THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:RHgl1832098

26 February 2020

Community Schemes Law Reform
Better Regulation Division
Department of Customer Service
Level 5, McKell Building
2-24 Rawson Place
Sydney NSW 2000

By email: communityscheme@customerservice.nsw.gov.au

Dear Sir/Madam,

Community Schemes Reforms

The Law Society of NSW appreciates the opportunity to comment on the proposed reforms to community schemes legislation contained in the draft Community Land Management Bill 2019 ("Management Bill") and the draft Community Land Development Bill 2019 ("Development Bill"). The Law Society's Property Law Committee has contributed to this submission.

We support the general approach that has been taken in both Bills, to align community schemes legislation with strata schemes legislation, unless there are factors or circumstances operating in community schemes that warrant a different approach. Our comments set out below largely relate to minor matters for further consideration.

We suggest it may be appropriate to develop a comparison table for the Bills indicating the relevant provision in the *Community Land Management Act 1989* ("CLMA") and the *Community Land Development Act 1989* ("CLDA"), as well as the mirror or relevant provision in the *Strata Schemes Management Act 2015* ("SSMA") and the *Strata Schemes Development Act 2015* ("SSDA").

References to the Reform Proposals below follow the same numbering used in the Tables of Reforms issued in relation to both Bills.

Management Bill

1. Reform proposal 1.1 – Change the definition of 'initial period'

We acknowledge the issue described in the Table of Reforms for the Management Bill and we support the proposal that where there is no subsidiary scheme in a community or precinct scheme, the initial period will expire with reference to the issue of an occupation certificate under the *Environmental Planning and Assessment Act 1979* for development on the lots. However, we suggest that further consideration of transitional provisions may be required. For example, clarification of whether the new

approach will apply to relevant existing schemes, or only to those schemes registered after the commencement of the legislation.

2. **Reform proposal 1.13 – When an association fails to maintain or repair association property under section 113, an owner who suffers loss as a result of the breach of duty will be able to recover damages from the association.**

The Management Bill should make clear whether the Tribunal or a Court has the power to award damages as we note that the NCAT Appeal Panel has recently held in *Shih v The Owners – Strata Plan No. 87879* [2019] NSWCATAP 263 that the relevant provisions of the SSMA do not empower the Tribunal to award damages.

3. **Reform proposal 1.20 – Provide that agreements for supply of utilities to neighbourhood schemes will automatically expire.**

We support the proposed limitation of agreement terms but suggest it should be the earlier of the conclusion of the first AGM or three years from the date of commencement. We do not support the exclusion of embedded network agreements and query the rationale for the exclusion in both strata and community legislation.

4. **Reform proposal 2.4 – Remove the right to legal representation in mediation and in the Tribunal, instead allow parties to apply for leave to be legally represented (this is consistent with the NCAT reforms).**

The Law Society does not support removing the right to legal representation in mediation contained in clause 185 of the Management Bill. Generally, the Law Society supports a right to legal representation without the need to prove a person's inability to adequately represent himself/herself due to limited education, disability, infirmity or limited knowledge of relevant provisions of the law. In our view, the complexity of community schemes legislation should mean that if a party wants to have legal representation at mediation, that party should be able to do so without having to obtain the consent of the other parties.

Lawyers can play a useful role at mediations in streamlining the issues, reducing the burden on parties participating in the mediation and, particularly in complex cases, bringing an understanding of the relevant legislation and case law to expedite the mediation process.

We note that often one of the parties to a mediation under community schemes legislation will be a corporate entity or the community or neighbourhood association itself. By their nature, these entities will require some form of representation and we suggest that lawyers are well placed to provide such representation.

5. **Reform Proposal 4.5 – Further encourage attendance by parties at mediation by allowing the Tribunal to issue cost orders against the party that does not attend.**

We note that the provisions for the conduct of mediation are to be found in Division 2 of Part 11 of the Management Bill. Under clause 184(2), the Secretary, being the Commissioner for Fair Trading, is required to "arrange for mediation in accordance with the regulations". In the absence of some clear guidance as to what the term "arrange" means, an order under clause 204(2) that a party "who has previously agreed to the mediation" pay the costs of the mediation if the party without reasonable excuse fails to attend, might operate very unfairly against a party who is not made aware of either the mediation or of the application for costs orders.

We suggest that the Management Bill should set out the basic details for "arranging" the mediation and the manner of service of notice of the mediation. Guidance in relation to what would be regarded as a "reasonable excuse" would also be of assistance. In the Society's view these matters should not be left to regulation, particularly the mechanics of giving notice of the mediation and a party's agreement to the mediation.

6. **Reform proposal 4.18 – Limit the number of proxies able to be held by any individual to 5 per cent of the lots (if more than 20 lots) or 1 if fewer than 20 lots.**

We suggest that a typographical error appears to have been made in clause 25(7)(b) of Schedule 1 to the Management Bill. The reference to "not less than 5%" should read "not more than 5%". Once amended this would then mirror clause 26(7)(b) of Schedule 1 to the SSMA.

7. **Reform proposal 4.27 – Extend the jurisdiction of the Tribunal to exclusively deal with the majority of disputes, including actions to recover outstanding levies.**

The general order making power in clause 197(1) of the Management Bill mimics the Tribunal's general order making power under s 232(1) of the SSMA. Case law is now emerging from the Tribunal concerning the scope of the Tribunal's power under that section to determine and settle disputes.

Section 232(1) of the SSMA was recently considered in the case of *Owners Corporation Strata Plan No. 14172 v Cai* [2019] NSWCATCD 56. In that case it was held that the power under s 232 of the SSMA did not extend to the making of a monetary order for the recovery of a debt as in doing so "would not be compatible with the objectives of the section in that such an order did not 'in some way achieve the workable operation, management and administration of the scheme'". The extent of the Tribunal's powers as drafted in clause 197(1) of the Management Bill should be considered in light of this case.

8. **Reform Proposal 4.30 – Provide that costs payable to an association for repairs to common property intentionally or negligently caused by an owner can be added to the owners' levy account.**

We note that clause 127(2) of the Management Bill mirrors s 132 of the SSMA, but we consider it is unclear who bears ultimate liability where the damage is done by an occupier rather than an owner.

Development Bill

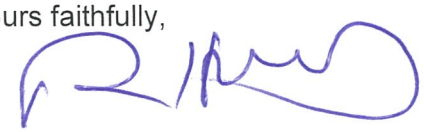
9. **Reform Proposal 2.3 – Remove the requirement to obtain a Supreme Court Order where land is resumed below the surface within a community, precinct or neighbourhood scheme.**

We note it is proposed that the exemption will only apply where s 62(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* applies, that is, where land is resumed for a tunnel and there will be no disturbance to the surface. However, we were unable to locate the relevant clause in the Development Bill.

We would be pleased to meet with you to further discuss the matters raised in this submission. We also look forward to reviewing the draft regulations in due course.

Any questions in relation to this submission should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,



Richard Harvey
President