

Update: Strata Managing Agents Legislation Amendment Act 2024

Christopher Kerin, 24 October 2024

The logo for Kerin Benson Lawyers is a black square containing the text 'KERIN BENSON LAWYERS' in white and green. The words 'KERIN' and 'BENSON' are in white, and 'LAWYERS' is in green.

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Introduction

- ▶ The following legislation has been amended:
 - ▶ Strata Schemes Management Act 2015
 - ▶ Strata Schemes Management Regulation 2016
 - ▶ Community Land Management Act 2021
 - ▶ Community Land Management Regulation 2021
 - ▶ Property and Stock Agents Act 2002
 - ▶ Property and Stock Agents Regulation 2002
- ▶ The Strata Managing Agents Legislation Amendment Act 2024 was passed on 19 September 2024 and assented to on 30 September 2024. However it only commences upon proclamation which has not yet occurred;
- ▶ The amendments to the Community Land Management Act 2021 and Community Land Management Regulations 2021 are effectively identical to the Strata legislation. Not addressed in the interests of brevity.

AGENDA

01 Requiring agents to disclose more specific information

02 Limitations on Powers

03 Strengthening NSW Fair Trading's enforcement and compliance powers

04 Increasing Maximum penalties and penalty infringement notice (PIN) amounts

Section 57(2) Strata Schemes Management Act (SSMA)

Breaches by a Strata Managing Agent

Current (s57(2))

- ▶ A strata manager is prohibited from requesting or accepting a gift or other benefit for himself, or herself, or for another person unless (s57(3)):
 1. that remuneration is paid by an owners corporation (**OC**).
 2. a monetary commission was permitted under the terms of the agency agreement, or has otherwise been approved by the OC.
 3. a training or service related to strata management functions and was permitted under the terms of the agency agreement or has otherwise been approved by the OC.
 4. a gift or benefit has a value less than the amount prescribed in the regulations (currently \$60).
- ▶ Max penalty : 20 penalty units (\$2,200)

Amended

Approval of the OC only under s57(3)(b) or (c) and motion must be accompanied by a document detailing:

- ▶ amount of any commission and how it is calculated;
 - ▶ the monetary value of any training or if not known an estimate;
 - ▶ the nature of the relationship between the managing agent and the person providing the commission or training;
 - ▶ why the commission or training is in that OC's best interests; and
 - ▶ a statement that the gift or benefit does not contravene the Property and Stock Agents Regulation 2022 Schedule 1, section 11.
- ▶ Max penalty : 100 and 500 penalty units for an individual or corporation, respectively

Section 60 SSMA Disclosure of Commissions and Training Services | 01

Current

Reporting (s60(1)(a) & (b))

- ▶ A managing agent is obliged to report at each Annual General Meeting:
 - (a) whether any commissions or training services have been provided to or paid for the agent (other than by the OC) in connection with the exercise by the agent of functions for the scheme during the preceding 12 months and particulars of that commission or training service;
 - (b) any such commissions or training services and the estimated value of the commission or training service that the agent believes are likely to be provided to or paid for the agent in the following 12 months.
- ▶ Max penalty : 20 penalty units (\$2,200)

Amended

Reporting (new s60(1)(c) & (d))

- (c) whether, during the preceding 12 months:
 - (i) a supplier of goods or services for the strata scheme has become connected with the agent;
 - (ii) an original owner of the scheme has become connected with the agent.
- (d) the report must now also include:
 - (i) the suppliers of goods and services who are connected with the agent;
 - (ii) the original owners of the scheme who are connected to the agent.
 - (iii) details of the nature of the relationship between the agent and the supplier or original owner;
 - (iv) details of the goods and services provided by the supplier.

New sections 60(2A) - (2D) Disclosure of commissions and training services

Notice Requirements

(2A) new requirement for the agent to give written notice to the OC before entering into a contract for the purchase of goods or services if:

- (a) commission or training services of the kind referred to in section 57(3)(b) or (c) may be provided or paid to the managing agent; and/or
- (b) the contract is with a person connected with the managing agent;

(2B) The notice must contain the following details:

- (a) the specific provision of the terms of appointment of the agent, if relevant, that demonstrates that it is permitted for the managing agent to obtain the payment of the commission, or provision of the training service;
- (b) details of the commission or training service, including:
 - (i) the amount of commission and the method of its calculation; and
 - (ii) the monetary value of the training, or if not known an estimate;
- (c) details of the nature of the relationship between the managing agent and the person providing the commission or training;
- (d) details of why the contract is in the OC's best interest;
- (e) a statement that the agent believes entering into the contract does contravene the Property and Stock Agents Regulation 2022 Schedule 1, section 11.

New sections 60(2A) - (2D) Disclosure of commissions and training services

Notice Requirements (contd)

(2C) an agent must give written notice to the OC asap after becoming aware:

- (a) a supplier of good or services for the strata scheme becomes connected with the agent;
- (b) the original owner of the strata scheme becomes connected with the agent;
- (c) the agent acquires a direct or indirect pecuniary interest in the share scheme.

Max penalty : 100 or 500 penalty units for an individual or corporation, respectively.

(2D) The notice must include –

- (a) for subsection (2C)(a) and (b) - details about the nature of the relationship between the agent and the supplier or original owner, and
- (b) for subsection (2C)(a) – details about the goods and services provided by the supplier.

Section 60(2) Disclosure of commissions and training services

Current

A managing agent must as soon as practicable after becoming aware that commissions or training services provided to or paid for the agent differ from the commissions or training services or any estimate of them disclosed at the annual general meeting disclose to the strata committee the variation and give an explanation for the variation.

Max penalty : 20 penalty units (\$2,200)

Amended

N/A

Section 71 Interests must be disclosed by potential managing agents or building managers

Current (s71)

(1) A person appointed as the strata managing agent or building manager for a strata scheme who has an interest that must be disclosed under this section must disclose the interest to the OC before the appointment of the person.

Maximum penalty — 50 penalty units.

(2) The following are interests that must be disclosed to the OC by a person—

- (a) that the person is connected with the original owner; and
- (b) any direct or indirect pecuniary interest in the strata scheme (other than an interest arising only from the prospective appointment).

Amended (new s71(2)(c) & (d), 71(3))

New requirements in relation to disclosures:

(c) that the person is connected with another person (**the supplier**) who routinely supplies goods or services for other strata schemes for which the person is the strata managing agent;

(d) that the person gave advice, whether under a formal contract or not, to the original owner during the previous 2 years about the strata plan or another strata plan or a community plan, and

(e) another interest prescribed by the regulations.

(3) The disclosure must:

(a) be in writing; and

(b) in relation to a supplier, include:

(i) details about the goods and services provided by the supplier

(ii) details about the nature of the relationship between the person and the supplier; and

Maximum penalty - 100 and 500 penalty units for an individual and corporation, respectively.

166 Strata Managing Agent to Obtain Insurance Quotations

Current (s166)

A strata managing agent must provide the OC with not less than 3 quotations from different providers for each type of insurance proposed by the agent to the OC or provide written reasons to the OC if less than 3 quotations are provided.

No penalty

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166 Strata Managing Agent to Obtain Insurance Quotations | 01

Amended (new s166(2) & (3))

(2) a quotation must include the following:

(a) a breakdown of charges, including the following if applicable:

- (i) base premium amount (other than commission);
- (ii) commission (other than broker fee) expressed as an amount and as a percentage of the base premium amount;
- (iii) the broker fee, expressed as an amount and as a percentage of the base premium amount;
- (iv) stamp duty;
- (v) levy amounts;
- (vi) underwriting agency fees;
- (vii) GST;
- (viii) other amounts or percentages relating to the charges prescribed by the regulations.

(b) the persons to whom the commission and broker fee will ultimately be paid; and

(c) a statement as to whether the person providing the quotation is connected with the agent.

(3) The strata managing agent must provide the OC with the insurance quotations or written reasons as soon as practicable to enable the OC to make a decision about the insurance.

Max penalty: 100 and 500 penalty units for an individual or corporation, respectively.

Schedule 1 clause 25 Rights of Proxies and Limits on Votes by Proxies

Current (cl24(7) & (8) Sch1))

Subclauses 7 and 8 state:

(7) Limits on exercise of proxy by building manager, on-site residential property manager or strata managing agent: A vote by a proxy who is a building manager, an on-site residential property manager or a strata managing agent is invalid if it would obtain or assist in obtaining a pecuniary interest for, or confer or assist in conferring any other material benefit on, the proxy.

(8) For the purposes of subclause (7), material benefit includes, but is not limited to, the following:

- (a) an extension of the term or an additional term of appointment of the proxy as building manager, on-site residential property manager or strata managing agent,
- (b) an increase in the remuneration of the proxy,
- (c) a decision of the OC not to proceed with, to withdraw, to delay, to compromise or to settle litigation or other legal proceedings relating to the proxy,
- (d) any other decision of the owners corporation that affects litigation or other legal proceedings relating to the proxy.

Schedule 1 clause 25 Rights of Proxies and Limits on Votes by Proxies

Amended

Insert after clause 25(8)(b) to add to the definition of material benefit:

(b1) an approval under s57(b) or (c) of the Act.

Add to the limits on voting by proxy by building managers, on-site residential property managers and strata managing agents to matters where 57(3)(b) or (c) would apply – i.e. when the OC is approving by ordinary resolution:

- ▶ a monetary commission provided to a strata managing agent,
- ▶ a training service provided to, or paid for, a strata managing agent.

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Connected Persons - Reg 62 Strata Schemes Management Regulation 2016

Current (Reg 62)

For the purposes of section 7(1)(f) of the Act, a person that is a corporation (the principal person) is connected with another person if the other person —

- (a) is a related body corporate or an associated entity (within the meaning of the Corporations Act 2001 of the Commonwealth) of the principal person, or
- (b) holds an executive position (within the meaning of section 7 of the Act) in a related body corporate or an associated entity of the principal person, or
- (c) holds or will hold any relevant financial interest in the principal person, or is or will be entitled to exercise any relevant power (whether in the person's own right or on behalf of any other person) in the business of the principal person, and by virtue of that interest or power is or will be able to exercise a significant influence over or with respect to the management or operation of the principal person.

Relevant Financial Interest, in relation to a principal person, means —

- (a) any shares in the capital of the principal person, or
- (b) any entitlement to receive any income derived from a business carried on by the principal person, or to receive any other financial benefit or financial advantage from the carrying on of the business, whether the entitlement arises at law or in equity or otherwise.

Relevant Power means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others —

- (a) to participate in any directorial, managerial or executive position in the principal person, or
- (b) to elect or appoint any person to any such position.

Connected Persons - Reg 62 Strata Schemes Management Regulation 2016

Amended (new reg 62(1A))

(1A) For the Act, section 7(1)(f), a person (the principal person) is connected with another person if the other person is-

- (a) the trustee of a trust for which the principal person is a beneficiary; or
- (b) one or more of the following in relation to a trust of which the principal person is, or has at any time been, a trustee:
 - (i) a beneficiary;
 - (ii) a child, spouse or de facto partner of a beneficiary.

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Section 55 Property and Stock Agents Act 2002 No Entitlement to Commission or Expenses without Agency Agreement

Current

1. A licensee is not entitled to any commission or expenses from a person for or in connection with services performed by the licensee in the capacity of licensee for or on behalf of the person unless—
- (a) the services were performed pursuant to an agreement in writing (an agency agreement) signed by or on behalf of—
 1. the person, and
 2. the licensee, and
 - (b) the agency agreement complies with any applicable requirements of the regulations, and
 - (c) a copy of the agency agreement signed by or on behalf of the licensee was served by the licensee on that person within 48 hours after the agreement was signed by or on behalf of the person.

Note: 55A allows a court or tribunal to order that commission & expenses are recoverable in certain circumstances despite ss (1)

2. The regulations may make provision for or with respect to regulating the form of agency agreements and the terms, conditions and other provisions that an agency agreement must or must not contain. Without limiting this subsection, the regulations may prescribe one or more standard forms of agency agreement.

3. Without limiting the means by which a copy of the agency agreement may be served on a person, it may be served by electronic means or by such other means as the regulations may allow.

Section 55 Property and Stock Agents Act 2002 No Entitlement to Commission or Expenses without Agency Agreement

Amended (new s55(3) and (4))

(4) a licensee must not require a person to pay a commission or expense in accordance with a “prohibited provision”.

(5) In this section - prohibited provision means a term, condition or other provision that, under a regulation made under section 55(2) must not be included in an agency agreement.

Such a regulation is included at Schedule 12 clause 6 of the Property and Stock Agents Regulation 2022 (elaborated on below).

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Property and Stock Agents Regulation 2022 - Schedule 12 Terms specific to agency agreement for management of strata or community title land

Insert new clause 6 : No commission or expenses for work not done

1. The agency agreement must not contain a provision that permits the agent to require the person for whom the agent is acting, or another person, to pay a commission to the agent in relation to a prescribed purchase of insurance.
2. The agency agreement must contain a provision that prohibits the agent requiring the person for whom the agent is acting, or another person, to pay a commission to the agent in relation to a prescribed purchase of insurance.
3. In this section—prescribed purchase of insurance means a purchase of an insurance policy where the person for whom the agent is acting obtained the quotation for the insurance policy and arranged the purchase of the insurance policy without the assistance of the agent.

Section 60(3) SSMA Disclosure of Commissions and Training Services

Current (s60(3))

Tribunal Enforcement

The Tribunal may, on application by an OC, order a managing agent to pay to the OC:

- (a) the whole or part of the amount or value of any commissions or training services provided to or paid for the agent and not disclosed in accordance with this section; or
- (b) the whole or part of the amount or value of any commissions or training services provided to or paid for the agent that are not of a kind or an amount disclosed by the agent under section 60, if tribunal is satisfied that the disclosure of those things at the previous annual general meeting was not made in good faith.

Amended

Tribunal Enforcement

The Secretary (Commissioner for Fair Trading, Department of Customer Service) is also now able to apply to the tribunal for an order under section 60(3).

Section 38 Property and Stock Agents Act 2002

Undertakings by licensees and registered persons

Current

The Secretary may accept a written undertaking from the holder of a license or certificate of registration as to the manner in which the holder will exercise functions under the license or certificate of registration.

Note — Part 12 provides that a breach of such an undertaking is grounds for taking disciplinary action against a person.

Amended

Section 38 has been deleted with the amendments to be incorporated into a new clause 210A.

Section 38 Property and Stock Agents Act 2002

Undertakings by licensees and registered persons

Current

53A Interpretation

53B Undertakings by Licensee

53C Register of Undertakings

53D Restraint of unjust conduct

53E Variation etc. of restraining order

Amended

Division 6 of Part 3 has been deleted, with a new section 210A to incorporate the relevant provisions

New Section 210A - Property and Stock Agents Act 2002

This amends and consolidates sections 38 and Division 6 of Part 3 of the current legislation in relation to enforceable undertakings:

1. The Secretary may accept a written undertaking given by a holder of a licence or certificate of registration in connection with a matter in relation to the following—

- (a) an Act or regulation administered by the Minister,
- (b) a matter for which the Secretary has a function under this Act.

2. Without limiting subsection (1), the Secretary may accept an undertaking to do one or more of the following—

- (a) refrain from conduct that contravenes an Act or regulation administered by the Minister,
- (b) take action to prevent or remedy a contravention of an Act or regulation administered by the Minister,
- (c) take action to resolve a complaint against the licensee or certificate holder,
- (d) pay into the NSW Consumer Law Fund established under the Fair Trading Act 1987, section 79Y an amount not more than the amount of financial benefit that the licensee or certificate holder has obtained directly or indirectly and that is reasonably attributable to a contravention of an Act or regulation administered by the Minister,
- (e) pay the Secretary's costs in relation to the negotiation and enforcement of the undertaking.

New Section 210A - Property and Stock Agents Act 2002

3. The licensee or certificate holder may withdraw or vary the undertaking at any time, but only with the written consent of the Secretary.
4. The consent of the Secretary is required even if the undertaking purports to authorise a withdrawal or variation of the undertaking without that consent.
5. The Secretary may apply to the Supreme Court for an order under subsection (6) if the Secretary considers that the licensee or certificate holder who gave the undertaking has breached any of the undertaking's terms.
6. The Court may make all or any of the following orders if satisfied that the licensee or certificate holder has breached a term of the undertaking—
 - (a) an order directing the licensee or certificate holder to comply with that term of the undertaking,
 - (b) an order directing the licensee or certificate holder to pay to the State an amount not more than the amount of financial benefit that the licensee or certificate holder has obtained directly or indirectly and that is reasonably attributable to the breach,
 - (c) any order the Court thinks appropriate directing the licensee or certificate holder to compensate a person who has suffered loss or damage as a result of the breach,
 - (d) another order the Court considers appropriate.

Schedule 5 – Penalty Notice Offences : Strata Schemes Management Regulation 2016

Current

| | |
|----------------------|--|
| Section 57(2) | \$550 (in the case of an individual) or \$1,100 (in the case of a corporation) |
| Section 60(1) | \$550 (in the case of an individual) or \$1,100 (in the case of a corporation) |
| Section 60(2) | \$550 (in the case of an individual) or \$1,100 (in the case of a corporation) |

Schedule 5 – Penalty Notice Offences : Strata Schemes Management Regulation 2016

Amended

- ▶ Increased the penalties for contravention of sections 57(2), 60(1) and (2) to \$1,100 for an individual and \$2,200 for a corporation.
- ▶ Insert new penalty offences to correspond to the newly inserted additional clauses detailed above.

| | |
|----------------|---|
| s60(2A) | \$1,100 (individual) or \$2,200 (corporation) |
| s60(2C) | \$1,100 (individual) or \$2,200 (corporation) |
| s71(1) | \$1,100 (individual) or \$2,200 (corporation) |
| s166(1) | \$1,100 (individual) or \$2,200 (corporation) |

Section 102 Offence – Property and Stock Agents Act 2002

Current

- (1) The regulations may prescribe rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration.
- (2) A licensee or registered person who without reasonable excuse contravenes a rule of conduct prescribed for the purposes of this section is guilty of an offence.

Maximum penalty —

1. 100 penalty units in the case of a corporation, or
2. 50 penalty units in any other case.

Amended

Maximum penalty:

1. for a corporation – 1,000 penalty units in the case of a corporation, or
2. otherwise, 200 penalty units.

Section 102 Offence – Property and Stock Agents Act 2002

Current s102

- 1.A licensee must not fail without reasonable excuse (proof of which lies on the licensee) to comply with a requirement under this Division.
- 2.A licensee must not, in purported compliance with a requirement under this Division, furnish information that the licensee knows is false or misleading in a material particular.
Maximum penalty—100 penalty units.

Amended

The maximum penalty has been doubled to 200 penalty units.

Section 207 Property and Stock Agents Act 2002

Obstruction etc. of Authorised Officers

04

Current s207

A person must not —

- (a) without reasonable excuse, refuse or fail to comply with any notice given or requirement made, or to answer any question asked, by an authorised officer under this Part, or
- (b) provide information or give evidence in purported compliance with a requirement made or question asked by an authorised officer under this Part knowing the information or evidence to be false or misleading in a material particular, or
- (c) wilfully delay, hinder or obstruct an authorised officer in the exercise of the officer's functions under this Part.

Maximum penalty—100 penalty units or imprisonment for 6 months, or both.

Amended

Maximum penalty
doubled to
200
penalty units

Schedule 13 Penalty notice offences: Property and Stock Agents Regulation 2022

| | |
|-----------------------|--|
| Section 37(2) | \$550 (in the case of an individual) or \$1,100 (in the case of a corporation) |
| Section 102(1) | \$1,100 (in the case of an individual) |
| Section 102(2) | \$1,100 (in the case of an individual) |
| Section 207(a) | \$1,100 (in the case of an individual) |
| Section 207(b) | \$1,100 (in the case of an individual) |
| Section 207(C) | \$1,100 (in the case of an individual) |

Schedule 13 Penalty notice offences: Property and Stock Agents Regulation 2022

Increased the penalties for contravention of sections 37(2), to \$1,100 for an individual and \$2,200 for a corporation and 102(1) and (2) and 207(a),(b) and (c) to \$2,200 for the individual.

Insert new penalty offences to correspond to the newly inserted additional clauses detailed above.

| | |
|--------|---|
| s55(4) | \$1,100 (individual) or \$2,200 (corporation) |
|--------|---|

Schedule 13 Penalty notice offences: Property and Stock Agents Regulation 2022

Increased the penalties for contravention of sections 37(2), to \$1,100 for an individual and \$2,200 for a corporation and 102(1) and (2) and 207(a),(b) and (c) to \$2,200 for the individual.

Insert new penalty offences to correspond to the newly inserted additional clauses detailed above.

s55(4)

\$1,100 (individual) or \$2,200 (corporation)