



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:GUgl1149376

27 May 2016

Draft Strata Regulations
Policy and Legislation
Fair Trading Policy
P.O. Box 972
PARRAMATTA NSW 2124

By email: strataconsultation@finance.nsw.gov.au

Dear Sir/Madam,

Strata Schemes Management Regulation 2016

The Law Society of NSW appreciates the opportunity to review the draft Strata Schemes Management Regulation 2016 ("Draft Regulation") and comment on the Regulatory Impact Statement for the Draft Regulation.

1. Comments in response to the Regulatory Impact Statement

The Law Society has made suggestions for further consideration in the attached table of responses to the questions raised in the Regulatory Impact Statement for the Draft Regulation.

The Law Society notes that sufficient time will need to be allowed between the making of the Regulation and commencement to allow stakeholders to become familiar with the Draft Regulation and revise commonly used forms and notices.

The Law Society has several other concerns in relation to the Draft Regulation as set out below.

2. Model by-laws for non-residential schemes

The Law Society notes that the Draft Regulation does not include model by-laws for non-residential schemes, such as industrial, commercial/retail and mixed use schemes. We understand that these model by-laws are still utilised for smaller schemes. The Law Society supports the retention of model by-laws for such schemes, appropriately updated.

3. Legal services to be approved by general meeting

The Law Society notes that, unlike the *Strata Schemes Management Regulation 2010*, the Draft Regulation has no additional provisions in relation to exemptions from the requirement under s 103(1) for a resolution approving the obtaining of legal services by the owners corporation at a general meeting.

Section 103(2) of the *Strata Schemes Management Act 2015* provides that:

- (2) An owners corporation or strata committee may obtain legal services without obtaining approval under this section if:
 - (a) it is of the opinion that urgent action is necessary to protect the interests of the owners corporation, and
 - (b) the cost of the legal services does not exceed \$10,000 or another amount prescribed by the regulations for the purposes of this subsection.
- (3) Approval under this section is not required for the following:
 - (a) to obtain legal advice before commencing legal action,
 - (b) to take legal action to recover unpaid contributions, interest on unpaid contributions or related expenses,
 - (c) to take any other legal action prescribed by the regulations for the purposes of this section.

The exemptions provided by s 103(2) are appropriate but insufficient. A further clause in the Regulation is required to enable non-urgent legal advice to be obtained below a certain threshold without the need for approval by the owners corporation at a general meeting. Unless this circumstance is provided for in the Regulation, if an owners corporation requires non-urgent legal advice for say \$1,200, a resolution approving the obtaining of legal advice by the owners corporation at a general meeting is required. In the Law Society's view this is unduly restrictive on the day to day operation of the owners corporation.

The Law Society also notes that the threshold in clause 15 of the *Strata Schemes Management Regulation 2010* is \$12,500, yet the threshold in s 103 of the *Strata Schemes Management Act 2015* is \$10,000. We query the rationale for the reduction in the threshold.

4. Proxies

The Law Society supports the limitation on proxies under clause 26(7) of Schedule 1 of the *Strata Schemes Management Act 2015*. However we suggest that further clarification needs to be provided in the Draft Regulation as to what happens if a person appointed as proxy receives proxies exceeding the 5% limit. For example:

- Should the person appointed as proxy only accept the proxies first received before that limit is reached?
- Should the person appointed as proxy be obliged to notify all members of the owners corporation that he or she is unable to accept any additional proxies?
- Should the limit on proxies only apply to proxies which do not specify the manner in which the person appointing the proxy wishes to vote?

Uncertainty may also arise as to the time of delivery if some proxies are delivered to the secretary and others delivered to the strata managing agent. It should be made clear, at the very least, that when a person receives proxies exceeding the 5% limit, that person cannot simply choose which of the proxies he/she will accept.

Should you have any queries about this letter, please contact Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Michael Tidball', with a stylized flourish at the end.

Michael Tidball
Chief Executive Officer

**Regulatory Impact Statement
Strata Schemes Management Regulation 2016**

Submission by the Law Society of NSW – May 2016

No.	Questions	Comments
	Option 3	The Law Society supports option 3, the making of the proposed Regulation, subject to the suggestions for further consideration set out below.
	Owners Corporations and Strata committees	
	Functions that may only be delegated to strata committee member or strata managing agent	
1	Are there any other functions of the owners corporation that should only be able to be delegated to a member of the strata committee or a strata managing agent?	No.
2	Are there any additional items that should be included in the agenda of the first AGM of the owners corporation?	No.
3	Are there any additional documents or records that the original owner or lessor should be obliged to provide to the owners corporation before the first AGM?	We suggest that documentation evidencing compliance with the new defect bond regime should be provided, eg evidence of payment of the bond.
4	Are the procedures for nominating a tenant representative to the strata committee set out in clauses 7 and 8 fair and reasonable? If not, what procedures would be preferable and why?	<ul style="list-style-type: none"> • We suggest an additional provision requiring notification of the outcome to the secretary of the owners corporation. • A similar notification provision should be added in relation to clause 8.
5	Are the procedures for electing the strata committee set out in clauses 9 and 10	<ul style="list-style-type: none"> • Yes and in our view these provisions are clearer than the existing provisions. • We do not support clause 10(7) and submit it should be deleted to achieve

No.	Questions	Comments
	appropriate? If not, what procedures would be preferable and why?	certainty.
6	Is the current multiplier of \$1,000 per lot an appropriate amount for priority votes?	<ul style="list-style-type: none"> • We note that for small schemes the threshold will be very low but for large schemes the threshold may be inappropriately high.
7	Are the procedures for electronic, pre-meeting electronic and postal voting set out in clauses 14, 15 and 16 fair and reasonable? If not, what procedures would be preferable and why?	<ul style="list-style-type: none"> • We support the greater flexibility provided by the use of electronic means in these provisions. • We suggest that given recent changes to Australia Post delivery times, the time frame stipulated in clause 16(3) should be longer.
8	Is there any other information that should be included in a payment plan?	<ul style="list-style-type: none"> • The information to be included is sufficient. • We suggest than in clause 19(2) the word “must” should be amended to “may”. Monthly written statements are quite onerous, particularly if the monthly payment is quite low. Alternatively, the written statements could be provided upon request.
9	Is there any other information that should be included in a notice of recovery action?	No.
10	Are there any other accounting records that the owners corporation should keep?	No.
11	Is \$30,000 still an appropriate limit for expenditure by large schemes not requiring at least two quotes? If not, what would be an appropriate amount and why?	Yes.
12	Does the proposed Common Property Memorandum appropriately set out maintenance responsibilities? If not, what responsibilities or items should be amended and why?	<ul style="list-style-type: none"> • The Law Society considers the Common Property Memorandum to be a useful guide as to maintenance responsibilities but does not support its adoption as a by-law, as this may lead to uncertainty in the event that the Memorandum is inconsistent with notations on a strata plan itself. • To provide further clarity, we suggest that two notations should be added to the Memorandum: <ul style="list-style-type: none"> ○ restate s 107(4) of the <i>Strata Schemes Management Act 2015</i> (the provision

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		<ul style="list-style-type: none"> ○ that deals with inconsistency between the Memorandum and a common property rights by-law or by-law made under s 108); and ○ state that the provisions or notations on the strata plan prevail to the extent of any inconsistency with the Memorandum.
13	Are there any other types of renovations that should specifically be included as minor renovations?	<ul style="list-style-type: none"> • The Law Society notes that s 110(3) together with clause 28 of the draft regulation provides a non-exhaustive list of minor works and we support this approach. We suggest consideration be given to adding the following further items to clause 28 as minor renovations: <ul style="list-style-type: none"> ○ Installation of ceiling fans and exhaust fans; and ○ Installation of internal shutters. • We further note that the draft regulation prescribes no additional work as “cosmetic work” under s 109(2)(h). The Law Society notes the non-exhaustive list of cosmetic works under s 109 and suggests consideration could be given to prescribing the following as cosmetic work under s 109(2)(h): <ul style="list-style-type: none"> ○ Installation of shower screens ○ Installation of wall beds; ○ Installation of external retractable awnings of canvas or similar material which are not visible from the street when extended.
14	Is the list provided in clause 29(1) appropriate for a maintenance schedule? Should any other items be included?	We suggest the addition of roofing, but otherwise defer to the expertise of other stakeholders.
15	Does the proposed amendment in clause 30 clarify the window safety requirements for unconventional or older strata complexes?	Yes.
16	Does clause 32 provide a fair and reasonable process for dealing with abandoned goods on common property? If not, how could the process be improved?	<ul style="list-style-type: none"> • The Law Society is concerned about the interaction of these new provisions with the <i>Personal Property Securities Act 2009</i>. • We suggest that the time frame in clause 32(3)(d) is insufficient and should be increased to five days.
17	Does clause 34 provide a fair and reasonable	<ul style="list-style-type: none"> • The Law Society is concerned about the interaction of these new provisions with the

No.	Questions	Comments
	process for dealing with abandoned vehicles on the common property?	<p><i>Personal Property Securities Act 2009.</i></p> <ul style="list-style-type: none"> We suggest that the time frame in clause 34(3)(d) is insufficient and should be increased to five days.
18	Are there any circumstances which should be exempt from an occupancy by-law?	The Law Society suggests that clause 36 could be broadened to cover the relationships of step parents, step children/siblings etc.
19	Is the proposed definition of 'resident' appropriate? If not, what would be a more appropriate definition?	We have concerns about the restriction of residency to a continuous period of not less than three months in clause 37. Any time stipulation may prove problematic. If the time stipulation is removed from clause 37, the whole clause should probably be removed as it does not add anything to s 137(5) of the Act.
20	Is the proposed setting of the minimum insured amount appropriate? If not, how should the minimum insured amount be determined?	Yes, and we note this is very similar to the approach in the current Regulation.
21	Should strata scheme records be required to be kept and made available in electronic form?	The Law Society supports the storage of records electronically but considers that for smaller schemes, many of which are self-managed, it would be onerous to require electronic storage. It would also appear to be inconsistent with s 176 of the Act which permits the owners corporation to determine the form in which records are made or stored.
22	Alternatively, should electronic storage be encouraged by setting lower fees that may be charged for inspection of paper records?	<ul style="list-style-type: none"> No, we would anticipate that even where some records are stored electronically there are also likely to be some records kept in paper only. A two tiered fee structure would create uncertainty about the applicable fee as payment could only be provided once the mode of storage of the records is known, rather than supplied prior to, or on inspection as usually occurs.
23	Is 13 months an appropriate period of time for keeping voting records?	Yes.
24	Are there any other professional bodies that building inspectors could be drawn from? If so, what are they and why?	The Law Society defers to the expertise of other stakeholders.

No.	Questions	Comments
25	Is the disclosure period of 2 years between employment by the developer and consideration of appointment as a building inspector appropriate? If not, what should the period be, and why?	No, the Law Society considers that the period should be longer than the period for appointment purposes in s 197(1) of the Act, which is two years. We consider that five years would be more appropriate for the disclosure period.
26	Should <i>contract price</i> be determined in some other way? If so, how and why?	No.
27	Are there any other circumstances in which the building bond should be able to be accessed to meet the costs of inspections or reports? If so, what are they?	No.
28	Is 14 days adequate notice of the proposed payment of the bond by the Secretary?	The Law Society suggests 28 days would be more appropriate given recent changes to Australia Post delivery times.
29	Are the requirements in clauses 60, 61 and 62 appropriate for the conduct of mediations? If not, what should they be and why?	<ul style="list-style-type: none"> • The Law Society has several concerns in relation to the requirements in clauses 59, 60 and 61 for the conduct of mediations. • As raised in our submission on the draft Bill, the Law Society does not support the requirement for all of the other parties to a dispute to consent to another party being represented at a mediation, which is reflected in clause 59(1). • It is also not possible for an owners corporation to appear otherwise than by a representative, as it is not a natural person. The requirement for consent for attendance by a representative is inappropriate and problematic. This clause 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. It should additionally be open to an owners corporation to have legal representation at a mediation without the consent of the other party. • A party should be entitled to legal representation as of right. The absence of legal representation can result in protracting a mediation, with more assistance needed to guide an unrepresented party. Preserving for parties the choice to be legally represented in a mediation will ensure matters are dealt with expeditiously. • If this clause is to remain as drafted, a mechanism should be inserted to allow the

No.	Questions	Comments
		<p>question of representation to be determined several days prior to the day of the mediation, so that all parties can prepare adequately.</p> <ul style="list-style-type: none"> • Consideration should also be given to stipulating that consent is only necessary for disputes below a certain monetary limit. Additionally, the mediator should be given discretion to require or waive the obtaining of consent, having regard to factors such as the nature of the dispute, and the ability of a party to represent itself.
30	Is the prescribed limit of \$60 for gifts to strata managers an appropriate amount?	No comment.
31	Is there any additional information that should be included in the strata information certificate in Form 4?	<ul style="list-style-type: none"> • In relation to item 1, we suggest that further clarification is required as to the content that is to be inserted. • We suggest that the following information also be included in the strata information certificate: <ul style="list-style-type: none"> ○ status of the defects bond and amount currently held as defects bond; ○ bank details for the owners corporation account, to facilitate immediate payment of outstanding levies in conveyancing settlements conducted electronically. • In relation to item 7, we are concerned that it may be difficult to identify the matters that should be inserted at item 7 and that a better approach may be to attach a copy of the 10 year capital works plan to the strata information certificate. • In respect of useability, will the updated form be made available on Fair Trading's website and will user testing be done? • In relation to the fee for the certificate, we suggest that the fee should include a verbal update from the strata manager in relation to amounts owing to the owners corporation by the owner of the lot in respect of which the certificate has been issued. This would assist practitioners in ensuring updated amounts owing to the owners corporation are paid out on settlement.
32	Does the keeping of animals model by-law provide useful options for regulating pet ownership in strata schemes? If not, what other options would be preferable and why?	<ul style="list-style-type: none"> • An option for a scheme to determine that no pets may be kept should be retained, in line with current model by-laws. • Apart from making this option available to new schemes, withdrawing this option may cast doubt on the validity of existing by-laws for schemes which stipulate no

No.	Questions	Comments
		<p>pets may be kept.</p> <ul style="list-style-type: none"> The Law Society also suggests some parameters in relation to timing should be inserted into Option A.
33	Is this model by-law appropriate to address poor behaviour by guests and other short-term visitors?	<ul style="list-style-type: none"> Model by-law 7 is satisfactory. The Law Society understands that some stakeholders are seeking the addition of a note or cross reference to provisions of the Act to make landlords more aware of this by-law. A note for educational purposes would be satisfactory in our view, but any change to the drafting of the by-law in this manner is not appropriate and not supported.
34	Is this model by-law appropriate for dealing with children playing on common property?	Yes.
35	Does this model by-law provide effective options for dealing with the issue of smoke penetration that may affect other residents?	An option for no smoking in the scheme must be provided. Many schemes have such a by-law. Any failure to include this option may cause confusion as to the legality of such a by-law.
36	Is this model by-law appropriate or should it be removed to encourage strata residents to avoid using clothes dryers and reduce their energy usage?	Yes it is appropriate.
37	Is this model by-law appropriate for the disposal of waste?	Further simplification of the drafting is encouraged.
38	Is the model by-law appropriate for dealing with change of use notification?	Yes.