision on a specific matter
  - order a developer to pay compensation for keeping levies artificially low during the initial period
  - order an owner to pay overdue levies

# NCAT: The Good

---

- An owners corporation no longer needs to serve on all owners:
  - NCAT applications (section 228)
  - NCAT orders (section 243) provided there is a noticeboard

# NCAT (A Toothless Tiger): The Debacle

---

- NCAT does not have power to impose monetary penalties for a breach of its own orders.
- So where NCAT orders an owner to stop breaching a by-law, and the owner continues to do so, the owners corporation cannot apply to NCAT for the owner to be penalised
- There is no longer a presumption that costs will be awarded to an owners corporation in penalty proceedings

# NCAT (Strata Managers): The Debacle

---

- NCAT now has power to:
  - Vary; or
  - Terminate;  
a strata management agency agreement
- When will NCAT exercise that power?
- The Act offers little guidance

# NCAT (Strata Managers): The Debacle

- NCAT may vary or terminate a strata management agreement were:
  - there is a breach of the agreement or the agreement is not performed satisfactorily;
  - the charges payable under the agreement are unfair;
  - the strata manager has not provided certain information;
  - the agreement is otherwise harsh, oppressive, unconscionable or unreasonable.
- Will a strata management agreement be terminated for minor breaches or just because the relationship between owners corporation and strata manager has broken down?

# The New Laws: Conclusion

- The Act contains some very useful reforms concerning strata meeting practice and procedure.
- The new laws concerning renovations and by-laws have provided opportunities to streamline the renovations approval process.
- The new laws that outlaw proxy farming have proven useful.
- However some of the new laws are poorly drafted and require urgent amendment including the new laws concerning levies and NCAT.
- Ultimately, the new laws will prove useful and should modernise and improve the way strata schemes are managed.

# Thank You!



# Thank You

---

Adrian Mueller | BCOM LLB FACCAL  
adrianmueller@muellers.com.au  
02 9562 1266

---

The information contained in this paper is provided for your personal information only. It is not meant to be legal or professional advice nor should it be used as a substitute for such advice. You should seek legal advice for your specific circumstances before relying on any information herein. Contact [JS Mueller & Co](#) for any required legal assistance.

