Statutory Review of the NSW Strata Schemes Laws

Strata Schemes Development Act 2015
Strata Schemes Management Act 2015

Discussion Paper

November 2020

NSW GOVERNMENT

Contents

Minister's Message

It is my pleasure as Minister for Better Regulation and Innovation to introduce the discussion paper for public consultation on the statutory review of the New South Wales strata schemes laws.

Together with my colleague, the Hon Victor Dominello MP, Minister for Customer Service, we are responsible for the legislation that governs the entire life cycle of over 82,000 strata schemes in New South Wales.

Minister Dominello has carriage of the *Strata Schemes Development Act 2015* which governs the development phase of schemes, including registration of the strata plan, creation of sub-divided stratum title and an owners corporation, apportionment of unit entitlements, registration of by-laws, changes to common property and termination of schemes.

The *Strata Schemes Management Act 2015* sits within the Better Regulation portfolio, also within the Customer Service cluster, and sets out a comprehensive governance framework for the life of a strata scheme after it moves out of the development phase.

The Management Act's territory therefore includes controls on the developer during the scheme's 'initial period', how the owners corporation makes decisions through resolutions at general meetings and committees, the making of by-laws, insurance and financial management and the resolution of disputes internally, via Fair Trading mediation and in the NSW Civil and Administrative Tribunal and the courts.

The two Acts resulted from a commitment by our newly elected NSW Liberal-Nationals Government in 2011 to overhaul the State's strata laws after they had remained largely unchanged for a generation.

Strata is now home to over 1.1 million people in New South Wales. We expect over half the population of Greater Sydney to be living in strata titled apartment towers, townhouses and blocks of flats by the year 2040.

Beyond the challenges and opportunities of residential strata living, there are also of course strong commercial interests in the success of the NSW strata sector, the insured value of which now exceeds $400 billion. Developers, builders, managing agents, building managers, insurers, law firms and other service providers and suppliers are all vital links in the strata chain.

It is now five years since those laws were enacted and we are once again seeking comprehensive feedback from you – the NSW strata community – on how the new laws have been operating and where there are opportunities for improvement.

The discussion paper and the online content that will accompany it highlight some of the key issues where we've already heard the laws may need improvement. Some policy options for reform are included to stimulate feedback.

If you share the NSW Government's vision of a world-best regulatory framework for the development and management of strata schemes, I encourage you to engage with the issues presented here, respond to the questions and raise any issues important to you.

Together, we can set up NSW strata for continued strong growth, urban development and cosmopolitan strata living throughout the twenty-first century and beyond.

THE HON KEVIN ANDERSON MP
MINISTER FOR BETTER REGULATION AND INNOVATION

How to get involved

You are invited to read this discussion paper and comment on the matters that interest you or all the issues raised. We prefer to receive submissions by email and ask that any documents are provided in an 'accessible' format. Accessibility is about making documents easily available to all members of the public, including those who have an impairment (such as visual, physical or cognitive). Further information on how you can make your submission accessible is contained at http://webaim.org/techniques/word/.

How to lodge your submission

You can provide a submission in one of three ways:

- online feedback for this consultation at haveyoursay.nsw.gov.au/strata-statutory-review-2020
- by email to stratareview@customerservice.nsw.gov.au
- by post to:

  Strata Schemes Statutory Review
  Policy & Strategy, Better Regulation Division
  Department of Customer Service
  4 Parramatta Square
  12 Darcy Street
  Parramatta NSW 2150

Submissions close at midnight on 7 March 2021.

The NSW Government's Guide to Better Regulation, which sets out how to apply the seven Better Regulation Principles to regulatory proposals, may assist you in considering the issues and preparing a submission. The Guide is available at: http://productivity.nsw.gov.au/sites/default/files/2018-05/Guide_to_Better_Regulation-October_2016.pdf.

Next steps

After the consultation period has closed:

- all comments and submissions will be considered
- there will be targeted consultation on specific issues
- a report on the review and its findings will be submitted to the Minister for Customer Service and the Minister for Better Regulation and Innovation
- the final report will be tabled in both Houses of Parliament by 5 November 2021.

Important note: publication of submissions

Submissions may be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission. Automatically generated confidentiality statements in emails are not sufficient. Submissions may be referred to in a report on the outcome of the consultation, however any anonymous submissions will be referred to as such.

Please note, there may be circumstances where the Government is required by law to release the information in your submission. For example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*. It is also a statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament.

Introduction

The statutory review of NSW strata schemes laws is required by law.

This discussion paper seeks feedback from any member of the public interested in the laws governing the development and management of strata schemes in NSW.

Public feedback is vital to the 2020-21 statutory review of the *Strata Schemes Development Act 2015* (the Development Act) and *Strata Schemes Management Act 2015* (the Management Act) which is required by sections 204 and 276 of those Acts respectively.

The purpose of the review is to determine whether the policy objectives of the Acts remain valid and whether the terms of the Acts remain appropriate for securing those objectives.

The Department of Customer Service is conducting the review on behalf of the Minister for Customer Service, who is responsible for the Development Act and the Minister for Better Regulation and Innovation, who is responsible for the Management Act. The Office of the Registrar General administers the Development Act, while NSW Fair Trading administers the Management Act. Both Acts are being reviewed together in a single integrated project.

The Acts require a report on the statutory review to be tabled in NSW Parliament within one year of the commencement of the review – that is, 5 November 2021. The Department of Customer Service will consider every submission received throughout the review and evaluate the performance of the Acts on the experience of stakeholders.

Strata living in NSW continues to evolve rapidly

This statutory review will impact the experience of the 1.125 million people that live in strata schemes in NSW from Albury to Tweed and Broken Hill to Sydney. There are now 81,717 strata schemes registered in NSW and every year this number grows by more than 1,000. NSW has experienced a strata boom in the last 20 years, with more than 33,000 strata schemes being established since the year 2000.

Strata schemes are integral to supporting NSW's growing population and housing boom. As more and more people choose to call NSW home, strata living holds the key to encouraging growing cities and urban development. As land becomes more of a commodity, subdividing vertical spaces into strata lots holds the key to growing NSW into the future.

Strata schemes are no longer just for everyday living. They also provide the infrastructure for retirement villages, short term holiday letting and lodges and directly employs more than 2,800 people state-wide. Strata living has changed significantly in the last five years and it is important that the laws that regulate strata schemes are adaptable and appropriate to operate in an ever-changing environment. A full discussion of the snapshot of strata living is included at page 11.

The review assesses the 2015 overhaul of NSW's sixty-year old strata laws

Fifty-nine years ago, New South Wales was a forerunner in the development of world first strata laws, with many other strata title laws in places like the United Kingdom and Dubai being modelled on New South Wales. While the original 1961 Act was reviewed and replaced in 1973, the 2015 reforms to strata laws in were the first major review of NSW strata laws since their inception.

The Development Act and Management Act were enacted in October 2015 as the culmination of the NSW Government's landmark reforms to NSW strata title laws that began in 2011. It is now four years since those Acts commenced together with their supporting regulations on 30 November 2016.

The terms of the 2015 strata reforms were written to achieve 10 distinct objectives, that together, create a higher standard of governance and development of strata schemes in NSW. The objectives of the reforms were to:

1. empower communities to make their own decisions in a democratic way
2. encourage participation in meetings and decision-making by residents and owners
3. foster a culture of community and co-operation
4. improve governance through greater transparency and accountability
5. establish flexible administrative and management arrangements
6. be future oriented with emphasis given to modern technology
7. help ensure building defects are identified and rectified earlier
8. provide protection from unfair practices
9. provide a simple and effective means for resolving disputes, and
10. establish a fair process for the collective sale and renewal of strata schemes.

These objectives are the benchmark upon which the Development and Management Acts will be measured. This discussion paper will set out the parts of both Acts that are designed to fulfil these objectives and seek feedback to identify whether there are opportunities to improve the operation of the Act in pursuit of these objectives.

The 2015 Acts addressed shortcomings identified throughout the review process and modernised the legislative framework to ensure strata laws are fit for a modern NSW.

The Development Act amalgamated the former strata schemes freehold and leasehold development Acts and states its objects as:

- to facilitate the subdivision of land into cubic spaces
- the disposition of titles, and
- the registration and renewal of strata schemes.

The most significant reform introduced by the 2015 Act was the acknowledgement that the sale or renewal of a scheme should not require the approval of 100% of lot owners – provided the process is transparent, fair and flexible.

The reduction of the voting threshold from a unanimous resolution (no votes against) to a special resolution (no more than 25% against) was designed to empower strata owners to make a collective decision about the important issue of what to do with a building as it ages.

The 2015 reforms also modernised the provisions relating to compensation, appeal and natural justice for dissenting voters in a scheme that has been subject to a collective sale process. NSW Fair Trading established the Strata Renewal Advice and Advocacy Program which includes a dedicated hotline for any affected owners and specialist advice and advocacy for older and more vulnerable owners.

The objects of the Management Act are to provide for the management of strata schemes and the resolution of disputes of strata schemes. Recognising the high level of governance undertaken by owners corporations, the Management Act aims to strike a balance between providing freedom for strata schemes to make decisions, while ensuring there are sufficient safeguards in place to protect minorities and guard against unfair decision-making. Democratic elections, voting methods, powers to make by-laws, setting levies, and taking enforcement action are critical issues affecting strata communities and are reflected in the reforms introduced by the 2015 Act.

Further discussion of these policy objects is undertaken at pages 13 and 27.

Resolution of disputes about building defects will be an important aspect of the review

In the last five years, the regulation of strata schemes has had to adapt to the growing concern about building defects in high rise residential apartment buildings. Since the 2015 reforms commenced, the NSW Government has responded to flammable cladding on apartment buildings following the tragic Grenfell Tower fire in 2017 and pursued other major reforms to the NSW building industry.

Unfortunately, high rise residential apartment buildings in NSW have attracted some negative attention in the past three years, with high profile media coverage of defective buildings such as Opal and Mascot Towers. Residents have been evacuated and there have been protracted disputes over who is responsible for paying the cost of remediation work.

One of the aims of this review and in the NSW Government's policy stance towards the property market generally is to identify opportunities to minimise costs for apartment owners and to improve the process of dispute resolution about building defects. This review is a crucial stage in the public dialogue about the experience of strata residents and owners with disputes over building defects, as the Government strives to improve the dispute resolution experience for all parties.

The 2015 reforms to the Management Act established the building defect bond scheme, under which developers of new residential strata buildings are required to pay a building bond equivalent to 2% of the building contract price. After two years the bond can be used to pay for any identified rectification work if the developer has failed to do so. The scheme commenced on 1 January 2018, with further amendments enacted in 2018 which commenced on 1 July 2020.

Section 215 of the Management Act requires the Minister for Better Regulation and Innovation to commence a review of Part 11 of the Act as soon as possible after 1 January 2024 and table a report on the review in NSW Parliament by 1 January 2025.

While the review will consider the resolution of disputes about building defects, the building defects bonds scheme will not be considered as part of this review.

Minor reforms to strata laws have occurred in the last five years

The Development Act and Management Act have been amended over the last four years to respond to social and environmental demands and changes to the built environment.

Firstly, the Government introduced two separate reforms to the Management Act in 2020. The first was an amendment to partially fulfill a 2019 election commitment to reduced barriers to the uptake of sustainable infrastructure. This amendment reduces the voting threshold for a resolution to install sustainability infrastructure from a 75% majority to a simple majority of 50% in favour. The election commitment also committed to a broader review of other barriers to the uptake of sustainability in strata and is being led by the Department of Planning, Industry and Environment. The report of this review will be added to the feedback sought from this statutory review on what further reforms may be needed to improve the uptake of sustainability in strata.

Strata schemes laws were also pressure tested by the COVID-19 health crisis as NSW Public Health Orders restricted the ability of people to meet in order to curtail the spread of the virus. The Government responded by passing emergency laws that temporarily allowed all strata schemes in the state to electronically vote even if they hadn't passed a resolution allowing them to do so. Emergency legislation also allowed owners corporations to execute documents by way of signature instead of affixing the common seal of the owners corporation to the document. The response to the emergency legislation by strata stakeholders has been overwhelmingly positive with stakeholders expressing an appetite to permanently entrench some of the emergency amendments.

The Government will ensure community schemes and strata schemes laws remain aligned

In September 2020, the Government introduced the Community Schemes Management Bill 2020 and Community Schemes Development Bill 2020 to NSW Parliament. The Bills repeal and completely re-write the *Community Schemes Management Act 1989* and *Community Schemes Development Act 1989* to modernise and update community schemes laws in NSW, aligning community with strata, while also accounting for their important differences.

The original community schemes laws were modelled on the first strata schemes laws as both types of land title are fundamentally similar.

The community schemes bills bring that legislation up to date with the current strata schemes laws in NSW. Reforms arising from this review that are applicable to community lands will be legislated simultaneously with strata to ensure the two regimes are not once again out of alignment as they have been between 2015 and 2020.

What happens next?

Following the 12 weeks consultation period, all submissions will be considered and the findings of the review will be published in a report tabled in both Houses of NSW Parliament by 5 November 2021. Throughout the review process, the Government may conduct further consultation on specific issues relating to the Acts if further feedback is needed to resolve them. If the findings of the review recommend legislative amendments to the Acts, drafting of new legislation will commence after the report has been tabled in NSW Parliament.

Snapshot of strata living since 2015

NSW has seen a sharp increase in strata living in recent years, with increasing numbers of residents and families choosing to live in apartments over detached houses.

More than 15% (1,125,000) of the state's total residents, and 22% (600,000) of the state's total households live in apartments. These residents occupy a large majority of the 81,717 strata schemes registered in NSW. This number has been steadily increasing since the year 2000 with more than 40% of all strata schemes in NSW being established in the last 20 years. More recently, more than 5,000 new strata schemes have been registered in NSW since the 2015 reforms commenced.

Strata living is far from the exclusive domain of metropolitan hubs like Sydney, Parramatta and Newcastle. Notable growth has also occurred in regional NSW. Each year since the 2015 reforms commenced, strata schemes have increased by 2.2% in Newcastle/Hunter, 2.8% in the Illawarra region and 1.55% in regional and rural NSW. Due to this growth, as at 30 June 2020 there are 1,418 schemes registered in the city of Ballina, 1,000 in Albury, 1,500 in Lake Macquarie and more than 500 in Bega Valley. Higher than average growth has occurred in areas like Penrith with 90 new schemes being registered every year since 2017, the Central Coast and Cumberland with 63 each per year, Newcastle with 77 and Wollongong registering 65 new schemes every year.

Australians of every age, culture and background are choosing to live in strata or are dependent on it for their housing needs in proximity to transport, employment and other opportunities. 48% of all apartment residents are between the age of 20 and 39 years old. 16% of apartment residents are under 20, 21% of residents are between 40 and 59 make up 21%, and residents over 60 make up 15%. Less than half (40%) of all apartment residents in NSW are born in Australia, 8% are from China, 5% are from India and the remaining 47% are from a diverse mix of other countries around the globe. The numbers of renters and owner-occupiers in apartments are similar: renters make up 48% of strata residents, with the remaining 52% either owned outright or with a mortgage.

Strata living reflects a cross section of Australian society, with different family structures and sizes calling strata apartments home. As we move further into the 2020s, the keeping of pets in strata is becoming an increasingly important issue to hundreds of thousands of Australians. Strata schemes are empowered to adopt their own by-laws about the keeping of pets that are tailored specifically to the needs and wants of their scheme. The Government understands that the keeping of pets in strata is an important issue and will be considering this issue in depth as part of this review.

The total insured value of strata schemes in NSW is more than $400 billion. Strata schemes also provide significant economic benefits by employing almost 1,500 strata managers and another 1,300 employees.

Callout jobs for maintenance and repairs on strata property indirectly employ plumbers, electricians and gardeners, with almost 600,000 callout jobs being made in 2019. Strata schemes also provide the infrastructure for retirement villages, lodges and short-term holiday letting.

NSW Fair Trading receives about 2,000 requests for mediation of strata disputes per year with the volume of requests increasing at about 200 per year. A majority of the requests are made by lot owners about repairs and maintenance, and the owners corporation exercising its duties and functions. The NSW Civil and Administrative Tribunal (the Tribunal) receives about 1,200 applications per year under the Management Act and just under half of those applications are dismissed or withdrawn. Most orders made by the Tribunal under the Management Act concern strata managing agents, access to the property for repairs or maintenance and cosmetic or minor repairs.

While these figures appear to indicate a large volume of disputes, they should be considered in the context that every year, more than 1,000 new strata schemes are registered in NSW.

The snapshot of strata living in 2020 tells the story that strata schemes are for everyone and represent a diverse cross section of the people that call NSW home. Strata schemes provide a valuable and growing contribution to the NSW economy and provide jobs to thousands of people.

This review will seek to identify opportunities for improvement to strata schemes laws to better realise the policy objectives of the 2015 reforms. Where the laws are not operating as intended, improvements will be progressed for the benefit of the million people who live in strata schemes and the thousands of people that they employ.

Strata Schemes Development Act 2015

Background

The Development Act was introduced to provide a modern and simplified legislative framework for development of lots and common property, by amalgamating the previously separate *Strata Schemes (Freehold Development) Act 1973* and *Strata Schemes (Leasehold Development) Act 1986* into one streamlined Act.

The legislation was intended to facilitate urban growth and enhance democratic decision making by introducing a new process for the collective sale and renewal of strata schemes, with 75% approval of lot owners.

Other key aspects of the legislation were to provide for:

- subdivision and consolidation of strata schemes
- conversion of lots into common property
- staged development of strata schemes and strata development contracts
- dealings with common property, including greater flexibility for owners corporations to acquire or lease land for the purposes of creating additional common property
- changes of by-laws to be registered on title as a consolidated list
- requirements for the issue of strata certificates by local councils or accredited certifiers
- a fairer method to determine unit entitlements, certified by a qualified valuer, and
- the variation, termination and renewal of strata schemes.

Objects of the Act

A key purpose of this review is to consider whether the objects of the Act remain current, and whether the provisions are effective in achieving those objects. Section 3 of the Development Act sets out its main objects, which are to provide for:

1. The subdivision of land, including buildings, into cubic spaces to create freehold and leasehold strata schemes;
2. Dealings with lots and common property in strata schemes; and
3. The variation, termination and renewal of strata schemes.

These statements provide a broad outline of the legislative purpose, although the Development Act deals with other aspects of the development process including staged development, planning approvals and development by way of part-strata parcels in buildings.

The statutory review process involves assessing the performance of the Development Act against the objects set out in section 3, and considering whether these objects should continue to apply, or be expanded to include other matters.

While this review is considering the performance of the Development Act as a whole, preliminary stakeholder and community feedback has identified several key areas where reform may be needed. This paper highlights those areas.

1. Are the current objectives of the Development Act still valid? If not, how should they be changed?
2. How successful is the Development Act in fulfilling those objectives?
3. Are there other objectives that should be included? If so, please identify what these should be and explain why.
4. If the objectives should be expanded, what corresponding measures would be needed in the Development Act to give effect to those objectives?

Strata renewal: collective sale and redevelopment

Strata renewal process for freehold strata schemes

Strata renewal

One of the most significant reforms introduced by the Development Act was the strata renewal regime, which provides an alternative mechanism to enable the collective sale or redevelopment of a strata scheme where not all, but at least 75%, of owners agree.

Prior to this reform, termination of a strata scheme could occur upon application to the Registrar General with the *unanimous* agreement of all owners. The effect of the previous system was that owners who wished to renew or redevelop their scheme could be blocked by just one individual who did not want to participate. If all owners did not agree, application could be made to the Supreme Court for an order that the strata scheme be terminated. This process was costly, time consuming, adversarial and did not encourage negotiation.

The strata renewal process was intended to overcome barriers to urban renewal created by the rigidity of the previous scheme. It draws on the collective decision-making process that is a hallmark of strata ownership, and offers transparency through several key stages, with a court approval process as a final safeguard.

However, initial stakeholder feedback, coupled with the relatively low take-up of strata renewal applications, has raised concerns that the staged process is too complex for schemes to navigate. The Government is interested in feedback about schemes' experiences in using the new renewal provisions, as well as any suggestions for improvement.

Built-in safeguards and protections

Any proposed collective sale or renewal must follow a multi-step process set out in Part 10 of the Development Act that provides transparency and allows time for consultation.

The procedure is intentionally rigorous, with the legislation prescribing a detailed process which has built-in timeframes, meeting procedures and particular matters that need to be included in a strata renewal plan. A key safeguard in the process is that a strata renewal plan must be approved by the Land and Environment Court before it can be implemented, however the court cannot approve a plan unless it is satisfied that the proper process has been followed.

The various steps include:

- **Opt-in** – Strata schemes in existence before the new laws commenced must opt into the process by passing a resolution.
- **Strata renewal committee** – An owners corporation considering renewal can appoint a committee to prepare a renewal plan.
- **Development of the strata renewal plan** – A renewal plan must include prescribed details about the proposal. When the owners corporation is satisfied with the plan, it can pass a special resolution, giving the plan to the owners for their individual consideration.
- **60 day consideration period** – Owners are given at least 60 days to consider the plan, allowing time for them to seek advice as required.
- **Signing of the plan by 75% of owners** – If the plan is signed by the owners of at least 75% of lots (excluding utility lots), a meeting of the owners corporation will be called to authorise an application to the Land and Environment Court.
- **Review by the Land and Environment Court** – the Court will check that the process has been followed properly and must be satisfied that the terms of any settlement are just and equitable in all the circumstances.

5. Are the key steps and safeguards imposed by the legislation still appropriate, or are these too complex or costly? Should any of these steps be changed?
6. Is the information required to be included in the strata renewal plan enough, or should the legislation require more information? If so, what information should be required for owners to properly assess a strata renewal proposal?
7. Are the timeframes in the strata renewal process reasonable, or should any of these be adjusted?
8. Are other improvements needed to the strata renewal process? Why?

Compensation

All lot owners in a collective sale, and dissenting owners in a strata renewal, must receive a minimum payout under the well-established principles of just terms compensation provided for under the *Land Acquisition (Just Terms Compensation) Act 1991*. This means at least the market value of their lot, plus compensation for related matters like legal fees and any disadvantage caused by relocation.

Compensation will differ depending on the use to which the lot has been put, and commercial lot owners will have differing expectations to residential lot owners, and owner-occupiers.

The legislation envisages that leases will be terminated in accordance with their terms (sections 184, 185). A lot owner's responsibility to pay out a tenant will be a financial cost attributable to the sale and included in the compensation value an owner receives. However, stakeholders have identified complexities in commercial leasing arrangements, particularly where there is a long-term tenant. In these cases, the owner's liability to the long-term tenant may not easily be determined at the time the strata renewal proceedings are determined by a court, leaving the lot owner exposed to additional costs and on an unequal footing to other owners in the scheme.

9. Should the legislation distinguish between residential and commercial strata owners in the strata renewal process? If so, should the Development Act provide additional protections for commercial lot owners?

10. Should tenants have more involvement in the renewal process, other than being notified that a strata renewal plan has been developed, for which court approval is being sought (section 178)?

11. Should the Development Act provide more guidance for treatment of leases in strata renewal proceedings?

12. Is more guidance needed on how compensation applies to lot owners and their tenants? Who should be responsible for paying compensation to the tenant?

Limited take-up of renewal process

Since the introduction of the new regime in November 2016, only 11 strata schemes have notified the Registrar General that they have received the required level of support for a renewal proposal (75%). Of those, three applications were filed with the Land and Environment Court for approval but were withdrawn before an order was made.

Only one scheme has had its renewal plan (for collective sale of the building) approved by the Court. This decision is discussed below.

Despite the relatively low take-up of strata renewals, there has been a significant increase in the number of administrative terminations lodged with the Registrar General, which require the unanimous support of all owners. Accordingly, the strata renewal process does appear to be encouraging strata owners to settle. Over the past four financial years, there has been a steady rise in the number of terminated strata schemes, averaging approximately 74 per year, compared to 54 in the 2015-16 financial year and only two in 2012-13.

13. How successful has the strata renewal process been in encouraging owners to consider collective sale/redevelopment options?

14. Are the provisions encouraging parties to settle in a positive manner, or only to avoid protracted disputes?

15. What alternative methods are being pursued to achieve collective sales (eg, options, interdependent deeds of sale)? How effective are these alternative methods?

Strata renewal case studies

Sydney CBD collective sale

In August 2019, the Land and Environment Court approved the first strata renewal plan for the collective sale of a 159 lot strata scheme in the Sydney CBD.

The scheme included 119 serviced apartments over 19 floors, a café and four levels of basement parking. The lot owners were investors, many living outside Australia. Although not all owners agreed to the strata renewal plan, the plan for a collective sale was supported by the owners of at least 75% of lots, satisfying the required level of support in the legislation.

Even though none of the non-consenting owners sought to appear in proceedings, the Court was still required to examine each step in the renewal process to ensure strict compliance with the legislative regime, and the judgment considered the procedural steps at length.

The application overcame logistical difficulties involved in serving documentation on more than 100 owners, many of whom were overseas. The Court made ancillary orders relating to the reallocation of unit entitlements and was satisfied that the proposed distribution of sale proceeds under the renewal plan was not less than the compensation value of each lot. In approving the plan, the Court found that the terms of settlement were just and equitable in the circumstances.

This decision sets an important precedent for strata owners, demonstrating the ability of the strata renewal regime to balance the interests of both supporting and dissenting owners in achieving a positive outcome.

Macquarie Park – unsuccessful renewal

The safeguards built into the process were introduced to ensure that dissenting owners, particularly those individual homeowners who may be vulnerable to financial distress or displacement, were adequately protected. However, it is important to note that not all dissenting owners will be vulnerable, and some may have commercial interests that guide their actions in objecting to a renewal proposal. A recent unsuccessful renewal case has highlighted the potential for rival developers to manipulate the protections to prevent the success of a proposed renewal process.

This case involved a proposal for the collective sale of two residential schemes at Macquarie Park – a 21-lot scheme and a 24-lot scheme, both built in the 1970s. The dissenting owner, who was another developer, was able to disrupt the process and draw out legal proceedings, incurring considerable costs which were ultimately borne by the owners corporation.

While the renewal process imposes obligations on the applicant to act in good faith and disclose conflicts of interest, the legislation does not impose the same obligations on the dissenting owners. Further, section 188 of the Development Act includes a presumption that the reasonable costs of a dissenting owner will be paid by the owners corporation. This section gives no guidance to a court in considering what might constitute 'reasonable' costs, or how to deal with dissenting owners who provide unjustified or frivolous objections.

The owners corporation was ultimately forced to withdraw its application for the Court to approve the strata renewal plan and the winning developer abandoned its proposal to purchase the scheme. With rival developers continuing to hold lots in the scheme, this proposal is at a standstill and the schemes' future is uncertain.

Even if the owners could agree on a proposal, once a strata renewal plan lapses, the same strata renewal proposal (or another proposal substantially similar) cannot be resubmitted to the strata committee until at least 12 months after the lapsing of the proposal (section 190).

16. Should the current requirement to act in good faith and to disclose conflicts of interest extend to dissenting owners? Should the court be required to consider these aspects in relation to an *objection* to a strata renewal plan, as well as to the application?

17. Should section 188 be expanded to provide more guidance to the court in relation to matters to be considered when making a costs order? How should the legislation deal with a dissenting owner who presses an objection on unmeritorious grounds? Should the dissenting owner be required to bear some or all of its costs?

18. Section 180 lists those who may lodge an objection to an application to the Land and Environment Court. Should an objecting party be required to disclose if they have or have had any further interests in the court proceedings? Should the same apply for those who may be joined as a party to the proceedings (section 181(6))?

19. Are the lapsing provisions in section 190 of the Development Act effective, and should any changes be made? Are there any circumstances in which it should be possible to resubmit a lapsed strata renewal plan within the 12 month period?

Part-strata developments: mixed-use and layered schemes

Strata management statements and building management committees

Strata management statements and easements relating to part strata parcels

Mixed-use developments typically involve a combination of separately titled, multiple uses such as residential, commercial and retail in a single building. To accommodate the conflicting needs of the various occupants, the building can be subdivided horizontally into stratum lots, each of which can then be sold, leased, mortgaged or further subdivided by a strata scheme. The Development Act permits registration of a strata plan that divides only part of a building into lots and common property – a 'part-strata parcel' (see section 9(1)(b)).

While the individual strata schemes within such a building are governed by the Management Act, the other, non-strata parts of the building, and the interactions between the various interests, are not governed by strata legislation.

Part 6 of the Development Act addresses this gap by requiring that all part strata developments have a strata management statement in place and registered on title to each of the stratum lots in the building. Where there is an existing building management statement created under the *Conveyancing Act 1919,* this may be taken to be a strata management statement if it complies with requirements for strata as per section 108 of the Development Act.

20. Are management statements effective in regulating mixed-use developments and setting out interested parties' rights and obligations? If not, why not, and how could the legislation be improved?

21. Are there circumstances where a strata management statement should not be required (for example, where the commercial lot area is relatively small, compared to the residential strata scheme)? If so, how could the various interests in the building be effectively managed without a management statement?

Requirements for strata management statements

The management statement operates as a contract under seal binding the owners corporation of the strata scheme/s and the owners, lessees and mortgagees from time to time of each of non-strata parts of the building. Each party jointly and severally agrees to carry out their obligations under the statement and permit others to carry out those obligations.

Schedule 4 of the Development Act prescribes the information that must be set out in the management statement, including:

- the establishment of a building management committee and its functions
- how the statement can be amended
- arrangements for settling disputes
- the fair allocation of costs for shared expenses and the method used to apportion those costs and expenses
- a review process for the allocation of costs, to occur at least every five years.

Schedule 4 sets out other matters that *may* be included in the management statement, which include the power to appoint a managing agent and to enter into service contracts. These optional matters are subject to the negotiation of the parties preparing the statement and are otherwise unregulated. This means that management statements can vary from building to building and may include unfair terms. Commonly, it is the original developers who negotiate and agree to the terms of the management statement, and who consequently have a critical role in setting the obligations of the future owners of the various lots.

22. Are the matters set out in Schedule 4 for inclusion in the strata management statement sufficient? If not, what other matters should be prescribed and why?

23. Should the legislation require the management statement to balance the rights of various lot owners? How could this be achieved?

Building management committees and conflicts of interest

A strata management statement must provide for the establishment of a building management committee. The role of the committee is to make decisions about the management of the building, including administering the shared facilities.

The committee comprises one representative from each of the component uses in the building. Where the building includes a strata plan, the owners corporation will have one representative on the committee.

The building management committee is effectively an agent for the owners of the component uses for contract purposes, rather than a separate legal entity.
As the committee negotiates contracts on behalf of each component lot owner, difficulties may arise when new lot owners become members of the committee, requiring deeds of novation to be executed to continue the contractual relationship.

The committee's duties and obligations are governed by the terms of their own management statement rather than legislation. Some stakeholders are concerned that this is encouraging poor outcomes, particularly that decisions are being made in favour of commercial lot owners than the residential owners corporations.

The building management committee may appoint a strata managing agent to carry out its functions if authorised to do so by the strata management statement. In these

circumstances, the agency is governed by the management statement and the underlying agency agreement, rather than the provisions of the Management Act. As a result, there may be no controls on the term of the appointment as would otherwise apply under the Management Act.

Where the agent for the building management committee is also the managing agent for a strata scheme within the building, there is a potential conflict of interest. The agent will be acting for two parties, on different terms.

Stakeholders have provided feedback that conflicts of interest are an ongoing challenge in mixed-use schemes. Anecdotal reports suggest developers who retain non-strata lots can retain management control of the building by holding a majority voting power. This exposes the potential for developers to negotiate contracts on behalf of the management committee with related entities and bind the various owners to long term contracts that would otherwise be restricted under the terms of the Management Act.

24. What improvements could be made to the governance of building management committees and their meeting processes?

25. What measures could be implemented to reduce conflicts of interest and unfair contracting in mixed-use schemes?

26. Should existing contracts negotiated by the building management committee automatically apply to new lot owners as they join the committee? How can the legislation be improved to deal with this issue?

27. Should there be limits on how long managing agents are appointed for by the building management committee? Should this apply to other types of contract? What would be a reasonable restriction?

28. Should a duty of good faith be imposed on strata managers and building management committees?

Shared facilities

Shared facilities are central to mixed-use schemes. While not defined in the legislation, these commonly include areas like car parks, fire stairs and safety systems, loading docks, entrances and exits, lifts and air conditioning systems that service the building as a whole, rather than one particular owner.

Typically, shared facilities are physically located within one of the component use areas of the building, while being utilised by the other parts of the building. In some instances, areas of strata common property are deemed to be shared facilities, so that an owners corporation must allow commercial lot owners access to parts of the strata common property. This may extend to public access, depending on the nature of the building.

It is necessary to ensure the shared facilities are available and properly maintained, and the associated costs are shared fairly between those who use them.

The legislation does not specifically apportion responsibility for maintenance and repair of shared facilities – this is governed by the management statement. However, the 2015 reforms imposed a requirement for the management statement to provide for the fair allocation of the costs of shared expenses relating to parts of the building. The management statement must also set out details of the method used to apportion those costs of shared expenses, as well as a review process to ensure that the allocation of those costs remains fair over time.

The new requirements apply to management statements lodged *after* the commencement of the legislation, not to those in already in place. As a result, there are some owners whose contributions towards shared facilities do not align with their use of those facilities because they are governed by management statements created under the former legislation.

29. Should the requirement for management statements to provide for the fair allocation of shared expenses and the obligation to review that allocation, apply retrospectively to schemes registered prior to the commencement of the reforms (November 2016)? If not, why not?

30. What other improvements, if any, could be made in relation to responsibility for shared facilities and why?

Expense allocation and voting rights

Initial stakeholder consultation has also revealed ongoing concerns about the fair allocation of maintenance costs for shared facilities, often arising from an inequality in voting rights.

While the management statement must provide for the fair allocation of shared expenses, there is no requirement in the legislation that voting rights be tied to expense allocations for shared facilities.

Voting rights are determined by the management statement. The Development Act implies several provisions into a management statement, including that the decision of a majority of the members present and voting at a meeting of the committee, is the decision of the committee. Other implied provisions relate to notice and quorums at meetings, and the requirement for the building management committee to meet at least once a year. While these provisions are implied by Schedule 4, the management statement may still provide otherwise.

There is no requirement for the management statement to balance the rights of the various types of lot owners in the scheme, with the result that some allocations are unfairly tipped in favour of the commercial owners. Residential owners corporations have reported having to pay significant contributions towards shared facilities that the residential owners do not use – or that they use to a lesser degree than the other component uses in the building.

Where a management statement allows for only one vote per strata plan or part strata parcel, a commercial lot owner may have control over decision-making. Anecdotal reports suggest that this inequality of voting rights between commercial

and residential owners may be producing some unfair outcomes, especially where the residential strata scheme bears the greater responsibility toward the costs of shared facilities. If commercial lot owners have majority voting power, they can choose the service provider contract (even if conflicts of interest are disclosed). Residential lot owners may have insufficient voting power to stop this.

Similarly, where the developer retains lots in the building, the developer can effectively maintain management control over the building where that developer (or their related entity) retains majority voting power. Some stakeholders have described situations in which strata management statements provide for commercial lot owners to have controlling voting rights over decisions about all shared facilities and of those rights being misused.

Some stakeholders have further suggested that the Government move to provide residential lot owners with rights and protections similar to those set out in the Management Act, but require fair decision making in relation to matters that relate to retail and commercial lots. This could be done by placing similar caps on service contracts like those provided for under the Management Act – for example, maximum 12 months initial terms for service contracts and three-year maximum contract terms thereafter.

A comparison of the regulation of mixed-use developments between the states is difficult as the legislative model of each state varies. Victoria and Queensland have Regulation Modules for various strata scheme types that distinguish between the size and use of the scheme. South Australia also distinguishes between the size of schemes in terms of governance, where complex schemes that involve mixed development have separate primary and tertiary corporations for primary and tertiary lots. Queensland has legislated a code of conduct for committee voting members, and the committee is obliged to put into effect the lawful decision of the body corporate.

In response to concerns of conflicting commercial and residential interests, and a forecasted increase in mixed-use developments, the Australian Capital Territory is introducing additional requirements for mixed-use unit (strata lot) plans. This change will include the requirement for the executive (strata) committee of the owners corporation to, if feasible, include at least one member who is an owner of a unit that is for residential use only and at least one member who is an owner of a unit that is for non-residential use.

31. Should voting rights be aligned to the relative contribution of building management committee members to the cost of the shared facilities, instead of being determined by the management statement? Are there any other alternative methods of allocating voting rights that could be implemented?

32. What improvements can be made to the legislation that balance the interests of commercial and residential lot owners in a mixed-use development, while ensuring fair decision-making?

33. What changes would provide fairer outcomes where strata management statements are in place? Should owners corporations be provided with rights and protections like those in the Management Act – for example, by placing limits on service contract terms?

Dispute resolution

Some stakeholders have reported concerns about the lack of legislative guidance about dispute resolution and remedies for conflicts relating to building management committee matters. The legislation requires the management statement to provide for the settlement of disputes, or the rectification of complaints, about the management of the building or its site, but does not prescribe a particular process or avenue for review.

It is the management statement that governs the way in which parties must resolve a dispute and determines the final arbiter of those issues. Residential owners have reported having very little protection under current laws.

34. How can dispute resolution be better managed in mixed-use developments, balancing the needs of commercial and residential property owners?

35. What, if any, legislative protection is needed for residential owners in the rectification of complaints?

Valuation of Unit Entitlements

Requirements for schedules of unit entitlement

Staged development

The schedule of unit entitlement sets the basis for the apportionment of contributions and voting rights within the scheme.

Prior to the 2015 reforms, each lot was given a unit entitlement based on the developer's estimate of the market value of that lot at that time.
This was open to manipulation and resulted disproportionate allocations that did not accurately reflect the relative values and sizes of each unit.

To remedy this inequality, the Development Act introduced a requirement for unit entitlements to be determined by a qualified valuer on a market value basis, as set out in Schedule 2. This change was intended to provide an impartial allocation of unit entitlements, and a fairer basis for assessing levies.

Impact on strata plans of subdivision

Where lots are subdivided after the scheme has been established, a strata plan of subdivision must be accompanied by a revised schedule of unit entitlement determined by a qualified valuer.

Where there is no common property involved in the subdivision, only the newly subdivided lots need to be valued. However, where the strata plan of subdivision will create or subdivide common property, all lots in the scheme need to be revalued. This is because the relationship between all lots will potentially have changed, and the extent of the change is a matter of degree, to be determined by the valuer.

Some stakeholders have raised concerns about the costs involved in obtaining valuations to revise unit entitlements. In some cases, this may involve the valuer inspecting every lot in the scheme, which can be an expensive process (particularly for large scale strata schemes).

Other feedback suggests that a valuation of all strata lots may not make sense in certain circumstances. For example, if an owner wants to swap a private car space with a common property parking space, a valuation of all lots would be needed as this proposal involves common property. If this involved a 70-lot scheme, the costs of the valuation could outweigh the value of the parking space.

The lack of owner input in those valuations has also been identified as an issue. Owners who are unaffected by the strata plan of subdivision have no right to object to changed unit entitlements, except when the owners corporation considers the resolution to approve it. Some stakeholders are concerned that registration of a strata plan of subdivision could be delayed if owners with changed unit entitlements (but unaffected by the subdivision) do not agree to the proposed change in unit entitlements.

36. Has the requirement for a qualified valuer's certificate to determine unit entitlements resulted in fairer apportionment of contributions? Could this process be improved?

37. Are unit entitlement valuations too costly for the scheme? If so, what other ways could unit entitlements be calculated that is fair to all owners?

38. Should owners have a right to object to a proposal to change unit entitlements without the passing of a resolution, even if they are unaffected by a strata plan of subdivision?

39. Should the legislation provide an exception to the requirement for a valuation of all lots in the scheme in any circumstances? If so, what would those exceptions be? What is the alternative proposed method of altering the unit entitlements in those situations?

40. Should there be guidance for valuers in assessing strata plan unit entitlement valuations? If so, what guidance is required?

Strata Schemes Management Act 2015

Objects of the Act

One of the purposes of this review is to assess whether the policy objectives of the Management Act remain appropriate and whether the terms of the Act remain effective for achieving those objectives.

The introduction of this paper outlined 10 distinct policy objectives of the 2015 reforms and that those policy objectives are the yardstick by which the performance of the Management Act will be measured.

Section 3 of the Act also contains the objects of the Management Act, which are broad overarching principles that guide how the Act should operate.

The objects of the Act are to:

1. provide for the management of strata schemes, and
2. to provide for the resolution of disputes arising from strata schemes.

All 10 policy objectives of the 2015 reforms can satisfy either one of the two objects above. While the 10 policy objectives are not written into the Act itself, it is important to consider the merits of adding those sorts of objectives – or others – to section 3 of the Act.

41. Do the objects of the Act remain appropriate? Should further policy objectives such as those that guided the 2015 reforms be added to section 3 of the Management Act?

Managing the Scheme

Strata Committees and Meetings of the Owners Corporation

Strata committees

Role and size of committees

Strata committees are essential to the effective management of owners corporations. Under section 36 of the Act, the committee's functions are to make decisions on behalf of the owners corporation, except for matters that require a special or unanimous resolution. The committee is accountable to the owners corporation and the committee's decisions can be overturned by resolution at a general meeting.

There can be confusion among strata schemes about the powers that are automatically given to the committee, versus what powers need to be conferred on the committee by general resolution. For example, during the COVID-19 health crisis, some owners corporations were uncertain about the powers of their committee, including whether they alone could decide to close the pool or gym.

To help improve accountability, the Act requires the appointment of a chairperson, treasurer and secretary with their responsibilities detailed in sections 42 to 44.

Section 30 allows the owners corporation to establish a committee of up to nine members, and large strata schemes (100 or more lots) must have at least three members. The size limits are meant to prevent the committee from becoming unwieldy while also recognising the increased workload in large schemes. This complexity of work in large schemes suggests that perhaps larger committees should be allowed in those cases.

42. How well do you think the functions of the committee and office holders have been working?

43. Committees can be up to 9 people. Is this size limit working?

Duty and liability of committee members

Committee members are elected by the lot owners of the scheme, are almost always unpaid volunteers and the law does not require that they have any particular expertise in managing a strata scheme. However, the Act does set duties and standards of behaviour expected of committee members.

Under section 37, committee members have a duty to carry out their functions as far as practicable for the benefit of the owners corporation with due care and diligence. Importantly, section 260 provides that committee members are protected from personal liability if they act in good faith and for the purpose of executing a function under the Act.

Other Australian jurisdictions have taken different approaches to ensure committee members remain accountable. Queensland has a mandatory code of practice under Schedule 1A to the *Body Corporate and Community Management Act 1997* (Qld). The code of practice legislates grounds for removing committee members including failing to act honestly, fairly and with confidentiality, or not acting in the interests of the owners corporation.

44. Under the law, strata committee members have a duty to act in the best interests of the owners corporation and with due care and diligence. How well is this working?

45. Are there any other measures that would improve accountability of strata committees? For example, by adopting a mandatory code of conduct as in Queensland.

Eligibility for election and removal

Under section 31, lot owners and company nominees can be elected or appointed to the committee. Section 32 excludes certain persons from being appointed due to conflicts of interest, including building managers, people acting as agents for the leasing out any of the lots, and persons with connections to the developer that they fail to disclose.

Some stakeholders have indicated that the restrictions in section 32 may not go far enough, while others believe they are too strict and may prohibit some people who should be allowed to serve on the committee.

Sections 35 and 45 give the owners corporation the power to remove office holders and committee members from their position by passing a special resolution. The Act, however, is silent on the reasons or grounds for removal, as they could be many and various.

46. How well are the eligibility requirements for election to the committee working? How could they be improved?

47. Are clear grounds for removing committee members and office holders needed? If so, what should they be?

Meeting procedures

Meeting procedures of both owners corporations and strata committees have the force of law. Clear and legally binding rules create consistency and empower democratic decision-making by relying on easy to find rules.

Flexibility to change procedures – the COVID-19 lessons

The 2015 reforms streamlined and simplified meeting procedures while maintaining a format that was familiar to the strata community. The procedures are largely contained in Schedules 1 and 2 to the Management Act, with some additional provisions in the *Strata Schemes Management Regulation 2016* (the Management Regulation).

The COVID-19 health crisis in 2020 showed that some meeting procedures required by the Management Act are impractical and not flexible enough to changing circumstances. Having certain elements of the law contained in the Management Regulation would allow it to be changed more quickly as needed. The pandemic experience suggests that having meeting procedures in the Management Regulation rather than the Management Act would be beneficial.

Holding meetings and providing notice

The Act requires that adequate notice be provided to lot owners prior to a meeting so that they can attend and vote. There are three kinds of meetings:

- First annual general meeting – held when the developer hands control over to the owners corporation.
- Annual general meetings (AGM) – must be held once in each financial year.
- General meetings – can be held at any time during the year as needed.

<u>Agendas</u>
The Act sets out the items that must be included on the agenda of the first AGM, AGMs, and general meetings.

The first AGM is the meeting where the developer officially hands control of the owners corporation to the lot owners. The Act therefore requires several items in section 15 be considered at this meeting, such as the setting of levies and receiving the plans of the building.

Quorum
For meetings to be valid it must have quorum, which is a minimum number of people in attendance. These minimums are set out in clause 17 of Schedule 1 and clause 23 of Schedule 2.

Resolutions
Decisions of the owners corporation are made by passing resolutions. The Act requires different voting thresholds depending on the significance of the decision being made.

There are three types of resolutions:

1. **Resolutions** ('ordinary resolutions') – which are passed by a simple majority (ie, 50% plus 1) of those present and entitled to vote.
2. **Special resolutions** – where not more than 25% of the votes cast, as calculated by unit entitlement, are against. Effectively, this means that 75% of the votes cast by unit entitlement must be in favour of the motion.
3. **Unanimous resolutions** – no votes must be cast against.

Note: the Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020, currently before NSW Parliament, contains a fourth type of resolution called a sustainability infrastructure resolution. If passed, this type of resolution will require at least 50% of the unit entitlements to vote in favour.

48. How have the meeting procedures been operating and are any changes needed? If so, what changes?

49. Should the meeting procedures be moved from the Management Act to the Management Regulation so they can be changed more easily? Should any parts remain in the Management Act and, if so, why?

Meetings and voting

Electronic meetings and voting

The 2015 reforms aimed to empower strata schemes to be flexible and future oriented by allowing owners corporations to hold meetings and to vote on resolutions electronically.

The types of technologies allowed to be used are outlined in the Management Regulation and include teleconferencing, video conferencing, email or any other electronic means that allow participation remotely. Strata committees could also hold a so-called paper meeting by voting in writing, which includes email or by other electronic means. But to use these methods, owners corporations must first pass a general resolution specifically adopting them for their scheme.

The COVID-19 health crisis showed that electronic voting laws are not as flexible as desired. The need for a resolution to have been passed authorising electronic meetings and voting left many schemes unable to function during the pandemic.

In May 2020, the NSW Parliament passed emergency legislation empowering the NSW Government to temporarily allow all strata schemes to be able to meet and vote electronically. To help protect against lot owners being disenfranchised the Government imposed a condition that secretary of the scheme had to take reasonable steps to ensure that lot owners were able to participate in the meeting.

Stakeholders have suggested that the law could allow schemes to meet in person or electronically without requiring an authorising resolution be first passed. If the Government adopted this approach, it needs to be clear who would make decisions on methods of voting. Additional protections may also be needed to prevent disenfranchisement.

50. Should the law be changed to permanently allow electronic voting in all circumstances without the need to first pass a resolution? If so, are additional protections for lot owners needed?

51. Are there other alternative methods for electronic meetings and voting that should be considered?

Methods of voting

Voting is most commonly done by a show of hands. Other methods of voting include polls, secret ballots, and different types of electronic and pre-meeting voting.

Polls can be called by a person present and entitled to vote at a meeting and are used to gauge opinion without a formal vote. A secret ballot can be used on a motion or an election if the committee decides it should be by secret ballot or at least one-quarter of those entitled to vote agree to the ballot.

The Management Regulation allows for teleconferencing, video-conferencing, email or other electronic means of voting and allows for pre-meeting electronic voting.

These methods of voting provide flexibility to owners corporations and options to protect voters where there are concerns about undue influence on votes. However, these methods do not allow for simpler options such as a mail-in ballot. These kinds of options could be valuable for owners with inadequate access to technology.

52. How well have the different ways (teleconferencing, email etc) of voting been working? Are any changes needed? If so, what changes and why?

Proxies

Owners who are unable to attend a meeting can delegate their voting rights to another person to act as their proxy. This helps ensure that a person can exercise their right to vote and helps the owners corporation to continue to operate.

Proxies have a history of being misused when they are 'farmed' or 'harvested' to obtain a controlling number of votes. This can occur where owners are absent or don't have the time or interest in the management of the owners corporation. Proxy farming subverts the democracy of the strata scheme by allowing an individual or small group of persons to skew votes for their own benefit.

The 2015 reforms placed a cap on the number of proxies that can be held, with the aim of curtailing proxy farming. In schemes with 20 lots or less only one proxy can be held, while in schemes of more than 20 lots a person can hold proxies for up to 5% of total lots.

The Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020 proposes that an owner of multiple lots should be allowed to appoint a single proxy for all their lots.

Feedback to date indicates the caps have been largely successful, however some owners appear to be finding ways around them. Examples include the use of company nominees and by appointing a person with power of attorney.

The Government is also interested in the future of proxies as it originates from a time when this was the only way for an absent owner to vote. However, with the possibility of electronic and other forms of voting becoming more prevalent, proxies may no longer be needed.

53. How well are the limits on proxies working and are any changes needed? If so, what changes?

Improving tenant participation

The large numbers of tenants residing in strata schemes saw the 2015 reforms seek to encourage greater tenant participation in the running of owners corporations. Tenants can be long term members of strata communities and have an interest in how the building is run but previously had no role under strata law.

Tenant representatives on the strata committee

Section 33 of the Management Act provides for the position of a tenant representative, who is nominated to the committee to represent tenant interests. A tenant representative can be nominated when at least half of the lots in the scheme are occupied by tenants and tenancy notices for these lots have been issued to the owners corporation.

A tenant representative cannot vote or move resolutions, hold office or count in determining quorum. The committee can also determine that a tenant representative

is not entitled to be present during discussions and votes on financial matters and strata renewals.

The Act sets the threshold for schemes to have a tenant representative relatively high and this may be preventing their uptake. Preliminary consultation suggests that the lack of voting power means the representative does not provide meaningful representation for tenants.

Tenant involvement in general meetings

Notice of meetings must be provided to tenants at least 7 days prior to the meeting date and include the agenda and any other documents relating to the meeting. Tenants may attend a meeting if they have received this notice but cannot vote unless they hold a proxy. A tenant cannot address a meeting unless authorised to do so by resolution. Tenants can always be excluded from those parts of meetings concerning financial matters or a strata renewal process.

54. How well is tenant participation working? How could tenant participation be improved?

Strata Managing Agents

Part 4 of the Act regulates the roles and responsibilities of strata managing agents and governs their relationship with the owners corporation they represent. Under the *Property and Stock Agents Act 2002* (NSW) (the Property and Stock Agents Act), a managing agent is a person who is appointed by the owners corporation of a strata scheme to exercise any of its functions.

The nature of the relationship between the managing agent and the owners corporation is a business contract. The agent is charged with undertaking the functions delegated to them and must perform those functions in the best interests of the owners corporation at all times.

Managing agents play a vital role in the management and function of strata schemes in NSW. Managing agents make life easier for the parties in a strata scheme by centralising management of the common interests of the owners and handling the important matters of the owners corporation in an appropriate manner. It is also the role of the managing agent to ensure the scheme is compliant with NSW legislation.

Appointment of strata managing agents

Managing agents are appointed by the owners corporation by way of a formal vote at the annual general meeting. The appointment of the strata managing agent must be made by instrument in writing authorised by an ordinary resolution at the AGM.

The 2015 reforms introduced new controls on the appointment of managing agents.

Under section 50, a managing agent can only be appointed for twelve months if they are appointed at the first AGM. In any other case, they can be appointed for up to three years. The term of appointment may be extended for successive periods of three months after it would have ordinarily expired but cannot be extended past the date of the next AGM, at which the owners corporation must formally vote on the appointment of the managing agent.

If the agent is appointed for a term of three years, they have an automatic option to extend their term of appointment for up to three months if the owners corporation has not elected to reappoint them for another term.

The Management Act provides strict notice requirements for the termination of a managing agent's term of appointment. The agent must give at least three months' written notice before the end of the term of their appointment, and at least one month's notice before the end of each extension of a term.

The Management Act introduced a prohibition on developers or persons that are connected to the developer of the strata scheme from being appointed as the managing agent. Section 49(3) provides that such a person is prohibited from being appointed for a strata scheme for a period of 10 years from the date of the commencement of the scheme.

Preliminary research and consultation in 2020 revealed the following concerns and suggestions among stakeholders about the law on appointing managing agents.

- **Extend the initial appointment from 12 to 15 months**
  In many cases, the initial appointment of the managing agent at the first AGM is extended for three months beyond the initial twelve-month period.
  Some have argued that the 12-month limitation period for the initial appointment of a managing agent should be extended to 15.

- **Notice period for end of managing agents contract**
  Section 50 of the Management Act requires managing agents to notify the owners corporation at least three months before the end of their appointment. The Government has received complaints of managing agents giving notice in the fine print of their agreement or via letter or email at the time of their appointment. While this technically complies with section 50, the intention of section 50 is to remind the owners corporation that they have three months to organise a new agreement for the managing agent. One option would be to amend section 50 to require 'no more than three months' notice' from the managing agent.

- **The developer should present the owners corporation with a choice of three potential managing agents at the first AGM**
  This would bolster the conflict of interest reforms introduced in 2015.

- **Allow a strata managing agent to manage a scheme they have developed**
  Section 49(3) of the Management Act fails to account for some situations that may arise in the event that a managing agent develops a strata building for

investment purposes and retains all lots in the strata plan either in their superannuation fund or on trust for a period of more than 10 years. In this hypothetical scenario, the agent would be precluded from managing their own strata scheme.

- **Standard form agreements used by many managing agents**
  These may contain unfair contract terms, with owners corporations perhaps not realising that the terms of the agreement are negotiable. Stakeholders have suggested the Government amend the legislation to restrict or prohibit certain contract terms on the basis they are unfair.

55. Are the current durations of appointment and termination notice periods for strata managing agents appropriate? If not, how should they be changed?

56. Do you think the developer should have to present the owners corporation with a choice of three managing agents at the first annual general meeting?

57. A developer or someone connected with them can't manage a strata scheme in its first 10 years. Is this appropriate? Please tell us why.

58. Do you think a standard form strata managing agent agreement should be included in the legislation? If so, why?

59. Should the law require strata schemes of a certain size to be professionally managed?

Minimising conflicts of interest

The 2015 reforms directly addressed long-held concerns about potential conflicts of interest that agents may have.

Section 71 of the Management Act requires the disclosure of any interests to the owners corporation, including any connection the agent may have to the original owner of the scheme and any direct or indirect pecuniary interest in the strata scheme.

The Management Act also regulates the procurement of services, gifts, benefits and commissions to prevent the potential inducement of the managing agent to act other than in the best interests of the owners corporation. Section 57(2) and (3) prohibits an agent from accepting gifts or benefits with a value greater than $60 – the same threshold as in the *Electoral Funding Act 2018.*

The 2015 strata reforms on gifts and benefits were extended in March 2020 to all other agents regulated under the Property and Stock Agents Act.

At each AGM, the managing agent must also declare whether commissions or training services have been provided or paid to them over the previous 12 months.

The agent must also report whether they expect to receive commissions or training services in the following 12 months and must report to the owners corporation as soon as they become aware of a discrepancy in the commissions or benefits they have reported.

The rules of conduct under the Property and Stock Agents Act also prohibit the managing agent from falsely representing that they do not have a connection to a service provider that they have referred to the owners corporation.

The Government has received queries from stakeholders asking whether the threshold on gifts received applies to an individual agent, or the whole agency business. It has also been suggested that agents have trouble adhering to the prohibition because it is difficult to know the exact value of a gift without documentation or proof of purchase price.

It has also been noted that current controls to mitigate conflicts of interest do not apply to service providers engaged by owners corporations and suggested that these controls should be strengthened.

Suggestions for additional reforms to the Management Act to further mitigate conflicts of interest include:

- **General duty of care**
  This would be a general duty to take reasonable steps to ensure that any goods or services procured by the managing agent on behalf of the owners corporation are procured at competitive prices and on competitive terms.

- **General duty of disclosure**
  This would require disclosure of any interest in, or potential commissions or benefits the managing agent might receive, in relation to a service that the owners corporations intends to contract for, before the contract is entered into.

60. Are the current conflict of interest laws working? If not, how should the laws be changed?

61. Are the provisions of the Management Act relating to gifts and commissions easy to understand?

62. Should there be a general duty of care in the laws to ensure managing agents obtain goods or services at competitive prices?

63. Should the rules be tightened on disclosure of conflicts of interest for owners corporation contracts?

Functions of strata managing agents

One of the key functions of the Management Act is to empower owners corporations to make decisions about their strata scheme and to be able to delegate the authority to make decisions to a managing agent.

Due to the sensitive nature of delegating authority, the Management Act contains voting and record-keeping requirements for delegations. The owners corporation may only delegate functions if agreed to by resolution at a general meeting. The delegations must be recorded in an instrument and may be revoked by or varied at any time if authorised by a resolution of the owners corporation.

The Management Act restricts the types of matters that can be delegated. Owners corporations cannot delegate the power to make delegations, the power to make decisions that the owners corporation is required by law to make, or a determination relating to the levying or payment of contributions.

Under the Management Act, a function that is exercised by the managing agent on delegation is taken to be an action that has been performed by the owners corporation itself.

The 2015 reforms introduced new accountability rules for managing agents.

Section 55 requires the managing agent to record the manner and function in which they exercise a delegation. A copy of the records kept for the preceding 12 months must be provided to the owners corporation at least once per year.

The Management Act also contains offence provisions where a managing agent fails to exercise a delegated duty. Section 57 provides that if a managing agent has been delegated a function and then breaches a duty that has been delegated and this would be an offence if committed by the owners corporation, the agent is guilty of an offence for any breach of the duty by the agent while the delegation remains in force.

It has been suggested that section 57 should be amended to include a defence to a prosecution for a breach by managing agents who are unable to carry out a duty in circumstances where the owners corporation has refused to release funds that have been levied and are necessary for the duty to be carried out.

64. The managing agent must follow certain rules when they make a decision for the owners corporation. Are these rules appropriate? If not, how can they be improved?

65. Owners corporations have duties and functions that can be delegated to managing agents (section 57 of the Management Act). If the agent breaches their duties, they will have committed an offence. How well is this working?

66. Do you have personal experience of managing agents being prevented from carrying out their duties because of disputes with the owners corporation? If yes, please describe your experience.

Accountability of strata managing agents

The 2015 reforms strengthened the position of owners corporations in terms of obtaining information from the managing agent about the day to day management of their scheme. Sections 58 and 59 of the Management Act require the managing agent to provide certain information about the trust account that they operate for the owners corporation, while section 61 sets out the procedure the owners corporation must follow to obtain information from the managing agent.

67. In your experience, are the laws to keep managing agents accountable working well? If not, how can they be improved?

68. Is the law clear on what information the owners corporation is allowed to request from the managing agent and how they get it? If not, please tell us why.

Licensing, education and rules of conduct

The Property and Stock Agents Act sets out the eligibility requirements for obtaining a strata managing agent's licence, including education and experience.

To obtain a certificate of registration and begin working as an assistant strata managing agent, completion of at least seven units of competency from a Certificate IV in Strata Community Management is required. To obtain a licence, completion of the whole Certificate IV is required, as well as at least 12 months experience as an assistant agent.

Licensed agents and are also required to undertake prescribed Continuing Professional Development (CPD) each year to remain eligible to hold a licence.

The *Property and Stock Agents Regulation 2014* (the Property and Stock Agents Regulation) also contains rules of conduct that apply to all property agents in NSW, and specific rules of conduct that apply only to strata managing agents. These rules of conduct have the force of law, with penalties for non-compliance.

The general rules of conduct for all agents include:

- knowledge and understanding of the Property and Stock Agents Act and the Management Act
- compliance with fiduciary obligations as an agent
- acting with honesty integrity and professionalism, and due skill, care and diligence,
- acting in the client's best interest – which for a managing agent is the owners corporation
- maintaining confidentiality
- acting in accordance with their client's instructions
- complying with rules on conflicts of interest, and

- not falsely representing to a person the nature or effect of a provision of the Act or the regulations.

Schedule 6 of the Property and Stock Agents Regulation contains rules of conduct specific to managing agents and assistant managing agents, which include:

- co-operating with the managing agent's successor in relation to provision of documents to the new agent
- facilitating the transfer of management functions between the former and new agent, and
- preparing for inclusion in the agency agreement written confirmation of the extent of the agent's authority to exercise functions of the owners corporation and any limitations on the agents authority to undertake those duties.

While managing agents are extensively regulated by the rules of conduct, education, licensing and CPD requirements under the Property and Stock Agents Act, complaints about the performance and accountability of managing agents still make up a large proportion of the strata consumer complaints received by Fair Trading.

Complaints against managing agents also make up a majority of applications to the Tribunal under the Management Act.

Improving the accountability and transparency of managing agents was a significant feature of the 2015 reforms and the Government acknowledges the strong interest many managing agents have in lifting the standards and reputation of their profession. The statutory review is now an ideal opportunity to hear about the experiences of lot owners, managing agents and others over the four years since the new Act commenced.

In what direction is the overall competency, transparency and accountability of managing agents heading? Are there are opportunities to improve the experience for all parties?

69. Do you think the rules of conduct for strata managing agents, under the Property and Stock Agents Regulation 2014, are appropriately balanced?

70. As a resident in a strata scheme, what do you think about the competency of strata managing agents?

71. As a strata managing agent, what additional resources and training do you think you should have access to?

Building defects

Managing agents play an increasingly important role in the management of building defects.

Lot owners often rely on their managing agent to advise them on how to respond to building defects and how to navigate through the complex process of remediation. Stakeholder feedback received by the Government suggests that sometimes this may be more problematic than helpful. Most managing agents are not building consultants and may not necessarily have all the skills and experience to provide the right advice to lot owners.

Some stakeholders have suggested the Government consider mandating an accredited course for managing agents specifically focused on issues with newly constructed apartment buildings – most importantly, building defects. An agent who had completed the course could be accredited under the Property and Stock Agents Act as specialists in management of strata building defects.

This review seeks feedback on the merits of the suggestion for a building defects accreditation for managing agents.

72. How important is it for managing agents to have specialist knowledge about building defects?

73. What would you think of a proposal for accreditation of certain licensees under the Property and Stock Agents Act as strata building defects management specialists?

Finances

Financial functions and funds of the owners corporation

The financial functions of the owners corporation can be exercised by the treasurer, strata managing agent and any other persons with delegated authority.

Sound financial management is crucial for the owners corporation to properly maintain the strata scheme. To achieve this, the Management Act requires the maintenance of two funds:

- **Administrative fund**
  This is for day-to-day operating costs, such as payments for the managing agent or insurance premiums.

- **Capital works fund**
  This is like a savings account for future expenses associated with maintaining, repairing or improving the common property and was formerly called the ‘sinking fund’.

Transfer of money between funds

The Management Act is flexible in that it allows for money from one fund to be used to temporarily cover the expenses of the other fund if there is not enough money in the one fund.

Based on early stakeholder feedback, there are different interpretations of the rules for paying back the money to the other fund. A common perception in the strata community, including among strata lawyers, appears to be that the amount transferred between funds must be repaid to the other fund in its entirety within three months.

But section 76(2) of the Management Act instead states that the owners corporation must make a decision within three months about the amount that is to be levied as a contribution to the fund to reimburse the amount transferred.

74. How well is money being managed in the administrative and capital works funds by your owners corporation? Are any changes needed and why?

75. Owners corporations can use money from one fund to temporarily cover the expenses of the other fund. How do you interpret the rules about repayment of money transferred from one fund to the other fund? What should be the rule?

Levies and arrears levies

Levies are raised for both funds by calculating the estimates of actual and expected expenses of each fund. The expenses to consider include:

- Administrative fund: the day-to-day maintenance of common property, insurance premiums, recurrent expenditure, such as utilities, gardening and cleaning.
- Capital works fund: costs of acquiring or replacing personal property or fixtures, painting or repairing the common property, and future costs needed to meet the 10-year capital works fund plan.

If additional expenses arise that cannot be met from either fund than additional special levies can be raised.

After preparing the estimates, an amount is levied on each lot in proportion to the unit entitlement of the lot. If an individual lot owner uses their lot so it causes higher insurance premiums their contribution can be made larger to cover this additional cost.

The non-payment of levies adversely affects the ability of owners corporations to meet expenses. Late payments accrue simple interest at a rate of 10% if payment is not made within one month of it becoming due and payable.

Sometimes lot owners experience financial difficulties and are unable to make levy payments on time. The Management Act allows the owners corporation to determine by resolution that no interest will be imposed on a late payment. The owners

corporation can also decide to apply a 10% discount on contributions if paid on time and can also enter into payment plans with individual lot owners for up to 12 months.

If an owners corporation is having difficulty with a lot owner not paying their levies, it can apply to the Tribunal or the courts for an order that the lot owner pay the amounts owed.

76. How well have the laws on levies and arrears been working? Please explain why and suggest any changes.

Financial records and audits

The owners corporation is required to prepare clear and accessible financial information to make available to the lot owners.

This includes preparing financial statements and statements of key financial information under sections 92 to 94 of the Management Act. It also must keep receipts, transaction records and a levy register. Large strata schemes with budgets exceeding $250,000 must be audited each year. Audits are voluntary for smaller schemes.

77. Are any changes needed to how financial records are prepared, for example, for deposits and withdrawals for the owners corporation? Are any changes needed?

78. Is a $250,000 budget the right threshold for compulsory annual audits to be carried out? If not, what do you think is the right amount?

By-laws

Making and recording of by-laws

By-laws can be made for the management, administration, control, use or enjoyment of the lots or common property and must be consistent with the Management Act.

By-laws are also critical in governing unacceptable behaviour in a scheme, facilitating harmony among owners and enabling smooth administration of their scheme.

Initially, it is the developer who decides which by-laws will apply when the scheme is registered, and as a result the developer has a significant role in determining the future operation of the scheme. However, the scheme can choose to change its by-laws by passing a special resolution at any time.

In order to be legally enforceable, by-laws must be lodged with NSW Land Registry Services within six months of the passing of the special resolution adopting the by-laws.

The 2015 reforms to the Development Act introduced a requirement for all changes to by-laws to be registered on title as a consolidated list, rather than each separate

change being registered in isolation. This change has ensured that the land titles register concisely records in a single and readily accessible instrument all the by-laws of a strata scheme.

Clause 24 of the *Strata Schemes Development Regulation 2016* (the Development Regulation) provides some scope for the Registrar General to waive the requirement for consolidation where this would be onerous for the scheme, and where there are no more than five separate changes of by-laws recorded on title.

Section 139 of the Management Act restricts the types of by-laws that can be passed by owners corporations. For example, a by-law cannot restrict or prohibit children occupying a lot unless the strata scheme is a retirement village or is exclusively for aged persons. The restrictions also ensure an owners corporation cannot prevent an occupant from keeping a genuine assistance animal.

Pets and assistance animals in strata are discussed in more depth on pages 45 to 48 of this paper.

By-laws can be invalidated by the Tribunal if the Tribunal finds that the by-law is harsh, unconscionable or oppressive – this formulation was a key part of the 2015 reforms.

The NSW formulation of ‘harsh, unconscionable or oppressive’ provides narrower grounds for challenging by-laws, compared to Queensland strata laws, for example, which include the concept that by-laws must not be ‘unreasonable’.

The ‘harsh, unconscionable or oppressive’ test would be more likely to be satisfied when, for example, a by-law sought to remove existing rights of lot owners, whereas the ‘unreasonable’ test is based on what a reasonable person would think about the by-law.

Notions of ‘reasonable’ change over time and can be difficult to determine without legal challenge, unless the law sets out specific grounds for what would be considered reasonable or unreasonable.

An order from the Tribunal to invalidate a by-law that is harsh, unconscionable or oppressive can be sought from those entitled to vote on by-laws. This means that while tenants are required to comply with by-laws, they have little to no opportunity to challenge by-laws that that believe are treating them unfairly.

79. Could we make it easier for owners corporations to make by-laws? If yes, please tell us how.

80. By laws must be lodged with Land Registry Services within 6 months. Is this a reasonable time?

81. The Registrar General has the power to waive the requirement for by-law changes to be lodged all at the same time and instead allow changes to be lodged separately. Should there be changes to this power?

82. While owners corporations can make their own by-laws for their strata scheme, there are restrictions on the types of by-laws that can be made. What do you think about prohibiting 'unreasonable' by-laws?

83. If the law was changed to allow tenants to seek Tribunal orders challenging by-laws on the basis they are harsh, unconscionable or oppressive, how would this work in your strata scheme?

Enforceability

The by-laws of the owners corporation are binding on the lot owners and any occupiers of the scheme but only if they are validly made and lodged with NSW Land Registry Services.

Enforcement of a by-law requires a notice of non-compliance be issued to the owner or occupier, which is followed by a time intensive and complex process to obtain an order from the Tribunal.

This is particularly difficult when dealing with non-compliant tenants as they may only reside in the scheme for a short period of time. In the time it takes to issue a notice and seek a Tribunal order the tenant may vacate the lot and it becomes difficult to enforce a penalty against them.

84. What is your experience with the enforcement of by-laws?

Status of by-laws from old Acts

Strata title has existed in NSW for decades, with some strata schemes established under prior laws that have long been repealed, which means some by-laws are decades old. The Management Act preserved existing by-laws established under previous laws but also required owners corporations to review their by-laws by 2017.

Section 134 provides that the by-laws that will apply to a strata scheme are those that are either created after the Management Act came into force or those that existed under the *Strata Schemes Management Act 1996* (the 1996 Act).

The by-laws applying to strata schemes created before the 1996 Act are set out in the Management Regulation. The Management Act provides that by-laws must be reviewed with 12 months of the Management Act commencing and existing by-laws are taken to be valid if they were valid under the previous law.

These provisions can create confusion about which by-laws are preserved and which are replaced. The different treatment of strata schemes based on their age creates confusion as some by-laws may be valid because they were made prior to the Management Act, even if they would now be invalid if made under the current law.

While there is a need to recognise that older strata schemes can have different needs and requirements, this comes with a cost as it makes the law more complex and inconsistently applied.

85. Should by-laws made under old strata laws be required to be compliant with the current law? Why, or why not?

Model by-laws

The Management Act allows for the creation of model by-laws in the regulations. The model by-laws provide standard wording that can be adopted by owners corporations instead of having to pay for legal drafting services.

This review is an opportunity for feedback from the strata community on whether it would be helpful for owners corporations to have additional model by-laws prescribed in the Management Regulation, and what they should be.

86. Are there any additional model by-laws that should be included in the legislation? If so, what are they and how would they assist?

Pets and assistance animal by-laws

The keeping of animals in strata schemes has attracted some contention and been the source of disputes.

Owners corporations can make by-laws for the management, administration, control, use or enjoyment of the lots within a strata scheme, or for the common property of the scheme.

The Management Act prohibits by-laws from being harsh, unconscionable or oppressive. A by-law is also invalid if it purports to prevent the keeping of an assistance animal, within the definition of section 9 of the *Disability Discrimination Act 1992* (Cth).

Assistance animals

A by-law cannot prohibit or restrict the keeping of an assistance animal. An assistance animal under the *Disability Discrimination Act 1992* is defined as a dog or other animal that:

- is accredited by a prescribed animal training organisation or under a State or Territory law, or

- is trained to assist a person with disability to alleviate the effects of the disability and meet the standards of hygiene and behaviour appropriate for an animal in a public place.

However, the owners corporation may pass a by-law that requires a person to provide evidence that an animal is an assistance animal. This is intended to prevent circumvention of by-laws that control the keeping of animals by an occupant falsely claiming that their pet is an assistance animal.

An example of an assistance animal is a seeing eye dog but the definition allows for a wide variety of animals that can alleviate the effect of a disability.

'Disability' is broadly defined as not just the loss of a person's bodily functions – it also includes mental functions. This means that an assistance animal can be for alleviating mental disabilities that may not be as readily apparent to other people as say, vision impairment.

This has led to two concerns about the current provision.

The first is that there is a misconception that an assistance animal is limited to the seeing eye dog variety and does not extend to other animals that assist in the alleviation of other disabilities.

The second is that the requirement to prove that an animal is an assistance animal can result in highly personal information, including a full health history, being required to be disclosed to the owners corporation.

Keeping of pets (companion animals) in strata schemes

There are strong opinions about the keeping of pets in strata schemes. People can be opposed to the keeping of pets for various reasons, including concerns about possible damage to common property, the animal being a nuisance, a general dislike or fear of animals, or the suitability of the strata building for keeping animals.

People who support pets in strata are often motivated by the strong emotional bonds they develop with the animal and the well-being benefits that keeping an animal can bring to the owner. There is also a strong current of opinion among people seeking law reform in this area that one's neighbours should not be able to decide on such a basic aspect of living in one's own home as the keeping of a pet animal.

A recent study[1] found that as many as three out of five Australians (60%) own a pet, meaning that Australia has one of the highest rates of pet ownership in the world. As the strata population continues to grow, the issue of pet ownership in strata is likely to remain contentious. When combined with the approximate 48% of the strata population who are tenants, this means it is not only lot owners who are facing challenges from by-laws banning pets.

The strata laws generally support democratic decision-making by owners corporations, but also recognise that strata living today for many people includes the

[1] Animal Medicines Australia, *Pets in Australia: A National Survey of Pets and People* (October 2019), https://animalmedicinesaustralia.org.au/wp-content/uploads/2019/10/ANIM001-Pet-Survey-Report19_v1.7_WEB_high-res.pdf.

keeping of pets in a manner suitable to the particular scheme. One of the Government's stated aims of the 2015 reforms was to make the laws more pet-friendly, including by providing new model by-laws setting out options for the owners corporation to adopt. If no choice is made, the default by-law that applies allows for pets, provided the lot owner seeks the owners corporation's permission which cannot unreasonably refused.

High profile disputes: Court of Appeal decision on The Horizon apartments

By-laws that ban pets in strata schemes have been the subject of some high-profile challenges in the Tribunal and the NSW Court of Appeal. Those disputes have centred on the question of whether a by-law that prohibits the keeping of companion animals is harsh, unconscionable or oppressive.

In October 2020, the NSW Court of Appeal handed down its decision in ***Cooper v The Owners – Strata Plan No 58068 [2020]*** **NSWCA 250 (*Cooper*).** The Court of Appeal ruled that The Horizon's by-law that imposed a blanket ban on the keeping of pets was oppressive, in contravention of section 139(1) of the Management Act.

The Court of Appeal explained that by-laws can be oppressive if they restrict the right of lot owners to use their property on a basis which lacks a connection to an impact on other lot owners. In the Cooper case, the by-law banned all pets (except assistance animals), without any reference to the impact that a pet might have on other lot owners.

The Court of Appeal's decision means that blanket pet bans that are not based on the impact of keeping a pet on other lot owners are invalid. However, the Court's decision doesn't extend to bans that are not blanket bans or which allow an owners corporation to consider each case of pet ownership and the impact on other lot owners. The case therefore leaves open the question of whether by-laws that are not identical to the ones on the Cooper case may be considered 'harsh, unconscionable or oppressive'.

At the time of writing, the Court of Appeal decision on a pet ban by-law in Sydney's Elan Towers building is yet to be handed down.

The NSW Government seeks feedback through this review on whether and how the Management Act should be changed in relation to pet by-laws, following the Court of Appeal decision.

There are several options to consider.

Option 1 – Status quo

The first option is to the leave the law as it is, on the basis that the Court of Appeal decision means that blanket pet bans are invalid.

Owners corporations can review their by-laws to make them more or less pet-friendly but will no longer have the option to retain a blanket ban on pets.

Risks

A risk with this approach is that there could still be uncertainty and disputes over the legal status of by-laws that restrict pets but don't ban them outright.

Option 2 – By-laws cannot unreasonably prohibit the keeping of pets

The second option is to amend the Management Act so that it is clear that a by-law is invalid if it unreasonably purports to prohibit the keeping of a pet on a lot.

The starting point for this option would be similar to the amendment to the Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020 passed by the Legislative Council of NSW Parliament in August 2020, following a motion by the Animal Justice Party. (This amendment is yet to be reconsidered by the Legislative Assembly.) However, this option would need to include further provisions that define what would be considered unreasonable – either in the Act or regulations.

Generally, this option would retain the right of owners corporations to regulate how animals are kept within their scheme – within certain limits. The Tribunal's power to issue orders for the removal of nuisance animals would be retained.

Risks

This option risks some lot owners feeling that they are being forced to live with pets in their building when they had previously chosen to live in a strata scheme without pets. Some may fear increased costs for cleaning and damage to common property if animals are permitted in their scheme.

The amendment would need to be carefully drafted and set clear grounds on which by-laws relating to pets would be either reasonable or unreasonable. Otherwise, there could be uncertainty about pet by-laws and ongoing disputes over pets in strata.

Option 3: Blanket pet bans are permitted

The third option is to amend the Management Act to permit owners corporations to adopt by-laws that impose a blanket prohibition on the keeping of animals by special resolution. This option would involve creating an exception to section 139(1) of the Management Act to provide that blanket bans on the keeping of pets are not harsh, unconscionable or oppressive.

This option would provide clarity and certainty about the limits of owners corporations' power to adopt by-laws that regulate the keeping of animals on a lot.

Risks

This option risks being contentious in that the Government would be legalising actions which the Court of Appeal has found to be oppressive.

Further, the substantial disquiet among strata residents about blanket bans on pets would continue and campaigns for change would likely continue.

Option 4: Enshrine the Court of Appeal decision in the Management Act

The final option is to amend the Management Act to provide that a by-law is invalid if it restricts the right of lot owners to use their property on grounds that are not related to any impact on other lot owners.

This option would provide clarity and certainty about the limits of owners corporations' power to adopt by-laws that regulate the keeping of animals on a lot, and maintain consistency with the decision of the Court of Appeal in *Cooper.*

Some lot owners and others may consider this option to be too narrow if they believe there are other grounds on which by-laws that restrict pet ownership should be invalidated.

87. Under the law, a by-law cannot ban assistance animals e.g. guide dogs. Are any changes needed to the way the laws govern assistance animals?

88. Should owners corporations be allowed to request proof that an animal is an assistance animal?

89. Should the Management Act outline what kinds of evidence owners corporations can request as part of proving an animal is an assistance animal? If so, what kinds of information should be provided?

90. The NSW Court of Appeal found in 2020 that a by-law imposing a blanket ban on pets was oppressive and therefore invalid under the laws. Should the law allow owners corporations to completely ban pets from a strata scheme? Please tell us why.

Other restrictions on the power to make by-laws

Other restrictions on the power of owners corporations to make by-laws has meant that certain by-laws cannot be made where they infringe on private property rights, for example in relation to the contentious issues of overcrowding and short-term rental accommodation.

Section 137 allows the owners corporation to set limits on the number of adults residing in a lot and is intended to prevent overcrowding that was occurring in some strata schemes. Section 137A allows owners corporations to prohibit lots being used for short-term rental accommodation, unless they are the principal place of residence of the short-term rental host. Section 137A commenced on 10 April 2020 as the first element in the NSW Government's broader framework for the better regulation of short-term rental accommodation.

91. Do the existing restrictions on the power to make by-laws require any changes? If so, what changes and why?

Records, Tenancy Notice and Service

Records

Strata roll and other records

The owners corporation must have a strata roll that contains key information of the strata scheme. This includes details of lot owners and the developer, addresses for service, tenancy notices, strata plan number, strata managing agent, the unit entitlements, by-laws and details of the insurance held.

The owners corporation is required to keep indefinitely notices and orders issued by the Tribunal or the courts under section 179, while other records must be kept for seven years. These include minutes of meetings, financial statements, correspondence, notices of meetings, proxies, voting papers, copies of the signed agreements with the managing agent or building manager, and other records given to the owners corporation by the managing agent.

The strata committee can issue notices to persons, including the strata managing agent, requiring that records be provided to the committee. Failure to comply with a notice to provide records can result in a penalty of up to $2,200.

92. How has record keeping been working? Are any changes needed and if so, why?

Electronic storage of records

The 2015 reforms provided that records are to be made and stored in hardcopy and/or electronic format. Allowing owners corporations to make and store records electronically enabled the transition from paper-based records. This also made it easier to serve documents, such as notices of meetings, by email.

93. Should keeping electronic records be made compulsory? Why/why not?

Mandatory reporting of strata information

In September 2020, the NSW Government introduced the Community Land Management Bill 2020 to Parliament, which also amends the Strata Schemes Management Act to insert a power allowing the Secretary of the Department of Customer Service to require strata and community schemes to report specified information about their schemes to the Department.

This is intended to improve and modernise the way the Government collects and stores information about community and strata schemes, as well as the way the Government interacts with customers in those schemes.

This mandatory reporting project has been known as the ‘Strata Portal’.

Phase 1 of mandatory reporting is expected to commence on 1 July 2021 and will require reporting of basic information about schemes including contact details of managing agents, building managers and an address for the service of documents. The second phase is expected to start in 2022 and will require reporting of more detailed information relating to the functioning and management of schemes.

At the time of writing the Bill has not yet been enacted.

This review is not seeking feedback on the design of the new mandatory data reporting scheme. Instead, the Government will consult the strata sector separately about the Strata Portal in early 2021.

Availability of records inspection

The records of the owners corporation can be inspected on request by a lot owner or someone authorised by the owner. The records that can be inspected include the strata roll, certificate of title and any other document the owners corporation is required to hold.

Inspection can occur in person or electronically at a time and place agreed to by the applicant and the owners corporation. If agreement on inspection cannot be reached the owners corporation can designate a time, place and means for inspection.

94. How is inspection of strata records working? Are any changes needed and if so, why?

Strata information certificate

A strata information certificate can be requested by an owner or a person authorised by the owner and contains key financial information on a lot. It also includes information on other matters such as whether a strata renewal committee has been appointed. If the strata scheme is part of a community or precinct scheme it will also contain additional information on contributions to those schemes.

95. How are the strata information certificate provisions working? Are any changes needed and if so, why?

Information for tenants

A landlord must provide to a tenant a copy of the by-laws and the strata management statement not later than 14 days after the tenant becomes entitled to possession of the lot. If the by-laws or strata management statement are changed then amended copies must also be provided. Failing to provide this information attracts a penalty of up to $550 but this provision does not apply to strata schemes within community schemes.

96. A landlord must provide a tenant with a copy of the by-laws and the strata management statement if there is one. How is this working? Please describe and suggest what changes might be needed.

Tenancy notice

An owners corporation needs to be aware of tenants occupying the building, so it is able to update the strata roll and important information can be provided to all occupants. When a lot is leased the landlord needs to give notice of this lease to the owners corporation no later than 14 days after the commencement of the lease. The notice must include the tenant's name, address, date of the lease's commencement and name of the landlord's agent. Failing to provide the notice can result in a $550 fine.

The notice assists in determining whether a tenant representative can be elected and for notice of meetings to be provided to tenants.

Fair Trading's strata inquiries and complaints unit reports anecdotal evidence of widespread non-compliance with this requirement to give notice of a tenancy.

97. If a lot owner leases their apartment to tenants, the lot owner must provide the owners corporation with information about the tenants living in their lot within 14 days. Is this notice working? Could this be improved? If so, how?

Service provisions

For legal proceedings, service of notices is a crucial mechanism to alert parties to the fact that proceedings have been commenced against them.

The Management Act's service provisions establish flexible arrangements for service of notices to remain contemporary with current practices.

98. The law sets out how notices and other documents can be served on or by an owners corporation. How is this working? Please describe and tell us if this can be simplified in any way.

Common Seal

Future of the common seal

The common seal is the official seal of the owners corporation and must be affixed to a document for it to be executed. This means that it has been officially approved. Attaching the seal is required for different purposes, such as lodging documents with the NSW Land Registry Service or entering contracts.

An owners corporation must keep a seal in the possession of one of the owners or with its strata managing agent.

The seal must be physically affixed to a document in the presence of two owners except when affixed by the managing agent, which does not require a witness.

The need to physically affix the seal is a cumbersome process as demonstrated during the COVID-19 pandemic. The COVID-19 restrictions prevented gathering to witness or access seals stored at strata managing agents' offices and so made it difficult for documents to be executed.

The NSW Government temporarily allowed documents to be signed instead of affixing the common seal. This was done by allowing witnessing to occur by audio visual link with details of the signatory and witness recorded, including name, date and licence number for managing agents. This was influenced by how corporations are regulated by the *Corporations Act 2001* (Cth). These corporations no longer need to use common seals to execute documents and instead documents can be signed by two directors, a director and company secretary, or if there is a sole director, then that director.

However, a difficulty in adopting this approach for owners corporations is that under Commonwealth law company directors' details need to be recorded on the Australian Securities and Investments Commission's company register. This means that the identities of the directors of these companies can be confirmed, for a fee, by searching the company register. There is no equivalent requirement under NSW law for the details of committee members or the strata managing agent to be recorded on a searchable register. This means it can be difficult to verify who has appropriate authority to execute documents on behalf of the owners corporation.

99. COVID-19 emergency laws, passed in May 2020, allowed owners corporations to approve official documents with the witnessed signatures of two authorised people, instead of affixing the common seal. If this was permanently included in strata laws, is there anything else that should be included?

100. To verify that documents are properly executed, should the details of strata committees and strata managing agents be required to be lodged and made available on a publicly searchable register similar to the ASIC company register? Please tell us why.

Initial period

'Initial period' and developer control

When an owners corporation is set up, the developer has control over the strata scheme until at least one-third of the unit entitlements are owned by new owners. This is called the 'initial period'.

During the initial period, restrictions are imposed on the developer to protect future owners. Some restrictions include not altering the common property except in accordance with a strata development contract and not borrowing money. The

Tribunal may, however, make orders waiving, varying or extinguishing a restriction relating to the initial period.

Complaints received by Fair Trading indicate that developers have not always fulfilled their obligations or complied with the restrictions on the initial period under the Management Act. These complaints range from incorrectly appointed strata managing agents to not holding the required meetings after the initial period has ended.

101. How have the initial period provisions been working? Are any changes needed, and if so, why?

Managing the Property

Managing common property in a strata scheme

The owners corporation is responsible for managing common property, including its repair and maintenance, and determining how common property is used.

Alterations, additions and other work affecting common property

Prior to the 2015 reforms, lot owners could not make any alterations to common property in connection with their lots without approval of the owners corporation and any changes to common property needed to be approved by special resolution.

An owner of a lot can now carry out work on the common property if they are authorised to do so under Part 6 of the Management Act, under a by-law made under Part 6 or a common property rights by-law, or by approval of the owners corporation given by a special resolution or in accordance with the by-laws.

Approval process for alterations and additions to common property (section 108)

The Management Act sets out the procedure for authorising any addition to, alteration of, or new structure on common property by an owners corporation or owner. A special resolution must be passed authorising the proposed action. If it is authorising a proposed action by an owner, the resolution **may** specify who is responsible for the ongoing maintenance of the altered common property. If it does not address this, then the Management Act provides that the owners corporation is responsible.

If the owner is to have responsibility for ongoing maintenance, the owners corporation must make a by-law providing for maintenance of that property by the owner after obtaining the owner's consent. The Management Act does not expressly require that maintenance or any other matter be addressed before providing approval.

102. Owners can make changes to common property in connection with their lots if they have authorisation. Either the owner or owners corporation could be responsible for ongoing maintenance of these changes. Should the Act require a decision to be made about who is responsible for ongoing maintenance of common property changes before approval is given to change common property??

Approval process for work by an owner affecting common property in connection with a lot

To make the approval process for work affecting common property more flexible, a new three-tier approval regime was established under the Management Act:

- **Cosmetic work**: can be carried out by owners without approval.
- **Minor renovations**: can be carried out with approval by resolution, which cannot be unreasonably withheld and can be subject to reasonable conditions.
- **Other proposed works affecting common property**: generally can only be carried out if approved by special resolution.

An owner must provide written notice of any proposed minor renovations to the owners corporation, including the information required by the Management Act (section 110(4)). The Management Act requires an owner to ensure that any damage caused to common property by cosmetic work or minor renovations is repaired, and the work and any repairs are done in a competent and proper manner.

Cosmetic work and minor renovations are not defined but some examples are listed in the Management Act and clause 28 of the Management Regulation. Cosmetic work includes installing hooks on walls or a built-in wardrobe or a handrail, and painting or laying carpet. Minor renovations include renovating a kitchen, installing an air conditioner and removing carpet to expose a hard floor. However, the following types of work are not cosmetic work or minor renovations: work involving structural changes, changes to the external appearance of a lot or waterproofing, and work for which another approval is required under any Act.

A scheme's by-laws can specify other cosmetic work or minor renovations and may also permit the owners corporation to delegate the approval of proposed minor renovations to the strata committee.

Some suggestions that have been made for changes to these provisions are:

- an express requirement for records for approved minor renovations to be kept by owners corporations permanently
- a clear prohibition on tenants doing work that affects the common property
- provision of reasons when consent is withheld
- clarification that minor renovations involving reconfiguring walls explicitly excludes structural walls.

103. When making changes to common property such as renovations, is it easy to understand what approvals are needed and when? If no, please tell us why not.

104. Are any changes needed to the types of work that are considered cosmetic work or minor renovations? Please tell us why.

105. Should committees be automatically able to make decisions on minor renovations instead of a resolution at a general meeting of the owners corporation being required?

106. Should a lot owner always be told the reasons why their request for work or renovations was not approved? If yes, when should the reasons be provided?

107. Do you have any other suggestions on how to improve the provisions on approval of changes to common property?

Common property rights by-laws

A common property rights by-law can confer certain rights and special privileges (for example, a right of exclusive use or enjoyment) to an owner or owners in a strata scheme in respect of the whole or any specified part of the common property. Common property rights by-laws are approved by special resolution.

The Management Act requires that the by-law address the responsibility for ongoing maintenance of the relevant common property and that a by-law may specify conditions such as the payment of money by the relevant owner/s to the owners corporation.

The Tribunal may make an order in relation to common property rights by-laws, in certain circumstances, under section 149 of the Management Act if it finds that:

- an owners corporation has unreasonably refused to make a common property rights by-law, or
- a lot owner has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to a proposed amendment or repeal of such a by-law.

108. Are the provisions relating to common property rights by-laws clear and working well? Do you have any suggestions for improvement?

Managing parking on common property

The 2015 reforms aimed to establish a regulatory framework that enables owners corporations to better manage parking on common property, including by non-residents.

An owners corporation can grant a licence to their local council in relation to a strata parking area in their scheme pursuant to section 112 of the Management Act. This licensed area is then governed by the *Local Government Act 1993* and enables the council to police the parking in that area. Otherwise, parking on common property is managed by a scheme's by-laws which are enforceable against owners and occupiers/tenants and can be enforced by seeking a penalty from the Tribunal for breach of a by-law.

Managing parking on common property can be an ongoing problem for some schemes and feedback is sought on how the current framework is operating and any suggestions for improvement.

109. Does your strata scheme have an agreement with your local council for a strata parking area? Please tell us your experience of how this is working.

110. Have you experienced problems due to parking on common property? If so, how might changes to the law help manage this issue?

Maintenance and repair of common property

Duty to maintain and repair common property

Maintenance and repair of common property is an important issue for owners and owners corporations, and a common source of disputes. Owners corporations have statutory duties to properly maintain and repair the common property and renew or replace any fixtures or fittings within the common property.

The 2015 reforms gave owners a new statutory right to recover from an owners corporation, as damages, any reasonably foreseeable loss suffered as result of a breach of these statutory duties. Any such claim must be commenced within two years after the owner first becomes aware of the loss.

An owners corporation can remove part of the property from its statutory duties by special resolution where it is inappropriate to maintain, renew, replace or repair that property. However, this decision must not affect the safety of any building, structure or common property, or detract from the appearance of the property.

As part of the 2015 reforms, owners corporations were provided with the flexibility to defer complying with their statutory duty, if they are in the process of taking action against a person for damage to common property, as long as it does not affect the safety of the building.

The reforms also introduced a new section 132 enabling an owners corporation to seek an order requiring an owner or occupier who causes damage to common property to repair that damage, or to seek an order for payment of the owners corporation's costs of repairing that damage.

111. How effective has the law been in ensuring owners corporations comply with their duty to properly maintain and repair common property?

112. Do you have any concerns with the statutory duty to maintain and repair common property? How could it be improved?

113. Is the two-year time limit on making a claim for damages for breaching the duty appropriate? If not, what would be an appropriate length of time?

114. Is it appropriate for owners corporations to remove part of the common property from their duty where it is inappropriate to maintain or repair that part of the property? Can you advise of any situations where this has been misused?

115. Is it appropriate that owners corporations can defer compliance with the statutory duty in situations where they are taking action against an owner for damage to common property? Are you aware of any situations where this has been misused?

116. Has the duty impacted owners corporations' and owners' pursuit of claims for building defects, or arranging of rectification of building defects? If yes, how could this be addressed?

Developer's estimates of levies and the initial maintenance schedule

The developer must prepare an initial maintenance schedule for the strata scheme's common property that is to be considered at the first AGM. This requirement was introduced to ensure the developer provides certain information about the building and its maintenance requirements to help the owners corporation better understand and plan for the type, and potential costs of, maintenance required.

Stakeholder feedback suggests that initial maintenance schedules are not always being provided or considered. This can impede the establishment of a maintenance program early in the life of a strata scheme and may affect the owners corporation's ability to accurately estimate future maintenance costs and levies.

Some stakeholders have also suggested that the setting of unrealistically low levies by developers during the initial period, to encourage unit sales, may still be an issue. An owners corporation can claim compensation from the developer if the estimates and levies determined during the initial period were inadequate to meet actual and expected expenditure. This is subject to a 'due care and diligence' defence and action must be made within three years after the end of the initial period.

Stakeholders have suggested that owners corporations may not be sufficiently aware of this right or may have difficulty recovering compensation, for example because the developer is wound up.

Possible ideas for further reform to address this issue may include:

- requiring levies determined during the initial period to be verified by an independent expert
- making it an offence for a developer to knowingly set unrealistic levies during the initial period
- requiring the right to seek damages for inadequate levies to be disclosed to and/or considered by the owners corporation at the first and second AGMs.

117. The developer must prepare an initial maintenance schedule for the strata scheme's common property to be considered at the first AGM. Do you agree with this? Are the requirements clear? Are any changes needed?

118. Have you experienced any difficulty obtaining the initial maintenance schedule, or information about estimates and levies determined during the initial period, from an original owner/developer?

119. Have you experienced unrealistic levies being set by an original owner/developer?

120. Do you have any suggestions for improving the initial maintenance schedule?

Planning and funding ongoing maintenance and repair

Maintenance and repair of common property in a strata scheme may be funded from the scheme's administrative fund or capital works fund, depending on the nature of the work.

The 2015 reforms provided flexibility for owners corporations to review, revise or replace their scheme's 10-year capital works fund plan at any time by resolution at a general meeting, as well as a requirement to review it at least once every five years. The 2015 reforms also introduced requirements for matters that must be included in the plan and for implementation of the plan.

Preliminary stakeholder feedback suggests that the quality and usefulness of these plans varies among strata schemes.

121. Are 10-year capital works fund plans clear and effective in helping with maintenance and repairs of common property? If no, how could the 10-year capital works fund plans be improved?

Managing Building Defects

Part 11 of the *Strata Schemes Management Act 2015* at provides for the building defect bond scheme. This was set up to protect homeowners and to rectify defective building work early in the life of high-rise strata buildings. This scheme started on 1 January 2018 with further substantive changes made to the scheme under laws that commenced on 1 July 2020.

A review of Part 11 is required to be undertaken (by section 215A) after 1 January 2024 with a report tabled in each House of Parliament no later than 1 January 2025. The review will include public consultation.

Sustainability infrastructure in strata schemes

Future opportunities for reform

The NSW Premier's 2019 strata sustainability election commitment signalled the Government's interest in reducing barriers to the uptake of sustainability infrastructure in strata schemes[2]. In June 2020, the Government introduced a Bill to reduce the voting threshold for sustainability infrastructure resolutions to a simple majority[3].

This review seeks feedback on possible further reforms to the strata laws (including those discussed below) to facilitate the uptake of sustainability infrastructure in strata schemes.

Prohibiting certain restrictions in by-laws on installing sustainability infrastructure

One option is to prevent by-laws that prohibit or restrict the installation of sustainability infrastructure in certain circumstances. Queensland laws[4] prevent by-laws that prohibit or restrict solar panel installations merely to enhance or preserve the external appearance of a building.

Additional model by-laws to assist with the installation of sustainability infrastructure

Another option is to consider whether additional model by-laws can be developed that might assist strata schemes with the installation of certain types of sustainability infrastructure.

Enabling approval function to be delegated to strata committee

Another option is enabling the owners corporation's function of approving sustainability infrastructure resolutions to be delegated to the strata committee (similarly to section 110(6) of the Management Act). This might make the approval

---

[2] Sustainability infrastructure reduces water/energy usage, reduces greenhouse gas emissions and pollution, or facilitates recycling and the reduction of waste. Examples may include solar panels, more energy-efficient upgrades to air conditioning, ventilation and lift systems, and electric vehicle charging stations.

[3] Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020.

[4] Section 180(8) of the *Body Corporate and Community Management Act 1997* (QLD) and Chapter 8A, Part 2 of the *Building Act 1975* (QLD).

process faster. The ability to delegate could be limited to certain types of installations.

Audit of common water and energy usage as a mandatory agenda item

Another option is to make consideration of an audit of the energy and water usage in a scheme's common areas a mandatory agenda item for annual general meetings. Schemes could decide on the type of audit, for example, self-assessment or a more formal assessment (such as, through the National Australian Built Environment Rating System (NABERS).[5]

Additional considerations under 10-year capital works fund plans

The Department of Planning, Industry and Environment has suggested that owners corporations should be required to consider the need for sustainability infrastructure upgrades and whether electricity meter boards need to be replaced, as part of their 10-year capital works fund plan.

122. The NSW Government is already changing the law to make it easier for strata schemes to install sustainability infrastructure such as solar panels, batteries, digital meters, hot water systems and electric vehicle (EV) charging stations. What other changes to the strata laws could encourage the uptake of sustainability measures in strata and how would they work?

Insurance

Maintaining the appropriate level of insurance is reflected in the requirement to obtain coverage for the destruction of or damage to the building. Owners corporations are also required to obtain workers compensation and other types of damages insurance.

For the building insurance, the Management Act and the Management Regulation provide a formula for calculating the minimum level of coverage that covers both reconstructions and destruction.

123. Owners corporations must maintain an appropriate level of building and workers compensation insurance. How are the laws working? Are any changes needed? If so, how?

[5] NABERS is a national initiative managed by the Department of Planning, Industry and Environment to provide performance ratings for certain buildings. NABERS can provide a rating for the energy and water efficiency of an apartment building's common property areas, such as, lifts and lobby areas, car parks, gyms and pools.

Utilities Supply Contracts

Effectiveness in protecting consumers

Section 132A was inserted into the Management Act in 2018 (and commenced on 1 October 2019) to address concerns that strata schemes were being locked into unfair long-term utility supply contracts. It inserted term limits on the length of contracts for electricity, gas or other utilities and requires these contracts to be considered at AGMs.

Electricity embedded networks were exempted from these provisions, as the Australian Energy Market Commission was undertaking a review of the regulation of embedded networks. The Government did not wish to pre-empt the findings of this review and impose controls that were contrary to its recommendations, which have now been handed down.

124. The law places time limits on contracts for electricity, gas or other utilities to ensure strata schemes aren't locked into long-term contracts. Are any changes needed? If so, what changes and why?

125. Embedded electricity networks are privately owned and managed networks that often supply all premises within a specific area or building. Embedded networks generally buy electricity in bulk and then on-sell it to customers inside their network and are currently exempt from the limits on the duration of the contract. Should embedded networks still be excluded from time limits on contracts? If not, what transitional arrangements should be included?

Building Managers

Building managers are persons hired by the owners corporation to assist with the management of the property. The Management Act defines a building manager as a person who assists in exercising any one or more of the following functions of the owners corporation:

- Managing common property
- Controlling the use of common property by persons other than the owners and occupiers of lots
- Maintaining and repairing common property.

A person may be both a building manager and an on-site residential property manager and may also be a lot owner. If the building manager also acts as an on-site residential property manager, they must be licensed under the Property and Stock Agents Act. A person is not a building manager if the person exercises the functions of the owners corporation on a voluntary or casual basis or as a member of the strata committee.

New measures introduced by the 2015 reforms

The 2015 reforms placed new restrictions on persons who can be appointed as a building manager. The introduction of these provisions was intended to strengthen

the accountability of building managers and controls around their appointment and engagement.

As with managing agents, the building manager's appointment is made in writing and executed by the building owner when executed before the strata scheme commenced, or by a resolution passed at a general meeting if executed after the strata scheme commenced. If the building manager is appointed before the strata scheme is established, the term of appointment ends at the first AGM. In any other case, the maximum term of appointment is 10 years.

The Management Act allows for the building manager to transfer his or her functions to another person authorised by a resolution of the owners corporation. The transfer of functions effectively transfers the contract from one manager to another, including the terms of the contract and term of appointment.

The 2015 reforms introduced new disclosure requirements for both strata managing agents and building managers. The Management Act requires building managers to disclose if they have a direct or indirect pecuniary interest in a scheme or if they have a connection with the developer. Failure to disclose is an offence that carries a maximum penalty of $5,500.

Section 72 of the Management Act confers on the Tribunal the power to terminate or vary the agreement between the building manager and strata scheme, on the application of the owners corporation. The Tribunal may make an order varying or terminating the agreement for any of the following reasons:

- the building manager has refused or failed to perform the agreement or has performed it unsatisfactorily
- that charges payable under the agreement are unfair
- the building manager has failed to disclose an interest in a scheme, a connection to developer, or commissions or training services provided
- the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

Are problems previously associated with managing agents now being seen with building managers?

Stakeholder feedback indicates that relationships between owners corporations and strata managing agents and developers have improved, but the problem may now have shifted to the relationship between developers and building managers. There is a perception that many building managers have a strong relationship with and loyalty to the developer.

Some options for reform to address potential conflicts of interest on the part of building managers include:

- requiring that at the first AGM, owners be presented with a proposal from a minimum of three building managers
- limiting the maximum duration of appointment of building managers
- limiting the initial terms for all service contracts

There has also been feedback on ways to mitigate conflicts of interest relating to service providers, including:

- legislating a general duty to take reasonable steps to ensure that any goods or services procured by the building manager are procured at competitive prices and on competitive terms
- requiring the building manager to disclose conflicts of interest and commissions or benefits it might receive in connection with services it intends to contract for, before the contract is entered into
- requiring multiple quotes for contracts over a certain value or length of time
- extending conflict of interest controls to persons associated with building managers, and
- including non-exhaustive definitions of 'interest' and 'benefit'.

This would more closely align the regulation of building managers and strata managing agents under the Management Act.

However, the Government has also received suggestions from some strata stakeholders and consumers that building managers should be subject to all the same regulations as strata managing agents.

That is to say, they would become a licensed occupation either under the Property and Stock Agents Act, or perhaps under the *Home Building Act 1989* (NSW) (the Home Building Act).

This would enable Fair Trading to hold building managers to the same enforceable standards as other licensees, including for example the rules of conduct under Schedules 1 and 5 of the Property and Stock Agents Act.

Such a proposal would require extensive consultation and consideration of the costs and benefits of increasing the regulatory burden, including evaluation against the NSW Guide to Better Regulation and the IPART Licensing Framework.

Building managers as statutory duty holders: safety compliance throughout the life of the building

Complex multi-storey buildings must be properly maintained and repaired to ensure their ongoing compliance and the safety of occupants. Fire safety is critically important in this regard.

Under the current laws, there are complex arrangements between the owners corporations, managing agents, building managers and contractors when it comes to maintaining the building and meeting compliance requirements.

The NSW Government has received feedback during 2020 that the missing element here may be that the legislation does not provide for a single point of accountability to ensure ongoing safety requirements are met throughout the life of the building. This could be resolved by imposing a statutory duty of care on an office holder in strata, and the building and facilities manager may be the most appropriate person to hold this duty of care.

However, such a substantial change in legal obligations would need to be carefully considered, including suitable qualifications and licensing or accreditation requirements.

126. The Management Act includes a list of reasons why the Tribunal can vary or terminate a building manager's agreement, for example, for unsatisfactory performance of duties. Should any more reasons be added and should they be the same grounds as those that apply to managing agents?

127. Are the current restrictions on who can be appointed as a building manager adequate? Why/why not?

128. Do you support changing the law to introduce a duty of care on the building manager to act in the best interests of the owners corporation? Why/why not?

129. Should building managers be subject to the same or a similar level of regulation as managing agents, which could include licensing?

130. Should the maximum duration of appointment of building managers be further limited in a similar manner to strata managing agents? (Note: managing agents can only be appointed for twelve months at the first annual general meeting and for a maximum term of three years after that. The owners corporation can also renew the agent's appointment.)

131. Should building managers have a statutory duty of care with responsibility for the safety of the building, including its fire safety? If so, what would be the appropriate qualifications, licensing or accreditation requirements?

Resolution of Disputes

NSW Fair Trading mediation and the NSW Civil and Administrative Tribunal

Overview of dispute resolution processes

A key objective of the 2015 reforms was to simplify and improve the three-layered dispute resolution process that existed under the 1996 Act. The reforms established a new two-layered dispute resolution process for most strata disputes, with Fair Trading mediation as the first step and the Tribunal as the second.

The most common requests for mediation received by NSW Fair Trading over the past five years were about:

- repair and maintenance of common property
- damage/alterations to common property

- exercise of duties/functions by or on behalf of the owners corporation, and
- damage to a lot.

Other issues that featured in high numbers were:

- by-laws
- levies
- noise
- nuisance
- meeting procedures, and
- the behaviour of owners, occupiers and visitors.

Part 12 of the Management Act sets out the processes for dispute resolution by NSW Fair Trading, internal dispute resolution and the powers of the Tribunal to hear and decide strata disputes. The Tribunal's jurisdiction in relation to strata matters is determined by the Management Act as well as the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act). The Tribunal also has power under the Home Building Act to hear matters about building claims relating to strata properties.

The dispute resolution provisions of the Management Act are discussed in more detail below. We seek feedback on how effective the dispute resolution processes under the Management Act are in resolving strata disputes and enabling appropriate remedies to be obtained.

132. Are the current dispute resolution processes effective? If not, please describe and suggest any improvements.

Internal dispute resolution in strata schemes

The 2015 reforms introduced a new provision in section 216 enabling owners corporations to establish a voluntary process for resolving disputes between certain persons living in or involved in strata schemes. We are interested in any feedback on this section from strata schemes.

133. Does the process for an owners corporation to directly manage disputes between people work? If not, please describe and suggest any improvements.

Mediations

The mediation provisions in the Management Act aim to encourage early and cost-effective resolution of strata disputes before proceedings are commenced. A person can apply to NSW Fair Trading for mediation of a dispute listed in Division 2 of Part 12.

An issue often raised by stakeholders is the restrictions on legal representation in mediations and in proceedings before the Tribunal. The general intent of the restriction on legal representation is to make the resolution of disputes simpler, less formal and less costly.

134. Have you been part of a Fair Trading strata mediation? Are there any changes that could be made to the process and, if so, why?

Jurisdiction and orders of the Tribunal

Both the Management Act and the NCAT Act give the Tribunal the power to hear and decide matters relating to strata schemes. The Management Act expressly provides that certain orders may be made by the Tribunal.

The Government is interested in any feedback on the Tribunal's role in relation to strata matters generally, even if it is not considered below.

135. Do you have any general feedback on the strata scheme orders available from the Tribunal and how easy it is to get them?

Power to order damages for breach of statutory duty

In some recent decisions,[6] the Tribunal has expressed conflicting views on whether it has power under sections 106 and 232 to award damages to a lot owner because an owners corporation has breached its statutory duty to maintain and repair common property.

Section 106(5) of the Management Act gives a lot owner a right to recover damages from an owners corporation for any reasonably foreseeable loss resulting from a breach of statutory duty under that section. However, section 106(5) does not indicate whether the Tribunal can award damages for such a breach. Those damages can be sought in a court of competent jurisdiction.

Section 232 provides that the Tribunal may make an order to settle a complaint or dispute about particular matters, including an exercise of, or failure to exercise, a function conferred or imposed by or under the Management Act or the by-laws of a strata scheme.

In the most recent decision on this issue,[7] the Appeal Panel found that the Tribunal does not have jurisdiction to order damages for breach of the duty to maintain and repair under either section 106 or 232. It also suggested that section 232 does not confer a general power to order damages or compensation in settling a complaint or dispute. This decision has been appealed to the Supreme Court of NSW and the appeal had not yet been determined at the time of writing.

Although interpretation of sections 106(5) and 232 is a matter for the Tribunal and the courts, stakeholders have suggested that the legislation should provide better clarity and certainty about the Tribunal's jurisdiction.

---

[6] *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15, *The Owners – Strata Plan SP20211 v Rosenthal; Rosenthal v The Owners – Strata Plan SP20211* [2018] NSWCATAP 243, *Shih v The Owners – Strata Plan No 87879* [2019] NSWCATAP 263, and *The Owners - Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5

[7] *The Owners - Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5.

The Tribunal has power to determine whether there has been a breach of the statutory duties in section 106 and to make orders for the repair or maintenance of common property. Some stakeholders suggest that the Tribunal should have power to order damages for breach of the statutory duties as it is more practical and cost-effective to have a claim relating to a breach determined in one forum. However, the assessment of damages is ordinarily something undertaken by the courts.

Other sections of the Management Act also provide rights to recover damages for breach of statutory duty:

- section 26(2) and (3) – right to recover loss resulting from the developer doing prohibited things during the 'initial period' without authorisation from the Tribunal
- section 140(2) – right to recover loss resulting from changes to by-laws during the 'initial period'.

Like section 106, these sections do not indicate that the Tribunal can award those damages.

In contrast, the Tribunal is expressly given powers under the Management Act to order payment of certain compensation, for example:

- to a party to the agreement appointing a strata managing agent or building manager,
- by the developer to the owners corporation if the estimates and levies determined during the 'initial period' were inadequate, and
- by an owners corporation to a lot owner in relation to a common property rights by-law.

136. Should the Tribunal be able to award damages for breaches of statutory duties under the Management Act? Why/why not? If yes, please tell us why.

137. Should the Tribunal have a general power to order damages, compensation or other monetary amounts in settling disputes? Why?

<u>Monetary limits on damages or compensation or other monetary orders</u>

The Management Act does not currently set any monetary limit on the Tribunal's jurisdiction. There is a jurisdictional limit of $500,000 on building claims that can be determined by the Tribunal which is set by the Home Building Act (section 48K(1)). Some stakeholders have suggested that the Management Act should be clear about the monetary limit applying to the Tribunal's jurisdiction in relation to strata matters.

The Local Court's current jurisdictional limit in its General Division for damages claims (other than for personal injury or death) is $100,000. The District Court of New South Wales current jurisdictional limit in relation to damages claims is $750,000.

138. There's no cap on the size of the claim that the Tribunal can consider. Should there be?

Power to order costs

The Tribunal's power to order costs in proceedings before it is sometimes raised by stakeholders in relation to strata disputes. The Tribunal's power on this is in section 60 of the NCAT Act and is not within the scope of this review.

Enforcement of Tribunal orders

Where an order made by the Tribunal is not followed, an application may be made to the Tribunal for an order for a civil penalty under section 72(3) of the NCAT Act. The sustainability infrastructure bill, currently before Parliament, proposes to insert a new section 247A into the Management Act to bolster section 72(3) of the NCAT Act and to simplify the application process.

The Tribunal has power to make other orders, including for contempt, under Part 5 of the NCAT Act.

139. Are the penalties for breach of orders made by the Tribunal adequate? If not, what should they be?

NSW Fair Trading's role and functions generally

NSW Fair Trading's role as regulator of strata schemes in New South Wales is provided in section 256 of the Management Act. This section sets out the powers and functions of the Secretary, which are also delegated to the Commissioner for Fair Trading. Three key areas of Fair Trading's role are:

- the resolution of complaints received from the public relating to strata schemes,
- investigating possible offences under the Management Act and, where appropriate, taking enforcement action in relation to offences, and
- providing information to the public about the Management Act and relevant services provided by the Secretary and the Tribunal.

Fair Trading's power to investigate and enforce non-compliance relating to strata schemes is also found in other pieces of legislation outside of the Management Act. For example, Fair Trading is the regulator of occupational licences under the Property and Stock Agents Act and residential building under the Home Building Act. Fair Trading investigates possible offences under a range of legislation and takes enforcement action including providing education, issuing warnings or fines and initiating prosecutions.

Some stakeholders have suggested that Fair Trading consider:

- Providing more information and assistance to strata schemes in relation to certain issues
- Strengthening enforcement in relation to offences under the Management Act, which might include increasing penalties for certain offences and/or publicising enforcement outcomes, where appropriate, as a deterrent.

140. Do you have any feedback on NSW Fair Trading's role with strata schemes, including any suggestions for improvement?

Consolidated list of questions

Strata Schemes Development Act 2015

Objects of the Act

1. Are the current objectives of the Development Act still valid? If not, how should they be changed?

2. How successful is the Development Act in fulfilling those objectives?

3. Are there other objectives that should be included? If so, please identify what these should be and explain why.

4. If the objectives should be expanded, what corresponding measures would be needed in the Development Act to give effect to those objectives?

Strata renewal: collective sale and redevelopment

Built in safeguards and protections

5. Are the key steps and safeguards imposed by the legislation appropriate, or are these too complex or costly? Should any of these steps be changed?

6. Is the information required to be included in the strata renewal plan enough, or should the legislation require more information? If so, what information should be required for owners to properly assess a strata renewal proposal?

7. Are the timeframes imposed in the strata renewal process reasonable, or should any of these be adjusted?

8. Are other improvements needed to the strata renewal process? Why?

Compensation

9. Should the legislation distinguish between residential and commercial strata owners in the strata renewal process? If so, should the Development Act provide additional protections for commercial lot owners?

10. Should tenants have more involvement in the renewal process, other than being notified that a strata renewal plan has been developed, for which court approval is being sought (section 178)?

11. Should the Development Act provide more guidance for treatment of leases in strata renewal proceedings?

12. Is more guidance needed on how compensation applies to lot owners and their tenants? Who should be responsible for paying compensation to the tenant?

Limited uptake of renewal process

13. How successful has the strata renewal process been in encouraging owners to consider collective sale/redevelopment options?

14. Are the provisions encouraging parties to settle in a positive manner, or only to avoid protracted disputes?

15. What alternative methods are being pursued to achieve collective sales (eg, options, interdependent deeds of sale)? How effective are these alternative methods?

Strata renewal case studies

16. Should the current requirement to act in good faith and to disclose conflicts of interest be extended to dissenting owners? Should the Court be required to consider these aspects in relation to an objection to a strata renewal plan, as well as to the application?

17. Should section 188 be expanded to provide more guidance to the Court in relation to matters to be considered when making a costs order? How should the legislation deal with a dissenting owner who presses an objection on unmeritorious grounds? Should the dissenting owner be required to bear some or all of its costs?

18. Section 180 lists those who may lodge an objection to an application to the Land and Environment Court. Should an objecting party be required to disclose if they have or have had any further interests in the court proceedings? Should the same apply for those who may be joined as a party to the proceedings (section 181(6))?

19. Are the lapsing provisions in section 190 of the Development Act effective, and should any changes be made? Are there any circumstances in which a lapsed strata renewal plan should be able to be resubmitted within the 12 month period?

Part-strata developments: mixed use and layered schemes

Strata Management statements and easements relating to part strata parcels

20. Are management statements effective in regulating mixed-use developments and setting out interested parties' rights and obligations? If not, why not, and how could the legislation be improved?

21. Are there circumstances where a strata management statement should not be required (for example, where the commercial lot area is relatively small, compared to the residential strata scheme)? If so, how could the various interests in the building be effectively managed without a management statement?

Requirements for strata management statements

22. Are the matters set out in Schedule 4 for inclusion in the strata management statement sufficient? If not, what other matters should be prescribed and why?

23. Should the legislation require the management statement to balance the rights of various lot owners in some way? How could this be achieved?

Building management committees and conflicts of interest

24. What improvements could be made to the governance of building management committees and their meeting processes?

25. What measures could be implemented to reduce conflicts of interest and unfair contracting in mixed-use schemes?

26. Should existing contracts negotiated by the building management committee automatically apply to new lot owners as they join the committee? How can the legislation be improved to deal with this issue?

27. Should there be limits on how long managing agents are appointed for by the building management committee? Should this apply to other types of contract? What would be a reasonable restriction?

28. Should a duty of good faith be imposed on strata managers and building management committees?

Shared facilities

29. Should the requirement for management statements to provide for the fair allocation of shared expenses and the obligation to review that allocation, apply retrospectively to schemes registered prior to the commencement of the reforms (November 2016)? If not, why not?

30. What other improvements, if any, could be made in relation to responsibility for shared facilities and why?

Expense allocation and voting rights

31. Should voting rights be aligned to the relative contribution of building management committee members to the cost of the shared facilities? Are there any other alternative methods of allocating voting rights that could be implemented?

32. What improvements can be made to the legislation that balance the interests of commercial and residential lot owners in a mixed-use development, while ensuring fair decision-making?

33. What changes would provide fairer outcomes where strata management statements are in place? Should owners corporations be provided with rights

and protections similar to those set out under the Management Act – for example, by placing limits on service contract terms?

Dispute resolution

34. How can dispute resolution be better managed in mixed-use developments, balancing the needs of commercial and residential property owners?

35. What, if any, legislative protection is needed for residential owners in the rectification of complaints?

Valuation of unit entitlements

Requirements for schedules of unit entitlement

36. Has the requirement for a qualified valuer's certificate to determine unit resulted in fairer apportionment of contributions? Could this process be improved?

37. Are unit entitlement valuations too costly for the scheme? If so, what other ways could unit entitlements be calculated that is fair to all owners?

38. Should owners have a right to object to a proposal to change unit entitlements without the passing of a resolution, even Fif they are otherwise unaffected by a strata plan of subdivision?

39. Should the legislation provide an exception to the requirement for a valuation of all lots in the scheme in any circumstances? If so, what would those exceptions be? What is the alternative proposed method of altering the unit entitlements in those situations?

40. Should there be guidance for valuers in assessing strata plan unit entitlement valuations? If so, what guidance is required?

Strata Schemes Management Act 2015

Objects

41. Do the objects of the Act remain appropriate? Should further policy objectives such as those that guided the 2015 reforms be added to section 3 of the Management Act?

Managing the scheme

Strata Committees

42. How well have the functions of the committee and office holders been working?

43. Committees can be up to 9 people. Is this size limit working?

44. Under the law, strata committee members have a duty to act in the best interest of the owners corporation and with due care and diligence. How well is this working?

45. Are there any other measures that would improve accountability of strata committees? For example by adopting a mandatory code of conduct as in Queensland?

46. How well have the eligibility requirements for election to the committee operated? How could they be improved?

47. Are clear grounds for removing committee members and office holders needed? If so, what should they be?

Meeting procedures

48. How have the meeting procedures been operating and are any changes needed? If so, what changes?

49. Should the meeting procedures be moved from the Management Act to the Management Regulation so they can be changed more easily? Should any parts remain in the Management Act and, if so, why?

Meetings and voting

50. Should the law be changed to permanently allow electronic voting in all circumstances without the need to first pass a resolution? If so, are additional protections for lot owners needed?

51. Are there other alternative methods for electronic meetings and voting that should be considered?

52. How have the different ways (teleconferencing, email etc) of voting been working? Are any changes needed? If so, what changes and why?

53. How well have the limits on proxies worked and are any changes needed? If so, what changes?

Improving tenant participation

54. How well is tenant participation working? How could tenant participation be improved?

Strata managing agents

Appointment of managing agents

55. Are the current durations of appointment and termination notice periods for strata managing agents appropriate? If not, how should they be amended?

56. Do you think the developer should have to present the owners corporation with a choice of three managing agents at the first AGM?

57. A developer or someone connected with them can't manage a strata scheme in its first 10 years. Is this appropriate? Please tell us why.

58. Do you think a standard form strata managing agent agreement should be included in the legislation? If so, why?

59. Should the law require strata schemes of a certain size to be professionally managed?

Minimising conflicts of interest

60. Are the current conflict of interest laws working? If not, how should they be changed?

61. Are the provisions of the Management Act relating to gifts and commissions easy to understand?

62. Should there be a general duty of care in the laws to ensure managing agents obtain goods or services at competitive prices?

63. Should the rules be tightened on disclosure of conflicts of interest for owners corporation contracts?

Functions of strata managing agents

64. The managing agent must follow certain rules when they make a decision for the owners corporation. Are these rules appropriate? If not, how can they be improved?

65. Owners corporations have duties and functions that can be delegated to managing agents (section 57 of the Management Act). If the agent breaches their duties, they will have committed an offence. How well is this working?

66. Do you have personal experience of managing agents being prevented from carrying out their duties under the Management Act because of disputes with the owners corporation? If yes, please describe your experience.

Accountability of managing agents

67. In your experience, are the laws to keep the managing agent accountable working well? If not, how can they be improved?

68. Is the law sufficiently clear on what information the owners corporation is entitled to request from the managing agent and how they get it? If not please tell us why.

69. Do you think the rules of conduct for strata managing agents under the Property and Stock Agents Regulation 2014 are appropriately balanced?

70. As an resident in a strata scheme, what do you think about the competency of strata managing agents?

71. As a strata managing agent, what additional resources and training do you think you should have access to?

72. How important is it for managing agents to have specialist knowledge about building defects?

73. What would you think of the proposal for accreditation of certain licensees under the Property and Stock Agents Act as strata building defects management specialists?

Finances and levies

74. How well is money being managed in the administrative and capital works funds by your owners corporation? Are any changes needed and why?

75. Owners corporations can use money from one fund to temporarily cover the expenses of the other fund. How do you interpret the rules about repayment of money transferred from one fund to the other fund? What should the rule be?

76. How well have the laws on levies and arrears been working? Please explain why and suggest any changes.

77. Are any changes needed to how financial records are prepared, for example, deposits and withdrawals for the owners corporation? Are any changes needed?

78. Is a $250,000 budget the right threshold for compulsory audits to be carried out? If not, what do you think is the right amount?

By-laws

79. Could we make it easier for owners corporations to make by-laws? If yes, please tell us how.

80. By-laws must be lodged with the Land Registry Services within six months. Is this a reasonable time?

81. The Registrar General has the power to waive the requirement for by-law changes to be lodged all at the same time, and instead allow changes to be lodged separately. Should there be changes to this power?

82. While owners corporations can make their own by-laws for their strata scheme, there are restrictions on the types of by-laws that can be made. What do you think about prohibiting 'unreasonable' by-laws?

83. If the law was changed to allow tenants to be able to seek orders challenging by-laws on the basis they are harsh, unconscionable or oppressive, how would this work in your strata scheme?

84. What is your experience with the enforcement of by-laws?

85. Should by-laws made under old strata laws be compliant with the current law? Why, or why not?

86. Are there any additional model by-laws that should be included in the legislation? If so, what are they and how would they assist?

<u>Pets and assistance animal by-laws</u>

87. Under the law, a by-law cannot ban assistance animals e.g. guide dogs. Are any changes needed to the way the laws govern assiatance animals?

88. Should owners corporations be allowed to request proof that an animal is an assistance animal?

89. Should the Management Act outline what kinds of evidence owners corporations can request as part of proving an animal is an assistance animal? If so, what kinds of information should be taken as proof?

90. The NSW Court of Appeal found in 2020, that a by-law imposing a blanket ban on pers was oppressive and therefore invalid under the laws. Should the law allow owners corporations to completely ban pets from a strata scheme? Please tell us why.

Other specific by-law making powers

91. Do the existing restrictions on the power to make by-laws require any changes? If so, what changes and why?

Records, tenancy notice and service

92. How has record keeping been working? Are any changes needed and if so, why?

93. Should keeping electronic records be made compulsory? Why/why not?

Availability of records

94. How is inspection of records working? Are any changes needed and if so, why?

95. How are the strata information certificates provisions working? Are any changes needed and if so, why?

96. A landlord must provide a tenant with a copy of the by-laws and the strata management statement if there is one. How is this working? Please describe and suggest what changes might be needed.

97. If a lot owner leases their apartment to tenants, the lot owner must provide the owners corporation with information about the tenants living in their lot within 14 days. Is this notice working? Could this be improved? If so, how?

98. The law sets out how notices and other documents can be served on or by an owners corporation. How is this working? Please describe and tell us if this can be simplified in any way.

Common seal

99. COVID-19 emergency laws, passed in May 2020, allowed owners corporations to approve official documents with the witnessed signatures of two authorised people, instead of affixing the common seal. If this was permanently included in strata laws, is there anything else that should be included?

100. To verify that documents are properly executed, should the details of strata committees and strata managing agents be required to be lodged and made available on a publicly searchable register similar to the ASIC company register?

Initial period

101. How have the initial period provisions been working? Are any changes needed, and if so, why?

Managing common property in a strata scheme

102. Owners can make changes to common property in connection with their lots if they have authorisation. Either the owner or owners corporation could be responsible for ongoing maintenance. Should the Act outline that a decision needs to be made about who is responsible for ongoing maintenance before any approvals are given to change common property?

103. When making changes to common property such as renovations, is it easy to understand what approvals are needed and when? If no, please tell us why not.

104. Are any changes needed to the types of work that are considered cosmetic work or minor renovations? Please tell us why.

105. Should committees be automatically able to make decisions on minor renovations rather than those decisions being delegated by resolution? Please tell us why.

106. Should a lot owner always be told the reasons why their request for work or renovations was not approved? If yes, when should the reasons be provided?

107. Do you have any other suggestions on how to improve approval of changes to common property?

108. Are the provisions relating to common property rights by-laws clear and working well? Do you have any suggestions for improvement?

109. Does your strata scheme have a licence agreement with your local council for a strata parking area? Have you experienced any issues?

110. Have you experienced problems due to parking on common property? If so, how might changes to the law help manage this issue?

<u>Maintenance and repair of common property</u>

111. How effectively has the law been in ensuring owners corporations comply with their duty to properly maintain and repair common property?

112. Do you have any concerns with the statutory duty to maintain and repair common property? How could it be improved?

113. Is the two-year time limit imposed on making a claim for damages for breaching the duty appropriate? If not, what would be an appropriate length of time?

114. Is it appropriate for the owners corporation to remove parts of the common property from their duty where it is inappropriate to maintain or repair that part of the property? Can you advise of any situations where this has been misused?

115. Is it appropriate that owners corporations can defer compliance with the statutory duty in situations where they are taking action against an owner for damage to the property? Are you aware of any situations where it has been misused?

116. Has the duty impacted owners corporations' and owners' pursuit of claims for building defects, or arranging of rectification of building defects? If yes, how could this be addressed?

Initial maintenance schedule

117. The developer must prepare an initial maintenance schedule for the strata scheme's common property to be considered at the first AGM. Do you agree with this? Are the requirements clear? Are any changes needed?

118. Have you experienced any difficulty obtaining the initial maintenance schedule, or information about estimates and levies determined during the initial period, from an original owner/developer?

119. Have you experienced unrealistic levies being set by an original owner/developer?

120. Do you have any suggestions for improving the initial maintenance schedule?

121. Are 10-year capital works fund plans clear and effective in helping with maintenance and repairs of common property? If no, how could the 10-year capital works fund plan be improved?

Sustainability infrastructure

122. The NSW Government is already changing the law to make it easier for strata schemes to install sustainability infrastructure such as solar panels, batteries, digital meters, hot water systems and electric vehicle (EV) charging stations. What other changes to the strata laws could encourage the uptake of sustainability measures in strata and how would they work?

Insurance

123. Owners corporations must maintain an appropriate level of building and workers compensation insurance. How are the laws working? Are any changes needed? If so, how?

Utility supply contracts

124. The law places time limits on contracts for electricity, gas or other utilities to ensure strata schemes aren't locked into long-term contracts. Are any changes needed? If so, what changes and why?

125. Embedded electricity networks are privately owned and managed networks that often supply all premises within a specific area or building. Embedded

networks generally buy electricity in bulk and then on-sell it to customers inside their network and are currently exempt from the limits on the duration of the contract. Should embedded networks still be excluded from time limits on contracts? If not, what transitional arrangements should be included?

Building managers

126. The Management Act includes a list of reasons why the Tribunal can vary or terminate a building manager's agreement, for example, for unsatisfactory performance of duties. Should any more reasons be added and should they be the same grounds as those that apply to managing agents?

127. Are the current restrictions on who can be appointed as a building manager appropriate? Why/why not?

128. Do you support changing the law to introduce a duty of care on the building manager to act in the best interests of the owners corporation? Why/why not?

129. Should building managers be subject to the same or a similar level of regulation as managing agents? Which could include licensing?

130. Should the maximum duration of appointment of building managers be further limited in a similar manner to strata managing agents?
(**Note:** managing agents can only be appointed for twelve months at the first annual general meeting and a maximum term of three years after that. The owners corporation can also renew the agent's appointment.)

131. Should building managers have a statutory duty of care with responsibility for the safety of the building, including its fire safety? If so, what would be the appropriate qualifications, licensing or accreditation requirements?

Resolution of disputes

132. Are the current dispute resolution processes effective? If not, please describe and suggest any improvements.

133. Does the process for an owners corporation to directly manage disputes between people work? If no, please describe and suggest any improvements.

134. Have you been part of a Fair Trading strata mediation? Are there any changes that could be made to the process? and if so, why?

<u>Jurisdiction and powers of the Tribunal</u>

135. Do you have any general feedback on the strata scheme orders available from the Tribunal and how easy it is to get them?

136. Should the Tribunal be able to award damages for breaches of statutory duties under the Management Act? Why/why not?

137. Should the Tribunal have a general power to order damages, compensation or other monetary amounts in settling disputes? Why?

138. There's no cap on the size of the claim that the Tribunal can consider. Should there be?

139. Are the penalties for breach of orders made by the Tribunal adequate? If not, what should they be?

NSW Fair Trading's role and functions generally

140. Do you have any feedback on NSW Fair Trading's role and functions with strata schemes, including any suggestions for improvement?