STRATA COMMUNITY
INSURANCE

Strata Managers:
Responsibilities for Placement of Insurance

The Strength of **Experience.**

In the context of strata and community title insurance, the relationships between strata communities, their appointed strata managers, and insurance brokers is particularly complex – with the common law and multiple pieces of State and Commonwealth legislation combining to create a series of bi-directional and overlapping contractual, statutory, and fiduciary obligations between the various parties.

Strata and community title insurance essentially exists to protect the assets and liabilities of strata communities and the individual owners that comprise them. Therefore, ensuring that appropriate cover is in place – through selection of the insurance company and design of the insurance policy – is absolutely critical.

However, given the complex legal environment within which strata and community title insurance operates, an important question is who, ultimately, is legally responsible for ensuring that appropriate cover is in place?

The Strata Community

Ultimately, the strata community has principal responsibility for management of their strata or community title scheme, including satisfying their statutory obligation to maintain insurances as set out in the relevant governing legislation in their particular jurisdiction.

The Strata Manager and Insurance Broker

In a majority of cases, the strata community's functions, duties and powers associated with managing statutory minimum insurances are outsourced to professional strata managers – with formal delegation being provided via a strata management agency agreement. In addition to these contractual obligations, the strata manager as agent owes common law fiduciary duties to the strata community as its principal. These obligations in turn are further supplemented by legislative obligations applying specifically to strata managers including, in some jurisdictions, statutory 'best interests' duties.

To discharge their obligations in fulfilling the strata community's insurance-related requirements, strata managers may elect to deal directly with an insurer or underwriting agency, or otherwise with a general insurance broker. Where a broker is engaged by the strata manager, in this context the broker is an agent and fiduciary of the strata community and – by extension – its delegated representative, the strata manager.

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A further layer of complexity is added, however, given that insurance for strata communities is classified as a type of 'general insurance product' for purposes of the *Corporations Act 2001* (Cth). Essentially, this necessitates that in executing their delegated responsibilities for strata communities, strata managers must be appointed – via a formal written agreement – as a representative (agent) of one or more Australian Financial Services (AFS) Licensees (such as brokers).

The consequence of these necessarily complicated arrangements is that strata managers and the brokers they engage are, simultaneously, both principals of, and agents for, each other.

Importantly however, while strata managers may choose to engage a broker to assist in arranging and purchasing insurance, this **does not** abrogate their own responsibilities as a fiduciary of the strata community.

In other words, despite the strata manager's engagement of a broker, they will not escape legal liability if the design and placement of insurance is insufficient to meet the strata community's needs. As a fiduciary, the strata manager remains responsible to its strata community principal in ensuring that the insurance arranged satisfies legal requirements and is in the strata community's best interests – this responsibility cannot be simplistically 'outsourced' through appointment of a broker.

Moreover, strata managers must be mindful that by introducing a broker as an additional party to any insurance transaction, they are necessarily introducing additional cost to the strata community. In this regard, it is imperative that any commissions payable to, and fees charged by, the broker are both: (a) transparently disclosed to the strata community prior to any decision being made in respect to placement of insurances; and (b) demonstrably commensurate with the actual value added by the broker to the insurance transaction. If the strata manager fails to ensure this occurs, they may be taken to have failed in their fiduciary obligations to ensure the best interests of the strata community have been served.

For the above reasons, it is essential that strata managers ensure clear instructions are provided to any broker they engage, reflecting the needs of the strata community they represent. It is important to remember in this regard that, despite any separate formal agency agreement existing as between the broker and strata manager in the financial services context, in receiving instructions the broker is an agent for and fiduciary of the strata community – and the strata manager as its delegated representative.

When should I instruct a broker?

Firstly, it is important to note that Owners may have specific preferences which you will need to accommodate within or in addition to your management agreement, and the services of a broker will not be required in all cases. For a majority of schemes, strata managers may deal directly with an insurer and will have (with the insurer's support where required) the necessary experience and expertise to fulfil the strata community's needs. Generally, a broker's professional skills will add more value in connection with unusual risks, and as the size and complexity of a scheme increases.

What general information should I expect from a broker?

Where a broker is appointed by a strata manager, the strata manager must ensure that the services and information being provided by the broker truly facilitate the strata community in making appropriate insurance decisions. For example, merely requesting – and then presenting – quotations for insurance products sourced by a broker, will be insufficient to discharge the strata manager's legal obligations to the strata community.

At the outset, it must be made clear to the broker what the strata community's expectations are with respect to which key criteria should inform the selection of an appropriate insurance provider and product. In general terms, the range of considerations should include (in order of importance) the following:

1. The strength, financial standing, and performance of the insurer – including ability and track record of paying claims quickly.
2. Whether the policy satisfies the specific insurance requirements of the relevant governing legislation and is otherwise sufficient to protect the assets and liabilities of the strata community.
3. The extent and amount of cover afforded, and deductibles (excesses), or self-insured retentions imposed.
4. The cost and level of premium to the insurer, taxes and levies payable to government, and any fees or other costs included in the total cost payable.

Strata managers should also clearly articulate exactly what is required from the broker – including:

- Confirming the type and extent of information and advice required;
- Confirming the required timing around provision of such information and advice;
- Insisting on disclosure of all remuneration arrangements including particulars of types, sources and amounts of monetary and non-monetary benefits; and
- Insisting on insurance terms being presented in a manner transparently disclosing breakdown between base premium, taxes, duties and levies, commissions payable to any party, and broker fees.

What specific instructions should be provided when appointing a broker?

In terms of the specific types and extent of information and advice required, strata managers should be instructing any appointed broker to:

- Consider the individual objectives, needs and financial position of the strata community in considering insurance providers and products suitable for satisfying minimum legislative requirements and otherwise protecting the strata community's assets, liabilities, and exposures.
- Advise on adequacy of requested sum(s) insured in terms of satisfying statutory minimum insurance requirements.
- Advise in respect to any risk improvements the strata community might, or may be required to, implement to reduce insurance costs and otherwise reduce risk within the scheme.
- In cases where insurance options from multiple providers are presented, include a product comparison highlighting key product differences including terms and conditions, benefits, limits and exclusions.
- Provide commentary on the relative strength, financial standing, and performance (including ability to pay claims quickly) of insurance providers whose products have been considered.
- Where a certain insurance provider and product is recommended, provide reasons justifying the selection, including highlighting any special conditions imposed and any potential gaps in insurance (and the extent to which the strata community will be self-insured).
- In presenting terms, transparently disclose details of the relationship between them and any insurance provider considered – including: (a) whether the broker is acting under binder; and (b) particulars of any remuneration arrangements including types and amounts of all monetary and non-monetary benefits associated with the transaction.
- In presenting terms, transparently display a breakdown of the total cost of insurance between base premium, taxes, duties and levies, commissions payable to any party, and broker fees. *NB: as the strata manager who has engaged the broker, you have a responsibility to ensure the total costs associated with that appointment are made transparent to Owners.*

Summary: Why is all this information important?

This information and advice is essential for the strata community to make an educated decision in respect to any insurance options or recommendations presented to them. If such information and advice is not provided, is provided at an inappropriate time in the insurance transaction process (such as after a decision on placement has already been made) or is otherwise disclosed in a manner that is not transparent – the strata community will necessarily be making decisions based on incomplete and imperfect information.

Strata managers must remain mindful that in such cases – owing to their fiduciary, contractual and statutory obligations to the strata community – even where a broker engaged may be 'responsible' for information asymmetry, the strata manager will not escape accountability and legal liability for any consequential incorrect or ill-judged decisions made by the strata community.

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stratacommunityinsure.com.au

T 1300 SCINSURE (1300 724 678)
E myenquiry@scinsure.com.au
A Level 10, 124 Walker Street
North Sydney NSW 2060
P PO Box 631 North Sydney NSW 2059

Strata Community Insurance Agencies Pty Ltd
ABN 72 165 914 009, AFSL 457787.

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