THE LAW SOCIETY
OF NEW SOUTH WALES

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19 December 2013

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 and Community Title Law Reform Position Paper

The Law Society appreciates the extensive consultation carried out by NSW Fair Trading to date during the review of strata and community title legislation. The Society's Property Law Committee ("Committee") has considered the *Strata Title Law Reform – Strata and Community Title Law Reform Position Paper* ("Position Paper") issued by NSW Fair Trading in November 2013.

There are a number of policy positions identified in the Position Paper that the Committee supports, such as the proposed model to facilitate collective sales and renewals and the introduction of reforms aimed at early detection and discussion of building defects.

The Committee is also grateful for the opportunity provided for representatives from the Committee to meet with policy officers and Commissioner Rod Stowe prior to and upon the release of the Position Paper to discuss initial concerns.

Although the Committee prefers to postpone any detailed comments until draft legislation is available, there are several significant matters that the Committee wishes to bring to your attention.

1. **Allow schemes to appoint as many people as they wish to the committee provided that at least three people are appointed to the committee in large schemes**

   In the Committee's view, the proposal at paragraph 1.9 that as many executive committee members as possible be elected is not a practical one. If an unlimited number of lot owners can be elected to the executive committee and a quorum is comprised of half the members of the executive committee, convened on giving 72 hours' notice, it is likely to be harder to achieve the requisite quorum. That is not a desirable situation. In the Committee's view, the current limit of nine persons on the executive committee should be retained for all strata schemes.

2. **Provision of a bond or bank guarantee by the developer of a high rise strata building**

   The Committee supports the requirement that the developer of a high rise strata building pay a bond or bank guarantee which will only be released once an independent inspector has agreed that identified defects have been fixed, as described in paragraph 2.3 of the Position Paper,. The Committee suggests that the independent third party holding the bond should be obliged to place it in a secure interest bearing deposit.

3. **Introduce an obligation for developers to provide any documents that are reasonably necessary to enable or assist the owners corporation to run the scheme and maintain the building**

   The existing obligations upon developers to provide documents at the first annual general meeting are regularly disregarded, or are not capable of compliance. The Committee suggests that the most effective way to ensure that owners corporations obtain such documents (referred to in paragraph 2.6 in the Position Paper) is to make the delivery of the documents a pre-condition to the registration of a strata plan. It is proposed that strata plans should not be permitted to be registered with Land and Property Information NSW until such time as the building contract, building plans, development approval documents, home owners warranty certificates and all other documents listed in clause 4 of Schedule 2 to the *Strata Schemes Management Act 1996* ("Act") have been provided to NSW Fair Trading for scanning.

4. **The introduction of broad principles in the Act for the setting of by-laws, including that by-laws cannot be unreasonable, oppressive or discriminatory**

   This proposal, described at paragraph 4.1 in the Position Paper, is not supported by the Committee. While in principle the introduction of these overarching principles would seem to be a good idea, the Committee is concerned that the introduction of these principles will foster uncertainty in a strata scheme. "Reasonableness" can often be subjective and the introduction of such a broad principle is likely lead to disharmony and uncertainty. If it is considered that broad principles should be contained in the Act regarding matters which may be the subject of by-laws, the principles should only relate to by-laws which discriminate. The determination of whether a by-law may be unreasonable or oppressive will be extremely hard to define or determine in case law. The principle that by-laws should not discriminate is reflected to a degree already in current strata legislation, for example a strata scheme may not make by-laws prohibiting children from living in the strata scheme.

5. **Require the secretary of a scheme (or delegated strata managing agent) to keep a consolidated set of the by-laws and require a consolidated set to be lodged with the Registrar General each time an amendment is made**

   While the Committee recognises the benefit of an owners corporation being required to keep a consolidated set of by-laws as proposed at paragraph 4.2, the practical operation of this requirement needs careful consideration. The task of preparing a consolidated set of by-laws will be significant when the scheme has a large number of existing by-laws, which is often the case in old schemes, large schemes or mixed use schemes. If the task of creating a consolidated set of by-

laws involves the copy typing of large portions of text, transposition errors are very likely to occur.

Sometimes a by-law might annex a plan relating to work that a lot owner will carry out in relation to the common property which has been approved by the owners corporation on specified terms. Where such plans exist in relation to several by-laws, placing these plans in a consolidated set of by-laws might not be done accurately.

Presumably, each time a by-law needs to be registered, the prior consolidated set of by-laws will need to be removed from the common property title and replaced with an updated consolidated set of by-laws containing the new by-laws. Where the scheme has many by-laws this will be an extremely cumbersome and time consuming process.

The Committee is also concerned that the cost of creating a consolidated set of by-laws will be imposed on the latest lot owner who seeks approval of a new by-law, so as to make the cost of seeking approval of a by-law prohibitive. The Committee seeks additional details about how this proposal would work as its members are concerned that it would impose an inordinate financial and legal burden on lot owners. The practical operation of this proposal should be thoroughly explored before it is adopted in the new Bill.

6. Allow schemes to voluntarily adopt a charter that outlines the 'spirit' of the strata community

The proposal at paragraph 4.4 of a charter identifying the spirit of a strata or community scheme is not a concept the Committee endorses. Such a concept may be conducive to the adoption of "spirits" that are offensive or discriminatory. The concept is not one which provides any significant or identifiable benefit to lot owners. It is proposed that all schemes should be treated the same at law. Allowing a scheme to adopt a "spirit" may undermine equal treatment at law of strata schemes and does not promote any identifiable objective.

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

The Committee is disappointed that the right to legal representation for general applications and appeals under the Act and the *Community Land Management Act 1989* was removed from the *Civil and Administrative Tribunal Amendment Act 2013*. The Committee strongly opposes the proposal to restrict the right to legal representation in strata matters as referred to in paragraph 5.7.

The experience of Committee members is that many lot owners do not have English as a first language, do not reside in the jurisdiction, or do not have a basic knowledge of legal rights and obligations of lot owners and occupiers. It is submitted that it is in the interests of owners, occupiers and the Tribunal that those persons who wish to be legally represented in disputes, should have an automatic right to such representation and should not have to wait until the day of a hearing to find out whether they can be legally represented. The involvement of legal representatives in proceedings usually has the effect of assisting the Tribunal to identify and resolve legal issues in dispute in a more timely manner than if owners or occupiers were to represent themselves. The involvement of legal representatives can also have an additional benefit of achieving resolution of disputes prior to hearings (where misunderstandings by lot owners as to the state of the law can be eliminated at an early stage of a dispute).

8. **Additional matter – address for service**

As personal service is required for a Statement of Claim in New South Wales, it is proposed that non-corporate lot owners should not be permitted to have a post office box address as the address for service on the strata roll. All non-corporate lot owners should be required to provide a residential address for service of notices by an owners corporation. Allowing non-corporate lot owners to have post office box addresses can add to legal costs incurred in achieving service of initiating process for recovery of levies.

Similarly, service of initiating process such as a Statement of Claim or Summons on an owners corporation is presently achieved (under s 235 of the Act) by serving that document on the secretary, chairperson or a member of its executive committee. In the case of third party creditor of an owners corporation, it will usually be the case that the creditor has no idea of the identity of the secretary, chairperson or members of the executive committee. Accordingly, it is proposed that the amending legislation permit service by post on the address for service specified in the common property certificate of title as an additional mode of service for initiating process.

9. **Additional matter - disputes between adjoining or neighbouring strata scheme**

At present, s 139(3) of the Act permits orders to be made by an Adjudicator or the Tribunal in relation to disputes between adjoining or neighbouring strata schemes, but only with the consent of both schemes. The Committee proposes that the need for consent by both schemes should be eliminated from any amending legislation. It would be convenient and appropriate for an Adjudicator and Tribunal to have jurisdiction to resolve disputes between neighbouring strata schemes. It is the experience of Committee members that many strata disputes involve neighbouring strata schemes in relation to issues such as damage caused by failing to prune trees or contain tree roots, disputes about retaining walls, and disputes about water damage caused by water flowing from one property to another due to inadequate drainage or defective retaining walls. Such disputes are appropriate for determination by the strata schemes division of the Tribunal.

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

Yours faithfully,

John Dobson
President

cc Leanne Hughes, Land and Property Information.