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UPDATE ON CARETAKING AGREEMENTS IN NSW COMMUNITY TITLE

What is Community Title?

I recently wrote an article that explained the difference between community title and strata title in NSW.

To recap, a good example of a community title is a gated community estate where there may be say 20 houses, each separated by boundaries and each owned by different people. The owner of each house will own all of the building and all of the land on which the building is situated – just like a traditional housing lot. At the centre of the estate there may be a tennis court, swimming pool and parking area. To enter the estate, you need to pass by an electric gate, which is monitored by a security company. In this example, each owner still owns their individual house and adjoining land, but they all share common amenities, including the security system, the entrance gate, the tennis court, the swimming pool and the parking area. These areas are known as "community property" (same as "common property" in strata subdivisions).

A community title scheme is created by the registration of a Community, Neighbourhood or Precinct plan and (much like a strata scheme) caretakers are often appointed by the Community Association to maintain the community property, including all recreational facilities, gardens and parklands.

Term of Caretaking Agreements in Community Title

When the *Strata Schemes Management Act* was amended in 2003 to limit the term of caretaking agreements in strata complexes to no more than 10 years (including options), similar changes were **not** made to the Community Titles legislation. Accordingly, agreements between Community Associations and caretakers could still be for terms of 25 years – and often were.

However, this has changed in late 2021 when the *Community Land Management Act 2021* (the "New Act") commenced on 1 December 2021. The New Act is designed to bring the legislation for community title into alignment with, and ensure consistency with, the *Strata Schemes Management Act 2015*.

Under the New Act, caretakers became known as "Facilities Managers" and are defined in the New Act as any person who assists with one or more of the following functions (except as a volunteer, casual or committee member):

- managing association property.
- controlling use of association property by persons other than owners/occupiers.
- maintaining and repairing association property.

These duties capture all of the traditional roles of an on-site caretaker.

Most importantly, the New Act prescribed that the maximum term of these agreements moving forward was now 10 years.

It also prescribed that:

1. the proposed facilities manager must disclose interests, including connection with the original owner and any pecuniary interest, in the association;

2. NCAT is empowered to make variations to, or terminate facility management agreements in certain circumstances; and

3. if authorised at a general meeting, an existing facility management agreement can be transferred to another entity.

What about Caretaking Agreements Already Existing at the Commencement of the New Act?

Unfortunately, the New Act did not grandfather all existing caretaking agreements so they could continue to operate in accordance with the old legislation.

In fact, it provided that a caretaking agreement in force immediately before the commencement of the new legislation is taken to be a facilities manager agreement for the purposes of the New Act and the agreement is deemed to expire 10 years after the commencement of the New Act, i.e. they will terminate by 1 December 2031.

Is there a Loophole in the new legislation?

There is one exception contained in the transitional sections of the New Act that may exempt some existing managers from this harsh new write down of their agreement term.

If the caretaker **is** entitled to "exclusive possession of a lot or association property in the scheme", any caretaking agreement in force immediately before the commencement of the New Act is **not** taken to be a "Facilities Management Agreement" for the purposes of the New Act and therefor the 10 year term limitation does not apply to that agreement.

In other words, the owner of the caretaking business must be the same entity as the owner of the lot where the business operates, or there must have been a lease in place prior to 1 December 2021 that grants to the caretaker exclusive possession of the lot or community property where the business operates.

If you are a caretaker or service provider for a community title it is strongly recommended you seek advice on this issue relevant to your circumstances.

Article Written by Col Myers of Small Myers Hughes Lawyers