Legislative Assembly

30/10/2002

Strata Schemes Management Amendment Bill Hansard Extract

Second Reading

Mr AQUILINA (Riverstone—Minister for Land and Water Conservation, and Minister for Fair Trading) [10.04 a.m.]: I move:

That this bill be now read a second time.

This bill makes some significant refinements to the New South Wales strata schemes management laws that will have a beneficial impact on strata lot owners and owners corporations generally. New South Wales pioneered the concept of ownership of individual parcels of floor and air space in high-rise buildings in 1961. Before then the only way to have any form of possession of an apartment-type accommodation was to own shares in the company which owned the company title building. This gave rise to a right of occupation of a unit in the building. The New South Wales strata system has since been adopted around Australia and in a number of other countries. Even today, delegations from overseas come to New South Wales to examine our strata system to see how it may be used and adapted for their own situations.

In 1973, management and dispute resolution provisions for strata schemes were passed by Parliament enabling the more efficient administration of strata schemes to take place. The Strata Titles Act 1973 stood the test of time as strata schemes continued to appear across the State and a great variety of strata complexes were developed. The original drafters of the legislation had in mind fairly standard three or four storey red brick blocks of flats but it did not take long for a wide range of strata developments to appear in our city and regional areas. While high-rise residential schemes are still the predominant form of strata scheme, other forms like townhouses, villas, simple two-lot schemes, commercial, industrial and retirement village developments have also arisen.

There are now in excess of 62,000 strata schemes in New South Wales and between 40 and 45 new ones are being registered every week. It is estimated that one in four of the State's population is connected with strata schemes through owning a lot or by working or living in a strata scheme. It is certainly a major form of building development in Sydney. The strata laws were continually updated to take account of new issues, and in 1996 a total overhaul took place with the passing of the Strata Schemes Management Act 1996. This latest round of amendments has arisen following a national competition policy review of the legislation. The review, which found that the small number of anti- competition provisions of the Strata Schemes Management Act were justified and that the benefits of the legislation outweighed the costs, also enabled a number of emerging trends and concerns in the strata scheme area to be examined.

This bill comprises stage one of the recommendations that arose from the national competition policy review. Stage one is limited to the more pressing matters associated with caretaker management contracts and proxy and priority voting arrangements. Stage two will cover a wide range of miscellaneous management matters that became evident during the public consultation process associated with the review. The Government proposes to introduce a bill comprising the stage two reforms in 2003.

I wish to move on to the specific detail of the bill. The bill will, for the first time, ensure that strata building caretaker management rights, often sold by developers, are regulated, as will be the associated contractual arrangements. Concern has arisen over the fact that owners corporations are sometimes tied up for 25 years to a contract entered into by the developer before there were any other individual owners in the scheme. A number of provisions are included in the bill to provide some relief to owners corporations in situations where they are not satisfied with the contracts they have been locked into by the developer.

While it is recognised that many on-site caretaker managers, some of whom also have the rights to the letting of units owned by investors, conduct honest and appreciated businesses, a minority of them are the cause of much unhappiness among owners. This area of caretaker management rights is a relatively new activity attached to some of the more recent large strata developments in Sydney and the North Coast. It is particularly common in developments where the majority of units have been bought by investors for letting either to tourists, perhaps as serviced apartments, or for longer-term occupation. While the caretaker manager industry has existed in Queensland for a number of years, its emergence in New South Wales has been more recent.

It is important to recognise that this bill's provisions directed towards caretaker managers are not referring to the role and responsibilities of strata managing agents. Licensed strata managing agents may be delegated either some or all of the financial and administrative functions of the owners corporation. In other words, they stand in the place of the owners corporation to the extent of their delegation. Caretaker managers cannot be given such extensive powers nor is that the purpose of their existence. This group of people are in fact engaged to assist the owners corporation in its oversight of common property, and in repairs to and maintenance of common property.

Cleaning, garden and grounds maintenance, acceptance of deliveries and security functions are the types of functions carried out by caretaker managers. They help to oversee the operation of the scheme and use of common property but in a clearly limited way. They have no power to handle owners corporation financial matters or enforce by-laws. While there are some caretaker managers who also hold strata managing agents' licences, I understand that this is not customary.

Caretaker managers usually own a lot in the scheme. They may have exclusive use of some part of the common property for the purpose of an office in the foyer. They are on site to deal with issues as they arise, from co-ordinating the maintenance of contractors carrying out work on the lifts or the swimming pool to giving access to owners who have lost their keys, and receiving deliveries from suppliers. Caretaker managers do all of these things but again, I stress, they are not strata managing agents. The bill goes a step further than the 1996 legislation in clearly separating the role of the strata managing agent from that of a caretaker or building manager assisting in the carrying out of certain owners corporation functions.

The main concern that has arisen over the appointment of caretaker managers by developers is that an owners corporation may be tied to a 25-year contract with little opportunity to challenge its terms. The developer has in effect decided, before there are individual owners within the scheme, what is in the best interests of the owners for the next 25 years. However it is the developer who has received the financial benefit, as the sale of caretaker management rights can be quite a lucrative transaction. The bill provides that no future caretaker management contract will be able to exceed a total period of 10 years. Contracts already in existence, which may have periods in excess of 10 years to go, will be allowed to run their course but from the day this bill becomes law 10 years will be the maximum contract period for new arrangements. If after the 10-year period the parties wish to renew for a further 10 years, that is in order. The important thing is that it will be the owners corporation, with input from individual owners, both investors and owners-in-residence, making a decision on what is desirable rather than a developer with little ongoing interest in the operation of the scheme.

A major feature of this bill is the provision included for review of caretaker management contracts where a dispute arises over its harshness and fairness. The bill provides that in such circumstances an owners corporation may make an application to the Consumer, Trader and Tenancy Tribunal for review of the contract. The tribunal will have a range of powers to deal with the contract ranging from cancellation of a contract or nullifying of individual clauses to variation of the contract or confirming its existing terms. This provision provides the circuit breaker that aggrieved owners corporations have been looking for. No longer will they have to endure another 15 or 20 years of a contract they believe is not in their interests. There will be a very accessible and low-cost opportunity for review through the tribunal. As this is new territory and as complex contractual arrangements could be under challenge, the tribunal may decide to have a panel of up to three tribunal members hear the case or utilise the tribunal's powers to have expert assessors assist it in its deliberations. Depending on the nature and outcome of the case, the tribunal will have the power to award compensation to either of the parties involved.

Applications to the tribunal will only be able to be made by the owners corporation concerned, and individual lot owners in the scheme will not be able to launch such an application. This is in recognition of the fact that one disgruntled owner should not be able to pursue a personal beef against an on-site caretaker manager and that an application should only arise when it is clear that a majority of owners are dissatisfied. I will shortly explain how the proxy voting provisions of the legislation are being overhauled to ensure that proxies are not misused to block an owners corporation from lodging an application in respect of a caretaker management contract.

In the consultation process leading to the introduction of this bill, caretaker managers pointed out that many contracts already have clauses providing remedies to situations where an owners corporation seeks to terminate the arrangement. This bill does not interfere in that process and if the parties wish to use contractual provisions to pursue a dispute or to seek cancellation of a contract, that is their prerogative. However, if an owners corporation, despite a dispute resolution clause in a contract, wishes to access the tribunal under the provisions of this bill, that will be available to them. Importantly, this particular provision of the bill will apply to contracts already in existence.

One of the most common complaints over caretaker management contracts is that people buying into a scheme are not always aware of the length or nature of contracts already in existence. The bill addresses this aspect by requiring owners corporations to declare this information in the section 109 certificate provided during the conveyancing process. A second provision will require owners corporations to make these contracts available for inspection. These two measures should ensure that there is much less likelihood that a purchaser of a strata unit will be unaware of an existing long-term caretaker management contract when he or she buys into the scheme. Of course, in some situations, the existence of a caretaker contract may have positive implications as an investor who does not intend to occupy the premises may be comforted by the fact that there is someone on site to look after his or her interests more closely.

A new provision is created by the bill to further limit decisions made in the initial period of a strata scheme. The initial period is the time between registration of the scheme and the stage when one-third of the lots have been sold. During the initial period the developer, if the building is a newly erected one, is still largely in control and some consumer protections are included to lessen the possibility that the minority lot owners will be disadvantaged. A caretaker management contract entered into during the initial period will only be able to last for a period extending to the first annual general meeting of the owners corporation. However, at that first annual general meeting the owners corporation will be free to ratify a longer contract if that is its desire. The important thing is that there will be input from the people who live in the scheme, or who own lots in it, in determining who will be engaged for any long-term caretaking contracts. It will be the owners corporation deciding who helps to look after their building rather than being dictated to by a developer who eventually goes off the scene.

I referred earlier to some changes to the proxy voting provisions of the Strata Schemes Management Act. The bill limits the way in which proxy votes held by caretaker managers or strata managing agents will be able to be used on resolutions which, if passed, would give a pecuniary or other material benefit to the caretaker manager or strata managing agent. This provision deals with another matter that the consultation process revealed to be an area of much consumer dissatisfaction. This concern arises over the issue of some persons in management or caretaking positions using a bundle of proxies to make decisions which financially or otherwise benefit themselves. An example would be a managing agent or caretaker using proxy votes to extend a term of appointment or to grant an increase in remuneration. The bill will prevent the use of proxies in this way. They would also not be able to be used to delay, impede or withdraw an insurance claim or to prevent legal proceedings in regard to a caretaker agreement.

While an ethical person would not use a proxy vote in the manner described, the bill puts beyond doubt that it is not only unethical but also void. The fact that managing agents commonly say that they would never use a proxy vote on a matter that gave them a financial or material benefit will clearly mean that they will not be troubled by this new provision. The bill also removes uncertainty over proxies issued prior to the commencement of the 1996 Act. That legislation placed a limit on the life of a proxy to 12 months or two consecutive annual general meetings, whichever is the longer. Advice received is that the effect of the provision on proxies issued prior to the commencement of the 1996 Act on 1 July 1997 was somewhat uncertain and that some very old proxies may still be valid. This was clearly not intended and the bill will put beyond doubt that all proxies have a limited life.

The bill also makes some changes to provisions regarding priority voting in strata schemes. Priority voting rights are given to mortgagees of strata units under the current legislation. It is a long-standing provision to ensure that the financial institution's security is protected. The financial institution providing the loan has a right to vote in place of the borrower should the circumstances warrant it. Historically, the traditional lenders like the banks have rarely, if ever, used the priority voting rights they have had. The legislation requires that mortgagees be notified of meetings at which more important issues are on the agenda. However, it is understandable that a bank with thousands of loans connected with strata schemes throughout the State would be reluctant to have staff attending meetings of various owners corporations on a continuing basis. The provision has been there for them to cast a vote at a meeting of an owners corporation if they considered that the security attached to the loan, that is the strata unit itself, was at any risk.

A much wider range of sources now provide loans for the purchase of strata units and mortgagees are now sometimes the developers of schemes. In some circumstances priority voting is more vigorously utilised and lot owners are sometimes in the position of having no input at all into the affairs of the owners corporation. The bill modifies the way in which priority voting may be used. A priority vote will only be able to be used for the more significant types of matters. This will ensure that lot owners who have mortgages will not be excluded from the general day-to-day decision making of their owners corporation. Priority voting rights will only be able to be exercised for resolutions on insurance, budgeting, fixing of levies, expenditure above a specific amount and on any matter requiring a 75 per cent or unanimous vote to pass. The prescribed level of expenditure will be included in the regulations that are to be drafted after the passage of the bill through parliament. The Department of Fair Trading will consult with interested parties on this issue before the figure is finalised.

The other change in relation to priority voting is that the mortgagee will be required to give the lot owner concerned two days notice of an intention to exercise the vote before it can be used. Failure to give notice will render the priority voting right void. Consequently, lot owners will know before the start of a meeting whether they can vote in their own right or whether the priority voter will vote in their place. In conclusion I wish to state that the bill overcomes some unintended impact on strata schemes solely owned by the Crown and in particular the New South Wales Land and Housing Corporation. Exemptions will be provided for the meaningless requirements of the legislation where, for instance, a whole building is owned by the Department of Housing and is used for public housing. The requirement to have regular meetings with lot owners, to appoint office-bearers, keep minutes, fix budget estimates and levy contributions are all superfluous when 100 per cent of the units are owned by the Crown.

It is the height of absurdity to require a government authority to have a meeting with itself each year and to document the business of such a meeting. The bill will overcome this obvious anomaly without removing any of the rights of occupants, who will continue to have access to all of the provisions of the legislation that benefit them. There is no doubt that this bill will further improve the effectiveness of the legislation in dealing with issues arising in modern strata schemes. Stage two of the amendments, to be introduced in 2003, will augment the changes contained in this bill with a further round of improvements. I commend the bill to the House.