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## Strata Committees

### *Strata Schemes Management Act 2015 (NSW)*

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for

Dynamic Property Services

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#### Introduction

This paper deals with the changes introduced by the *Strata Schemes Management Act 2015* ("New Act") and *Strata Schemes Management Regulation 2016* ("New Regulation") when it comes to **strata committees**.

The New Act and New Regulation are due to commence on **30 November 2016**.

#### Name

What is currently known as the 'executive committee' will now be known as the 'strata committee' (section 29).

#### Size of the strata committee

Section 30 (2) of the New Act provides that the strata committee of a large strata scheme (more than 100 lots) must consist of at least 3 members.

### **Eligibility for election**

Section 31 of the New Act introduces the following new requirements (these are seen as clarifications on items that are not clear under the current law):

- A sole owner of a lot in a strata scheme may not nominate more than one person for election as a member of the strata committee (unless they own more than one lot – see further below).
- Only one co-owner (including a company nominee of a co-owner) of the same lot may be a member of a strata committee at the same time.
- A person who is an owner of more than one lot in the strata scheme may nominate one person for election as a member of the strata committee for each lot for which the person is an owner.

Section 32 of the New Act introduces the following new requirements:

- The following persons are not eligible for appointment or election to a strata committee or to act as members of a strata committee unless they are also the owners of lots in the strata scheme:
  - a) the building manager for the strata scheme,
  - b) a person who acts as an agent for the leasing of a lot or lots in the strata scheme to tenants,
  - c) a person who is connected with the original owner of the strata scheme or the building manager for the scheme, unless the person discloses that connection at the meeting at which the election is held and before the election is held or before the person is appointed to act as a member *[note: this is substantially the current law also]*,
  - d) any other person prescribed by the regulations for the purposes of this section *[no other prescriptions at this point in time]*.
- Unfinancial owners are not eligible for appointment or election to the strata committee.

- A person who becomes ineligible for appointment or election to a strata committee after being appointed or elected must disclose that fact to the secretary or chairperson of the owners corporation as soon as possible after becoming aware of that fact.
- A disclosure by a person under this section, other than a disclosure that is made at a meeting of an owners corporation or strata committee, is to be made by written notice given to the secretary or chairperson.

### **Nomination for officers**

Clause 11 of the New Regulation sets out a procedure for nominating strata committee officers (chairperson, secretary, treasurer).

- The written notice of the first meeting of a strata committee after the appointment of the committee is to include a call for nominations for chairperson, secretary and treasurer of the committee.
- Any person who is a member of the strata committee may nominate another member for election as any or all of chairperson, secretary or treasurer of the committee.
- The nomination is to be made by written notice given to the person convening the meeting that states the name of:
  - a) the person nominated, and
  - b) the person making the nomination and that the person nominated consents to the nomination.
- The person convening the meeting must include any prior nominations in the notice of the meeting at which the election is to take place. Notice of any subsequent nomination is to be given by the convenor at the meeting.
- A nomination may be made at any time before the election is held and may be made at the meeting.
- If a ballot for the election of a person as chairperson, secretary or treasurer of the committee is required, the election is to be conducted by a show of hands of persons at the meeting (unless voting is being conducted electronically).

### **Tenant representatives**

Section 33 of the New Act provides that if there are tenants (being tenants notified in a tenancy notice given in accordance with section 258 of the New Act) for at least half of the number of lots in the scheme, then the tenants in the scheme may nominate one tenant representative for the strata committee:

- The tenant representative on a strata committee, in that capacity:
  - (a) is not entitled to vote on decisions of the committee or to put a motion or nominate a person for office, and
  - (b) is not entitled to act as an officer of the owners corporation for committee purposes, and
  - (c) cannot be counted in determining whether there is a quorum of the committee.
  
- The strata committee, at any meeting or for the purpose of all meetings, may determine that a tenant representative is not entitled to be present when the following matters are being discussed or determined:
  - (a) financial statements and auditor's reports,
  - (b) levying of contributions,
  - (c) recovery of unpaid contributions,
  - (d) the collective sale or renewal of the building,
  - (e) any other financial matter specified by the regulations [*nothing further is specified at this point in time*]

### **Vacation of office of elected member of strata committee**

#### **For members that are not officers**

Section 35 of the New Act deals with the vacation of office of non-officer members of the strata committee:

New items for attention are:

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- an elected member of a strata committee vacates office as a member if the person was eligible to be a member at the time of election and the person ceases to be so eligible (other than because the person is an unfinancial owner)
  - an elected member of a strata committee vacates office as a member if the person dies.

A strata committee may appoint a person eligible for election as a member to fill the vacancy.  
*\*\*\*Note this change from “must appoint” (current law) to “may appoint” (new law)\*\*\**

#### For members that are officers

Section 45 of the New Act deals with the vacation of office of officer members of the strata committee (chairperson, secretary or treasurer).

An officer of an owners corporation vacates office as an officer:

- (a) if the person ceases to be a member of the strata committee, or
- (b) on the receipt by the owners corporation from the person of written notice of the person’s resignation as an officer, or
- (c) if another person is appointed by the strata committee to hold that office, or
- (d) if the owners corporation, by special resolution, declares that the person’s office is vacated, or
- (e) if the person dies.

A strata committee is to appoint a person who is a member of the strata committee, or who is eligible to be a member of the strata committee, to fill an officer vacancy.

#### For tenant representatives

Clause 8 of the New Regulation deals with vacation of office by tenant representative:

- A tenant representative ceases to be a tenant representative:
  - (a) if the person ceases to be an eligible tenant, or
  - (b) on receipt by the secretary of the owners corporation from the person of written notice of the person’s resignation as the tenant representative, or

- (c) at the end of the next meeting at which a new strata committee is elected by the owners corporation, or
- (d) if the person dies.

- If a tenant representative ceases to be a tenant representative before the next meeting at which a new strata committee is elected, the secretary of the owners corporation is to convene a meeting of eligible tenants for the purpose of the nomination of a person for the position of tenant representative on the strata committee
- The secretary must give at least 7 days' notice of the meeting to each eligible tenant.
- The secretary, a member of the strata committee or a tenant nominated by the eligible tenants at the meeting is to chair the tenants meeting.
- The term of a replacement tenant representative is for the remainder of the term of the representative that the person replaces.

### **Duty of members of strata committee**

Section 37 of the New Act provides:

*“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.”*

Section 260 of the New Act provides protection from personal liability for members of strata committees who act in good faith.

### **Convening committee meetings**

Section 39 of the New Act provides:-

- The secretary of the owners corporation may convene a meeting of the strata committee at any time.

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- The secretary of the owners corporation, or any other member of the strata committee, must convene a meeting of the committee if requested to do so by at least one-third of the members of the committee.
  - The meeting must be held:
    - (a) in the case of a large strata scheme, not later than 28 days after the request is made, or
    - (b) in the case of any other strata scheme, not later than 14 days after the request is made.

### **Electronic Voting**

Clause 14 of the New Regulation provides that a strata committee may, by resolution, adopt voting by means of tele conference, video-conference, email or other electronic means (“Electronic Voting”).

Electronic Voting may occur either at the meeting, or before the meeting. When it occurs before the meeting, it is called “pre-meeting electronic voting”.

#### **Pre-meeting electronic voting**

Specific requirements for pre-meeting electronic voting are set out in Clause 15 of the New Regulation.

- If a matter may be determined partly by pre-meeting electronic voting, the notice of the meeting must include a statement that the relevant motion may be amended by a further motion given at the meeting after the pre-meeting electronic voting takes place and that consequently the pre-meeting vote may have no effect.
- A motion that is to be determined wholly by pre-meeting electronic voting may not be amended at the meeting for which the pre-meeting electronic voting is conducted.
- A motion that is to be determined partly by pre-meeting electronic voting must not be amended at the meeting for which the pre-meeting electronic voting is conducted if the effect of the amendment is to change the subject matter of the original motion.
- If a motion that is to be determined wholly or partly by pre-meeting electronic voting is amended at the meeting for which the pre-meeting electronic voting is conducted, the

minutes of the meeting distributed to owners must be accompanied by notice of the change and a statement setting out the power to make a qualified request for a further meeting under section 19 of the Act.

Each person must have access to an electronic ballot paper, or a voting website at least 7 days before the meeting. This 7 day requirement is something to be cautious of for committees: notices of committee meetings do not need to go out until 3 days before the meeting, yet access for the purpose of electronic voting must be available 7 days before the meeting.

The electronic ballot paper must be sent to the secretary of the owners corporation no later than the close of the ballot. In the case of committee meetings, “close of the ballot” is immediately before the commencement of the committee meeting at which the matter is to be determined.

### **Disclosure**

Schedule 2, clause 18 of the New Act deals with a committee member’s disclosure of direct or indirect ‘pecuniary interests’.

The term “pecuniary interest” is not defined in the New Act or New Regulation. Its generally accepted meaning at law is: *“an interest in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person”*

- If:
  - (a) a member of a strata committee has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting, **and**
  - (b) the interest appears to raise a conflict with the proper performance of the member’s duties in relation to the consideration of the matter,

the member must, as soon as possible after the relevant facts have come to the member’s knowledge, disclose the nature of the interest at a meeting of the strata committee.

*Maximum penalty: 10 penalty units [current equivalent: \$1,100].*

- A disclosure by a committee member at a committee meeting that the member:

- (a) is a member, or is in the employment, of a specified corporation or other body,  
or
- (b) is a partner, or is in the employment, of a specified person, or
- (c) has some other specified interest relating to a specified corporation or other  
body or to a specified person,

is a sufficient disclosure of the nature of the interest in any matter relating to that corporation or other body or to that person which may arise after the date of the disclosure.

- Particulars of any disclosure made must be recorded by the strata committee in a book kept for the purpose and that book must be open at all reasonable hours to inspection by any person on payment of the fee determined by the strata committee.
- After a member has disclosed the nature of an interest in any matter, the member must not, unless the strata committee otherwise determines:
  - (a) be present during any deliberation of the strata committee with respect to the matter, or
  - (b) take part in any decision of the strata committee with respect to the matter.
- For the purposes of the committee making the above determination, a member who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not:
  - (a) be present during any deliberation of the strata committee for the purpose of making the determination, or
  - (b) take part in the making by the strata committee of the determination.
- A contravention of the disclosure rules does not invalidate any decision of the strata committee.
- A person has an “indirect pecuniary interest” in a matter if a person “connected with” the person has a direct interest in the matter.

“Connected with” means:

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- (a) is a relative of the principal person or, if the principal person is a corporation, is a relative of the holder of an executive position in the corporation, or
  - (b) is employed or engaged by the principal person or is a business partner of the principal person, or
  - (c) if the principal person is a corporation, holds an executive position in the corporation (“executive position” means the position of director, manager or secretary of the corporation, or any other executive position of the corporation, however those positions are designated), or
  - (d) is the employer of the principal person, or
  - (e) is employed or engaged by, or holds an executive position in, a corporation that also employs or engages the principal person or in which the principal person holds an executive position, or
  - (f) has any other connection or association with the principal person of a kind prescribed by the regulations.

The principal person is not connected with a member of an owners corporation, or the strata committee of an owners corporation, merely because of any dealing, contact or arrangement the member has with the principal person in the capacity of a member of the owners corporation or strata committee.

[Section 7 of the New Act deals with the term “connected with”.]

### **Common questions**

***Q: Does the person nominating another for the committee need to be financial? Do they have to remain financial for the committee member’s annual term?***

Clause 5(6) of Schedule 1 to the New Act provides that “An owner or a person may make a nomination even if the owner or person cannot vote because the owner is an unfinancial owner”.

So, an unfinancial owner can nominate someone else as a member of the committee. Importantly, clause 9(4) of Schedule 2 to the New Act provides that:

*“A member of the strata committee is not entitled to vote on any motion put or proposed to be put to the strata committee if the member was, or was nominated as a member by a member who was, an unfinancial owner of a lot in the strata scheme at*

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*the date notice of the meeting was given and the amounts owed by the unfinancial owner were not paid before the meeting.”*

This wording is a little confusing.

In our view, it means:

- (a) in the case of a committee member who is a lot owner, if they are not up to date in their contributions before the committee meeting, they cannot vote at the committee meeting; and
- (b) in the case of a committee member who is not a lot owner but was nominated to their position by a lot owner, if the lot owner who nominated them has not paid their contributions up to date before the committee meeting, the committee member they nominated cannot vote at the committee meeting.

It will therefore be important for managers/chairpersons to keep an up to date record of who nominated each committee member, and make a note, prior to any committee meeting whether or not that nominator is up to date with their contributions. In addition, it will be important to be aware of whether or not lot owner committee members are financial.

***Q: When voting electronically prior to an AGM, what happens when it comes to the nomination and election of committee members?***

Clauses 14, 15, 16 and 17 of the New Regulation are relevant to electronic voting.

Clause 14 is relevant to this question.

Clause 14(1)(b) provides that an owners corporation may, by resolution, adopt *“voting by means of email or other electronic means before the meeting at which the matter (not being an election) is to be determined by the corporation”*. This is referred to as “pre-meeting electronic voting”.

In our view, the inclusion of the bracketed words “not being an election” (highlighted in yellow above) has the effect of prohibiting a committee election to be conducted by pre-meeting electronic voting.

A handwritten signature in black ink, appearing to read 'A Farmer', with a large, stylized initial 'A'.

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