

Adjusting Managing Agent's Fees For Lost Insurance Commissions

It has become common for strata managing agents to receive commissions from insurers in relation to insurance business written on behalf of their owners corporation clients. In fact, most strata managing agents are operating on very tight margins and many are dependent on receipt of such commissions for their businesses to be viable.

These have become controversial, largely due to a perception that such arrangements involve a conflict of interest and disadvantage owners corporation clients. Such arrangements were considered in the course of the recent review of NSW strata laws and it is likely that the new act proposed to replace the Strata Schemes Management Act 1996 will make substantial changes in this area. It is likely that these will be prohibited, unless disclosed to and approved by the owners corporation, on an annual basis. It is not certain when the new act will commence, but this is currently expected to be early 2016. It is also not clear what if any transitional arrangements will be made for agency agreements negotiated prior to commencement of the new act.

Such arrangements involve many benefits and we do not challenge them as a matter of principle. However, the reality is that they may soon be unlawful, at least without formalities having been observed and that agents need to deal with this urgently, as the agency agreements which they are negotiating with clients may be impacted by the new legislation.

In our experience, the most common response has been to introduce a service fee, i.e. an additional fee payable to the strata managing agent in the event that the agent is precluded from receiving insurance commissions as a result of insurance arrangements made or not made by the owners corporation client. However, there are some issues with such fees, including:

- Commercial - although an owners corporation client would be more likely to be receptive to a service fee than a substantial increase in management fees, agents will need to explain to owners corporation clients why a service fee is required and the benefits resulting to the owners corporation. In particular, agents must convey that it is not a "success fee", but rather a fee for a range of services provided by the agent for which the agent would not otherwise be remunerated. However, it would also be beneficial to present the various benefits flowing to the client from structuring arrangements in this way, including better handling of and promotion of training in relation to insurance issues.
- Contract law issues - the provision in the agency agreement for payment of a service fee needs to comply with contract law principles. For example, the provision may be unenforceable if not sufficiently clear or expressed in such a way as to amount to a penalty for breach of the agreement, e.g. failure to effect insurance recommended by the agent. Ideally, management fees would be presented as an aggregate fee, towards which a credit would be made for any insurance commissions received, with no credit if none are received.

- Competition and Consumer Act 2010 issues - section 47 of the Competition and Consumer Act 2010 prohibits a range of conduct known collectively as "exclusive dealing", broadly involving supply or refusal to supply goods or services to another party on the basis of that party's acquisition or supply arrangements with third parties. For example, arrangements involving supply of services to a party on the basis that the party will acquire other specified services from a third party are generally prohibited. Care needs to be taken in framing a service fee provision, so as not to contravene section 47. That would normally not be a problem, as the usual purpose of a service provision is not to require the owners corporation client to obtain insurance from a particular insurer, but rather to provide a total remuneration package to the agent and to leave it to the owners corporation to decide its insurer and insurance product.
- Strata Schemes Management Act issues - provision for a service fee needs to be framed flexibly to facilitate compliance with the requirements of the new act, the precise requirements of which are not yet known. Most likely, on an annual basis, probably at each annual general meeting, the agent will be required to disclose anticipated insurance commissions if approved by the owners corporation and fees which would be payable by the owners corporation if receipt of insurance commissions is or is not approved by the owners corporation, i.e. with and without service fees.

We have been assisting strata managing agents with these issues for some time now and our view is that a response will be more effective the earlier it is implemented.

**Prepared by Bannermans Lawyers
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