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FAIR TRADING PROVIDING INCORRECT INFORMATION ABOUT WINDOW SAFETY DEVICES

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FAIR TRADING PROVIDING INCORRECT INFORMATION ABOUT WINDOW SAFETY DEVICES

NSW Fair Trading has updated the information on its website concerning window safety devices. However, that information is incorrect. This is resulting in some incorrect conclusions that it is possible for an owners corporation to relieve itself from the responsibility for installing window safety devices.

Fair Trading's Statement

By 13 March 2018, every owners corporation in NSW was meant to have installed compliant window safety devices on applicable windows throughout its strata scheme. NSW Fair Trading has been providing information about the obligations of owners corporations concerning window safety devices. Fair Trading recently updated the page on its website which provides information about window safety devices requirements. That website page currently contains the following statement:

Can the installation of window safety devices be delegated to each individual lot owner?

The owners corporation can adopt a common property rights by-law which confers the right and obligation to install and maintain any locking or safety device to individual lot owners.

Why Fair Trading's Statement is Wrong

Section 118 of the *Strata Schemes Management Act 2015* (**Act**) deals with window safety devices. Section 118 (1) says the following:

118 Window safety devices – child safety

(1) An owners corporation for a strata scheme to which the section applies must ensure that there are complying window safety devices for all windows of each building in the strata scheme that are windows to which this section applies.

Section 118(1) makes clear that an owners corporation must ensure that window safety devices are installed on all applicable windows.



Section 136 of the Act explains the matters that are able to be covered by the by-laws made by an owners corporation. Section 136(2) says the following:

136 Matters by-laws can provide for

...

(2) A by-law has no force or effect to the extent that it is inconsistent with this or any other act or law.

This means that a by-law that purports to force owners to install or ensure that there exist window safety devices on all applicable windows in their strata scheme would be directly inconsistent with section 118 of the Act. For that reason, any such by-law would have no force or effect.

This means that any owners corporation that made a by-law purporting to make owners responsible for the installation of window safety devices would not relieve itself from the responsibility for ensuring that the window safety devices are installed on all applicable windows and would expose itself to penalties and various other risks if, ultimately, window safety devices were not installed on all applicable windows in its scheme.

Maintenance of Window Safety Devices

The Act is silent on who is responsible for maintaining, repairing and replacing window safety devices after they have been installed. However, most window safety devices will be situated on the common property and the owners corporation is responsible for maintaining, repairing and replacing the common property under section 106 of the Act. This means that normally an owners corporation will be responsible for the maintenance, repair and replacement of window safety devices.

However, an owners corporation is able to make a common property rights by-law which grants the owners special rights over a specific part of the common property and imposes on the owners the responsibility for the maintenance, repair and replacement of that common property. Section 144(3) of the Act says that if a common property rights by-law makes owners directly responsible for the maintenance and repair of any common property, it relieves the owners corporation from its obligations to maintain and repair that common property under the Act.

This means that it is possible for an owners corporation to relieve itself from the responsibility for maintaining, repairing and replacing window safety devices. This can be done by the owners corporation making a common property rights by-law which grants owners exclusive use of their window safety devices after they have been installed and imposes on the owners the responsibility for the maintenance,



repair and replacement of those window safety devices. This type of by-law can be made by a special resolution passed at a general meeting of the owners corporation but requires the written consent of all of the owners to whom the by-law applies.

An Easier Alternative?

It is also possible for an owners corporation to make a by-law (without the written consent of the owners) which makes owners responsible for maintaining and repairing any window safety devices installed by them. This is because the owners corporation has the power to make a by-law that deals with the same topic as a model by-law and both the new and old model by-laws contain a by-law that permits owners to install locking or other safety devices, such as devices to improve the safety of children in the lots, and imposes on the owners the responsibility to maintain and repair any such locking or safety device: see old model by-law 5 and new model by-law 2. This type of by-law is arguably not a common property rights by-law and therefore would not require the written consent of owners and could just be made by passing a special resolution at a general meeting but would only apply to window safety devices installed by owners, not window safety devices installed by an owners corporation itself.

Conclusion

It is simply not possible for a by-law to make owners responsible for installing window safety devices and to relieve the owners corporation from its statutory obligation to do so, despite any advice to the contrary contained on the website of NSW Fair Trading. In other words, the current advice on Fair Trading's website is wrong. However, it is possible for a by-law to relieve the owners corporation from the responsibility for the maintenance, repair and replacement of window safety devices and to shift that responsibility onto the owners provided that the owners are prepared to take on that responsibility. It will be a matter for each owners corporation to decide whether or not it is sensible to place the obligation for the maintenance, repair and replacement of window safety devices on the individual owners rather than the owners corporation itself.

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JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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