

Owners and Community & Strata Corporations

Changes to community and strata titles legislation

To take effect from 28 October 2013

Introduction

The Statutes Amendment (*Community and Strata Titles*) Act 2012 will change the laws (the *Community Titles Act 1996* and the *Strata Titles Act 1988*) governing community and strata titles in South Australia, to take effect from **28 October 2013**.

This fact sheet outlines the effect of these impending law changes and what they mean for owners and community and strata corporations (corporations).

Body corporate managers can also find information on changes that impact directly on them in the separate **Fact Sheet for Body Corporate Managers**.

Body corporate management contracts

New requirements will apply to contracts with professional body corporate managers (also known as 'strata managers') made or renewed after 28 October 2013.

All body corporate management contracts with a paid professional manager entered into or renewed after the changes must be in writing.

The contracts must specify:

- the term of the contract;
- the functions or powers to be delegated by the corporation to the manager (e.g. the services to be provided by the manager);
- the fees payable to the manager, or the basis on which such fees are to be calculated;
- the corporation's termination rights (see also **'Termination of long term contracts'**);
- that the manager is insured as required by the legislation (see **'Compulsory insurances'**) and undertakes to maintain that insurance throughout the life of the contract; and
- that each member of the corporation has the right at any time during business hours to inspect the records of the corporation in the possession or control of the manager, and how inspection can be arranged.

Managers must ensure that a copy of the proposed contract and a required explanatory pamphlet are available for inspection by any owner at least five clear days before the date a vote is to be taken to appoint a body corporate manager.

The agenda for an AGM at which it is proposed to vote to appoint a manager must include the text of the resolution to enter into the contract and set out where and when the contract and pamphlet can be viewed or obtained by owners.

The required explanatory pamphlet must set out:

- the role of the manager; and
- the rights of the corporation and its members, including the rights to:
 - > inspect records held by the manager;
 - > revoke the delegation of a particular function;
 - > appoint the manager as a proxy and to revoke that appointment;
 - > be told of any payment or benefit that the manager receives from another trader for placing the corporation's business;
 - > terminate the contract in certain circumstances; and
 - > apply to the Magistrates Court for resolution of a dispute.

Termination of long term contracts

A corporation will be able to terminate a body corporate management agreement that is for a period of over 12 months (taken to include any renewal period at the option of the manager) after the contract has run for 12 months.

The corporation must give at least 28 days' notice of termination, although the notice period can be less if agreed in the contract. This will provide protection for corporations that inherit long-term management contracts entered into by developers during the period whilst they retain control of a new development.



Compulsory insurances

Professional Indemnity Insurance for managers

Professional body corporate managers will be required to maintain a policy of professional indemnity insurance providing cover of at least \$1.5 million per claim per 12 months.

Fidelity Guarantee Insurance for corporations

(*From 27 October 2014)

Community and strata corporations will be required to hold fidelity guarantee insurance, covering the risk of theft or fraud of the corporation's funds by a manager or other persons authorised to handle the corporation's funds. Such insurance is sometimes automatically included with community and strata building insurance policies. The amount of the cover is required to be the maximum total balance of the corporation's bank accounts at any time in the past three years or \$50,000, whichever is higher.

All strata corporations that have an administrative or sinking fund will be required to hold the insurance.

The following corporations will be exempt from the requirement to hold fidelity guarantee insurance:

- strata corporations with no administrative or sinking fund;
- 2-lot community corporations with no administrative or sinking fund; and
- community corporations with common property insurance cover of \$100,000 or less (on the basis that corporations with minimal or no common property generally collect minimal levies).

*Commencement of this new requirement will be delayed by 12 months to allow corporations time to review current policies and take out this insurance.

Meetings, proxies and conflict disclosure

Participation in meetings remotely

Owners will be permitted to participate in meetings remotely, for example by telephone, video-link or internet, if the articles or by-laws provide for this or the secretary of the corporation agrees with an owner's written request for this.

Length and revocation of proxies

The law changes make it clear that the appointment of a proxy (for example, the manager) can be revoked at any time and that any agreement to the contrary is ineffectual. Also, even if an owner has appointed a manager as their proxy, this does not prevent an owner from attending a meeting and voting in person.

The owner must still receive notices of meetings, although copies can go to their proxy in addition if the corporation agrees. Proxies will be limited to no more than 12 months. Further, a proxy appointing the body corporate manager will lapse automatically if the appointment of the body corporate manager ends.

Disclosure of conflicts of interest

The amendments confirm that all members of the corporation and any proxies or attorneys who attend the meeting on their behalf have to disclose any interest that they or their principals have in matters being considered by the corporation (other than interests held in common with the other members of the corporation).

Managers are required to disclose to the corporation any monetary interest, or monetary benefit they stand to gain, from acting for the corporation. For example, if the manager would receive a commission from a person for placing business of the corporation with that person, it would be an offence to fail to disclose that fact before placing business with the person. Similarly, if the manager were to profit by placing business of the community corporation with a related company, it would be an offence to fail to disclose that.

Chairing of meeting by body corporate manager

Under the changes, a body corporate manager may only chair a corporation meeting if a majority of those present votes for this. The manager may only vote on this question if the manager holds specific proxies to this effect and only after telling the meeting at the outset:

- that he or she may only chair the meeting if a majority of those present vote for this and that he or she has no right to vote, except when exercising a specific proxy for a member;
- whether he or she holds any proxies for the meeting, and for whom, and that they are available for inspection; and
- that he or she has no right to prevent any member from moving or voting on any motion.

Timing of meetings of secondary and tertiary corporations

The requirement that secondary and tertiary corporations must meet within one month after the annual general meeting of the primary corporation will be removed. Instead they will be required to hold an annual general meeting for a financial year within 6 months after the commencement of each financial year. Corporations will be free to hold the meeting either before or after the meeting of the primary or secondary corporation.

By-laws and articles

Penalty notices for breach

Currently, community corporation by laws are able to impose a penalty of up to \$500 for breach of a by-law. The changes will enable strata corporation articles to do this also for breaches of the articles and provide that both community and strata corporations may impose a higher maximum fine of \$2,000 where the scheme includes only non-residential lots.

Both community and strata corporations will be able to issue a notice requiring an owner or occupier to comply with a by-law within a specified time and warning that if this is not done, a penalty will be incurred. If satisfactory action is not taken, the corporation can issue a notice requiring payment of the penalty. The recipient can apply to the Magistrates Court within 60 days for an order that no penalty is payable but otherwise the amount is recoverable as a debt due to the corporation. An unpaid penalty will also be recoverable by the corporation on the sale of the unit, in the same way as unpaid levies.

The prescribed **penalty notice forms** for breaches of strata articles and community by laws are set out in the legislation and are available to download with the Fact Sheets.

The Court is empowered to revoke a penalty notice if satisfied that the breach was trifling in the circumstances.

By-laws re assistance and therapeutic animals

As a result of a separate enactment, the community and strata titles legislation will also, from 28 October 2013, prohibit articles or by-laws that prevent an occupier who has a disability from keeping an assistance animal or therapeutic animal as defined in the *Equal Opportunity Act 1984*. This is a broader class of animals than guide dogs and would, for example, include a certified autism assistance dog.

Entering premises to carry out work

A corporation can issue a notice to an owner to carry out work on the owner's unit. If he or she does not, the corporation can arrange for a person to enter the property and carry out the work and can recover the cost from the owner. Although the owner must be given reasonable notice of the proposed entry, there is no requirement for the corporation to notify tenants. The owner ought to notify the tenant, but an owner who has disregarded a notice to carry out work might also disregard the duty to notify the tenant.

The changes will require a corporation to give written notice to an occupier (including a tenant) of a lot or unit before exercising a power of entry to carry out work. It will be sufficient for the corporation to leave the notice,

addressed to the occupier, in a mailbox belonging to the unit. Two days' notice will be required, except where urgent action is necessary to avert a risk of death or injury or significant damage to property.

Challenging unfair article or by-law

An owner of a community titled lot is entitled to apply to the Magistrates Court to challenge a by-law that reduces the value of the lot or unfairly discriminates against the owner. The application must be made within three months of the date this happens or of the date on which the owner should reasonably have found it out. Currently, an application can be made only by a person who is an owner at the time the by-law is made. That is because a person should not be able to complain of a by-law that already existed when he or she bought the unit.

It is common, however, for lots in new community schemes to be bought off-the-plan. In that case, the buyer does not become the owner for some time after the contract is made. Under the changes, a person who has signed a contract to buy a lot will have the same rights as an owner to challenge a by-law made or amended after the date of contract that reduces the value of a lot or unfairly discriminates against the person.

The *Strata Titles Act* does not currently provide an equivalent right to an owner or purchaser of a strata unit if the articles are amended in a way that reduces the value of the unit or unfairly discriminates against that owner. The changes will provide the same rights for strata titles.

Other recourse for owners

The *Community Titles Act* provides for an owner to apply to the Magistrates Court for a remedy if prejudiced by the wrongful act of a delegate of the corporation, including a body corporate manager, or if he or she claims that the manager/delegate's decision is unreasonable, oppressive or unjust. The changes will provide the same for strata title owners. In the case of community titles (noting that all new developments are under that legislation), the right is extended to provide recourse against wrongful acts by a developer.

Currently under these provisions, the Court may on application make orders resolving a dispute, including orders:

- requiring a person to provide reports or information;
- requiring a person to take action to remedy a default;
- requiring a person to refrain from specified further action;
- altering the articles or by-laws;
- varying or reversing a decision of the corporation; or
- giving judgment on a money claim.

Without cutting down the general power to make such orders as are necessary to resolve a dispute, the changes will enable the Court to also:

- declare that a vote has been validly or invalidly taken;
- declare that a by-law or article is valid or invalid; and
- in the case of community titles, vary or terminate a contract entered into with an associate of a manager or developer in breach of a manager or developer's duty to act in a corporation's best interests.

Insurance and maintenance of buildings

Currently most strata groups collectively insure buildings because they are common property. Under the changes, the members of a community scheme will also be able to agree to insure some or all of the buildings in a community scheme through the agency of the corporation if they wish (even though the buildings are generally owned by members and are not common property). By-laws can be made to authorise the corporation to arrange the insurance and to collect the premium from the owners according to their lot entitlements.

Register of owners

Both community and strata corporations will be required to keep a list of the contact details of the unit owners, including email addresses, and make these available to other unit owners on request. This will help an owner who is trying to convene a general meeting. Corporations must keep a record of the information used to compile the register for 7 years.

Access to records

The corporation already has a statutory right to require anyone holding its property, including records, to return the property in response to a notice. The changes introduce further rights:

- managers must make corporation records available to an owner to inspect within 10 business days of a request, and managers are required to provide the member with a copy of a record on payment of a fee (max. \$1.20 per page);
- the corporation will be required to send copies of the corporation's bank statements each quarter to any owner who applies, unless a body corporate manager is handling the corporation's money, in which case the manager must send a quarterly financial statement to an owner who requests this;

- managers will have 10 business days after their contract with a corporation ends to return the records and trust money of the corporation. This is in addition to any notice period for termination or non-renewal of the contract.

Currently for community corporations, accounts for the previous financial year must be presented at each annual general meeting. Under the changes, this will apply also to strata corporations.

Time limits are also introduced for the provision of other information. In particular, the corporation will have five business days to provide a statement detailing the financial situation of the corporation and copies of general meeting minutes, most recent statement of accounts and insurance policies. This information is generally sought for prospective purchasers and it is important for the sale process that this information is provided promptly.

Mandatory sinking fund budget

Apart from 2-lot corporations, all community corporations must establish a sinking fund for irregular maintenance or capital works and make annual estimates, or budgets, of future spending (sections 113, 116 *Community Titles Act*).

Contributions to the sinking fund can, however, be set at negligible levels. Under the *Strata Titles Act*, there is no requirement to have a sinking fund. This will not change. To improve planning, however, and to encourage sinking funds, strata and community corporations other than small groups (6 or less) will be required to prepare a longer-term forward budget for maintenance and capital works.

- Medium sized groups of between 7 and 20 lots or units will have to prepare a 3 year sinking fund budget to be reviewed every 3 years; and
- Large groups of over 20 lots or units will have to prepare a 5 year budget and review it every 5 years.

Groups with 6 or less lots or units, and community corporations with common property insurance cover of \$100,000 or less, will be exempt from the requirement for these longer-term sinking fund budgets.

Audits

Currently, in the case of community corporations without managers that have more than six lots or collect more than \$3,000 income a year, the corporation is obliged to have its accounts audited annually. There is no corresponding obligation on strata corporations and this will not change.

In the case of community corporations, the changes will increase the audit requirement threshold. The following community corporations will be exempt from the requirement for audits:

- corporations that collect no more than \$20,000 in contributions per year and with administrative and sinking fund balances of no more than \$20,000, respectively, at the start of the financial year;
- groups with no more than six (all residential) lots that resolve not to have their accounts audited; and
- groups where all lots are owned by the same person.

An owner will however be able to apply to the Magistrates Court for an order requiring an audit.

In the case of audits of the body corporate manager's trust account, the manager will be required to send a copy of the audit report to the secretary of the corporation. It will not be sufficient to simply file the report in the manager's office.

Contracts made by the developer

There are examples of new developments where a developer will enter into agreements, often long-term agreements, with service providers that benefit the developer to the detriment of the community corporation.

The legislation will be amended to state that where a corporation intends, during the period whilst the developer retains control, to appoint a body corporate manager or enter into other contracts for services, the developer must exercise reasonable skill, care and diligence and act in the best interests of the community corporation (as it will be constituted after the developer control period ends). See also '**Termination of long term contracts**' above.

Voting and special resolutions

The definition of 'special resolution' for strata titles will be changed so that it matches that for community titles.

Currently under the *Strata Titles Act*, a special resolution is passed if two-thirds of all lot holders vote for it at a validly convened meeting. For example, in a group of 15 units, at least 10 owners must vote in favour for the resolution to pass. If fewer than 10 owners attend the meeting, the resolution cannot pass, even though the members not attending might have no strong views on the resolution.

The *Community Titles Act* takes a different approach. Under that Act, a special resolution is passed if no more than 25% of all lot holders vote against it at a validly convened meeting. For example, in a group of 16 units, if

nine owners attend the meeting and 4 of them vote against the resolution, it will pass even though it has the active support of only 5 of the 16 members. The result is that a special resolution is much more easily achieved under the *Community Titles Act*, because it is not defeated by those who are indifferent but can only be defeated by those who are actively opposed. Under the changes, this will be the same for strata titled groups.

A meeting is only validly convened if 14 days' notice has been given to all owners, including notice of the text of the proposed special resolution. That means that anyone concerned about the resolution has a chance to vote.

See also '**Meetings, proxies and conflict disclosure**' above.

Deposits for off-the-plan sales

To protect consumers who pay large deposits to purchase lots 'off-the-plan', deposits will be required to be paid into the trust account of a legal practitioner, conveyancer or land agent to be held on trust until the plan is deposited and lots created.

Further, a person will be prohibited from selling a lot before the plan of community division is deposited unless the contract of sale provides that the deposit is to be held on trust by a specified legal practitioner, conveyancer or land agent.

If no plan has been deposited within the agreed time, the buyer can rescind the contract and recover the deposit. If an agreed period is not specified, a default period of 6 months applies.

A provision in the contract of sale providing for the deposit to be held on trust, as well as a provision setting out the timeframe (ie period after the date of the contract) in which the plan is to be deposited in the Lands Titles Registration Office, are to be:

- printed in bold in a font size not less than 14 points;
- specifically brought to the attention of the purchaser by the vendor; and
- initialled by, or on behalf of, both the purchaser and the vendor.

Email communications

Currently the legislation provides for documents to be served by post. Under the changes, service can be by email if the recipient agrees.