THE LAW SOCIETY
OF NEW SOUTH WALES

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13 November 2012

Strata and Community Scheme Review
Fair Trading Policy
PO BOX 972
PARRAMATTA NSW 2124

Email: policy@services.nsw.gov.au

Dear Sir / Madam

Re: Reform of Strata and Community Title Law

The Law Society of NSW appreciates the opportunity to participate in the consultation process for the Reform of Strata and Community Title Law. The Law Society, largely through the Property Law Committee (Committee), has for a number of years advocated comprehensive reform of Strata and Community Title Law. The Committee advises the Council of the Law Society on developments in the area of property and strata law and is comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for various stakeholders in the area of property law.

The Committee has reviewed NSW Fair Trading Discussion Paper, *Making NSW No. 1 Again: Shaping Future Communities Strata & Community Title Law Reform Discussion Paper* (Discussion Paper), released in September 2012. The Committee's response is in three sections, firstly general comments regarding the review, secondly responses to the specific questions raised in the Discussion Paper (Attachment 1) and thirdly some suggestions as to further areas for Strata and Community Reform (Attachment 2).

General Comments

The Committee notes the indicative review timetable set out in the Discussion Paper. The Committee is keen to participate in the meetings with key stakeholders scheduled to take place in early 2013 and considers that it is well placed to make a valuable contribution.

The Committee also notes with concern that it is proposed that an Exposure Draft Bill is scheduled to be released in July 2013 with the Bill to be finalised in August 2013. The Committee does not believe that this will be sufficient time for stakeholders to review the Exposure Draft Bill and effectively engage in consultation with NSW Fair Trading regarding any further suggested amendments to the Bill. The Committee considers that given the extensive review being undertaken and time already invested in the review by the Department and stakeholders, it would be unfortunate if the short timeframe allowed for this

important stage in the process resulted in a less than optimal legislative outcome. The Committee urges the Department to allow increased time between the release of the Exposure Draft Bill and its finalisation.

Response to Discussion Paper

In Attachment 1, the Committee sets out its responses to the specific questions raised in the Discussion Paper. There are several questions where the Committee has chosen not to respond on the basis that other stakeholders have greater expertise or familiarity with the practical operation of policy in the specific area.

Further areas for Strata and Community Reform.

In Attachment 2, the Committee sets out its suggestions as to further potential areas for Strata and Community Reform. The matters raised in this final section are largely matters not specifically addressed in the questions raised by the Discussion Paper but are matters upon which the Committee wishes to comment, drawing upon its expertise and experience in the area. The Committee notes that some of its suggestions require substantial consideration by, and consultation with, Land and Property Information and the Department of Finance and Services.

The Law Society appreciates the opportunity to comment on the reform of Strata and Community Title Law and looks forward to contributing to the next stages of the review. Please contact Gabrielle Lea, Policy Lawyer, Property Law Committee if you have any questions regarding this letter via email: gabrielle.lea@lawsociety.com.au or on telephone (02) 9926 0375.

Yours faithfully

Justin Dowd
President

STRATA AND COMMUNITY TITLE LAW REFORM DISCUSSION PAPER

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 1	**FUTURE REGULATORY APPROACH**	
DIFFERENT RULES FOR DIFFERENT SCHEMES	1. **Should the law distinguish more between different schemes based on size, usage, type of construction or other reasons? If so, how?**	• Keeping the status quo for two lot strata schemes is supported. • The recognition of different rules on different matters for large schemes (as currently defined) is also supported. However, many larger schemes with fewer than 100 lots have special characteristics that need addressing. For example, some larger schemes can be likened to commercial buildings where they have lifts, air-conditioning systems and car park ventilation systems, all of which require building management services. Amendments to the law giving recognition to specific obligations regarding these buildings in the area of governance and maintenance, regular servicing, regular inspection etc) would be supported. • Retirement villages have unique characteristics and should be governed by the retirement villages' legislation as regards management arrangements. Development matters should still be governed by the *Strata Schemes (Freehold Development) Act 1973*, the *Strata Schemes (Leasehold Development) Act 1986* and the *Community Land Development Act 1989* (collectively referred to as the Development Acts) . • There is merit in differentiating between residential and non-residential strata schemes to a greater extent than merely providing different sets of model by-laws. For example, where a lot in a non-residential scheme is subject to existing tenancies, those tenancies will typically be for longer terms than residential tenancies. A longer-term tenant is more likely to be affected by a proposal to terminate a strata scheme.

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REDUCING RED TAPE	**2. Should the current laws be combined and if so, how?**	• At first glance it may seem there is merit in combining the *Strata Schemes Management Act 1996* (SSM Act) and the *Community Land Management Act 1989*, (collectively referred to as the Management Acts). However due to the differences in the management structures of strata and community schemes (for example, in the latter there can be tiered management structures resulting in different management arrangements), in the Committee's view the Management Acts should remain separate. • Given the differences between what constitutes strata (subdivision of buildings) and what constitutes community (generally the subdivision of land) and the differences in the approval processes, the better position is to also keep separate the *Strata Schemes (Freehold Development) Act 1973* and the *Community Land Development Act 1989*. • Consideration could be given to combining the *Strata Schemes (Freehold Development) Act 1973* and the *Strata Schemes (Leasehold Development) Act 1986*. • Consideration should be given to removing references to strata schemes and stratum development from the *Real Property Act 1900* and the *Conveyancing Act 1919* and incorporating the relevant provisions in the strata legislation.
	3. What examples of unnecessary red tape do you believe should be removed?	• Creating easements benefiting common property in the initial period should be permitted without the requirement of the approval of the owners corporation in general meeting, provided the easement only creates rights and not obligations/burdens. • Owners should be able to change the timing of their annual general meeting by a general resolution. The legislation should allow greater flexibility in timing of AGMs. • Retain the obligatory audit and office bearer liability insurances as motions on agendas for AGMs. • Insurance policies should not have to be taken out with approved insurance companies. • The notice periods between the strata and community scheme laws should be consistent. • The purpose of contributions should govern its destination in each case. • A general meeting resolution should continue to be required before an owners corporation can change its postal address. This creates transparency and has consequences on the service of notices.

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FLEXIBILITY FOR INDIVIDUAL SCHEMES	**4. To what extent should the Government prescribe rules for all schemes?**	• The current legislation in relation to creating, amending and repealing by-laws is relatively effective. • There is merit in adopting the philosophy of the *Corporations Law 2001* – unless something is expressly prohibited or prescribed, by-laws should be able to contain anything. However, there is also merit in giving special attention to some matters such as child safety devices and pets (see later comments). • "Proxy farming" should be expressly prohibited. • An obligation for child safety devices should be contained in section 49 of the SSM Act.
	5. Should broad principles apply to the making of by-laws?	A position under which the law could require by-laws to be reasonable and enforced consistently would not be supported: this would create uncertainty as to interpretation, leading to litigation.
	6. Is there merit in the mission statement idea?	A mission statement is not supported.

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PERSONAL FREEDOMS vs COOPERATIVE DUTY	7. **Should the law give more recognition to the personal freedoms of owners?**	Owners already have rights, particularly the freedom to govern themselves. Owners are able to make their own by-laws under special resolution. The current legislation already provides a good balance between control and personal freedom.
COMPETING INTERESTS	8. **Are reforms needed to address the competing interests of stakeholders? If so, what should they be?**	• A holistic approach should be taken to the caretaker provisions. • The "priority vote" given to mortgagees and covenant chargees should be retained. • Long term contracts must be addressed (see Attachment 2).
TERMINOLOGY AND PLAIN ENGLISH	9. **What terms or provisions in the current law do you believe should be rewritten in plain English?**	Plain language is the preferred alternative. There must be uniformity between all the Acts. The first issue is whether to use the term "body corporate" as provided in the Development Acts (eg. *Strata Schemes (Leasehold Development) Act 1986*) or the term "owners corporation" as provided in the Management Acts (eg. SSM Act). "Body corporate" is the term preferred by the Committee. In some of the other jurisdictions, the terms used can be problematic and confusing. For example, the use of managing director used to describe strata managing agent can be confused with *Corporations Law 2001* and can lead to a false impression on the role of the agent. The following terms should remain the same: executive committee, sinking fund, by-laws and initial period. There may be some merit in changing the following terms: • "Owners corporation" to "owners association" (unless "body corporate" is kept); • "Strata managing agent" to "managing agent"; • "Strata roll" to "register of members"; • "Unit entitlements" to "lot entitlements"; and • "Common property" to "shared property". However, terms should not be changed for the sake of change. On balance it is best to stay with what all stakeholders in New South Wales have come to know.

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AWARENESS OF RIGHTS AND RESPONSIBILITIES	**10. Which of the following would help to improve awareness and in what ways?** **(i) more information resources (e.g. factsheets, targeted brochures, template forms, sample documents and an email newsletter)** **(ii) compulsory training for executive committee members of all schemes or just large schemes** **(iii) having new committee members signing a statement setting out their obligations and responsibilities** **(iv) requiring managing agents/Secretaries to supply new owners and tenants with an up to date set of by-laws within a specified timeframe (e.g. 14 days)** **(v) making it a requirement that schemes review their by-laws at regular intervals (e.g. every 5 years)** **(vi) expanding the section 109 certificate to disclose more matters likely to be of material interest to prospective buyers** **(vii) clarifying and simplifying the law dealing with the inspection of records**	The risk of persuading people to accept office within a scheme if the regulatory bar is set too high must be weighed up against the proper governance of a scheme. As to whether the specific measures would help to improve awareness: (i) Supported. (ii) The greater availability of training resources for executive committee members is supported. Compulsory training is not supported. There is a greater need for mandatory training of strata managing agents who should have the training and ability to assist and guide owners corporations. (iii) A statement setting out the obligations and responsibilities of an executive committee would be supported (depending on its terms). (iv) The supply of an up to date set of by-laws after a person becomes an owner or tenant is too late. The provision of that material is better left to vendors and landlords as part of the contractual documentation – for example, amending the *Conveyancing (Sale of Land) Regulation* 2010 to require copies of all applicable by-laws (whether registered or contained in model by-laws) to be attached to a contract for sale. (v) This is an unnecessarily bureaucratic measure. (vi) This suggestion fundamentally misunderstands the purpose of a section 109 certificate, which provides information on matters such as strata levies and insurance details which are significant as at the date of settlement of a purchase. Changes to section 109 would be useful, but not in the manner contemplated by this suggestion (see answer 87 (i) below). (vii) Supported.

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	11. Do you have any other suggestions for how awareness of rights and responsibilities could be improved?	
PARTICIPATION	**12. Which of the following would help to improve participation and in what ways?** **(i) limiting the numbers or restricting the use of proxies** **(ii) introducing a system of pre-meeting postal voting for those who cannot attend a meeting** **(iii) mandating that all owners must vote, with fines imposed if they do not** **(iv) providing the option of secret ballots on certain issues** **(v) reducing the restrictions on quorum requirements or removing the need for quorums altogether** **(vi) enabling some form of tenant representation in schemes** **(vii) calling for committee nominations in advance of AGMs** **(viii) allowing payments to be made to committee members for attending meetings** **(ix) clarifying the legal liability of executive committee members**	There is a risk that wide-ranging regulation of the use of proxies could potentially add significant (and in some cases unnecessary) costs to the administration of strata schemes and the conduct of meetings. The Committee believes the range of matters contemplated in this question, if fully implemented, would be an over-reaction to the difficulties which can arise in relation to "proxy farming". There is a tension between some of the suggested measures – it is hard to reconcile a proposal to make voting compulsory with one to remove the need for a quorum. However, the practice of "proxy farming" creates major difficulties in scheme administration and governance (fostering apathy in lot owners and facilitating the tendency of those lot owners with dominant views to stifle debate about important scheme issues). There is clear benefit in regulating the use of proxies during the initial period, or when the vote relates to a specific class of matters (for instance, building defects). The measures in (i), (ii), (vii), (viii) and (ix) are supported. The measures in (iii),(iv), (v) and (vi) are not supported.
	13. Do you have any other suggestions for how participation in schemes could be improved or owner apathy addressed?	

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COMMUNICATION	**14. Which of the following would help to improve communication and in what ways?** **(i) recognising various technological options for distributing information to those involved with individual schemes** **(ii) enabling teleconferencing, videoconferencing or other means of holding meetings** **(iii) providing more certainty as to how correspondence to schemes should be handled** **(iv) reducing the documents required to be sent to owners ahead of meetings** **(v) giving schemes the flexibility to make documents available on their website or on request from owners** **(vi) requiring minutes of meetings to be made available within a specified time after the meeting (e.g. 14 days)** **(vii) making it clear when contact details can be given to executive committees and owners/residents.**	A proposal specifying a time within which an owners corporation must respond to correspondence causes concern. The response time will depend on the complexity of the issue, the number of issues raised, the frequency of correspondence to the owners corporation and other issues which would make mandating a set time for reply inappropriate. Other reforms in all of these areas broadly adopting the approach taken by the Discussion Paper at pages 14 to 15 are supported. Making scheme law more "technology friendly" is strongly supported.
	15. Do you have any other suggestions for how communication in schemes could be improved?	

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TRANSPARENCY	**16. Which of the following would help to improve transparency and in what ways?** **(i) requiring any person with a conflict of interest to declare that interest and not participate in any discussion or voting on the matter** **(ii) restricting the ability of certain persons (e.g. non-owners or more than one co-owner) from being elected to executive committees** **(iii) making the managing agent automatically a non-voting committee member** **(iv) requiring office bearers be elected at each annual general meeting** **(v) imposing a minimum number of committee members (e.g. three)** **(vi) limiting the period of time any individual can continually hold the same office (i.e. Chairperson, Secretary or Treasurer)** **(vii) requiring motions to be accompanied by an explanatory note and to identify the person who submitted the motion** **(viii) prohibiting or requiring the disclosure of commissions**	As indicated in the comments in response to Question 10, there is a danger in putting significant regulatory impediments on those who are considering assisting an owners corporation in carrying out its functions. There is a risk that there may be difficulty in finding sufficient numbers of persons who are eligible to hold office within a scheme if the regulatory bar is set too high. Any transparency reforms may need modification to accommodate the needs of small schemes. General support for transparency reforms will be subject to consideration of the detailed provisions in draft legislation. As for the specific matters raised: (i) Conflict of interest provisions should be aligned with the position of directors under Australian corporate law. The more onerous Singaporean provisions are inappropriate. (ii) The Committee believes the non-owners or more than one co-owner should, in general, not be eligible for election to executive committees. However, exemptions should be included for immediate family members of lot owners and co-owners where there are insufficient nominations. The position of mortgagees and covenant chargees should also be considered. (iii) Supported. (iv) Supported. (v) Supported, with the proviso that the situation where there are insufficient nominees will need to be addressed. (vi) Not supported. There will be many schemes where the members will be entirely comfortable with experienced, long-serving office holders retaining their positions. (vii) Supported. (viii) A regime requiring meaningful disclosure of commissions rather than outright prohibition is the preferred position.

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	(ix) imposing further restrictions on the length of contracts associated with schemes **(x) streamlining the levels of consent required to make decisions** **(xi) providing greater clarity over who can make what decisions in schemes** **(xii) requiring all or some schemes to have accounts audited** **(xiii) giving owners a right to request and receive copies of any documents relating to expenditure**	(ix) The tension between the need to ensure the provision of essential long-term services to schemes and the possibility of abuse by developers is recognised: see the attached paper for suggestions. In general, the Committee supports further restrictions, perhaps by bringing strata law into line with the requirements under the community schemes legislation (Discussion Paper at page18), coupled with an obligation for disclosure of the particulars of any long-term contracts to purchasers off the plan. Disclosure obligations should encompass not only those contracts in place at the time of entry into the contract for sale of each lot, but also those agreements entered into after exchange (with limited rights of rescission if the agreement substantially disadvantages a purchaser). (x) Supported. (xi) Supported. (xii) Whether or not a scheme has its accounts audited should ultimately be a matter for determination by the scheme other than schemes over a certain size (eg 50 lots) in which case it should be made mandatory. (xiii) Possibly such a right could, in the absence of carefully drafted limitations on the right, encourage vexatious lot owners to bombard a secretary or strata managing agent with numerous requests for voluminous information.
	17. Do you have any other suggestions for improving transparency within strata and community schemes?	

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ACCOUNTABILITY	18. **Which of the following would help to improve accountability and in what ways?** **(i) more clearly defining the role of managing agents, executive committees and office bearers** **(ii) holding agents directly accountable for their actions** **(iii) providing an easier process for schemes to terminate the services of agents** **(iv) making professional management mandatory for large schemes** **(v) introducing a Code of Conduct for executive committees or requiring them to act with due care, skill, honesty and for the benefit of all owners** **(vi) giving the CTTT more options before appointing a compulsory agent** **(vii) requiring executive committees to prepare brief annual reports**	(i) Supported. (ii) Given the requirements for licensing of strata managing agents (the retention of which is supported) the question of accountability of agents raised at page 20 of the Discussion Paper is better dealt with under the licensing legislation. (iii) Termination of the services of a strata managing agent is best left to resolution in a general meeting and empowering executive committees to dismiss strata managing agents is opposed. Giving power to terminate the services of "underperforming" agents by issue of a termination notice signed by a majority of owners is also opposed, not least because of the imprecision in the term "underperforming agent". (iv) Supported. (v) The duties outlined in this question already exist under the general law, but if there is any doubt about that there is benefit in explicitly stating the scope of the duties. The formulation of a Code of Conduct with the sanction of removal from the executive committee if breached is not supported. (vi) Supported. (vii) The additional compliance burden of an annual report by the executive committee is not supported.
	19. **Do you have any other suggestions for how to improve accountability?**	

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URBAN RENEWAL	**20. Do you support the introduction of an alternative process for terminating strata schemes? If so, how many lot owners would need to agree to initiate the process?**	• Yes, the current procedures for terminating strata schemes require examination and review. • There are several matters to take into consideration when determining an approach to termination. They are dealt with separately below. • The first is to ensure proper protection for all "Interested Parties". These include: ➢ owners ➢ tenants (registered and unregistered) ➢ registered mortgagees and chargees. • The second is to determine who may commence the termination procedures. It is suggested these parties (the "Proponent") are: ➢ the owners corporation ➢ an owner or a group of owners ➢ a mortgagee in possession of a lot ➢ a party outside the scheme (the developer). • The third is to ensure there is a process or forum under which the position of all interested parties is considered and accommodated where appropriate. • The fourth is to determine what resolutions of the owners corporation are required to achieve termination. • The fifth is to include an "appeal procedure". • The following suggestions are an outline only and do not include the detail (such as timing of notices, timing of appointment of experts, payment of costs, who may represent owners etc):

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		Step one ➢ Before embarking on the time consuming (and no doubt costly) procedure of termination there should be an initial general meeting of the owners corporation to gauge the reaction of the owners corporation to a proposal to terminate. ➢ Further details which require consideration include such matters as: who can call the meeting, length of notice for the meeting and what resolution is required to take the matter to the next step. ➢ It is suggested that neither a unanimous resolution or special resolution is appropriate to take the termination procedures to the next step and that a new type of resolution should be introduced, possibly described as a "Termination Resolution" (being a resolution resulting from a motion against which owners with no more than 10% of unit entitlement vote against). ➢ Possibly the Proponent may have held a preliminary open forum to discuss the matter with owners before the meeting. Consideration should be given to a process under which, if requested by the Proponent, the secretary of the owners corporation is obliged to call such a meeting for this information exercise. **Step two** ➢ If the resolution is passed, there should then be a period (the "Negotiation Period") in which all stakeholders meet in a "controlled environment" for the purposes of concluding a plan for the termination. ➢ The purpose of the Negotiation Period should be to achieve an outcome for all Interested Parties and the Proponent, with "appeals" permitted only on matters of law. ➢ Accordingly, these negotiations should be conducted/managed by an appropriately skilled party (such as a mediator from the Institute of Arbitrators and Mediators) and should be conducted in the same manner as conciliation conferences in Land and Environment Court matters where the Commissioners assist the parties to come to a resolution. ➢ Experts may have to be appointed to assist in the resolution process. The situations in which the experts will be required will differ for each scheme. For example: o if an owner wants to be paid out rather than being relocated to the new building, and if the parties cannot agree on the compensation amount, an expert (such as a valuer) would be appointed to make the assessment.

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		(The legislation should contain instructions on how the valuation is to be made such as, the value of the apartment on the open market in its current state and not the value to the Proponent (which would be a higher value): o an owner may wish to be relocated to the new building and relocation/ temporary accommodation costs must be determined. ➢ The plans (for the purposes of this submission called "Renewal Plan") should include detailed procedures as to how and when the site will be redeveloped and how each Interested Party will be dealt with. ➢ The Renewal Plan will be different for each site. However, there could be identified compulsory items. These could include: o details of what is proposed on the site; o the position on financing (for example finance may be based on pre-sales and accordingly the termination would be made conditional on finance being procured); o when the termination will take place (for example financiers may require termination to have occurred prior to construction commencing); o what approvals are necessary and what approvals are yet to be obtained; o describing the position in detail for each owner for example whether they will be compensated (and if so, how much and when); and o dealing with mortgagees. **Step three** ➢ A second general meeting to approve the Renewal Plan, also requiring a Termination Resolution. The question to consider here is, whether having gone to the expense of putting the Renewal Plan in place, the Proponent is reimbursed its expenses by the owners corporation if the resolution is not passed. **Step four** ➢ Each party carrying out its obligations in the Renewal Plan.

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		• Other changes to strata laws in the context of termination should be considered. For example, proxies only permitted in limited circumstances. • Changes to other laws are also required to ensure the success of strata terminations: ➢ refining the stamp duty laws to ensure termination procedures (and any associated documents) do not attract stamp duty; ➢ changes to ensure there are no capital gains implications for those pre-1985 apartments; ➢ GST clarification.
	21. **Should any alternative process accommodate only collective sale or should the process be more flexible, to enable co-operative redevelopment of the scheme?**	See the answer to Question 20.
COMMON PROPERTY MAINTENANCE	22. **Should the meaning of common property be changed? If so, which approach do you favour?**	The current concept in the legislation as to what comprises lots and common property is simple and should remain unchanged. The problems arise, not from the current meaning of common property in the legislation, but rather from identifying common property. These issues could be overcome: • by adopting the idea of the Memorandum developed by the Strata Industry Working Group; • by including the Memorandum as a check list with the strata plan (to be completed by the surveyor preparing the plan in consultation with the developer); • with the default situation under which anything not identified on the check list is common property. The idea of owners in general meeting adopting the Memorandum at a later date or the owners in general meeting having the ability to subsequently amend the Memorandum is not supported.

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	23. Should owners be responsible for all internal repairs within their lot and/or work which only benefits or affects them?	The concept of owners being responsible for any fixture which is technically common property but which is wholly within their lot is supported. The concept of owners being responsible for any pipe or wire carrying a service which only services that owner's lot is also supported. The Committee supports embodying these exclusions in the legislation.
	24. Should the absolute obligation to maintain common property be changed to take account of the age and life of the scheme and the funds available?	The concept of liability for maintenance and repair being limited to availability of funds is not supported. The concept of introducing into the obligation of maintenance and repair the concept of reasonableness has some support. Exceptions to the obligations of the owners corporation for maintenance and repair could include: • circumstances where the building is the subject of termination arrangements (underway or under negotiation); • where the damage has been caused by a particular owner or occupier; and • where the damage is the subject of a claim against a developer or builder pursuant to section 18B of the *Home Building Act 1989* (NSW) unless immediate action is required for safety reasons.
	25. Should owners or occupants be responsible for any damage to common property they cause?	Owners and occupiers should be responsible for any damage they cause to common property. Schemes should be given the power to: • seek an order requiring that owner or occupier to rectify the damage; or • carry out the work themselves and recover the costs from the owner or occupier (including costs incurred in recovering those monies (strata managing agents costs and legal costs)) and including recovering any excess on insurance claims.
	26. Should the law about common property for pre 1974 strata schemes be changed?	The better option is to give the owners corporation the option to make changes; there may be some owners who would be disadvantaged by an automatic change.

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OWNER RENOVATIONS	27. **Should the process for owners wanting to renovate or make changes to their lot be simplified and/or clarified?**	• Owner renovations to their lot could be simplified. The processes should be contained in the legislation (the Act or the Regulations). • Structural or permanent changes should require the approval of the owners corporation; section 65A of the SSM Act could be retained with modifications (for example, in section 65A(1) of the SSM Act remove the words "For the purpose of improving or enhancing the common property,").
	28. **Could easy-to-read guidelines be produced giving information to owners on what they can and cannot alter/renovate? What would the content of these guidelines be?**	The Strata Living publication produced by NSW Fair Trading could be updated to include this information.
OVERCROWDING AND SHORT-TERM RENEWALS	29. **Which of the following would help address overcrowding and short-term rentals in schemes and in what ways?** • **enabling schemes to make and enforce by-laws to deal with the issue** • **giving the CTTT power to prohibit certain letting arrangements for a lot where there is a proven pattern of anti social behaviour** • **introducing a law setting the maximum number of persons per bedroom** • **giving local councils more power to deal with such matters**	• The CTTT is not the appropriate forum as suggested. • Councils have the ability in their planning instruments to include restrictions (on numbers or the type of use (eg see the current Manly LEP)). • The strata laws are not the correct forum for these restrictions. • There is probably power in schemes (particularly in developer by-laws for new schemes) to make by-laws restricting the number of persons per bedroom. • For new schemes, councils could make it a condition of development consent with a section 88B instrument registered on title. • However, enforcement is the issue. There does not seem much evidence of enforcement of LEP restrictions by councils. Enforcement of by-laws though the CTTT requires improvement.
	30. **Do you have any other suggestions for how the issues surrounding overcrowding and short-term rentals could be addressed**	• For new schemes, councils could make it a condition of development consent with a section 88B instrument registered on title.
BUILDING DEFECTS	31. **Do you think that maintenance schedule prepared by the developer would be useful?**	No.
	32. **Should defects be a compulsory agenda item for discussion at the first AGM?**	Yes, but care must be taken as regards those parts of the common property which may be a shared facility in a strata management statement where the strata scheme is a stratum parcel.

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	33. **Should the law set clear rules for voting on action regarding defects?**	No.
	34. **Should any other changes be made to the strata laws to more adequately deal with defects?**	The strata laws are not the correct forum for protection of owners corporations regarding defects, except to give owners corporations the power (if that power is necessary) to take an assignment of warranties and retention sums under building contracts (this would require amendments to other legislation). The Home Building legislation is the forum for some changes and requires review, particularly in the areas of statutory warranties and insurance.
ADDING LAND TO A SCHEME	35. **Should land be able to be added to a community scheme, precinct scheme and a subsidiary neighbourhood or strata scheme? If so, should land be able to be added only as association or common property or should land also be able to be added as a separate lot?**	Land should be able to be added to a subsidiary scheme. Land should also be able to be added to a lot.
MULTI-TIERED COMMUNITY SCHEMES	36. **Should a mechanism be introduced to enable amalgamation of subsidiary neighbourhood schemes with a community scheme? If so, what kind of resolution should be required?**	Yes. Special resolution.

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CHAPTER 4	MANAGING MONEY	
UNIT ENTITLEMENTS	37. **Should initial unit entitlements for strata schemes be based upon a valuation from a qualified valuer as it is for community and staged strata schemes?**	Yes.
	38. **Should more flexibility be given to schemes to determine levies other than on the basis of unit entitlements?**	There is already sufficient degree of flexibility in striking levies - for example: • where the use to which a lot is put affects insurance premiums (sections 77 and 149(2) SSM Act). • exclusive use and special privilege by-laws. The uncertainty in having a variety of methods of determining levies outweighs any benefits arising from further "flexibility".
	39. **How could the process of reallocating unit entitlements be improved? Would you support the ACT model being adopted in NSW? Should the procedure for revising unit entitlements in community schemes be expanded to precinct scheme, standalone neighbourhood schemes and strata schemes?**	The risk in a change in unit entitlements based on changes in relevant values over time is that owners corporations may be involved in multiple and frequent applications for review based on what owners perceive to be a significant and disproportionate increase in the value of their lot. The existing system works reasonably well. The differences between strata and community schemes are such that this aspect should not be harmonised; that is, there should be no expansion of the current community schemes model.
LEVIES	40. **Should notices for AGMs contain more details about proposed levy increases? If yes, what additional information do you suggest?**	More information about proposed levy increases (detailing the "bottom line" impact on the lot owner) is supported.
	41. **Should the law require periodic levy notices to be issued?**	The Committee: • supports an explicit statement in legislation that levies are not payable unless a notice has issued setting out the contribution payable and the due dates for payment; • does not support a quarterly levy payable only if a specific levy notice for that quarter had issued; • supports an annual levy notice allowing for either immediate payment or for payment quarterly by nominated dates. If the lot owner chose to pay quarterly, notices of instalments due could issue (perhaps using the practice of councils regarding rates as a model).

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 4	**MANAGING MONEY**	
	42. Is more regulation over the initial setting of levies by developers required?	While the Committee recognises the problem, any law reform would need greater certainty than the obligation to set "realistic" budget forecasts, and would need to balance the desirability of purchasers being informed with the vicissitudes of forecasting expenses.
	43. Should developers be liable for budget shortfalls in the initial period?	The Committee does not support the British Columbia model described at page 38 of the Discussion Paper. The Committee does consider it beneficial that budget information be disclosed annually during the initial period.
	44. Should the law allowing discounts for early payment of levies be removed?	No. It is useful to have an incentive for prompt payment.
	45. Should a strata management statement be required to disclose the method of allocating the shared expenses and/or be certified by a quantity surveyor?	It would be sufficient if the strata management statement clearly disclosed the method used to allocate expenses. A certification mechanism is an unnecessary regulatory burden.
DEBT RECOVERY	**46. Should the penalty interest rate on outstanding levies be raised? If so, what should the figure be?**	The Committee: • recognises the burden imposed on some strata schemes by delinquent lot owners, particularly given the strict liability imposed on owners corporations which must be funded through the levy provisions; • recognises the difficulty of a fixed interest rate becoming inappropriate as market interest rates vary; • considers the interest rate should be capable of being varied by Regulation (as is currently the case – see SSM Act section 79(2)), and reviewed annually; and • considers the interest rate should be sufficiently high to act as a deterrent to non payment of levies; • notes section 556 of the *Local Government Act 1993* (NSW) permits interest to be charged on overdue rates and charges immediately after the rate becomes due and payable, and allows the Minister to specify a maximum interest rate (the Committee understands the current specified rate is 11% pa). In the light of that provision the 10% interest rate for strata levies appears too low.
	47. Should schemes be required to take recovery action within a certain time? If so, what should the timeframe be?	Yes. There should be obligations on schemes to have in place a levy recovery strategy with a view to recovering outstanding levies as soon as they are overdue and to follow that strategy strictly (with exceptions: for example, deceased estates and hardship cases (to be supported by an order of the CTTT).

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 4	MANAGING MONEY	
	48. Should the CTTT be given jurisdiction to deal with outstanding levies?	The CTTT should be granted non-exclusive jurisdiction.
	49. What hardship provisions (if any) should be introduced?	The Committee believes the introduction of "hardship" provisions would create undue uncertainty and complexity in the administration of strata schemes. In particular, given the communal nature of strata living, a potential for one or more owners to defer their obligation to pay levies would frequently create "hardship" for the other lot owners and the owners corporation as a whole. The Committee believes hardship provisions should not be introduced unless they were supported by an order of the CTTT.
	50. Should the recovery of expenses for outstanding levies be limited to reasonable expenses or built into the penalty interest rate?	• A limiting of costs and expenses to what is reasonable invites controversy (and perhaps the need for a dispute resolution mechanism to deal with disputes about reasonableness). • Costs should be separate to the interest rate. • The legislation requires amendments to enable the recovery of costs from mortgagees in possession.
	51. Should owners who owe levies continue to not having voting rights? Do you support any other practical punishments or deterrents and if so what?	• A lot owner owing levies should not have voting rights. • A lot owner owing levies should be barred from participating on an executive committee while levies, interest and costs are outstanding. • A scheme should continue with work on lots for work, health and safety reasons. • Care should be taken that any sanction against an owner in arrears does not unfairly impact on tenants. • Owners corporations should be given greater enforcement powers (such as sale of the lot in certain circumstances).
	52. Should a minimum period of arrears (e.g. two levy payments) be required before loss of voting rights or other punishments are imposed?	No, any arrears should be sufficient to trigger sanctions.
	53. Should schemes be able to seek orders that tenants pay rent to them to cover debts owed by investor owners?	The Committee believes the power described in this question already exists under, for example, the *Civil Procedure Act 2005* (NSW). The Committee supports a broadening of the power, including the grant of non-exclusive jurisdiction to the CTTT.

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 4	MANAGING MONEY	
SINKING FUNDS	54. **Should sinking funds remain compulsory? Should schemes be able to carry forward budget surpluses instead?**	The Committee believes that a properly resourced sinking fund is the best means of dealing with funding the costs of capital works. The alternatives mentioned in the first paragraph of page 42 of the Discussion Paper (raising special levies when the need arises; borrowing to fund capital works) should be discouraged. The Committee believes the dual funds model (maintaining an administrative and a separate sinking fund) is preferable to carrying forward budget surpluses.
	55. **Should the law dictate contributions to sinking funds? If so, how?**	The Committee believes it is important that there be legislative provisions "dictating" contributions to sinking funds. The Committee believes the current legislation should be amended to give additional guidance to owners corporations about the effective operation of sinking funds. Any amendments would need to maintain a reasonable degree of flexibility for the reasons discussed at page 41 and 42 of the Discussion Paper.
	56. **Have the 10 year sinking fund plan reforms been successful? Should they be retained and expanded to the community scheme sector? Are any refinements needed to make them more effective?**	The Committee believes it is premature to pass judgment on the 10 year sinking fund plan reforms, especially given that the reforms have only been fully operational since 1 July 2009 *Strata Schemes Management Regulation 2010* (NSW) (SSM Reg) clause 30. The Committee supports the introduction of regular expert inspections (although care would need to be taken that the role of the inspector did not render the 10 year requirement otiose). The Committee believes that community schemes should be subject to the 10 year sinking fund plan reforms and, in relation to association property, to a regular expert inspection (that is, the inspection should not extend to, for example, the dwellings entirely located within a lot which is not an association lot).
INSURANCE	57. **Should the requirement for valuations every 5 years be kept or changed?**	The five year requirements strike an appropriate balance and should be retained.
	58. **Should insurance and valuation details be on the notices for each AGM?**	Yes.
	59. **What items should the law require to be covered by scheme insurance policies?**	The Committee believes the existing requirements for the risks that must be covered are appropriate, subject only to clarifying issues of "double coverage" or uncertainty about whether an item within a lot is covered (issues addressed in Chapter 3 of the Discussion Paper under the heading "Common Property Maintenance").
	60. **Should schemes be encouraged or required to have a higher insurance excess?**	It would be appropriate for owners corporations to have a greater awareness of the implications of having a higher insurance excess, but this should be left to the market rather than mandated by legislation.

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 4	MANAGING MONEY	
	61. **How could the law give schemes more flexibility over their insurance requirements?**	The exemption from building insurance currently in section 83(4) of the SSM Act could be extended to apply to more than two lots (for example, "triplexes") if the criteria set out in the section are satisfied.
	62. **Should the cost of insurance be shared only on the basis of unit entitlements?**	The Committee does not support removing the ability of an owners corporation to pass on additional costs of insurance based on the particular use of the lot. Section 77 of the SSM Act should be retained.
	63. **Is there a need to increase the minimum public liability cover for schemes? If so, what should be the amount?**	The Committee considers there is no need for an increase.
FINANCIAL RECORDS AND STATEMENTS	64. **How do the laws around accounting records need to be modernised (if at all)?**	The Committee considers strata law should recognise the increasing use of electronic strategies for the maintenance of accounting records. In addition to the matters raised at page 45 of the Discussion Paper, the availability of financial statements and budgets via a website should be considered. The Committee agrees that any reform in this area should have effective fraud mitigants in place.
	65. **Do you support a simplified set of financial statements?**	The Committee supports the principle that the financial statements should be simplified. However, the Committee considers that this simplified statement should be in addition to, not in substitution for, more detailed financial statement. A lot owner could choose to receive the detailed financial information or not (the Act would set one or the other as a default position). Consideration could be given to the model adopted by many public companies addressing whether a lengthy or short form annual report is sent to shareholders.
	66. **Are annual financial statements sufficient? Should the law require or recognise the ability of schemes to request statements on a more regular basis?**	The Committee believes the preparation of annual financial statements is sufficient.

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 5	DISPUTE RESOLUTION STEPS	
	67. **Should internal dispute resolution mechanisms be recognised in the law?**	Yes.
	68. **Should attendance at mediation be made compulsory?**	The Committee observes that compulsory mediation of retail tenancy disputes appears to be effective in resolving a significant proportion of retail tenancy disputes at an early stage. The Committee is aware of anecdotal evidence that despite section 125 of the SSM Act, mediation does not seem to be as effective in relation to scheme disputes. The Committee believes that in many cases there is not a genuine commitment by the disputants to mediation in scheme disputes. Any proposal to mandate attendance at mediation would need to be accompanied by a commitment of additional resources, including mediators with skills comparable to those who perform that role in retail tenancy disputes.
	69. **If mediation is unsuccessful should parties be able to apply for a CTTT hearing without needing to go through the Adjudication step?**	No.
	70. **Should legal representation be limited to where a proven need is shown or the dispute is over a specific amount (e.g. $10,000)?**	No.
	71. **Is there merit in establishing a "duty advocate" like information service at mediation sessions and CTTT hearings?**	Possibly, subject to clarification of the precise role of such an advocate.
COST OF MEDIATION	72. **Should mediation for strata and community schemes be a free service? If so, how should dispute resolution services be funded?**	No.
JURISDICTION & POWERS	73. **Should the jurisdiction of mediation and the CTTT be broadened to cover the majority of disputes which arise in strata and community schemes? If so, should such jurisdiction be exclusive? What types of matters would be inappropriate for mediation and the CTTT to handle?**	No.
	74. **Should the procedure around cost orders and interim orders be clarified?**	Yes.

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 5	DISPUTE RESOLUTION STEPS	
	75. Should there be a process to reject applications about trivial matters or where the same matter has been contested before?	Yes.
COMPLIANCE & ENFORCEMENT	**76. Which of the following would improve the level of compliance?** • **streamlining the number of offences** • **increasing the penalties that can be imposed** • **enabling penalty notices to be issued** • **requiring or encouraging schemes to appoint a committee member as a "compliance officer"**	• enabling penalty notices to be issued. • increasing the penalties that can be imposed.
ENFORCING BY-LAWS	**77. Should schemes be able to issue their own fines for by-law breaches?**	Yes, within guidelines.
	78. Should it be mandatory for a scheme to enforce its by-laws?	Yes.
	79. What other changes to the system of enforcing by-laws would you like to see?	• Consistency of decisions by the CTTT. • Compulsory reporting of District Court decisions.
PARKING, PETS & OTHER COMMON DISPUTES **(a) Parking**	**80. What do you think should be done, if anything, about parking in schemes?**	• Defining "visitor" is the first step: this could be defined in legislation. • Identifying visitors is the next step: issuing of visitor permits would help but there are management costs in this process. • The third step is enforcement: the following measures have support: ➢ reinstating the ability to wheel clamp or tow offending vehicles (supported by amendments to the *Local Government Act 1993*); and ➢ allowing the delegation of enforcement rights to the local council (councils should be prepared to take on this responsibility if they require visitor car parking in their development consents).

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 5	DISPUTE RESOLUTION STEPS	
(b) Pets	**81. What do you think should be done, if anything, about pets in schemes?**	• The Committee considers there is benefit in clarifying the issue of pets in residential schemes, particularly given the uncertainty (exacerbated by conflicting Tribunal decisions) as to what constitutes the unreasonable withholding of consent. • The Committee supports the development of more comprehensive model by-laws to clarify the status of pets in any given scheme. • There is merit in differentiating between multi-storey schemes and those schemes where the structures are in a townhouse or villa configuration.
(c) Noise	**82. What do you think should be done, if anything, about noise in schemes?**	• Schemes should be given power to control noise within their own environment (even though council and police powers may be widened). • The idea of a "cease and desist" notice has some merit, if it is coupled with substantial fines.
(d) Smoking	**83. What do you think should be done, if anything, about smoking in schemes?**	• It is impractical to expect contracts for sale to include terms governing smoking (landlords may wish to avail themselves of the opportunity to do so in their leases, but the obligation to do so should not be contained in legislation). • Providing information about smoking can help but may not be necessarily effective. • By-laws in schemes may not necessarily address the issue and accordingly banning smoking on common property or within lots where it can be detected in an adjoining property should be included in the legislation.
(e) Timber flooring	**84. What do you think should be done, if anything, about flooring in schemes?**	• Making it compulsory to use carpet as a floor covering in living areas above ground level is not a practical solution. • Any changes to the legislation or the model by-laws making it obligatory to comply with the acoustic requirements in the Building Code of Australia when installing timber flooring would be supported.
(f) Drying of washing on balconies	**85. What do you think should be done, if anything, about washing in schemes?**	• Drying washing on balconies is a matter which is relevant to a scheme and the aesthetics of a building (even if the local council also has issues). • Legislation prohibiting drying washing on balconies would be supported. Legislation permitting drying washing on balconies (despite by-laws to the contrary) would not be supported.

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 5	DISPUTE RESOLUTION STEPS	
MISCELLANEOUS ISSUES	**86. Do you agree with any of the following reform proposals:** (i) expanding the list of documents which must be handed over by the developer at the first AGM (ii) updating the existing provisions dealing with development contracts in community, precinct and neighbourhood schemes to make the provisions consistent with the staged development provisions of the Strata Schemes (Freehold Development) Act (iii) removing the requirement for compulsory registration of a neighbourhood development contract and allowing a development contract to be provided with a neighbourhood scheme where circumstances require (iv) enabling an owners corporation or community association to lease additional common property or association property from within its own scheme or a subsidiary scheme (v) giving schemes the power to deal with abandoned goods (vi) authorising schemes to enter lots to trim trees which pose a risk or are damaging common property (vii) removing the cap of nine executive committee members (viii) clarifying who is the 'controlling officer' in a scheme for OH&S purposes (ix) expanding the information to be kept on a strata roll to include details of all licences, loans and an index (x) enabling legal notices required to be given to owners corporations to be served on the managing agent, and (xi) clarifying the circumstances when a scheme can restrict owners or residents from accessing common property.	(i) Supported. (ii) Supported. (iii) Supported. (iv) Supported. (v) Supported. (vi) Supported, upon the giving of reasonable notice on intention to do so. (vii) Not supported. (viii) It may be better left to the circumstances of an individual scheme – there may well be more than one relevant "controlling officer". (ix) Supported. (x) Supported provided there are appropriate arrangements in place for determining the identity of the strata managing agent (for example, obliging this information to be recorded on the certificate of title for the common property). (xi) Supported.

SECTION	CHAPTER	OBSERVATIONS/COMMENTS
CHAPTER 5	DISPUTE RESOLUTION STEPS	
	87. **Do you have any other suggestions for how the existing law regulating strata and community schemes could be improved?**	(i) The "section 109 update" regime introduced in the SSM Reg 2010 has no practical utility, and should be replaced by a provision which facilitates the provision of an oral update for no additional payment beyond the fee on issue, with protection to the strata managing agent or executive committee providing that information in good faith. (ii) Disclosure would be enhanced by requiring the preparation and recording on title of a disclosure document comparable to a strata development contract. (iii) Although the operation of the *Home Building Act 1989* is the subject of a separate inquiry process, the Committee believes the issue is of such importance in protecting the rights of lot owners that it needs to be addressed in this review. The Committee strongly supports the reinstatement of home warranty insurance for multi-storey buildings. (iv) Please see Attachment 2.

(A) *Strata Schemes (Freehold Development) Act 1973* (NSW)

1. Permitting various activities

There are many instances where a particular activity must be carried out after registration of a strata plan for the proper development of the particular project: some of these activities are presently prohibited during the initial period and all such activities require a special resolution of the owners corporation (which can be at a time when the original proprietor may no longer have the voting power to enable the passing of the required resolution).

These activities are not necessarily only for the benefit of the developer, and include:

- granting of leases and easements in favour of telecommunication authorities;
- creation of rights in favour of particular lot owners (such as exclusive use rights and special privileges);
- caretaker/building management agreements;
- hotel management agreements;
- agreements for "green buildings" (such as long term electricity agreements);
- creation of rights in favour of adjoining owners;
- creation of rights in favour of the owners corporation over adjoining land;
- creation of rights and obligations necessitated by development consents; and
- creation of rights and obligations necessitated by consent and other authorities.

Some examples of legislative provisions restricting the timing of certain activities are set out below.

- Section 28 of the *Strata Schemes (Freehold Development) Act 1973* (NSW) (Freehold Development Act) prohibits the registration of various dealings in the initial period: these include the creation of leases and licences over common property, the creation of easements and covenants burdening and benefiting the common property;
- Section 113 of the *Strata Schemes Management Act 1996* (NSW) (Strata Management Act) prohibits the owners corporation entering into certain documents during the initial period. These include caretaking agreements, agreements under which the owners corporation agrees to provide owners and occupiers access to recreational facilities in an adjoining strata scheme in return for a fee.
- The Strata Management Act prohibits the carrying out of certain works to common property, both during the initial period and after the initial period: for example, alterations and additions to the common property are prohibited during the initial period and alterations and additions to the common property after the expiration of the initial period are only permitted if the procedures in section 65A are followed.

Those matters which are governed by the Strata Management Act are dealt with later in these comments.

Recommendation

The Committee suggests that these issues could be dealt with by the introduction of the concept of a Disclosure Contract which would have the following features:

- the timing of registration may vary: it could be registered at the same time as the relevant strata plan (similar to a strata development contract) or it could be registered earlier (provided it was not cancelled when the strata plan was lodged for registration);

- it could be registered against the title to the common property (similar to a strata development contract);
- it could detail the proposed development activities, and like strata development contracts, it would contain warranted development activities (being ones the developer is obliged to do) and authorised development activities (being ones which the developer is permitted to do but not obliged to do);
- in some instances (in the public interest) the terms of the proposed document would be disclosed in full (for example, a caretaker agreement or facilities agreement);
- it could endure after the expiration of the initial period and continue to the earlier of its expiry date and the date the disclosed development activities were completed;
- it would not require the consent of the council; and
- in the same manner as strata development contracts, it would have an expiry date (nominated in the disclosure contract).

The concept of disclosure by way of a registered document is not novel. Current legislation contains mechanisms which permit development activities provided they are disclosed. Some examples are:

- the activities to achieve the staged registration of a strata plan under Division 2A of the Freehold Development Act by the registration of a strata development contract.
- the appointment of a caretaker under the community titles legislation provided the terms of the agreement are disclosed in the community management statement registered on title.

The Disclosure Contract would be similar to a strata development contract.

The activities disclosed in the Disclosure Contract would be automatically permitted, in the same way a plan of subdivision of a development lot in a staged strata scheme is permitted without the consent of the owners corporation if it is disclosed in a registered strata development contract.

A number of matters the subject of the Disclosure Contract will not be known at the time a contract for sale of a strata lot is issued (except possibly the long term agreements) and accordingly it is not suggested the Disclosure Contract is a compulsory vendor disclosure document. The document is more a tool to permit the proper development of projects, by way of a registered document.

2. Strata development contracts under Division 2A of Part 2

Section 28B of the Strata Development Act prohibits a consent authority issuing development consent unless the development application is accompanied by the proposed strata development contract.

This may not always happen in practice and raises an argument as to the validity of the consent.

Further, there is information in the strata development contract which may not be known at the time of lodging the development application (for example, proposed management arrangements, proposed by-laws, proposed covenants, easements and dedications).

Recommendation

The Committee suggests that changes be made to the legislation removing the obligation to lodge the strata development contract with the development application.

3. Strata management statements and building management statements

Strata management statements are registered under Division 2B of Part 2 of the Strata Development Act. Building management statements are registered under Division 3B of Part 23 of the *Conveyancing Act 1919* (NSW).

Strata management statements were introduced first into the Strata Development Act and building management statements followed at a later date, effectively to do the same things as strata management statements in buildings where there was no stratum parcel.

In accordance with section 196J of the *Conveyancing Act 1919* (NSW) a building management statement ceases to have effect when a strata management statement is registered.

Building management statements are effectively the same document as strata management statements.

Replacement of one document with a virtually identical document involves doubling up of work.

Recommendation

The Committee recommends that changes be made to the legislation to permit the seamless conversion of a building management statement to a strata management statement at the time of creation of the first stratum parcel for the building.

4. Certification of strata development contracts

Section 28B of the Freehold Development Act requires the "consent authority" which grants consent to certify the strata development contract.

"Consent authority" is defined in the Strata Development Act as having the same meaning as in the *Environmental Planning and Assessment Act 1979*. "Consent authority" under that Act means either the council or another authority (such as a Minister) if so specified either under the *Environmental Planning and Assessment Act 1979* or an environmental planning instrument.

The limited definition of "consent authority" in the *Environmental Planning and Assessment Act 1979* (NSW) technically prohibits the execution of strata development contracts by the consent authority as required by section 28B.

Recommendation

The Committee suggests that either the Strata Development Act or the *Environmental Planning and Assessment Act 1979* (NSW) is amended to clarify the requirement for certification.

5. Shared facilities in strata management statements under Division 2B of Part 2

When preparing strata management statements, the current practice is to include a shared facilities register for the purposes of allocating costs between the various buildings in the complex of which the stratum parcel forms part.

There is no compulsory legislative requirement to do so or to have a cost sharing arrangement under which there is a fair allocation of costs between the buildings in the complex. In some circumstances it may not be commercially appropriate to do so.

The greatest area of dispute in complexes with stratum parcels is the cost sharing mechanism and its consequent results.

Recommendation

The Committee suggests that changes be made to the legislation making it obligatory for strata management statements to include a statement as to the method of determining the cost calculation attributable to each shared facility.

6. Determining disputes under strata management statements under Division 2B of Part 2

Schedule 1C of the Strata Development Act obliges a strata management statement to provide for the settlement of disputes and provides a number of dispute options as examples. There needs to be clarity as to the jurisdiction of the Consumer Trader Tenancy Tribunal (CTTT) in connection with disputes.

The Committee's preference is for the Supreme Court to be the arbiter of disputes. However, the Committee recognises this may be costly and the CTTT may be the proper forum for some disputes.

Recommendation

The Committee suggests that changes be made to the legislation:

(a) identifying those disputes which must be referred to the Supreme Court and those which must be addressed in the CTTT under strata management statements (and building management statements); and

(b) to the effect that only owners corporations and stratum lot owners can activate disputes and that lot owners and lot occupiers do not have standing to do so.

7. Other areas for reform - strata management statements under Division 2B of Part 2

While matters relating to the governance of a strata scheme are contained in the legislation, these matters are governed by the terms of the strata management statement itself, subject to the statement complying with the provisions of Schedule 1C of the Strata Development Act.

The Committee supports this position.

Recommendation

The Committee suggests that changes be made to the legislation:

(a) making it obligatory for strata management statements to include a statement as to the method of determining the cost calculation attributable to each shared facility (see above);

(b) providing clearer insurance provisions covering the situation where one party (for example, a government body) is a self insurer;

(c) to the effect that building management committees (under both building management statements and strata management statements) have the status of a statutory entity (similar to owners corporations);

(d) placing obligations on building management committees to keep in a state of good and serviceable repair the shared facilities for which it has responsibility (similar to section 62 obligations on owners corporations); and

(e) establishing a regime under which representatives and substitute representatives for owners corporations may only make decisions as directed by their owners corporation through the executive committee (with a corresponding obligation on executive committees to call and hold a meeting within the necessary time to give directions to the representative or substitute representative for voting at the meeting of the building management committee).

8. Original proprietor's obligation to hand over documents

Presently the original proprietor must hand over prescribed documents at the first annual general meeting. Practically this does not always happen in the Committee's view.

Recommendation

The Committee suggests that there are a number of ways to address the issue:

(a) increase the penalties for not complying with the hand over of prescribed documents as required; and

(b) bring forward the time the documents must be produced – in the Committee's view, the better time would be to produce them to the strata certifier prior to the issue of the strata certificate, coupled with an obligation on the strata certifier to provide the documents to the owners corporation.

Other matters which the Committee suggests could be considered are:

- an obligatory format for the documents and an obligatory way of compiling them (both hard and soft copies);
- obligations on strata managing agents to retain them and to hand them over to the new strata managing agent when the scheme changes strata managing agents; and
- a central register for the documents (such as the Registrar General).

For consistency, the Committee also suggests that corresponding changes be made to the *Strata Schemes (Leasehold Development) Act 1986* (NSW).

(B) *Strata Schemes Management Act 1996* (NSW)

1. Long term agreements

Paragraph (A)1 of this Attachment describes various activities under the Strata Management Act which are prohibited during the initial period or which require a special resolution in general meeting after the initial period when the original proprietor may not have the requisite voting power.

Recommendation

The Committee recommends that the right to carry out certain activities should be permitted with disclosure. This disclosure could be by a registered document (such as the Disclosure Contract referred to in paragraph 1) or in contracts for sale. The intention to introduce the concept of these arrangements into a scheme should be known when contracts for the sale of an "off the plan" strata lot are issued.

2. Incorporation into legislation by-law case law reform

Background on the White v Bettali decision

The decision of the Court of Appeal in *White v Betalli & Anor [2007] NSWCA243* (14 September 2007) leaves open the argument as to or whether a *White v Betalli* by-law can be created during the term of the scheme (unlike "at plan registration" as occurred in *White v Betalli*).

Recommendation

The Committee recommends amendment of the legislation:

(a) enabling the creation of such a by-law, on registration and during the term of the scheme;

(b) supported by a special resolution;

(c) with the written consent of the "burdened" lot owner; and

(d) with the added protection that the by-law cannot be repealed, varied or modified without the consent of that owner.

The Committee notes that while the decision in *James v The Owners Strata Plan SP11478 [2012] NSWSC 590* is the most current case law on whose consent must be obtained to the granting of an exclusive use by-law under section 52(1)(a) of the Strata Management Act, there has been confusion in the past as to the meaning of "the owner or owners of the lot or lots concerned" (see the decision of Santow J in *Young v Owners Strata Plan 3529 [2001] NSWSC 1135*).

Recommendation

The Committee suggests that changes be made to section 52(1)(a) the Strata Management Act:

(a) providing the consent is required from the owner or owners of the lot or lots on whom the rights and privileges are conferred (or proposed to be conferred) to resolve the uncertainty; and

(b) specifying that the owner(s) written consent must be provided before the meeting containing the motion for the granting of the exclusive use right or special privilege.

3. Owner renovations

Following the comments under the heading "Owner Renovations" made in response to question 27 of the Discussion Paper, further recommendations are set out below.

Recommendation

The Committee suggests that section 65A of the Strata Management Act be amended by:

(a) deleting "For the purpose of improving or enhancing the common property," from section 65A(1);

(b) introducing provisions such that:

- section 65A only applies to "major" additions, alterations or erections; and
- "minor variations" can be carried out subject to conditions.

4. Repair obligations of owners corporations when their common property is a shared facility under a strata management statement under Division 2B of Part 2

Owners corporations are obliged to maintain and repair their common property in accordance with section 62 of the Strata Management Act.

Parts of common property may be a shared facility in a strata management statement registered under Division 2B of Part 2 for which the building management committee has assumed responsibility.

Recommendation

The Committee suggests that section 62 should be amended to remove the responsibility from the owners corporation to the extent it is assumed by the building management committee.

5. Single mixed use schemes

Single mixed use schemes usually comprise a single strata scheme with a mix of uses, which are usually retail and residential. These schemes have their own special issues, one being the refusal of an owners corporation to endorse a development application in its capacity as "landowner".

Executing a development application as landowner does not mean consent to the use or works the subject of the application.

Recommendation

The Committee suggests that consideration should be given to amending the legislation obliging owners corporations to execute development applications in their capacity as landowner where the proposed use or activity the subject of the application is not prohibited by the relevant planning instrument.

6. Strata certifiers

There are a number of documents which require the consent of the consent authority to be endorsed upon them before they can be registered. These include strata development contracts and management statements under the community legislation.

In practice, often councils are not familiar with these documents which can cause delay in their release from council.

Recommendation

The Committee suggests that changes be made to the legislation permitting the execution of these documents by the relevant certifier.

(C) Community Schemes Legislation

The Committee commented on a Consultation Paper prepared by the Department of Lands and the New South Wales Office of Fair Trading on matters governed by the *Community Land Development Act 1989* and the *Community Land Management Act 1989* on 8 August 2006.

A copy of the Committee's submission can be provided on request.