Some stakeholders have raised concerns about the costs involved in obtaining valuations to revise unit entitlements. In some cases, this may involve the valuer inspecting every lot in the scheme, which can be an expensive process (particularly for large scale strata schemes).

Other feedback suggests that a valuation of all strata lots may not make sense in certain circumstances. For example, if an owner wants to swap a private car space with a common property parking space, a valuation of all lots would be needed as this proposal involves common property. If this involved a 70-lot scheme, the costs of the valuation could outweigh the value of the parking space.

The lack of owner input in those valuations has also been identified as an issue. Owners who are unaffected by the strata plan of subdivision have no right to object to changed unit entitlements, except when the owners corporation considers the resolution to approve it. Some stakeholders are concerned that registration of a strata plan of subdivision could be delayed if owners with changed unit entitlements (but unaffected by the subdivision) do not agree to the proposed change in unit entitlements.

36. Has the requirement for a qualified valuer's certificate to determine unit entitlements resulted in fairer apportionment of contributions? Could this process be improved?

37. Are unit entitlement valuations too costly for the scheme? If so, what other ways could unit entitlements be calculated that is fair to all owners?

38. Should owners have a right to object to a proposal to change unit entitlements without the passing of a resolution, even if they are unaffected by a strata plan of subdivision?

39. Should the legislation provide an exception to the requirement for a valuation of all lots in the scheme in any circumstances? If so, what would those exceptions be? What is the alternative proposed method of altering the unit entitlements in those situations?

40. Should there be guidance for valuers in assessing strata plan unit entitlement valuations? If so, what guidance is required?

Strata Schemes Management Act 2015

Objects of the Act

One of the purposes of this review is to assess whether the policy objectives of the Management Act remain appropriate and whether the terms of the Act remain effective for achieving those objectives.

The introduction of this paper outlined 10 distinct policy objectives of the 2015 reforms and that those policy objectives are the yardstick by which the performance of the Management Act will be measured.

Section 3 of the Act also contains the objects of the Management Act, which are broad overarching principles that guide how the Act should operate.

The objects of the Act are to:

1. provide for the management of strata schemes, and
2. to provide for the resolution of disputes arising from strata schemes.

All 10 policy objectives of the 2015 reforms can satisfy either one of the two objects above. While the 10 policy objectives are not written into the Act itself, it is important to consider the merits of adding those sorts of objectives – or others – to section 3 of the Act.

41. Do the objects of the Act remain appropriate? Should further policy objectives such as those that guided the 2015 reforms be added to section 3 of the Management Act?

Managing the Scheme

Strata Committees and Meetings of the Owners Corporation

Strata committees

Role and size of committees

Strata committees are essential to the effective management of owners corporations. Under section 36 of the Act, the committee's functions are to make decisions on behalf of the owners corporation, except for matters that require a special or unanimous resolution. The committee is accountable to the owners corporation and the committee's decisions can be overturned by resolution at a general meeting.

There can be confusion among strata schemes about the powers that are automatically given to the committee, versus what powers need to be conferred on the committee by general resolution. For example, during the COVID-19 health crisis, some owners corporations were uncertain about the powers of their committee, including whether they alone could decide to close the pool or gym.

To help improve accountability, the Act requires the appointment of a chairperson, treasurer and secretary with their responsibilities detailed in sections 42 to 44.

Section 30 allows the owners corporation to establish a committee of up to nine members, and large strata schemes (100 or more lots) must have at least three members. The size limits are meant to prevent the committee from becoming unwieldy while also recognising the increased workload in large schemes. This complexity of work in large schemes suggests that perhaps larger committees should be allowed in those cases.

42. How well do you think the functions of the committee and office holders have been working?

43. Committees can be up to 9 people. Is this size limit working?

Duty and liability of committee members

Committee members are elected by the lot owners of the scheme, are almost always unpaid volunteers and the law does not require that they have any particular expertise in managing a strata scheme. However, the Act does set duties and standards of behaviour expected of committee members.

Under section 37, committee members have a duty to carry out their functions as far as practicable for the benefit of the owners corporation with due care and diligence. Importantly, section 260 provides that committee members are protected from personal liability if they act in good faith and for the purpose of executing a function under the Act.

Other Australian jurisdictions have taken different approaches to ensure committee members remain accountable. Queensland has a mandatory code of practice under Schedule 1A to the *Body Corporate and Community Management Act 1997* (Qld). The code of practice legislates grounds for removing committee members including failing to act honestly, fairly and with confidentiality, or not acting in the interests of the owners corporation.

44. Under the law, strata committee members have a duty to act in the best interests of the owners corporation and with due care and diligence. How well is this working?

45. Are there any other measures that would improve accountability of strata committees? For example, by adopting a mandatory code of conduct as in Queensland.

Eligibility for election and removal

Under section 31, lot owners and company nominees can be elected or appointed to the committee. Section 32 excludes certain persons from being appointed due to conflicts of interest, including building managers, people acting as agents for the leasing out any of the lots, and persons with connections to the developer that they fail to disclose.

Some stakeholders have indicated that the restrictions in section 32 may not go far enough, while others believe they are too strict and may prohibit some people who should be allowed to serve on the committee.

Sections 35 and 45 give the owners corporation the power to remove office holders and committee members from their position by passing a special resolution. The Act, however, is silent on the reasons or grounds for removal, as they could be many and various.

46. How well are the eligibility requirements for election to the committee working? How could they be improved?

47. Are clear grounds for removing committee members and office holders needed? If so, what should they be?

Meeting procedures

Meeting procedures of both owners corporations and strata committees have the force of law. Clear and legally binding rules create consistency and empower democratic decision-making by relying on easy to find rules.

Flexibility to change procedures – the COVID-19 lessons

The 2015 reforms streamlined and simplified meeting procedures while maintaining a format that was familiar to the strata community. The procedures are largely contained in Schedules 1 and 2 to the Management Act, with some additional provisions in the *Strata Schemes Management Regulation 2016* (the Management Regulation).

The COVID-19 health crisis in 2020 showed that some meeting procedures required by the Management Act are impractical and not flexible enough to changing circumstances. Having certain elements of the law contained in the Management Regulation would allow it to be changed more quickly as needed. The pandemic experience suggests that having meeting procedures in the Management Regulation rather than the Management Act would be beneficial.

Holding meetings and providing notice

The Act requires that adequate notice be provided to lot owners prior to a meeting so that they can attend and vote. There are three kinds of meetings:

- First annual general meeting – held when the developer hands control over to the owners corporation.
- Annual general meetings (AGM) – must be held once in each financial year.
- General meetings – can be held at any time during the year as needed.

<u>Agendas</u>
The Act sets out the items that must be included on the agenda of the first AGM, AGMs, and general meetings.

Building defects

Managing agents play an increasingly important role in the management of building defects.

Lot owners often rely on their managing agent to advise them on how to respond to building defects and how to navigate through the complex process of remediation. Stakeholder feedback received by the Government suggests that sometimes this may be more problematic than helpful. Most managing agents are not building consultants and may not necessarily have all the skills and experience to provide the right advice to lot owners.

Some stakeholders have suggested the Government consider mandating an accredited course for managing agents specifically focused on issues with newly constructed apartment buildings – most importantly, building defects. An agent who had completed the course could be accredited under the Property and Stock Agents Act as specialists in management of strata building defects.

This review seeks feedback on the merits of the suggestion for a building defects accreditation for managing agents.

72. How important is it for managing agents to have specialist knowledge about building defects?

73. What would you think of a proposal for accreditation of certain licensees under the Property and Stock Agents Act as strata building defects management specialists?

Finances

Financial functions and funds of the owners corporation

The financial functions of the owners corporation can be exercised by the treasurer, strata managing agent and any other persons with delegated authority.

Sound financial management is crucial for the owners corporation to properly maintain the strata scheme. To achieve this, the Management Act requires the maintenance of two funds:

- **Administrative fund**
  This is for day-to-day operating costs, such as payments for the managing agent or insurance premiums.

- **Capital works fund**
  This is like a savings account for future expenses associated with maintaining, repairing or improving the common property and was formerly called the ‘sinking fund’.

Transfer of money between funds

The Management Act is flexible in that it allows for money from one fund to be used to temporarily cover the expenses of the other fund if there is not enough money in the one fund.

Based on early stakeholder feedback, there are different interpretations of the rules for paying back the money to the other fund. A common perception in the strata community, including among strata lawyers, appears to be that the amount transferred between funds must be repaid to the other fund in its entirety within three months.

But section 76(2) of the Management Act instead states that the owners corporation must make a decision within three months about the amount that is to be levied as a contribution to the fund to reimburse the amount transferred.

74. How well is money being managed in the administrative and capital works funds by your owners corporation? Are any changes needed and why?

75. Owners corporations can use money from one fund to temporarily cover the expenses of the other fund. How do you interpret the rules about repayment of money transferred from one fund to the other fund? What should be the rule?

Levies and arrears levies

Levies are raised for both funds by calculating the estimates of actual and expected expenses of each fund. The expenses to consider include:

- Administrative fund: the day-to-day maintenance of common property, insurance premiums, recurrent expenditure, such as utilities, gardening and cleaning.
- Capital works fund: costs of acquiring or replacing personal property or fixtures, painting or repairing the common property, and future costs needed to meet the 10-year capital works fund plan.

If additional expenses arise that cannot be met from either fund than additional special levies can be raised.

After preparing the estimates, an amount is levied on each lot in proportion to the unit entitlement of the lot. If an individual lot owner uses their lot so it causes higher insurance premiums their contribution can be made larger to cover this additional cost.

The non-payment of levies adversely affects the ability of owners corporations to meet expenses. Late payments accrue simple interest at a rate of 10% if payment is not made within one month of it becoming due and payable.

Sometimes lot owners experience financial difficulties and are unable to make levy payments on time. The Management Act allows the owners corporation to determine by resolution that no interest will be imposed on a late payment. The owners

corporation can also decide to apply a 10% discount on contributions if paid on time and can also enter into payment plans with individual lot owners for up to 12 months.

If an owners corporation is having difficulty with a lot owner not paying their levies, it can apply to the Tribunal or the courts for an order that the lot owner pay the amounts owed.

76. How well have the laws on levies and arrears been working? Please explain why and suggest any changes.

Financial records and audits

The owners corporation is required to prepare clear and accessible financial information to make available to the lot owners.

This includes preparing financial statements and statements of key financial information under sections 92 to 94 of the Management Act. It also must keep receipts, transaction records and a levy register. Large strata schemes with budgets exceeding $250,000 must be audited each year. Audits are voluntary for smaller schemes.

77. Are any changes needed to how financial records are prepared, for example, for deposits and withdrawals for the owners corporation? Are any changes needed?

78. Is a $250,000 budget the right threshold for compulsory annual audits to be carried out? If not, what do you think is the right amount?

By-laws

Making and recording of by-laws

By-laws can be made for the management, administration, control, use or enjoyment of the lots or common property and must be consistent with the Management Act.

By-laws are also critical in governing unacceptable behaviour in a scheme, facilitating harmony among owners and enabling smooth administration of their scheme.

Initially, it is the developer who decides which by-laws will apply when the scheme is registered, and as a result the developer has a significant role in determining the future operation of the scheme. However, the scheme can choose to change its by-laws by passing a special resolution at any time.

In order to be legally enforceable, by-laws must be lodged with NSW Land Registry Services within six months of the passing of the special resolution adopting the by-laws.

The 2015 reforms to the Development Act introduced a requirement for all changes to by-laws to be registered on title as a consolidated list, rather than each separate

change being registered in isolation. This change has ensured that the land titles register concisely records in a single and readily accessible instrument all the by-laws of a strata scheme.

Clause 24 of the *Strata Schemes Development Regulation 2016* (the Development Regulation) provides some scope for the Registrar General to waive the requirement for consolidation where this would be onerous for the scheme, and where there are no more than five separate changes of by-laws recorded on title.

Section 139 of the Management Act restricts the types of by-laws that can be passed by owners corporations. For example, a by-law cannot restrict or prohibit children occupying a lot unless the strata scheme is a retirement village or is exclusively for aged persons. The restrictions also ensure an owners corporation cannot prevent an occupant from keeping a genuine assistance animal.

Pets and assistance animals in strata are discussed in more depth on pages 45 to 48 of this paper.

By-laws can be invalidated by the Tribunal if the Tribunal finds that the by-law is harsh, unconscionable or oppressive – this formulation was a key part of the 2015 reforms.

The NSW formulation of ‘harsh, unconscionable or oppressive’ provides narrower grounds for challenging by-laws, compared to Queensland strata laws, for example, which include the concept that by-laws must not be ‘unreasonable’.

The ‘harsh, unconscionable or oppressive’ test would be more likely to be satisfied when, for example, a by-law sought to remove existing rights of lot owners, whereas the ‘unreasonable’ test is based on what a reasonable person would think about the by-law.

Notions of ‘reasonable’ change over time and can be difficult to determine without legal challenge, unless the law sets out specific grounds for what would be considered reasonable or unreasonable.

An order from the Tribunal to invalidate a by-law that is harsh, unconscionable or oppressive can be sought from those entitled to vote on by-laws. This means that while tenants are required to comply with by-laws, they have little to no opportunity to challenge by-laws that that believe are treating them unfairly.

79. Could we make it easier for owners corporations to make by-laws? If yes, please tell us how.

80. By laws must be lodged with Land Registry Services within 6 months. Is this a reasonable time?

81. The Registrar General has the power to waive the requirement for by-law changes to be lodged all at the same time and instead allow changes to be lodged separately. Should there be changes to this power?

82. While owners corporations can make their own by-laws for their strata scheme, there are restrictions on the types of by-laws that can be made. What do you think about prohibiting 'unreasonable' by-laws?

83. If the law was changed to allow tenants to seek Tribunal orders challenging by-laws on the basis they are harsh, unconscionable or oppressive, how would this work in your strata scheme?

Enforceability

The by-laws of the owners corporation are binding on the lot owners and any occupiers of the scheme but only if they are validly made and lodged with NSW Land Registry Services.

Enforcement of a by-law requires a notice of non-compliance be issued to the owner or occupier, which is followed by a time intensive and complex process to obtain an order from the Tribunal.

This is particularly difficult when dealing with non-compliant tenants as they may only reside in the scheme for a short period of time. In the time it takes to issue a notice and seek a Tribunal order the tenant may vacate the lot and it becomes difficult to enforce a penalty against them.

84. What is your experience with the enforcement of by-laws?

Status of by-laws from old Acts

Strata title has existed in NSW for decades, with some strata schemes established under prior laws that have long been repealed, which means some by-laws are decades old. The Management Act preserved existing by-laws established under previous laws but also required owners corporations to review their by-laws by 2017.

Section 134 provides that the by-laws that will apply to a strata scheme are those that are either created after the Management Act came into force or those that existed under the *Strata Schemes Management Act 1996* (the 1996 Act).

The by-laws applying to strata schemes created before the 1996 Act are set out in the Management Regulation. The Management Act provides that by-laws must be reviewed with 12 months of the Management Act commencing and existing by-laws are taken to be valid if they were valid under the previous law.

These provisions can create confusion about which by-laws are preserved and which are replaced. The different treatment of strata schemes based on their age creates confusion as some by-laws may be valid because they were made prior to the Management Act, even if they would now be invalid if made under the current law.

While there is a need to recognise that older strata schemes can have different needs and requirements, this comes with a cost as it makes the law more complex and inconsistently applied.

85. Should by-laws made under old strata laws be required to be compliant with the current law? Why, or why not?

Model by-laws

The Management Act allows for the creation of model by-laws in the regulations. The model by-laws provide standard wording that can be adopted by owners corporations instead of having to pay for legal drafting services.

This review is an opportunity for feedback from the strata community on whether it would be helpful for owners corporations to have additional model by-laws prescribed in the Management Regulation, and what they should be.

86. Are there any additional model by-laws that should be included in the legislation? If so, what are they and how would they assist?

Pets and assistance animal by-laws

The keeping of animals in strata schemes has attracted some contention and been the source of disputes.

Owners corporations can make by-laws for the management, administration, control, use or enjoyment of the lots within a strata scheme, or for the common property of the scheme.

The Management Act prohibits by-laws from being harsh, unconscionable or oppressive. A by-law is also invalid if it purports to prevent the keeping of an assistance animal, within the definition of section 9 of the *Disability Discrimination Act 1992* (Cth).

Assistance animals

A by-law cannot prohibit or restrict the keeping of an assistance animal. An assistance animal under the *Disability Discrimination Act 1992* is defined as a dog or other animal that:

- is accredited by a prescribed animal training organisation or under a State or Territory law, or

- is trained to assist a person with disability to alleviate the effects of the disability and meet the standards of hygiene and behaviour appropriate for an animal in a public place.

However, the owners corporation may pass a by-law that requires a person to provide evidence that an animal is an assistance animal. This is intended to prevent circumvention of by-laws that control the keeping of animals by an occupant falsely claiming that their pet is an assistance animal.

An example of an assistance animal is a seeing eye dog but the definition allows for a wide variety of animals that can alleviate the effect of a disability.

'Disability' is broadly defined as not just the loss of a person's bodily functions – it also includes mental functions. This means that an assistance animal can be for alleviating mental disabilities that may not be as readily apparent to other people as say, vision impairment.

This has led to two concerns about the current provision.

The first is that there is a misconception that an assistance animal is limited to the seeing eye dog variety and does not extend to other animals that assist in the alleviation of other disabilities.

The second is that the requirement to prove that an animal is an assistance animal can result in highly personal information, including a full health history, being required to be disclosed to the owners corporation.

Keeping of pets (companion animals) in strata schemes

There are strong opinions about the keeping of pets in strata schemes. People can be opposed to the keeping of pets for various reasons, including concerns about possible damage to common property, the animal being a nuisance, a general dislike or fear of animals, or the suitability of the strata building for keeping animals.

People who support pets in strata are often motivated by the strong emotional bonds they develop with the animal and the well-being benefits that keeping an animal can bring to the owner. There is also a strong current of opinion among people seeking law reform in this area that one's neighbours should not be able to decide on such a basic aspect of living in one's own home as the keeping of a pet animal.

A recent study[1] found that as many as three out of five Australians (60%) own a pet, meaning that Australia has one of the highest rates of pet ownership in the world. As the strata population continues to grow, the issue of pet ownership in strata is likely to remain contentious. When combined with the approximate 48% of the strata population who are tenants, this means it is not only lot owners who are facing challenges from by-laws banning pets.

The strata laws generally support democratic decision-making by owners corporations, but also recognise that strata living today for many people includes the

[1] Animal Medicines Australia, *Pets in Australia: A National Survey of Pets and People* (October 2019), https://animalmedicinesaustralia.org.au/wp-content/uploads/2019/10/ANIM001-Pet-Survey-Report19_v1.7_WEB_high-res.pdf.

keeping of pets in a manner suitable to the particular scheme. One of the Government's stated aims of the 2015 reforms was to make the laws more pet-friendly, including by providing new model by-laws setting out options for the owners corporation to adopt. If no choice is made, the default by-law that applies allows for pets, provided the lot owner seeks the owners corporation's permission which cannot unreasonably refused.

High profile disputes: Court of Appeal decision on The Horizon apartments

By-laws that ban pets in strata schemes have been the subject of some high-profile challenges in the Tribunal and the NSW Court of Appeal. Those disputes have centred on the question of whether a by-law that prohibits the keeping of companion animals is harsh, unconscionable or oppressive.

In October 2020, the NSW Court of Appeal handed down its decision in ***Cooper v The Owners – Strata Plan No 58068 [2020]*** **NSWCA 250 (*Cooper*).** The Court of Appeal ruled that The Horizon's by-law that imposed a blanket ban on the keeping of pets was oppressive, in contravention of section 139(1) of the Management Act.

The Court of Appeal explained that by-laws can be oppressive if they restrict the right of lot owners to use their property on a basis which lacks a connection to an impact on other lot owners. In the Cooper case, the by-law banned all pets (except assistance animals), without any reference to the impact that a pet might have on other lot owners.

The Court of Appeal's decision means that blanket pet bans that are not based on the impact of keeping a pet on other lot owners are invalid. However, the Court's decision doesn't extend to bans that are not blanket bans or which allow an owners corporation to consider each case of pet ownership and the impact on other lot owners. The case therefore leaves open the question of whether by-laws that are not identical to the ones on the Cooper case may be considered 'harsh, unconscionable or oppressive'.

At the time of writing, the Court of Appeal decision on a pet ban by-law in Sydney's Elan Towers building is yet to be handed down.

The NSW Government seeks feedback through this review on whether and how the Management Act should be changed in relation to pet by-laws, following the Court of Appeal decision.

There are several options to consider.

Option 1 – Status quo

The first option is to the leave the law as it is, on the basis that the Court of Appeal decision means that blanket pet bans are invalid.

Owners corporations can review their by-laws to make them more or less pet-friendly but will no longer have the option to retain a blanket ban on pets.

Risks

A risk with this approach is that there could still be uncertainty and disputes over the legal status of by-laws that restrict pets but don't ban them outright.

Option 2 – By-laws cannot unreasonably prohibit the keeping of pets

The second option is to amend the Management Act so that it is clear that a by-law is invalid if it unreasonably purports to prohibit the keeping of a pet on a lot.

The starting point for this option would be similar to the amendment to the Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020 passed by the Legislative Council of NSW Parliament in August 2020, following a motion by the Animal Justice Party. (This amendment is yet to be reconsidered by the Legislative Assembly.) However, this option would need to include further provisions that define what would be considered unreasonable – either in the Act or regulations.

Generally, this option would retain the right of owners corporations to regulate how animals are kept within their scheme – within certain limits. The Tribunal's power to issue orders for the removal of nuisance animals would be retained.

Risks

This option risks some lot owners feeling that they are being forced to live with pets in their building when they had previously chosen to live in a strata scheme without pets. Some may fear increased costs for cleaning and damage to common property if animals are permitted in their scheme.

The amendment would need to be carefully drafted and set clear grounds on which by-laws relating to pets would be either reasonable or unreasonable. Otherwise, there could be uncertainty about pet by-laws and ongoing disputes over pets in strata.

Option 3: Blanket pet bans are permitted

The third option is to amend the Management Act to permit owners corporations to adopt by-laws that impose a blanket prohibition on the keeping of animals by special resolution. This option would involve creating an exception to section 139(1) of the Management Act to provide that blanket bans on the keeping of pets are not harsh, unconscionable or oppressive.

This option would provide clarity and certainty about the limits of owners corporations' power to adopt by-laws that regulate the keeping of animals on a lot.

Risks

This option risks being contentious in that the Government would be legalising actions which the Court of Appeal has found to be oppressive.

Further, the substantial disquiet among strata residents about blanket bans on pets would continue and campaigns for change would likely continue.

Option 4: Enshrine the Court of Appeal decision in the Management Act

The final option is to amend the Management Act to provide that a by-law is invalid if it restricts the right of lot owners to use their property on grounds that are not related to any impact on other lot owners.

This option would provide clarity and certainty about the limits of owners corporations' power to adopt by-laws that regulate the keeping of animals on a lot, and maintain consistency with the decision of the Court of Appeal in *Cooper.*

Some lot owners and others may consider this option to be too narrow if they believe there are other grounds on which by-laws that restrict pet ownership should be invalidated.

87. Under the law, a by-law cannot ban assistance animals e.g. guide dogs. Are any changes needed to the way the laws govern assistance animals?

88. Should owners corporations be allowed to request proof that an animal is an assistance animal?

89. Should the Management Act outline what kinds of evidence owners corporations can request as part of proving an animal is an assistance animal? If so, what kinds of information should be provided?

90. The NSW Court of Appeal found in 2020 that a by-law imposing a blanket ban on pets was oppressive and therefore invalid under the laws. Should the law allow owners corporations to completely ban pets from a strata scheme? Please tell us why.

Other restrictions on the power to make by-laws

Other restrictions on the power of owners corporations to make by-laws has meant that certain by-laws cannot be made where they infringe on private property rights, for example in relation to the contentious issues of overcrowding and short-term rental accommodation.

Section 137 allows the owners corporation to set limits on the number of adults residing in a lot and is intended to prevent overcrowding that was occurring in some strata schemes. Section 137A allows owners corporations to prohibit lots being used for short-term rental accommodation, unless they are the principal place of residence of the short-term rental host. Section 137A commenced on 10 April 2020 as the first element in the NSW Government's broader framework for the better regulation of short-term rental accommodation.

91. Do the existing restrictions on the power to make by-laws require any changes? If so, what changes and why?

Records, Tenancy Notice and Service

Records

Strata roll and other records

The owners corporation must have a strata roll that contains key information of the strata scheme. This includes details of lot owners and the developer, addresses for service, tenancy notices, strata plan number, strata managing agent, the unit entitlements, by-laws and details of the insurance held.

The owners corporation is required to keep indefinitely notices and orders issued by the Tribunal or the courts under section 179, while other records must be kept for seven years. These include minutes of meetings, financial statements, correspondence, notices of meetings, proxies, voting papers, copies of the signed agreements with the managing agent or building manager, and other records given to the owners corporation by the managing agent.

The strata committee can issue notices to persons, including the strata managing agent, requiring that records be provided to the committee. Failure to comply with a notice to provide records can result in a penalty of up to $2,200.

92. How has record keeping been working? Are any changes needed and if so, why?

Electronic storage of records

The 2015 reforms provided that records are to be made and stored in hardcopy and/or electronic format. Allowing owners corporations to make and store records electronically enabled the transition from paper-based records. This also made it easier to serve documents, such as notices of meetings, by email.

93. Should keeping electronic records be made compulsory? Why/why not?

Mandatory reporting of strata information

In September 2020, the NSW Government introduced the Community Land Management Bill 2020 to Parliament, which also amends the Strata Schemes Management Act to insert a power allowing the Secretary of the Department of Customer Service to require strata and community schemes to report specified information about their schemes to the Department.

This is intended to improve and modernise the way the Government collects and stores information about community and strata schemes, as well as the way the Government interacts with customers in those schemes.

This mandatory reporting project has been known as the ‘Strata Portal’.

Phase 1 of mandatory reporting is expected to commence on 1 July 2021 and will require reporting of basic information about schemes including contact details of managing agents, building managers and an address for the service of documents. The second phase is expected to start in 2022 and will require reporting of more detailed information relating to the functioning and management of schemes.

At the time of writing the Bill has not yet been enacted.

This review is not seeking feedback on the design of the new mandatory data reporting scheme. Instead, the Government will consult the strata sector separately about the Strata Portal in early 2021.

Availability of records inspection

The records of the owners corporation can be inspected on request by a lot owner or someone authorised by the owner. The records that can be inspected include the strata roll, certificate of title and any other document the owners corporation is required to hold.

Inspection can occur in person or electronically at a time and place agreed to by the applicant and the owners corporation. If agreement on inspection cannot be reached the owners corporation can designate a time, place and means for inspection.

94. How is inspection of strata records working? Are any changes needed and if so, why?

Strata information certificate

A strata information certificate can be requested by an owner or a person authorised by the owner and contains key financial information on a lot. It also includes information on other matters such as whether a strata renewal committee has been appointed. If the strata scheme is part of a community or precinct scheme it will also contain additional information on contributions to those schemes.

95. How are the strata information certificate provisions working? Are any changes needed and if so, why?

Information for tenants

A landlord must provide to a tenant a copy of the by-laws and the strata management statement not later than 14 days after the tenant becomes entitled to possession of the lot. If the by-laws or strata management statement are changed then amended copies must also be provided. Failing to provide this information attracts a penalty of up to $550 but this provision does not apply to strata schemes within community schemes.

96. A landlord must provide a tenant with a copy of the by-laws and the strata management statement if there is one. How is this working? Please describe and suggest what changes might be needed.

Tenancy notice

An owners corporation needs to be aware of tenants occupying the building, so it is able to update the strata roll and important information can be provided to all occupants. When a lot is leased the landlord needs to give notice of this lease to the owners corporation no later than 14 days after the commencement of the lease. The notice must include the tenant's name, address, date of the lease's commencement and name of the landlord's agent. Failing to provide the notice can result in a $550 fine.

The notice assists in determining whether a tenant representative can be elected and for notice of meetings to be provided to tenants.

Fair Trading's strata inquiries and complaints unit reports anecdotal evidence of widespread non-compliance with this requirement to give notice of a tenancy.

97. If a lot owner leases their apartment to tenants, the lot owner must provide the owners corporation with information about the tenants living in their lot within 14 days. Is this notice working? Could this be improved? If so, how?

Service provisions

For legal proceedings, service of notices is a crucial mechanism to alert parties to the fact that proceedings have been commenced against them.

The Management Act's service provisions establish flexible arrangements for service of notices to remain contemporary with current practices.

98. The law sets out how notices and other documents can be served on or by an owners corporation. How is this working? Please describe and tell us if this can be simplified in any way.

Common Seal

Future of the common seal

The common seal is the official seal of the owners corporation and must be affixed to a document for it to be executed. This means that it has been officially approved. Attaching the seal is required for different purposes, such as lodging documents with the NSW Land Registry Service or entering contracts.

An owners corporation must keep a seal in the possession of one of the owners or with its strata managing agent.

The seal must be physically affixed to a document in the presence of two owners except when affixed by the managing agent, which does not require a witness.

The need to physically affix the seal is a cumbersome process as demonstrated during the COVID-19 pandemic. The COVID-19 restrictions prevented gathering to witness or access seals stored at strata managing agents' offices and so made it difficult for documents to be executed.

The NSW Government temporarily allowed documents to be signed instead of affixing the common seal. This was done by allowing witnessing to occur by audio visual link with details of the signatory and witness recorded, including name, date and licence number for managing agents. This was influenced by how corporations are regulated by the *Corporations Act 2001* (Cth). These corporations no longer need to use common seals to execute documents and instead documents can be signed by two directors, a director and company secretary, or if there is a sole director, then that director.

However, a difficulty in adopting this approach for owners corporations is that under Commonwealth law company directors' details need to be recorded on the Australian Securities and Investments Commission's company register. This means that the identities of the directors of these companies can be confirmed, for a fee, by searching the company register. There is no equivalent requirement under NSW law for the details of committee members or the strata managing agent to be recorded on a searchable register. This means it can be difficult to verify who has appropriate authority to execute documents on behalf of the owners corporation.

99. COVID-19 emergency laws, passed in May 2020, allowed owners corporations to approve official documents with the witnessed signatures of two authorised people, instead of affixing the common seal. If this was permanently included in strata laws, is there anything else that should be included?

100. To verify that documents are properly executed, should the details of strata committees and strata managing agents be required to be lodged and made available on a publicly searchable register similar to the ASIC company register? Please tell us why.

Initial period

'Initial period' and developer control

When an owners corporation is set up, the developer has control over the strata scheme until at least one-third of the unit entitlements are owned by new owners. This is called the 'initial period'.

During the initial period, restrictions are imposed on the developer to protect future owners. Some restrictions include not altering the common property except in accordance with a strata development contract and not borrowing money. The

Tribunal may, however, make orders waiving, varying or extinguishing a restriction relating to the initial period.

Complaints received by Fair Trading indicate that developers have not always fulfilled their obligations or complied with the restrictions on the initial period under the Management Act. These complaints range from incorrectly appointed strata managing agents to not holding the required meetings after the initial period has ended.

101. How have the initial period provisions been working? Are any changes needed, and if so, why?

Managing the Property

Managing common property in a strata scheme

The owners corporation is responsible for managing common property, including its repair and maintenance, and determining how common property is used.

Alterations, additions and other work affecting common property

Prior to the 2015 reforms, lot owners could not make any alterations to common property in connection with their lots without approval of the owners corporation and any changes to common property needed to be approved by special resolution.

An owner of a lot can now carry out work on the common property if they are authorised to do so under Part 6 of the Management Act, under a by-law made under Part 6 or a common property rights by-law, or by approval of the owners corporation given by a special resolution or in accordance with the by-laws.

Approval process for alterations and additions to common property (section 108)

The Management Act sets out the procedure for authorising any addition to, alteration of, or new structure on common property by an owners corporation or owner. A special resolution must be passed authorising the proposed action. If it is authorising a proposed action by an owner, the resolution **may** specify who is responsible for the ongoing maintenance of the altered common property. If it does not address this, then the Management Act provides that the owners corporation is responsible.

If the owner is to have responsibility for ongoing maintenance, the owners corporation must make a by-law providing for maintenance of that property by the owner after obtaining the owner's consent. The Management Act does not expressly require that maintenance or any other matter be addressed before providing approval.

102. Owners can make changes to common property in connection with their lots if they have authorisation. Either the owner or owners corporation could be responsible for ongoing maintenance of these changes. Should the Act require a decision to be made about who is responsible for ongoing maintenance of common property changes before approval is given to change common property??

Approval process for work by an owner affecting common property in connection with a lot

To make the approval process for work affecting common property more flexible, a new three-tier approval regime was established under the Management Act:

- **Cosmetic work**: can be carried out by owners without approval.
- **Minor renovations**: can be carried out with approval by resolution, which cannot be unreasonably withheld and can be subject to reasonable conditions.
- **Other proposed works affecting common property**: generally can only be carried out if approved by special resolution.

An owner must provide written notice of any proposed minor renovations to the owners corporation, including the information required by the Management Act (section 110(4)). The Management Act requires an owner to ensure that any damage caused to common property by cosmetic work or minor renovations is repaired, and the work and any repairs are done in a competent and proper manner.

Cosmetic work and minor renovations are not defined but some examples are listed in the Management Act and clause 28 of the Management Regulation. Cosmetic work includes installing hooks on walls or a built-in wardrobe or a handrail, and painting or laying carpet. Minor renovations include renovating a kitchen, installing an air conditioner and removing carpet to expose a hard floor. However, the following types of work are not cosmetic work or minor renovations: work involving structural changes, changes to the external appearance of a lot or waterproofing, and work for which another approval is required under any Act.

A scheme's by-laws can specify other cosmetic work or minor renovations and may also permit the owners corporation to delegate the approval of proposed minor renovations to the strata committee.

Some suggestions that have been made for changes to these provisions are:

- an express requirement for records for approved minor renovations to be kept by owners corporations permanently
- a clear prohibition on tenants doing work that affects the common property
- provision of reasons when consent is withheld
- clarification that minor renovations involving reconfiguring walls explicitly excludes structural walls.

103. When making changes to common property such as renovations, is it easy to understand what approvals are needed and when? If no, please tell us why not.

104. Are any changes needed to the types of work that are considered cosmetic work or minor renovations? Please tell us why.

105. Should committees be automatically able to make decisions on minor renovations instead of a resolution at a general meeting of the owners corporation being required?

106. Should a lot owner always be told the reasons why their request for work or renovations was not approved? If yes, when should the reasons be provided?

107. Do you have any other suggestions on how to improve the provisions on approval of changes to common property?

Common property rights by-laws

A common property rights by-law can confer certain rights and special privileges (for example, a right of exclusive use or enjoyment) to an owner or owners in a strata scheme in respect of the whole or any specified part of the common property. Common property rights by-laws are approved by special resolution.

The Management Act requires that the by-law address the responsibility for ongoing maintenance of the relevant common property and that a by-law may specify conditions such as the payment of money by the relevant owner/s to the owners corporation.

The Tribunal may make an order in relation to common property rights by-laws, in certain circumstances, under section 149 of the Management Act if it finds that:

- an owners corporation has unreasonably refused to make a common property rights by-law, or
- a lot owner has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to a proposed amendment or repeal of such a by-law.

108. Are the provisions relating to common property rights by-laws clear and working well? Do you have any suggestions for improvement?

Managing parking on common property

The 2015 reforms aimed to establish a regulatory framework that enables owners corporations to better manage parking on common property, including by non-residents.

An owners corporation can grant a licence to their local council in relation to a strata parking area in their scheme pursuant to section 112 of the Management Act. This licensed area is then governed by the *Local Government Act 1993* and enables the council to police the parking in that area. Otherwise, parking on common property is managed by a scheme's by-laws which are enforceable against owners and occupiers/tenants and can be enforced by seeking a penalty from the Tribunal for breach of a by-law.

Managing parking on common property can be an ongoing problem for some schemes and feedback is sought on how the current framework is operating and any suggestions for improvement.

109. Does your strata scheme have an agreement with your local council for a strata parking area? Please tell us your experience of how this is working.

110. Have you experienced problems due to parking on common property? If so, how might changes to the law help manage this issue?

Maintenance and repair of common property

Duty to maintain and repair common property

Maintenance and repair of common property is an important issue for owners and owners corporations, and a common source of disputes. Owners corporations have statutory duties to properly maintain and repair the common property and renew or replace any fixtures or fittings within the common property.

The 2015 reforms gave owners a new statutory right to recover from an owners corporation, as damages, any reasonably foreseeable loss suffered as result of a breach of these statutory duties. Any such claim must be commenced within two years after the owner first becomes aware of the loss.

An owners corporation can remove part of the property from its statutory duties by special resolution where it is inappropriate to maintain, renew, replace or repair that property. However, this decision must not affect the safety of any building, structure or common property, or detract from the appearance of the property.

As part of the 2015 reforms, owners corporations were provided with the flexibility to defer complying with their statutory duty, if they are in the process of taking action against a person for damage to common property, as long as it does not affect the safety of the building.

The reforms also introduced a new section 132 enabling an owners corporation to seek an order requiring an owner or occupier who causes damage to common property to repair that damage, or to seek an order for payment of the owners corporation's costs of repairing that damage.

111. How effective has the law been in ensuring owners corporations comply with their duty to properly maintain and repair common property?

112. Do you have any concerns with the statutory duty to maintain and repair common property? How could it be improved?

113. Is the two-year time limit on making a claim for damages for breaching the duty appropriate? If not, what would be an appropriate length of time?

114. Is it appropriate for owners corporations to remove part of the common property from their duty where it is inappropriate to maintain or repair that part of the property? Can you advise of any situations where this has been misused?

115. Is it appropriate that owners corporations can defer compliance with the statutory duty in situations where they are taking action against an owner for damage to common property? Are you aware of any situations where this has been misused?

116. Has the duty impacted owners corporations' and owners' pursuit of claims for building defects, or arranging of rectification of building defects? If yes, how could this be addressed?

Developer's estimates of levies and the initial maintenance schedule

The developer must prepare an initial maintenance schedule for the strata scheme's common property that is to be considered at the first AGM. This requirement was introduced to ensure the developer provides certain information about the building and its maintenance requirements to help the owners corporation better understand and plan for the type, and potential costs of, maintenance required.

Stakeholder feedback suggests that initial maintenance schedules are not always being provided or considered. This can impede the establishment of a maintenance program early in the life of a strata scheme and may affect the owners corporation's ability to accurately estimate future maintenance costs and levies.

Some stakeholders have also suggested that the setting of unrealistically low levies by developers during the initial period, to encourage unit sales, may still be an issue. An owners corporation can claim compensation from the developer if the estimates and levies determined during the initial period were inadequate to meet actual and expected expenditure. This is subject to a 'due care and diligence' defence and action must be made within three years after the end of the initial period.

Stakeholders have suggested that owners corporations may not be sufficiently aware of this right or may have difficulty recovering compensation, for example because the developer is wound up.

Possible ideas for further reform to address this issue may include:

- requiring levies determined during the initial period to be verified by an independent expert
- making it an offence for a developer to knowingly set unrealistic levies during the initial period
- requiring the right to seek damages for inadequate levies to be disclosed to and/or considered by the owners corporation at the first and second AGMs.

117. The developer must prepare an initial maintenance schedule for the strata scheme's common property to be considered at the first AGM. Do you agree with this? Are the requirements clear? Are any changes needed?

118. Have you experienced any difficulty obtaining the initial maintenance schedule, or information about estimates and levies determined during the initial period, from an original owner/developer?

119. Have you experienced unrealistic levies being set by an original owner/developer?

120. Do you have any suggestions for improving the initial maintenance schedule?

Planning and funding ongoing maintenance and repair

Maintenance and repair of common property in a strata scheme may be funded from the scheme's administrative fund or capital works fund, depending on the nature of the work.

The 2015 reforms provided flexibility for owners corporations to review, revise or replace their scheme's 10-year capital works fund plan at any time by resolution at a general meeting, as well as a requirement to review it at least once every five years. The 2015 reforms also introduced requirements for matters that must be included in the plan and for implementation of the plan.

Preliminary stakeholder feedback suggests that the quality and usefulness of these plans varies among strata schemes.

121. Are 10-year capital works fund plans clear and effective in helping with maintenance and repairs of common property? If no, how could the 10-year capital works fund plans be improved?

Managing Building Defects

Part 11 of the *Strata Schemes Management Act 2015* at provides for the building defect bond scheme. This was set up to protect homeowners and to rectify defective building work early in the life of high-rise strata buildings. This scheme started on 1 January 2018 with further substantive changes made to the scheme under laws that commenced on 1 July 2020.

A review of Part 11 is required to be undertaken (by section 215A) after 1 January 2024 with a report tabled in each House of Parliament no later than 1 January 2025. The review will include public consultation.

Sustainability infrastructure in strata schemes

Future opportunities for reform

The NSW Premier's 2019 strata sustainability election commitment signalled the Government's interest in reducing barriers to the uptake of sustainability infrastructure in strata schemes[2]. In June 2020, the Government introduced a Bill to reduce the voting threshold for sustainability infrastructure resolutions to a simple majority[3].

This review seeks feedback on possible further reforms to the strata laws (including those discussed below) to facilitate the uptake of sustainability infrastructure in strata schemes.

Prohibiting certain restrictions in by-laws on installing sustainability infrastructure

One option is to prevent by-laws that prohibit or restrict the installation of sustainability infrastructure in certain circumstances. Queensland laws[4] prevent by-laws that prohibit or restrict solar panel installations merely to enhance or preserve the external appearance of a building.

Additional model by-laws to assist with the installation of sustainability infrastructure

Another option is to consider whether additional model by-laws can be developed that might assist strata schemes with the installation of certain types of sustainability infrastructure.

Enabling approval function to be delegated to strata committee

Another option is enabling the owners corporation's function of approving sustainability infrastructure resolutions to be delegated to the strata committee (similarly to section 110(6) of the Management Act). This might make the approval

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[2] Sustainability infrastructure reduces water/energy usage, reduces greenhouse gas emissions and pollution, or facilitates recycling and the reduction of waste. Examples may include solar panels, more energy-efficient upgrades to air conditioning, ventilation and lift systems, and electric vehicle charging stations.

[3] Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020.

[4] Section 180(8) of the *Body Corporate and Community Management Act 1997* (QLD) and Chapter 8A, Part 2 of the *Building Act 1975* (QLD).

process faster. The ability to delegate could be limited to certain types of installations.

Audit of common water and energy usage as a mandatory agenda item

Another option is to make consideration of an audit of the energy and water usage in a scheme's common areas a mandatory agenda item for annual general meetings. Schemes could decide on the type of audit, for example, self-assessment or a more formal assessment (such as, through the National Australian Built Environment Rating System (NABERS).[5]

Additional considerations under 10-year capital works fund plans

The Department of Planning, Industry and Environment has suggested that owners corporations should be required to consider the need for sustainability infrastructure upgrades and whether electricity meter boards need to be replaced, as part of their 10-year capital works fund plan.

122. The NSW Government is already changing the law to make it easier for strata schemes to install sustainability infrastructure such as solar panels, batteries, digital meters, hot water systems and electric vehicle (EV) charging stations. What other changes to the strata laws could encourage the uptake of sustainability measures in strata and how would they work?

Insurance

Maintaining the appropriate level of insurance is reflected in the requirement to obtain coverage for the destruction of or damage to the building. Owners corporations are also required to obtain workers compensation and other types of damages insurance.

For the building insurance, the Management Act and the Management Regulation provide a formula for calculating the minimum level of coverage that covers both reconstructions and destruction.

123. Owners corporations must maintain an appropriate level of building and workers compensation insurance. How are the laws working? Are any changes needed? If so, how?

[5] NABERS is a national initiative managed by the Department of Planning, Industry and Environment to provide performance ratings for certain buildings. NABERS can provide a rating for the energy and water efficiency of an apartment building's common property areas, such as, lifts and lobby areas, car parks, gyms and pools.

Utilities Supply Contracts

Effectiveness in protecting consumers

Section 132A was inserted into the Management Act in 2018 (and commenced on 1 October 2019) to address concerns that strata schemes were being locked into unfair long-term utility supply contracts. It inserted term limits on the length of contracts for electricity, gas or other utilities and requires these contracts to be considered at AGMs.

Electricity embedded networks were exempted from these provisions, as the Australian Energy Market Commission was undertaking a review of the regulation of embedded networks. The Government did not wish to pre-empt the findings of this review and impose controls that were contrary to its recommendations, which have now been handed down.

124. The law places time limits on contracts for electricity, gas or other utilities to ensure strata schemes aren't locked into long-term contracts. Are any changes needed? If so, what changes and why?

125. Embedded electricity networks are privately owned and managed networks that often supply all premises within a specific area or building. Embedded networks generally buy electricity in bulk and then on-sell it to customers inside their network and are currently exempt from the limits on the duration of the contract. Should embedded networks still be excluded from time limits on contracts? If not, what transitional arrangements should be included?

Building Managers

Building managers are persons hired by the owners corporation to assist with the management of the property. The Management Act defines a building manager as a person who assists in exercising any one or more of the following functions of the owners corporation:

- Managing common property
- Controlling the use of common property by persons other than the owners and occupiers of lots
- Maintaining and repairing common property.

A person may be both a building manager and an on-site residential property manager and may also be a lot owner. If the building manager also acts as an on-site residential property manager, they must be licensed under the Property and Stock Agents Act. A person is not a building manager if the person exercises the functions of the owners corporation on a voluntary or casual basis or as a member of the strata committee.

New measures introduced by the 2015 reforms

The 2015 reforms placed new restrictions on persons who can be appointed as a building manager. The introduction of these provisions was intended to strengthen

the accountability of building managers and controls around their appointment and engagement.

As with managing agents, the building manager's appointment is made in writing and executed by the building owner when executed before the strata scheme commenced, or by a resolution passed at a general meeting if executed after the strata scheme commenced. If the building manager is appointed before the strata scheme is established, the term of appointment ends at the first AGM. In any other case, the maximum term of appointment is 10 years.

The Management Act allows for the building manager to transfer his or her functions to another person authorised by a resolution of the owners corporation. The transfer of functions effectively transfers the contract from one manager to another, including the terms of the contract and term of appointment.

The 2015 reforms introduced new disclosure requirements for both strata managing agents and building managers. The Management Act requires building managers to disclose if they have a direct or indirect pecuniary interest in a scheme or if they have a connection with the developer. Failure to disclose is an offence that carries a maximum penalty of $5,500.

Section 72 of the Management Act confers on the Tribunal the power to terminate or vary the agreement between the building manager and strata scheme, on the application of the owners corporation. The Tribunal may make an order varying or terminating the agreement for any of the following reasons:

- the building manager has refused or failed to perform the agreement or has performed it unsatisfactorily
- that charges payable under the agreement are unfair
- the building manager has failed to disclose an interest in a scheme, a connection to developer, or commissions or training services provided
- the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

Are problems previously associated with managing agents now being seen with building managers?

Stakeholder feedback indicates that relationships between owners corporations and strata managing agents and developers have improved, but the problem may now have shifted to the relationship between developers and building managers. There is a perception that many building managers have a strong relationship with and loyalty to the developer.

Some options for reform to address potential conflicts of interest on the part of building managers include:

- requiring that at the first AGM, owners be presented with a proposal from a minimum of three building managers
- limiting the maximum duration of appointment of building managers
- limiting the initial terms for all service contracts

There has also been feedback on ways to mitigate conflicts of interest relating to service providers, including:

- legislating a general duty to take reasonable steps to ensure that any goods or services procured by the building manager are procured at competitive prices and on competitive terms
- requiring the building manager to disclose conflicts of interest and commissions or benefits it might receive in connection with services it intends to contract for, before the contract is entered into
- requiring multiple quotes for contracts over a certain value or length of time
- extending conflict of interest controls to persons associated with building managers, and
- including non-exhaustive definitions of 'interest' and 'benefit'.

This would more closely align the regulation of building managers and strata managing agents under the Management Act.

However, the Government has also received suggestions from some strata stakeholders and consumers that building managers should be subject to all the same regulations as strata managing agents.

That is to say, they would become a licensed occupation either under the Property and Stock Agents Act, or perhaps under the *Home Building Act 1989* (NSW) (the Home Building Act).

This would enable Fair Trading to hold building managers to the same enforceable standards as other licensees, including for example the rules of conduct under Schedules 1 and 5 of the Property and Stock Agents Act.

Such a proposal would require extensive consultation and consideration of the costs and benefits of increasing the regulatory burden, including evaluation against the NSW Guide to Better Regulation and the IPART Licensing Framework.

Building managers as statutory duty holders: safety compliance throughout the life of the building

Complex multi-storey buildings must be properly maintained and repaired to ensure their ongoing compliance and the safety of occupants. Fire safety is critically important in this regard.

Under the current laws, there are complex arrangements between the owners corporations, managing agents, building managers and contractors when it comes to maintaining the building and meeting compliance requirements.

The NSW Government has received feedback during 2020 that the missing element here may be that the legislation does not provide for a single point of accountability to ensure ongoing safety requirements are met throughout the life of the building. This could be resolved by imposing a statutory duty of care on an office holder in strata, and the building and facilities manager may be the most appropriate person to hold this duty of care.

However, such a substantial change in legal obligations would need to be carefully considered, including suitable qualifications and licensing or accreditation requirements.

126. The Management Act includes a list of reasons why the Tribunal can vary or terminate a building manager's agreement, for example, for unsatisfactory performance of duties. Should any more reasons be added and should they be the same grounds as those that apply to managing agents?

127. Are the current restrictions on who can be appointed as a building manager adequate? Why/why not?

128. Do you support changing the law to introduce a duty of care on the building manager to act in the best interests of the owners corporation? Why/why not?

129. Should building managers be subject to the same or a similar level of regulation as managing agents, which could include licensing?

130. Should the maximum duration of appointment of building managers be further limited in a similar manner to strata managing agents? (Note: managing agents can only be appointed for twelve months at the first annual general meeting and for a maximum term of three years after that. The owners corporation can also renew the agent's appointment.)

131. Should building managers have a statutory duty of care with responsibility for the safety of the building, including its fire safety? If so, what would be the appropriate qualifications, licensing or accreditation requirements?

Resolution of Disputes

NSW Fair Trading mediation and the NSW Civil and Administrative Tribunal

Overview of dispute resolution processes

A key objective of the 2015 reforms was to simplify and improve the three-layered dispute resolution process that existed under the 1996 Act. The reforms established a new two-layered dispute resolution process for most strata disputes, with Fair Trading mediation as the first step and the Tribunal as the second.

The most common requests for mediation received by NSW Fair Trading over the past five years were about:

- repair and maintenance of common property
- damage/alterations to common property

- exercise of duties/functions by or on behalf of the owners corporation, and
- damage to a lot.

Other issues that featured in high numbers were:

- by-laws
- levies
- noise
- nuisance
- meeting procedures, and
- the behaviour of owners, occupiers and visitors.

Part 12 of the Management Act sets out the processes for dispute resolution by NSW Fair Trading, internal dispute resolution and the powers of the Tribunal to hear and decide strata disputes. The Tribunal's jurisdiction in relation to strata matters is determined by the Management Act as well as the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act). The Tribunal also has power under the Home Building Act to hear matters about building claims relating to strata properties.

The dispute resolution provisions of the Management Act are discussed in more detail below. We seek feedback on how effective the dispute resolution processes under the Management Act are in resolving strata disputes and enabling appropriate remedies to be obtained.

132. Are the current dispute resolution processes effective? If not, please describe and suggest any improvements.

Internal dispute resolution in strata schemes

The 2015 reforms introduced a new provision in section 216 enabling owners corporations to establish a voluntary process for resolving disputes between certain persons living in or involved in strata schemes. We are interested in any feedback on this section from strata schemes.

133. Does the process for an owners corporation to directly manage disputes between people work? If not, please describe and suggest any improvements.

Mediations

The mediation provisions in the Management Act aim to encourage early and cost-effective resolution of strata disputes before proceedings are commenced. A person can apply to NSW Fair Trading for mediation of a dispute listed in Division 2 of Part 12.

An issue often raised by stakeholders is the restrictions on legal representation in mediations and in proceedings before the Tribunal. The general intent of the restriction on legal representation is to make the resolution of disputes simpler, less formal and less costly.

134. Have you been part of a Fair Trading strata mediation? Are there any changes that could be made to the process and, if so, why?

Jurisdiction and orders of the Tribunal

Both the Management Act and the NCAT Act give the Tribunal the power to hear and decide matters relating to strata schemes. The Management Act expressly provides that certain orders may be made by the Tribunal.

The Government is interested in any feedback on the Tribunal's role in relation to strata matters generally, even if it is not considered below.

135. Do you have any general feedback on the strata scheme orders available from the Tribunal and how easy it is to get them?

Power to order damages for breach of statutory duty

In some recent decisions,[6] the Tribunal has expressed conflicting views on whether it has power under sections 106 and 232 to award damages to a lot owner because an owners corporation has breached its statutory duty to maintain and repair common property.

Section 106(5) of the Management Act gives a lot owner a right to recover damages from an owners corporation for any reasonably foreseeable loss resulting from a breach of statutory duty under that section. However, section 106(5) does not indicate whether the Tribunal can award damages for such a breach. Those damages can be sought in a court of competent jurisdiction.

Section 232 provides that the Tribunal may make an order to settle a complaint or dispute about particular matters, including an exercise of, or failure to exercise, a function conferred or imposed by or under the Management Act or the by-laws of a strata scheme.

In the most recent decision on this issue,[7] the Appeal Panel found that the Tribunal does not have jurisdiction to order damages for breach of the duty to maintain and repair under either section 106 or 232. It also suggested that section 232 does not confer a general power to order damages or compensation in settling a complaint or dispute. This decision has been appealed to the Supreme Court of NSW and the appeal had not yet been determined at the time of writing.

Although interpretation of sections 106(5) and 232 is a matter for the Tribunal and the courts, stakeholders have suggested that the legislation should provide better clarity and certainty about the Tribunal's jurisdiction.

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[6] *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15, *The Owners – Strata Plan SP20211 v Rosenthal; Rosenthal v The Owners – Strata Plan SP20211* [2018] NSWCATAP 243, *Shih v The Owners – Strata Plan No 87879* [2019] NSWCATAP 263, and *The Owners - Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5

[7] *The Owners - Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery* [2020] NSWCATAP 5.

The Tribunal has power to determine whether there has been a breach of the statutory duties in section 106 and to make orders for the repair or maintenance of common property. Some stakeholders suggest that the Tribunal should have power to order damages for breach of the statutory duties as it is more practical and cost-effective to have a claim relating to a breach determined in one forum. However, the assessment of damages is ordinarily something undertaken by the courts.

Other sections of the Management Act also provide rights to recover damages for breach of statutory duty:

- section 26(2) and (3) – right to recover loss resulting from the developer doing prohibited things during the 'initial period' without authorisation from the Tribunal
- section 140(2) – right to recover loss resulting from changes to by-laws during the 'initial period'.

Like section 106, these sections do not indicate that the Tribunal can award those damages.

In contrast, the Tribunal is expressly given powers under the Management Act to order payment of certain compensation, for example:

- to a party to the agreement appointing a strata managing agent or building manager,
- by the developer to the owners corporation if the estimates and levies determined during the 'initial period' were inadequate, and
- by an owners corporation to a lot owner in relation to a common property rights by-law.

136. Should the Tribunal be able to award damages for breaches of statutory duties under the Management Act? Why/why not? If yes, please tell us why.

137. Should the Tribunal have a general power to order damages, compensation or other monetary amounts in settling disputes? Why?

<u>Monetary limits on damages or compensation or other monetary orders</u>

The Management Act does not currently set any monetary limit on the Tribunal's jurisdiction. There is a jurisdictional limit of $500,000 on building claims that can be determined by the Tribunal which is set by the Home Building Act (section 48K(1)). Some stakeholders have suggested that the Management Act should be clear about the monetary limit applying to the Tribunal's jurisdiction in relation to strata matters.

The Local Court's current jurisdictional limit in its General Division for damages claims (other than for personal injury or death) is $100,000. The District Court of New South Wales current jurisdictional limit in relation to damages claims is $750,000.

138. There's no cap on the size of the claim that the Tribunal can consider. Should there be?

Power to order costs

The Tribunal's power to order costs in proceedings before it is sometimes raised by stakeholders in relation to strata disputes. The Tribunal's power on this is in section 60 of the NCAT Act and is not within the scope of this review.

Enforcement of Tribunal orders

Where an order made by the Tribunal is not followed, an application may be made to the Tribunal for an order for a civil penalty under section 72(3) of the NCAT Act. The sustainability infrastructure bill, currently before Parliament, proposes to insert a new section 247A into the Management Act to bolster section 72(3) of the NCAT Act and to simplify the application process.

The Tribunal has power to make other orders, including for contempt, under Part 5 of the NCAT Act.

139. Are the penalties for breach of orders made by the Tribunal adequate? If not, what should they be?

NSW Fair Trading's role and functions generally

NSW Fair Trading's role as regulator of strata schemes in New South Wales is provided in section 256 of the Management Act. This section sets out the powers and functions of the Secretary, which are also delegated to the Commissioner for Fair Trading. Three key areas of Fair Trading's role are:

- the resolution of complaints received from the public relating to strata schemes,
- investigating possible offences under the Management Act and, where appropriate, taking enforcement action in relation to offences, and
- providing information to the public about the Management Act and relevant services provided by the Secretary and the Tribunal.

Fair Trading's power to investigate and enforce non-compliance relating to strata schemes is also found in other pieces of legislation outside of the Management Act. For example, Fair Trading is the regulator of occupational licences under the Property and Stock Agents Act and residential building under the Home Building Act. Fair Trading investigates possible offences under a range of legislation and takes enforcement action including providing education, issuing warnings or fines and initiating prosecutions.

Some stakeholders have suggested that Fair Trading consider:

- Providing more information and assistance to strata schemes in relation to certain issues
- Strengthening enforcement in relation to offences under the Management Act, which might include increasing penalties for certain offences and/or publicising enforcement outcomes, where appropriate, as a deterrent.

140. Do you have any feedback on NSW Fair Trading's role with strata schemes, including any suggestions for improvement?

Consolidated list of questions

Strata Schemes Development Act 2015

Objects of the Act

1. Are the current objectives of the Development Act still valid? If not, how should they be changed?

2. How successful is the Development Act in fulfilling those objectives?

3. Are there other objectives that should be included? If so, please identify what these should be and explain why.

4. If the objectives should be expanded, what corresponding measures would be needed in the Development Act to give effect to those objectives?

Strata renewal: collective sale and redevelopment

Built in safeguards and protections

5. Are the key steps and safeguards imposed by the legislation appropriate, or are these too complex or costly? Should any of these steps be changed?

6. Is the information required to be included in the strata renewal plan enough, or should the legislation require more information? If so, what information should be required for owners to properly assess a strata renewal proposal?

7. Are the timeframes imposed in the strata renewal process reasonable, or should any of these be adjusted?

8. Are other improvements needed to the strata renewal process? Why?

Compensation

9. Should the legislation distinguish between residential and commercial strata owners in the strata renewal process? If so, should the Development Act provide additional protections for commercial lot owners?

10. Should tenants have more involvement in the renewal process, other than being notified that a strata renewal plan has been developed, for which court approval is being sought (section 178)?

11. Should the Development Act provide more guidance for treatment of leases in strata renewal proceedings?

12. Is more guidance needed on how compensation applies to lot owners and their tenants? Who should be responsible for paying compensation to the tenant?

Limited uptake of renewal process

13. How successful has the strata renewal process been in encouraging owners to consider collective sale/redevelopment options?

14. Are the provisions encouraging parties to settle in a positive manner, or only to avoid protracted disputes?

15. What alternative methods are being pursued to achieve collective sales (eg, options, interdependent deeds of sale)? How effective are these alternative methods?

Strata renewal case studies

16. Should the current requirement to act in good faith and to disclose conflicts of interest be extended to dissenting owners? Should the Court be required to consider these aspects in relation to an objection to a strata renewal plan, as well as to the application?

17. Should section 188 be expanded to provide more guidance to the Court in relation to matters to be considered when making a costs order? How should the legislation deal with a dissenting owner who presses an objection on unmeritorious grounds? Should the dissenting owner be required to bear some or all of its costs?

18. Section 180 lists those who may lodge an objection to an application to the Land and Environment Court. Should an objecting party be required to disclose if they have or have had any further interests in the court proceedings? Should the same apply for those who may be joined as a party to the proceedings (section 181(6))?

19. Are the lapsing provisions in section 190 of the Development Act effective, and should any changes be made? Are there any circumstances in which a lapsed strata renewal plan should be able to be resubmitted within the 12 month period?

Part-strata developments: mixed use and layered schemes

Strata Management statements and easements relating to part strata parcels

20. Are management statements effective in regulating mixed-use developments and setting out interested parties' rights and obligations? If not, why not, and how could the legislation be improved?

21. Are there circumstances where a strata management statement should not be required (for example, where the commercial lot area is relatively small, compared to the residential strata scheme)? If so, how could the various interests in the building be effectively managed without a management statement?

Requirements for strata management statements

22. Are the matters set out in Schedule 4 for inclusion in the strata management statement sufficient? If not, what other matters should be prescribed and why?

23. Should the legislation require the management statement to balance the rights of various lot owners in some way? How could this be achieved?

Building management committees and conflicts of interest

24. What improvements could be made to the governance of building management committees and their meeting processes?

25. What measures could be implemented to reduce conflicts of interest and unfair contracting in mixed-use schemes?

26. Should existing contracts negotiated by the building management committee automatically apply to new lot owners as they join the committee? How can the legislation be improved to deal with this issue?

27. Should there be limits on how long managing agents are appointed for by the building management committee? Should this apply to other types of contract? What would be a reasonable restriction?

28. Should a duty of good faith be imposed on strata managers and building management committees?

Shared facilities

29. Should the requirement for management statements to provide for the fair allocation of shared expenses and the obligation to review that allocation, apply retrospectively to schemes registered prior to the commencement of the reforms (November 2016)? If not, why not?

30. What other improvements, if any, could be made in relation to responsibility for shared facilities and why?

Expense allocation and voting rights

31. Should voting rights be aligned to the relative contribution of building management committee members to the cost of the shared facilities? Are there any other alternative methods of allocating voting rights that could be implemented?

32. What improvements can be made to the legislation that balance the interests of commercial and residential lot owners in a mixed-use development, while ensuring fair decision-making?

33. What changes would provide fairer outcomes where strata management statements are in place? Should owners corporations be provided with rights

and protections similar to those set out under the Management Act – for example, by placing limits on service contract terms?

Dispute resolution

34. How can dispute resolution be better managed in mixed-use developments, balancing the needs of commercial and residential property owners?

35. What, if any, legislative protection is needed for residential owners in the rectification of complaints?

Valuation of unit entitlements

Requirements for schedules of unit entitlement

36. Has the requirement for a qualified valuer's certificate to determine unit resulted in fairer apportionment of contributions? Could this process be improved?

37. Are unit entitlement valuations too costly for the scheme? If so, what other ways could unit entitlements be calculated that is fair to all owners?

38. Should owners have a right to object to a proposal to change unit entitlements without the passing of a resolution, even Fif they are otherwise unaffected by a strata plan of subdivision?

39. Should the legislation provide an exception to the requirement for a valuation of all lots in the scheme in any circumstances? If so, what would those exceptions be? What is the alternative proposed method of altering the unit entitlements in those situations?

40. Should there be guidance for valuers in assessing strata plan unit entitlement valuations? If so, what guidance is required?

Strata Schemes Management Act 2015

Objects

41. Do the objects of the Act remain appropriate? Should further policy objectives such as those that guided the 2015 reforms be added to section 3 of the Management Act?

Managing the scheme

Strata Committees

42. How well have the functions of the committee and office holders been working?

43. Committees can be up to 9 people. Is this size limit working?

44. Under the law, strata committee members have a duty to act in the best interest of the owners corporation and with due care and diligence. How well is this working?

45. Are there any other measures that would improve accountability of strata committees? For example by adopting a mandatory code of conduct as in Queensland?

46. How well have the eligibility requirements for election to the committee operated? How could they be improved?

47. Are clear grounds for removing committee members and office holders needed? If so, what should they be?

Meeting procedures

48. How have the meeting procedures been operating and are any changes needed? If so, what changes?

49. Should the meeting procedures be moved from the Management Act to the Management Regulation so they can be changed more easily? Should any parts remain in the Management Act and, if so, why?

Meetings and voting

50. Should the law be changed to permanently allow electronic voting in all circumstances without the need to first pass a resolution? If so, are additional protections for lot owners needed?

51. Are there other alternative methods for electronic meetings and voting that should be considered?

52. How have the different ways (teleconferencing, email etc) of voting been working? Are any changes needed? If so, what changes and why?

53. How well have the limits on proxies worked and are any changes needed? If so, what changes?

Improving tenant participation

54. How well is tenant participation working? How could tenant participation be improved?

Strata managing agents

Appointment of managing agents

55. Are the current durations of appointment and termination notice periods for strata managing agents appropriate? If not, how should they be amended?

56. Do you think the developer should have to present the owners corporation with a choice of three managing agents at the first AGM?

57. A developer or someone connected with them can't manage a strata scheme in its first 10 years. Is this appropriate? Please tell us why.

58. Do you think a standard form strata managing agent agreement should be included in the legislation? If so, why?

59. Should the law require strata schemes of a certain size to be professionally managed?

Minimising conflicts of interest

60. Are the current conflict of interest laws working? If not, how should they be changed?

61. Are the provisions of the Management Act relating to gifts and commissions easy to understand?

62. Should there be a general duty of care in the laws to ensure managing agents obtain goods or services at competitive prices?

63. Should the rules be tightened on disclosure of conflicts of interest for owners corporation contracts?

Functions of strata managing agents

64. The managing agent must follow certain rules when they make a decision for the owners corporation. Are these rules appropriate? If not, how can they be improved?

65. Owners corporations have duties and functions that can be delegated to managing agents (section 57 of the Management Act). If the agent breaches their duties, they will have committed an offence. How well is this working?

66. Do you have personal experience of managing agents being prevented from carrying out their duties under the Management Act because of disputes with the owners corporation? If yes, please describe your experience.

Accountability of managing agents

67. In your experience, are the laws to keep the managing agent accountable working well? If not, how can they be improved?

68. Is the law sufficiently clear on what information the owners corporation is entitled to request from the managing agent and how they get it? If not please tell us why.

69. Do you think the rules of conduct for strata managing agents under the Property and Stock Agents Regulation 2014 are appropriately balanced?

70. As an resident in a strata scheme, what do you think about the competency of strata managing agents?

71. As a strata managing agent, what additional resources and training do you think you should have access to?

72. How important is it for managing agents to have specialist knowledge about building defects?

73. What would you think of the proposal for accreditation of certain licensees under the Property and Stock Agents Act as strata building defects management specialists?

Finances and levies

74. How well is money being managed in the administrative and capital works funds by your owners corporation? Are any changes needed and why?

75. Owners corporations can use money from one fund to temporarily cover the expenses of the other fund. How do you interpret the rules about repayment of money transferred from one fund to the other fund? What should the rule be?

76. How well have the laws on levies and arrears been working? Please explain why and suggest any changes.

77. Are any changes needed to how financial records are prepared, for example, deposits and withdrawals for the owners corporation? Are any changes needed?

78. Is a $250,000 budget the right threshold for compulsory audits to be carried out? If not, what do you think is the right amount?

By-laws

79. Could we make it easier for owners corporations to make by-laws? If yes, please tell us how.

80. By-laws must be lodged with the Land Registry Services within six months. Is this a reasonable time?

81. The Registrar General has the power to waive the requirement for by-law changes to be lodged all at the same time, and instead allow changes to be lodged separately. Should there be changes to this power?

82. While owners corporations can make their own by-laws for their strata scheme, there are restrictions on the types of by-laws that can be made. What do you think about prohibiting 'unreasonable' by-laws?

83. If the law was changed to allow tenants to be able to seek orders challenging by-laws on the basis they are harsh, unconscionable or oppressive, how would this work in your strata scheme?

84. What is your experience with the enforcement of by-laws?

85. Should by-laws made under old strata laws be compliant with the current law? Why, or why not?

86. Are there any additional model by-laws that should be included in the legislation? If so, what are they and how would they assist?

<u>Pets and assistance animal by-laws</u>

87. Under the law, a by-law cannot ban assistance animals e.g. guide dogs. Are any changes needed to the way the laws govern assiatance animals?

88. Should owners corporations be allowed to request proof that an animal is an assistance animal?

89. Should the Management Act outline what kinds of evidence owners corporations can request as part of proving an animal is an assistance animal? If so, what kinds of information should be taken as proof?

90. The NSW Court of Appeal found in 2020, that a by-law imposing a blanket ban on pers was oppressive and therefore invalid under the laws. Should the law allow owners corporations to completely ban pets from a strata scheme? Please tell us why.

Other specific by-law making powers

91. Do the existing restrictions on the power to make by-laws require any changes? If so, what changes and why?

Records, tenancy notice and service

92. How has record keeping been working? Are any changes needed and if so, why?

93. Should keeping electronic records be made compulsory? Why/why not?

Availability of records

94. How is inspection of records working? Are any changes needed and if so, why?

95. How are the strata information certificates provisions working? Are any changes needed and if so, why?

96. A landlord must provide a tenant with a copy of the by-laws and the strata management statement if there is one. How is this working? Please describe and suggest what changes might be needed.

97. If a lot owner leases their apartment to tenants, the lot owner must provide the owners corporation with information about the tenants living in their lot within 14 days. Is this notice working? Could this be improved? If so, how?

98. The law sets out how notices and other documents can be served on or by an owners corporation. How is this working? Please describe and tell us if this can be simplified in any way.

Common seal

99. COVID-19 emergency laws, passed in May 2020, allowed owners corporations to approve official documents with the witnessed signatures of two authorised people, instead of affixing the common seal. If this was permanently included in strata laws, is there anything else that should be included?

100. To verify that documents are properly executed, should the details of strata committees and strata managing agents be required to be lodged and made available on a publicly searchable register similar to the ASIC company register?

Initial period

101. How have the initial period provisions been working? Are any changes needed, and if so, why?