ACSL
Australian College of Strata Lawyers

Tuesday, 06 April 2021

The Honourable Victor Dominello MP
Minister for Customer Service

The Honourable Kevin Anderson MP
Minster for Better Regulation & Innovation

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

Copy by post:

Strata Schemes Statutory Review Policy & Strategy,
Better Regulation Division
Department of Customer Service
4 Parramatta Square
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Dear Ministers,

Strata Schemes Statutory Review

Introduction

The Australian College of Strata Lawyers is pleased to make a submission to the Strata Schemes Statutory Review. Our college is a self-governing association which seeks the development of laws for the common good and achieve the highest standard of good governance under those laws. Our members as legal professionals represent owners, occupiers, owners corporations, bodies corporate, community associations, managing agents, building managers, governments, consent authorities, developers and financiers.

This submission has been prepared by a working group of experienced strata lawyers engaged in the day-to-day operation of the NSW legislation, and Australia's leading academic strata law expert. The author's names appear at the foot of this letter.

Comments below are made in respect of the *Strata Schemes Development Act 2015* ("SSDA"), the *Strata Schemes Management Act 2015* ("SSMA"), the Strata Schemes *Regulation* 2016 ("SSDR") and the *Strata Schemes Management Regulation 2016* ("SSMR"). We follow the scheme of the discussion paper, and address the questions raised in it.

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At the end we address some matters in respect of which questions are not asked.

We are willing to assist further with the reform process as it moves forward.

The ten objectives

1. We support the ten objectives laid out at page 8 of the November 2020 discussion paper. However, we observe that the law as currently interpreted by the NSW Court of Appeal restricts the effectiveness of the first objective, namely to: "empower communities to make their own decisions in a democratic way."

2. The balance between democratic governance of community living and restraining unreasonable interference with individual rights is not an easy one to draw. We address some options for striking an appropriate balance below.

Questions 1-4 – Objectives of the *Strata Schemes Development Act* 2015

3. We are of the view that the objectives of the SSDA remain valid, and have no concern about their level of generality.

Questions 5-12 – Strata Renewal

4. We do not propose changes to the key steps in the strata renewal process, but acknowledge that simplification may assist in enabling strata renewals to go forward.

5. However, the process is costly, and the rigidity of the timings in the legislated process, impede commercially sound decision-making. We do not consider that the present regulatory structure is working as well as was intended.

6. We recommend some improvements below.

Remove the skew towards lapsing proposals

7. SSDA §159, for example, needs redrafting. Assume that "*the strata committee decides a strata renewal proposal does not warrant further consideration by the owners corporation*" and minutes are promptly sent to all owners (which is not required by §159), and "*a qualified request to consider the proposal at a general meeting of the owners corporation*" is made, the strata renewal proposal lapses, despite the qualified request having been made because relevantly the "*decision*" relevantly has been made.

8. One assumes that it was intended that the decision can only be made by a general meeting once a qualified request is in, and lapsing ought to not occur until the general meeting makes its decision, and if a qualified request is made, the proposal ought not lapse.

9. Further, given the importance of strata renewal the SSDA should be amended to add a new provision requiring that minutes of strata renewal committee meetings be given to

every lot owner, and not just placed on a notice board or in the case of large schemes if they had previously been requested.

Remove the skew towards lapsing plans

10. SSDA §177(1)(b) provides as 3-month time limit to obtain the necessary level of support for a plan. §177(2) provides for lapsing. As noted in "Strata Laws NSW" "*it seems unreasonable that a failure to meet a condition which might be corrected – for example, by re-holding a general meeting under §178 if notice of the meeting was not given to all owners – could lead to the lapsing of the plan which would then cease to have force and effect, and the further consequence that, in view of §190, the proposal could not be resubmitted for 12 months*." Indeed, any minor procedural defect could lead to lapsing. This skew towards lapsing rather than progressing renewal should be rebalanced.

Allow the committee to operate for two years; introduce flexibility

11. The one year time limit in SSDA §166(a) should be extended to two years. In our experience, the one-year limit encourages rushed decision making. In larger schemes, one year will almost never be enough. Further, if our recommendations to reducing the rigidity of the lapsing provisions are accepted, then a two year time limit will make even more sense.

12. The Court should have the power to extend time limits by ordering that the plan should not lapse. We address lapsing issues further below.

13. Not only in the strata renewal process but more generally the legislation should distinguish between residential and commercial strata owners. For example, residential lots may be the subject of a residential tenancy agreement while commercial lots may be subject to a commercial lease or even a retail lease.

14. Duration of the leasehold interest will often be shorter in a residential tenancy agreement than in a retail or other commercial lease. And there are important differences in the leasehold rights under each of the separate pieces of legislation, governing residential tenancies, retail leases and other commercial leases, and they need to be taken into account. We now set out some principles to guide doing so.

Treat residential and commercial strata owners differentially

15. Not only in the strata renewal category, but more generally, there does need to be some distinction between residential and commercial strata owners. In particular, more detailed provision needs to be made for circumstances where there are both residential and commercial lots in a strata building, and where there are multiple strata schemes joined together by a strata management statement.

16. Tenants, particularly long-term commercial tenants with a leasehold interest extending beyond three years or with options to extend beyond three years, have a particular interest warranting compensation when renewal occurs. The Act needs to protect those tenancy interests so that they also are bought out at fair market value.

Introduce a simpler overall disclosure standard

17. Disclosure beyond the minimum statutory requirements should, but does not always, occur when it is driven by the need to persuade lot owners to move towards renewal.

18. We agree that all parties involved in a renewal scheme, whether for or against, must fully disclose conflicts of interest and must disclose all offers and invitations to treat including the pricing formula, for every lot, to every lot owner and as recommended above, long-term commercial tenants.

19. The law should reflect a simpler overall disclosure standard. In our view, disclosure must be sufficient to ensure that the ordinary reasonable lay lot owner is not likely to be misled. That should be the statutory test to replace SSDA §170(2).

Add a continuous disclosure obligation

20. The strata renewal process often is a moveable feast, with new information becoming relevant to decision-making as the process proceeds. We therefore recommend that a continuous disclosure regime be implemented so that all lot owners are:

    20.1 updated as information already disclosed changes in any material respect;

    20.2 aware of all of the terms of any offer made by a developer to each lot owner in respect of a proposal; and

    20.3 aware of any conflict of interest whenever arising during the process must be disclosed.

Alternatives to sale contracts

21. The use of alternative methods to achieve collective sales also can undermine the capacity for lot owners to understand whether they are all being treated fairly and equitably. We have no difficulty with the use of option structures in the context of strata renewals so long as there is full disclosure and equitable treatment of all lot owners.

Compensation values

22. There is scope for improving the legislation around the power of the Court to make a decision about compensation values (currently based on §55 of the *Land Acquisition (Just Terms Compensation) Act 1991)* pursuant to SSDA §182(1)(e).

23. SSDR clause 36 prescribes, for the purposes of §182(1)(g) that the Court must be satisfied that the effects of the plan are just and equitable in all the circumstances despite any difference between a valuation contained in the plan and any valuation that accompanied the application for an order to give effect to the plan. Expert valuation evidence will have been tendered to enable the Court to make this decision.

24. There is, however, a wrinkle in the legislation which needs to be ironed out. SSDA §182 applies to all strata renewal plans. However, under SSDA §171(2) only in the case of "*a strata renewal plan for redevelopment of a strata scheme*", is the amount to be paid for

the sale of a dissenting owner's lot not to be less than the compensation value of the lot. Under §171(1): "*If a strata renewal plan is for a collective sale of a strata scheme, the amount paid for the sale of the lots and common property in the scheme must be apportioned among the owners of the lots in the same proportions as the unit entitlements of the owners' lots*." Is the Court to apply §171(1) or §182(1)((e)&(g)?

25. As noted in Strata Laws NSW:

> *"For a number of reasons, the compensation value of the various lots may not be in the same proportion as the unit entitlements in the plan, bearing in mind the fact that no valuations were required to support the schedule of unit entitlements in plans registered before 30 November 2016, that values may have changed over time and that the definition of "compensation value" contains such elements as compensation for severance and/or disturbance and solatium"*

26. Also, the practical operation of "*just and equitable*" as across all lot owners may differ from that which is just and equitable for a particular owner. For example, a dissenting owner of a residential lot could be an elderly couple of pensioners who have occupied the lot as their home for many years and one of whom is bed-ridden and cared for by the other. That which they need will differ from a young fit professional couple, although their lots may have a similar market value and may (or might not) have similar unit entitlements. There is an important policy choice to be made in deciding whether such differences are to be allowed for in a compensation regime.

27. In Re Owners of Strata Plan No 61299 [2019] NSWLEC 111 Pain J determined that "*just and equitable*" did not require distribution of proceeds in accordance with unit entitlements. We recommend making that the general rule. Doing so has an additional benefit. If the result of apportioning the sale proceeds on a unit entitlement basis, one or more lot owners would receive less than the compensation value of the lot, §182(1)(d) would not be complied with and it seems that the Court would most likely not make an order approving the plan. In our view, the legislation should allow the Court a discretion to take such matters into account so that it can approve renewal rather than be required to lapse the renewal plan.

28. Further, to call a meeting requiring 14 days clear notice within 45 days of the date of the valuation is impractical: See SSDR cl27(d) compensation value & cl28(1)(b) market value.

Questions 13-15 – Strata Renewal (cont.)

Reduce the skew towards lapsing over renewal

29. It is reasonably apparent from the details set out in the discussion paper that the strata renewal process has not encouraged owners, and has not encouraged developers.

30. The high transaction costs, and the rigidity which favours lapsing over renewal plan revision and the high cost of dispute resolution can all lead to inaccurate settlements of disputes, but more importantly discourage the process from being undertaken at all.

31. Where there are disputes, the complexities in the compensation structure outlined in the discussion paper in large part, are likely to be contributing to settlements based on avoiding transaction costs, rather than on achieving positive results.

32. In our view, the solution package must give more time, require fuller and continuous disclosure as recommended above, and give the Court additional flexibility.

Questions 16-19 – Strata Renewal (cont.)

Conflicts of interest must be fully disclosed.

33. We comment above about conflicts of interest, and the need for a simpler overall disclosure standard and a continuous disclosure regime.

Adjust the costs threshold

34. In relation to SSDA §188, there is a need to adjust the rules relating to costs. Where a dissenting owner imposes transaction costs on the majority owners and the developer by making objections which the Court considers to be unreasonable, a costs order should follow. The Court should have a discretion to impose costs either on the ordinary basis or on the indemnity basis.

35. Regrettably, some of the undersigned have come across developers (some of whom offered competing renewal proposals which were rejected by an owners corporation) buying one or 2 lots in the scheme for the sole purpose of frustrating another developer's renewal proposition. On one view, this needs to be regulated. The competing view is that developers should be allowed to buy up lots as they come on the market, and express their views like any other lot owners. But where the Court detects opportunistic and cynical behaviour (which may be thwarting the will of the majority of owners) it should be penalised by an indemnity costs order and not encouraged - as it is by the current regime.

Allow the Court more discretion

36. The Court must not make an order giving effect to a strata renewal plan unless it is satisfied:

    36.1 "the steps taken in preparing the plan and obtaining the required level of support were carried out in accordance with this Act; and

    36.2 all notices required to be served under sections 179 and 181 have been served"

    (see §182).

37. Many of the steps are procedural or involve strict time periods or limits. A renewal plan otherwise complying with substantive requirements of the legislation should not be rejected because of a technical or minor failure to achieve these requirements if the non-compliance was not material or prejudicial to an owner or owners. The Court has no discretion under §182(4) in this regard and must reject a plan unless there has been

compliance with all requirements. In our view, the Court should have a discretion to extend time limits for good cause.

Questions 20-21 – Strata Management Statements

Strata management statements, like building strata management statements, are necessary in developments where parts of the building have different owners

38. It is fundamental in regulating strata management statements to understand what they do and who they regulate. They run with the land. They regulate the relationship between the owners of different parts of a building.

39. The fact the owner of one of these parts may be an owners corporation does not mean that strata laws apply to regulate the relationship between these owners. This is highlighted by the fact a building management statement (which is identical in nature and most terms to a strata management statement) morphs into a strata management statement once part of the building becomes a stratum parcel.

40. A building management statement regulates the relationship between different owners, none of whom are owners corporations. In this regard, the *Conveyancing Act* was amended in 2001 by the *Conveyancing Amendment (Building Management Statements) Act 2001* to provide for a building management statement to be entered into governing the arrangements between the owners of the various parts of the building – see now Pt 23 Division 3B ss 196B–196L.

41. We note that the required provisions of a building management statement (Schedule 8A of the *Conveyancing Act 1919*) are similar but not identical to those set out in Schedule 4 of the 2015 *Development Act*. The differences are not considered material.

42. We are of the view that strata management statements, whilst constituting dealings with land, which bind people by virtue of ownership of a lot, are necessary in multi-stratum or mixed-use developments, where there is at least one stratum parcel.

43. In summary, we recommend any proposed reforms affecting strata management statements should take into account the fact a strata management statement is an instrument that regulates, not a strata scheme, but a building with multiple owners, some of whom may not be owners corporations. Accordingly, laws relating to strata schemes are not necessarily laws appropriate to building management statements and strata management statements. Care must be taken to ensure that a coherent set of laws apply to both strata management statements and building management statements.

Not needed for residential buildings with very few lots

44. Some of the undersigned are of the view that a strata management statement may make no sense in wholly residential schemes with very few lots. Consolidation into one strata scheme often makes more sense. Others of the undersigned are of the view that it

should make no difference the number of lots in the strata scheme that forms the stratum parcel. If the former view is preferred, the carve-out should be limited to schemes with 3 or few lots.

Occupiers should be bound by a strata management statement

45. SSDA §105 nominates the parties bound by a strata management statement. While lessees of a lot are included, licensees and occupiers of a lot are not. In our view, the section should be revised to include parties who may be occupying a lot but are not a lessee.

Repairs?

46. Shared facilities can only be repaired in accordance with provisions of a strata management statement but the statement cannot be allowed to override statutory obligations such as under SSMA §106.

47. Most strata management statements enable a member to veto repairs and/or improvements to common infrastructure. This creates an inconsistency with the SSMA. For instance, if a swimming pool is a shared facility, the building management committee may veto its repair. Yet the swimming pool is located on the common property of an owners corporation. Legislative change is required to ensure that where a veto has been applied the owners corporation cannot be in breach of its duty under §106. The strict statutory obligation would then fall upon the parties to the strata management statement. Where some of the parties to a strata management statement are not an owners corporation, such a change would have the effect of subjecting those parties to, say, the strict duty to repair and maintain under SSMS §106 in respect of shared facilities. This would ensure upkeep of shared facilities. The alternative is to amend the legislation so that the §106 obligation does not apply to such shared facilities. In one sense, this would be the preferred alternative in view of strata legislation which gives owners corporations the ability to decide not to repair their common property Further, imposing a strict strata statutory obligation on members who may not be owners corporations would be taking the duty of these members too far. One or other of these options should be implemented explicitly in the legislation.

48. In many schemes all decisions must be unanimous, and if a decision is not reached the statement should provide for the matter to be referred to an expert for determination. This will encourage owners to reach agreement (otherwise expert costs and delay will be incurred).

49. The law could have a mechanism to ensure that a veto cannot persist, where it is plainly unreasonably exercised. One possible approach is to model the boundaries akin to those in SSMA §149(1), but we do not support that approach. Building management committees comprise owners of different parts of a building (who are then members of the building management committee). It does not follow that the strata legislation (or the Tribunal) have any relevance to the disputes between these owners. The broader question is whether or not disputes between members of a building management

committee should be regulated by the strata legislation. The answer should be no. This is already partly recognised by §232(4) of the SSMA which provides that disputes involving strata management statements can only be determined by the Tribunal if all parties to the dispute agree to that process.

Minimum protections

50. Some of the undersigned are of the view that whilst it would be inappropriate to over-regulate, some mechanisms need to be created that are streamlined, efficient, and cannot be contracted out of, such as the right to have harsh provisions reviewed by a Court.

51. Others of the undersigned are of the view that building management statements and strata management statements are contracts between two building owners (that also run with the land). It is important not to create an avenue for uncertainty which will be created if there is a right in a third party to review the terms of a contractual arrangement between two building owners. yes, there may be registered statements that may not seem fair to one of the parties. The position for owners has now improved with vendor disclosure. And as the statements are registered, potential owners have the opportunity to not buy into a building if they do not like the terms of statement.

Questions 22-23 – Strata Management Statements (cont.)

52. We note that Schedule 4 is minimum standard. One matter missing from Schedule 4 is a requirement that an SMS not only identify the facilities and the percentages but also what categories of charges relating to the facilities are to be shared. For example, only repairs and maintenance? Or, can one simply install a pot plant next to a pool and charge everybody for it without the approval of a Building Management Committee?

53. Management statements are an agreement between two or more building owners. The Tribunal is not the venue for the determination of disputes. Schedule 4 requires the statement to provide for dispute resolution or rectification of complaints and there is no reason why legislation should override what the building owners may agree between each other (even though one may be a strata scheme) subject to that which we recommend below in relation to 5 yearly reviews.

Questions 24-30 – Building Management Committees

Agent or separate entity

54. The options for reform are:

    54.1 Make it clear in the legislation the committee is the agent for the owners; or

    54.2 Make the committee a separate legal entity.

55. The preferred option is to keep the current arrangement, make it clear the committee is the agent and legislate to cover such issues as to how these committees enter into

contracts and how they are represented in legal proceedings. Ordinary rules of agency law will require modification to empower committees by force of law to have actual decision-making and action authority.

Constituting the committee

56. There needs to be greater clarity around the governance of building management committees, and around the ability of lot owners to obtain disclosure of building management committee records. Presently, SSDA Schedule 4, Clause 3(4) provides that a member of the committee (being an owners corporation or other corporation) *may* be represented for the purposes of the committee. The clause also provides the appointment is to be made by way of special resolution or by-law of owners corporations or a resolution of corporations.

57. On one view, building management committees are a forum in which buildings make up their own governance. Inevitably, whoever writes the building management statement is going to write it in a way that most benefits whoever they represent. There are some things that private citizens and entities should not have freedom in relation to, and one is the governance structure of large, complex buildings in which other citizens work, live and invest. This should be standardised by government in the same way strata governance has been. The alternative creates too many possibilities for mistakes and abuse.

58. Another view is that building management statements and strata management statements govern the way the separate parts of the building work together. While it is fair to say that some statements do contain clauses that benefit one part of the building over the other, the majority of statements are fairly vanilla: and, subject to the later comments in this paragraph, Schedule 4 addresses the issue of what should be contained in these statements. The two areas that require attention are voting rights and shared facilities (which are the most common areas of dispute).

59. We recommend that the legislation should make it compulsory for owners corporations and corporations to appoint a representative, and that the representative of an owners corporation to be a member of the strata committee and for the representative of a corporation to be a director or the secretary.

60. At building management committee meetings, representatives make decisions on behalf of the member. Under the legislation as presently drafted, there are no procedures as to how the representative must vote at those meetings. In practice, most representatives think (and act) as though they have autonomous authority.

61. The legislation has criteria as to the identity of strata committee members, but no such criteria for the party representing them on building management committees.

62. For example, for the same reason the strata managing agent for a strata scheme is not eligible for appointment to the strata committee, they should not be eligible to represent the owners corporation on building management committees.

63. The legislation should state that only members of the strata committee are eligible to be appointed as the representative of an owners corporation. And for corporate parties, they must appoint a director or secretary.

64. Further, so as to ensure owners corporations are properly represented at meetings of the building management committee, the representative of owners corporations should only vote in accordance with directions from the owners corporation (whether at strata committee level or the owners in general meeting) if given, say, by way of strata committee or board resolution.

Ensure coordination as much as practicable

65. There are many instances where buildings with the same strata managing agent are managed competently and without conflict. There is more opportunity for conflict (not necessarily conflicts of interest, but day-to-day conflict) where the strata managing agents are different. Take insurance for instance. Damage insurance must be effected by the owner of each part of the building (this is done through the building management committee) and each owner must effect insurance for its own part (contents, public risk). One strata managing agent and one broker makes this a seamless exercise. The scene can be very different with competing strata managing agents. That said, we do not suggest that the law should require there to be only one agent and we do not agree that the law should require different agents.

66. A mechanism for ensuring coordination needs to be incorporated into the legislation. Reference to binding expert determination can resolve these difficulties. How the expert is chosen also brings its difficulties. We recommend a default provision empowering the President of the Law Society to appoint the expert. Experts can be empowered to obtain assistance from other experts where multifaceted problems need to be resolved, and expert determinations must be required to move to resolution with 90 days after a dispute is notified by one party to the others.

67. In addition, commercial building owners should not be governed by restrictive legislation simply because they occupy the same building as an owners corporation.

68. That said, it seems to us incongruous that a strata committee should be required to make disclosures under SSMA§181 and 182 but a similar requirement is not imposed on building management committees.

Review the framework every five years

69. One view is that provision should be made for rules, including as to dispute resolution mechanisms and cost sharing formulas, to be reviewed every five years by the building management committee to ensure that they are objectively reasonable in the light of various lot owners interests at the time of each review. The alternative is retain an obligation to review shared facilities every 5 years, with clearer direction as to how that review should take place. This requires recognition that there arguably are fiduciary and financial obligations on members of building management committees to each other.

70. That said, it must be recognised that the shared facilities register in a management statement, if prepared by an external consultant (as it should be) will on average cost between $5,000.00 to $18,000.00. It will be the same cost whether the schedule is prepared at the outset or reviewed. This is a factor that must be taken into consideration when discussing five yearly reviews. Reviews are necessary because circumstances change. However, circumstances also change in strata schemes and there is no suggestion that the legislation change to require owners corporations to review their schedule of unit entitlements every five years. Clarity is needed around what provisions must be reviewed. Is it a full review? Is it a review to take account of a subdivision stratum lot? Is it a review to take account of a member ceasing to use a facility? Is it a review to accommodate changes that have occurred in the building or the use of shared facilities? Our preferred position is that when the five yearly review comes around, the review would not be a total review of the shared facilities and costing, but rather an assessment as to whether there has been any change (for example, more or less parties using a shared facilities) and to change the register and rules if there has been a change. It is important that the obligation for a five yearly review does not place excessive fiduciary and financial obligations on a building management committee.

71. When a lot owner purchases a unit in a scheme that is governed by building management committee, that lot owner should be reviewing the building management committee's rules, bylaws and decisions in the same way as it would review a strata committee's rules, bylaws and decisions before deciding to purchase. This, of course, would be greatly assisted by making a building management committee's records subject to search and disclosure requirements. In any event, with that improvement, a new lot owner should take the scheme as they find it.

72. In relation to the term of appointment of managing agents and building managers appointed by a building management committee, we again do not see why there should be any difference between the rules relating to an appointment for a strata scheme and the appointment by a building management committee. Much as we have recommended that costing formulas be subject to five-yearly reviews, there should be a maximum limit on contract terms of five years so that when a review is undertaken contracts can also be renegotiated as appropriate.

73. The question is raised whether a duty of good faith should be imposed on strata managers and building management committees. As a matter of common law, one would have thought that strata managers are agents and building management committee members are agents, that they are fiduciaries and the usual duties of an agent towards a principal apply in any event. The duty of good faith is but one of those duties.

> Once the boundaries of the five yearly review are settled, the five-yearly review requirement should be gradually introduced. There must be recognition that many amendments can be minor: to fix mistakes, to insert operational provisions etc. There may also need to be grandfather provision so that a review is not imposed on unwilling owners and occupiers who did not subscribe to a statement which required a 5 year review.

Shared facilities

74. Some consideration needs to be given to the intersection between the SSDA and the *Real Property Act 1900*. For example, the discussion paper at page 22 states:

> *"Shared Facilities are physically located within one of the component use areas of the building, while being utilised by other parts of the building".*

75. That is often, but not always the case and the law needs to incorporate some flexibility in that regard. In any event, shared facilities and the allocation of costs cause the most disputes in part strata buildings. There needs to be clarity around the scope of the Supreme Court's review power and, as recommended above, a time-bound expert determination mechanism.

76. The most likely boundaries for such a judicial review would be:

    76.1 In circumstances where there is a dispute over shared facilities or how they are funded, or where no decisions are being taken by a committee due to it having become dysfunctional;

    76.2 the shared facilities register requires rectification; or

    76.3 the party making the application supports its position by a new shared facilities register, prepared by an independent consultant, highlighting discrepancies.

Easements needs to be cross-referenced in the Strata Management Statement and recorded on the Strata Plan

77. It needs to be made clear whether the developer who draws the Strata Management Statement (SMS) needs to have both:

    77.1 easements registered on a §88B instrument with the SMS and the strata plan to get access to those areas in one building from other areas; and

    77.2 whether reference to it in the SMS alone is sufficient without the need to create §88B easements, for example, to access shared facilities.

78. When a person buys a Torrens title lot, he or she is only subject to interests recorded on the register, excepting easements that have been omitted but which were initially "*validly created at or after that time under this or any other Act or a Commonwealth Act*": *Real Property Act 1900* §42(1)(a1). If an easement is only in an SMS, it is created under a piece of delegated legislation, not an Act. It, thus, may not have the force of §42 behind it!

79. Of course, SMSs bind people who buy and they cannot be altered without unanimous consent so all new owners end up being bound anyway, but via a circuitous route. One view is that it is much better to have all easements on the register. On the other hand, there are instances where access to parking areas have been too complicated to draft in easements and have been put in the strata management statement only (e.g., World Square). There is also the difficulty of positive covenants on easements not running with

the land. Take the example of the rules surrounding access over penthouse foyers to access the roof for services. The rules of access, covenants to repair damage, covenants to give notice, covenants to be accompanied by a representative of the penthouse owner are in themselves complicated.

80. One simple solution is to legislate that access provisions in a strata amendment statement and in a building management statement fall within the *Real Property Act* §42(1)(al).

81. That way, where rights of access are created in a management statement, they are given the force of §42.

82. SSDA §34 requires an ordinary resolution of the owners corporation in circumstances where an easement or covenant benefitting common property is being accepted rather than created by the owners corporation, as proposed in the NSW Government's Strata Title Law Reform Position Paper (November 2013). The earlier legislation required a special resolution. The issue is whether a resolution is required at all.

83. The preferred position is that a resolution is not required unless the easement or restriction that is to be created benefitting the common property also includes an obligation on the owners corporation (such as maintenance); most usually do. Notification of the dealing could being given to the owners corporation and the opportunity to object.

84. Finally, SSDA and *Real Property Act* §42(i)(a1) will need to change as the foregoing is adopted. Strata plans should continue to record easements, if only to avoid unnecessary disputes.

Questions 31-33 – Operation of Strata Management Statements

Start with disclosure

85. These questions relate to expense allocation and voting rights. As we have indicated, we share the view that building management committees and strata management statements should be subject to the same disclosure requirements as applied to strata owners corporations generally. And with the five yearly review process outlined above, the legislative scheme can provide for a focus on keeping the statement up to date.

86. Those who advocate for owners, particularly once the develop is no longer on the scene, consider that these reviews should require that the building management committee satisfy itself on an objective basis that cost-sharing arrangements are fair and reasonable to all members and any lot or freehold and leasehold owners. A set of factors which must be taken into account should be set out. These would include an objectively reasonable assessment of both the use of, and the taking of benefit from, shared facilities. Any change to the sharing formulas should, however, only operate prospectively.

87. Those who work with developers would not empower the ultimate owners to form their own contracts. Courts and Tribunals have always indicated their reluctance to rewrite contracts. The better position is that, for the future, there is higher quality developer and vendor disclosure and, with some redrafting of the legislation, proper disclosure of records of the building management committees.

88. That said, disclosure has limited benefits. It should happen but that which is being disclosed often is so complex (and often incomplete) that purchasers cannot possibly make informed decisions. The only real protection is to ensure that contracts formed by developers come to an end as soon as practicable so that ultimate owners can form their own contracts. The real policy question is when that should occur certainly not later than the first five yearly review.

Do not link voting rights to levies

89. Any proposal that voting rights should be linked to levies payable should be rejected. It would enable oppression of minority owners, and is inconsistent with requiring consensus decision making as the basis for building management committee operations.

Questions 34-35 – Dispute Resolution in Part Strata Buildings

Facilitate amendment

90. Moreover, it is very often the case that strata management statements reflect a particular developer's view of the future needs of the building and that view may not be shared by subsequent owners. At present, there is insufficient protection for the rights of the subsequent owners and their ability to amend the strata management statements to suit ongoing needs. If the review option recommended above is made available, and the court's review powers are clarified, this gap in the law should be satisfactory addressed.

91. Where provisions have become harsh in changed circumstances, the Court (or less preferably the Tribunal) should have a power to vary those provisions but the Court and presumably the Tribunal will be reluctant to redraft such provisions. Perhaps there should be a judicial power to order an expert to do so.

92. Usually, a Strata Management Statement (SMS) requires a unanimous resolution to amend one of its terms. As a consequence, any amendments which seek to redress the allocation of obligations between the parties on the ground that they are unfair, are very unlikely to be unanimously supported.

93. The case law has not resolved whether there is judicial power to vary an SMS. Following the trail through The Owners Corporation Strata Plan 70672 v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2009] NSWSC 1283; Owners – Strata Plan 78102 v Owners – Strata Plan 78101 [2010] NSWSC 973; and The Owners Corporation Strata Plan 70672 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2011) 16 BPR 31,435, it would seem that SSDA §28U(1)(b) does not itself confer jurisdiction for the making of an order to amend the SMS. Associate Professor Sherry disagrees: Sherry C: "*Building management statements and strata*

management statements: Unholy mixing of contract and property" (2013) 87 ALJ 39. In Italian Forum Ltd v The Owners –Strata Plan 60919 (2012) 16 BPR 31,685 at [59], White J, as his Honour then was, appeared to agree with Associate Professor Sherry. Also, Bergin CJ in The Owners – Strata Plan 78101 [2010] NSWSC 973 at [79] said that the court had a 'broad power' to amend an SMS.

94. In our view a specific judicial power to vary an SMS should be provided for. Its scope, however, should be carefully circumscribed and the Court should be empowered to order an expert to do so.

Questions 36-40 – Valuing Units and Entitlements

The current valuation requirements are mostly satisfactory

95. We strongly support the requirement for qualified valuer's certificate to determine unit entitlements now provided for in the SSDA. In our experience, the cost of valuations is not a deterrent, and sometimes results in no application being made to vary unit entitlements under the *Strata Schemes Management Act 2015*. Sometimes, however, the valuation discloses that errors were made in the original allocation, and an order can be sought from the Tribunal. In our view, this is as it should be.

96. One possible exception might be allowed. Some subdivisions can be as small as the desire to incorporate a common property planter box into a lot. Where only one or two lost are affected, there should be an allowance to only value those lots.

97. We consider that the valuation requirements as presently set out for staged developments are satisfactory.

98. The qualified expert valuer does not need expert guidelines for assessing strata plan unit entitlement valuations. Depending on how fluid or thin the market is, the nature of the locale and available comparable, and for a new development or a staged development involving commercial lots, potential cashflows may all figure in different ways at different times. Prescription is inappropriate.

Question 41 –Objectives of the Strata Schemes Management Act 2015

99. We do not consider that there is any need to change the objects of the Act.

Questions 42-43 – Strata Committees

Keep the nine person limit for strata committees

100. In our experience, the larger the committee, the more cumbersome its operation becomes. The present limit of nine is sensible.

Questions 44-45 – Strata Committees (cont.)

Recognise that strata committees are fiduciaries

101. Today's strata schemes have developed far beyond their origin as a means for community residential living. In the context of large strata schemes at least, relatively few community members exercise considerable power over lot owners and their property.

102. Whenever a committee has powers over the property of others, the application of fiduciary duties is appropriate.

103. In relation to schedule 1A to the *Body Corporate & Community Management Act 1997 (Qld)*, we agree that it can be adapted for use in NSW. It should not be copied wholesale. Clause 2(2) in particular is not well drafted and some explanatory notes are needed to guide lay committee members.

Questions 46-47 – Strata Committees (cont.)

Facilitate democratic control over strata committees

104. In our experience, the power to remove office holders is seldom exercised and by requiring a special resolution, there is a sufficient brake upon the exercise of that power.

105. If grounds for removal were introduced, there would be ongoing litigation about whether the grounds were satisfied. This will further tie up owners corporations, and lead to more appointments of compulsory strata managing agents under section 237 of the *Strata Schemes Management Act 2015*.

106. It is, however, important that the appointment of strata committee members not be limited to annual general meetings only as is the case under SSMA §30(4). It should be possible to be undertaken at an extraordinary general meeting, particularly if a special resolution is passed to remove one or more members from the strata committee.

Questions 48-49 – Meeting Procedures

Make a series of changes to meeting procedures.

107. SSMA §19(2) requires a general meeting to be convened after the secretary of an owners corporation receives a "*qualified request*." The obligation to call a meeting is too often honoured in the breach. Where the officers of the owners corporation do not call the meeting, a signatory to the qualified request should be empowered to do so, but only to conduct the requested business. They would then need access to the strata roll to send out meeting notices (which may or may not comply with the requirements of schedule 1 of the SSMA) or better still the signatory to the qualified request should be given the power to instruct the strata manager to do so.

108. The requirement to "convene" a general meeting is the subject of much debate. Does that merely require the secretary to convene the general meeting by issuing the notice of meeting within 14 days of receipt of the qualified request or does it mean the meeting must be held within 14 days. We tend to think it is the former which can lead to situations where a secretary complies with a qualified request by issuing a notice of general meeting within 14 days but the date of the meeting is months away, which seems to defeat the purpose of the section.

109. We recommend that the provision be amended to make clear that not only must the secretary convene the general meeting within 14 days such meeting must be held as soon as practicable and no later than 35 days after receiving the qualified request. This will ensure that all other time requirements relating to the notice of meeting can be complied with.

110. We also recommend an amendment to Schedule 1 in relation to meeting procedures of owners corporations to require that 6 weeks prior to an annual general meeting, the Secretary notify all lot owners of their right to move motions to be considered at that meeting.

111. How a quorum is to be measured, and when must be addressed. Under SSMA Schedule 1 Part 3 Clause 17, a quorum is tested arguably each time a particular motion or election comes up for consideration. It can happen that a quorum is present at the commencement of the meeting but is not present at the time a particular motion or election is reached during the course of the meeting. The persons opposing a particular motion can simply walk out for part of a meeting so as to deny a quorum for a particular motion that they oppose. This kind of abuse is prevented simply by adopting the more tradition provision that a quorum is established only at the commencement of a meeting.

112. The way in which a special resolution is determined also needs to be clarified. The discussion paper is incorrect in indicating that:

> *"Where not more that 25% of the votes cast, as calculated by unit entitlement are against [a special resolution passed]. Effectively, this means 75% of the votes cast by unit entitlement must be in favour of the motion."*

113. SSMA §5 looks to see **only** how many votes were against a resolution. By way of contrast, the definition of special resolution in §9 of the *Corporations Act* refers to a resolution "*that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution*."

114. In other words, the *Corporations Act* looks to see how many votes were *in favour*. The *Strata Scheme Management Act* looks to see how many votes were *against*. Neither statute deals with the circumstance where an owners corporation (or a corporation under the *Corporations Act*) provides a voting paper on which three choices are offered, one of which is marked "*Abstain*".

115. In a number of strata corporations, secret ballots (a poll) are undertaken at general meetings. Each lot owner is entitled to tick one of three boxes, yes, no, abstain. A

person would normally abstain by declining to vote. As a matter of law, a vote is cast if any of those boxes are ticked. Consequently, it may well be that no more than 25% of the votes cast are against a particular resolution, but less than 75% of the votes cast are in favour of it. Such a motion still passes as a special resolution. If that is not what is intended, then the Act should be amended to the scheme set out in the *Corporations Act* which requires 75% of the votes to be cast in favour for a special resolution to be passed.

116. Similarly, the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* introduces new section 132B, under which a resolution to install sustainability infrastructure passes with "*less than 50% are against the resolution*." Thus, if on a secret ballot, 41% vote in favour, 10% vote to abstain and 49% vote against, the resolution passes. Is that really intended?

117. The case law is also of assistance.

118. In Re Maurice Walsh Pty Ltd (1979) 4 ACLR 185 at 187, Smith J in referring to an affidavit of a Mr Levi, without comment or criticism, explicitly drew a distinction between voters who attend a meeting and vote to abstain (in exercise of a right to vote) from voters who cast no vote.

119. In Re Tiger Investment Co ltd (1999) 33 ACSR 438 as the headnote states:

> *The issues for the court were whether the shareholders of a company to whom a proposed selective capital reduction relates will be prevented from voting because they receive consideration as part of the reduction, and secondly, determination of the meaning of the phrase "no votes being cast" in CL s 456C(2)(a).*

120. The Court had to determine the meaning of the term "No votes being cast in favour of the resolution by any person who is to receive consideration as part of the reduction …" At [16] Santow J posed the following question "In particular, does "cast" mean the act of voting, or the result of counting the vote? Is a vote made but not counted nonetheless cast?" His Honour did not finally determine the question but obiter considered that a vote may be cast but is to be disregarded if the relevant person exercising the vote is to be excluded from voting: 33 ACSR at 445 [39]-[40]. Thus, a vote can be cast but need not be a vote yes or no.

121. In Village Roadshow Ltd v Boswell Film GMbH [2004] VSCA 16 at [16]-[17], Callaway JA adopted Santow J's approach. Similarly, in Bateman v Newham v Park Stud Ltd [2004] NSWSC 566 at [47] both the earlier decisions of the Victorian Supreme Court and that of Santow J were followed by Barrett J, as his Honour then was.

122. In the context of listed companies, §251AA of the *Corporations Act* addresses that which must be included in minutes in relation to proxy votes. The section provides as follows:

> *251AA Disclosure of proxy votes — listed companies*
>
> *(1) [Information to be included in minutes]*

A company must record in the minutes of a meeting, in respect of each resolution in the notice of meeting, the total number of proxy votes exercisable by all proxies validly appointed and:

(a) if the resolution is decided by a show of hands — the total number of proxy votes in respect of which the appointments specified that:

(i) the proxy is to vote for the resolution; and
(ii) the proxy is to vote against the resolution; and
(iii) the proxy is to abstain on the resolution; and
(iv) the proxy may vote at the proxy's discretion; and

*(b) if the resolution is decided on a poll — the information specified in paragraph (a) and the total number of **votes cast** on the poll:*

(i) in favour of the resolution; and
(ii) against the resolution; and
*(iii) **abstaining** on the resolution.*

(3) [Application of section]

This section only applies to a company that is listed.

123. It is reasonably apparent from the foregoing that the premise of §251AA is that a vote cast **includes** a vote to abstain on a resolution.

124. In GetSwift Limited, in the matter of GetSwift Limited (No. 2) [2020] FCA 1733 at [40], the Court recorded the voting at an investment scheme meeting and explicitly included in counting the total number of votes cast; votes for, votes against **and** votes to abstain. Whilst the Court did not decide explicitly that a vote to abstain is a vote cast, by including votes to abstain in the total votes cast, it included the votes to abstain.

125. Further, in our experience, there are a number of abuses which occur at meetings. To give but one example, a chairperson can attend a meeting at which a resolution is put which the Chairperson opposes. The Chairperson can then adjourn the meeting before that motion is put. There is then an adjournment to a time when fewer people attend (as is invariably the case) and the motion then fails.

126. There need to be limits on adjournments of meetings for particular purposes only. There need to be limits on the Chairperson's powers. There needs to be provisions for replacement of a Chairperson on a vote of no-confidence. If a vote of no-confidence has passed (even on an ordinary majority) the strata committee should be compelled to elect a new Chairperson or even a new set of officers at the next strata committee to be held immediately after the general meeting.

127. We have no difficulty in moving the meeting procedures from the Act to the regulations to ensure that the provision can be kept up to date as circumstances require. However, some provisions must remain in the Act. These would include the classification of resolutions, the need to elect a strata committee, the need to elect officers, and the essential duties of the officers of a strata committee towards acting in the interests of the lot owners as a whole.

128. Also, if the intent of SSMA §22(3)(a) is to give (i) executors or administrators of deceased estates, and (ii) liquidators or receivers in bankruptcy, the right to cast a vote at a meeting of the owners corporation, it does not have that effect. That is because of the operation of clause 23(1) in Schedule 1 and SSMA §178(1)(a). Those persons must first become registered proprietors of the lot (and be recorded on the strata roll as such) before they have a right to cast a vote. In some circumstances, it can be many months if not years before it is possible to transmit title. Until this happens, the estate (whether deceased or in bankruptcy) retains the obligation to make contributions but without the right to vote and has no say in the operation and administration of the strata scheme.

129. In practice, owners corporations and their strata managers are accepting strata interest notices from those persons, updating the strata roll and permitting them to vote – misunderstanding the effect of clause 23(1) in Schedule 1. The preferred option is to amend clause 23(1) in Schedule 1 to reflect the practice.

Questions 50-52 - Electronic Meetings and Voting

Electronic meetings must be meetings

130. The way in which owners corporations take decisions needs further consideration. Electronic meetings, for example over Zoom, are entirely practicable, and yet many strata managing agents are issuing notices for "*paper*" meetings at which lot owners do not have the opportunity to see or hear each other and discuss issues of concern. We have seen notices which say: "*The Meeting is being held via Pre-Meeting Voting, whereby No physical attendance is necessary*."

131. In our view, calling a paper meeting cannot reasonably constitute reasonable steps necessary to ensure that each owner of a lot in the strata scheme or each member of the strata committee, as the case may be, can participate in the Annual General Meeting, as required by SSMR clause 71(3). Nor can quorum requirements be met via a "*paper*" meeting.

132. We recommend that the legislation be clarified to ensure that while electronic meetings can occur, the reference to "*meetings*" must be to an electronic mechanism whereby lot owners can see and hear or at least hear each other simulating a "*live meeting*."

133. Schedule 1 will have to be amended.

134. Of course, if all lot owners approve a resolution, it can be signed by all of them electronically, much as is the case with unanimous resolutions by boards of directors in *Corporations Act* corporations.

135. Whilst we have great sympathy for those who are not used to modern technologies and wish to send in a postal ballot for a general meeting decision, as we note above, it should not be permitted to conduct a general meeting as a "*paper meeting*".

136. Discussion at a meeting needs to be possible.

137. A general meeting should be empowered to pass and adopt an amendment to any motion, including for a special resolution. If a motion is amended, the pre-meeting vote ought not then to count because it is not a vote on the amended motion. As long as this risk is disclosed to those who choose to vote in advance of the meeting, there should be no particular difficulty with this course. It may also serve to encourage more attendance and voting at general meetings.

138. It is also important that where a meeting is conducted over Zoom or similar technology, secret ballot polling software be made available to the meeting should a secret ballot be required. This is perfectly practicable, but too many owners corporations and strata managing agents are unfamiliar with it.

Question 53 - Proxies

Do not change the proxy rules

139. We are of the view that the present limits on proxies are working reasonably well. It is possible to impose limits on the abuse of the system through multiple corporate structures by importing the relevant provision from the *Corporations Act* structure. However, such complication may well not be worth the candle.

140. The approach adopted in the *Strata Schemes Management Amendment (Sustainable Infrastructure) Bill 2020* is one which we support, and we should apply generally.

Question 54 – Tenant Participation

A new approach to tenant participation is needed

141. The underlying flaw in the tenant participation provision is that tenants have common interests. They seldom do.

142. A tenant with a lease term of more than one-year at least for residential (including any options) and three-years for commercial or retail (including any options to renew) should be eligible for election to a strata committee, and be eligible to nominate themselves or an officer if the tenant is a corporation. The tenant can, however, be elected only if the freehold owner is not elected. We recommend that such a provision replace the present tenant representative provision which is inappropriate, and is not working.

143. We agree, however, that all tenants should receive notice of the meetings so that they know what is going on, and should also receive minutes of meetings.

144. The present provision for a tenant to attend a meeting but not to speak unless invited to do so is satisfactory if the above recommendations are not adopted. Any unfairness would be better ameliorated by allowing tenants (subject to the foregoing limits) to stand for election to a strata committee.

Questions 55-59 - Strata Managing Agents

Much reform is needed to the legislative structure relating to strata managing agents

145. There are substantial problems with the present legislative structure relating to strata managing agents.

146. In additional to addressing the specific questions raised in the discussion paper, we draw your attention to the following key points.

147. Whilst the relationship between a managing agent and an owners corporation is a business contract, it is a contract of agency, and the common law duties of an agent apply. However, where the agent acts in breach of its duties, the ability of an owners corporation to intervene is excessively restricted by the legislation. Indeed, the discussion records that:

> *"Managing agents play a vital role in the management and function of strata schemes in NSW. Managing agents make life easier for the parties in a strata scheme by centralising management of the common interests of the owners and handling important matters of the owners corporation in an appropriate manner. It is also the role of the managing agent to ensure the schemes comply with NSW legislation."*

148. Whilst that paragraph sets out the ideal, in our experience, there is a huge variety in competence, ability and performance by strata managing agents. Sometimes strata managing agents act as mere post boxes expecting strata committees to take decisions. There are other examples of strata managing agents taking major decisions about expenditure pursuant to a contractual delegation without ever informing the strata committee of the decisions which have been taken. And there are many in-between.

149. In our view, the legislation presently creates a power imbalance in favour of agents as opposed to owners corporations. This power imbalance needs to be remedied.

150. More and more schemes are "*professionally managed*", and it is our view that any scheme that qualifies as a large scheme should be required to be managed by a strata managing agent.

151. That said, we do not consider that the current durations of appointment and termination notice periods for strata managing agents are appropriate.

152. Appointments should not extend for more than three years.

153. The decision to appoint should be made by a general meeting.

154. A strata committee should only be permitted to give one, and only one, three-month extension for an appointment if an appointment runs out just before a general meeting.

155. It is crucial that strata managing agents not be entitled to any extension if they do not provide notice to the strata committee at least three months *and not more than six*

months before a term expires of the right to obtain quotes from and consider alternative appointees. The notice should be in a standard form and in large, bold type, be provided to the strata committee and a copy provided to every lot owner; not just placed on a notice board.

156. The way SSMA §50(6)(a) is being operated in practice by many agents is that they merely state the expiry date of the term on the front page of the agency agreement, or record it in the minutes of the meeting at which they are appointed. This may be up to 3 years before the agreement is due to expire. In our view, it Is necessary to amend SSMA §50(6)(a) to add the words: *"but not earlier than 6 months"* after the words *"at least 3 months."*

157. At the first annual general meeting, the developer is entitled to propose a strata managing agent, but should be required to provide reasonably comparable alternative contracts from other licensed strata managing agents, and must provide evidence that all of the strata managing agents who are providing quotes have been given the same information upon which to provide their quote and proposed contract. The term of appointment should be up to three years, but subject to the termination provision reforms we set elsewhere in this submission.

158. The strata managing agent appointed at the first annual general meeting will be reviewing important documents and the development of the building, including a consideration of possible defects. Where that agent is associated with the developer, there is a potential for a conflict of interest to affect the agent's advice given to the lot owners. There is a countervailing benefit in the agent having familiarity with the scheme and its history. Full disclosure well in advance of the meeting of any association with the developer to the lot owners, who will have much less familiarity with the scheme and its history, is essential.

159. Whilst there is some benefit in having a standard form strata managing agent agreement included in the legislation, the safer course will be to provide for a rebalancing of agents' and owners corporations' interests with a prohibition on contracting out of the legislative minimums.

Questions 60-66 – Strata Managing Agents (cont.)

Mandatory rules for agency termination are needed

160. The rules relating to conflicts of interest on the part of managing agents are, in essence, the common law rules. They are supplemented by the legislation.

161. Again, we stress that there should be statutory provisions that fairly balance the rights of strata corporations and managing agents which cannot be contracted out of.

162. For example, we are not aware of any managing agent contracts which require, even for large contracts, competitive tendering. There is no requirement of disclosure where a tender or a contract is let to an entity with whom the strata managing agent has a

particular relationship. The fiduciary duty to always act in the best interests of the owners corporation is too often honoured in the breach.

163. Full and frank disclosure of far more than "*pecuniary interests*" will assist.

164. In our view, the rules relating to gifts and commissions are of minor import. Far more important is the rebalancing of powers as between agents and owners corporations.

165. At present, there is an imbalance of power sharing in favour of the managing agent over owners corporations. Consider, for example, that not all agency contracts provide for the ordinary contractual termination for breach.

166. The legislation should provide for the following. Where an agent breaches a duty under a contract, a strata committee should be permitted to give notice of that breach allowing the agent to 28 days to cure the breach to the satisfaction of the owners corporation acting through its strata committee.

167. If a satisfactory remedy has not been achieved, the strata committee should be at liberty to terminate the contract and appoint a new agent.

168. The terminated agent currently is required to cooperate fully in transferring records, assets and funds to a new agent pursuant to *Property, Stock and Business Agents Regulation 2014*, Schedule 6, Clause 1, but there needs to be broader obligation to cooperate fully in transferring records, assets and funds to the owners corporation as the strata committee may direct. Under the current law, if an owners corporation moves to self-management, the terminated agent has no duty to cooperate. Such a provision would focus strata managing agents on putting the interests of their owners corporation first. And the provisions consequent upon termination should explicitly apply also where an agent's appointment expires.

169. Also, where an owners corporation terminates an agent's appointment the prompt transfer back of records and funds must be required. In our experience, many underperforming agents hold on to records and owners' funds after termination trying to extract financial advantage, and further, one bank in particular does not appreciate that an owners corporation is entitled to access its own funds once an agent has been terminated.

170. When strata managing agents open or operate bank accounts, they should be required to open or operate them in the name of the owners corporation so that the bank must take instructions from the owners corporation where the agent's appointment has been terminated. This will require amendments to the *Property, Stock and Business Agents Regulation 2014*.

171. Agents should also be required to fully and frankly disclose conflicts of interest. This may need to be defined broadly. For example, where an incorporated agent is run by a person who recommends that an owners corporation appoint a particular building manager company and that company is run by a relative of the person who runs the

strata manager, full and frank disclosure is needed. Presently, the two companies, agent and building manager, may be unrelated, and so no disclosure is required.

172. We recommend that SSMA §72(1) be amended to empower the Tribunal to make orders declaring the agreement with a strata managing agent or building manager to have been validly terminated (in addition to the power to make an order terminating the agreement).

173. In respect of §72(2), the Tribunal should also be empowered to order a strata managing agent or building manager to take all necessary steps to require a financial institution which holds monies for the benefit of the owners corporation to take all steps necessary to enable the owners corporation or any subsequent agent or building manager to access those funds.

174. In respect of §72(3), two additional grounds should be added.

    174.1 The first is to address the circumstance where an agreement has been terminated whether by reason of a repudiation which has been accepted or pursuant to the terms of the contract in place.

    174.2 The second is the circumstance where the mutual trust and confidence between a strata managing agent and the owners corporation has broken down. As the section currently stands, there may have been a complete breakdown in the mutual trust and confidence but the Tribunal could not make an order terminating the agreement or declaring it to have been terminated.

175. We note also that most agreements do not usually contain a provision which would relate to termination by acceptance of repudiation as a matter of contract law. For that reason, §72 should provide not only for terminations pursuant to the terms of the contract but also termination pursuant to the common law. See for example: Walldorf Apartment Hotel v Owners Corporation Strata Plan 71623 [2009] NSWSC 882 at [45], [51] and [55].

176. The present provision which provides for breach to be disciplined by way of criminal offence is entirely unsatisfactory. Criminal provisions should not be used to discipline breaches of contracts.

177. On the other side of the coin, where a managing agent makes recommendations for an owners corporation to fulfill its duties and the owners corporation does not cooperate, the agent should be permitted to give a similar notice requiring remedy within 28 days, failing which it can withdraw from continuing to act. In such circumstances, a lot owner may well approach the Tribunal for the appointment of a compulsory agent under section 237. Such an owners corporation may well be dysfunctional. We consider those to be adequate remedies.

Questions 67-68 – Strata Managing Agents (cont.)

Accountability goes beyond trust accounting and requesting information

178. We consider that the trust account provisions are working adequately.

179. Most strata managing agents provide information to a strata committee on request. However, that is in and of itself insufficient. There should be a requirement that the strata managing agent provide all material information about decision which it is proposing to take to the strata committee giving the strata committee time to consider the decision and to either approve or disapprove at a strata committee meeting.

180. Routine decisions ought not to be included, but significant contracts to be entered into are a good example of matters which ought to be disclosed for a strata committee to approve or disapprove even if the agent has a sufficient delegation.

181. In our experience, strata committees do not necessarily know what questions to ask. It should be incumbent on the agent to provide the material and draw the strata committee's attention to the nature of the decision that needs to be taken. If the strata committee does not vote to disapprove the decision, the agent's decision will stand.

Questions 69-71 – Strata Managing Agents (cont.)

Introduce some public performance reporting by agents

182. As set out above, we do not consider that the rules of conduct for strata managing agents are appropriately balanced.

183. The licencing regime provides only a very basic level of assurance as to competence.

184. Public transparency would be aided if agents were required to report the extent of each manager's and assistant manager's training and experience, as well as actions taken by Fair Trading as the regulator in respect of any of the agent or its employees.

Questions 72-73 – Building Defects

Agents are not building experts

185. There is much merit in giving managing agents basic training in how to ask the right questions of the building consultants. Beyond that is too much of an ask. It is not reasonable to expect agents to be strata building defects management specialists.

Strengthen the Building Defect Bond Scheme

186. The *Building Defect Bond Scheme*, as amended on 1 July 2020, was an important development, but given the size and scale of defects already being identified, it will need to be significantly strengthened and expanded. Far too often, builders and developers are established as single purpose corporations which ceases to exist, or ceases to have any resources, within a short time after a development is completed. A building bond

equivalent to 2% of the building contract price will seldom be sufficient to address necessary repairs once the builder and developer are no longer available. Further, the ability of an owners corporation to access the scheme and to obtain the necessary documents with which to make decisions needs to be streamlined

187. Also, the Building Defect Bond Scheme only catches defects known as at the date of the interim defect report. The final building defect report is only required to report on the defective building work reported on in the interim report, any defective repairs of that work and specify how the defective work should be repaired. The fourth requirement of the final report is to contain any information required by the regulations which just say that it must be in the approved form: SSMA §201 and SSMR cl48.

188. The form states "The final report must not contain matters that relate to defective building work not identified in the interim report, other than arising from rectification of defective building work identified in the interim report."

189. The effect is that if the defect is not known within 15-18 months of the date of the occupation certificate then it does not get reported on in the interim report. This is most unsatisfactory.

190. No one would buy a new toaster or car on the understanding that they had to check for defects themselves. For goods we have moved well past the days of caveat emptor. Why not for buildings?

191. We recommend also that there should be added to the documents required to be handed over by a developer prior to the first annual general meeting:

    191.1 an assignment of any bond held in respect of building work;

    191.2 each document that identifies building defects of which the developer is aware; and

    191.3 reports from the building inspectors (as well as form the developer);

Questions 74-75 – Administrative and Capital Works Funds

192. There needs to be clarity as to the purposes of which each of the administrative and capital works funds can be used. A transfer from one fund to the other to cover an expense within the purpose of the other fund should be permitted. A transfer for another purpose should not be permitted.

Question 76 – Levies and Arrears

Simplify waiving interest and recognising hardship

193. The laws relating to levies and arrears and their collection, including as to interest, under §86 work in most circumstances.

194. However, at least in today's environment, a 10% interest rate is beyond anything available in the market. It operates as an incentive to lot owners to borrow money at commercial rates in order to avoid the 10% rate being charged. However, lot owners are seldom aware that a 10% interest rate will be charged, and many strata managing agents impose it even on payments that are one day late. In our view, lot owners should be permitted to identify a particular hardship to a strata committee. The strata committee should be required to address the request reasonably, and be empowered to enable payment by instalments so as to relieve any financial burden for a period of up to 12 months.

195. Also, SSMA §85(3) empowers an owners corporation to resolve that a contribution is to bear no interest. Does this mean the resolution to waive interest on contributions can be made by resolution at a strata committee meeting, given that under SSMA §36(2) *"a decision of a strata committee is taken to be the decision of the owners corporation"?* Many strata communities have struggled to understand this during the height of the pandemic, when owners sought relief from interest on overdue contributions.

196. It is efficient for the decision to waive interest on overdue levies to fall to the strata committee, which can convene a meeting on 3 days' notice to consider an individual request. These requests are often made in circumstances of personal financial strain. An amendment should be made to insert the words "*at a strata committee meeting*" after the word "*resolution*."

Questions 77-78 – By-laws

197. In our experience, financial records tend to be prepared accurately, and enable adequate questions to be asked by lot owners when they are received.

198. In our view, any scheme that is a large strata scheme should have its accounts audited. There are too many lot owners for individuals to have a sufficiently active interest to check the financial conduct of the scheme. A dollar limit is, in our view, inappropriate.

Questions 79-83 – By-laws (cont.)

Significant reform to the regulation of by-laws is needed

199. Section 139 of the *Strata Schemes Management Act 2015* should expressly enshrine lot owners' rights of access to their lots absent unreasonable hardship on an owners corporation in providing that access (e.g., wheelchair ramps, stairlifts etc). This would codify the outcome of in Hulena v Owner's Corp Strata Plan 13672 [2010] NSWADTAP 27, and make the SSMA consistent with the *Anti-Discrimination Act 1977*.

200. We do, however, recommend changes to the provision relating to amendments and repeals of by-laws. At present under SSMA §141(1) a bylaw, including a special bylaw, can be changed pursuant to a special resolution without the consent of a lot owner who is adversely affected by the change. For example, a lot owner might have been granted an exclusive use area and special privileges to do works in an exclusive use area. They

would have made a substantial investment. As §141(1) currently stands, the exclusive use bylaw could be changed, or even repealed, without that lot owners consent. That is plainly an unsatisfactory position.

201. Also, imagine a 4 lot scheme, two up, two down. The two downstairs owners want a common property by-law in their favour over the garden, so they can use it privately. One upstairs neighbour agrees because they don't want to pay for garden maintenance. The other upstairs neighbour really wants to use the garden but has just lost the right to it because they were outvoted and although adversely affected by the loss of common property, their agreement was not needed.

202. There is also a need to amend SSMA §149 to enlarge the power from merely prescribing a change to bylaw to also invalidating a change to a bylaw so that if a bylaw is changed to the detriment of a lot owner, he or she can make an application under §149.

203. SSMA §143 needs to be amended to make it clear that a common property rights by-law can not only be made with the written consent of each affected lot owner, but also cannot be amended or repealed without the consent of each affected lot owner. The problem is not overcome by SSMA §142 and the words at the end of that provision "*or that changes such a by-law,*" because a by-law can be changed (amended or repealed as defined in SSMA §133) by passing a special resolution, rather than by making another by-law to amend or repeal the existing common property rights by-law.

204. As the law is currently interpreted by the Tribunal, a common property rights bylaw does not of itself authorise significant work being undertaken that affects the common property. Section 108(2) also would have to be complied with, namely, that the by-law specifically authorises the taking of the particular action proposed: The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd [2020] NSWCATAP 202. Rarely is work done on lot property that does not affect common property. This position warrants legislative reversal (unless it is overruled by the Supreme Court).

205. There is also a need to confirm legislatively that §149(1) is a gateway provision requiring findings to be made before the Tribunal can make an order under §149. There have been some tribunal decisions where a tribunal has considered that the factors set out in §149(2) should be considered in determining whether or not a finding should be made under §149(1): Capcelea v Owners Strata Plan No. 48887 [2019] NSWCATCD 27 at [53]-[59]; Owners Strata Plan No. 12289 v Donaldson [2019] NSWCATAP 213. A more recent appeal panel decision in Gelder v Owners Strata Plan No 38308 [2020] NSWTACAP 227 adopted the more traditional gateway approach.

206. Bylaws and changes to them should, however, be lodged within three months, not six-months, of them being made. Although this will put pressure on strata managing agents and their solicitors to move more quickly, far too often purchasers of lots in a strata scheme make decisions based on the registered bylaws which are not current. In some cases, bylaws are amended and decisions are taken by a strata corporation under them which affect the likely interest of an incoming purchaser. That purchaser should be made aware of the change in bylaws. Sometimes the change has not been recorded in the

minute books on the basis (sometimes posed by agents) that the minutes have not yet been adopted at a subsequent meeting; all that would be available on search is a meeting agenda, and the motion to change a by-law (say) but no clear outcome. That position is unsatisfactory. A shorter time frame for lodgement, together with a requirement that minute books include any special resolution that has been passed by a general meeting, provide a solution.

207. We have no difficulty with allowing bylaws to be lodged as special or amended bylaws without a reconsolidation.

208. As to what restrictions should be imposed the making, amending or repeal of bylaws, there will inevitably be much debate.

All lot owners should be treated alike when it comes to challenging by-laws

209. Next, the ability to challenge bylaws should not be restricted to those who are entitled to vote on the bylaw at the time it was made. Subsequent lot owners can be just as affected by an unconscionable bylaw. It is imperative that all lot owners be entitled to challenge a bylaw. We recommend a substantial change to §150 of the *Strata Schemes Management Act* to remove the restriction which presently only allows lot owners who were entitled to vote at the time a bylaw was adopted to challenge it.

210. When a lot is purchased, the lot owner takes the lot subject to the bylaws that are there in place and has the opportunity to inspect them and agree to them when they purchase their lot.

Unreasonable or unconscionable?

211. On one view, it would be sensible for the legislation to prohibit unreasonable by-laws, because the alternative – that schemes can create unreasonable by-laws – is untenable. In the same way that no citizen should be expected to tolerate unreasonable laws, no resident of a strata scheme should be expected to tolerate unreasonable by-laws. The countervailing view is that challenges to reasonableness will be many, costly, and often unwarranted (especially in a no costs regime in the Tribunal, as to which see below).

212. Many people seem to be nervous about the idea of 'unreasonableness' being unclear or undefined, but there is substantial jurisprudence around this issue. The term: "*unreasonable*" is regarded as meaning "*not endowed with reason, not guided by reasonable good sense, not based on or in accordance with reason or sound judgment, immodest, capricious or exorbitant*": see Olive Grove Investment Holdings Pty Ltd v The Owners-Strata Plan No 5942 [2015] NSWCATAD 120 at [67]; Capcelea v The Owners-Strata Plan No 48887 [2019] NSWCATAD 27 at [31].

213. The question of whether a by-law is unreasonable does not disappear because the legislation does not give people the power to challenge unreasonable by-laws. A lack of power to challenge by-laws simply means that schemes are free to make unreasonable by-laws and residents have to suffer them. For example, if a scheme wanted to pass a by-law that prohibited anyone playing music after 6pm (a by-law that clearly relates to

the use and enjoyment of lots and common property, and is presumptively valid: s136(1)), that by-law will not miraculously become reasonable because the legislation does not give anyone the power to challenge it. The question of whether that by-law is reasonable or unreasonable exists no matter what. A lack of legislative power to challenge is an imprimatur for schemes to make any by-laws they please, irrespective of their reasonableness.

214. Establishing limits for the by-law making power always involves questions of judgement. Owners corporations are using their judgement every time they make a new by-law. However, in the rare circumstances in which an owners corporations' collective judgement is irrational or unreasonable, residents of schemes need the ability to apply to the Tribunal to remedy the by-law.

215. If, however, Government prefers to stay with the scope for challenge as it presently is, that is, limited to bylaws which are harsh, unconscionable or oppressive, or otherwise invalid then there needs to be some clarifications in relation to this standard.

216. Firstly, a bylaw can be unconscionable on its face because its terms are unconscionable.

217. Secondly, a bylaw can become unconscionable by the way in which it is administered. Or it can become unconscionable by reason of changed external circumstances.

218. A question is asked as to whether tenants should be allowed to challenge bylaws, and it is our view that tenant representation on strata committees should be permitted on the basis recommended above. Similarly, residential tenants for a term in excess of one-year and a commercial for a term in excess of three-years should also have standing to make a challenge.

219. Often challenges to bylaws also involve challenges to resolutions at a general meeting. SSMA §24(1) should be expanded to empower the Tribunal to invalidate a resolution or election if the relevant meeting was conducted in a manner which was unconscionable or suffered from substantive or procedural unfairness. This would put a brake on abuses of meeting procedures. In this regard, SSMA subsection 25(2) is too narrowly crafted. A lot owner may well not be denied a vote on a motion yet the motion may be put in circumstances where there has been insufficient debate or procedural rulings from the Chair which skew the prospects for the motion being passed or defeated (as the case may be).

220. The argument that lot owners are bound by the by-laws as they find them when they purchase did not find favour with the NSW Court of Appeal in Cooper v Owners of Strata Plan No 58068 [2020] NSWCA 250. The Court took the view that even a by-law which was closely based on a model by-law that earlier had been prescribed by Parliament and adopted by an owners corporation (as this one was) could be declared "*harsh oppressive or unconscionable*" on its face.

221. Clearly this imposes a new uncertainty for the governance of strata schemes. Every by-law or model by-law will need to be assessed to consider whether it would inevitably operate arbitrarily in some cases, one judge's formulation or where a restriction in a by-

law could not on any rational view enhance or be needed to preserve the other lot owners' enjoyment of their lots and the scheme common property, on another judge's formulation. The more traditional test for delegated legislation is that set out by Starke J in City of Brunswick v Stewart (1941) 65 CLR 88 at 97, where his Honour said "*The question is whether the delegated legislation is so oppressive or capricious that no reasonable mind can justify it*."

222. Choosing the correct test is necessary step in the now essential reform of SSMA §139(1) and 150.

223. In our view the legislation should empower an owners corporation to make a by-law so long as it has a reasonable (or alternatively, rational) connection with the enjoyment of other lots or the common property.

Question 84 – Enforcement of By-laws

Stronger enforcement powers long overdue

224. SSMA §147 provides for civil penalties for breaches of by-laws upon notice having been given pursuant to SSMA §146.

225. In addition to the procedures set out in §§146 and 147, it is open to an owners corporation in some cases to seek an order from the Tribunal under s 232 without a preliminary notice.

226. But then what if a tribunal order is disobeyed?

227. On 31 October 2017, the Tribunal handed down its decision in The Owners – Strata Plan No. 82306 v Anderson [2017] NSWCATCD 85. This was application by an owners corporation to the Tribunal for a monetary penalty to be imposed on a lot owner for breaching an order made by a Strata Schemes Adjudicator. In the course of deciding the case, the Tribunal confirmed that it does not have power to impose a monetary penalty on a person who breaches an order made by the Tribunal.

228. The *Strata Schemes Management Act 1996* had allowed for a pecuniary penalty on a person who breached and Adjudicator's order in an amount of up to $5,500. However, this was omitted from the SSMA 2015.

229. Indeed, the Tribunal observed that whilst §72(3) of the *Civil and Administrative Tribunal Act 2013* prohibited a person, without reasonable excuse, from contravening an order made by the Tribunal, §75 and 77 of that Act made clear that only the NSW Attorney-General or a person with the written consent of the Attorney-General or a person authorised by the Attorney-General for that purpose is entitled to apply to the Tribunal for an order that a person pay a monetary penalty for breaching an order made by the Tribunal.

230. The Anderson case highlights a flaw in the 2015 Act. The flaw is that the Tribunal does not have power, at the request of an owners corporation, or other interested person

such as a lot owner who obtained orders requiring repairs to common property, , to impose a monetary penalty on a person who breaches an order made by the Tribunal under the 2015 Act such as an order for the person to comply with a by-law.[1] This is a significant flaw in the 2015 Act which the introduction of SSMA §247A by way of the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* seeks to correct.

231. There is another very substantial defect in relation to the enforcement of Tribunal decisions. The renewal process under *Civil and Administrative Tribunal Act 2013* Schedule 4 – Consumer and Commercial Division, Part 5, clause 8 has proven to be an inadequate means of enforcement.

232. By way of example, there has been one case where a lot owner of a penthouse suite suffering severe water ingress, reached an agreement at a mediation for repairs. The agreement was not honoured by the owners corporation. Subsequent proceedings were brought and consent orders were entered into, with time-bound requirements for the owners corporation to conduct specific repairs. Those orders were only complied with in part when renewal proceedings were commenced, but the renewal proceedings have now extended in excess of one year with multiple adjournments obtained by the owners corporation, with the owners corporation now contending that it does not need to do all of the work to which it consented in the previous orders. Meanwhile, the lot owner has to contend again that he does not have a safe, secure and watertight home. The renewal process is a profoundly inadequate enforcement mechanism, and in our experience is not managed well by the Tribunal.

233. Where a Tribunal order is flouted, there needs to be a mechanism for the Tribunal to certify its orders and reasons so that the certificate can be filed in the Supreme or District Court, whereupon the applicant can to access the relevant Court's enforcement processes.

Question 85 – Preserved by-laws

Limit the capacity to challenge pre-2016 by-laws to avoid regulating retrospectively

234. The present transitional provision in SSMA Schedule 3, Part 2, clause 4(2) which preserves the validity of bylaws which came into force prior to 30 November 2016 should be preserved. However, this should only mean that such a bylaw is considered valid as a matter of law, and thereby not unconscionable on its face. If it becomes unconscionable in the way it is administered, it should be subject to challenge under section 150.

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[1] We acknowledge that this section of the submission is drawn from JS Mueller & Co Update published shortly after the decision in Anderson was issued.

Question 86 – Model By-laws

We favour the use of model by-laws for different types of scheme

235. We are of the view that model bylaws should be included in the regulations, and they should be different for commercial, residential and mixed-used schemes.

236. This is so even though there is but a limited function of model by-laws. Model by-laws do not have to be used by schemes initially and they can be changed subsequently. As a result, if the Government thinks that an issue is fundamentally important, it should not be placed in model by-laws. Changing the model by-laws in relation to pets is a case in point. Schemes can just exclude the model by-laws.

Questions 87-90 – Pets

Regulate behaviour not pet ownership

237. The Government has now decided as a matter of policy that:

    237.1 the default position that lot owners can have any animal as a pet; and

    237.2 bylaws can only regulate keeping of the animal if keeping the animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property: *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021*.

238. This goes well beyond the NSW Court of Appeal decision in Cooper v Owners SP58068 [2020] NSWCA 250 which admittedly did not provide a clear standard for determining what types of bylaws are harsh, unconscionable or oppressive. The simplified explanation provided at page 47 of the discussion paper underplays the internal inconsistency between the judgments of the different member of the Court of Appeal.

239. And the provision in SSMA Schedule 3, Part 2, clause 4(2) which preserves the validity of bylaws which came into force prior to 30 November 2016 remains unaffected by the change, passed by Parliament on 16 February 2021, but not yet proclaimed.

240. Also, the animal and assistance animal provisions of the SSMA need to be completely reconsidered. They are currently unworkable in a number of ways.

    240.1 Under the *Disability Discrimination Act 1992* (Cth), assistance animals have to be trained to alleviate a disability, but they do not have to be professionally trained: Forest v Queensland Health [2007] FCA 936. This is often misunderstood. The definition causes problems in strata schemes if someone wants to get a dog or other animal to alleviate a disability, that they intend to train themselves. At the point they acquire a puppy, for example, it cannot be trained to alleviate a disability and thus is not an assistance animal under the *Disability Discrimination Act*. As a result, the puppy can be excluded from a strata scheme pursuant to the power to regulate and/or ban animals and the person with a disability is denied an assistance animal.

240.2 Other widely misunderstood issues in relation to assistance animals are that animals have to be dogs or that they have to be on a leash. They do not: Sheehan v Tin Can Bay Country Club [2002] FMCA 95, [24].

240.3 These and other problems in relation to assistance animals could be entirely avoided if schemes did not have the power to ban or approve animals. These problems only arise because private citizens (members of owners corporations) are given inappropriate powers to regulate their neighbour's private lives and the keeping of pets.

241. Requiring owners of assistance animals to provide highly personal, private medical information to their neighbours is a gross abuse of privacy. Further legal analysis is needed before a definitive statement can be made, but it is likely that SSMA §139(6) is invalid as a result of inconsistency with the *Privacy Act 1988 (Cth)* and §109 of the Australian Constitution.

242. Members of owners corporations lack any qualifications to make an assessment about whether something is a disability under the *Disability Discrimination Act* or whether an animal is trained to alleviate that disability. Section 130(6) should be repealed and it is inconsistent with new §137B. The requirement to provide neighbours with medical information would be entirely unnecessary if schemes could not ban or approve pets. If all residents of strata schemes could keep pets, subject only to regulation when specific pets cause others problems, no one would need to go through the highly invasive, inappropriate and possibly illegal process of having to prove their animal was an assistance animal.

243. If legislation is designed to solve problems, it must focus on the problem. The problem with pets is not that someone may "*keep*" a cat or bird or a pig that never leaves their apartment, the problem is that some pets, can disturb residents with noise or other behaviour. As a result, the legislation should focus on the ability of schemes to regulate problem behaviour or to exclude specific animals who have caused problems. It should not sloppily regulate all animals because a minority are a problem. Overreach is an attribute of badly drafted legislation.

244. New §137B, once proclaimed, turns on the keeping of an animal, not on regulating nuisance behaviour. Its broad permissiveness is ripe for abuse. Should pigs be allowed to live in building where religious sensibilities are offended? Should animals which usually reside in a zoo (and are not common pets) benefit under §137B. These and related issues need to be carefully and quickly addressed.

245. The *Strata Scheme Management Act 2015* already amply regulates problem animals. SSMA §153 prohibits any owner or occupier from:

245.1 Using their lot property in any way that causes a nuisance or hazard to the occupier of any other lot – prohibits barking, howling etc in a lot;

245.2 Using common property in a manner than unreasonably interferes with the use or enjoyment of the common property – defecating, aggressive behaviour etc;

245.3 Using common property in a manner that unreasonably interferes with the use or enjoyment of a lot – barking, howling etc on common property.

246. Further, SSMA §158 empowers the Tribunal to order the removal of an animal that is causing "*a nuisance or hazard to the owner or occupier of another lot or unreasonably interferes with the use or enjoyment of another lot or of the common property*."

247. These provisions already provide strata title residents with a much higher level of protection than residents of any other housing. Barking dogs and roaming cats can disturb residents of terraces and freestanding housing. A dog barking in a backyard is just as audible for neighbours as a dog barking inside an apartment. Residents of non-strata property have no ability to regulate their neighbours' pets. Their only remedy is to make a complaint to the local council. Strata owners can use this avenue too, in addition to orders and fines under the SSMA.

248. The SSMA should be further amended to prohibit schemes pre-emptively approving or disapproving any pet. Strata schemes should only have the power to regulate activity or behaviour that actually causes unreasonable disturbance to others. Dogs persistently barking or defecating on common property is behaviour that unreasonably disturbs others and can rightly be regulated under SSMA §§153 and 158. A dog on a leash travelling obediently in a lift or walking across common property or a cat living inside a private apartment is not activity that disturbs others and the law needs to be reformed accordingly.

249. Finally, we observe that SSMA §157 continues to limit the Tribunal's power to permit an animal to be kept on a lot or common property to schemes where "the by-laws permit the keeping of an animal with the approval of the owners corporation and provide that the owners corporation cannot unreasonably withhold consent to the keeping of an animal." This does not sit well with well new §137B.

Question 91 – Short Term Letting

Simplify the regulation of short-term letting

250. Short-term letting is a matter for planning law, not strata schemes. It cannot be the case that an owner can buy a property that is legally able to be used for short-term letting, and then their neighbours strip them of that right. That is no different to a commercial owner purchasing a food outlet at the base of a strata scheme, only to have the owners corporation create a by-law banning commercial use.

251. The use of property is a matter for public planning law. Problems with Airbnb etc are a result of a failure of planning law, which has either not been enforced by owners corporations or strata owners (who have standing to do so) or is insufficiently clear about whether it captures Airbnb.

252. SSMA §137A is confusing and impractical. It leaves to owners corporations the task of defining what is a term "*principal place of residence*." We recommend that the SSMA

define the term "*principal place of residence*" to have the same meaning it has under s 3 of the *Land Tax Management Act 1956 (NSW)*, that is:

> *The Principal Place of Residence of a person means the one place of residence that is, among the one or more places of residence of the person within and outside Australia, the principal place of residence of the person.*

Already established principles of interpretation will then apply.

253. In our view, a clear blanket rule allowing or disallowing short -term letting is needed.

Questions 92-93 – Record Keeping

254. Issues around record keeping do not concern the state of the legislation. They more often concern compliance by strata managing agents and in owner-operated strata schemes, an understanding of what compliance is required.

255. The keeping of electronic records remains optional, and should remain optional. However, where electronic records are kept in a readily accessible format, backing them up should be required. Where paper records are kept, keeping them in a secure and firesafe waterproof location should be required.

Question 94 – Inspections of Strata Records

Introduce limited, reviewable privacy rights

256. In our experience, there are two significant issues that have arisen in relation to inspection of strata records.

257. The first issue concerns privacy. At present, all documents and records including correspondence with lot owners, except only secret ballots (once the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* commences) remain available for inspection: Walker v Owners Strata Plan No. 1992 [2020] NSWCATAP 192.

258. Sometimes correspondence concerns sensitive personal information. For example, a person with a disability requiring an assistance animal may well record the nature and extent of their disability. This is sensitive information, and sometimes concerns mental health information.

259. Within limits, appropriate privacy protections should be introduced. There necessarily will be some information (not just secret ballots; for example, sensitive private medical information) which should only be released for inspection on a Tribunal order, and not as a matter of right. There is also some information which should not be released at all. This would require a further amendment to SSMA §182 beyond that which appears in the *Sustainability Infrastructure Bill.*

260. That said, basic information such as names, addresses and email addresses should be released as a matter of right. It needs to be amended to make it clear that the email address of lot owners provided to the strata manager must be provided to lot owners

who make an application to the strata manager or secretary for a copy of the strata roll. Too many strata managing agents refuse to provide the email address based on the grounds of "*privacy laws*".

261. There should be added to the persons with the right of inspection, any person who has exchanged contracts for the purchase of a lot or their agent. At present, most schemes permit inspections of records by agents acting on behalf of intended purchasers. However, their right to inspect needs to be properly enshrined.

Clarify where inspections of records occur

262. Secondly, the default place for inspections should be an accessible place and usually that will be the office of a strata managing agent if there is one, or at a place within the scheme designated by the Secretary where there is adequate access, lighting and facilities for the inspection to be undertaken. The lot owner and the owners corporation may agree on a different location. But SSMA §183(1) needs to be amended to ensure that the place of inspection is accessible and appropriate.

Question 95 – Strata Information Certificates

263. Strata information certificates are quite useful and as supplemented by the right of inspection, appear to be sufficient.

Question 96 – Giving Tenants the By-laws

Clarify what must be given to tenants

264. The obligation of a landlord to provide a tenant with a copy of the bylaws and any strata management statement is an important one. The obligation should apply to the registered bylaws and any registered strata management statement. Particularly if our recommendation above requiring registration within three months rather that six months is adopted, the risk of these bylaws not being up to date is significantly reduced.

Question 97 – Information About Tenants

Introduce annual reminders

265. Notice of new tenancies are more often given when a landlord employs a real estate agent to manage their tenancies. Private landlords need to be reminded of the obligation. Failure to provide the notice is seldom intentional, but usually results from not knowing of the requirement. It would be useful if, when annual general meeting notices go out, they would include a reminder of the need to provide these notices. At least that way, if a notice has not been given it can be given late, thus, keeping the owners corporation properly informed.

Question 98 – Service of documents

266. We do not at present see a need to reform the provisions relating to service of notices.

Questions 99-100 – Signatures and Seals

Two to sign should be the rule

267. The seal of an owners corporation is usually kept by a strata managing agent, or if there is none, by the Secretary.

268. The need for a seal can be abolished. We agree that the need for the common seal is historic rather than current. There is significant value in abolishing it altogether. If this is done, all documents should be required to be signed by two signatories who may be two of the officers of the owners corporation or one of the officers and a strata managing agent.

269. In our experience, there have been many occasions when strata managing agents apply the seal to a document under delegation and without the strata committee even knowing this has been done. If the seal is retained, the only circumstances where a strata managing agent should be permitted to apply the seal with only their own signature is the circumstances where the owners corporation has specifically authorised that to occur for a particular document or transaction.

270. Whether or not the use of the seal is abolished, the owners corporation should be required to keep and up to date register identifying not only the strata roll, but the elections of office bearers and strata committees.

271. The Secretary should be required to keep that register up to date, and the register should be searchable.

272. If two persons named on the register have signed a document, there should be a presumption that the document has been validly executed.

273. However, as owners corporations are not engaged in business transactions generally, importing the indoor management rule would be inappropriate. The presumption should extend to no more than that the signatories are the correct signatories, and the document has been validly executed. It should be a rebuttable presumption. That way, in case of fraud or misuse of the power of assigned documents, an owners corporation can exercise its right to challenge the validity of the document. There is a slight disadvantage to third parties in taking this approach insofar as a third party may have relied on a document to its detriment and, for example, provided goods and services. Such a third party who is a goods or service provider would still have a *quantum meruit* or *quantum valebat* claim in relation to being paid.

274. Once the foregoing is accepted, substantial reform to SSMA §273 will be required. In particular, §273(5) needs to be amended. Requiring proof of fraud in circumstances where a strata managing agent has affixed the seal without authority leaves an owners

corporation exposed to third party claims in circumstances where the liability should rest with the strata managing agent and not with the owners corporation. If, as suggested above, a strata managing agent can only ever sign if counter-signed by an officer of the owners corporation, the risk is reduced. Even then, if those two persons were to affix the seal or sign on behalf of the owners corporation without having been authorised to do so, it is they who should be liable and not the owners corporation in respect of labilities to third parties.

Question 101 – Initial Period Provisions

275. Except as stated in relation to building defects and other developer disclosures discussed elsewhere in this submission, we do not recommend changes to the initial period provisions.

Questions 102-108 – Renovations and Additions to Common Property

SSMA Part 6 is in need of a series of improvements

276. The legislation relating to work on common property, both in respect of §108 and 111 of the *Strata Schemes Management Act 2015* and common property rights bylaws needs a series of improvements.

277. Section 126 also comes within this compass. It is unclear to us why there should be a different process for approving work in advance as opposed to approving work retrospectively. Special resolutions should be required for either and detailed disclosures, particularly in relation to impacts on the structure of the building, should be required for either.

278. We note also that the classification of minor renovations is not working as it was intended. Permit us to give but one example. Renovating a kitchen is considered a minor renovation. Renovations of a kitchen almost always include waterproofing work. Once the waterproofing work is required, a §108 resolution is needed despite the classification of kitchen renovations as minor. We are of the view that kitchen and bathroom renovations should be removed from the "*minor*" classification.

279. There also are definitional problems. For example, the term "*reconfiguring walls"* in s 110(3)(c) 2015 SSMA needs to be defined. This meaning is unclear. Does it mean: (i) removing a wall, (ii) making an archway in a wall, (iii) making the opening in a wall even bigger such as to hold a larger window than the window currently installed, or (iv) relocating a wall, or something else.

280. Further, owners corporations should not be permitted to expand the list of minor renovations. We have reviewed the suggestion at page 55 of the discussion paper for changes, and agree with each of them.

281. Finally, as to a matter not raised in the discussion paper, the provisions which established a regime for owners corporations to deal with goods abandoned on common property

and motor vehicles illegally parked or otherwise obstructing common property – SSMA §1125 and SSMR clause 34 were repealed by the *Fair Trading Legislation Amendment (Miscellaneous) Act 2018*). When the provisions commenced in November 2016, many communities adopted by-laws reflecting the provisions. Those by-laws are now otiose.

282. Owners corporations' rights to deal with these matters have now been subsumed within the *Uncollected Goods Act 1995*. This lengthy and complex regime is not appropriate in the community living context, where goods are regularly abandoned on the common property by vacating tenants and there are very limited options to deal with parking violations.

283. These important provisions should be reinserted and consequential amendment will also be required to the *Uncollected Goods Act 1995* to remove reference to the *Strata Schemes Management Act.*

Questions 109-110 – Parking

There needs to be significant reform to the enforcement provisions in the legislation.

284. Parking on common property is a particularly ripe source of disputes within owners corporations. Very few owners corporations recognise that parking must comply with any conditions in a development consent.

285. Illegal parking on common property is a frequent daily problem in Sydney and with more cars and people daily it will get worse.

286. Almost all councils in New South Wales decline to agree to entry into a car parking licence between them and the owners corporation. That licence agreement (if implemented) involves the council policing the area in question. This provision in SSMA §112 is therefore not operating as intended.

287. When parking problems are experienced, they require prompt or immediate resolution. The only way enforcement has been promptly satisfied in the past is by having services provided by private contractors or towing companies such as:

    287.1 towing away of vehicles; and

    287.2 wheel clamping.

288. Once this becomes widely known in the community, persons will be much more observant in regard to parking prohibitions. The Government would need to regulate the fee payable to regain their vehicle.

289. Enforcement is also a significant issue. Neither bylaws nor Tribunal orders are easily enforced for the reasons set out above. As recommended above, there needs to be further reform to the enforcement provisions in the legislation.

Questions 111-116 – The Statutory Duty to Maintain and Repair

The duty is clear, but the remedies need reform

290. Another significant and routine area for disputation concerns compliance with subsections 106(1) and 2016(2) of the *Strata Schemes Management Act 2015*. Far too often, we, as practitioners, see owners corporations flouting their responsibilities. There are even cases where owners corporations are advised that the duty is only enforceable before the Tribunal, and Tribunal orders are difficult to enforce.

291. As to the limits on claims for damages, particularly now that the NSW Court of Appeal has determined that the Tribunal has an unlimited, in money terms, jurisdiction in this regard, it is our view that the damages provisions should be removed from §106 altogether. When the suggested reforms to the jurisdictional provisions around §229-241 are implemented, rights to claim damages from the Tribunal should be addressed there. In our view, the Tribunal with jurisdiction to award damages should not be greater than that of the Local Court. When damages are claimed beyond that sum, parties should be free to approach the District Court or the Supreme Court of NSW without facing the automatic costs allocation under §253 of the *Strata Schemes Management Act 2015*.

292. Once appropriate jurisdictional limits and allocations are undertaken, a claim for damages should be subject to the same limitation period as any other common law tort claim for damages, namely, six years.

293. Then, there needs to be better definition of when the limitation period commences.

294. For example, in the case of water ingress does the limitation period commence on the date that water entry is seen entering the lot? Or when lot property is first damaged? Does a new limitation period commence each time water enters/damages lot property?

295. Loss might only be incurred once an owner incurs cost in fixing damaged lot property. Surely, that cannot be when the limitation period commences.

296. In our view, the Act also should embed the three key propositions adopted in Owners - Strata Plan SP20211 v Rosenthal [2018] NSWCATAP 243, to the effect that to recover damages for breach of the §106 duties, an applicant must demonstrate that (i) the breach of duty arose after 30 November 2016, (ii) the loss must be demonstrated to have been caused by such a breach, and (iii) the loss was objectively foreseeable when the breach occurred.

Add a power to make orders to undertake repairs to lot property incidental to common property repairs.

297. The right of owners corporations to resolve that a particular item of common property is not to be repaired is an important one. Sometimes there is common property that is neither utilised by, nor affects the enjoyment of, the scheme by lot owners. However, there have been abuses. One abuse that we have identified occurs when an owners corporation simply declares an entire class of common property to be beyond the repair

obligation without specifying any particular items. Another abuse is the failure to give reasons as to why an item should not be subject to the duty of repair. Much as additions to common property should require structural engineering certification of no adverse impact on the structural integrity of the building, any decision not to repair should be subject to a similar requirement. There also needs to be clarification as to the extent of this power.

298. Where an owners corporation needs to pursue an owner for damaging common property, the simple practical solution in most cases is for the owners corporation to undertake the necessary repair and have the right to charge the owner for the amounts expended by the owners corporation. Non-payment should have the same consequences as non-payment of levies. That is, an owners corporation continues to have control over the work done on the common property, and can seek a money order against an owner who has damaged common property rather than seeking that a lot owner undertake work on common property.

299. Many of us have experience with claims concerning building defects, and we are of the view that central to addressing this issue is the principal that the owners corporation should be in control of work done on property, and not lot owners.

Authorise replacement of an asset instead of repair where replacement is a more economically sound long-term option.

300. The last, but by no means least, issue to be addressed in relation to SSMA §106 is whether the duty should be limited to the minimum works need to conduct a repair or should the statute authorise replacement of an assets (for example a lift) instead of repair where such a replacement is not strictly necessary as a repair but is a more economically sound long-term option. This would overcome the effect of Glenquarry Park Investments Pty Ltd v Hegeyesi [2019] NSWSC 425. Following that decision, owners corporations would require a special resolution under §108 to make the economically sound decision to replace rather that repair an assets which will require ongoing repairs.

Questions 117-121 – The Initial Maintenance Schedule and Capital Works Plans

Stronger minimum content standards are long overdue

301. Developers should be required to provide a capital works plan for the building in exactly the same way as owners corporations are required to prepared capital works plans. The content of those plans should be prescribed by regulation. At present, there is a degree of under-prescription, and therefore far too much variation as to what is included in capital works plans. For example, we have seen plans prepared without reference to any site inspection or diagnosis of defects. Stronger minimum content standards are long overdue.

302. Furthermore, the levies should be set so as to reflect that which is set out in the capital works plan.

303. For example, capital works plans should be signed-off by a master builder or structural or civil engineer. They should be required to identify all works which may reasonably be anticipated for the common property over the life of the plan. The developer should be required to estimate the costs of complying with the initial capital works plan based on commercially reasonable estimates in respect of which the developer has a documented factual basis for the estimated levies. The documents should be handed over to the owners corporation in preparation for the first annual general meeting.

Strengthen owners corporations' rights in relation to long-terms debts incurred by developers

304. SSMA §26 only partially overcomes the effect of Bondlake Pty Ltd v Owners - Strata Plan No 60285 (2005) 62 NSWLR 158 at [34], which is to leave an owners corporation debt-ridden into the future, at least where the developer corporation has ceased to exist or cannot pay. It is far from clear why an owners corporation should not be able to terminate a contract entered into in breach of SSMA §26(1) as long as already accrued amounts payable to an innocent third party are paid.

305. Escaping long term, continuing debt under a contract which lot owners would not have approved, but which the developer did approve, ought to be permitted. Further the developer should be required to disclose to the third party that any contract it enters into in the initial period is thus terminable. Failing to do so would constitute misleading conduct under the Australian Consumer Law.

Question 122 – Sustainability Infrastructure Legislation

Require inclusion of a requirement to specifically address sustainability infrastructure upgrades in capital works plans

306. In relation to sustainability infrastructure, whilst there have been important structural reforms introduced, which we applaud, more is needed.

307. Top of the line will be financial incentives to make buildings energy efficient. That, of course, is beyond the scope of the process of reforming the two statutes. However, it is difficult to predict what will be suitable for each particular building, and therefore setting out model bylaws or mandating particular types of work that will be acceptable or unacceptable is a difficult task, and not recommended.

308. However, requiring owners corporations to include a requirement to specifically address sustainability infrastructure upgrades (not limited to electricity meter boards) in their 10-year capital works funds plans, and each review of those plans is an important reform which we support. As noted above, this requirement should be included in the first capital works plan to be provided by the developer. More importantly, developers should be required to certify the degree to which the buildings that they construct are energy efficient.

Question 123 – Insurance

Empower cross-funding of insurance premiums

309. Insurance is probably the most important item for which levies should be raised and paid.

310. Issues arise when one lot owner defaults in the payment of their levies and there are not enough funds to meet the obligations in SSMA §160(2) (regardless of the defence in SSMA §160(3)). When premiums are not paid, insurance is not effective. There is a real need to empower owners corporations to borrow funds to meet insurance premiums, or to allow any non-defaulting lot owner to pay the unpaid portion of the insurance premiums and recover the defaulting lot owner's share with interest and costs.

Questions 124-125 – Utilities Supply Contracts

311. We applaud the introduction of SSMA §132A.

312. Also, the "*safe harbour*" for embedded electricity networks enables developers to reduce their upfront costs in order to reduce the prices of lots by splitting the capital cost over the term of an embedded electricity network contract. At a minimum, the capital costs recovery should be limited to the life of the first 10-year capital works plan. At the end of that 10 years, the contract should be up for renegotiation, because at that stage capital works costs will have been recovered.

Questions 126-131 – Building Managers

Fully empower owners corporations around contracting with building managers

313. Whilst the 2015 reforms improved the regulation of building managers, further improvements are needed.

314. New South Wales should adopt a similar provision to the *United States Uniform Common Interest Ownership Act 1982* which provides that all contracts made by a developer can be terminated by the owners corporation on 90 days' notice. This solved problems the United States had with a range of developer-made contracts, including management contracts. It also has the economic effect of requiring capital costs incurred by suppliers to be paid by the developer and incorporated into sale prices. Allowing long term provider arrangements enable, for example, an electricity provider, who has provided an on-site substation to recoup set-up costs over the life the contract, instead of in the sale price. Sale prices are then artificially lowered.

315. The people who pay under a contract should be the people who negotiate a contract. Only they have a true incentive to negotiate it properly. As long as developers can create contracts that they will not pay, whether in strata schemes or stratum subdivisions, there will be unnecessary disputes over contracts that bind owners corporations and stratum owners.

316. The more difficult question is whether to point such contract terminations from when the initial period ends, or later, such as after 5 years.

317. Disclosure documents are ironically both complex and incomplete, and as a result, purchasers are unable to make informed choices. Further, choice only exists if there are alternatives. If strata schemes are bound long-term by developer-made contracts, there are no alternatives. That is, there is no strata property that someone can purchase that will be free of management or other contracts that favour a manager or developer.

318. Allowing owners corporations to terminate developer-made contracts will not harm the building management industry. It will not reduce the amount of work available, which exists by virtue of the complexity of modern buildings. It will simply mean that building managers and other contract holders have to negotiate contracts directly with the people to whom they are providing a service.

319. We recommend that similar provisions be implemented in relation to the termination of building managers to those which we recommend above in relation to the termination of strata managers. There is one difference of course, building managers do not manage owners corporations' funds.

320. Next, the conflict of interest disclosures from building managers needs to be extended to their relationship with the strata manager for the building, if there is one. From time to time, it occurs that strata managers have incorporated or develop a particular relationship with certain building managers, and recommend them for appointment to owners corporations. Owners corporations are entitled to know whether some "*sweetheart deal*" is in place.

321. SSMA §72 should be augmented to provide that a building management agreement can become unconscionable in operation as well as on its terms, and there should be a specific power in the hands of the Tribunal to order damages up to the limit of the Local Court's jurisdiction in respect of damage to a strata scheme building caused by a building manager in breach of the building manager contract. That way, the action for termination, which goes to the Tribunal, does not need to be accompanied by a separate action in a court to recover damages for contractual breach or negligence.

322. In relation to the appointments of building managers, we agree with the recommendations at page 63 of the discussion paper. We recommend a maximum five-year term for contracts.

323. Where an owners corporation has made a delegation to a building manager to subcontract certain services, in most cases those services are routine matters in respect of which subcontracts are often utilised as an alternative to employing staff.

324. When a building manager is employed, the building manager should be required to disclose how it will fulfill contractual obligations, the extent to which employees or subcontractors will be used and provide an estimate of the likely costs (which estimate must be dated if the costs vary by more than 15-20% in any year).

325. Building managers, unlike strata managing agents, are not agents for the owners corporation. They are independent contractors. They should not have a delegation to enter into contracts without the approval of the strata committee, or, if there has been an adequate delegation, the strata managing agent.

326. The concern around conflicts of interest arises largely from those building management contracts which appoint a building manager as an agent for the owners corporation. Where the building manager is an agent, the usual common law agency duties apply.

327. The real question seems to us to be whether building managers should be allowed to be agents for an owners corporation, or should be required to be independent contractors subject to supervision by the strata committee or the strata managing agent. Where the law to require them to be independent contractors and not agents, and to not be empowered to make decisions on behalf of the owners corporation, many of the difficulties around conflicts of interest would disappear, and the need to regulate under the *Property and Stock Agents Act* or the *Home Building Act* would become otiose.

328. Next, there is much merit in identifying a minimum list of duties which all building managers must comply with as a schedule to the amended legislation. These would be statutory warranties and undertakings which could not be contracted out of. Compliance with applicable laws and regulations, especially in relation to safety, would be included. The duty of care could not be contracted out of. All employees and subcontractors who work on a building would have to be licensed. These are but some examples.

329. SSMA §67 has been construed as directory only: Premium Building Management Pty Ltd v Owners Strata Plan 69204 [2019] NSWDC 312. As a result, an owners corporation can be exposed to paying for work in circumstances where they have not approved contract terms for a building manager.

330. In addition to taking our preferred position that building manager agreements cannot be contracts of agency, it is our view that the legislation should provide that a building manager not commence work in a strata scheme until such time as the instrument in writing appointing the building manager has been duly executed by the owners corporation.

Questions 132 and 134-138 – Dispute Resolution Processes

Redefine the Tribunals' powers

331. The dispute resolution processes through Fair Trading and the NSW Civil and Administrative Tribunal have proven to be slow, and of variable quality.

332. It is reasonably plain to us as practitioners that there are significant delays in the system, largely due to both the Department and the Tribunal being very much under-resourced.

333. Just as importantly, the quality of Tribunal Members is highly variable. There is little consistency in decision making or in the way in which cases are managed.

334. And, the NSW Court of Appeal decision in Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284 has exposed substantial defects in the way in which the legislation governs the Tribunal's powers.

335. We particularly note that whilst mediation as a process is generally effective, a compulsory conciliation process similar to that which hitherto operated in the industrial relations area is likely to be far more effective. Attendance would be compulsory, and the conciliator would have to certify that reasonable efforts have been made to settle the dispute but were unsuccessful before a dispute proceeds onto a final hearing before the Tribunal. Too often, either lot owners or owners corporations refuse to attend mediation, and the mediation process is simply a means for delaying a necessary Tribunal hearing.

336. A conciliation process should be the subject of a direction, at the first directions hearing held by the Tribunal, rather than prior to the Tribunal process commencing. That way the Tribunal has control over the manner, scope and timing of the conciliation process and can set time limits for it. By placing the power to order the conciliation in the hands of the Tribunal, the seriousness with which conciliation must be undertaken will be further emphasised to participants.

337. If proceedings are not resolved through compulsory conciliation, thereafter should follow the event. This can be achieved by an amendment to rule 38 of the *Civil and Administrative Tribunal Rules*.

Strata disputes are commercial and property disputes to which ordinary costs rules should apply

338. There also needs to be a recognition that most owners corporations are insured for legal defence costs but lot owners are generally uninsured. Were strata disputes removed from the operation of §60 of the *Civil and Administrative Tribunal Act 2013* so that in the ordinary course costs follows the event, lot owners would think twice about commencing proceedings inappropriately, and owners corporations would think twice about defending proceedings where a claim genuinely ought to be admitted. It will also act as an incentive for parties to settle. The §60 costs rule actually operates as a disincentive to settlement.

339. We also strongly recommend that the Tribunal separate a Commercial and Property List from its Consumer List. That way it would be possible to establish a separate costs rule for the Commercial and Property List, with the no-costs approach continuing to apply in the Consumer List.

340. We have already referred to the widening of the Tribunal's jurisdiction under §232 whereby most strata disputes are now resolved by the Tribunal. However, §90 deals with contributions for legal costs awarded in proceedings between owners and owners corporations and subsection (2) only refers to the "*court*" and not the "*court or Tribunal*".

341. Section 90 replicates §229 under the *Strata Schemes Management Act 1996*, however, under the *1996 Act* the adjudication system was in place (where Adjudicators did not have the power to award damages or costs) and many disputes, for example a claim for

damages, were dealt with by the Courts. Now, most cases are dealt with by the Tribunal and therefore this provision should be amended to also expressly empower the Tribunal to make an order that that any money (including costs payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order so that injustice does not arise, for example, by a lot owner who obtains an order for damages and costs having to contribute to the owners corporation's payment of damages or costs to the lot owner.

342. Sadly, by reason of the under-resourcing of the Tribunal (and Fair Trading), and a number of inadequate processes around the setting down of matters for hearing, it is often quicker and cheaper to conduct proceedings in a Court than in the Tribunal.

343. In a court, parties' practitioners, or the parties themselves, can attend a listing hearing with a judicial officer, diaries in hand, and agree upon hearing dates. In the Tribunal, practitioners are often required to provide unavailable dates, but the registry sets down hearing dates without reference to those unavailable dates.

344. Next, many strata matters require more than one or two days of hearing. The Tribunal's practice often is to not allocate more than one or two days at a time. This means that the first day or two of hearing occur, there is then a delay of many months before the hearing resumes, which creates more cost and unsatisfactory delay for the parties. Finally, the approach of Tribunal members towards case management varies widely. Some are concerned to move matters forward efficiently and put pressure on the practitioners to comply with strict timetables. Others allow adjournments to be had without any costs or other penalty, often for reasons which would not be accepted by a court. There is a serious need to develop consistency across the Tribunal Members hearing strata disputes.

Reintroduce adjudications for the simpler issues

345. There is also scope for reintroducing adjudications as a Tribunal process for simpler issues such as bylaw breaches. By resolving claims concerning a breach of bylaws "*on the papers*" costs will be significantly reduced. It is, of course, essential that both applicants and respondents be given an opportunity to put their cases as fully as possible on paper. Tribunal Members who adjudicate bylaw breach disputes should also have the power to refer the matter to the Tribunal where an oral hearing is appropriate. At least this way, some simpler disputes can be resolved more quickly at lower costs.

Simplify and clarify the Tribunals' jurisdiction

346. We recommend that there be substantial reform of the jurisdictional provision around SSMA §229-241.

347. The disparate provisions relating to the orders for the payment of money, compensation and damages should be replaced by a single power to order damages or compensation for breach of statutory duty. There should be a jurisdictional limit similar to that of the local court, namely $100,000 (as that limit presently stands). Claims in excess of

$100,000 should proceed in the District Court or the Supreme Court of NSW, as applicable, and section 253 should not apply to those claims.

348. The Tribunal should have jurisdiction to award damages for any statutory breach resulting in loss but limited to the jurisdictional limits of the Local Court.

349. Subsection 232(1) should be a power to resolve, or make orders in respect of, a complaint or dispute rather that to settle it.

350. Two significant changes should be made to the scope of jurisdiction.

    350.1 It should extend to any failure to comply with an obligation under the SSMA or under any bylaws or instrument referred to in the SSMA.

    350.2 The jurisdiction should be extended to any matter which is incidental to the exercise of another power held by the Tribunal to resolve a dispute. This will necessitate revision of subsection 232(7). That subsection at present requires a Tribunal not to exercise its powers if <u>both</u> another act confers jurisdiction on another court or Tribunal with respect to the subject matter of complaint or dispute <u>and</u> the Tribunal has no jurisdiction under a law other than the SSMA with respect to that subject matter. If another act confers jurisdiction on another court or tribunal, that should be sufficient for if that conferral of jurisdiction is exclusive to that court or tribunal. In our view, that is all that subsection 7 ought to address.

    350.3 The incidental power could be relied upon on in for example circumstances where an owners corporation is required to do extensive work on common property pursuant to its obligations to maintain and repair under SSMA §106. The necessary work would affect lot property, and at present the Tribunal does not have the power to order an owners corporation to do work on lot property. It should have that power in circumstances where work on lot property is incidental to the work on common property. Requiring such work to be undertaken in one line is cost-efficient. It also would remove some of the burden from subsection 106(5) insofar as work could be done to repair lot property without there needing to be a damages claim, at least in some cases.

351. SSMA §229 only provides for orders in respect to "*any ancillary or consequential matter*." A matter can only be ancillary or consequential if the Tribunal already possesses order making power in relation to the subject matter. As things presently stand, if there is no power to order an owners corporation to do work on lot property, there is no relevant ancillary or consequential matter in respect of which the Tribunal could order an owners corporation to do work on lot property either. For a matter to be ancillary, it must be ancillary to a matter that falls within the Tribunal's jurisdiction. This is an important reason why the incidental power needs to be added to section 232.

352. SSMA §241 empowers the Tribunal to order any person the subject of an application for an order to do or refrain from doing the specified act in relation to a strata scheme. This is analogous to a power to give injunctive relief but does not empower the Tribunal to

make orders about a subject matter for which it could not otherwise make an order. That is because the Tribunal does not have general supervisory powers over strata schemes: Walsh v Owners Strata Plan No. 10349 [2017] NSWCATAP 230 at [32]; Owners – Strata Plan No. 37762 v Pham [2006] NSWSC 1287 at [62]. Also see Hoare v Owners Strata Plan No. 73905 [2018] NSWCATCD 45.

353. There also is a need to amend SSMA §254(4) to give a Court or the Tribunal power to order differential contributions from lot owners where there is a differential impact of an order being made by the Court or tribunal. In Owners Strata Plan 85044 v Murrell [2020] NSWSC 20, Williams J emphasised that SSMA §254 applies only to an action taken by an owners corporation affecting all lot owners and it operates even if lot owners are affected differently to each other: Murrell at [162]. The power to allocate contributions differentially should be subject to the discretion of the Court or the Tribunal. It would enable justice to be done in unusual circumstances such as those which prevailed in the Murrell case.

Question 133 – Internal Dispute Resolution

354. Legal practitioners are seldom involved in internal dispute resolution under section 216. We offer no comments in that regard.

Question 134 – Fair Trading strata mediation

355. Our experiences with Fair Trading strata mediation are variable, but mostly unsatisfactory. They serve to delay dispute resolution, and very seldom are the mediators' appropriately trained for proactive.

356. The delays caused by mediation can be highlighted by a real example, An application for mediation was filed by a lot owner on 1 November 2020 in relation to a refusal by the owners corporation to authorise renovations to his lot. The application was not processed by Fair Trading until 22 December 2020 when it issued an invitation to the owners corporation to mediate on 23 March 2021. This means that the mediation will not be conducted until almost 5 months after the application was lodged. In the meantime, the lot owner cannot do the renovations and cannot make an application to the Tribunal. The delay is a barrier to justice.

357. We recommend adoption of the conciliation process set out above instead. However, if this recommendation is not adopted and compulsory mediation is to remain, Fair Trading should be properly resourced such that mediation can be conducted within 4 weeks of application so as to not prejudice parties to a dispute.

Question 139 – Penalties

358. The enforcement powers of the Tribunal are profoundly inadequate as set out above.

359. As observed above, the new §247A in the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* plugs a gap in the legislation, but does not address all the relevant issues.

360. Reliance upon contempt powers is also profoundly inadequate. Contempt is difficult to prove and the evidentiary standards are high.

Questions 140 – NSW Fair Trading's Role with Strata Schemes

361. In our experience, the officers in the Department of Fair Trading do their absolute best to assist the public and indeed practitioners with information about licencing, and their role within strata schemes. The critical problem that is experience is often one of delay, and that is largely due to under-resourcing of the Department.

Additional Matter – Prudential Provisions

362. When one considers the most unfortunate issues at Mascot Towers and Opal Towers, where lots have essentially become worthless, there is a real risk in those circumstances, and in other financially difficult circumstances, that an owners corporation will have very large liabilities to fund repairs and will be unable to collect enough in levy contributions from owners to meet those liabilities, even on a deferred basis. In those circumstances, given that the obligation to effect repairs is a strict one and cannot be deferred, the owners corporation is, for all practical purposes, insolvent. At present there are no provisions in place for resolving such an insolvency. There should be provisions around insolvent administration and winding-up of owners corporations. They will need considerable discussion and planning.

363. Owners have no recourse under the Home Building Compensation Scheme for apartment buildings four-storeys and up. Opal Tower has 36 storeys. This is a matter for reform of the Home Building Compensation Scheme.

364. One simple measure that can be introduced very quickly is to require both on establishment and every five years thereafter, when a capital works plan is being reviewed for example, that an owners corporation must certify its solvency to Fair Trading. Where no certificate is provided, Fair Trading ought to be able to intervene, and if necessary, have the power to appoint a compulsory strata manager, or at least be an applicant to the Tribunal for such an appointment.

Additional Matter – The Community Schemes Statutes

365. We note that the discussion paper mentions that the community schemes statutes be brought into line with the strata schemes statutes.

366. Once the present strata review is completed, the many, substantial improvements to the strata schemes legislation are likely to give rise to further improvements which can be made to the community schemes legislation.

Additional matter – Contracting for Legal Services

367. Following the decision in 2 Elizabeth Bay Rd Pty Ltd v Owners Strata Plan 73943 [2014] NSWCA 409, owners corporations can ratify contracts to retain lawyers. SSMA §103 is thus relevantly a toothless tiger. Further, the references to "*cost*" for example in subsection 2(b) should in fact be a reference to "*estimated costs*" because the section purports to deal with costs estimates that induce an owners corporation to retain services rather that the costs which are billed once the services have been provided.

368. SSMA §103 will not prevent legal proceedings being commenced or continued, and there is not penalty for breach. Where a general meeting is not called to approve the obtaining or continuance of legal services or proceedings, there is a real question as to whether or not a dissatisfied lot owner can approach the Tribunal under SSMA §231 for an interim order preventing the owners corporation from obtaining or continuing with those legal services. The Supreme Court, given the authorities, would be unlikely to grant an injunction. In this regard, see also: Owners Strata Plan 57164 v Yau [2016] NSWSC 1056.

369. In short, §103 has no teeth, and probably should be removed from the legislation.

370. If it is not removed, then it needs to be simplified to provide that a strata committee can approve retention of legal services in circumstances where there estimated costs to the owners corporation is likely not to exceed say $20,000, and a general meeting can approve for any amount above $20,000.

371. **Availability for Further Consultation**

We are available to assist with the subsequent stages of the statutory review process, and can be contacted through:

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Yours faithfully,

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