THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:JEgl1044033

19 August 2015

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,

Strata Schemes Management Bill 2015

The Law Society of New South Wales appreciates the opportunity to review the Strata Schemes Management Bill 2015 ("Bill"). The Property Law Committee ("Committee") has reviewed the Bill and the Dispute Resolution Committee ("DR Committee") has also reviewed Part 12 Disputes and Tribunal powers of the Bill.

1. Comments on the Bill

The Committee has made suggestions for further consideration in in the attached table. The table contains joint comments from the DR Committee and the Committee in relation to s 218.

The Committee notes that sufficient time will need to be allowed between assent and commencement to permit the drafting of regulations. Given the far-reaching changes introduced in the Bill, the Committee considers that a reasonable time should be allowed between publication of the regulations and commencement of the legislation. It is important that sufficient time be allowed for all stakeholders to become familiar with the details of the new regime, including taking into account changes to commonly used forms and notices.

The Committee also considers that, as far as possible, the Bill should not have a staged commencement; it would be preferable to have a single commencement date.

The Committee would welcome further opportunities to discuss this Bill and review the draft regulations when released.

2. Part 12 Disputes and Tribunal powers

The DR Committee does not support the s 215 definition of "Mediator" in the Bill. Mediators are key to the efficient resolution of disputes under the Bill. It is important

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to the integrity of the dispute resolution scheme that mediators meet minimum quality standards. On that basis, the DR Committee recommends that the legislation refer explicitly to mediators that are nationally accredited under the National Mediator Accreditation System.

The benefits of an accredited mediator are:

(1) the mediator has been approved as an accredited mediator by a Recognised Mediator Accreditation Body ("RMAB");

(2) the mediator is required to comply with the Approval Standards and the Practice Standards and any relevant legislation;

(3) the RMAB is satisfied that the mediator has appropriate competence taking into account their qualifications, training and experience;

(4) for the mediator to maintain their accredited status they must reapply for accreditation every two years;

(5) the RMAB has obtained evidence that the mediator is insured (either individually or via their employer); and

(6) the RMAB has obtained evidence that the mediator is of good character.

The DR Committee recommends that the Bill follow the approach of s 5 and s 11 of the *Courts Legislation Amendment Act 2015* (ACT), which modifies the *ACT Civil and Administrative Tribunal Act 2008,* to update the definition of "mediation" and essentially provide for mediations to be conducted only by mediators accredited under the National Mediator Accreditation System.

The DR Committee suggests that the Bill should also include the following definitions (taken from section 11 of the ACT legislation):

> *Mediator Standards Board* means the incorporated body registered under the Corporations Act as the Mediator Standards Board Limited (ACN 145 829 812).
>
> *accredited mediator* means a person who is entered as a mediator in the register of nationally accredited mediators maintained by the Mediator Standards Board.

Should 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,

John Eades
President

Draft Strata Schemes Management Bill 2015

Detailed comments of the Law Society of New South Wales

Section	Content	Comments
s 4	Definitions	• The Committee supports the use of cross references in this Definitions section. • In the definition of "lessor of a leasehold strata scheme", the Committee suggests the words "lessor of a leasehold strata scheme" should all appear in bold and italics.
s 13	Functions that may only be delegated to member of strata committee or strata managing agent	The Committee suggests that the wording in s 13(1)(b) should be replaced with the more appropriate wording used in s 44(1)(a). The phrase "the levying of contributions" is potentially misleading as it may connote that the strata committee or strata managing agent determines the amounts to be levied, rather than merely notifying the amounts determined by the owners corporation.
s 15	Matters to be determined at first AGM	• The Committee suggests that s 15 be renamed "Agenda for the first AGM" because not all the matters listed are determinations, for example s 15 (k), (l), (m) and (n). • The agenda item referred to in s 15(g) "to decide whether the by-laws should be altered or added to" is confusing and should be removed. Technically, the by-laws cannot be varied without notice. As drafted, it does not make clear the need to comply with Schedule 1, clause 18. If by-laws are to be varied, the existing practice (to hold an extraordinary general meeting to immediately follow the first annual general meeting) is to be preferred.
s 16	Documents and records to be provided to owners corporation at first AGM	• The Committee suggests that delivery of the documents by the original owner to the owners corporation *at its first annual general meeting*, if read literally, means they must be delivered to the meeting. This is not practical, and in any event does not give the strata managing agent the opportunity to collate the material and ascertain what might be missing. The obligation should be to provide these documents at least 48 hours prior to the meeting. • The Committee suggests a fact sheet for the original owner or developer setting out extensively the types of documentation that should be assembled and handed over to the owners corporation may assist in improving the quantity and quality of documentation provided. The fact sheet could usefully act as a coversheet for the

Section	Content	Comments
		documentation. • In the Committee's view s 16(2) appears unduly restrictive and open to abuse. The need to supply important documentation should not be diluted to take into account whether it is still in the possession of the original owner or developer. Copies can always be obtained and if the documentation is not assembled at this stage it is often much harder to try and retrieve later, if ever. The Committee submits s 16(2) should be deleted. • Ideally the Committee suggests that provision of the material referred to in this section should be a pre-requisite for registration of the strata plan, but this raises the issue of to whom it is to be delivered. In the Committee's view the best alternative is NSW Fair Trading. Failing that option, an appropriately regulated person such as the surveyor who prepared the strata plan or the strata certifier is the next best option. The holder of the documents could then hand over the documents as identified. The agenda item would then be to decide what action should be taken to recover the missing documents. In the Committee's view it is unfortunate that NSW Fair Trading has declined to play a more active role in ensuring this important material for the scheme is carefully assembled at the time when it is most easily obtained.
s 18	AGM must be held	• The Committee notes there is no definition of financial year. The Committee understands that different schemes operate on different financial years. • The Committee prefers the current approach to the timing of the AGM as referred to in Schedule 2, clause 31 of the *Strata Schemes Management Act 1996* ("Act"). The proposed new approach may result in successive AGMs being almost two years apart or merely several months apart. The current approach provides a window of two months by providing that a scheme's AGM be held on a date not earlier than one month before and not later than one month after each anniversary of the first annual general meeting. In the Committee's view, the current approach provides sufficient flexibility while maintaining appropriate frequency.
s 19	Other general meetings	The Committee suggests that the obligation to give the notice under s 19 (2) should be "as soon as practicable and within 14 days of receipt of a qualified request". This is because any such requisition is usually provided in a contentious environment and "as soon as practicable" is open ended.

Section	Content	Comments
s 22	Notice to be given to owners corporation of right to cast vote at meeting	The Committee is concerned with potential inconsistencies between Court Rules for the service of originating process and changes made in the Bill which allow a lot owner to provide only an email or facsimile number as an address for service. (See also s 256). The Committee supports greater use of email communication with lot owners. However, to enable the postal address of an owner to be included in the strata roll, as required by s. 179 (1)(b), the Committee recommends that section 22(2)(a) be amended to: "the person's full name, postal address and an address for service of notices".
s 30	Members of strata committee	The Committee supports capping the number of persons on a strata committee at nine, excluding any tenant representative.
s 33	Tenant representatives	• Owners are anecdotally lax at notifying the owners corporation of tenancies. It may be difficult for an owners corporation to know if the 50% threshold has been reached. The Committee notes that under s 33 (2) only those tenants duly notified may participate in the nomination process. • Presumably the reference in s 33(1) to "half of the lots" is to the number of lots without reference to unit entitlement; if so, this should be clarified. • The Committee suggests the section should be amended to require that the details of the representative be communicated to the Secretary.
s 35	Vacation of office of elected member of strata committee	This section should be revised to include that an elected member of a strata committee will also vacate office upon death.
s 37	Duty of members of strata committee	The Committee supports the duty of each member of the strata committee to carry out his or her functions for the benefit of the owners corporation and with due care and diligence.
s 45	Vacation of office by officer	This section should be revised to include that an officer of an owners corporation will also vacate office upon death.
s 50	Term of appointment of strata managing agents	The Committee supports the three year cap on the term of appointment of a strata managing agent and notes the ability to reappoint in s 50(2).
s 103	Legal services to be approved by general meeting	The Committee welcomes s 103 as it clarifies the steps required for an owners corporation to obtain legal services.

Section	Content	Comments
s 106	Duty of owners corporation to maintain and repair property	The Committee considers that it should be explicitly stated that nothing in s 106 authorises an owner or occupier to carry out maintenance and repair work to the common property.
s 107	Common property memorandum	The Committee notes s 107(4) clarifies that a common property rights by-law or by-law made under s 108 will prevail where it is inconsistent with the adopted common property memorandum. However, in the event of any inconsistency between the strata plan and the adopted common property memorandum, it should also be clarified which one will prevail.
s 108	Changes to common property	• The Committee suggests that the words "for the purpose of improving or enhancing the common property" be deleted from s 108(1) because not all changes to the common property will be in themselves an improvement or enhancement. For example, the demolition of a common property laundry used by very few owners is arguably not an enhancement or improvement of common property but may reflect the will of an overwhelming majority of lot owners. • The Committee is concerned that the common property memorandum may be used to impose obligations of maintenance repair or replacement of parts of the common property without due regard to the lot owner burdened, without consent of the owner concerned. Care needs to be taken in drafting the prescribed common property memorandum. • The Committee recommends the insertion of an additional subsection allowing ratification by a special resolution, a change that has already been made to common property. • The Committee considers that it should be explicitly stated that nothing in s 108 authorises an owner or occupier to carry out changes to common property.
s 109	Cosmetic work by owners	• The Committee suggests in s 109(2) the words "internal" be inserted before the words "blinds". • The Committee considers that "work that requires development consent" should be expressly included in s 109(5) and s 110(7). • In the Committee's view, it is likely there will be disputes about the meaning of "structural changes" in s 109(5)(b).
s 110	Minor renovations by owners	• The Committee is pleased to note s 110(4) in relation to the owner providing prior

Section	Content	Comments
		details, plans, qualifications of persons carrying out the works and proposed times to the owners corporation. This subsection should also be expanded to expressly require provision of the details of relevant insurances. • The Committee is aware that many schemes have adopted a by-law which prohibits hard flooring. The Committee is concerned about the tension between s 110(3) and a by-law that would be made under s 136. That tension is further compounded by s 111 which permits multiple paths for approval. • The Committee suggests that s 110(7) should also exclude work involving a reconfiguration of the layout of a lot, for example swapping a bathroom for a bedroom. • It is likely there will be disputes about the meaning of "structural changes" in s 110(7)(b).
s 112	Owners corporation may grant licence to use common property	• The Committee does not support the granting of such a licence to an occupier. Any licence should be only granted to the owner who may choose to grant a sub-licence to the occupier. Problems may arise if the occupant vacates the lot. An owner of a lot will always be easier to locate in the event of default. • The Committee notes that this section will not apply to licences granted to third parties, such as telecommunication companies.
s 115	Initial maintenance schedule must be prepared	The Committee notes that further details about the content of the initial maintenance schedule will be provided in the regulations.
s 134	By-laws that apply to strata schemes	• In the Committee's view it would be very useful if the prescribed by-laws applicable between 1996 and the commencement date of the Bill could be preserved as filed memoranda at Land and Property Information. It is important that lot owners are aware of the applicable by-laws for their schemes and this would be a relatively easy way of assisting lot owners in that regard. • Given the commencement date of the current Act (1 July 1997) and the possible commencement date of the Bill (possibly 1 July 2016), the Committee considers the references to "1996" and "2014" in the headings to ss 134(2) and 134(3) may be misleading.
s 136	Matters by-laws can provide for	The Committee is aware that many schemes have adopted a by-law which prohibits hard flooring and repeats its comments in respect of s 110.

Section	Content	Comments
s 137	Occupancy limits	The Committee considers that by-laws that prohibit short term letting should be expressly recognised in the legislation.
s 141	Procedures for changes to by-laws	The Committee supports the insertion of a six month limit within which to lodge the change of by-laws for registration.
s 143	Requirements and effect of common property rights by-laws	The Committee is pleased to see that the approach to the meaning of the owners of the lots "concerned" by the Supreme Court in *Jennifer Elizabeth James v The Owners Strata Plan No. SP 11478 (No 4)* [2012] NSWSC 590, being the owners on whom the rights and privileges are conferred, has been adopted in s 143(1).
s 179	Content of strata roll	• The strata roll should also contain details of any leases or licences of common property. • The Committee repeats its earlier comments in relation to s 22.
s 181	Certain records to be retained for prescribed period	The retention period should be seven years, not five, consistent with common business practice.
s 185	Certificate by owners corporation as to financial and other matters relating to lot	• The Committee considers that the certificate should be available to any transferee. • Either the section itself or the prescribed form of certificate should require the owners corporation to provide details of the bank account into which levies are to be paid (to facilitate the use of electronic conveyancing and in particular the making of direct payments to clear levies at settlement).
s 187	Provision of strata scheme information to tenants	• The Committee notes that the time frame within which a landlord must notify a tenant in relation to a change in by-laws has been increased from 7 to 14 days. However the Committee still has concerns about the practical implications of this obligation when the Bill does not appear to impose any duty on the owners corporation to inform lot owners generally that a by-law has been registered, enabling a lessor or sub-lessor to comply with its obligations under this section. • The Committee is concerned about the imprecision inherent in the concept of a "consolidated" copy of the by-laws. On one view, the consolidation process could be as straightforward as a folder containing the by-laws in hard copy, and that creates no difficulty in the Committee's view. On the other hand, if what is contemplated is a requirement to produce a new copy of the set of by-laws each time a by-law is added,

Section	Content	Comments
		changed or deleted, this would impose unduly onerous obligations. The Committee believes the word "consolidated" should be deleted.
s 190	Definitions	• The Committee considers it is unfortunate that by default the strata legislation is the vehicle to rectify deficiencies in the building industry. The better solution would have been to amend the home building legislation and other legislation that deals with building work. • Each of the definitions in this Part would be better placed in the definition section (s 4), or at least cross references inserted in s 4, consistent with the approach adopted to definitions elsewhere in the Bill. • The Committee considers that the definition of "contract price" should be in the Bill rather than the regulations.
s 192	Date of completion of building work	The Committee has made a number of submissions to NSW Fair Trading regarding practical issues arising in ascertaining the date of completion under the *Home Building Act 1989,* for example see the Committee's comments in its submission on the Home Building Position Paper dated 17 October 2013.
s 193	Building work to which this Part applies	• The Committee notes that s 193(2) has been drafted such that Division 2 applies to building work which commences before or after the commencement of the section, but not where the work has been completed. • In the Committee's view it may be problematic to require the building bond for developers who have made financial arrangements for projects but have not yet entered into a contract for the building work. Similarly it may be problematic for developers in the early stages of selling off the plan who have not formally entered into a contract for the building work.
s 196	Obligation of developer to appoint building inspector to obtain building inspection report	The Committee is concerned as to what may happen if the developer becomes insolvent during the period contemplated for notification to the Chief Executive.
s 201	Final report	The Committee would be pleased to see in due course a copy of the regulation which will prescribe the contents of the interim and final reports.

Section	Content	Comments
s 204	Costs of reports and appointments	The Committee notes that s 204 provides for regulation of the fees that may be charged for an inspection and appointments by the Secretary. Given the divergence in size and scale of strata schemes the Committee believes the prescription of appropriate fees may create difficulties.
s 207	Bond to be given	"occupation certificate" as referred to in s 207(6) should be defined in s 4.
s 209	When building bond payable	The Committee suggests 30 days may not be sufficient time in s 209(2), particularly if the owners corporation proposes to circulate the final report to lot owners for their input.
Part 12	**Disputes and Tribunal Powers**	• The Committee notes the dispute resolution mechanisms contained in Part 12. The Committee remains concerned with the abolition of the Adjudicator system because in its view, dealing with the majority of strata disputes at first instance "on the papers" is useful, efficient and cost effective and should remain an option for the resolution of disputes. • The Committee considers that the table appearing as part of the introductory note to Chapter 5 of the current Act is extremely useful, and would be of even greater utility in the new Bill, in light of the relocation throughout the Bill of various provisions relating to the powers of the Tribunal.
s 215	Definitions	The Committee suggests that where definitions are included in a section, a cross reference should be made to that particular section in s 4, as has been done for other terms defined throughout the Bill.
s 217	Mediation involving disputes about part strata parcels	The Committee suggests "site" should be defined.
s 218	Representation of parties	• Both the DR Committee and the Committee do not support s 218 which requires all of the other parties to the dispute to consent to another party being represented. A party should be entitled to representation as of right. The Committees strongly support parties being able to access legal representation as of right. The absence of legal representation can result in more protracted proceedings with more assistance needed to guide an unrepresented party. Preserving for parties the choice to be legally

Section	Content	Comments
		represented in a mediation will ensure matters are dealt with expeditiously. • The Committee also suggests that as drafted this section could prevent an owners corporation being represented by a strata managing agent (or indeed represented at all) if the other party to the dispute objected. More generally, where a party to the dispute is a company the mediation process could be frustrated if s 218 remains in its current form. It should additionally be open to an owners corporation to have legal representation at a mediation without the consent of the other party. • If despite the strong views of the Committees this section is to remain as drafted, a mechanism should be inserted to allow the question of representation to be determined prior to the day of the mediation.
s 228	Orders to settle disputes or rectify complaints	• The Committee welcomes the broadening of the Tribunal's powers under s 228(1). • The Committee suggests that the definition of "exercise a function" in section 4 should be expanded to: "use a power, act under an authority or perform a duty". Without this expansion, the Tribunal's powers will be limited to settling disputes which involve an owners corporation performing or failing to perform a duty. The Tribunal would have no power to determine a dispute where an owners corporation had a power or authority to act but did not do so. This would defeat the intent to expand the Tribunal's powers .
s 231	Orders enforcing restrictions on uses of utility lots	It is noted this section is similar to s 161 of the Act, which introduced the concept of an authority having the right to seek an order for the purposes of enforcing a restriction on use. The Committee suggests this concept be extended to enable councils to enforce breaches of their planning instruments in certain circumstances (for example, reallocation of visitor or disabled parking spaces).
s 234	Orders relating to strata committee and officers	It is not clear whether the order in s 234(1)(b) only prohibits future matters or whether it can also cover past decisions on that matter. The Committee suggests consideration should be given as to whether the section should be expanded so that the order can provide that all earlier decisions on the prohibited matter are reversed or cancelled.
s 244	Recovery of unpaid civil penalty	The Committee supports s 244.
s 250	Structural defects – proceedings as agent	The Committee notes that s 250(1), while not attempting to proffer a definition, reflects one commonly held understanding of what constitutes a "structural defect". The Committee

Section	Content	Comments
		reiterates the difficulties whenever reference is made to the notion of a structural defect or structural change.
s 255	Personal liability of officers and strata committee members	The Committee suggests replacement of the words "for the purpose of executing" with the word "under".
s 256	Address for service	The Committee repeats the comments made in relation to s 22.
Schedule 1	**Meeting procedures of owners corporation**	
Generally	Deceased lot owner	The Committee notes that neither the current Act nor the Bill appears to allow for representation at a meeting where the lot owner has died and the Committee considers it would be appropriate to provide for this contingency.
Clause 4	Inclusions of matters on agenda	• The Committee considers that the explanation in clause 2(c) should be optional rather than mandatory. • Clause 4(4) mirrors cl 36 Schedule 2 of the current Act. To ensure the item appears on the agenda of the next annual general meeting, the Committee suggests the words "by including the motion on the agenda of the general meeting next following the date the requirement is made" are added at the end of cl 4(3). • The payment of levies is important to ensure the proper running of a scheme. If levies are unpaid then an owners corporation can be placed in a position of not being able to meet its statutory obligations. The Committee suggests that the agenda item should be removed from the meeting if on the day of the meeting the owner who made the requirement has unpaid contributions.
Clause 5	Nomination of candidates for election prior to meeting	The Committee maintains that cl 5(6) should be deleted. The payment of levies is paramount to the proper running of a scheme and members with unpaid contributions should not have the right to nominate.
Clause 14	Decisions at meetings	• In the Committee's view it would be preferable to delete the last sentence of clause 14(3) and the note, and replace with the last sentence of section 5(2). • The Committee suggests that two amendments be added to the first sentence of cl14(4).

Section	Content	Comments
		Insert: "on a motion" after "poll" in the first line; and at the end of the first sentence insert "on that motion". • In the experience of the Committee, lot owners sometimes use the mechanism of demanding a poll to revisit an item previously dealt with much earlier in the meeting. If a poll is to be taken it should be taken at the same time that the agenda item is first addressed at the meeting. • The Committee suggests the insertion of a new subsection requiring the Chairperson to announce the result of the voting on any motion at the meeting at which the motion is considered. This will assist transparency and understanding.
Clause 17	Quorum	The Committee does not support cl 17(4)(b) as it effectively removes the need for a quorum. The Committee requests cl 17(4)(b) be deleted.
Clause 22	Minutes	The Committee suggests the words "full and" be deleted from clause 22(1).
Clause 23	Persons entitled to vote at general meetings	The Committee reiterates that the Bill should allow for representation at a meeting where the lot owner has died.
Clause 26(7)	Appointment of proxies	The Committee notes that proxy farming is a controversial issue. Some members of the Committee consider there should be no exemption for strata managing agents from the limit on the number of proxies that may be held. Other members noted the difficulties with absentee landlords and convening meetings dealing with a single issue, for example, approving what is currently an exclusive use by-law. The Committee suggests as a compromise that all proxies given to strata managing agents must be completed to specifically direct the strata managing agent as to how to vote on each motion and on this basis there should be an exemption for strata managing agents from the proxy limit.
Schedule 2	**Meeting procedures of strata committees**	
Clause 3	Definition of "tenant member"	• The Committee considers describing the tenant representative as a "tenant member" may cause some confusion as to whether that party is a member or a representative. As the representative has no voting rights, and as Part 2 Schedule 2 and s 33 do not describe that party as a member, the better position may be to call that party the "tenant

Section	Content	Comments
		representative" and not "tenant member". Following from the above point, if the representative is not a member, then he or she will not be entitled to receive a notice. The clause should be amended so that the tenant representative receives a notice. The Committee suggests that the term "tenant representative" be used consistently throughout the Bill and the consideration should be given to deleting all references to "tenant member". • It may be that the tenants do not appoint a representative. To avoid the argument that a meeting was not valid because a representative did not receive a notice, Part 2 Schedule 2 should be amended so that the notice need only be given to a tenant representative if that party has been appointed and if that party's details are given to the Secretary (see comments on s 33 about notice).
Schedule 3	**Savings, transitional and other provisions**	
Clause 4	Review of by-laws	It is unclear to the Committee how a review would take place. It could be costly for an owners corporation to undertake this exercise. In any event, no change can be made without a special resolution, so the effect of the clause is questionable.