

Introduction

My submission deals with Strata Managing Agents – licensee under the Act (SMA) but the issue may extend to other types of licensees. The regulations require a licensee of a SMA to be insured under a professional indemnity policy. In practice the many SMA's require an Owners Corporation to enter into Strata Management Agency Agreements that contain Hold Harmless Agreements, which transfer either part or all of the SMA's liability to the Owners Corporation. Some agreements go to the extent of requiring the Owners Corporation to pay any policy excess payable under the SMA's professional indemnity policy. A modification to the Hold Harmless Agreements is the use of the words "gross negligence" but these words do not have a clear meaning at law, consequently, if they are used in a contract they should be accompanied with a definition.

Owners Corporation insurance cover

The many public liability policies offered to Owners Corporation by SMA's exclude cover for any liability under Hold Harmless agreements, unless that liability would have otherwise been incurred, by the Owners Corporation. Should either the SMA or their insurer require the Owners Corporation to accept liability under the terms of the Hold Harmless clause the Owners' Corporation insurer is entitled to deny cover to the Owners Corporation by operation of the policy exclusion.

The following is a hypothetical example. A SMA fails or delays communication to the Strata Committee of a lot owner's advice of a serious defect, which would not be noticed by the Strata Committee during normal inspections and the defect causes a serious injury. Another example, should the Strata Committee's important instructions are not attended to in a timely manner by the SMA and the delay causes damage or injury.

The consequences

The combination of transferring of liability under Strata Management Agency Agreements and the standard policy exclusions creates a potential for substantial financial exposure for Owners Corporations. This is an unacceptable outcome for Owners Corporations and consequently individual lot owners, particularly when:

1. The Regulations require the SMA licensee must be insured for professional liability.
2. The SMA usually arranges the owners' corporation insurance cover and receives a fee for that service.

What do consumers want from the regulations?

Many years ago, the NSW Government created the Strata Title legislation to permit individuals to purchase property located in the air space about the ground. Recently events have demonstrated that due to unsatisfactory building practices that some individual owners have suffered considerable losses and as a result a few have lost their homes. It is pleasing to see that the NSW Government recently acted to improve this situation by introducing the D&BP Act. Individual owners of Strata Title apartments would expect that any NSW legislation will protect them from liability that is the responsibility of professional persons or organisations engaged to manage the property they own and use a residence. The draft Property and Stock Agents Regulation do not appear to achieve this outcome.

The Solutions

1. The Regulations should include a clause that prevents SMA's from transferring any or all of their own liability in to the Owners Corporation. In other words a "No contracting out" provision.
2. Alternately to 1 above, should an SMA transfer their liability to the Owners Corporation under any agreement and the SMA receives a fee or commission for involvement with the Owners Corporation insurance, then the SMA must ensure that the Owners Corporation insurance covers the transferred liability.