Making NSW No. 1 Again: Shaping Future Communities

Strata & Community Title
Law Reform Discussion Paper

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Every effort has been made to ensure that the information presented in this discussion paper is accurate at the time of publication. Because this discussion paper avoids the use of legal language, information about the law may have been summarised or expressed in general statements. This information should not be relied upon as a substitute for professional legal advice or reference to the actual legislation.

Cover Photo

Strata Plan No. 1 'Lindsay Gardens', Enfield

15 September 2012

How to have your say

The NSW Government is seeking your feedback and comments on the options discussed in this paper to reform the strata and community scheme laws. Specific questions have been included throughout the paper to help focus your feedback.

You may wish to comment on only those matters of particular personal interest or all of the issues raised in this discussion paper.

While submissions may be lodged electronically, by post or by facsimile, we would prefer to receive submissions by email.

To assist you in making a submission an optional submission form is provided at the back of the paper. However, this form is not compulsory and submissions can be in any written format. You can also have your say by completing an online survey at www.fairtrading.nsw.gov.au

Please, where possible, use the same headings and numbering for your answers and comments as those used for the questions in this paper.

Closing date for submissions: 15 November 2012

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Important note: release of submissions

All submissions will be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*.

Table of Contents

MINISTER'S MESSAGE

I am pleased to release this discussion paper which raises a number of options to provide a more modern, innovative and effective regulatory framework for strata and community schemes. New South Wales can be proud of its achievement as the birthplace of both the strata and community scheme models.

Some fifty years on, more than one quarter of the State's population owns, lives or works in strata and community schemes.

We now have more than 70,000 schemes worth an estimated $350 billion in total assets. These numbers are set to rise even more dramatically over coming decades.

There is a growing consensus among key stakeholders and the community that our once groundbreaking laws have failed to keep pace with change and no longer meet the needs of the sector.

The NSW Liberals and Nationals Government understands the call to make the laws simpler and more certain for all involved. In particular, we want to recognise and assist arguably our largest army of volunteers, those men and women who give up their valuable time to serve on their scheme's executive committee.

Owners corporations effectively act as a 4th tier of government, with democratic elections and powers to raise levies and to make and enforce rules. This paper looks at ways that the governance of schemes could be improved as well as better ways to manage buildings, money and disputes.

The Government is committed to working with the community to create a set of laws which we can take forward for the next 50 years and which other jurisdictions around the country and the world will look to once more as best practice.

Some of the guiding principles for this review are to ensure that the laws:

- adequately protect consumers
- provide fair, accessible and practical democratic processes
- raise the level of transparency and accountability
- make schemes as easy to run as possible
- encourage self-governance
- are future orientated
- are appropriate and scalable for different types of schemes.

The release of this discussion paper gives the community an opportunity to have their say on the development of the laws which will shape the way we live together in shared communities for decades to come. It builds upon the innovative and successful online consultation run by Global Access Partners that concluded earlier this year.

Your input is important to the Government in deciding how best the laws can be improved. I encourage you to participate in this discussion and provide your views on the options outlined in this paper.

Anthony Roberts MP
Minister for Fair Trading

CHAPTER 1
FUTURE REGULATORY APPROACH

This chapter looks at the 'big picture' and asks questions about the type of laws needed to regulate strata and community schemes in a broad sense. This is in line with the Government's commitment to carry out a 'root and branch' review, given that some of the laws are now more than 50 years old.

DIFFERENT RULES FOR DIFFERENT SCHEMES

The existing laws have largely taken a 'one size fits all' approach. While there are some differences, such as those for two lot schemes and large schemes over 100 lots, the laws are generally the same for all schemes. This approach achieves consistency and makes education simpler but can also be seen as rigid and inflexible.

Whether the laws should distinguish more between small and large schemes is one issue that needs to be considered. For example, all strata schemes in NSW, regardless of their size, have to elect an executive committee each year. In Victoria, only schemes with 13 or more lots have to elect a committee. Schemes with less than 13 lots are able to choose whether or not to have a committee. In NSW, almost three quarters of all schemes have ten lots or less (see Fig 1.1).

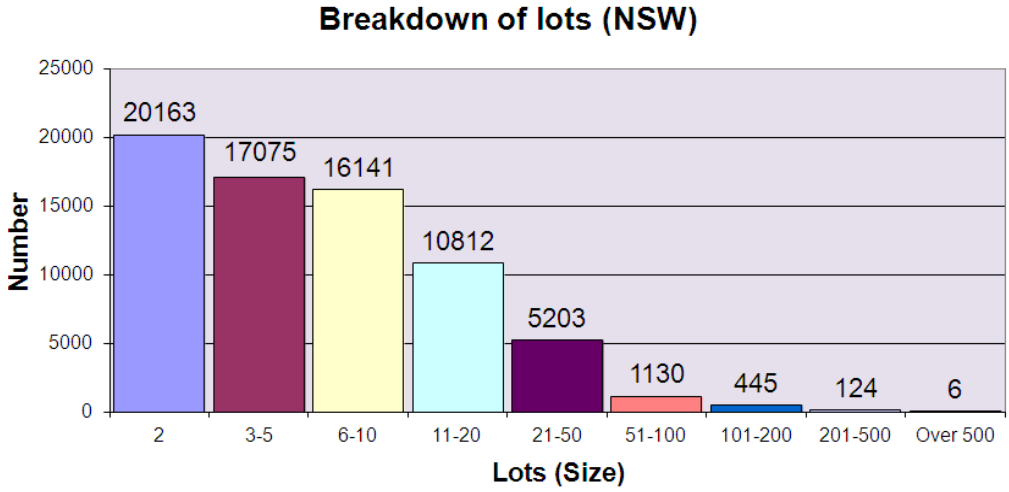


Fig 1.1 source: Land and Property Information March 2012

The future laws could also distinguish between schemes based on the amount of their budgets. At present, only schemes with over 100 lots must have their financial accounts audited each year. This means that schemes with less than 101 lots have no mandatory auditing obligations, even though their budgets may run into many hundreds of thousands of dollars. In Victoria, schemes over 100 lots, as well as those that collect more than $200,000 in annual levies, must have their accounts audited. NSW could adopt similar measures.

Distinctions could be built into the law depending on the type of construction of a scheme. For instance, the law around such matters as pets and alterations could be different for vertical blocks of flats as opposed to horizontal developments such as townhouses, villas and side by side duplexes.

Different rules for different schemes could also apply depending on a scheme's usage. Most of the existing law is based around the use of schemes for residential purposes. Other than some differences in the model by-laws, the law is essentially the same for commercial, retail and industrial schemes, retirement villages, strata offices and car parks, holiday resorts and mixed use schemes. In a strata retirement village, both the strata laws and the retirement village laws deal with many of the same matters, such as meetings, committees, voting and levies. This is often confusing and complex for residents and operators. The future laws could take into account these and other differences in the usage of schemes.

Question

1. **Should the law distinguish more between different schemes based on size, usage, type of construction or other reasons? If so, how?**

REDUCING RED TAPE

The Government has given a commitment to reduce red tape by 20% in its first term and has introduced a 'One On, Two Off' rule for any new legislation.

Cutting red tape for strata and community schemes would make the law simpler and easier to understand and administer, save unnecessary costs and reduce the number of matters over which technical arguments could arise.

The original strata laws contained only 29 provisions. Today the strata and community scheme laws are spread across five separate Acts and five associated Regulations.[1] In total there are now more than 1,500 provisions covering some 926 pages, fast approaching the Commonwealth's Tax Act in size.

There would be few, if any, people who would have a full knowledge and understanding of all of the current provisions. This creates an environment where unintentional breaches of the law are common and many people feel the need to go to the trouble and expense of obtaining advice and assistance from specialist lawyers, even on fairly routine matters.

There are a range of options that could be considered to reduce uncertainty and confusion about the legislation. One option could be to combine all of the laws into the one Act. This would remove many provisions which are currently duplicated and the need for confusing cross references. Bringing the laws together in this way may better reflect the full lifecycle of schemes, in that the development, management and termination provisions would all be in the one place and easier to find. This approach has been taken in many other jurisdictions. For instance, Queensland has one Act common to all schemes with five different sets of regulations for different types and sizes of schemes.

An alternative option could be to combine the strata and community scheme management laws into one Act. Separately, the three current development laws could be combined into one or two Acts, where appropriate. This has many similar benefits to the above option without the possibility of ending up with an unwieldy large single Act. For example, the dispute provisions and meeting procedures of the strata and community scheme management laws could be easily merged as they are almost identical in many respects. In other areas, the community scheme management laws have fallen behind amendments made to the strata laws in recent years, for example, in relation to caretaker agreements, conflicts of interest and sinking fund planning. Combining them would remove these inconsistencies.

[1] See Appendix B for a full list of the current NSW strata and community scheme laws.

A third option could be to combine the strata scheme management laws with the strata development laws. Separately, the community scheme management laws could be combined with the community scheme development laws. This would recognise the subtle differences between the two forms of land title involved.

Whether or not the laws are combined, there are many examples of unnecessary red tape in the current laws. Here are a few examples that have been identified in earlier community feedback:

- the law requires that any vacancy on an executive committee be filled, even if the scheme may otherwise be perfectly content to carry the vacancy, particularly if a fresh election is around the corner
- creating easements in the initial period is banned, even though they may benefit rather than burden a scheme
- an owners corporation can only change the timing of their annual general meeting by applying to the Consumer, Trader, Tenancy Tribunal (CTTT) for an order
- notices for each AGM must contain a motion to consider auditing and office bearer liability insurance, even though year after year the owners reject such motions
- insurance policies can only be taken out with 'approved' insurance companies
- the notice periods between the strata and community scheme laws are different
- special levies and certain other income must be paid into the administration fund not the sinking fund
- executive committee meeting notices and minutes must be sent to all owners in a large scheme
- a general meeting resolution is required before an owners corporation can change its postal address.

Questions

2. **Should the current laws be combined and if so, how?**
3. **What examples of unnecessary red tape do you believe should be removed?**

FLEXIBILITY FOR INDIVIDUAL SCHEMES

A balance needs to exist between the role of government in setting laws for all and the individual freedom of schemes to make rules to suit their own circumstances.

For example, under the existing law each scheme must hold an annual general meeting and it must be held at roughly the same time each year (give or take one month). There is no flexibility given to schemes to change to another time period of the year. Nor can schemes decide not to hold an AGM in a particular year, even if they believe it would be a waste of time and money as there is nothing for the agenda. On the other hand, there are some who want the law to be more prescriptive and set out rules fixing the timing of each AGM to the same date, as well as rules about the venue and hours in which AGMs must be held.

Another example is the current law that restricts a scheme from shifting money between its sinking fund and administration fund to cover changes in spending needs. Any money transferred must be paid back within 3 months. There are people who argue that such restrictions are unnecessarily prescriptive.

The main focus of government in deciding to intervene and set laws should be on protecting consumers and preventing harm. Beyond that, individual schemes should have the freedom and flexibility to democratically decide their own rules.

A standard set of model by-laws is prescribed under the current laws which a scheme can choose to adopt or modify. Schemes can also make their own by-laws as long as they relate to the use and enjoyment of lots or common property.

Examples of the extreme use of this power include by-laws which:

- mandate a particular colour scheme for outdoor furniture
- prohibit the use of barbeques on balconies
- ban Christmas decorations and the flying of flags
- impose a blanket ban on all pets, including fish
- prevent individual owners from installing child window safety devices because they may detract from the overall appearance of the scheme
- require an owner to pay the scheme's costs associated with a dispute.

There are some people in the strata community who argue that the power of the majority to write laws for their neighbours is potentially dangerous and oppressive. If misused, it can foster disharmony and resentment within shared communities.

One option would be for the Government to set clear and fair rules over such matters as pets and child safety devices. This would provide certainty and consistency and take these contentious issues out of the decision making hands of individual schemes.

Another alternative would be to keep the existing flexibility for individual schemes to make their own rules, but for the Government to set broad guidelines using a principles based approach. For example, the law could require by-laws to be reasonable, enforced consistently and fairly and contain a presumption that by-laws which regulate activities that do not significantly affect others or do no harm are invalid.

A further suggestion is that schemes be required to draft a short mission statement, to be attached to the plan or front page of their by-laws, drawing attention to the key elements of their individual scheme (e.g. pet friendly, smoke-free, retirement orientated etc).

Questions

4. **To what extent should the Government prescribe rules for all schemes?**
5. **Should broad principles apply to the making of by-laws?**
6. **Is there merit in the mission statement idea?**

PERSONAL FREEDOMS vs COOPERATIVE DUTY

For many people, buying into a strata or community scheme requires a cultural shift. Some have difficulty in accepting that what they are buying is air space and not actual bricks and mortar. The concept of common property and shared responsibility can be hard to understand, especially for people who have previously lived in their own free standing house and for some overseas investors.

Under the current law, the freedom to do what you like within your own property is subject to a cooperative duty to the common good. Two recent case studies illustrate this point. One involved an owner who installed a shed in their courtyard (attaching it to a common

property wall in the process). They had gained the local council's approval but did not have the owners corporation's consent. Another owner renovated his bathroom (changing tiles on a common property wall and floor in the process) without owners corporation consent. Both of these matters ended up in protracted legal battles costing all sides tens of thousands of dollars in legal expenses.

One option could be for the law to give more recognition to the personal freedoms of owners, but put checks and balances in place to ensure that no harm is done to others. For example, owners could be prevented from enclosing their parking space if it would limit the ability of the resident on either side to use their space. Bathroom and kitchen renovations could generally be permitted, provided the owners corporation and any neighbours were notified in advance and the owner was responsible for ongoing maintenance and repairing any damage to common property.[2]

The balance between individual freedoms and the common good can also arise where a person wishes to operate a home business in a residential scheme. Smoking is another example where there can be a conflict between the personal rights of individuals to smoke in their own home versus the rights of their neighbours not to suffer the health risks associated with second hand smoke.[3]

Question

7. Should the law give more recognition to the personal freedoms of owners?

COMPETING INTERESTS

In many schemes there can often be competing interests between different groups of stakeholders. The chart below shows the various stakeholders that can be found in a strata scheme.

The most often cited example of competing interests is that between developers and owners. The law has been changed a number of times over the years to reduce the control of developers and to require more information to be handed over once a scheme is up and running. However, some owners believe that developers still exercise too much control, directly and indirectly, to the owners' disadvantage. This has led to calls for further restrictions to be placed on the ability of developers to enter into contracts on behalf of schemes and to further limit the voting rights of developers, particularly after the first AGM.

[2] See chapter 3 for more discussion on owner renovations.
[3] See chapter 5 for more discussion on the issue of smoking.

However, others argue that developers should be required to take a position on the executive committee and provide information and participate in decisions for a few years after the scheme begins. They believe part of the problem is that most developers take a short term interest in the buildings they develop and move on as soon as all units are sold. As a result, the developer's knowledge of the building construction and structure is lost.

Under the current law, mortgagees and covenant chargees are given a 'priority vote' over certain matters. If they choose to vote the owner of the lot cannot vote on the same matter. This is a long-standing provision which has rarely, if ever, been used. Whether there is a need for this provision to remain in the legislation going forward is arguable.

Another area where competing interests often arise is where a scheme contains a mix of investors and resident owners. Some investors may only be interested in the short term and in maximising their rental return. They can be less inclined to spend money on maintenance as they do not live there and may prefer the levies to be kept low. At other times they may push for money to be spent, for example, when they are planning to sell. Investors and their agents may also put their own interests first in selecting and keeping tenants. One option that has been put forward is to give resident owners two votes at an AGM, in recognition of their higher stake.

Question

8. **Are reforms needed to address the competing interests of stakeholders? If so, what should they be?**

TERMINOLOGY AND PLAIN ENGLISH

Most stakeholders believe that the laws need to be written in plain English and the terms used should be straight forward and easy to understand. Old fashioned or overly complex language should be avoided.

Here are two examples of overly complex provisions from the existing legislation:

Section 93 Strata Schemes Management Act 1996
An owner of a lot may bring any action against the owners corporation of which the owner is a member that the owner might have brought against the owners corporation if the owner had not been such a member.

Section 8AB(2) Strata Schemes (Freehold Development) Act 1973
If:
(a) a stratum parcel is the subject of a strata scheme, and
(b) an instrument has created or has had the effect of creating after the commencement of this section a right of vehicular access, a right of personal access or an easement for a specified service, over or through or as appurtenant to the stratum parcel, or the land comprised in that parcel, and
(c) the site of the easement is identified on a plan lodged in the office of the Registrar-General,
the rights and obligations conferred or imposed by the easement created by the instrument are as specified in Schedule 1B, except in so far as those rights or obligations may have been varied or negatived under this section or in the instrument.

There are a number of terms used in the legislation where the meaning is not readily apparent by the wording used. Terms such as *lot, sinking fund, strata roll, initial period, contributions, unit entitlements, poll vote, stratum parcel* and *common seal* would fall into this category. This has resulted in suggestions that the law should be rewritten in "layman's language", with the needs of new owners and those where English is not their first language kept in mind.

Additionally, the concepts behind some of these terms, such as initial periods and poll votes, can be confusing and misunderstood. There are other jurisdictions around the world that work perfectly well without such concepts in their legislation. The unnecessary complexity is particularly evident in regard to community schemes. On top of concepts such as common property and association property, those in community schemes can also be faced with community associations, precinct associations, neighbourhood associations and possibly a number of strata owners corporations.

Terminology can also influence perceptions. For example, there are some who believe that the term 'executive committee' does not adequately reflect the purpose and functions of these elected representatives. Similar comments have been made about the term 'strata managing agent'.

The terms 'body corporate' and 'proprietor' were replaced by 'owners corporation' and 'owner' when the strata management and development laws were split in 1996, yet the development laws still refer to the old terms. There are terms in common everyday use such as special levies and tenant that do not appear anywhere in the current legislation.

Below is a table showing some of the different terminology used in other places around Australia and overseas.

Term used in NSW	**Equivalent terms used elsewhere**
owners corporation	strata corporation, owners' association, management corporation
executive committee	board of directors, management committee, council of unit owners, strata committee
strata managing agent	managing director
sinking fund	reserve fund, long-term maintenance fund, special maintenance fund, development fund
strata roll	strata records, register of unit owners, membership list, owners corporation register
by-laws	rules, common rules
initial period	interim period, control period, start-up period, preliminary period
unit entitlements	lot entitlements
common property	shared property

Question

9. What terms or provisions in the current law do you believe should be rewritten in plain English?

CHAPTER 2
GOVERNANCE

The management and governance of strata and community schemes requires a sensibly structured regulatory framework that promotes self-governance and enables decisions to be made by democratic processes at the lowest cost for consumers. This chapter looks at ways to improve awareness of rights and responsibilities, increase participation and deal with owner apathy, enhance communication and encourage greater transparency and accountability.

AWARENESS OF RIGHTS AND RESPONSIBILITIES

Education of owners and executive committees

In order to make sound decisions and minimise disputes owners, particularly those who serve as committee members, need to know their rights and responsibilities and have readily available access to information.

NSW Fair Trading and Land and Property Information together play a large role in providing information to those involved in strata and community schemes. Over 50,000 phone calls and hundreds of letters are received each year from people seeking information and advice. Information seminars are regularly held around the State and a number of publications are produced and distributed, including the popular *Strata Living* and *Living in a Community Scheme* booklets. Both agencies also have a range of information material on their websites.

Some stakeholders have called on the Government to do more in terms of educating owners and executive committee members. One suggestion is that a series of factsheets on particular issues be developed and published. Targeted publications, dealing with such matters as buying into a scheme or operating guidelines for executive committees, could go into more detail than a generic booklet. For example, Queensland has a Body Corporate and Community Management Information Kit which includes factsheets on a wide range of topics such as insurance, maintenance and executive committees. Another suggestion is that the Government make available template forms (e.g. agendas) and sample documents (e.g. minutes and financial statements). These could become useful guides, particularly for people in self-managed schemes.

More use could also be made of digital communication. Queensland has an electronic newsletter to keep interested parties informed of news, events and issues. In NSW, a similar email newsletter (i.e. *the Letterbox*) has proven to be a successful information source for those involved in the rental property market.

Currently, anyone who is nominated and elected can serve as a committee member or office bearer. There is no requirement for any training, skills or knowledge. Some stakeholders suggest that there can be difficulties with allowing laypeople, often with no professional background or formal training, to serve on committees and assume responsibility for governing multi-million dollar properties.

This has led to calls to make it mandatory for existing and future committee members to undertake formal training. Strata Community Australia (NSW) already provides a free online course for executive committee members.[4] This course covers governance and ethics, roles and responsibilities, plan interpretation, administrative matters and communication. A similar online tutorial is provided in Queensland by the Office of the Commissioner for Body Corporate and Community Management.

One option is to make it compulsory for committee members to complete a course of this kind, either for all schemes or just large schemes (e.g. those over 100 lots or with an annual levy income over $200,000). However, this could reduce the number of volunteers willing to serve on committees due to the potential time and effort that would be involved. Another approach could be to have new committee members read and sign a summary document produced by the Government at their first meeting which sets out their obligations and responsibilities. This document could draw attention to the existence of online courses and other information that is available to help them carry out their role.

Knowledge of by-laws

While it is important to have an understanding of the law, it is equally important for good governance that owners and tenants are aware of the particular by-laws in place for their scheme. When an owner buys into a scheme they often do not receive a copy of the by-laws unless they specifically ask their solicitor to obtain them. The current law requires a landlord to give their tenant a copy of the by-laws within 7 days. Although the standard set of by-laws is usually included as part of a tenancy agreement, these may be quite different to the actual by-laws in place for the particular scheme. Some schemes pin a copy of the by-laws to their noticeboard but these are often out of date or rarely noticed by incoming owners and tenants.

Other problems arise because there is no requirement for the scheme to maintain an up to date, consolidated copy of their by-laws. The by-laws that are given to new owners and tenants may consist of the original set of by-laws that were registered with the plan, plus many pages of amendments and new by-laws that have been added over the years. This can also include numerous ‘special’ by-laws for other units, of interest only to the owners of those units (e.g. about the placement of an air conditioner). The law could include a requirement for the secretary to maintain a set of the current by-laws that apply to a scheme at the present time. If these were kept in an electronic file, they could be easily printed or emailed on request. The law could also be changed to enable special or exclusive use by-laws to be kept separate, with new owners and tenants given just the by-laws that affect them.

One option available to ensure owners and tenants have knowledge of their scheme’s by-laws is to have the managing agent or Secretary provide an up to date copy at the beginning. This could be part of a welcome pack that is sent out to all incoming residents and the law could prescribe that this information be provided within a certain time-frame, for example, within 14 days.

Changing and reviewing by-laws

Many schemes still have the by-laws they first started with. These may have been chosen by the developer and may not reflect the views of the current owners. Keeping by-laws that are ignored or are different to the current practices in schemes is poor governance. It sends a confusing message to residents and those thinking of buying into a scheme. For

[4] http://nsw.stratacommunity.org.au/page/education/free-online-executive-committee-training/

example, a buyer may be put off if a by-law banning pets is on the books, without knowing that the scheme may have adopted a practice of considering reasonable requests. One option that has been suggested is that all schemes be required to review and endorse their existing by-laws at regular intervals (e.g. at every 5th AGM).

One of the reasons that schemes may be reluctant to review and change their by-laws is that, under the current law, all amendments must be registered with Land and Property Information. A registration fee of around $100 applies each time. One option to reduce red tape may be to remove this registration requirement. Copies of the latest set of by-laws could be obtainable from the strata managing agent or Secretary upon request from anybody involved in the scheme and potential buyers.

Inspection of records

Before a person buys a property in a scheme it is recommended they obtain a 'section 109 certificate' and arrange for their solicitor/conveyancer or a specialist strata search company to inspect the books and records of the scheme. The section 109 certificate gives information about such things as the levies payable by the owners and any outstanding levies. An inspection may help to uncover details of disputes, the history of maintenance and plans for future spending.

The Strata Inspectors Association believes that deficiencies and misinterpretation of the existing legislation is resulting in higher costs for consumers, as well as less efficiency and accuracy in record keeping. This opens up the potential for legal action and additional costs for consumers trying to clarify the information.

Some of the problems that have been raised with the current inspection process include poor record layout, unsorted documents, missing or archived records, poor file naming of electronic files, incompatibility of transferred files between managers and claims of price gauging over printing and photocopying costs. Some inspection companies encounter difficulties making appointments and when they do they may be given a slow or obsolete computer to carry out their task. On the other hand, some managing agents view inspections as an interruption to their business and do not feel that they are adequately compensated for the interruptions.

One option is for the law to contain clearer provisions about the inspection process. The types of records that can be accessed could be more clearly specified. Timeframes for access could be prescribed. The way in which a scheme's records are stored and catalogued could be set out. The law could set a fixed fee for inspections, rather than the time based fees currently set, and set maximum fees for printing and copying. The minimum functionality of the computer and software used to undertake inspections could be specified.

Another approach could be to reduce the need for inspections to take place. The law could give persons acting on behalf of a buyer the right to request and receive by email specified documents (e.g. financial statements, the sinking fund plan, and minutes of meetings for the past five years). The section 109 certificate could be expanded to become more of a disclosure statement, with information provided about such things as known defects and current or recently concluded court action involving the scheme. The law could also give

parties the flexibility to arrange remote inspections of electronically stored documents via an online log-in system.

Questions

10. Which of the following would help to improve awareness and in what ways?

- **more information resources (e.g. factsheets, targeted brochures, template forms, sample documents and an email newsletter)**
- **compulsory training for executive committee members of all schemes or just large schemes**
- **having new committee members signing a statement setting out their obligations and responsibilities**
- **requiring managing agents/Secretaries to supply new owners and tenants with an up to date set of by-laws within a specified timeframe (e.g. 14 days)**
- **making it a requirement that schemes review their by-laws at regular intervals (e.g. every 5 years)**
- **expanding the section 109 certificate to disclose more matters likely to be of material interest to prospective buyers**
- **clarifying and simplifying the law dealing with the inspection of records**

11. Do you have any other suggestions for how awareness of rights and responsibilities could be improved?

PARTICIPATION

According to the Owners Corporation Network, there is a common perception by owners that the governance and management of their scheme is taken care of by someone else and is not their concern. All they have to do is pay their levies and others will do the rest. If most owners in a scheme think that way problems will inevitably arise.

Voting process

Under the current law, voting can only take place by physical attendance at a meeting or by giving another person a proxy to vote on your behalf. Proxy voting ensures that owners who cannot attend can still have their say. Proxies also help to achieve a quorum.

However, concerns have been raised about the practice of ‘proxy farming’, where one individual or a small group can gather large numbers of proxy votes, sometimes using intimidation or harassment, to effectively gain total control of the decision making process. They can end up having more proxies than the voting power of the others who attend, meaning that the outcomes are already predetermined. Often proxies are obtained from absentee owners or owners who are vulnerable, elderly or from non-English speaking backgrounds.

Currently, there is no limit on the number of proxy votes any one person can exercise at any one time. While there are provisions limiting the use of proxies by caretakers, strata managing agents or on-site residential property managers in situations where the matter to be voted on would give them a financial or material benefit, there are no limits on the number of proxies they or anyone else may hold.

One option is to limit the number of proxies an individual may hold, for example, to a set number or a percentage of the total lots in the scheme. This is the approach Queensland has adopted, where an individual cannot hold proxies representing more than 5% of total lots. If there are less than 20 lots in the scheme, a person must not hold more than 1 proxy. Other suggestions include limiting the matters on which proxies can be used,

banning the solicitation of proxies or imposing shorter expiry periods of proxies (e.g. that they expire after one meeting).

Another approach is the South Australian model, which has introduced the concept of absentee votes. This requires voting papers to be sent out allowing those who are not attending the meeting to have their say. Next to each motion owners can vote 'for' or 'against' or 'abstain'. This is similar to the system for voting on motions at general meetings of public companies. It may encourage participation by owners who cannot attend meetings and do not know anybody to give their proxy to or who are worried about their proxy vote being misused. It would help to address the quorum issue in the same way as proxy votes.

As strata and community schemes represent the '4th tier of government' it has been suggested by some stakeholders that voting, either in person or by submitting a completed postal voting form, should be compulsory, as it is in government elections. Owners who do not vote could be fined by their scheme (e.g. $50 for not voting at an AGM). Compulsory voting would make it very clear that buying into a scheme is a joint commitment to working cooperatively with other owners.

It is suggested that some owners are reluctant to vote by way of a show of hands in front of other owners. This can be a particular issue when an owner has a differing view to the majority of other owners or when voting involves more personal matters such as elections. Some owners may be worried about possible repercussions or being ostracised if they are seen to vote a certain way. One option is to enable certain decisions to be voted on by secret ballot to avoid pressure being placed on voters.

Quorums

Under the current law, a general meeting cannot go ahead unless a quorum is reached, being one quarter of the total number of people entitled to vote. If a quorum is not reached the meeting must be adjourned for at least one week. For executive committees, a quorum of half the members is required. Some of the other options discussed in this paper (postal voting, electronic voting, compulsory voting etc) may have an impact on quorums. However, the quorum requirement may be seen to disadvantage those who make the effort to attend. One option could be to enable all meetings to proceed after a 30 minute delay if a quorum is not reached. In Victoria and the ACT, decisions reached at a meeting without a quorum are interim and can be blocked, if a given percentage of owners object within a month.

Tenant representation

Just over half of all lots in NSW are currently investor owned. In some schemes tenants may make up all or a significant majority of residents. Under the current laws, tenants have no voting rights and cannot attend meetings, other than in rare instances where they act as the proxy of the owner. It is claimed that some strata managing agents do not even deal with enquiries from tenants, who some see as 'second class citizens'.

While it is generally agreed that tenants should not be involved in the financial affairs of owners, there are other issues affecting the day to day operation of a scheme in which tenants have as large a stake as owners. Examples include the operation and enforcement of by-laws, such as those dealing with pets, parking and noise, as well as repairs to common property.

In British Columbia, Canada, the standard by-laws allow tenants to attend general meetings, and to participate in discussions with the Chairperson's approval. Long-term tenants of three years or more are given voting rights. Another option could involve

appointing a tenant representative to attend general meetings and represent the interests of tenants in relation to specific matters (e.g. by-laws). Encouraging tenant participation may be one way to create a stronger sense of community in schemes and improve compliance with by-laws.

Participation on committees

Getting people to volunteer to serve on committees is an ongoing issue for many schemes. Often it is the same handful of people who put their hand up to serve each year. In many schemes there is no competitive election process, as the few nominations that are received are simply accepted.

This review provides an opportunity to look at ways to encourage more people to serve on committees. An issue for some may be that they do not know when or how to go about nominating themselves. One suggestion that has been made is to require owners to be informed about how to nominate for office in advance of each AGM.

Non-owners (e.g. tenants) can only be nominated by an owner. If this restriction was removed and tenants could directly nominate themselves more tenants may be willing to serve on committees.

The unpaid nature of executive committee positions may be another deterrent. Serving on committees can involve a great deal of time and effort, particularly in large or complex schemes. The law currently allows for honorariums to be paid. These are largely intended as token payments to basically cover out of pocket expenses. Only a small minority of schemes are understood to pay honorariums. One idea that has been put forward is that committee members be paid for attending each committee meeting (e.g. $50) in a similar manner to directors of companies. This would recognise that time is money and may encourage participation. Such remuneration could however, attract people more interested in the money than administering the scheme effectively.

A further deterrent is the risk of legal liability that comes with serving on committees. While office bearers liability insurance cover is available, only a minority of schemes would currently have such insurance. One suggestion is to make such insurance mandatory. Alternatively, the law could give committee members statutory protection against any decisions they take while acting in good faith.

Questions

12. Which of the following would help to improve participation and in what ways?

- **limiting the numbers or restricting the use of proxies**
- **introducing a system of pre-meeting postal voting for those who cannot attend a meeting**
- **mandating that all owners must vote, with fines imposed if they do not**
- **providing the option of secret ballots on certain issues**
- **reducing the restrictions on quorum requirements or removing the need for quorums altogether**
- **enabling some form of tenant representation in schemes**
- **calling for committee nominations in advance of AGMs**
- **allowing payments to be made to committee members for attending meetings**
- **clarifying the legal liability of executive committee members**

13. Do you have any other suggestions for how participation in schemes could be improved or owner apathy addressed?

COMMUNICATION

Open communication between strata managing agents, executive committees, owners, real estate agents and tenants is essential for the good governance and effective management of schemes. Poor communication can create an atmosphere of mistrust and misunderstanding, when rumour and misinformation fill the void.

Electronic communications

Some stakeholders believe that the current law is not 'technology friendly'. Notices and other information to owners are largely still sent by post. Sending documents via email is only permitted if a scheme has a by-law in place allowing it, which few schemes would have. Email notices can be sent for executive committee meetings but not for general meetings. In some instances it is sufficient to place a document on a scheme's noticeboard, which means that non-resident owners do not see them.

It has been suggested that the legislation needs to be modernised to recognise advances in technology, such as the use of email, sms and the internet. Owners, tenants and others associated with a scheme should be able to register an email address and/or a mobile phone number for notifications. Managing agents and executive committees could use these details to send official notices (e.g. minutes and agendas etc), sound out ideas (e.g. a garden bee) and reminders of specific events (e.g. the due date for levies or when the lift will be out of service for repairs). This could reduce administrative costs for schemes and improve information.

A further suggestion to improve communication is that the law should recognise the ability of a scheme to use a website. A scheme could either have its own website or have its own page on the managing agent's website. Information currently required for noticeboards could be hosted on the website. Such websites could contain a secure or private section accessible only by 'log-in', with owners and others able to register as a user and be given a password for access. Social media (e.g. Facebook and twitter) could also be used.

However, not every owner in each scheme will have the ability to use or be comfortable with using modern technology. Any changes to the law in this area would need to retain the existing paper based processes as an option for individuals.

Virtual meetings

Currently in NSW, all general meetings must be conducted at a physical venue where only those present can participate. On the other hand, the law allows executive committee meetings to be conducted in writing, including by email. It has been suggested that the law should make it possible for both executive committee meetings and general meetings to be conducted electronically, through such methods as webcams, Skype and teleconferencing. It is argued that this would promote participation in meetings and cut costs for those who do not live in or near the scheme. Such arrangements could only be optional at this point in time as not all schemes would have this level of technology.

Schemes could have the option to have combined electronic and face to face meetings. For example, laws in British Columbia enable schemes to provide for attendance at a general meeting by telephone or other method, if it permits all persons participating in the meeting to communicate with each other. Fundamentally, the basic test for a voting process is that it should be fair, accessible and practical.

Answering correspondence

One of the statutory functions of the Secretary of a scheme is to answer communications addressed to the owners corporation. This function can be delegated to the managing agent. One of the criticisms of some owners is the lack of a timely response to emails and letters they send to the Secretary or agent. In some instances no reply at all is received. It has been suggested that the law provide more clarity around this issue, including a set time period to respond. At the same time, there are examples of individuals who bombard their Secretary or agent with frequent correspondence, often of a repetitive or trivial nature. Replying to this correspondence can involve a disproportionate amount of time and cost. The law could provide an exemption from the general obligation to reply in these situations, or allow schemes to recover costs if more than a certain amount of correspondence from an individual is received each year.

Timing and amount of information

The strata law currently requires schemes with over 100 lots to send notices of executive committee meetings and minutes of those meetings to every owner. In schemes of all sizes it has traditionally been the practice to send out large volumes of attachments with notices, including financial statements, previous minutes, quotes, copies of contracts and proxy forms. This all adds to the cost of managing a scheme, and in some instances owners may have already received the information, via email or at previous meetings, or have little interest in receiving it.

One option that has been put forward is that the law should reduce the documents which must be supplied to each owner to just the essentials, such as the notice of the annual general meeting and key attachments. Other documents could be made available on websites or on request from owners. This is seen as a way of reducing red tape and saving costs for schemes.

The timing of sending documents is another matter for consideration. For example, under the current law the minutes of an AGM do not need to be supplied until the notices for the next AGM go out. This can mean that there is almost a year gap for those who were at the meeting to review the minutes or for those who were not at the meeting to find out what was decided. It has been suggested that the law should require draft minutes to be distributed to those who attended, within 14 days of the meeting, and give a period of time for owners to raise any inaccuracies. The minutes could be vetted and approved by the executive committee or agent and then sent to all owners within a specified timeframe. In Queensland, for example, minutes of an AGM must be distributed to all owners (e.g. by email) within 21 days of the meeting.

Access to contact details for owners

There are occasions where an executive committee may wish to communicate with all owners. For example, they may wish to provide updates on repair work or organise a meeting to terminate the appointment of the agent. Similarly, individual owners may wish to communicate with other owners, such as in the instance of a resident disturbing the quiet enjoyment of the owner next door. Where an executive committee or resident asks for contact details it is understood that some agents, in particular, refuse such requests citing ‘privacy laws’.

An owners corporation is under a general obligation to collect and use personal information in a fair and lawful way. Perhaps the strata and community schemes laws could set out clear guidelines stating what information can be released and to whom it can be released.

Questions

14. **Which of the following would help to improve communication and in what ways?**
    - **recognising various technological options for distributing information to those involved with individual schemes**
    - **enabling teleconferencing, videoconferencing or other means of holding meetings**
    - **providing more certainty as to how correspondence to schemes should be handled**
    - **reducing the documents required to be sent to owners ahead of meetings**
    - **giving schemes the flexibility to make documents available on their website or on request from owners**
    - **requiring minutes of meetings to be made available within a specified time after the meeting (e.g. 14 days)**
    - **making it clear when contact details can be given to executive committees and owners/residents**
15. **Do you have any other suggestions for how communication in schemes could be improved?**

TRANSPARENCY

Conflicts of interest

Issues have been raised about actual or perceived conflicts of interest within schemes. It is claimed that some people participate in discussions, lobby others or vote for decisions that directly or indirectly benefit themselves or a close associate, such as a family member. The current law in NSW contains a few provisions dealing with conflicts of interest. For example, an agent or caretaker cannot use a proxy to vote on a motion from which they may gain a material benefit. Other jurisdictions have much broader provisions. For example, in Singapore no executive committee member or agent may use their position to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the scheme. In Australia, directors of companies and members of incorporated associations must disclose any direct or indirect conflict of interest and must not be present during any deliberations or vote on the matter. The ACT has similar provisions in its strata laws.

Committee membership

Under the current law anybody can be a committee member so long as they are an owner or are nominated by an owner. This can result in people who are not owners being on committees or co-owners and family members from the one unit controlling a committee. It can also lead to a blurring of roles and a lack of transparency when, for example, managing agents are elected to committees. Other jurisdictions take a stricter view as to who can be a committee member. In South Australia, committee members must be unit owners. A similar law applies in Singapore, although they allow immediate family members to be on committees. In Queensland, managing agents, letting agents, service contractors and their associates are all specifically prevented from being elected, although managing agents are automatically non-voting members. In Western Australia, the law provides that if a lot has co-owners only one can be an executive committee member. Queensland has a similar provision but allows more than one co-owner if there are insufficient other nominations.

In NSW, the law allows committees to have anywhere between one and nine members. Committees consisting of one person are a particular cause for concern given that all the decisions are made by one individual. This level of power can be unhealthy and result in a form of dictatorship. Most other places in Australia require a minimum of three committee members to avoid this situation from occurring.

Another issue is how office bearers are elected. Currently in NSW, the positions of chairperson, secretary and treasurer are decided only by the committee members at their first meeting. A number of stakeholders have called for the adoption of the more transparent Queensland approach, where office bearers are elected by owners at the AGM before the election for committee members is held. It may also be helpful if those seeking election had to provide a short statement of their background, interests and intentions for owners to consider, in a similar fashion to those seeking election as directors of publicly listed companies.

Some owners are concerned about the ability for power cliques to be formed in committees which may become entrenched. This has led to calls for a cap to be placed on the consecutive holding of office for committee members (e.g. three or five years). In Singapore, no person can be treasurer for more than two consecutive years. Similarly, in retirement villages in NSW no person may hold the same office on a residents committee for more than three years to stop cliques and ensure there is a rotation of experience.

Motions

In NSW, all motions submitted for consideration at a meeting are simply listed on the agenda in numerical order. There is usually no indication as to who the motion came from or a reason why it is being put forward. While this may be explained at the meeting itself, it does not help those who do not attend but want to submit a proxy vote. A number of stakeholders have suggested that NSW adopt the more transparent Queensland approach, where all motions have to identify the person who submitted it and include an explanatory note of no more than 300 words.

Commissions

Related to the issue of conflict of interest is the payment of commissions, particularly to managing agents. Currently, agents must declare any commission they receive from a service provider, such as an insurer, in their contract.[5] Commissions can unduly influence the advice given by agents and may result in increased costs for schemes than if they went with another provider who did not pay commissions. As a result, this has led to calls for the law to either prohibit the receipt of commissions altogether, or for a requirement that they be fully and openly disclosed at the time any decision on the matter is taken.

Length of contract terms

An owners corporation or community association may enter into a contract with a third party for a number of reasons. This includes management agreements with the managing agent, caretaker and building manager contracts, concierge contracts and agreements with service providers such as for lift maintenance or gardening. Some of these contracts can be entered into for extended periods of time and contain automatic roll over clauses. These clauses effectively renew the contract automatically if no cancellation notice is given to the service provider. The length of these contracts is a concern for some owners.

There is also a particular issue with contracts entered into during the initial period or while the developer still exerts control or influence over decision making. Owners may not have the knowledge or experience to understand the implications of these contracts, which can be significant and long-term and may give substantial material benefits to associates, subsidiary companies or relatives of the developer.

The current strata law in NSW limits initial agent and caretaker agreements to not beyond the first AGM. After that future caretaker agreements cannot be more than 10 years. Some stakeholders suggest this period is too long and should be reduced (e.g. 5 years). Others

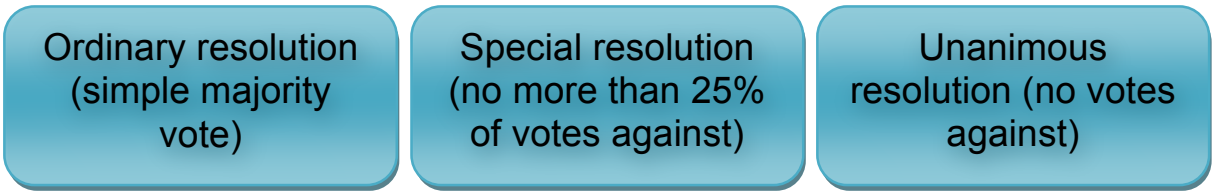
[5] Property, Stock and Business Agents Act 2002 (NSW), s57.

argue that contract limitations should apply to all forms of contracts not just those involving caretakers. Under the community scheme legislation agreements for the provision of services or recreational facilities entered during the initial period terminate of the end of the first annual general meeting unless the agreement was disclosed in the association management statement. It has been suggested that the provisions dealing with initial agreements should be the same for both community schemes and strata schemes. It has also been suggested that roll over clauses be prohibited, to ensure a transparent and proper review process at the end of each contract period. Others argue that roll-over clauses allow a scheme to renew a contract where they are happy with their service provider without having to go through a costly process every time.

In respect to contracts entered into at the start of a scheme, British Columbia, for example, provides that all such contracts must end no later than four weeks after the second annual general meeting.

Decision making

Under the current law there are three ways decisions can be made in schemes:



The rationale behind this categorisation is unclear. For example, there are over 30 matters that require special resolution and 10 matters that require unanimous resolution. This adds an extra layer of red tape and can make decision making complex. It has been suggested that the decision making process be reviewed and streamlined, with a presumption that a democratic majority vote is enough unless a case is made that a higher threshold is merited in specific circumstances (e.g. termination of schemes).

A further issue is who should have the authority to make decisions within schemes. Under the current law any decision made by an executive committee is deemed to be a decision of the owners corporation, although there are some decisions that an executive committee does not have the power to make (e.g. setting levies). An owners corporation can overturn any decision of its executive committee. The law does not make it clear where agents fit into the process, particularly in terms of making decisions independently or when acting on instructions from the committee. Some owners are also concerned when decisions are made by one or two office bearers without input from other committee members. Again, a number of stakeholders have called for a complete overhaul of the process and for the law to more clearly set out who can decide what.

There are those who believe that the powers of executive committees should be limited. They argue power to make major decisions should rest with all owners. A number of jurisdictions have taken this approach. For example, in Queensland executive committees cannot determine any matters that require a resolution of owners and cannot approve expenditure on anything totalling more than $200 times the number of lots.

Others take a different view, believing that a duly elected committee should be allowed to fulfil its purpose and manage the scheme without having to constantly report to owners on everything it does or call general meetings to pass what it decides. They liken executive committees to a board of directors of publicly listed companies elected to run the business and held accountable to shareholders, who can be voted out at the next AGM if there is dissatisfaction with their performance. A number of jurisdictions have preferred this approach. For example, committees in Ontario can make, amend or repeal by-laws.

Under the current law, an executive committee's decision making power can be limited by a motion passed at a general owners corporation meeting. However, many owners are unaware of this ability. It may be better for the law to set restrictions out clearly, while enabling schemes to vary these restrictions to suit their own needs.

Some owners want to ensure that expenditure is properly accounted for and funds are not misused. A number of jurisdictions have made it mandatory for all schemes to have accounts audited annually. Another approach could be to give owners the right to request and receive copies of quotes, contracts, invoices etc from an agent or the committee. Alternatively, the law could prescribe that schemes over a certain size or annual income (e.g. perhaps 50 lots or $100,000 in annual levies) must be audited by a qualified accountant every year or every two or three years.

Unanimous resolution to deal with community association property

There is currently an inconsistency between the type of resolution required to allow an owners corporation to deal with common property and the resolution required to allow a community, precinct or neighbourhood association to deal with association property. Under the strata legislation, most actions can be authorised by special resolution. However, the Community Land Development Act requires that a unanimous resolution be passed to enable an association to deal with association property. The types of actions affected include granting a lease of association property, converting a lot to association property or creating an easement over association property.

There does not seem to be any good reason for this difference. The requirement for a unanimous resolution is onerous and hampers the ability of an association to act in the best interest of the majority of owners. It has been suggested that the requirements be aligned and that community, precinct and neighbourhood schemes should be able to deal with association property by special rather than unanimous resolution.

Questions

16. **Which of the following would help to improve transparency and in what ways?**
    - **requiring any person with a conflict of interest to declare that interest and not participate in any discussion or voting on the matter**
    - **restricting the ability of certain persons (e.g. non-owners or more than one co-owner) from being elected to executive committees**
    - **making the managing agent automatically a non-voting committee member**
    - **requiring office bearers be elected at each annual general meeting**
    - **imposing a minimum number of committee members (e.g. three)**
    - **limiting the period of time any individual can continually hold the same office (i.e. Chairperson, Secretary or Treasurer)**
    - **requiring motions to be accompanied by an explanatory note and to identify the person who submitted the motion**
    - **prohibiting or requiring the disclosure of commissions**
    - **imposing further restrictions on the length of contracts associated with schemes**
    - **streamlining the levels of consent required to make decisions**
    - **providing greater clarity over who can make what decisions in schemes**
    - **requiring all or some schemes to have accounts audited**
    - **giving owners a right to request and receive copies of any documents relating to expenditure**
17. **Do you have any other suggestions for improving transparency within strata and community schemes?**

ACCOUNTABILITY

Performance of agents

Around 60% of all schemes in NSW are managed by a licensed managing agent, rising close to 100% of large and complex schemes. Many agents are dedicated to their work and perform their functions in a diligent and timely fashion.

Under the present legislation, if owners have a complaint or concerns about the performance of their agent or the terms of the management agreement, resolving the dispute can be lengthy and complex. Owners can take legal action through the courts as a contractual dispute, but this can be daunting and costly, especially as the contract is with the owners corporation, not the owners. In 2003, the strata law was changed to allow the owners corporation to apply to the CTTT for orders to terminate the services of a caretaker, seek compensation for poor performance and/or vary unfair terms of a caretaker agreement. It has been suggested that similar powers be given to the CTTT to enable owners to take faster and less costly action against underperforming agents.

The role of managing agents is often misunderstood by owners. Some agents may only provide basic secretarial services, such as sending notices and drafting minutes, while others provide a much fuller service including running meetings, preparing budgets, advising the committee and proactively organising for tasks to be completed within schemes they are managing. The difference in service can be reflected in the fees charged. It has been suggested that it may help if the law set out clearly the core functions that all agents must perform and the additional services that can be offered or negotiated with individual schemes. The law could clearly define the role of agents as independent, professional advisers who must always act with due care and skill and in the best interests of the schemes they manage.

It is estimated that around 25% of all current disputes are actually disputes about the conduct of a managing agent. The existing legislation requires disgruntled owners to take action against their owners corporation/community association because the managing agent is only acting on its behalf. The result of this is that orders may only be made against the scheme without any direct responsibility being borne by the managing agent for his or her actions. One option is to allow orders and penalties to be imposed on agents directly, payable out of their own pocket and not the scheme's funds. Once a certain number of adverse orders or penalties is reached, the licence of the agent could be jeopardised. This would mean agents would have some 'skin in the game' and may help to lift the overall standing and reputation of managing agents.

Terminating an agreement with a poorly performing agent can be a costly and complicated task for schemes. Outside of the AGM cycle an extraordinary general meeting needs to be called. This can be a difficult or impossible task for owners to organise themselves without the assistance of the agent, who may be obstructive or reluctant to help if they suspect the owners are trying to bring about their dismissal.

Even when this is achieved, some agents challenge the nature of their dismissal on technical grounds or rely upon terms of contracts requiring long notice periods or early termination payments. Another approach could be to give executive committees the power to hire and fire agents based on statutory notice periods and conditions. Alternatively, the law could allow underperforming agents' contracts to be terminated if a majority of owners signed a termination notice form. These types of reforms, if adopted in NSW, could help to make the strata management industry more accountable.

Performance of executive committees

Under the current law, executive committees play a pivotal role in governing schemes. The performance of executive committees varies widely depending on the skills and experience of its members and their capacity to work together.

Some stakeholders favour keeping the current model, as they see an elected group of owners as being the most likely to act in the best interests of all owners. This approach could include some minimal changes, such as improving clarity over the role and functions of committees. For example, the law could set out more clearly the role of a chairperson.

However, other stakeholders take a view that the executive committee approach is a poor governance model which exists more by default than by design, given that it was developed before the emergence of managing agents. It is often a complaint that many committee members are unqualified and motivated more by self-interest than working for the common good. This has led to calls to recognise the need for external professional management to become the norm, with self-management the exception, rather than the rule, particularly for large schemes over 20-30 lots.

Other jurisdictions have taken different approaches to try to improve the governance model and make committees more accountable. In Singapore, the law requires committee members to act honestly and use reasonable diligence in the discharge of their duties. Western Australia requires committee members to carry out their duties for the benefit of all owners, without favour. Queensland and the ACT have gone one step further and introduced a Code of Conduct for committees. The penalty for breaches of such Codes is the potential of being removed from office. Another approach could be to impose a statutory duty to act with due care and skill as is the case with company directors.

Under the current law when a scheme is dysfunctional, an application can be made to the CTTT seeking the appointment of a compulsory managing agent. This may be viewed as a fairly blunt and extreme step which can give all decision making power to the agent and completely exclude the involvement of owners for the period of the appointment. Given the consequences, such orders can be hard to obtain (i.e. the scheme may not be dysfunctional enough). A stepped series of sanctions before it gets to this stage may help to make committees more accountable. This could include the power to spill all positions and call for re-elections, banning an individual from serving on a committee for a specified period of time, or requiring self-managed schemes to find and appoint a managing agent themselves.

Another suggestion that has been made to make committees more accountable is a requirement for a brief annual report to be prepared. This could set out the committee's achievements over the past year, its goals for the coming year and detail how many meetings were attended by each member over the past year.

Questions

18. Which of the following would help to improve accountability and in what ways?

- **more clearly defining the role of managing agents, executive committees and office bearers**
- **holding agents directly accountable for their actions**
- **providing an easier process for schemes to terminate the services of agents**
- **making professional management mandatory for large schemes**
- **introducing a Code of Conduct for executive committees or requiring them to act with due care, skill, honesty and for the benefit of all owners**
- **giving the CTTT more options before appointing a compulsory agent**
- **requiring executive committees to prepare brief annual reports**

19. Do you have any other suggestions for how to improve accountability?

CHAPTER 3
MANAGING THE BUILT ENVIRONMENT

For most people, ownership of a property in a strata or community scheme is the biggest investment they will make. Ensuring that the physical asset of the building is properly managed and maintained is crucial to protecting that investment. This chapter looks at a range of 'bricks and mortar' issues, such as the renewal or termination of schemes, common property maintenance, owner renovations and building defects.

URBAN RENEWAL

The success of the strata legislation has been that it allows unit owners to have title to land. However, strata title involves different rights and obligations to conventional land ownership. The extent of a strata lot owner's title is defined by a building, and buildings do not last forever.

During the 50 years that NSW has had strata legislation many different types of buildings, in varying states of repair, have been subdivided by a strata plan. Many older buildings were converted to strata title once the concept of strata living became more widely accepted, some of which are now nearing 100 years old. Approximately 30% of residential strata schemes in the Sydney metropolitan area were registered more than 30 years ago. There are now many strata buildings needing major renovation or redevelopment through the effects of time or the lack of ongoing maintenance. Often the owners find it difficult to raise enough in levies to cover the cost of necessary work.

Another driver for the re-development of existing strata schemes is the need for urban consolidation. As land uses evolve and higher densities are made possible in urban areas, strata title often acts as a barrier to change. The number of households in NSW is projected to increase to 3.72 million by 2036, a rise of 41%. In the Sydney region the projection is for a 46% increase in households over that period. To meet this need the Metropolitan Strategy requires that over the next 25 years between 60 – 70% of new housing for Sydney will be built in existing urban areas. Unless some of the existing low density strata schemes can be renewed this target will not be met.

There is a strong argument for the ongoing renewal of some existing housing stock. Where land is held in single ownership an owner can renovate and update a building to ensure it meets environmental and aesthetic standards. Once a building has been strata subdivided this becomes much more difficult to achieve.

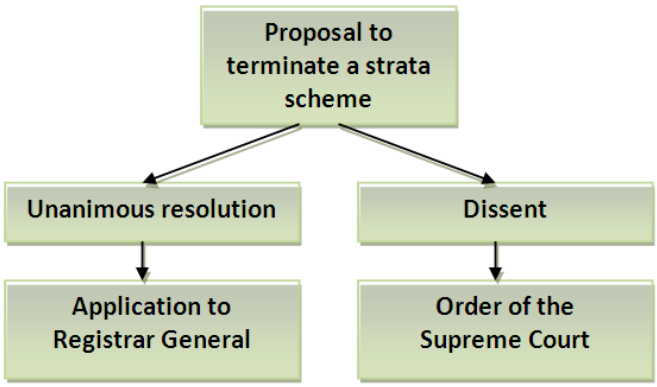
Many older buildings do not meet current Building Code of Australia Standards or are unable to retrofit environmental features that would make the building more energy efficient. Unless procedures are in place to deal with strata buildings as they age, the community will continue to bear the cost of unproductive developments.

It is argued that one of the factors stifling urban renewal is the complex and difficult process associated with terminating a strata scheme. Owners who wish to benefit from a proposal to renew or redevelop their scheme can be blocked by one individual who does not want to participate. When this happens the general community also misses out on the benefits of replacing a tired, run down scheme with a modern building that can accommodate more people.

Currently in NSW, the law provides two methods of terminating a strata scheme. These are:

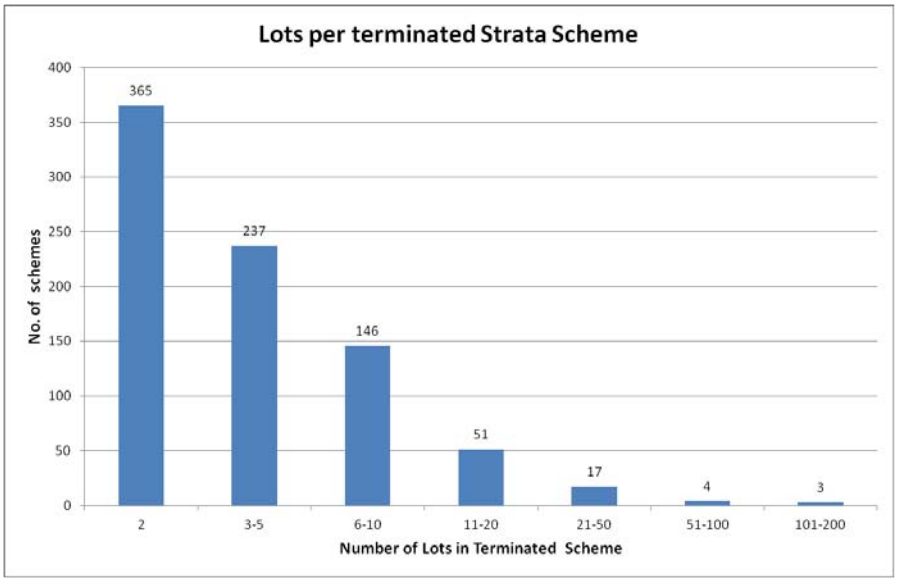
- *by order of the Supreme Court* – an application may be made by the owners corporation, by a lot owner or by a mortgagee of a lot; or

- *by application to the Registrar General* – an application must be signed by each owner of a lot, registered lessee and registered mortgagee and supported by a unanimous resolution of the owners corporation.



According to LPI records, 826 schemes have been terminated since the strata legislation began, which is a small percentage compared to the 71,000 strata schemes in NSW. Almost all of these terminations have been made following an application to the Registrar General unanimously signed by the lot owners, with only 5 schemes being terminated by Supreme Court orders.[6]

Another interesting feature of the strata schemes termination process is the size of the schemes concerned. Most are small, with a significant majority being two lot schemes. The table below shows the number of lots per terminated strata scheme.



[6] Section 51A *Strata Scheme (Freehold Development) Act 1973*, introduced in 1993

The low levels of terminations (particularly amongst strata schemes with more than ten lots) tend to support anecdotal evidence that the current termination procedures are too restrictive. Achieving unanimous agreement among owners about all aspects of a termination proposal is difficult and becomes harder the more people are involved.

There are many examples of strata buildings that have become run down and have been issued with fire safety or other orders by the local council. Although termination and redevelopment of the scheme would be the most financially viable option, this can be thwarted by a minority, or even one dissenting owner.

Where the parties disagree on termination the only option is an application to the Supreme Court, which is costly and time consuming. The process is adversarial and does not encourage negotiated agreement. Rather than taking on the cost and effort required to pursue a termination through the courts, owners are left with little option but to sell their units, often at a significant loss, leaving the problem of the building for future owners and the community.

There is an overwhelming consensus amongst stakeholders that the current termination processes are too difficult.

It has been suggested that NSW needs a simpler and fairer system to enable the redevelopment or renewal of strata buildings. Strata legislation must provide an effective means to not only establish and manage a strata scheme, but to facilitate the replacement of an unproductive or unliveable building once it inevitably reaches the end of its useful life.

Termination procedures in other jurisdictions

All jurisdictions with strata or condominium legislation have provided a mechanism for winding up a scheme where circumstances require the redevelopment of the building. In the UK, the *Commonhold and Leasehold Reform Act*, introduced in 2002, includes a procedure for winding up a scheme by a resolution passed with at least 80% of the members voting in favour. Where the winding up resolution is approved with less than 100% support, a court order is required to determine the terms and conditions on which the termination is to proceed and to specify how the assets of the commonhold association will be distributed.

Most North American condominium legislation provides for termination of a scheme following a resolution passed by at least 80% of the unit owners. One interesting feature of the *Ontario Condominium Act* is the procedure for terminating a scheme where the building has suffered substantial damage. 'Substantial damage' is defined to mean:

> *damage for which the cost of repair is estimated to equal or exceed 25 per cent of the replacement cost of all the buildings located on the property.*

Once the board of the condominium corporation has determined that the building has suffered substantial damage, a meeting must be held to consider termination. The scheme will be terminated if the owners of at least 80% of the units agree. If there is no vote in favour of termination, the condominium corporation must repair the damage to the building within a reasonable time. This procedure encourages owners to face serious building issues and deal with them, either by repairing the building or terminating the scheme.

'Collective sale' – the Singapore procedure

Singapore has the most regulated procedure for terminating strata schemes. It facilitates the collective ('en bloc') sale of the whole strata building to a common purchaser, for

example, a property developer. The collective sale process was introduced in 1999 to address Singapore's critical land shortage.

The key elements of the Singapore system are:

- To initiate a collective sale the following levels of support must be obtained
  - if the strata development is 10 years or older – from 80% of the owners, or
  - if the strata development is less than 10 years old – from 90% of the owners.
- Once the required level of support is obtained, the owners must enter into a collective sale agreement with the purchaser.
- The collective sale agreement must specify how the sale proceeds are to be distributed amongst all lot owners. The method of distribution is not prescribed by legislation, as the circumstances of each scheme will differ. The owners must agree on the fairest method for their scheme, which may include a distribution based on unit entitlement, the size of the unit or separate unit valuations.
- An independent valuation report must be prepared on the value of the development at the date of sale and another valuation report on the proposed method of distributing funds.
- An application to the Strata Titles Board for a collective sale order must then be made by the owners.
- Before the application is lodged with the Board, notice must be given to all unit owners and registered mortgagees.
- An objection may be made by any unit owner who has not agreed in writing to the sale or by the mortgagee of an objecting owner.
- Even if there are no objections, the Board must not make an order unless satisfied that there was no bad faith in the transaction by taking into account:

(1) The sale price	(2) The method of distributing the sale price	(3) The relationship between the purchaser or any owner

- Where an objection to the sale is lodged, the Board can refuse to make an order for sale if the objector will suffer financial loss or if the amount the objector receives from the sale would be insufficient to redeem any mortgage. A unit holder will be considered to have suffered financial loss if the sale proceeds for the unit after deductions (e.g. stamp duty and legal fees paid on purchase of the unit and the costs incurred in the collective sale) are less than what was paid for the unit.

The Singapore model provides a transparent process that encourages consultation and collective decision making. The independent review provided by the Strata Title Board helps to ensure community confidence in the fairness of the process.

Alternative termination proposal – 'Renewal Plan'

The Singapore model only allows for the collective sale of all lots. It has been suggested that any legislative amendment in NSW should be flexible enough to enable co-operative redevelopment of the scheme as an alternative to a collective sale. This process would provide strata owners with the option to participate in the refurbishment of their building rather than being forced to sell when the building needs major redevelopment.

A number of bodies, including the Property Council of Australia (PCA) and the Owners Corporation Network (OCN), have proposed an alternative termination process that would enable the renewal of a scheme. Although the suggested models differ in detail, they both centre on development of a 'renewal plan' for the scheme.

Under the PCA proposal, a newly created 'strata schemes Commissioner' would be appointed to assist in the termination and to oversee the renewal process. If an owner in the minority does not agree to termination, an independent valuation would be obtained and the dissenting owner would be effectively paid out by the participating owners who have opted into the renewal plan. The sale would be at the expense of the participating owners. Any disputes would be referred to an independent appraiser. Disputes on procedural matters would be determined by the strata schemes Commissioner, whereas matters of law would be heard by the Supreme Court.[7]

The OCN has suggested that redevelopment of a strata building could proceed by way of a strata renewal plan that would be signed by a significant majority of lot owners for either the collective sale or redevelopment of the strata property. A key feature of the OCN scheme is a requirement for owners to obtain independent legal advice before a strata renewal plan is signed. The OCN also proposes that a strata review panel be established to resolve disputes between minority and majority lot owners.[8]

The threshold required to initiate a termination proposal

The current requirement in NSW for a unanimous resolution to approve a termination may be a barrier to the renewal of existing schemes. However, redevelopment or termination of a scheme is a significant undertaking that needs to be accepted by the majority of owners. The most common level of support required in international legislation to initiate a termination is 80%. This is a significant percentage that would represent a clear majority of strata owners.

There are advocates of strata title reform that suggest an 80% threshold is too high and who favour a threshold of 75%, i.e. the same level that applies to matters that require a special resolution. Another way of addressing the issue would be to introduce two levels of approval with, perhaps, 80% required for schemes of 5 lots or more and 75% for schemes with 4 lots or less. Alternatively, another option could be to vary the majority required to dissolve an existing strata plan on a sliding scale based on the age of the building. Under this proposal, 100% agreement would be required for schemes less than 20 years old, with the minimum majority dropping by 10% with every decade, e.g. schemes aged between 20 and 30 years old require a 90% majority vote.

Whatever the percentage deemed appropriate, a further consideration would need to be how to calculate the numbers. One approach could be to only count those who participate in the voting process. The alternative approach is to base the percentage on all owners in the scheme, with those not voting counted as being against the proposal.

Rather than focusing only on the resolution of the owners corporation that would be required, endorsement of a termination or a renewal plan could be required to be signed by a specified number of lot owners, along the lines of the OCN proposal.

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[7] Strata Title Renewal Paper – Property Council of Australia 2009

[8] Review of Strata Legislation in NSW – Submission by the Owners Corporation Network of Australia Limited Part 3 – OCN Strata Renewal Model May 2012

Independent review of the termination process

Introducing a process of termination or renewal with less than unanimous approval would inevitably require an independent review process and a means of resolving disputes between the majority and minority lot owners. Given the potential complexity of issues and the amount of money involved, the review body would need to have sufficient expertise and authority to ensure community confidence in the system.

Some people have suggested that the Supreme Court should retain its overview role in view of the significance of the issues involved. The CTTT could be responsible for reviewing whether the procedures have been correctly followed, with disputes being referred to the Supreme Court. Alternatively, it may be preferable to have such matters fall within the jurisdiction of the Land and Environment Court, which would have a role in both reviewing the process and resolving disputes.

Questions

20. **Do you support the introduction of an alternative process for terminating strata schemes? If so, how many lot owners would need to agree to initiate the process?**
21. **Should any alternative process accommodate only collective sale or should the process be more flexible, to enable co-operative redevelopment of the scheme?**

COMMON PROPERTY MAINTENANCE

Under the existing law, the owners corporation must maintain and repair common property, while individual owners are responsible for maintaining anything within their lot. It is not always clear what is common property and what is the individual lot. This creates arguments about whether the owners corporation or an owner is responsible for the repair or maintenance of a particular item.

Land and Property Information and NSW Fair Trading receive over 500 calls each week on this topic alone, making it the number one enquiry from strata and community schemes. Providing information and advice can be difficult, as what is common property is not the same for all schemes. It often requires an interpretation of the registered plan, including an examination of the thickness of lines relating to walls and floors etc, and the fine print written on the plan by the property developer.

Identifying common property

Common property is everything that is not comprised within a lot. The difficulty is in identifying what forms part of the lot.

Unless the plan otherwise provides, the boundary of a lot is the inner surface of the boundary walls, the upper surface of the floor and the under surface of the ceiling. Generally, everything inside the airspace of the lot, including all internal walls, fixtures, carpet and the paint on the walls forms part of the lot and is therefore the responsibility of the lot owner. Everything outside of that airspace, including external walls, windows, doors and tiles fixed to the floor and external walls, are usually common property and therefore the responsibility of the owners corporation.

The grey area distinguishing between common property and each lot can result in absurd outcomes. For example:

- an owner who wants to replace the wall tiles in a bathroom can do so for some walls but not others, even though they are all the same tiles

- changing a light bulb in a recessed light fitting, such as a down light, within a lot is legally the owners corporation responsibility as it forms part of the ceiling.

To address some of the anomalies, a memorandum has been developed by the Strata Industry Working Group that attempts to clarify the responsibility for maintenance of many of the grey areas.[9] There is, however, some doubt as to how effective the Memorandum can be. An owners corporation is required by law to maintain common property and there are currently limited circumstances where a by-law can alter the general maintenance obligations imposed by the law.

Other jurisdictions in Australia have a range of approaches to defining common property:

WESTERN AUSTRALIA	Generally all of the outside is common property and the inner space of the unit is private property (i.e. the inside walls, floor, ceiling etc).
SOUTH AUSTRALIA	The exterior to the inside wall is common property and pipes or electrical wiring which service only one unit are considered part of that unit. The law states that if something is repaired or replaced that benefits only one owner then that particular owner should be responsible for the cost.
QUEENSLAND	Common property differs between schemes recorded as a 'building format plan' (e.g. multistorey buildings) and those recorded as a 'standard format plan' (e.g. townhouses). In a building format plan the boundary of the lot is the centre of the floor, wall or ceiling. In a standard format plan the lot owner is responsible for most things except roads, gardens and lawns on common property and some elements of utility infrastructure.
TASMANIA	Shared gardens and stairwells are common property, along with all areas above and below the boundaries of a lot. If the boundaries are not stated on the strata plan the boundaries are taken to be the centre of all floors, walls and ceilings.
VICTORIA	It is left to the plan to determine what is common property for each scheme.
ACT	A distinction is made between 'A-class' units and 'B-class' units along similar lines to the Queensland law.

What is needed is certainty in relation to the grey areas so that unnecessary disputes can be avoided. One simple thing that could be done would be to give some legislative force to the Memorandum developed by the Strata Industry Working Group, by including the body of the Memorandum in a Regulation and enabling an owners corporation to adopt it by passing an appropriate resolution.

One option could be for the law to contain a clearer and simpler definition of common property. Another option could be to retain the current meaning but for the law to make owners responsible for certain parts of common property. For instance, it has been

[9] How can an Owners' Corporation identify common property in a strata scheme? – Land and Property Information 2012 www.lpi.nsw.gov.au

suggested that any fixture attached to common property that is wholly within a lot and used exclusively by that lot should be treated as part of the lot. Similarly, any pipe or wire servicing only one lot could be that owner's responsibility. The law could also state that balconies, courtyards and gardens accessible only from one lot are the responsibility of the individual owner concerned.

Currently, the developer is responsible for identifying specific items as either common property or part of a lot when the strata plan is prepared. It may be appropriate to allow the owners corporation to change the status of a specified range of items, such as tiles and air conditioning units, by resolution at a general meeting or by order of the CTTT.

Absolute obligation to maintain common property

Currently, the law imposes an absolute obligation on schemes to properly maintain the common property and any personal property it owns and keep it in a state of good and serviceable repair. This applies regardless of the age of the building or item, its projected life and the amount of funds at the scheme's disposal. As a result, unless a special resolution is passed in relation to a particular item of personal or common property, schemes have a legal obligation to spend money on maintenance and repairs when it may be uneconomical to do so. Failure to comply with this obligation can expose a scheme to a claim for compensation or legal action by an individual owner to force the work to be carried out.

One option could be to change the obligation to introduce an element of 'reasonableness', that is, the obligation would be one of 'reasonable repair' considering the age and life of the building and the funds available for maintenance. This would reflect the practical situation for many schemes. Exceptions could be made for matters such as water penetration, concrete cancer and structural issues.

The current absolute obligation applies regardless of who may have been at fault in causing the damage. For example, if an occupant leaves a bath to overflow and it floods downstairs, the scheme is still obliged to repair the damage. One option could be to exclude the scheme's liability for an intentional or negligent act of an owner or occupant. Schemes could be given the power to take action against an owner or occupant if the scheme believes they have caused damage to common property and have failed to remedy it, including recovering any excess on insurance claims.

Pre-1974 strata plans

The current strata legislation presumes that the boundary of a lot ends at the inside face of a dividing wall, ceiling and floor, with surfaces beyond the internal skins being common property. However, this presumption does not apply to all strata schemes.

Before the 1973 Strata Act, strata plans were registered under the *Conveyancing (Strata Titles) Act 1961* (now repealed). Under that Act, the boundary between lots and common property was assumed to be the centre line of any dividing wall, ceiling or floor, unless the strata plan stated otherwise.

Under the transitional provisions introduced with the 1973 Strata Act, the boundary line was moved to the inner face of the walls, the upper surface of the floors and the lower surface of the ceilings. The structure of the wall then became common property. However, any wall or other structure that separated parts of the same lot remained as part of the lot and did not become common property. This particularly affects the wall between the living space and a balcony, which for pre 1974 schemes remains part of the lot and is not common property.

Approximately 8,500 schemes were registered under the 1961 Act. The difference in identifying common property in pre 1974 strata plans causes considerable confusion and can lead to lot owners being responsible for the cost of major building repairs which, in more recent schemes, would be the responsibility of the owners corporation.

It has been suggested that this anomaly between strata schemes should be resolved. One option is to change the law altering the common property status of pre 1974 buildings to bring them into line with all other schemes. Another approach could be to enable a pre 1974 owners corporation to pass a resolution adopting the modern definitions regarding common property.

Questions

22. **Should the meaning of common property be changed? If so, which approach do you favour?**
23. **Should owners be responsible for all internal repairs within their lot and/or work which only benefits or affects them?**
24. **Should the absolute obligation to maintain common property be changed to take account of the age and life of the scheme and the funds available?**
25. **Should owners or occupants be responsible for any damage to common property they cause?**
26. **Should the law about common property for pre 1974 strata schemes be changed?**

OWNER RENOVATIONS

Under both the standard and model by-laws, an owner cannot mark, paint, drive nails or screws into or otherwise damage common property without written approval. Such consent is commonly given by the executive committee or at a general meeting by majority vote.

In 2004, a new provision was added to the *Strata Schemes Management Act* requiring a special resolution to be passed (75% vote) if an owner or a scheme wants to add, alter or erect a new structure on common property. These situations often require an exclusive use by-law to be drawn up and registered, making the owner responsible for any future maintenance of the addition, alteration or new structure.

The 2004 amendments have created confusion over the process required to approve owner renovations. Whether a simple majority vote or a special resolution is needed, for example, to install flyscreens or a water tank in the backyard of a townhouse, is unclear. The blurring of lines between the two processes is causing uncertainty and resulting in unnecessary disputes.

Costs involved for owners wanting to do renovations is another issue. For instance, an owner who wants to install an air conditioner may be told to pay for the cost of a lawyer to draft an exclusive use by-law, the cost of an extraordinary general meeting to consider and pass the by-law and the cost of registering the by-law. All of these costs combined could well exceed the cost of the air conditioner and deter the owner from going ahead with their plans. Such red tape can have a flow on effect and stifle the broader economy.

The current laws also foster a high level of non-compliance. Many owners go ahead with renovations or changes to their lot without seeking consent, whether out of ignorance or a fear of having their request rejected. For example, few owners would think to ask for permission to hang a picture hook, paint the inside of a window or install a security ‘peephole’ or chain latch on their front door.

All of the above issues have led to some stakeholders calling for reforms to the law to better recognise the different types of renovations and changes an owner may wish to make to his or her lot.

Owner renovations generally fall into the following categories:

Interior decorating or cosmetic changes	Painting, adding or replacing internal fixtures (e.g. light fittings), new blinds and curtains, removing vermiculite from ceilings, kitchen and bathroom renovations, replacing existing carpet/tiling (like for like)
Security and safety	Security doors, window grilles, child safety devices, disability related alterations, smoke alarms etc
Environmental	Solar panels, insulation, gas hot water, window tinting, window shutters, rainwater tanks etc
Technological	Pay TV, internet, new phone lines, extra power points etc.
Structural or permanent changes	Enclosing balconies or car parking spaces, repositioning kitchens or bathrooms, replacing floor coverings with something different, knocking out walls, joining two adjacent units together, increasing the floor space of a lot, adding fixtures to shared external walls or the roof and other changes requiring development consent

When an owner wants to renovate or make a change to his or her lot, the major concerns of other owners/occupants are largely based around:

1. noise and inconvenience, while the work is being carried out and after
2. responsibility for any damage caused by the work and future maintenance, and
3. any negative impact on the external appearance of the scheme.

A practical and common sense approach could be to change the law and generally allow owners to renovate or make a change to their lot provided certain conditions are met. For instance, the law could require owners to:

- notify in advance the managing agent/secretary, and adjoining occupants, if during any work they are planning to have done there is likely to be noise or other disturbances
- cover the cost of any damage to common property or other lots caused by having the work carried out or which may arise later on as a consequence of having the work done
- be responsible for any future maintenance of any fixtures or new structures they add to their lot, with such responsibility passing on to all subsequent owners, and
- obtain prior approval from the scheme, and any necessary development consents, for any structural or permanent changes (see above examples). In Victoria, owners are generally entitled to renovate or refurbish the interior of their unit but must notify the owners corporation if the work requires a building or planning permit.

This approach would remove the need for costly exclusive use by-laws while still achieving the same result. It would free up executive committees from having to consider every minor request. Replacing the complicated and confusing current set of rules with clear and certain rights and obligations may help to reduce the number of disputes.

Questions

27. **Should the process for owners wanting to renovate or make changes to their lot be simplified and/or clarified?**
28. **Could easy-to-read guidelines be produced giving information to owners on what they can and cannot alter/renovate? What would the content of these guidelines be?**

OVERCROWDING AND SHORT-TERM RENTALS

With the increasing population and the demand for more affordable accommodation, shared living arrangements are becoming increasingly common. This is particularly so in inner city, coastal areas and suburbs/towns near universities which are popular with workers, holiday makers and international students.

Some owners and head tenants use their units in a strata or community scheme to offer accommodation to a large number of people. Bunk beds and partitioned sleeping areas can maximise the number of occupants and, in return, maximise the profit made by the owner or head tenant. Effectively these units are being used as a de facto backpacker hostel, boarding house or serviced apartment. Examples of more than six to eight people living in a two bedroom unit are not uncommon. There are even claims of an emerging practice called 'hotbedding', where occupants use the same beds in rotating shifts.

Short-term rentals and overcrowding in schemes can impact on the amenity of other residents and the levies payable by all owners. Some of the problems that have been noted include more noise complaints, increased water consumption, not enough parking and a greater strain on facilities and common property as a result of overuse. Overcrowding also has obvious fire safety implications.

Some stakeholders believe that the current law provides insufficient power for schemes to deal with overcrowding and the problems associated with short-term rentals. A by-law cannot prohibit or restrict the leasing of a lot. This provision was included originally to prevent a scheme from imposing a blanket ban on tenants. It could be argued that the law has failed to keep up with the changing nature of rental arrangements in some schemes.

One option that has been suggested is for the law to set a limit on the number of persons who may occupy a residential lot (e.g. no more than two persons per bedroom). Alternatively, schemes could be permitted to impose such limits through a by-law. How such a law would be monitored or enforced is unclear, given that some people may claim to be visitors or short-term guests. A law like this may also indirectly discriminate against large families and those from different cultural or ethnic backgrounds. In 2006, the City of Sydney Council introduced a condition of consent for newly built apartments limiting the number of adult occupants per bedroom to two. It is understood that, to date, no court action to enforce this condition has been taken by the Council.

Another option suggested is to allow schemes to make a by-law prohibiting short-term rentals (e.g. those less than 3 months) or rentals which are not covered by the *Residential Tenancies Act 2010*. However, this may only encourage sham tenancy agreements to be entered into and would not address overcrowding problems created by head tenants.
A further option could be to tackle the problem at the other end and focus on dealing with undesirable outcomes. If there is a regular turnover of occupants of a particular lot, with a proven pattern of by-law breaches, a scheme could be given the ability to apply to the CTTT for an order prohibiting similar letting arrangements for that lot in the future.

Empowering schemes to set and enforce their own rules in this area may assist when it is only one or a small handful of lots involved. However, in some instances many lots may be being used in this fashion, meaning the minority of owner/occupants affected will have little success in persuading the scheme to do anything about the problem. Therefore, an alternative approach could be to empower local councils to fine owners in breach of zoning, development consents, Local Environment Plans or safety laws rather than relying on individual schemes to take action.

Questions

29. Which of the following would help address overcrowding and short-term rentals in schemes and in what ways?

- **enabling schemes to make and enforce by-laws to deal with the issue**
- **giving the CTTT power to prohibit certain letting arrangements for a lot where there is a proven pattern of anti social behaviour**
- **introducing a law setting the maximum number of persons per bedroom**
- **giving local councils more power to deal with such matters**

30. Do you have any other suggestions for how the issues surrounding overcrowding and short-term rentals could be addressed?

BUILDING DEFECTS

Issues around the design and construction standards of buildings and the certification process are outside the scope of this review. These matters fall under the separate review of the Planning system.[10] Similarly, issues such as the application of home warranty insurance to multi-storey buildings and the time periods for defect claims are being examined as part of a separate review of the *Home Building Act 1989*.[11]

Building defects such as water leaks and structural cracks, are a common concern in strata buildings. Building warranty and insurance disputes are made more complex by arguments about whether the repairs are needed due to a defect in the building work or because of inadequate maintenance by the owners corporation.

One option that has been suggested is that developers should be required to present a maintenance schedule for consideration and adoption at the first annual general meeting of new schemes. This may help to distinguish actual defects from wear and tear issues and may provide useful evidence in the event that a dispute arises. The maintenance schedule could be linked to the sinking fund plan and a requirement for the sinking fund to be adequately financed by the developer, and any other owners, during the 'initial period' of the scheme.

The current law has a long list of compulsory agenda items for the first annual general meeting of schemes, none of which relate to defects. Defect inspection and a plan for rectification could be added to the compulsory list of agenda items. This may help to draw the attention of new owners to this potentially serious and costly issue. More information could be made available to help owners better understand what a defect is, the difference between structural and non-structural defects, sources of advice and how they can go about getting any defects rectified.

[10] A New Planning System for New South Wales – Green Paper – NSW Department of Planning and Infrastructure 2012 www.planning.nsw.gov.au

[11] Reform of the Home Building Act 1989 – NSW Fair Trading 2012 www.fairtrading.nsw.gov.au

Some schemes spend hundreds of thousands of dollars on expert consultant reports and legal expenses in protracted disputes with developers over rectifying defects. At times these expenses can amount to more than the cost of the work required. If the legal action is unsuccessful more money needs to be raised to fund the actual work. The total costs involved can result in owners being required to pay substantial special levies.

Given the financial consequences for owners, one option may be to require a resolution at a general meeting before an expert report is obtained or legal action is commenced over defects. This would allow a full and frank discussion by all owners of the various options and costs.

There are claims that some developers use their influence, either directly or indirectly, to delay or stifle a scheme taking action over defects, until the statutory claim period expires, in order to avoid liability. In particular, this can occur where a developer retains voting rights in relation to unsold lots. Clearly in a case where defects are claimed the developer has an obvious conflict of interest. One option would be to remove the ability of a developer, or any person linked to the developer, to vote on motions relating to defects.

Questions

31. **Do you think that a maintenance schedule prepared by the developer would be useful?**
32. **Should defects be a compulsory agenda item for discussion at the first AGM?**
33. **Should the law set clear rules for voting on action regarding defects?**
34. **Should any other changes be made to the strata laws to more adequately deal with defects?**

ADDING LAND TO A SCHEME

Under the current legislation, land cannot be added to a community or precinct scheme, nor can it be added to a strata scheme or neighbourhood scheme that is part of a community scheme. This was intended to provide a safeguard to purchasers by giving them assurance that the land within a community scheme would not be expanded.

Rather than providing a safeguard, it has been suggested that this is an unnecessary restriction. There are many reasons why it may be appropriate to add land to a scheme. A lot owner may wish to extend his or her property by buying neighbouring land outside of the scheme. An association may want to expand its shared facilities or increase the amount of open space. Adjoining land owners may want to become part of a community association to share the communal facilities, which the association may be happy to agree to as it would reduce each lot owner's contribution towards ongoing expenses.

There have been calls for the law to be amended to enable land to be added to all schemes. The legislation could allow land to be added either as association property, common property or as part of a lot. The owners corporation or association would need to accept the additional land into the scheme by passing a resolution. In addition, if land is to be added to a subsidiary scheme, the approval of the community scheme would also be required.

Question

35. **Should land be able to be added to a community scheme, precinct scheme and a subsidiary neighbourhood or strata scheme? If so, should land be able to be added only as association or common property or should land also be able to be added as a separate lot?**

MULTI-TIERED COMMUNITY SCHEMES

One of the advantages of the community schemes legislation is that it enables a tiered management structure with subsidiary strata and neighbourhood schemes within the umbrella of a larger community. This provides a mechanism for managing large schemes more efficiently and enables a mix of different densities and styles of development within one scheme. However, where the subsidiary schemes are too many or too small it can add unnecessary cost and bureaucracy to the ongoing management of the scheme. Every subsidiary scheme is required to have its own insurance, maintain an administrative fund and a sinking fund and hold annual general meetings.

Some residents have been calling for a procedure that would enable a subsidiary neighbourhood scheme to be dissolved and amalgamated with the parent community scheme.

There are a number of ways in which a subsidiary neighbourhood scheme could be amalgamated with the community scheme. One way would be to wind up the subsidiary neighbourhood association and to vest all the neighbourhood property in the community association. Lots in the subsidiary scheme would become lots in the community scheme. No changes would be made to the individual lots so there would be minimal impact on the individual lot owners.

This process would not be possible for strata schemes, as strata schemes are a subdivision of a building, whereas a neighbourhood scheme is a subdivision of land.

Amalgamation would need to be approved by an appropriate resolution of the neighbourhood scheme as well as the community scheme with which it will amalgamate. As amalgamation would simplify the ongoing management of the scheme, a special resolution may be sufficient. Alternatively, as amalgamation will result in the winding up of an association, a higher threshold vote may be more appropriate.

Question

36. Should a mechanism be introduced to enable amalgamation of subsidiary neighbourhood schemes with a community scheme? If so, what kind of resolution should be required?

CHAPTER 4

MANAGING MONEY

Many disputes in strata and community schemes centre around money, often arising from the need for owners to share expenses. This chapter looks at unit entitlements, how levies are set, the process for dealing with unpaid levies, sinking funds, insurance, accounting records and financial statements.

UNIT ENTITLEMENTS

When a plan is registered each lot is given a unit entitlement, being a proportion of the total value of all lots in the scheme. In most strata schemes the unit entitlements are based upon the developer's estimate of the market value of each lot at the commencement of the scheme. For staged strata schemes and for community and precinct schemes the unit entitlements must be based on a valuation by a qualified valuer.

It has been suggested that the unit entitlements for all strata schemes should be based on the valuation of a qualified valuer. Allowing the developer to allocate the unit entitlements has the potential to create inequity or disharmony in strata schemes, whether intentional or not. In Queensland, the allocation of lot entitlements in strata schemes must be accompanied by a registered valuer's certificate.

Unit entitlements are used to determine each owner's:

- contribution towards payment of levies
- beneficial interest in the common property, and
- voting rights on a poll.

Some owners have suggested that unit entitlements should not be used as the basis for determining levies. They argue that just because one unit has a higher value than another, because of better views, for example, does not mean the owner will make any more use of common property. It has been suggested that it would be fairer if levies were based on floor area, with perhaps a loading based on usage of common facilities.

Separately, some stakeholders have suggested that owners who rent out their properties should pay higher levies due to the potential for extra wear and tear caused by tenants. However, it has been argued that owner occupiers could just as likely cause damage to common property and it would be unfair to landlords with good tenants to force them to pay higher levies.

It is a standard feature of the laws in other parts of Australia and around the world that levies are based on the unit entitlements. However, a number of jurisdictions have variations to the standard approach. Victoria distinguishes between 'lot entitlements' (which determines voting rights and a lot owner's beneficial interest in the common property) and 'lot liability' (i.e. the share of the scheme's expenses that each lot owner is required to pay). Tasmania provides for 'special unit entitlements' which allows differing circumstances to be taken into account when setting levies (e.g. if a scheme has a lift, the cost of maintenance and upkeep can be limited to only those lots who use the lift). Singapore allows its schemes to deviate from unit entitlements by using any other method or formula if there is a resolution by consensus. Any one, or a combination, of these approaches could be adopted in NSW.

Reallocating and revising unit entitlements

Sometimes the unit entitlements set by the developer are unfair or unjust from the beginning or may create anomalies in later years. An individual owner can apply to the CTTT for a reallocation of the unit entitlements, but is required to provide the CTTT with a valuation certificate of all the units in the whole scheme (at the time of original registration). It has been suggested that there is no reason why an historical valuation has to be obtained as at the date of the plan, as relative values change over time for a variety of reasons. Other jurisdictions take a different approach. For example, in the ACT an application can be made if a special resolution has been passed by owners and the Tribunal considers it necessary to change the unit entitlements to reflect accurately the relative improved value of the units.

The community schemes legislation provides an alternative means of adjusting unit entitlements without the need for an order of the CTTT. When a community scheme is complete the community association can replace the schedule of unit entitlements with a revised schedule, if approved by special resolution. The revised schedule of unit entitlements is to be based on the table of values obtained from the Valuer General. This procedure allows a community association to update its schedule of unit entitlements without the expense involved in engaging a registered valuer to value the completed scheme. Similarly, a revised schedule of unit entitlements can also be adopted by a stand-alone neighbourhood association.

A precinct scheme or a subsidiary neighbourhood scheme can only have its schedule of unit entitlements revised as part of the revision of the entire scheme's unit entitlement by the community association. A subsidiary scheme cannot separately agree to a revision of its unit entitlements. It has been suggested that this restriction is unnecessary. There may be a problem in the schedule of unit entitlement for a precinct scheme even though there is no problem with the overall unit of entitlements for the community association. This should not prevent the precinct scheme from utilising this cost effective method of resolving the issue for its scheme.

There is no equivalent procedure allowing a strata scheme, whether part of a community scheme or not, to revise its schedule of unit entitlements on the basis of the Valuer General's table of values. Extending this procedure to strata schemes may be a cheap and effective means for individual schemes to resolve problems with unit entitlements without the need for an order from the CTTT.

Questions

37. **Should initial unit entitlements for strata schemes be based upon a valuation from a qualified valuer as it is for community and staged strata schemes?**
38. **Should more flexibility be given to schemes to determine levies other than on the basis of unit entitlements?**
39. **How could the process of reallocating unit entitlements be improved? Would you support the ACT model being adopted in NSW? Should the procedure for revising unit entitlements in community schemes be expanded to precinct scheme, standalone neighbourhood schemes and strata schemes?**

LEVIES

Each year, every scheme is required to estimate the amounts needed to pay for the expenses of running their scheme. This forms the basis of a budget which determines the levies each owner pays. The levies are deposited into two accounts:

- administrative fund, for day-to-day recurrent expenses, and
- sinking fund, to cover future capital needs.

Under the current law, levy increases must be determined at each AGM. One issue with this process is that while owners receive a budget, the impact on their individual levy amounts is often unclear. Owners may not know until they receive their next levy notices how much their levies have increased. One option to address this is for the notice of the meeting to indicate, in general terms, the proposed increase to the levies (i.e. % or $ amount). Alternatively, the notice could identify the most common levy amounts in the scheme and what the new amounts will be if the budget is passed. This would better inform owners and may help increase the participation rate in the voting process.

While sending out quarterly levy notices is common industry practice, the law is currently silent on this issue. One notice each year is sufficient. Owners are liable to pay levies even though they may not have been given a notice advising them of how much and when to pay. This can result in unfair or unjust consequences, particularly for those who were not at the meeting when the levies were decided. In Queensland, the law requires owners to be given at least 30 days prior written notice of any amounts due.

The initial levies for a scheme are set largely by the developer. There are claims that in some schemes the initial levies are set artificially low in order to attract more buyers and for the developer to pay less themselves during the initial period. This is one of the biggest sources of complaints from buyers in new schemes. One suggestion that has been made is that developers should be required to set realistic budget forecasts, not just for the first year but for the first two or more years. This may help to ensure that the initial levies are set at around the amount they should be and that there is no need for substantial rises in the first few years. In British Columbia, Canada, the developer is responsible for covering budget shortfalls against actual expenses for either 12 months after registration of the plan or the sale of the first unit. Alternatively, the law could require the developer to convene a general meeting each year during the initial period and accurately disclose expenses in a budget. Other owners could then vote on the levies and if they consider them inadequate or excessive could challenge the decision in the CTTT.

The law currently permits schemes to pass a special resolution offering a 10% discount to owners who pay their levies early. Some stakeholders claim this makes it difficult for schemes to budget as they must prepare for everyone potentially paying early. It has been suggested that the capacity to offer discounts for early or on time payments be removed.

Shared expenses in a part strata scheme

A strata scheme that exists over only part of a building (a part strata scheme) must have a strata management statement to regulate the operational aspects of the building. One of the key functions of the strata management statement is to allocate responsibility for payment of the costs of shared facilities. The current legislation does not specify how the cost of shared facilities is to be apportioned, nor is there any requirement for the developer to disclose the basis on which the apportionment was made. This can lead to protracted disputes as there is no standard against which a schedule of shared facilities can be compared to determine whether an error has been made in the allocation.

It is also difficult to correct an inappropriate allocation. This would require amendment of the strata management statement, which would need the approval of each strata scheme within the building and each owner of a part of the building not within the scheme. It is therefore important to ensure that the original allocation is as fair as possible. To encourage this, it has been suggested that the strata management statement disclose the method used to allocate expenses. Another option would be to require the allocation to be made by a quantity surveyor or other similarly qualified professional.

Questions

40. **Should notices for AGMs contain more details about proposed levy increases? If yes, what additional information do you suggest?**
41. **Should the law require periodic levy notices to be issued?**
42. **Is more regulation over the initial setting of levies by developers required?**
43. **Should developers be liable for budget shortfalls in the initial period?**
44. **Should the law allowing discounts for early payment of levies be removed?**
45. **Should a strata management statement be required to disclose the method of allocating the shared expenses and/or be certified by a quantity surveyor?**

DEBT RECOVERY

Anecdotal evidence suggests that the problem of unpaid levies is becoming an increasing issue for many strata and community schemes. At some schemes there can be multiple owners who owe money and substantial debts may be outstanding. This means that other owners have to pay more to cover the shortfall in order to meet expenses. Overall the amount outstanding across the sector could add up to many millions of dollars at any point in time.

Under the current law, unpaid levies can attract statutory interest (10% per annum) after a one month grace period from when they fall due. Schemes can take legal action through the courts to recover outstanding levies, as well as interest and all costs and expenses incurred. The ultimate sanction is to bankrupt the owner and force a sale of the property to recover the debt. Under the present law, any owner who is unfinancial loses their voting rights, except on matters requiring unanimous resolution, and can have applications for mediation and to the CTTT rejected. However, unfinancial owners can still put forward motions and attend meetings.

Penalty interest

It has been suggested that the existing interest rate is an insufficient deterrent against the late payment of levies. Some other jurisdictions have higher amounts. For example, the interest penalty in Western Australia is 15% per annum. In Queensland the interest rate is 2.5% per month (which equates to 30% on an annualised basis). Some jurisdictions allow schemes to set their own penalty interest rates. Most jurisdictions commence the calculation of interest from the date the payment falls due and do not provide a grace period like NSW does.

Delays in taking action

One of the concerns that some owners have is that debts can be allowed to accumulate and drift forward with little or no action being taken. This lack of action can result in the amount owed blowing out to unmanageable levels and making recovery of the debt harder. Other owners may see no action being taken as a green light to do the same thing and then the scheme has a bigger problem on its hands. One suggestion that has been made is that the law should require schemes to start proceedings to recover outstanding levies once they go past a certain time period. Queensland, for example, imposes such an obligation if a contribution has been outstanding for two years. This may help prevent debt accumulating to the point at which the owner is subjected to major confiscation of assets.

Role for CTTT in debt recovery

At present the CTTT does not have any jurisdiction over unpaid levies. Schemes must take recovery action through the court system. This can be a costly, lengthy and formal process. Having to deal with large numbers of cases involving unpaid levies is an impost on the courts, which could be using their limited resources to deal with other more complex or urgent matters.

The CTTT already has wide jurisdiction to deal with other matters involving strata and community schemes. It has extensive experience in dealing with debts in other areas, such as unpaid rent by tenants. Enabling applications to be taken to the CTTT for unpaid levies would provide schemes with a quick, cheap and relatively informal process, reducing the need for lawyers and debt recovery agents to be involved. Orders could be made on the papers, based on supporting evidence of the debt, with owners having the option to seek a hearing if they believe they do not owe the money. Orders for payment from the CTTT could be enforceable through the local court system should this reform be adopted. Victoria, for example, already gives its schemes the ability to take debt recovery action through its equivalent Tribunal.

Hardship provisions

The existing law treats all owners the same and makes no allowance for owners experiencing financial hardship. It has been suggested that executive committees or agents should be able to defer the whole or any part of the levies for a reasonable period on conditions as it thinks fit, or approve a flexible payment plan, if an owner is facing genuine financial hardship. Where schemes unreasonably refuse such requests it has been suggested that an owner be able to take their case to the CTTT and seek appropriate orders.

Recovery of expenses

The present law allows any and all costs and expenses to be recoverable from an owner in arrears. There is no requirement for prior disclosure or for the costs to be reasonable. It has been argued that allowing schemes to recover any and all expenses provides no incentive to keep costs to a minimum. Some owners may only be one or two payments behind which may add up to less than $500. Once legal expenses and costs are added on this amount could blow out to thousands of dollars, well in excess of the original debt.

Examples have been raised where owners have been charged more than $50 for a form letter asking them to pay. One option is to limit the recovery of expenses and costs to those which are reasonable in the circumstances. This would give owners a right to challenge any excessive overcharging. Such a requirement exists in Ontario, Canada. Other jurisdictions, for example Victoria, take a firmer view and do not allow any other fees or charges to be recoverable other than the penalty interest.

Loss of voting rights

Some argue that the loss of voting rights for owners who owe levies is an inadequate or inappropriate penalty. Citizens who owe taxes do not lose their voting rights in an election or access to courts. There have been instances where an owner has been prevented from exercising their voting rights when it is claimed they are only a few cents or a few dollars in arrears. On the other hand, if an owner was not intending to go to a meeting and vote anyway, the loss of voting rights is not an effective way to encourage them to pay on time.

More practical alternatives to losing voting rights may be worth considering. For instance, an owner in arrears could be prevented from nominating for or remaining on an executive committee until the money is paid. The law could say the scheme is not obliged to do any work on lots if the owner has outstanding levies. Schemes could be given the power to remove access to common facilities (e.g. gyms or pools) from resident owners in arrears. The impact on the owner's tenants, if any, may need to be considered if this suggestion was adopted.

Whether loss of voting rights remains or other sanctions are introduced, a minimum period (e.g. two levy payments behind) could apply before any sanctions, other than interest, could be imposed.

Recovering debts from tenanted properties

Recovering outstanding levies from investors is a particular problem for many schemes. Bankrupting owners and forcing sale of their properties is an extreme outcome. Other alternatives before it gets to this stage should be considered. Enforcing judgment debts against investors, particularly those living overseas, can be a difficult process. One option may be to allow schemes to apply to the CTTT or the courts for an order that any rent being paid on the property should be payable by the tenant to the scheme until the debt has been cleared.

Questions

46. **Should the penalty interest rate on outstanding levies be raised? If so, what should the figure be?**
47. **Should schemes be required to take recovery action within a certain time? If so, what should the timeframe be?**
48. **Should the CTTT be given jurisdiction to deal with outstanding levies?**
49. **What hardship provisions (if any) should be introduced?**
50. **Should the recovery of expenses for outstanding levies be limited to reasonable expenses or built into the penalty interest rate?**
51. **Should owners who owe levies continue to not have voting rights? Do you support any other practical punishments or deterrents and if so what?**
52. **Should a minimum period of arrears (e.g. two levy payments) be required before loss of voting rights or other punishments are imposed?**
53. **Should schemes be able to seek orders that tenants pay rent to them to cover debts owed by investor owners?**

SINKING FUNDS

The existing legislation requires all schemes to establish and maintain a sinking fund. The purpose of a sinking fund is to set aside money to fund the cost of capital works during the year, and also in future years, such as painting the common property and replacing carpets, roofing and guttering.

In 2005, the law was changed to require all strata schemes to have a 10-year sinking fund plan, designed to make owners think about what work will need to be done in the future and plan for when and how the scheme will pay for it. These reforms were introduced in response to community concerns that many strata schemes were not adequately planning for longer term maintenance costs. The requirement for 10-year sinking fund plans does not currently apply to community schemes.

One of the common criticisms of the current law is that, while schemes are required to have a sinking fund, they can choose to have little or no money in it beyond what is required for the current year. Another criticism is that, while strata schemes must prepare a 10-year sinking fund plan, there is no duty imposed to actually carry out the plan. Schemes can elect to draft up their own plans and are not required to use an expert. As a result, the amounts deposited into sinking funds and the adequacy of sinking fund planning varies widely across the strata sector.

This had led to calls for a system of indicative benchmarks or minimum levels to be introduced, mandating an appropriate amount to be set aside in a sinking fund. Some of the suggestions that have been put forward include a set percentage of the levies each year (e.g. 10%) or requiring the balance in the account to generally be equal to or above the annual budget or a specific percentage of the scheme's insured value.

While making contributions to sinking funds compulsory could help schemes to fund future capital works and avoid 'crisis management' it would also limit flexibility for schemes that prefer not to raise funds this way. Sinking funds are not the only way schemes can fund capital works. Schemes also have the option of raising a special levy when the need arises or borrowing the money required.

Some owners are against the idea of putting money aside for future work, particularly those owners thinking of selling in a few years time who see the money as only benefitting future owners. Others are concerned about having large amounts tied up earning little interest, and the potential risk for embezzlement and waste, where money may be spent on unnecessary expenses simply because it is available.

Some schemes build up large sinking funds, which grow from year to year. This becomes a selling point for incoming purchasers. However, one of the problems is that once money is put into a sinking fund it cannot be used for any other purpose than capital works. Distributing surplus funds from a sinking fund account to owners requires a unanimous resolution, which is hard to achieve. Owners do not currently have the option to transfer the excess money to the administrative fund to cover other expenses.

One option is to make sinking funds no longer compulsory. In Victoria, for example, only prescribed schemes (i.e. those over 100 lots or with an annual levy income of more than $200,000) are required to have a sinking fund or a 10-year plan. Sinking funds for all other schemes are optional and there is no evidence to suggest that schemes in Victoria are any less well maintained than in NSW because of this different approach.

Another option is to do away with the whole notion of sinking funds and allow schemes to carry forward budget surpluses instead. Surpluses could grow in the same way as sinking funds and be available to fund capital works when needed. This approach would do away with the red tape of having two separate accounts and give schemes more flexibility over the use of their funds.

The 10-year sinking fund plan reforms were adopted from overseas. How successful they have been to date in NSW is difficult to judge. A number of criticisms have been raised about 10-year plans. These include their mandatory nature, the fact that the person preparing the plan need not have any qualifications and once a plan is drafted there is no compulsion to do anything about it. Some view 10-year sinking fund plans as unnecessary red tape which imposes costs on schemes with little benefit, other than the establishment of a burgeoning expert sinking fund planning industry.

An alternative option is to require schemes to have a building inspection carried out by a building inspector or quantity surveyor at regular intervals (for example, every five years) to assess the structural integrity of the building and identify any longer term capital expenses needed in coming years. The findings of the report could be placed on the strata records and used to inform the setting of levies.

If 10-year sinking fund plans are to remain, some refinements could be made to make them more effective. For example, in Victoria, if a scheme has a maintenance plan it is required to report on its implementation at each AGM. In Queensland, the law not only requires the preparation of sinking fund forecasts over a 10 year cycle, it also requires schemes to adopt a sinking fund budget each year, based upon the expenditure noted in the forecast. In Canada the developer must prepare and submit a reserve fund study as part of the registration process and subsequent plans must be prepared by a qualified person using a prescribed form. Florida gives its schemes the flexibility to pass a motion not to have a plan. If 10-year sinking fund plans remain in NSW, a legislative requirement

whether they should be extended to community schemes is another issue for this review to consider.

Questions

54. **Should sinking funds remain compulsory? Should schemes be able to carry forward budget surpluses instead?**
55. **Should the law dictate contributions to sinking funds? If so, how?**
56. **Have the 10 year sinking fund plan reforms been successful? Should they be retained and expanded to the community scheme sector? Are any refinements needed to make them more effective?**

INSURANCE

Under the current law, all schemes must take out an insurance policy for the building, to provide for repair or replacement in the event of damage or destruction, as well as public liability cover of at least $10 million. Similar laws are in place in most other jurisdictions around the world.

Periodic valuations

In NSW all schemes are required to be insured for the full replacement value. To assist this process the law requires schemes to be valued every five years by a registered valuer or quantity surveyor. Some stakeholders suggest that many schemes are underinsured, particularly in the period between valuations. For example, a scheme may be insured for $2million based on a valuation. However, three or four years later the value of the scheme may have risen to $3million or $4million, but the insured value may not have changed. As a result, there will be inadequate funds available to reinstate or replace the property in the event of a major disaster.

One option could be to increase the requirement for a valuation to every two or three years. However, this would add extra costs for schemes. Another option could be for the insured amount to be indexed annually by some formula, which may reduce the likelihood of schemes becoming underinsured.

The five year valuation requirement can mean that owners become complacent about their insurance needs. A number of other jurisdictions (e.g. New Zealand) do not require periodic valuations. Some argue that common sense and the fear of a lawsuit for underinsurance should be incentive enough for regular valuations, without the law needing to dictate to schemes how often they should be done.

Another approach is that taken in Queensland where schemes are required to disclose details about the insurance in notices for each AGM, including details about the most recent valuation. This may help to focus the attention of owners on insurance and the value of their shared assets on a regular basis.

What needs to be insured?

The National Disaster Insurance Review earlier this year looked at the issue of strata insurance in the wake of Cyclone Yasi in Northern Queensland. A number of submissions to that review suggested that strata insurance risks becoming unaffordable for many schemes.

One element that affects the cost of premiums is what is covered by the policy. The law in NSW currently requires policies to cover most owner improvements and fixtures (e.g. kitchen cupboards, toilets etc). However, some other jurisdictions take a different approach. For instance, South Australia excludes owners' fixtures and fittings and Ontario, Canada excludes improvements made by an owner. Adopting similar measures in NSW may help to lower the premiums for schemes. It would also address the issue of 'double insurance' as such items are already covered by owners who have home and contents insurance policies. Tenant fixtures are currently excluded by the law from being covered by the scheme's insurance.

The law in NSW sets out a number of incidental matters that must be covered by all policies (e.g. the cost of removing debris and employing architects). These would be standard features of most policies and the need for the legislation is unclear. Other incidental matters, such as temporary accommodation expenses for owners and tenants, are not required by law, the need for which was illustrated by the gas explosion that extensively damaged a high rise building in Bondi Junction in 2009.

A large impact on the cost of insurance is the excess payable in the majority of policies. In the USA it is understood that the average level of excess/deductibles is around $7,500. In NSW most policies would have an excess in the hundreds of dollars. According to CHU Underwriting Agencies Pty Ltd, a major strata insurance company in NSW, approximately two thirds of all claims are for amounts less than $1,000. Encouraging or requiring schemes to have a higher excess payable could reduce the number of claims and, in turn, the overall cost of insurance.

Exemptions from compulsory insurance

Under the current law only two lot schemes can agree not to be insured and then only if the buildings are physically detached. There is an anomaly in that schemes of more than two lots may be also be physically detached but are still required to be insured under one policy. Schemes can apply for an order from a strata Adjudicator not to be insured on limited grounds, but this is rarely used. Sometimes the only parts of common property that are able to be insured are items such as fences and driveways. In these situations it may be more economical for owners to 'self insure' and meet costs themselves when needed rather than to spend money each year on unnecessary insurance.

In Western Australia, for example, the law does not require insurance where the only common property is the air above the lots and the soil below them, or fences, or where the scheme decides by resolution without dissent not to take out joint insurance. Adopting similar provisions in NSW would reduce red tape and costs and provide a more flexible approach to insurance, especially for smaller and unattached schemes.

Increased premiums based on lot usage

Under the current law where the use of a particular lot (e.g. a café) causes the insurance premium for the scheme to be greater than it would otherwise be, the extra cost can be passed onto the owner/s concerned (with their consent or by an Adjudicator's order). A similar provision exists in the Queensland legislation. However, many other places do not have such provisions. Some stakeholders argue that allowing for premium contributions to be adjusted for different use promotes disputes. It can be difficult to determine exactly how much of the premium is attributable to the use by the lot owner or their tenant. There is no equivalent ability to apportion other extra costs on the basis of different usage of lots, such as water and power consumption. Removing the provision allowing adjustments of premium contributions would be consistent with the general principle underpinning the legislation that shared expenses are to be shared on the basis of unit entitlements.

Public liability cover

Some stakeholders believe that the current $10 million minimum level of public liability insurance is too low. There have been calls to increase the minimum level of cover to $20 million. Others suggest the minimum amount should be $30 million. Increasing the level of coverage would increase costs for schemes. No jurisdiction in Australia has a requirement for more than $10 million in public liability coverage.

Questions

57. Should the requirement for valuations every 5 years be kept or changed?
58. Should insurance and valuation details be on the notices for each AGM?
59. What items should the law require to be covered by scheme insurance policies?
60. Should schemes be encouraged or required to have a higher insurance excess?
61. How could the law give schemes more flexibility over their insurance requirements?
62. Should the cost of insurance be shared only on the basis of unit entitlements?
63. Is there a need to increase the minimum public liability cover for schemes? If so, what should be the amount?

FINANCIAL RECORDS AND STATEMENTS

Recognition of modern accounting systems

The existing law around accounting records for schemes was largely drafted well before modern accounting systems were introduced. It refers to old fashioned processes such as bank passbooks, cheques and written receipt books with consecutive numbers. The law was designed more for the time when treasurers collected levies in cash door to door and wrote out receipts by hand. While this still occurs today in some smaller, self-managed schemes, most financial payments are accounted for by agents using modern computerised accounting systems.

Updating the law in this area, focusing more on what needs to be recorded rather than how it is done, would provide greater clarity and certainty over accounting records. For example, the law could recognise electronic payment of levies, the use of online bank accounts, electronic record keeping and the provision of financial statements and budgets electronically. However, some have argued that increased flexibility in this area may make it easier for individuals to defraud schemes.

Financial statements

Schemes are currently required to prepare and distribute a set of financial statements with the agenda for each AGM. The law sets out a list of matters that must be included in the financial statements. These include particulars of each item of income and expenditure during the year, the balance of funds, the amount of levies payable by each owner and details of all levies in arrears. This can lead to owners receiving pages and pages of financial statements, which are costly for schemes to produce and difficult for many owners to understand. It can encourage those who want to micro manage a scheme to query or dispute minor expenditure items, which in some schemes are broken down as far as individual phone calls and postage stamps.

Despite the large volumes of financial statements sent out, some of the key information is not being understood. For example, a recent study by the University of NSW[12] revealed

[12] *Governing the Compact City: The role and effectiveness of strata management*, Final Report, City Futures, University of New South Wales, May 2012.

that 1 in 5 owners had no idea how much (even approximately) their scheme currently had in its sinking fund.
A different approach could be to streamline the statements and only require schemes to prepare and distribute 1 page of key financial information. This could include:

- the total amount of levies to be paid by owners for the year
- the total amount of levies in arrears
- all other outstanding receipts and payments
- balances for all the scheme's accounts and investments (including sinking and administrative funds)
- major proposed expenses or purchases during the year
- any remuneration, allowances or expenses paid to committee members, and
- corresponding figures from the previous financial year.

This would reduce red tape and enable owners to get a better snapshot or overview of their scheme's financial position and the amount of costs increases. Those wanting more information would be able to ask questions at the meeting or inspect the scheme's records. Requiring corresponding figures from the previous year would allow owners to make a quick comparison, recognising that few owners retain their financial statements from one year to the next.

Queensland allows its schemes to choose whether they prepare their statements of accounts on a cash or accrual basis. The main difference is one of timing. Accounts kept on a cash basis show income when it is received while under an accrual accounting system accounts are based on when the income falls due. It has been suggested that similar flexibility should be provided to schemes in NSW.

A further issue that has been raised is the frequency of providing financial statements to owners. At present, the law only requires financial statements to be provided on an annual basis for all schemes. This may be adequate for some schemes but may not be frequent enough for other schemes, particularly larger schemes or those with large budgets. A lot can happen during the course of a year. One suggestion that has been made is that the law should require half yearly or quarterly financial statements to be provided in large schemes or those with annual levies over $200,000. This would impose extra costs on those schemes. An alternative suggestion is that the law should give all schemes the ability to pass a resolution requesting financial statements to be provided more often, if they are willing to meet the extra costs involved.

Another option could be for only an overview of the financial position to go out with the notice for each AGM, with the full financial statements being available at the meeting, along with an option that an owner can otherwise request a copy of the full statement be emailed once a year (or more often for large schemes).

Many schemes already comply with Australian Taxation Office (ATO) record keeping and reporting requirements. In addition, the ATO has developed booklets and software to support paper based and electronic financial record keeping and reporting requirements. Any reforms in this area would need to be consistent with the ATO requirements.

Questions

64. How do the laws around accounting records need to be modernised (if at all)?
65. Do you support a simplified set of financial statements?
66. Are annual financial statements sufficient? Should the law require or recognise the ability of schemes to request statements on a more regular basis?

CHAPTER 5
MANAGING DISPUTES

The first textbook on the original strata laws published in 1962 commented that *"it is beyond human power (even legislative power) to make neighbours live happily ever after*". While that statement is as true today as it was back then, this chapter looks at ways to improve the handling of disputes that inevitably arise in strata and community schemes.

DISPUTE RESOLUTION STEPS

Informal arrangements

Many disputes are resolved internally within schemes. This may be through discussions between residents, raising matters with the executive committee or at general meetings or asking the strata managing agent to intervene. Using informal dispute resolution is not compulsory. Some parties to a dispute go straight to seeking mediation or apply to the CTTT, without trying to firstly resolve the dispute within the scheme. Some stakeholders have suggested internal dispute resolution mechanisms should be recognised in the law.

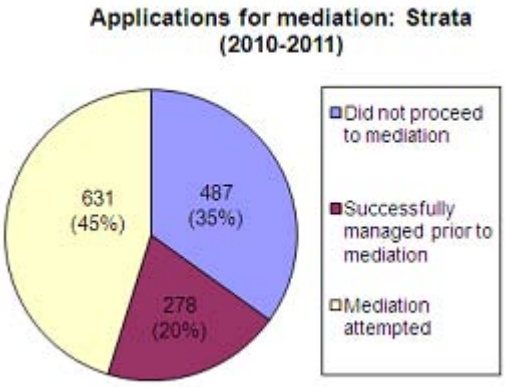
Formal procedures

Under the current system there is a three tiered formal process of dispute resolution. The first step is to apply for mediation, usually with NSW Fair Trading, although it can be with another mediation service. If that fails, an application for adjudication to the CTTT can then be made, where a decision is made 'on the papers'. This means there is no hearing and the parties are invited to lodge written submissions. Any party who is dissatisfied with an Adjudicator's decision is able to appeal through the CTTT.

Concerns have been raised about the complicated and legalistic nature of this process as well as its effectiveness and the time taken to resolve disputes. In some cases it can take many months or even years for matters to reach a final outcome. Some people give up on the process along the way, leaving those disputes to fester within schemes.

The three tiered formal dispute resolution process is fairly unique when compared with other jurisdictions or other matters heard by the CTTT. One element rarely used elsewhere is adjudication on the papers. This step is seen by many as unfairly favouring lawyers, managing agents and experienced owners over those from a non-English speaking background, those with poor literacy skills and those with a poor grasp of the legislation or the evidentiary requirements of the CTTT. Removing the adjudication step could result in faster and more effective justice and a better use of limited CTTT resources. The paper based adjudication process provides no opportunity for clarification of issues before a decision is handed down.

Currently, mediation is only compulsory in the sense that an application must be lodged. The respondent can refuse to participate for any reason without any consequences. Less than half of all applications for mediation result in a mediation attempt.



Some agents and owners corporations routinely refuse invitations to mediate. This wastes the applicant's money and prolongs the dispute, given that when mediation is carried out the success rate is close to 70%.

The mediation of disputes is an important step in achieving solutions parties can work with. It helps to keep matters out of the more costly and adversarial CTTT. One option could be to make it mandatory for parties to attend mediation, unless there was proven exceptional circumstances. If a party does not wish to participate in mediation the law could shift the onus to take the next step onto the respondent. Alternatively, any costs wasted in applying could be recoverable from the respondent.

Legal representation

An increasing number of parties are seeing an advantage in employing a specialist lawyer to act on their behalf in disputes. While legal representation can help to ensure arguments are presented in a clear and concise manner, it can add significantly to the cost and complexity of the proceedings. It can also place unrepresented parties at a disadvantage. Currently, a party involved in a strata or community scheme dispute is automatically entitled to be legally represented. No such automatic right applies in any of the CTTT's other Divisions. One option could be to remove the automatic right to legal representation and require parties to demonstrate, on a case by case basis, that representation is needed. A presumption against legal representation could apply for matters under a specified amount (e.g. $10,000). Similar limits apply in other Divisions of the CTTT and would be consistent with the original intention of a relatively quick, cheap and informal dispute resolution process.

One reason more lawyers are becoming involved is that some parties are not confident that they have a full understanding of their rights and responsibilities. A lack of knowledge of the law by parties involved in mediation sessions or CTTT hearings can cause unnecessary delays in the proceedings. NSW Fair Trading currently offers an informal 'duty advocate' type of service for those who attend mediation and need information about the law. It has been suggested that this arrangement be formalised and expanded to include CTTT hearings. This may assist to have disputes resolved in a smoother and swifter fashion.

Question

67. **Should internal dispute resolution mechanisms be recognised in the law?**
68. **Should attendance at mediation be made compulsory?**
69. **If mediation is unsuccessful should parties be able to apply for a CTTT hearing without needing to go through the Adjudication step?**
70. **Should legal representation be limited to where a proven need is shown or the dispute is over a specific amount (e.g. $10,000)?**
71. **Is there merit in establishing a 'duty advocate' like information service at mediation sessions and CTTT hearings?**

COST OF MEDIATION

Under the existing funding arrangements for disputes there is an element of 'user pays'. The current application fee for both mediation and CTTT proceedings is $76. However, the actual cost of a mediation session can run into many hundreds of dollars while the cost to the CTTT of proceedings can be several thousand dollars.

Cost can be a financial impediment to justice. There is also an issue of equity, in that only the applicant must pay a fee when the service is provided to all sides. Paying a fee can be an issue for those who see the other party as the 'wrongdoer'. This is particularly the case in mediation, where the fee is not refundable if the other party chooses not to participate.

One option that has been suggested is that the application fee for mediation be removed. Removing the fee and making the process free may encourage greater use of the

mediation service. Similar services are provided free of charge in Queensland, Victoria, South Australia and other places. In NSW mediation through Community Justice Centres is also a free service. However, providing a free mediation service for strata and community schemes would have significant budget and resource implications for NSW Fair Trading.

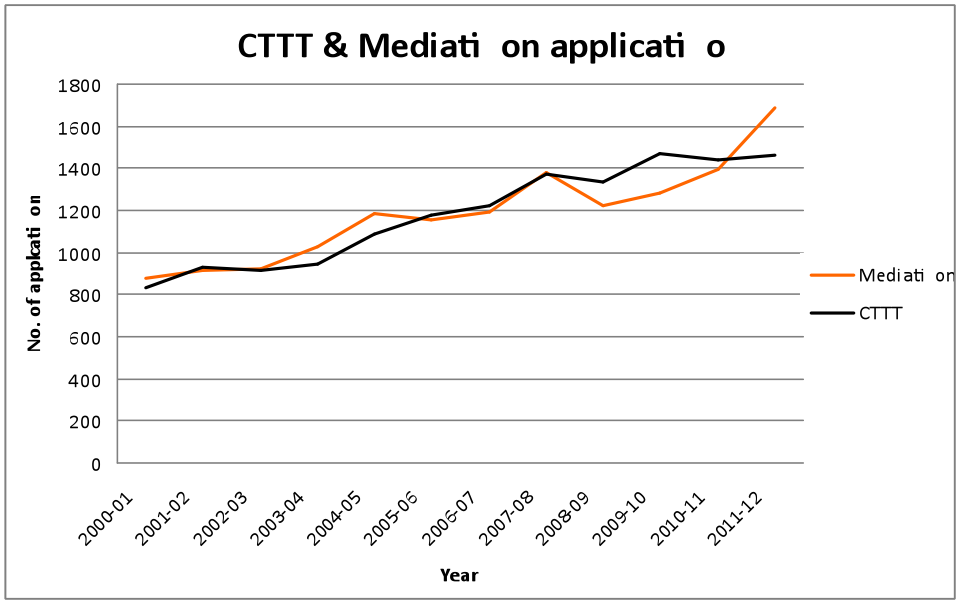
Question

72. Should mediation for strata and community schemes be a free service? If so, how should dispute resolution services be funded?

JURISDICTION & POWERS

At the outset, it should be noted that in October 2011, the NSW Government commenced a review of all NSW Tribunals, including the CTTT. A report of the review by the NSW Legislative Council's Standing Committee on Law and Justice was tabled in Parliament in March 2012. There were no specific recommendations made in the report to alter the arrangements in the CTTT's Strata and Community Schemes Division.

The number of applications to NSW Fair Trading for mediation and to the CTTT have been steadily increasing (see chart below), but are relatively low when compared with the total number of strata and community schemes in NSW.



One of the reasons for the low number of disputes being handled by mediation and the CTTT is the limitations on jurisdiction imposed by the existing law. An application can only be made if there is a specific order making power in the legislation. This prevents some disputes involving strata and community schemes from using the dispute resolution services available. Applications are regularly rejected due to lack of jurisdiction.

For instance, the following types of disputes cannot be taken to mediation or to the CTTT:

- a claim by an owner for reimbursement for urgent repairs to common property
- a claim for compensation for damage caused to common property
- action to recover outstanding levies from owners[13]

[13] See chapter 4 for more discussion of this specific issue

- disputes involving an owner who wants to do renovations but the scheme is refusing to sign the development application
- disputes between owners corporations and managing agents over the terms of the management agreement
- disputes involving strata management statements and building management committees in the case of a mixed development which is part strata.

Most of these types of disputes can be attempted to be resolved through the local courts or elsewhere. This can lead to a disconnect with different elements of the same dispute being fought out in different forums. For example, where a scheme has neglected to maintain common property, and as a result damage is caused to an owner's personal property, the claim for compensation is handled by the local court but an order for repairs to be carried out must be obtained through the mediation/CTTT process.

One option could be to broaden the jurisdiction and allow the majority of disputes which arise in strata and community schemes to be dealt with by Fair Trading mediation or the CTTT. This would free up the local courts and be consistent with the Government's goal of providing alternative dispute resolution mechanisms that are relatively quick, informal and inexpensive. Expanding the volume and range of matters would increase the expertise and specialist knowledge of mediators and Tribunal members. It makes sense to handle most related disputes in the one forum. The CTTT already has broad jurisdiction in other areas, such as tenancy and home building, where disputes about arrears, compensation and terms of agreements are commonly dealt with.

Broadly, the jurisdiction could work alongside specific exemptions where it may be more appropriate for certain disputes to be handled in other forums. Whether the CTTT should be given exclusive jurisdiction or whether parties should continue to have a choice to commence action elsewhere is another issue.

Under the existing system, for certain matters there must be an application for mediation before applying for Adjudicator's or Tribunal orders. Other matters can bypass mediation and go straight to adjudication, or can go directly to the CTTT for hearing. This adds complexity to the dispute resolution process and the rationale for the differing categories is not always clear. Mediation, for example, may help to resolve disputes over unit entitlements and claims that a scheme is dysfunctional.

Cost orders

There is a general and long-standing principle that parties before the CTTT should bear their own costs, unless there are exceptional circumstances or the Tribunal finds that an application was frivolous, vexatious, misconceived or lacking in substance. This is reflected in clause 20 of the *Consumer, Trader and Tenancy Tribunal Regulation 2009* which applies to all Divisions of the CTTT, except the Strata and Community Schemes Division. There are a range of separate provisions in the strata and community scheme laws which set out similar principles about costs. Removing these provisions and relying on the general provision in the CTTT Act would ensure that a consistent approach to cost orders is taken by the CTTT across all of its Divisions.

Interim orders

Another feature of the CTTT's power in this area is the capacity to grant interim orders. For some time the practice of the CTTT was to make interim orders in the absence of one of the parties, without notifying that party of the application before making the order. This approach was criticised by the Supreme Court on appeal which ruled that the CTTT should observe the rules of procedural fairness in making interim orders. While the CTTT has put in place systems to accommodate the Court's concerns, one option would be to amend the

legislation to clarify the procedures before an interim order can be made. For instance, an application would need to show there was real urgency in having the order made (e.g. work due to start the next day) and it would need to be on an injunctive basis to prevent an action that could not be undone (e.g. cutting down a tree). An alternative option would be to do away with the power to make interim orders and instead put in place a system for the CTTT to conduct urgent hearings where needed. This is how matters of a similar nature are generally dealt with in other areas of the CTTT.

Vexatious litigants

Within the system there are those who could be classed as a vexatious litigant or 'chronic complainer'. These are people who apply for mediation or to the CTTT over numerous matters, or sometimes the same matter over and over again. While the CTTT can award costs in these instances if a hearing is held, another approach could be to provide a power to reject applications deemed to be frivolous before they get to a hearing or where essentially the same matter has been through the system before.

Question

73. Should the jurisdiction of mediation and the CTTT be broadened to cover the majority of disputes which arise in strata and community schemes? If so, should such jurisdiction be exclusive? What types of matters would be inappropriate for mediation and the CTTT to handle?
74. Should the procedure around cost orders and interim orders be clarified?
75. Should there be a process to reject applications about trivial matters or where the same matter has been contested before?

COMPLIANCE & ENFORCEMENT

There are 76 separate offence provisions in the current strata and community scheme laws, many of which incur maximum penalties of only $110 or $220. Over the past 10 years there have been no successful prosecutions or any penalties imposed by the courts for breaches of the Acts. The absence of visible enforcement action has led to a feeling among some stakeholders that the law 'lacks teeth' and people can choose to ignore the legislation with impunity.

Some of the current offences are relatively trivial in nature. For example, a penalty can be imposed on any landlord who fails to give their tenant a copy of a management statement or fails to notify them when the by-laws are amended. Mortgagees can be prosecuted for failing to tell an owners corporation when they have repossessed a property. Other offences are more serious, such as where a developer fails to hand over required documents or where a terminated strata managing agent fails to return the scheme's books and records within the required time.

One option is to restore an element of deterrent and fear of consequences into the system. The list of offences could be revised and shortened to a core group of key breaches. The penalties for these offences could be substantially increased. Higher penalties could apply to corporations (i.e. agents) as opposed to individuals. For instance, the maximum penalties for offences in Ontario, Canada are $100,000 for corporations and $25,000 for individuals. An increasing scale of penalties could also apply to repeat offenders.

Another feature of a revised system of compliance could be the introduction of penalty notices. This enables a type of infringement notice to be issued by Fair Trading Investigators, with the offender either electing to pay or challenging the matter in court. Penalty notices have proven to be a successful enforcement tool in other legislation.

An additional option, particularly for larger schemes, could be a requirement or encouragement to appoint one of its committee members as a 'compliance officer', whose role would be to internally monitor procedures and actions to ensure they comply with the law. This is a common business management tool in many sectors.

Question

76. Which of the following would improve the level of compliance?

- **streamlining the number of offences**
- **increasing the penalties that can be imposed**
- **enabling penalty notices to be issued**
- **requiring or encouraging schemes to appoint a committee member as a 'compliance officer'**

ENFORCING BY-LAWS

Under the current law a two step process is generally used to enforce breaches of by-laws. Firstly, either the executive committee or owners corporation/community association must meet and agree to issue a formal notice to comply, using a prescribed form. Often this power is delegated to the strata managing agent. If the breach continues, an application can be made to the CTTT for a fine of up to $550 to be imposed. This requires the parties to attend a hearing. Generally, the penalty is payable to Fair Trading, however the Tribunal can order that part or all be paid to the scheme as damages. The involvement of the CTTT ensures a fair hearing is provided before any penalty is imposed by an independent third party. A similar system operates in Queensland, Victoria and in other places.

In the 2011-2012 financial year there were 155 applications to the CTTT seeking a penalty for a breach of a by-law. This equates to less than 3 applications across NSW each week. There would be substantially more by-law breaches occurring than these figures reflect. Many schemes would have multiple by-law breaches happening every day, with people parking in the wrong place, hanging washing on the balcony, keeping pets without approval or making too much noise etc.

Some stakeholders see the current system as time consuming, costly, ineffective and unenforceable. It is argued that schemes should be given more power to be self governing and to be able to police their own rules without Government or CTTT overview.

However, there are those who suggest that the current system works quite well and that the low numbers are more to do with a lack of knowledge and understanding of the process. For example, many owners, and some agents, still think that an application must be made for mediation after issuing the notice to comply. A specific education campaign may assist to raise awareness.

One option that is used in South Australia, Western Australia and some overseas jurisdictions is to allow schemes (e.g. via the executive committee or at a general meeting) to issue their own fines to owners and occupants who breach by-laws. Such fines are generally capped (e.g. no more than $500) and can only be issued after the alleged offender has been notified and given an opportunity to rectify the breach or where the breach is repeated after a warning. Another feature of these systems is that once a fine is issued, the person has a right of appeal to an independent third party if they wish to contest the matter. This shifts the onus back on to the offender to take the next step. If this system was adopted in NSW, the CTTT could perform this role.

Allowing schemes to police and issue their own fines is seen by some to be a swifter, less costly, more effective and enforceable process than the current system. However, others

are concerned that it could be abused with certain individuals or groups targeted (e.g. tenants or those who have had a falling out with the committee). One option could be to limit the ability to issue fines only to managing agents.

A further option discussed in chapter 1 would be for the law to require by-laws to be enforced consistently and fairly. This would provide a defence for an individual who was fined, for example, for parking in the wrong place or keeping a pet in breach of a by-law, when no action was taken against others in the scheme for doing the same thing. The CTTT could be given the power to suspend or remove a particular scheme's or agent's ability to issue fines if the power is being abused.

Another suggestion that has been put forward is that the law should make it mandatory for all schemes to enforce their by-laws. It is argued by some stakeholders that there is no point in having by-laws if they are not going to be enforced. However, this could dramatically increase the workload of executive committees, strata managing agents and the CTTT. It could also lead to unjust outcomes if action is forced to be taken against trivial breaches or those which occurred many years ago.

One of the challenges of community living is the differing perception of breaches. While some things like parking on common property are clear – you have either parked on common property of you have not – other issues like noise are subjective and can be compounded by poor acoustics within a building. In many instances people accept some noise from their neighbours and accept it as part of community living. The requirement to enforce all by-laws may lead to less emphasis on getting along with one another and an increased attitude of enforcing one's rights.

Regardless of whether fines are issued by the CTTT or individual schemes, to be effective the penalty needs to be recoverable. One of the problems with the current system is that some people choose to ignore the CTTT order. If the present system is to remain, where the penalty is issued by the CTTT, it has been suggested that outstanding fines be referred to the State Debt Recovery Office which can then take steps to recover the money.

Another option could be that the penalty be payable to the owners corporation rather than Fair Trading. Alternatively, if the law is to allow schemes to issue their own fines, any unpaid amounts could be added to the levies of owners. This would be problematic where breaches are committed by tenants rather than owners. One option could be to make owners vicariously liable for breaches committed by their tenants. However, some may argue that it is not fair or reasonable to make landlords responsible for the actions of their tenants which are outside of their control. Another approach could be to give schemes the ability to apply to the CTTT for orders to make a landlord take action against their tenants.

Questions

77. Should schemes be able to issue their own fines for by-law breaches?
78. Should it be mandatory for a scheme to enforce its by-laws?
79. What other changes to the system of enforcing by-laws would you like to see?

PARKING, PETS & OTHER COMMON DISPUTES

(a) Parking

Unauthorised parking is becoming an increasing issue, particularly in newer schemes where residents often have more cars than the total number of parking spaces approved by the Council. There is a high incidence of residents misusing visitor parking spots or parking illegally on common property (such as grassed areas). Sometimes those parking illegally may not even be residents in the scheme or connected to the scheme in any way.

Many stakeholders are of the view that the current powers are ineffective to prevent or punish unauthorised parking. Some of the options to address this issue that have been suggested include:

i defining 'visitor' in the law and giving schemes the ability to set rules (e.g. time limits, frequency etc) on the use of visitor parking spaces

ii reinstating the ability of schemes to wheel clamp or tow offending vehicles, provided a proper system of notification is observed and warning signs clearly displayed. This would require amendments to the Local Government Act

iii allowing schemes to delegate, by agreement, enforcement of parking by-laws to the local council, to be enforced by council patrols and rangers, with the clear display of warning signs to this effect. Fines could be retained by the council to cover costs. This would overcome the problem of schemes having to identify car ownership, or

iv encouraging schemes to make more use of self-help measures, such as boom gates, chains or bollards and visitor parking permits.

Question

80. What do you think should be done, if anything, about parking in schemes?

(b) Pets

The issue of pets in schemes is fiercely debated. The model by-laws give schemes three options to choose from: pets with consent, which cannot be unreasonably refused; small pets allowed so long as they are generally kept within the lot; or a ban on any pets. It is argued by some that the blanket bans permitted under the law are unreasonable and that pets can contribute positively not only to the health and well-being of their owners, but also to strata communities as a whole, by helping to bring people together. Some of the options to address this issue that have been suggested include:

i setting the default position under the law to say that pets can be kept with consent, which cannot be unreasonably withheld, but still allow schemes to pass a resolution or make a by-law to ban all pets

ii the ACT approach of removing the ability of schemes to ban pets, and allow pets to be kept with consent, which cannot be unreasonably withheld

iii doing away with the need to obtain consent to keep a pet but require pet owners to comply with set conditions regarding common property, noise and waste. Schemes could be given greater powers to enforce these conditions, and those who fail to comply could lose their right to keep a pet

Question

81. What do you think should be done, if anything, about pets in schemes?

(c) Noise

In strata and community schemes a certain level of noise is to be expected. Under the standard and model by-laws an owner or occupier must not make noise at any time within their lot or on common property that is likely to disturb the peaceful enjoyment of another resident. There is other NSW legislation regulating noise which also covers strata and community schemes. Despite these provisions complaints about noise are often raised

within schemes. This can include the playing of loud music, door slamming and loud parties. Some of the options to address this issue that have been suggested include:

i widening local council and police powers to deal with 'breaches of the peace' in strata and community schemes

ii giving schemes the power to issue a 'cease and desist' notice for repeated noise or antisocial behaviour backed by an enforceable fine

iii providing greater clarity in the law over what type of noise is and is not acceptable in schemes

Question

82. What do you think should be done, if anything, about noise in schemes?

(d) Smoking

Given the close proximity of homes in many strata and community schemes, the issue of smoking is highly contentious. Pregnant women, young children and those with chronic respiratory illnesses are particularly vulnerable to second hand smoke. Schemes can introduce smoke free by-laws and some have already taken this step in NSW. A number of stakeholders noted that the law and model by-laws are presently silent on the issue of smoking. Some of the options to address this issue that have been suggested include:

i introducing a smoking related model by-law which could be adopted by schemes

ii clearly stating in the law that tobacco smoke that drifts into any residential lot is a hazard and a nuisance

iii providing information to schemes about the problem of smoke drift and how to resolve complaints

iv banning smoking on common property or on open air balconies where it can be detected in an adjoining property, or

v requiring leases and sales agreements involving strata and community schemes to include terms governing smoking.

Question

83. What do you think should be done, if anything, about smoking in schemes?

(e) Timber flooring

Intrusive floor noise caused by the replacement of carpet with floating or polished floorboards, or other hard floors, is a common cause of dispute. It can be extremely difficult and expensive to rectify after the event. The current standard and model by-law dealing with this matter was drafted back in the days before timber flooring became popular. It simply says that an owner must cover or treat the floor of their lot to stop noise which may disturb another resident. Some of the options to address this issue that have been suggested include:

i amending the standard and model by-laws to mandate minimum noise insulation standards where carpet is to be replaced with timber flooring in multi-storey buildings above ground floor level. The Association of Australian Acoustical Consultants' 5 or 6 star rating system was identified as one possibility, or

ii making it compulsory to use carpet as a floor covering in living areas for all properties above ground floor level.

Question

84. What do you think should be done, if anything, about flooring in schemes?

(f) Drying of washing on balconies

Some stakeholders believe that by-laws mandating that washing must not be dried on balconies visible from the street are unnecessary in this day and age. It causes no harm to others and is a commonly accepted practice in many countries. They point to the environmental benefits of drying washing naturally in the sun as opposed to the noise and energy consumption of using dryers. Some schemes do not have common clothes lines and even where they do it can be impractical for some people to use them, particularly in large blocks of units. There is also a potential for theft when using common clothes lines. Some of the options to address this issue that have been suggested include:

i removing all restrictions from drying washing on balconies

ii allowing drying on portable clothes airers but not on fixed lines, or

iii making it a local council issue since it is more about the visual streetscape. This could also capture clothes drying on balconies or visible areas of non strata buildings.

Question

85. What do you think should be done, if anything, about washing in schemes?

MISCELLANEOUS ISSUES

A range of other reform proposals were suggested in the GAP round of public consultation which concluded earlier this year and during earlier consultation. These suggestions included:

- expanding the list of documents which must be handed over by the developer at the first AGM
- updating the existing provisions dealing with development contracts in community, precinct and neighbourhood schemes to make the provisions consistent with the staged development provisions of the Strata Schemes (Freehold Development) Act
- removing the requirement for compulsory registration of a neighbourhood development contract and allowing a development contract to be provided with a neighbourhood scheme where circumstances require
- enabling an owners corporation or community association to lease additional common property or association property from within its own scheme or a subsidiary scheme
- giving schemes the power to deal with abandoned goods
- authorising schemes to enter lots to trim trees which pose a risk or are damaging common property
- removing the cap of nine executive committee members
- clarifying who is the ‘controlling officer’ in a scheme for OH&S purposes
- expanding the information to be kept on a strata roll to include details of all licences, loans and an index
- enabling legal notices required to be given to owners corporations to be served on the managing agent, and
- clarifying the circumstances when a scheme can restrict owners or residents from accessing common property.

Question

86. Do you agree with any of the above reform proposals?

87. Do you have any other suggestions for how the existing law regulating strata and community schemes could be improved?

REFERENCE MATERIAL

The following were used to inform this discussion paper:

- ***Strata Laws: Online Consultation Final Report***, produced by Global Access Partners Pty Ltd, April 2012 – available at www.openforum.com.au/strata

- ***Governing the Compact City: The role and effectiveness of strata management***, City Futures Research Centre, Faculty of the Built Environment, University of NSW, May 2012 – available at www.cityfutures.net.au

In addition, recent correspondence and complaints, relevant decisions from the Consumer, Trader and Tenancy Tribunal, comments on online blogs and forums and the approach taken to issues by interstate and overseas jurisdictions were considered in preparing this paper. Advice received from the Minister for Fair Trading's Property Services Advisory Council and LPI's Strata Industry Working Group was also incorporated.

WHAT HAPPENS NEXT?

Indicative review timetable

Task	Timeframe
Assess submissions received	November-December 2012
Meetings with key stakeholders	Early 2013
Cabinet consideration and approval	March 2013
Drafting of law changes	April – June 2013
Release of Exposure Draft Bill	July 2013
Finalise Bill after assessing feedback	August 2013
Introduce Bill to Parliament	Spring Session 2013

Note: These dates are indicative only and are subject to change.

APPENDIX A: HISTORICAL TIMELINE

1961 NSW enacts the world's first strata title laws with the introduction of the *Conveyancing (Strata Titles) Act 1961*.

1973 The legislation was overhauled and a new Act (*Strata Titles Act 1973*) was introduced. This Act included an expanded range of new management and dispute resolution provisions.

1986 Amendments to enable staged development of strata schemes and a separate Act was introduced to facilitate leasehold strata schemes.

1989 NSW enacts another world first with the introduction of community schemes legislation, offering an alternative to conventional strata scheme subdivision, by allowing shared property to be included within a land subdivision. These laws enable developers to sell off lots in stages and to develop communities around a theme.

1996 Another major overhaul led to the current 3rd generation of strata laws. The 1973 Act was split into two separate Acts: one dealing with the development of schemes and another Act regulating the day-to-day management of schemes once they have been built. A range of reforms were made at this time including the introduction of compulsory mediation, limitations on the use of proxies, reduced quorums, notices to comply with by-laws and changes in terminology.

2001 Amendments were made to the law dealing with part strata developments, the initial period and the process for transferring common property.

2002 A small number of amendments were made dealing mainly with caretaker arrangements, proxy voting by caretakers and strata managing agents and the use of priority voting rights by mortgagees.

2004 Further amendments made including the introduction of special provisions for large strata schemes over 100 lots, mandatory 10 year sinking fund plans and limits on legal action by owners corporations.

2004 A discussion paper on the strata laws was released for public consultation. Many of the issues raised in that paper are the same as those in this paper. No amendments to the law eventuated.

2006 A discussion paper on the community scheme laws was released for public consultation. It suggested adopting the changes made to the strata laws since 1996. No amendments to the law arose from this process.

2008 The law was changed to prevent developers from obtaining a proxy or power of attorney upon sale and requiring those standing for Executive Committee election to declare any connection with the developer.

2011 In December a comprehensive review of the strata and community scheme laws commenced with an innovative online forum. More than 1200 comments with over 600 suggested law changes were received.

APPENDIX B: CURRENT LAWS IN NSW

Act/Regulation	What it does
Strata Schemes (Freehold Development) Act 1973	This Act enables the strata development and sub-division of freehold land. The Act provides for the creation of common property and prescribes how strata lots and common property can be dealt with and makes provision for the termination of strata schemes.
Strata Schemes (Freehold Development) Regulation 2007	This Regulation deals with the lodgment or registration of plans and other information relating to the establishment of strata schemes, including staged developments.
Strata Schemes Management Act 1996	This Act provides the governance framework for the day to day management of strata schemes. It sets out rules about such things as holding meetings, voting procedures, raising levies, insurance, maintenance of common property and by-laws. The Act also provides a system for resolving disputes in strata schemes.
Strata Schemes Management Regulation 2010	This Regulation contains a series of model by-laws, forms used in strata schemes, fees, record keeping and the process for the election of executive committee members.
Strata Schemes (Leasehold Development) Act 1986	This Act enables the strata development of leasehold land. Its provisions largely mirror those of the *Strata Schemes (Freehold Development) Act 1973* (see above).
Strata Schemes (Leasehold Development) Regulation 2007	This Regulation largely mirrors the *Strata Schemes (Freehold Development) Regulation 2007 (see above)* in respect to leasehold schemes.
Community Land Development Act 1989	This Act enables land to be subdivided into lots and shared property (known as association property) and constitutes an association to manage the shared property. It provides for standalone neighbourhood schemes as well as tiered community or precinct schemes containing neighbourhood or strata schemes within them. It prescribes how lots and association property can be dealt with and makes provision for the termination of schemes.
Community Land Development Regulation 2007	This Regulation deals with the lodgment or registration of plans and other information relating to community schemes.
Community Land Management Act 1989	This Act provides the governance framework for the day to day management of community schemes. Many of its provisions mirror those in the Strata Schemes Management Act in areas such as raising levies, insurance, and the maintenance of association or common property. The Act also provides a similar system for resolving disputes in community schemes.
Community Land Management Regulation 2007	This Regulation sets out fees, record keeping provisions and the process for the election of Executive Committee members in community schemes.

Consultation Submission Form

The NSW Government values your feedback on the issues and options presented in this discussion paper. You do not need to answer every question and you are welcome to fill out only the areas which interest you the most. Please complete and return this submission form, or any other type of written submission, by the closing date, by one of the following methods:

Email to: policy@services.nsw.gov.au

Post to: Review of strata and community title laws
Fair Trading Policy
PO BOX 972
PARRAMATTA NSW 2124

Fax to: 02 9338 8918

The deadline for submissions is **5:00pm, Thursday 15 November 2012**

All submissions may be made publicly available under the *Government Information (Public Access) Act 2009* or for other purposes. If you do not want your personal details released, please indicate this clearly in your submission.

BACKGROUND INFORMATION

You do not need to provide this information. However, knowing some basic information about the community will help us gain a better understanding of strata and community schemes in NSW. This information will not be disclosed or used in any way that identifies you.

1. Are you? Male ☐ Female ☐

2. How old are you?
   ☐ 17 or under ☐ 18 to 24 ☐ 25 to 34 ☐ 35 to 44
   ☐ 45 to 54 ☐ 55 to 64 ☐ 65 to 74 ☐ 75 or over

3. What is your post code? ……

4. What is your involvement with the strata and community schemes industry?
   ☐ owner occupier ☐ investor owner
   ☐ tenant ☐ caretaker
   ☐ strata managing agent ☐ building manager
   ☐ other (please specify)……..

5. Which term best describes your scheme?
   ☐ strata scheme ☐ community scheme

6. What is the size of your scheme?
   ☐ 2 lots ☐ 3 to 5 ☐ 6 to 10 ☐ 11 to 20 ☐ 21 to 50
   ☐ 51 to 100 ☐ 101 to 200 ☐ 201 to 500 ☐ Over 500

Feedback on issues raised in the Discussion Paper

1. There are currently five separate Acts and five associated Regulations regulating strata and community schemes. Do you believe that the laws should be simplified? Given the different types of schemes in NSW, should the legislation be more or less prescriptive?

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2. Do you think that the way schemes are run can be improved by more education and training? Should these initiatives be voluntary or mandatory?

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3. How could more owners be encouraged to participate in the running of their scheme? For example, do you support a system of postal voting or compulsory voting being introduced?

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4. For some schemes, there will be a point where it is better to terminate a scheme rather than arrange significant and expensive repairs. What process should be in place to terminate a scheme? How many owners would need to agree for a termination to be approved?

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5. Do you believe that the definition and responsibilities relating to common property should be clarified? If so, how?

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6. An owner wanting to renovate his or her own lot can sometimes be faced with significant red tape in getting permission from the owners corporation. Should this process be simplified? If so, how?

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7. Currently, it is compulsory for all schemes to have two accounts, an administrative fund and a sinking fund. Should this still be the case? If so, should the law set how much money should go into the sinking fund?

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8. Do you have any views on how the process of preventing and/or handling disputes in schemes could be improved?

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9. Should schemes be given greater powers to enforce their own by-laws? If so, what steps could be introduced to prevent this power from being abused?

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10. Are there any other issues you wish to raise?

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(signed by) *(date)*

Print name:……..

Address:……..

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Email:……..

Providing your details will help us keep you informed of future progress on the review.