

Important Changes to Be Aware of Following Commencement of the Community Legislation

The NSW Government has proclaimed the commencement date for the Community Land Management Act 2021 (**CLMA**) and Community Land Development Act 2021, as well as their associated regulations – all set to commence on 1 December 2021.

Ahead of the commencement date stakeholders should be aware of some of the more significant changes coming in. A non-exhaustive list of the more notable changes for each of these groups, and generally, are set out below:

Managing Agents

Section 11 of the CLMA restricts certain activities to only be able to be delegated to the managing agent or committee, including:

- administrative & capital works funds estimates,
- levying of contributions,
- banking and accounting for money paid to the association,
- custody of/payments from any money paid to the association,
- insurance,
- meetings and correspondence,
- maintenance of records.

Regulation 5 of the Community Land Management Regulations (**CLMR**) expands this list to include WHS compliance and entry into contracts for maintenance of/services to association property.

Managing agents are required to keep record of exercise of functions.

Section 61 of the CLMA imposes potential liability against the managing agent for failing to exercise their delegated function, where that liability would otherwise apply to the association.

Section 61 imposes further restrictions on managing agents receiving gifts and benefits, with the exclusion of remuneration, approved monetary commission and gifts below a prescribed amount (prescribed by regulation 38 of the CLMR as \$60).

A managing agent is required by section 53 to be appointed by an instrument in writing approved by a resolution at a general meeting. Section 75 requires any proposed managing agent to disclose interests, including connection with the original owner and pecuniary interest in the scheme.

The maximum term for an agency agreement is now 1 year for appointment at the FAGM or otherwise 3 years.

Section 54 makes provision for 3 month extensions until the next AGM. Schedule 3 Clause 12 provides that the 3 year cap on managing agent term applies to prior agreements, except to the extent it would reduce the term to less than 6 months from commencement of new act.

The Tribunal is empowered to vary or terminate agency agreements under section 76.

Managing agents are required to disclose at AGM commissions from the previous 12 months and estimate for the next 12 months. S 64 provides that the Tribunal can order payment to an association of undisclosed commissions.

If authorised at a general meeting under section 55, an existing management agreement can be transferred to another entity. The term of the agreement cannot be increased in this manner.

Caretakers (Now Facility Managers)

Caretakers are now to be known as Facilities Managers under section 70.

Under section 70, any person who assists with 1 or more of the following functions (except as a volunteer, casual or committee member) will be a Facilities Manager:

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

It is possible to be both a facilities manager and on on-site residential property manager.

Section 71 requires the appointment must be in writing and authorised by a resolution at a general meeting if entered into after the association is registered. It can, however, be signed by the original owner before the registration of the association.

If signed before the registration of the association, the maximum term is until the end of the First Annual General Meeting. For all others, the maximum term is 10 years. This 10 year maximum term applies to existing caretaker agreements as well under s72 and Schedule 3 Clause 13.

The proposed facilities manager must disclose interests, including connection with the original owner and any pecuniary interest in the association under section 75.

The Tribunal is empowered under section 76 to make variations to, or terminate facility management agreements.

If authorised at a general meeting, an existing facility management agreement can be transferred to another entity. The term of the agreement cannot be increased in this manner.

Executive Committee (Now Association Committee)

The Executive Committee is now to be known as Association Committee under section 30.

Section 41 imposes an express duty on office bearers to exercise functions for the benefit of the association and with due care and diligence, however section 222 limits office bearer's liability where they have executed their functions in good faith.

For Neighbourhood Associations, s 36 states that if tenancy notices have been given for at least 50% of lots in neighbourhood scheme, tenants may nominate a representative to be present on the association committee. That representative can't vote, serve as office bearer or be considered for quorum and can be excluded from consideration of financial statements, levies and recoveries.

The process for their selection, and vacation are set out in regulations 8 and 9 of the CLMR.

General

A new term "connected person" has been introduced, which will be relevant to restrictions on certain votes and supplier contracts.

This is defined as a relative, employer/employee, business partner, person with executive position with a corporation by which other person is in executive position or employed or engaged.

CLMR regulation 4 imposes Corporations Act concepts of associated entities and persons, e.g. persons with financial interest in and significant influence over management of a corporation.

The definition of Initial Period has been redefined to end earlier for some community and precinct schemes, such as where lots are no longer owned by the original owner and subject to occupation certificates.

Association and association committees are now able vote by other means including instantaneous electronic communication, pre meeting electronic ballot and also utilise a secret ballot. Section 21 & Schedule 1(27 & 28) & Schedule 2(8) CLMR regulations 14 - 17 set out the requirements.

Certain works involving sustainability infrastructure have a lower threshold to being resolved, with section 125 of the CLMA noting that a special resolution requirement can be satisfied by simple majority.

Restrictions are imposed for legal services, with section 106 of the CLMA and Regulation 24 of the CLMR noting exceptions for urgent action up to \$15,000, and non-urgent action up to \$3,000.

Section 108 requires the fee proposal for the legal services to be circulated.

Contracting out of the CLMA is now expressly prohibited.

Levies

There has been a change in terminology with the Capital Works Fund replacing the previous Sinking Fund.

Contributions are now required to fall due at least 30 days after issue of the levy notice (section 88).

Section 90 deals with a number of ancillary aspects of contributions including:

- Interest – contributions bear interest from the due date if not paid within 1 month of the due date, but:
- An association is able to resolve not to require interest, or an application can be made to either NCAT or the Court to obtain an order negating interest;
- Associations may by resolution approve 10% discounts for payment by the due date. This previously required special resolution; and
- Associations may by resolution approve payment plans generally or in specific cases, for term up to 12 months. CLMR Clause 18 sets out required contents.

Section 91 deals with recovery actions, with NCAT able to make a debt order with respect to contributions not paid within 1 month of the due date including contribution, interest and recovery costs.

Alternatively, the association may, without order, recover as debt in competent court, contributions not paid within 1 month of due date, interest and recovery costs.

There are prescribed steps required prior to bringing an application, including issuing a notice of recovery action, containing a number of prescribed details, set out in regulation 19 of the CLMR:

- (a) the date the amount was due to be paid,
- (b) the way in which the amount may be paid,
- (c) whether a payment plan may be entered into,
- (d) other action that may be taken to arrange for payment of the amount.

Dispute resolution:

Associations are able to adopt voluntary dispute resolution procedures under section 178.

Adjudication is being phased out, with applications to now be determined by the NSW Civil and Administrative Tribunal at first instance, apart from matters currently filed at the time of commencement (1 December 2021).

The Tribunal has powers with respect to association committees under section 197 including removal of members, blocking consideration of matters and referral of matters to an association.

Section 199 allows the Tribunal to make an order under a provision of the act by making an order under a different provision if appropriate.



T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

The Tribunal is also empowered to require information from association as needed under section 203.

Section 208 provides for civil penalties for contravention of an order payable by an owner to the association which may be recovered as unpaid contributions.

Section 225 has relaxed the methods of service on associations in relation to proceedings, e.g. permitting service of legal process on managing agents and other documents by email.

An interested party can bring proceedings as agent for another party in some circumstances under section 216 where the other party has failed to act, generally proceedings for rectification of the condition of part of a building, if that condition affects or is likely to affect the support or shelter provided by that part to any other part of the building.

The Secretary (being the Commissioner for Fair Trading, Department of Customer Service) has been granted enhanced powers to investigate non-compliances with the CLMA. Including the ability to require information to be provided and to inspect the association property.

There are a number of significant changes that will be required to the current documents and processes used by Community Associations, including:

- Review of management statements/bylaws to ensure ongoing compliance.
- Review of management agreements, particularly in relation to capped term, change in scope of permitted delegations and restrictions on gifts and benefits.
- Review of facilities management agreements, in relation to capped term and functions.
- Review of levy recovery processes and documentation to comply with changed requirements.

Our lawyers are available to provide specific and detailed advice to those affected by the changes to make the transition as seamless as possible.

Further limited advice and template documentation will also be made available via Bannermans' compliance pack portal to all members.

Prepared by Bannermans Lawyers
15 October 2021



T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA