As we go to press, the Strata Schemes Management Act and the Strata Schemes Development Act come into effect in NSW.

Although these Acts may have no direct bearing on our shopping centres, they throw up some interesting development opportunities. They are about retailers and landlords, being about one aspect of retail property development and management, so we ought to be aware of them.

Strata retail owners take note: legislative changes will impact you

The NSW property industry is poised to implement the new Strata Schemes Development Act 2015 (NSW) (SSD Act) and the Strata Schemes Management Act 2015 (NSW) (SSM Act) which will both come into effect on 30 November 2016. While the media spotlight has centred on the likely impacts for residential property owners (most likely because strata retail tends to be limited to smaller retail strips or mixed-use strata schemes), retail landlords should be paying attention.

A primary outcome will be to empower the majority voice in strata schemes, so that owners will be able to band together to wind up their strata scheme and sell their lots in a single line, whereas previously unanimous consent was required (so a single lot owner could thwart the process).

For strata retail, a clear opportunity presented by these changes is for owners to use the strata renewal and collective resale process to convert an ageing strata scheme into a retail shopping complex, and to potentially profit collectively from the sale of their lots in a single line.

However, there are 2 other key issues which warrant consideration and which might have the potential to materially impact on strata schemes which involve retail. These are:

- The introduction of a 'tenant representative' concept; and
- The termination of retail leases following a collective sale or renewal.

The introduction of tenant representatives to owners' corporations

Where at least half of the lots in a scheme are tenanted (as notified to the scheme per the SSM Act), then the tenants in the scheme may nominate one tenant representative to represent them at the strata committee and to attend meetings of the owners' corporation. This is an entirely new concept for strata, and one which was hotly contested by many industry sectors during the legislative consultation process as being an unnecessary and burdensome complication to an already complex management process.

What can tenant representatives do?

Tenant representatives must be notified of, and may attend, strata committee meetings and general meetings of the owners' corporation, but will have no entitlements to vote or act as an officer of the owners' corporation, and may be specifically excluded from parts of meetings whilst certain matters are being discussed (e.g. financial statements, contributions, strata renewal proposals, etc).

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How will this impact the retail sector?

It seems likely that most strata schemes involving retail will be mixed use in nature and will have a relatively small proportion of retail lots when compared to the scheme as a whole. Therefore, it is likely that the tenant representative in these schemes will often be a commercial or residential tenant rather than a retail tenant and may therefore have little input or impact on the scheme from a retail perspective. As we see it, there are pros and cons to having a retail tenant representative from a retail landlord perspective. For example, a retail tenant representative will likely push for changes which improve the scheme from a retail perspective (e.g. better services, better

access etc) and therefore improve the value of retail stock in the scheme, which is obviously a positive outcome for a retail landlord. However, it may also have the unwanted consequence of driving up levies, given that retail enhancements and changes are often more expensive than what may be required for commercial or residential tenants. In addition, a tenant representative will gain much greater insight into matters such as outgoings, long-term plans for the scheme, the landlord's position on contentious issues and forthcoming factors that might impact on tenancy like compulsory works. This may not be desirable from the perspective of a retail landlord as it may weaken the landlord's position in future negotiations with the tenant (e.g. on lease renewal).

How can retail landlords protect themselves?

Landlords wishing to prevent their tenants from becoming the tenant representative for the scheme might consider introducing new clauses to prohibit them from nominating for the position or accepting a nomination.

> However, caution should be exercised to ensure that the obligations imposed on the tenant do not amount to unconscionable conduct under the Retail Leases Act 1994 (NSW) (RLA). The landlord should be able to demonstrate that a condition preventing the tenant from participating in management of the scheme is reasonably necessary for the protection of the legitimate interests of the landlord.

Termination of retail leases following a collective sale or renewal

What is collective sale or renewal?

The introduction of the collective sale and renewal process allows strata lot owners to decide (on a 75% majority basis) whether to end or wind up a strata scheme so that the site can be sold or renewed. Whilst it is hoped that this change will be a boost to urban renewal and will present better commercial outcomes for many lot owners (e.g. where rising maintenance costs are no longer viable, or where the entire scheme can be collectively sold at above market value to a developer), the impact of the new regime on leasehold interests is contemplated only at the tail end of the process as part of the Court order process.

What is the process for termination of a retail lease under the new regime?

If the Court makes an order to give effect to a collective sale or redevelopment plan under the SSD Act, all leases of lots in the scheme (including retail leases) will be terminated on the date contemplated in the strata renewal plan or on such later day as specified in the order.

What rights will tenants have?

Termination of a lease under the SSD Act is expressly stated to not affect a right or remedy a person may have under the relevant lease, and it appears to be intended that leases will generally be terminated in accordance with their terms or legislation relevant to the lease in question (e.g. Residential Tenancies Act 2010) rather than under the SSD Act. To protect tenant rights and remedies, the SSD Act further empowers the court to make ancillary orders regarding the payment of compensation to a person whose lease is terminated in order to give effect to a collective sale or redevelopment. It is assumed (but unclear) that the order to pay compensation to a tenant would be imposed on the relevant lot owner, but factored into the determination of compensation for that owner (e.g. in calculating market value for a dissenting owner).

So, how should you terminate a retail lease in this scenario?

There is nothing in the RLA to specifically address the consequences of a landlord terminating a retail lease in accordance with a Court order relating to a collective sale or renewal. So, in the absence of any specific provisions in the retail lease itself contemplating termination in this scenario, then it is anticipated in the event that the parties are unable to reach agreement on compensation directly, that a tenant may seek ancillary orders from the court based on compensation calculated in accordance with the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

Staying ahead of the curve

> Landlords with retail interests in strata schemes may consider introducing new clauses into their leases to contemplate an agreed scenario and compensation mechanism in the event that a lease is terminated under Part 10 of the SSD Act, which is consistent with the intent of the SSD Act (ie for a lease to be terminated in accordance with its own terms).

Once again, caution should be exercised to ensure that the obligations imposed on the tenant do not amount to unconscionable conduct under the RLA. The conditions imposed on the tenant should be reasonably necessary for the protection of the legitimate interests of the landlord. **SCN**