



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:REgl917236

1 December 2014

Strata and Community Title Law Review
Fair Trading Policy
P.O. Box 972
PARRAMATTA NSW 2124

By email: policy@services.nsw.gov.au

Dear Sir/Madam,

Community Title Law Reform Position Paper

The Law Society acknowledges the extensive consultation carried out by NSW Fair Trading to date during the review of strata and community title legislation. The Society's Property Law Committee ("Committee") has considered the *Community Schemes Law Reform – Position Paper* ("Position Paper") issued by NSW Fair Trading in September 2014.

The Committee largely supports the approach NSW Fair Trading has adopted in relation to the reform of community title, which is to mirror many of the proposed reforms in the strata scheme law reform. The Committee also supports many of the proposed reforms specific to community title, particularly the development proposals which introduce an appropriate level of flexibility.

The Committee prefers to postpone any detailed comments until draft legislation is available. However there are several matters which the Committee wishes to comment upon.

1. Removal of the right to legal representation in mediation and tribunal hearings

The Committee strongly opposes the proposal to restrict the right to legal representation in mediation and at the NSW Civil and Administrative Tribunal ("Tribunal") for community title matters as referred to in paragraph 1.41. Instead parties will be required to apply for leave to be legally represented.

Although this is consistent with the *Civil and Administrative Tribunal Act 2013*, it is not the case that restricting representation automatically saves time and money. The absence of legal representation can result in more protracted hearings with more assistance needed to guide an unrepresented person through unfamiliar processes and avoid irrelevant issues. The involvement of legal representatives in proceedings usually has the effect of assisting the Tribunal to identify and resolve legal issues in dispute in a more timely manner.

It is the experience of Committee members that many lot owners do not have English as a first language, do not reside in the jurisdiction, or do not have a basic knowledge of legal rights and obligations of lot owners and occupiers. In the Committee's view it is in the interests of the Tribunal and all parties that those persons who wish to be legally represented in disputes, should have an automatic right to such representation and should not have to wait until the day of a hearing to find out whether leave for legal representation will be granted.

2. Uncertainty as to the end of the initial period

Although not mentioned in the Position Paper, the Committee is hopeful that the review of community title will include legislative reform to provide greater clarity in relation to the expiry of the initial period in a community scheme. Transparency and certainty in relation to the expiry of the initial period is essential to the smooth management and administration of a community scheme.

3. Tenant representative

The Committee has concerns as to the manner in which a tenant representative for neighbourhood schemes will be appointed, as referred to in paragraph 1.4. As noted in the context of strata reform, owners are often quite lax in notifying the association of tenancies, making it difficult to ascertain if and when tenants occupy more than half the lots in the scheme.

4. Developer to set realistic levies in initial period and first year

In principle, the Committee supports requiring developers to set appropriate and adequate levies during the initial period and the first year after the initial period expires, as referred to in paragraph 1.18. However the Committee is concerned as to how the question of whether levies are realistic will be determined. Where levies are grossly inadequate, such a determination will not be problematic, but in most cases this will more likely be a matter of degree. The Committee suggests that when drafting the relevant provisions it will be necessary to provide further guidance as to the making of the determination.

5. Provide that penalty payments are to be payable to an association rather than the Commissioner for Fair Trading, and penalties incurred by an owner can be added to the owner's levy account.

The Committee notes the proposal set out in paragraph 1.35, and that in extenuating circumstances the Tribunal will still be able to order that the penalty be paid to the Commissioner for Fair Trading.

The Committee notes that generally penalty orders payable to the Government would be issued as a deterrent and in some circumstances, the Tribunal would have some discretion to order less than the maximum penalty, depending on the owner's financial circumstances. It is not clear if the owner will be given the opportunity to be heard in that regard.

In certain circumstances, when a penalty is payable to Government, the person liable may make an application to pay the penalty by instalments and this application is heard by the relevant Government Authority. The Committee queries whether payment by instalments will be an available option and if so how this will work in relation to the owner's levy account.

The Committee would be pleased to discuss any of the issues raised in this letter and looks forward to reviewing draft community title legislation when available in the new year. If you have queries about this letter, please contact Gabrielle Lea, Policy Lawyer for the Committee on (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,

A handwritten signature in blue ink that reads "Ros Everett". The signature is written in a cursive, flowing style.

Ros Everett
President