

## FURTHER PENDING CHANGES TO THE ROLE OF BUILDING MANAGERS IN NSW – PART 2

In last month's article, I outlined some of the key issues raised in the current review by the NSW Government of the *Strata Schemes Management Act 2015* and *Strata Schemes Development Act 2015*.

These issues included:

1. Amending the definition of a Building Manager under the Act to more clearly distinguish the role of Building Managers from that of other contractors who engage with the Owners Corporation from time to time; and
2. Imposing on Building Managers a higher degree of disclosure to the Owners Corporation of potential conflict of interest issues when engaging contractors and receiving referral fees etc.; and
3. Further consultation in relation to the ongoing review of the term of Building Management Agreements (currently capped at 10 years).

Further recommendations which directly relate to Building Managers include:

1. Building Managers be subject to a statutory duty to act in the best interests of the Owners Corporation in carrying out their duties.

**Background** – *Some stakeholders argued that, in addition to conflict of interest controls, Building Managers should be subject to an explicit statutory duty to act in the best interests of the Owners Corporation. For example, the Property and Stock Agents Regulation 2014 requires managing agents conducting letting to be licensed professionals subject to a fiduciary duty and an explicit duty to act in the best interest of their client.*

2. The Department of Consumer Service to consult with the strata and facilities management industries about ways to improve the expertise of Building Managers, especially in the management of defects, including the possibility of a licensing framework in the longer term.

**Background** – *The review panel noted that the maintenance and repair of common property is a critically important duty of the Owners Corporation, in order to ensure the ongoing safety and amenity of strata buildings throughout their life. In complex, multi-storey strata buildings, the Owners Corporation of necessity relies more on the Building Manager than in simpler buildings, for expert advice on managing defects, safety, repairs and maintenance. The lack of expertise of the Owners Corporation when dealing with issues of building defects, fire safety and maintenance has led to suggestions that overall management of maintenance and repairs should rest with an accredited or licensed Building Manager, who is subject to statutory duties to ensure the upkeep and safety of the building.*

*The Facilities Management Association of Australia argued for the licensing of facilities (or building) managers and for a requirement to engage a suitably qualified Building Manager for buildings of a certain complexity. Other submissions were concerned that placing such a duty on a Building Manager would be unfair if, for example, they requested approval for*

*repairs or upgrades but were refused by the Owners Corporation. The review considered that any proposal to delegate the obligation of the Owners Corporation to maintain and repair the common property to a Building Manager would require suitably qualified Building Managers supported by a licensing scheme and compulsory qualification requirements. Without such uniformity and oversight of qualifications, imposing such a duty could be unfair to some Building Managers who would not have the right expertise, and could risk dangerous practices and Owners Corporations placing their trust in unsuitable candidates.*

*However, it was noted that at this time, there is a lack of a properly recognised qualification in the vocational educational framework that could be used to support such a scheme. Further, developing and implementing a licensing scheme would involve substantial costs which would be borne by the Government, the industry and Owners Corporations as the end consumer. The review therefore did not consider that a licensing scheme is a viable or supportable option at this time. Nevertheless, the review recognised that there is substantial support for improving the expertise of Building Managers, especially in the management of defects.*

3. Building Managers be subject to explicit statutory duties to:
- (a) disclose to the Owners Corporation the qualifications and experience that make them suitable for the role;
  - (b) familiarise themselves with fire safety and building safety obligations to which the Owners Corporation is subject;
  - (c) take all reasonable steps to ensure that the Owners Corporation complies with these obligations; and
  - (d) promptly bring to the attention of the Owners Corporation any maintenance, repair or safety problems with the building, and provide a proposal for how these could be best addressed.

**Background** – *It was the opinion of the review panel that, prior to an Owners Corporation entering into Building Management Agreement, a potential Building Manager should be required to disclose to an Owners Corporation the qualifications and experience that make them suitable for the role. While such disclosure may already be common in practice, mandating it will ensure that all Owners Corporations are required to explicitly consider the qualifications of a prospective Building Manager.*

4. That a failure by a Building Manager to disclose to the Owners Corporation any commissions it has received be added to the existing grounds for termination of Building Manager Agreements under the Strata Schemes Management Act.

Current termination grounds are:

- (a) a failure to satisfactorily perform the duties;
- (b) if the caretaking fee is unfair;
- (c) a failure to disclose a connection to the original developer; or
- (d) that the terms of the Agreement are harsh, oppressive, unconscionable or unreasonable.

**Background** – *The Discussion Paper asked whether any further grounds for termination of Building Manager Agreements should be added or if the grounds should be the same as those for strata managing agents. Submissions supported the current grounds for termination of Building Managers in section 72 of the Strata Schemes Management Act and the review recommended their retention. Given the recommendation that Building Managers be subject to the same requirement to disclose commissions and training services that applies to strata managing agents, the review recommended that the Tribunal should also be able to terminate a Building Manager’s contract on the grounds that the Building Manager has failed to make these commission disclosures or has failed to make them in good faith.*

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