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REALLOCATION OF EXCLUSIVE USE AREAS – A COST ON WHO?, FOR THE BENEFIT OF TWO

A situation that frequently comes across my desk is where two or more lot owners (but usually just two) are seeking to 'swap' exclusive use areas between their lots. Sometimes it is just one owner, who owns multiple lots, seeking to transfer areas between their lots (usually for the purpose of selling one or more of the lots with the different allocations in place).

Section 171(1) of the *Body Corporate and Community Management Act 1997* (***Act***) sets out the following:

(1) The common property or body corporate asset to which an exclusive use by-law for a community titles scheme applies must be—

(a) specifically identified in the by-law; or

(b) allocated—

*i by a person (who may be the original owner or the original owner's agent) authorised under the by-law to make the allocation (an **authorised allocation**); or*

*ii by 2 or more lot owners under a reallocation agreement (an **agreed allocation**).*

Essentially, if two or more owners decide that they would like to swap areas of common property (that are subject to an exclusive use by-law), then they are entitled to such a swap by entering into a 'reallocation agreement'. Such an agreement is defined in the Act to be 'an agreement in writing under which two or more owners of lots for which allocations are in place under an exclusive use by-law agree to redistribute the allocations between the lots.'

Other than needing to be in writing, there are no strict requirements about the form or content of a reallocation agreement. It could be as simple as a one page document setting out an extract of how the revised allocations will appear in the table in Schedule E of the Community Management Statement (**CMS**) and executed by the owners involved. I have also seen and prepared much more complex versions, setting out the terms of the reallocation in a formal deed of 10 or so pages. Much depends on the needs of the owners involved in the transposition, whether they are related parties, and whether the reallocation also involves the exchange of money.

Section 174(1) of the Act provides than an authorised or agreed allocation has no effect unless details of the allocation are given to the body corporate. Accordingly, once two or more owners agree to swap their exclusive use areas, the owners must give notice and details of the agreed allocation (ie a copy of reallocation agreement) to the body corporate.

Once the notification is received, the body corporate must lodge a new CMS with the Department of Resources (**titles office**) that includes the change within 3 months (section 176 of the Act).

Two questions that are frequently posed to me by a committee or body corporate manager following receipt of an agreed allocation are:

1. What are the approval requirements for the body corporate to lodge the new CMS?; and

2. Who is responsible for the costs of preparing and lodging the new CMS with the titles office?

It is important to note that body corporate consent is not required to the recording of a new CMS pursuant to an agreed allocation. The approval requirements set out in section 62 of the Act do not apply to an agreed allocation. The body corporate must simply comply with the legislative obligation to register a new CMS within 3 months of the allocation being notified (in accordance with section 176 of the Act).

Sometimes a body corporate will still be concerned to properly record the fact of the new CMS being lodged and, in such circumstances, my recommendation is that the committee pass a motion at its next meeting, or by voting outside committee meeting (VOC / flying minute), noting the agreed allocation and the fact of the new CMS being prepared and lodged with the titles office. A committee meeting may be required in any event to properly engage and instruct a solicitor to prepare and lodge the new CMS on behalf of the body corporate. That brings us to the next issue of the responsibility for the costs associated with preparing and lodging the new CMS.

Section 63 of the Act provides that the body corporate is responsible for the costs of preparing and lodging a new CMS (unless another section of the Act provides otherwise). There is no exception to the general position under section 63 of the Act in relation to the preparation and lodgment of a new CMS arising because of an agreed allocation. Accordingly, the body corporate is responsible for preparing and lodging the CMS at its own cost.

This often comes as quite a surprise to the committee given that an agreed allocation only benefits the lot owners involved and the body corporate may have no reason (other than the reallocation itself) to register a new CMS in the 3 months following notification of the agreed allocation. Nonetheless, the statutory obligations of the body corporate are clear in this regard and, whilst the owners providing the notification can be asked to contribute to the cost, the body corporate cannot insist upon it if the owners decline.