THE LAW SOCIETY
OF NEW SOUTH WALES

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6 April 2021

Strata Schemes Statutory Review
Policy & Strategy, Better Regulation Division
Department of Customer Service
4 Parramatta Square
12 Darcy Street
Parramatta NSW 2150

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

Dear Sir/Madam,

Statutory Review of the NSW Strata Schemes Laws

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper for the Statutory Review of the NSW Strata Schemes Laws.

The Law Society's Property Law and Environmental, Planning and Development Committees have contributed to this submission.

Our submission is comprised of:

- Annexure A – responses to the questions raised in the Discussion Paper; and
- Annexure B – suggested amendments to the *Strata Schemes Management Act 2015*, following the Court of Appeal decision in *Vickery v The Owners – Strata Plan No. 80412* [2020] NSWCA 284, concerning the powers of the NSW Civil and Administrative Tribunal (NCAT).

Thank you for the opportunity to comment. We look forward to further consultation with you as the review progresses. 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,

Juliana Warner
President

Encl.

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Law Council
OF AUSTRALIA
CONSTITUENT BODY

Statutory Review of the NSW Strata Schemes Laws

Strata Schemes Development Act 2015
Strata Schemes Management Act 2015

Discussion Paper November 2020

Law Society submission – April 2021

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Strata Schemes Development Act 2015	
Objects of the Act	
1. Are the current objectives of the Development Act still valid? If not, how should they be changed?	In our view the current objectives of the *Strata Schemes Development Act 2015* ("SSDA") remain valid.
2. How successful is the Development Act in fulfilling those objectives?	Relatively well, although we agree it is appropriate to particularly consider the operation of Part 10 of the SSDA - the renewal of strata schemes. While Part 10 of the SSDA provides a good basis for strata scheme renewal, it does not appear to have been successful, as reflected in the small number of applications to the Land and Environment Court since the legislation commenced in November 2016.
3. Are there other objectives that should be included? If so, please identify what these should be and explain why.	No, the existing objectives are sufficiently broad.
4. If the objectives should be expanded, what corresponding measures would be needed in the Development Act to give effect to those objectives?	We do not see the need to expand the objectives.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Strata renewal: collective sale and redevelopment	
Built in safeguards and protections	
5. Are the key steps and safeguards imposed by the legislation appropriate, or are these too complex or costly? Should any of these steps be changed?	We acknowledge that the key steps and safeguards are quite detailed but in our view this is appropriate. It is difficult to comment meaningfully on how the steps might be changed when to date they have only been used in a limited number of instances.
6. Is the information required to be included in the strata renewal plan enough, or should the legislation require more information? If so, what information should be required for owners to properly assess a strata renewal proposal?	We believe the legislation strikes the right balance between providing interested parties with sufficient information, without creating an undue burden on developers and owners corporations.
7. Are the timeframes imposed in the strata renewal process reasonable, or should any of these be adjusted?	In our view the timeframes are reasonable.
8. Are other improvements needed to the strata renewal process? Why?	The strata renewal process was intended to overcome barriers to urban renewal, but the limited uptake has raised concerns that the process is too complex and costly, as referred to on page 17 of the Discussion Paper. However, we suggest that the failure of the Part 10 arrangements to be more widely used may also be due to difficulties in identifying and addressing the circumstances in which a renewal can or should take place. The legislation accommodates only the case where the owners of lots in a strata building come to the decision that the building itself needs renewal. It assumes that the owners in an ageing scheme are actively considering the need for major work or redevelopment. However, there is currently no catalyst or trigger for lot owners to consider the building's viability and whether it may be appropriate to consider renewal. Consideration could be given to implementing a legislative mechanism which requires the owners corporation to periodically consider the question of strata renewal. For example, the legislation could impose a new obligation on an owners' corporation to consider, once a strata scheme reaches a particular age, whether to obtain a building report and/or

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
	structural engineer's report, to inform considerations about pursuing strata renewal.
Compensation	
9. Should the legislation distinguish between residential and commercial strata owners in the strata renewal process? If so, should the Development Act provide additional protections for commercial lot owners?	No, in our view the legislation should not distinguish between residential and commercial strata owners in the strata renewal process as the protections already provided in the SSDA are appropriate for all types of owners.
10. Should tenants have more involvement in the renewal process, other than being notified that a strata renewal plan has been developed, for which court approval is being sought (section 178)?	No, this is a matter for negotiation between the landlord and tenant. Provided tenants who have had a lease terminated because of a renewal plan are justly compensated and have adequate notice of the termination of their tenancy, no further involvement is warranted.
11. Should the Development Act provide more guidance for treatment of leases in strata renewal proceedings?	In our view this is not necessary as this is a matter for negotiation between the landlord and tenant.
12. Is more guidance needed on how compensation applies to lot owners and their tenants? Who should be responsible for paying compensation to the tenant?	In our view, section 154 of the SSDA provides sufficient guidance in defining "compensation value" with reference to the principles under section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*. As to who should be responsible for paying compensation to the tenant, in our view this is a matter for negotiation between developer, landlord and tenant. The starting point for negotiations would usually be that the landlord should be the party responsible for paying compensation to the tenant. However, in our experience in relation to strata renewals effected outside the Part 10 framework, often the developer pays the compensation directly to the tenant.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Limited uptake of renewal process	
13. How successful has the strata renewal process been in encouraging owners to consider collective sale/redevelopment options?	There is anecdotal evidence from members of the Law Society who practise in the area that some developers continued to negotiate outside the Part 10 provisions to secure options from lot owners as this option offers more certainty and is quicker than the process under Part 10. In that sense, the provisions could be regarded as relatively unsuccessful. The possibility of spending significant funds on completing the requirements of the process and preparing an application for approval by the Land and Environment Court may be less attractive than distributing some part of those funds as a premium to lot owners in order to secure their direct agreement. Arguably, the existence of Part 10 of the SSDA as the alternative means to proceed has indirectly encouraged owners to actively consider all collective sale/redevelopment options. We suggest that a new legislative trigger which prompts lot owners to consider the strata renewal process, after a building reaches a particular age, would assist in encouraging owners to consider collective sale/redevelopment options.
14. Are the provisions encouraging parties to settle in a positive manner, or only to avoid protracted disputes?	The existence of the provisions in Part 10 of the SSDA can sometimes be used as leverage in negotiations and thus to facilitate deals by developers outside the Part 10 framework. However, it is clear that there are also parties with the financial capacity to protract negotiations if they do not get a deal that is suitable to them.
15. What alternative methods are being pursued to achieve collective sales (eg, options, interdependent deeds of sale)? How effective are these alternative methods?	In our experience, option agreements are continuing to be used, and less commonly, contracts for the sale of land with lengthy settlement periods. Broadly, alternative methods are effective in our view and appear to be regarded as quicker processes which provide more certainty.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Strata renewal case studies	
16. Should the current requirement to act in good faith and to disclose conflicts of interest be extended to dissenting owners? Should the Court be required to consider these aspects in relation to an objection to a strata renewal plan, as well as to the application?	No. Given the small number of applications, we have insufficient basis for considering such a change and prefer a more minimalist approach to any legislative changes in this area. In our view the Court should not be *required* to consider these aspects, it is a matter best left to the discretion of the Court.
17. Should section 188 be expanded to provide more guidance to the Court in relation to matters to be considered when making a costs order? How should the legislation deal with a dissenting owner who presses an objection on unmeritorious grounds? Should the dissenting owner be required to bear some or all of its costs?	Given only one scheme has had its renewal plan approved by the Court, it is again difficult to suggest, on the basis of practical experience, whether changes should be made at this stage. As the legislation has specifically adopted a costs regime that differs from the usual approach to costs, this is an area that requires active monitoring to ensure that the approach to costs is working as intended and not open to abuse. If it is found that problems are occurring with dissenting owners pressing objections on unmeritorious grounds, we suggest that consideration be given to amending section 188(1)(a) of the SSDA to broadly mirror the provisions in section 98 of the *Civil Procedure Act 2005*. In our view this would give the Court sufficient discretion to consider whether the costs incurred by a dissenting owner should be payable by the owners corporation or the dissenting owner, having regard to the merits of the claim.
18. Section 180 lists those who may lodge an objection to an application to the Land and Environment Court. Should an objecting party be required to disclose if they have or have had any further interests in the court proceedings? Should the same apply for those who may be joined as a party to the proceedings (section 181(6))?	No, we do not think it is necessary to require an objecting party or a person joined as a party to the proceedings to disclose if they have or have had any further interests in the court proceedings. We do not consider that this additional information serves any useful purpose.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
19. Are the lapsing provisions in section 190 of the Development Act effective, and should any changes be made? Are there any circumstances in which a lapsed strata renewal plan should be able to be resubmitted within the 12 month period?	The limited number of matters which are proceeding utilising a court approval pursuant to Part 10 makes it difficult to make any useful comment on this question. However, in principle, we do not consider that any changes need to be made. The provisions are sound and require the proposal to be dealt with efficiently and quickly.
Part-strata developments: mixed use and layered schemes	
Strata Management statements and easements relating to part strata parcels	
20. Are management statements effective in regulating mixed-use developments and setting out interested parties' rights and obligations? If not, why not, and how could the legislation be improved?	Broadly, yes. We do not see the need for prescriptive changes.
21. Are there circumstances where a strata management statement should not be required (for example, where the commercial lot area is relatively small, compared to the residential strata scheme)? If so, how could the various interests in the building be effectively managed without a management statement?	Yes, a strata management statement should not be required if there are minimal shared facilities, which could be managed more effectively managed through easements: for example, a shared driveway.
Requirements for strata management statements	
22. Are the matters set out in Schedule 4 for inclusion in the strata management statement sufficient? If not, what other matters should be prescribed and why?	Section 2(f) of Schedule 4 requires the building management committee to undertake a review of the shared allocation of costs; however it does not require that the management statement include a mechanism for the building management committee to then adopt the recommendations received following the review. This should be considered as part of this review.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
23. Should the legislation require the management statement to balance the rights of various lot owners in some way? How could this be achieved?	No, strata management statements are used to regulate a number of different types of uses (e.g. residential, commercial and hotel) and different types of owners (owners corporations, Government, corporations). The legislation should allow the drafter of the management statement to be flexible on how these parties deal with each other: for example, a Government owner of a relatively small stratum lot may deliberately not want to have an active role in the building management committee.
Building management committees and conflicts of interest	
24. What improvements could be made to the governance of building management committees and their meeting processes?	Section 5 of Schedule 4 provides a good set of basic rules for meetings of the building management committee. Given the different nature of uses/lot owners within the building, the drafter of the strata management statement should be able to retain the flexibility to provide for different meeting provisions in the terms of the strata management statement. The SSDA should also be expanded to include provisions relating to a registered strata management statement where the members of the building management committee decide that they no longer wish to be members of the building management committee in accordance with section 3 of Schedule 4. The provisions should clarify whether a strata management statement continues to apply where there are no members on the committee, and how that provision interacts with other obligations, such as the requirement that the committee insure the building.
25. What measures could be implemented to reduce conflicts of interest and unfair contracting in mixed-use schemes?	If the legislation allows for a "fair" method of establishing voting entitlements, this would ensure that each member has a fair say in the approval of any contracts entered into by the building management committee. However, the legislation ultimately needs to remain flexible as to how building management committees procure and enter into service contracts. For example, if there is a Government entity or child care centre in the building, it may be appropriate that the strata management statement contain a provision that allows the Government owner or child care operator the ability to set base level

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
	requirements that the building management committee needs to consider before tendering out the service contract, such as stipulating that a service contractor must have certain qualifications or a working with children's check.
26. Should existing contracts negotiated by the building management committee automatically apply to new lot owners as they join the committee? How can the legislation be improved to deal with this issue?	Yes, this is a major issue for building management committees as non-owners corporation members may be required to enter into high value contracts which they need to novate on the sale of their stratum lot. In our view, the legislation should be amended to provide that the building management committee is a legal entity for the limited purposes of entering into contracts, suing, and being sued.
27. Should there be limits on how long managing agents are appointed for by the building management committee? Should this apply to other types of contract? What would be a reasonable restriction?	No, given the complex nature of building management committees, it would not be appropriate to place the same time limits on managing agents or other contractors (e.g. building managers) that exist in relation to owners corporations.
28. Should a duty of good faith be imposed on strata managers and building management committees?	Not in relation to building management committees. As for strata managers, we note the existing obligations of strata managers under the *Property and Stock Agents Act 2002.* Please also see our comments on questions 55 and following.
Shared facilities	
29. Should the requirement for management statements to provide for the fair allocation of shared expenses and the obligation to review that allocation, apply retrospectively to schemes registered prior to the commencement of the reforms (November 2016)? If not, why not?	Yes, this is such a critical aspect of the management statement that we regard retrospectivity as appropriate.
30. What other improvements, if any, could be made in relation to responsibility for shared facilities and why?	Lot owners should be allowed to take over repairs/maintenance to shared facilities if the building management committee fails in its obligation to repair/maintain and appropriate notice mechanisms have been followed.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Expense allocation and voting rights	
31. Should voting rights be aligned to the relative contribution of building management committee members to the cost of the shared facilities? Are there any other alternative methods of allocating voting rights that could be implemented?	The legislation could require that voting rights be "fair", similar to the current provisions relating to the "fair" share of costs. However, the legislation should remain flexible as to how voting rights are determined. Whilst a contribution to the cost of shared facilities is one method of determining voting entitlements, it is not always the most equitable. For example, in a building with a shared facility that is located in the commercial stratum but for which the residential stratum pays 100% of the cost, it may not be reasonable for the commercial stratum to have no say in relation to that facility given the location within its title boundary. There are also decisions that need to be made by the building management committee that do not relate to a shared facility (e.g. adoption of an architectural code).
32. What improvements can be made to the legislation that balance the interests of commercial and residential lot owners in a mixed-use development, while ensuring fair decision-making?	We have no suggestions. Our experience is that, unfortunately, in a two-lot stratum scheme, there is always potential for tension or conflict between the commercial and residential lot owners.
33. What changes would provide fairer outcomes where strata management statements are in place? Should owners corporations be provided with rights and protections similar to those set out under the Management Act – for example, by placing limits on service contract terms?	Given the varied nature of potential mixed use and shared facilities arrangements, we doubt it is possible to legislate certain prescribed requirements to achieve fairer outcomes. However, one legislative change that could be considered is providing the NSW Civil and Administrative Tribunal ("NCAT") with jurisdiction to review issues of fairness, including voting rights of members in strata management statements. In *The Owners – Strata Plan No. 70672 v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 973, the Court decided that the *Contracts Review Act 1980* theoretically applied to a strata management statement. We suggest it would be beneficial if the Tribunal could be provided with an express power to review strata management statements taking into account the types of considerations set out in section 9(2) of the *Contracts Review Act 1980.* In relation to the second question, which we assume relates to strata management statements, no, we do not think such rights and protections are necessary.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Dispute resolution	
34. How can dispute resolution be better managed in mixed-use developments, balancing the needs of commercial and residential property owners?	No specific amendments are suggested to deal with mixed used developments any differently from other developments.
35. What, if any, legislative protection is needed for residential owners in the rectification of complaints?	Similarly, no specific amendments are suggested to deal with mixed used developments any differently from other developments.
Valuation of unit entitlements	
Requirements for schedules of unit entitlement	
36. Has the requirement for a qualified valuer's certificate to determine unit resulted in fairer apportionment of contributions? Could this process be improved?	The requirement for a qualified valuer's certificate to determine unit entitlements has resulted in unit entitlements being apportioned with greater fairness and consideration to relative value of lots. In our view, the valuation process prior to registration of a strata plan is working well. However, valuing unit entitlements at the time of preparation of a strata plan of subdivision requires attention, to address the disproportionate cost of valuing unit entitlements that can occur, particularly in schemes of more than a few lots, when a strata plan of subdivision only involves a minor alteration to lots and common property.
37. Are unit entitlement valuations too costly for the scheme? If so, what other ways could unit entitlements be calculated that is fair to all owners?	Valuations can be costly where all unit entitlements need to be re-valued for a strata plan of subdivision that has little impact on most of the existing unit entitlements. By way of example, where a scheme involving 40 or more lots is to transfer a common property parking space to a lot owner and the lot owner is to transfer his/her parking space of similar size to the owners corporation, there is presently a need to re-value the unit entitlement of every lot in the scheme, pursuant to clause 4 of Schedule 2 to the SSDA. To avoid excessive valuation costs, this could be addressed by: • Limiting the requirement for valuing unit entitlements in such a case to the value of the parking spaces being transferred, and allowing a presumption that all other unit entitlements are correct and remain unchanged (subject to rights in the SSDA to challenge the accuracy of unit entitlements); and

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
	• In other cases, by creating a presumption that all existing unit entitlements for lots prior to the registration of a strata plan of subdivision are accurate, with any valuation to be limited to the variation in value of the unit entitlements of the lots and common property affected by the strata plan of subdivision. If a small section of common property was to be transferred to a lot for use as a storage space, for example, the valuation could be limited to the increase in value of the unit entitlement of the lot receiving part of the common property, and a reduction in the aggregate unit entitlement for the reduction in area of common property.
38. Should owners have a right to object to a proposal to change unit entitlements without the passing of a resolution, even if they are otherwise unaffected by a strata plan of subdivision?	The obligation to pass a special resolution to approve a change of unit entitlements where common property is involved should be retained. If unit entitlements of lots unaffected by a proposed strata plan of subdivision are to remain unchanged as suggested at 37 above, and valuations of new unit entitlements are limited to lots and common property affected by a strata plan of subdivision, in our view owners should not have the right to vote against a valuation of the affected unit entitlements. However, the rights in section 236 of the SSMA should be retained to allow any lot owner to challenge unit entitlements arising from a strata plan of subdivision, as such rights require the owner seeking to vary unit entitlements to support such an application with valuation evidence in accordance with section 236(4) of the SSMA.
39. Should the legislation provide an exception to the requirement for a valuation of all lots in the scheme in any circumstances? If so, what would those exceptions be? What is the alternative proposed method of altering the unit entitlements in those situations?	Yes, see response to 37 above.

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40. Should there be guidance for valuers in assessing strata plan unit entitlement valuations? If so, what guidance is required?	Yes. A requirement at the time of valuing unit entitlements for a strata plan to identify how the total unit entitlement for a lot is divided amongst any parking space or storage space for the lot would assist with valuing subsequent transfers of parking spaces and storage spaces. For example, if a lot includes two parking spaces and a storage space on title, a total unit entitlement of 150 could be divided as to 5 for each parking space, 2 for the storage space and 138 for the remainder of the unit. In the same way as a strata plan identifies the areas of separate components of a lot, the valuer could value the unit entitlement of the separate components to facilitate subsequent transfers and remove the need for re-valuing these components when affected by a strata plan of subdivision. If valuations specified on the strata plan are presumed to remain accurate, without the need for re-valuing in the circumstances set out at 37 above, the circumstances in which unit entitlements would need to be re-valued would be limited.
Strata Schemes Management Act 2015	
Objects	
41. Do the objects of the Act remain appropriate? Should further policy objectives such as those that guided the 2015 reforms be added to section 3 of the Management Act?	Yes, they remain appropriate, and we see no need to include further policy objectives.
Managing the scheme	
Strata Committees	
42. How well have the functions of the committee and office holders been working?	We consider that broadly they have been working well, particularly where strata managers are involved in assisting committee members and office holders.
43. Committees can be up to 9 people. Is this size limit working?	The size limit is working, but it would assist if large strata schemes were required to have at least 5 members (instead of the current 3).

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
44. Under the law, strata committee members have a duty to act in the best interest of the owners corporation and with due care and diligence. How well is this working?	This would appear to not be working as well as it should, given our members report an increasing number of strata disputes appearing before the Tribunal that raise issues of strata committee members not exercising due care and diligence in complying with the meeting and voting procedures under the SSMA. This is more common where there is no strata manager involved in the strata committee meetings.
45. Are there any other measures that would improve accountability of strata committees? For example by adopting a mandatory code of conduct as in Queensland?	Yes, adopting a mandatory code of conduct would assist in providing much needed guidance and would assist members in remaining accountable.
46. How well have the eligibility requirements for election to the committee operated? How could they be improved?	We consider they are working well and there is no need for improvement.
47. Are clear grounds for removing committee members and office holders needed? If so, what should they be?	Yes, this would be of assistance. Potential grounds for removal could include if the member: • is not present for 2 consecutive committee meetings (without the committee's leave), • is convicted of an offence involving fraud or dishonesty, or • breaches any code of conduct.
Meeting procedures	
48. How have the meeting procedures been operating and are any changes needed? If so, what changes?	In our experience, meeting procedures have been operating well generally. We suggest there may be some limited circumstances, such as appointing, re-appointing, or changing a strata manager or building manager, where there is potential for conflict and a need for transparency in recording votes.

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49. Should the meeting procedures be moved from the Management Act to the Management Regulation so they can be changed more easily? Should any parts remain in the Management Act and, if so, why?	No, they should stay in the SSMA.
Meetings and voting	
50. Should the law be changed to permanently allow electronic voting in all circumstances without the need to first pass a resolution? If so, are additional protections for lot owners needed?	Yes, in our view the law should be changed to permanently allow electronic voting without the need to first pass a resolution. The need to protect lot owners who do not have the technology to participate in electronic voting should be considered by identifying the reasonable steps that the secretary would need to take to ensure lot owners were able to participate in the meeting.
51. Are there other alternative methods for electronic meetings and voting that should be considered?	No, the current methods are adequate.
52. How have the different ways (teleconferencing, email etc) of voting been working? Are any changes needed? If so, what changes and why?	We understand they have been working well in relation to EGMs. However, the nature of the compulsory agenda items for AGMs makes it difficult to conduct those meetings electronically. Certain matters that need to be resolved at an AGM require more than a vote in favour or against, such as nomination of committee members, limits on powers of the strata committee and budget/levy questions.
53. How well have the limits on proxies worked and are any changes needed? If so, what changes?	The limits have been working well. In our view no changes are needed, particularly with the introduction of electronic and other forms of voting being introduced, proxies may be used less frequently.
Improving tenant participation	
54. How well is tenant participation working? How could tenant participation be improved?	Generally well, and we have no suggestions for improvement.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Strata managing agents	
Appointment of managing agents	
55. Are the current durations of appointment and termination notice periods for strata managing agents appropriate? If not, how should they be amended?	The current durations of appointment and termination notice periods for strata managing agents are broadly appropriate. However, to assist with smooth transitions, the notice period given by the managing agent before the end of the term of their appointment required under section 50(6)(a) of the SSMA should be amended to require between three to six months' notice.
56. Do you think the developer should have to present the owners corporation with a choice of three managing agents at the first AGM?	Yes, if it is going to be recommended to appoint the strata manager at the AGM, this would reinforce the conflict-of-interest reforms. However, there may need to be a carve-out for regional areas that may not have ready access to three managing agents.
57. A developer or someone connected with them can't manage a strata scheme in its first 10 years. Is this appropriate? Please tell us why.	Yes. It protects against a potential conflict of interest in respect of any of the lots retained by the developer and reduces the likelihood that the terms of the management agreement adopted may be considered to be too favourable for the strata manager and would not otherwise have been agreed to by the owners corporation.
58. Do you think a standard form strata managing agent agreement should be included in the legislation? If so, why?	We suggest that the appropriate place to deal with the content of a strata managing agency agreement is the *Property and Stock Agents Act 2002*. If this is to be pursued, our preferred option would be to prescribe certain terms rather than have a prescribed form of agreement.
59. Should the law require strata schemes of a certain size to be professionally managed?	Yes, for large strata schemes this is appropriate.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Minimising conflicts of interest	
60. Are the current conflict of interest laws working? If not, how should they be changed?	We are unaware of any issues with the current operation of the laws governing conflicts of interest. Other stakeholders may be better placed to comment.
61. Are the provisions of the Management Act relating to gifts and commissions easy to understand?	We note the issues raised in the third paragraph on page 36 of the paper. Clarification would be welcome on whether the threshold applies to the individual agent or to the agency (our preliminary view is that the former is preferable). We note the practical difficulty in asking any gift giver to provide proof of purchase price and suggest that the question of proof should be linked to market value.
62. Should there be a general duty of care in the laws to ensure managing agents obtain goods or services at competitive prices?	We are concerned about the relative uncertainty of concepts such as “competitive prices” and “competitive terms”. We suggest a preferable approach would be to require a specified number of quotations to be obtained for goods or services over a prescribed value (with power to exclude certain transactions by regulation).
63. Should the rules be tightened on disclosure of conflicts of interest for owners corporation contracts?	Apart from in respect of the issues identified at questions 61 and 62, we see no need for amendment.
Functions of strata managing agents	
64. The managing agent must follow certain rules when they make a decision for the owners corporation. Are these rules appropriate? If not, how can they be improved?	We have no suggestions for improvements to these provisions (sections 55 and 56 of the SSMA).
65. Owners corporations have duties and functions that can be delegated to managing agents (section 57 of the Management Act). If the agent breaches their duties, they will have committed an offence. How well is this working?	We note and support the amendment to section 57 providing a defence to a prosecution of a managing agent where the owners corporation has refused to release necessary funds, as referred to on page p 37 of the Discussion Paper.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
66. Do you have personal experience of managing agents being prevented from carrying out their duties under the Management Act because of disputes with the owners corporation? If yes, please describe your experience.	We are not aware of any particular issues that are not adequately addressed in existing legislation.
Accountability of managing agents	
68. Is the law sufficiently clear on what information the owners corporation is entitled to request from the managing agent and how they get it? If not please tell us why.	We believe Part 4 Division 3 of the SSMA is sufficiently clear.
69. Do you think the rules of conduct for strata managing agents under the Property and Stock Agents Regulation 2014 are appropriately balanced?	Yes.
72. How important is it for managing agents to have specialist knowledge about building defects?	We consider a knowledge of building defects in apartment buildings (including but not limited to newly constructed apartment buildings) is of increasing importance. The knowledge should at a minimum be an awareness of when it is appropriate to seek expert advice about the more commonly occurring categories of apartment building defects.
73. What would you think of the proposal for accreditation of certain licensees under the Property and Stock Agents Act as strata building defects management specialists?	We believe a knowledge of how to manage strata building defects should be a core competency for all holders of a strata managing agent licence, rather than a matter for optional accreditation.
Finances and levies	
74. How well is money being managed in the administrative and capital works funds by your owners corporation? Are any changes needed and why?	Broadly speaking these provisions appear to be working well. Some additional guidance may be useful for those strata schemes not using the services of a strata managing agent regarding, for example, the division of items between the administrative fund and the capital works fund.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
75. Owners corporations can use money from one fund to temporarily cover the expenses of the other fund. How do you interpret the rules about repayment of money transferred from one fund to the other fund? What should the rule be?	In our experience, the common perception of the three-month time limit is that repayment must occur within three months. If the requirement is merely to "make a decision to repay", that leaves open the possibility that actual repayment could occur at a time far in advance of the decision, and that would be an undesirable outcome. We suggest this ambiguity should be resolved.
76. How well have the laws on levies and arrears been working? Please explain why and suggest any changes.	These provisions have been tested by the financial impact of the pandemic and seem to be working well.
78. Is a $250,000 budget the right threshold for compulsory audits to be carried out? If not, what do you think is the right amount?	The figure of $250,000 seems appropriate at the moment. We do not support an annual indexation of the figure but believe the figure should be reviewed periodically. We note that section 95(1) of the SSMA allows for another amount to be prescribed, which effectively facilitates review of the adequacy of the figure at roughly five yearly intervals which is appropriate.
By-laws	
79. Could we make it easier for owners corporations to make by-laws? If yes, please tell us how.	The present process, including requirements for a special resolution, obtaining a lot owner's consent where relevant, works well in our view.
80. By-laws must be lodged with the Land Registry Services within six months. Is this a reasonable time?	Given the importance of current by-laws being noted on the Register, we consider six months to be reasonable.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
81. The Registrar General has the power to waive the requirement for by-law changes to be lodged all at the same time, and instead allow changes to be lodged separately. Should there be changes to this power?	This question appears to refer to the discretion conferred on the Registrar General under sub-clause 24(3) of the *Strata Schemes Development Regulation 2016* to waive the requirement under sub-clause 24(1) that all changes of by-laws be lodged as a consolidated version. Anecdotal evidence suggests that it has not been easy to obtain the exercise of the Registrar General's discretion. There also remains the difficulty posed by schemes with a multitude of historical registered changes of by-laws, sometimes involving the amendment, replacement or partial repeal of earlier by-laws in circumstances where determination of the true effect of the various changes is difficult. The drafter of a simple additional by-law is confronted with a complex task of attempting to untangle and re-assemble the by-laws to present a workable, coherent set of by-laws. We note that after several years of registering Consolidation of By-Laws forms that consolidate all existing by-laws into one Consolidation *without any change to existing by-laws*, the LRS is now stipulating that a special resolution is needed to register a Consolidation of By-Laws form even if it doesn't make, amend or repeal any by-law. In our view, this appears to be inconsistent with sections 133 and 141 of the SSMA, which only deal with the amendment, repeal or addition of by-laws. The SSMA does not specify that existing by-laws can only be consolidated if a special resolution is made. Many schemes wish to consolidate their by-laws without changing them, so it would be worthwhile making it clear in the SSMA that this can be done without a special resolution. In our experience, the discretion conferred in clause 24 of the *Strata Schemes Development Regulation 2016* to waive the requirement for consolidation is rarely exercised. Consideration could be given to setting out specific circumstances in which consolidation would not be required and leaving all other cases to the discretion of the Registrar General.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
82. While owners corporations can make their own by-laws for their strata scheme, there are restrictions on the types of by-laws that can be made. What do you think about prohibiting 'unreasonable' by-laws?	This prohibition in section 139 of the SSMA, notably the subject of the recent decision in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250, appears to operate effectively. We support the current approach as set out in sections 139 and 150 of the SSMA. Another relevant issue is the validity of by-laws which purport to impose penalties for non-compliance with by-laws. For example, sometimes an owners corporation will make a by-law that provides that if you park on common property it can impose a fine of $200. Other by-laws permit the owners corporation to recover the cost of damage an owner causes to common property. It might assist if the SSMA made it clear whether these are valid and enforceable types of by-laws.
83. If the law was changed to allow tenants to be able to seek orders challenging by-laws on the basis they are harsh, unconscionable or oppressive, how would this work in your strata scheme?	As a tenant has a tenure of limited duration and may have intentions or wishes not necessarily consonant with the interests of their landlord, it would appear inappropriate to give tenants such standing. We do not support extending section 150 to provide standing to tenants.
84. What is your experience with the enforcement of by-laws?	The requirement for a Strata Committee to be satisfied that a breach has occurred before issuing a notice to comply or taking penalty proceedings can lead to residents affected by breaches of noise by-laws having no remedy where Committee members do not observe the breach. Noise breaches can be difficult to establish; sometimes a complainer may be overly sensitive to noise or vexatious. There is no clear test of what level of sound transmission amounts to disturbance of peaceful enjoyment. This can lead to disputes about whether there has been a breach of the relevant by-law. A notice to comply served weeks after a breach occurs is often an unsatisfactory remedy for the inconvenience caused by a breach at the time it occurred e.g. a noisy party or blocking a resident's vehicle by parking on common property. The penalty notice system is not a particularly effective means of enforcement. Cost and effort spent by the owners corporation to impose a penalty often outweighs the value of obtaining the penalty. The limited monetary amount of penalties is often insufficient to deter further breaches.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
	The cost of rectifying damage caused to common property by a breach of a by-law often exceeds the penalty imposed for breach of the by-law. In some cases it is difficult in practical terms to enforce the penalty. For example, a by-law prohibiting rubbish being dumped on common property is usually unenforceable against residents who dump rubbish and unwanted furniture on common property as they vacate a unit, as their whereabouts is often not known. We acknowledge that the enforcement of by-laws is a particularly problematic area, but we have no suggested changes.
85. Should by-laws made under old strata laws be compliant with the current law? Why, or why not?	It would appear to be inconsistent with the principle that accrued rights should not be removed without just cause to suggest that by-laws should be the subject of mandatory change. We do not support requiring by-laws made under old strata schemes to comply with current law. Owners, mortgagees and tenants acquired their rights and obligations under a by-law regime that existed at the time. Those rights are known and potentially valuable, and should not be jeopardised.
86. Are there any additional model by-laws that should be included in the legislation? If so, what are they and how would they assist?	The present residential model by-laws are suitable for straightforward residential schemes. If a proposed scheme has particular features that need to be addressed in the by-laws, it appears more appropriate that these be prepared by the developer, rather than attempting to provide legislated "off the shelf" solutions which may not always provide a solution. We expressed concern at the time of the consultation about the current *Strata Schemes Management Regulation 2016* that only one set of model by-laws was carried forward from the previous Regulation. It seemed to us that each of Schedules 3 to 7 of the *Strata Schemes Management Regulation 2016* provided useful templates for developers and their advisers, and if adopted, would provide a useful degree of conformity in strata by-law drafting. We are still of that view.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Pets and assistance animal by-laws	
87. Under the law, a by-law cannot ban assistance animals e.g. guide dogs. Are any changes needed to the way the laws govern assistance animals?	No changes are needed to the provisions which govern assistance animals in our view.
88. Should owners corporations be allowed to request proof that an animal is an assistance animal?	Yes, we consider this a reasonable request.
89. Should the Management Act outline what kinds of evidence owners corporations can request as part of proving an animal is an assistance animal? If so, what kinds of information should be taken as proof?	An assistance animal permit, issued by Service NSW, would be the simplest and easiest evidence to obtain.
90. The NSW Court of Appeal found in 2020, that a by-law imposing a blanket ban on pets was oppressive and therefore invalid under the laws. Should the law allow owners corporations to completely ban pets from a strata scheme? Please tell us why.	The Court of Appeal identified that part of the assessment of whether a by-law was "harsh, unconscionable or oppressive" was to consider whether the restriction imposed by the by-law has "a rational connection with the enjoyment of other lots and the common property", or "provides [any] material benefit to other occupiers". In our view, that approach strikes a balance between the need for owners corporations to administer their strata schemes and the "ordinary incident[s] of the ownership of real property". We note the insertion of new section 137B into the SSMA by the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* which reflects the approach adopted by the Court of Appeal.
Other specific by-law making powers	
91. Do the existing restrictions on the power to make by-laws require any changes? If so, what changes and why?	In our view, the current restrictions are appropriately balanced.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
Records, tenancy notice and service	
92. How has record keeping been working? Are any changes needed and if so, why?	The move to electronic record keeping, particularly by the larger professional strata managers, has been welcome. Many strata managers provide online portals to their owners to enable easy access to the scheme's records, including the by-laws. This should be encouraged.
93. Should keeping electronic records be made compulsory? Why/why not?	Yes. In most other areas of commercial life, electronic communication and record storage are the norm.
Availability of records	
94. How is inspection of records working? Are any changes needed and if so, why?	Our observation is that the availability of electronic records, particularly with the larger strata management companies, has made record inspection a much simpler task, and freed inspectors from the delays inherent in seeking an appointment to attend the strata manager's premises in person. We have no suggestions for any changes to be made.
95. How are the strata information certificates provisions working? Are any changes needed and if so, why?	Generally, the provisions appear to be working well. However, issues do arise in obtaining an update to the financial information contained in the certificate closer to the settlement of a conveyance. We have also observed that sometimes certificates are not fully compliant with the prescribed form. There may be a need for further education in this area.
96. A landlord must provide a tenant with a copy of the by-laws and the strata management statement if there is one. How is this working? Please describe and suggest what changes might be needed.	Further education about the landlord's obligations would be welcome.

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97. If a lot owner leases their apartment to tenants, the lot owner must provide the owners corporation with information about the tenants living in their lot within 14 days. Is this notice working? Could this be improved? If so, how?	Where schemes are managed by professional managers, and lettings managed by competent letting agents, the provision of notice of tenancies appears adequate. For self-managed lettings, a simple electronic template for notifying tenancies may be of assistance.
98. The law sets out how notices and other documents can be served on or by an owners corporation. How is this working? Please describe and tell us if this can be simplified in any way.	The availability of email service upon and by an owners corporation is working well.
Common seal	
99. COVID-19 emergency laws, passed in May 2020, allowed owners corporations to approve official documents with the witnessed signatures of two authorised people, instead of affixing the common seal. If this was permanently included in strata laws, is there anything else that should be included?	We note the operation of clause 72 of the *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* which applied these changes to an "instrument or document". We suggest the meaning of "instrument or document" could be clarified.
100. To verify that documents are properly executed, should the details of strata committees and strata managing agents be required to be lodged and made available on a publicly searchable register similar to the ASIC company register?	In our view, the existing law suffices. In particular we note the case of *The Owners – Strata Plan No 44999 v Premier Holdings Corp Pty Ltd and Greg Ritchie & Partners Pty Ltd* [2012] NSWSC 171, at paras [16]-[18], which allows certain assumptions to be made regarding due execution by an owners corporation without the need for further enquiry.
Initial period	
101. How have the initial period provisions been working? Are any changes needed, and if so, why?	In our experience they are working well. Generally, Approved Form 10 acts as a backstop to enable the otherwise prohibited dealings to proceed under section 26 of the SSMA. However, we suggest that the content of Form 10 appears to go beyond what the legislation requires in that it specifies that consent has been obtained by 'any purchaser under an exchanged contract for the purchase of a lot in the scheme'.

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	We suggest there is a need for common property rights by-laws to be able to be made in the initial period for the fitting out of commercial lots, without the need to obtain orders from NCAT. This should be a limited exception only. We also note that the initial period provisions will likely need to be reviewed in light of the Government's proposed response to financing the remediation of flammable cladding.
Managing common property in a strata scheme	
102. Owners can make changes to common property in connection with their lots if they have authorisation. Either the owner or owners corporation could be responsible for ongoing maintenance. Should the Act outline that a decision needs to be made about who is responsible for ongoing maintenance before any approvals are given to change common property?	Yes, this would assist in informed decision making and transparency.
103. When making changes to common property such as renovations, is it easy to understand what approvals are needed and when? If no, please tell us why not.	No, aside from the requirements set out in sections 109(2) and 110(3) of the SSMA, lot owners rely on the owners corporation to define what cosmetic and minor work respectively means for the scheme. The information is not easily ascertainable without reference to an up to date copy of the by-laws. This also assumes that an owners corporation has passed a by-law that defines cosmetic/minor work in the first place, which is not always the case. It would assist if further examples were provided in the legislation.
104. Are any changes needed to the types of work that are considered cosmetic work or minor renovations? Please tell us why.	Yes, in our view, increased prescription of cosmetic work/minor renovations would avoid disputes and promote clarity. The reference to "changing recessed light fittings" in section 110(3) could be varied to also include "installing recessed light fittings". It would also assist if common works, such as replacing tiles and membranes in wet areas, were expressly identified as not minor renovations.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
105. Should committees be automatically able to make decisions on minor renovations rather than those decisions being delegated by resolution? Please tell us why.	No, a regime already exists for owners corporations to delegate approval to their committees (either in an initial by-law or subsequently) if they seek to hasten the approval process.
106. Should a lot owner always be told the reasons why their request for work or renovations was not approved? If yes, when should the reasons be provided?	Yes, this is an important way of holding the owners corporation to account and it enables an owner to assert their rights based on an owners corporation's unreasonable refusal to approve work. Often reasons are not provided, making it very difficult for owners to prove that the owners corporation has acted unreasonably. Reasons should be provided as soon as practicable after the decision is made. This would particularly assist a lot owner who has started to organise contractors, rearrange personal commitments, seek finance approval or prepare a development approval.
107. Do you have any other suggestions on how to improve approval of changes to common property?	We note the four suggestions made for changes referred to at the base of page 55 of the Discussion Paper: • We support an express requirement for records for approved minor renovations to be kept by owners corporations, but only for a period of 10 years. • We do not support a clear prohibition on tenants doing work that affects the common property. • We support the provision of reasons when consent is withheld. • We support the proposed classification that minor renovations involving reconfiguring walls explicitly excludes structural walls.
108. Are the provisions relating to common property rights by-laws clear and working well? Do you have any suggestions for improvement?	Generally, the provisions are working well in our view. However, we note that the current SSMA contains a change in section 143 from the provisions contained in the 1996 Act. In the unreported NCAT decision of *Wichai Ruamsri v The Owners – Strata Plan No 54275 and The Owners – Strata Plan No 54275 v Wichai Ruamsri and Nutch Ruamsri* SCS19/31956 and SCS 19/38382 (15 November 2019), that change was interpreted to mean that the consent of the owner

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	concerned was not required to repeal the by-law if a motion to repeal it was approved by special resolution. We query that decision, as in our view, the consent of the owner concerned should be required and this should be expressly clarified in the SSMA.
109. Does your strata scheme have a licence agreement with your local council for a strata parking area? Have you experienced any issues?	We note that section 650(6) of the *Local Government Act 1993* is the empowering section. Currently, owners corporations are unable to impose conditions in these agreements relevant to their scheme, leaving the Council to determine the terms. In our experience some owners corporations have by-laws in place that deal with parking arrangements and there can be a disconnect between that and what the owners corporation wish to preserve in the parking agreement, leading to reliance on the by-laws only. In addition, owners corporations have no say in relation to enforcement or the issuing of penalty notices, leaving prosecution entirely with Council.
110. Have you experienced problems due to parking on common property? If so, how might changes to the law help manage this issue?	Anecdotally we understand there are numerous problems in relation to parking, including policing, control, enforcement within the scheme and in relation to persons outside of the scheme. One example is a neighbour who suggests visitors park in the visitor spot of a neighbouring development. We acknowledge this is a particularly problematic area, but we have no suggested changes.
Maintenance and repair of common property	
111. How effectively has the law been in ensuring owners corporations comply with their duty to properly maintain and repair common property?	Generally, in our experience, owners corporations take their responsibilities seriously.
112. Do you have any concerns with the statutory duty to maintain and repair common property? How could it be improved?	The issue of whether NCAT has power to award damages has recently been resolved in *Re: Pullicin, Re: Vickery*. Please see our detailed comments in Annexure B.

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113. Is the two-year time limit imposed on making a claim for damages for breaching the duty appropriate? If not, what would be an appropriate length of time?	Given the two-year period runs from when the owner becomes aware of the loss, we consider the time frame appropriate. There is a need to clarify whether the two-year period restarts when a change of ownership occurs. Please also see our detailed comments in Annexure B regarding an alternative approach to the time limit.
114. Is it appropriate for the owners corporation to remove parts of the common property from their duty where it is inappropriate to maintain or repair that part of the property? Can you advise of any situations where this has been misused?	We note that section 106 adopts a strict approach to the issue. In our view, there are legitimate reasons why an owners corporation may decide it is inappropriate to maintain and repair common property. One example is where a lot owner is undertaking a scheme of works which would have a substantial effect on common property. We have not come across a situation where this has been misused.
115. Is it appropriate that owners corporations can defer compliance with the statutory duty in situations where they are taking action against an owner for damage to the property? Are you aware of any situations where it has been misused?	Section 106(4) appropriately permits an owners corporation to defer complying with its statutory duty if it has taken action against an owner or other person in respect of damages to common property. Typically, this arises where an owners corporation sues the original builder for defective work. We suggest that the legislation should clarify whether damages are recoverable by a lot owner for any loss which accrues during the deferral. It would also assist to clarify whether the right to defer compliance also provides a defence to claims in negligence or nuisance.
116. Has the duty impacted owners corporations' and owners' pursuit of claims for building defects, or arranging of rectification of building defects? If yes, how could this be addressed?	Not in our experience.

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Initial maintenance schedule	
117. The developer must prepare an initial maintenance schedule for the strata scheme's common property to be considered at the first AGM. Do you agree with this? Are the requirements clear? Are any changes needed?	Yes. The requirements, as set out in clause 29 of the *Strata Schemes Management Regulation 2016* are sufficiently clear and we have no suggested changes.
118. Have you experienced any difficulty obtaining the initial maintenance schedule, or information about estimates and levies determined during the initial period, from an original owner/developer?	Generally, no, although sometimes there are issues relating to the accuracy of that information. We agree with the observation on page 58 of the Discussion Paper that initial maintenance schedules are not always provided or considered at the first AGM.
119. Have you experienced unrealistic levies being set by an original owner/developer?	Anecdotally we understand this to be a problem in practice.
120. Do you have any suggestions for improving the initial maintenance schedule?	No, we have no suggestions.
121. Are 10-year capital works fund plans clear and effective in helping with maintenance and repairs of common property? If no, how could the 10-year capital works fund plan be improved?	The plans are generally effective. However, in our view the 10-year capital works fund plans should be regarded as a guide to anticipated expenditure only, rather than as a prescriptive document. We suggest this should be reflected in the legislation.
Sustainability infrastructure	
122. The NSW Government is already changing the law to make it easier for strata schemes to install sustainability infrastructure such as solar panels, batteries, digital meters, hot water systems and electric vehicle (EV) charging stations. What other changes to the strata laws could encourage the uptake of sustainability measures in strata and how would they work?	Given the recent legislative changes, we have no suggestions at present.

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Insurance	
123. Owners corporations must maintain an appropriate level of building and workers compensation insurance. How are the laws working? Are any changes needed? If so, how?	We have come across issues where an owners corporation is unable to obtain insurance for the building due to building defects, combustible cladding or a failure to repair and maintain. In our view, the concession given to two lot strata schemes in relation to building insurance under section 160(4) is often misunderstood. We suggest that the procedures set out under that subsection should be reviewed for clarity and ease of compliance.
Utility supply contracts	
124. The law places time limits on contracts for electricity, gas or other utilities to ensure strata schemes aren't locked into long-term contracts. Are any changes needed? If so, what changes and why?	Further consideration is needed in relation to Embedded Network Agreements which are dealt with in section 132A and clause 6(e), Schedule 1 of the SSMA. Section 132A does not deal with ancillary issues such as: • lot owners having to acquire related infrastructure to buy out the developer; • third party management agreements regarding network use fees as distinct from a utility fee; and • the ability of developers to introduce network arrangements without further scrutiny or transparency.
125. Embedded electricity networks are privately owned and managed networks that often supply all premises within a specific area or building. Embedded networks generally buy electricity in bulk and then on-sell it to customers inside their network and are currently exempt from the limits on the duration of the contract. Should embedded networks still be excluded from time limits on contracts? If not, what transitional arrangements should be included?	In our view, embedded electricity networks should not be excluded from the operation of section 132A. As the Discussion Paper references on page 62, embedded electricity networks were excluded at the time of drafting the new provisions due to a review being undertaken by the Australian Energy Market Commission. However, we consider that the limits on the contract period and requirements for consideration at AGMs that apply under section 132A should be extended to embedded electricity networks as the same underlying issues arise with these contracts. We have no suggestions in relation to any transitional arrangements that should be included, but we would be happy to review draft transitional provisions.

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Building managers	
126. The Management Act includes a list of reasons why the Tribunal can vary or terminate a building manager's agreement, for example, for unsatisfactory performance of duties. Should any more reasons be added and should they be the same grounds as those that apply to managing agents?	No additional grounds are required for either a building manager or strata managing agent. In our view, the present list of grounds in section 72(3) is sufficiently broad.
127. Are the current restrictions on who can be appointed as a building manager appropriate? Why/why not?	The Act does not presently restrict who can be appointed as a building manager by reference to qualifications of licensing requirements and such requirements are not considered to be necessary.
128. Do you support changing the law to introduce a duty of care on the building manager to act in the best interests of the owners corporation? Why/why not?	No. Determining what is in the best interests of the owners corporation is often the subject of differing opinions and would place an unnecessary burden on building managers.
129. Should building managers be subject to the same or a similar level of regulation as managing agents? Which could include licensing?	No. We do not consider it necessary to require building managers to be licensed as this would create as unnecessary regulatory burden.
130. Should the maximum duration of appointment of building managers be further limited in a similar manner to strata managing agents? (**Note:** managing agents can only be appointed for twelve months at the first annual general meeting and a maximum term of three years after that. The owners corporation can also renew the agent's appointment.)	Yes. It is suggested that the limitations on the term of appointments of building managers be identical to those which apply to the appointment of strata managing agents in order to prevent the appointment of a building manager by the developer for a term of ten years on conditions that may not be commercially viable.

CONSOLIDATED LIST OF QUESTIONS	COMMENTS
131. Should building managers have a statutory duty of care with responsibility for the safety of the building, including its fire safety? If so, what would be the appropriate qualifications, licensing or accreditation requirements?	No. Those obligations should remain with the owners corporation.
Resolution of disputes	
132. Are the current dispute resolution processes effective? If not, please describe and suggest any improvements.	Improvements could be made to the current dispute resolution processes by restoring the adjudication system of determining disputes in the first instance which existed under the *Strata Schemes Management Act* 1996, subject to a right of appeal on questions of law to NCAT. Adjudication of disputes on the papers would be a cost-effective method of resolving disputes. The requirement to mediate disputes prior to seeking orders from NCAT is inappropriate in relation to certain matters in our view, and it is suggested that the obligation to attempt mediation in such matters should be removed. In particular, applications by lot owners for by-laws to be made or set aside under sections 149 and 140 of the SSMA should not require mediation, as the decision to make, amend or repeal a by-law can only be made at a general meeting of the owners corporation. Representatives of the owners corporation who attend mediation do not have the legal capacity on their own to agree to make, amend or repeal a by-law, which means mediation is of little utility in such matters. Mediation by telephone has been occurring during the COVID-19 pandemic. The telephone mediation system is working well and we suggest it be continued indefinitely due to the efficiency of mediating in this way. We consider that in strata cases litigants should have a right to obtain legal representation in all cases, without having to justify why they should be granted leave to be represented. It is inappropriate to require litigants to explain to NCAT that they should be entitled to legal representation because, for example, they have poor English skills or limited understanding of legislation and case law. Involvement of legal representatives is likely to assist litigants and NCAT, by increasing the likelihood of unmeritorious cases being withdrawn and having meritorious cases presented in a more succinct manner than often occurs when litigants prepare cases without legal assistance.

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133. Does the process for an owners corporation to directly manage disputes between people work? If no, please describe and suggest any improvements.	Anecdotally, we understand the process has been rarely used.
134. Have you been part of a Fair Trading strata mediation? Are there any changes that could be made to the process? and if so, why?	Yes. In our experience, the process works well when the dispute is one that representatives of the parties have legal capacity to resolve, but is of little utility when the parties do not have legal capacity to resolve the matter (see our response to question 132 above).
Jurisdiction and powers of the Tribunal	
135. Do you have any general feedback on the strata scheme orders available from the Tribunal and how easy it is to get them?	The general order making power in section 232 would benefit from more precise wording, in the manner suggested by the Court of Appeal in *Vickery v The Owners – Strata Plan No. 80142* [2020] NSWCA 284. Please see our further comments in Annexure B.
136. Should the Tribunal be able to award damages for breaches of statutory duties under the Management Act? Why/why not?	Yes, this provides an incentive to comply and provides an appropriate remedy for persons affected by the breach. Please see our further comments in Annexure B.
137. Should the Tribunal have a general power to order damages, compensation or other monetary amounts in settling disputes? Why?	No. The power to award damages, compensation or other monetary amounts should be limited to specific identified grounds, rather than at large. The Tribunal is a creation of statute and it is submitted that its powers and jurisdiction should be identified by statutory provisions. This position is consistent with the finding of the Appeal Panel of the Tribunal in *Shih v The Owners – Strata Plan No. 87879* [2019] NSWCATAP 263, in which the Appeal Panel said at [66]: > The respondent submitted and we agree that it would be unusual to empower this Tribunal with the right to determine whether and to what extent damages for statutory breach should be ordered in the absence of any specific provision creating such empowerment. It was said that the determination of a common law claim for damages, albeit based on a statutory cause of action is in general terms the province of courts. The Supreme Court of NSW has a common law jurisdiction and power to award such damages. The District Court of NSW and the Local Court have such a jurisdiction and power created by statute. No such

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	general jurisdiction or power is contained either within the CAT Act or within any enabling legislation.
138. There's no cap on the size of the claim that the Tribunal can consider. Should there be?	No. Provided a matter is one over which jurisdiction is granted to NCAT, there should be no monetary limit or cap on the amount it can award or the size of claims it can consider.
139. Are the penalties for breach of orders made by the Tribunal adequate? If not, what should they be?	No, but we note that the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* contains a new section 247A to the SSMA which will create appropriate penalties in our view.
NSW Fair Trading's role and functions generally	
140. Do you have any feedback on NSW Fair Trading's role and functions with strata schemes, including any suggestions for improvement?	Fair Trading has an important educational role in explaining the nature and effect of relevant legislation, case law and dispute resolution processes to consumers, and in our view does so effectively, particularly via its website.

Annexure B - Suggested amendments to the *Strata Schemes Management Act 2015* (NSW) ("SSMA") following the Court of Appeal decision in *Vickery*

In *Vickery v The Owners – Strata Plan No. 80412* [2020] NSWCA 284, the Court of Appeal considered the powers and jurisdiction of the NSW Civil and Administrative Tribunal ("NCAT") in relation to the settlement of disputes and whether it is authorised by the SSMA to award damages to a lot owner. Basten JA and White JA held that section 232 of the SSMA confers jurisdiction and power on NCAT to hear and determine a claim for damages under section 106(5) of the SSMA.

The Court spoke of the desirability of legislative reform at [2], [66] and [190]. In separate judgments, Basten JA and White JA held that section 232 confers jurisdiction on NCAT to hear and determine a claim for damages. Leeming JA (dissenting) described the use of the words "settle a complaint or dispute" in section 232 as establishing a means of dispute resolution other than by the payment of damages.

The Court was in agreement at [2] that "it is unsatisfactory that such an important question, potentially affecting the procedural rights of millions of lot owners, must be resolved by reference to imprecise terminology and legislative history", and that it would be far better for the uncertainty to be resolved by legislative amendment than by the courts. Basten JA described the words "settle a complaint or dispute" as awkward language which is explained by reference to the statutory history of the SSMA (at [8]).

Consideration was given to whether the statute creates a private right of action. Basten JA concluded that it does, and that section 106(5) was enacted in response to the decision in *The Owners – Strata Plan No. 50276 v Thoo* [2013] NSWCA 270*,* in which it was found that there was no relevant general law cause of action. His Honour concluded that a breach of section 106 of the SSMA is a statutory cause of action.

Leeming JA said that the decision in *Thoo* was contrary to an almost consistent body of decisions over several decades in which breach of the statutory duty was said to give rise to an action for breach of statutory duty sounding in damages, and that section 106(5) overturned the position in *Thoo*. His Honour found that section 106(5) creates a tort of breach of statutory duty, which he described as a separate cause of action at common law.

Leeming JA referred to a possible "glitch" in the wording of section 106, with the indefinite article being used in section 106(6) ("breach of a statutory duty") but not in section 106(5) ("breach of statutory duty").

The use of the word "settle" in section 232 was said by Leeming JA (at [112]) to be "an unlikely word to describe the determination of an action" and more commonly used in relation to consensual resolution of disputes. It was contrasted with words such as "hear and determine" or "hear and dispose of", being words used in section 30 of the *Local Court Act 2007* (NSW) and section 44 of the *District Court Act 1973* (NSW) respectively.

His Honour also noted that the heading of section 232 contains the words "or rectify complaints" and yet the text of the section makes no reference to rectifying complaints.

In relation to the jurisdiction of the Tribunal, Leeming JA noted that if a claim were brought in the District Court for losses in excess of $100,000, the rules of evidence would apply, and there would be a right of cross-examination and a right of appeal by way of re-hearing. By contrast, parties to the same dispute before NCAT would not be entitled to legal representation without obtaining leave, the rules of evidence would not apply and NCAT would be required to act with as little formality as the circumstances of the case permitted. An appeal as of right to the Appeal Panel is limited to appeals on questions of law, and with leave on other grounds. This difference in process contributed to his Honour concluding that NCAT does not have the power to award damages.

Leeming JA attributed the use of the words "settle a complaint or dispute" to four major revisions of the legislation since *The Conveyancing (Strata Titles) Act 1961* (NSW). The *Strata Schemes Management Act 1996* (NSW) established a system of adjudication with adjudicators having a dispute resolution role, but precluded them from making orders involving the payment of damages. The SSMA removed the adjudication process, gave decision making powers to NCAT and removed the prohibition on awarding damages.

It was held in *McElwaine v The Owners – Strata Plan 75975* [2017] NSWCA 239; 18 BPR 37,207 that even after *Thoo* and before the introduction of section 106(5), an action for damages in nuisance or negligence was available to a lot owner. Leeming JA said that if section 232 confers on NCAT a power to award damages, NCAT would also have authority to hear and determine claims in nuisance or negligence apart from breach of statutory duty so long as the nuisance or negligence arose out of a function conferred or imposed under the SSMA.

Taking into account the statements made by the Court of Appeal, the Law Society suggests the Department consider legislative amendments along the following lines to the SSMA:

1. replacing the words "settle a complaint or dispute" in section 232 with the words to the effect of "hear and determine an action about any of the following:…";

2. expressly empowering NCAT to award damages for breach of the owners corporation's duty to maintain common property in a state of good and serviceable repair under section 106 of the SSMA;

3. empowering NCAT to award damages for breach of any exercise or failure to exercise a function conferred or imposed on an owners corporation under the SSMA or any other Act (which would include awarding damages for tortious claims);

4. requiring rules of evidence, a right of cross-examination and a right of legal representation to apply to all claims for damages made under the SSMA, and a right of appeal on questions of law and on other grounds with leave; and

5. specifying that there is no cap on the amount of damages that NCAT can award.

It is also suggested that the limitation period specified in section 106(6) be maintained at two years, but that the wording of section 106(6) be brought into line with the wording of section 14 of the *Limitation Act 1969* (NSW):

> An **action** is not maintainable if brought after the expiration of a limitation period of two years running from the date on which the cause of **action** first accrues to the owner;
>
> rather than:
>
> (6) An **owner** may not bring an action under this section for breach of a statutory duty more than 2 years after the **owner** first becomes aware of the loss.

The present wording of the limitation period is open to an interpretation that could permit the limitation period to commence as an owner becomes aware of each new specified item of loss (with the specific item of loss being "the loss"). This may occur after a significantly longer period than two years from the date when an owner first became aware of some loss arising from a breach of duty by an owners corporation. Amending the limitation period in this way would also permit case law relating to the interpretation of section 14 of the *Limitation Act 1969* to apply to proceedings under the Act.