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Strata Review 2020

The Real Estate Institute of New South Wales Limited

Submission in response to the *Strata Schemes Management Act 2015* (NSW), the *Strata Schemes Management Regulation 2016* (NSW) and the *Strata Schemes Development Act 2015* (NSW)

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1. Introduction

This submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in anticipation of the upcoming review of the strata legislation.

REINSW is the largest professional association of real estate agents and other property professionals, with over 7,500 individual members in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues.

This submission has been prepared under the guidance of members of the REINSW Strata Management Chapter Committee. These members are licensed real estate professionals with longstanding knowledge, experience, and expertise in the practice of strata management and strata development. REINSW considers it prudent to avail this expertise to the legislators for consideration and inclusion in any discussion paper in advance of the public consultation process later this year.

Since 2016, REINSW and members of the REINSW Strata Management Chapter Committee have been collaborating in a series of meetings regarding the anticipated legislative review of the strata legislation. Several issues have been raised during these meeting [redacted] REINSW is of the view that necessary amendments should be made to the *Strata Schemes Management Act 2015* (NSW) (**SSMA**), *Strata Schemes Management Regulation 2016* (NSW) (**SSM Regulation**) and the *Strata Schemes Development Act 2015* (NSW) (**SSDA**).

[redacted]

REINSW will continue to consult with expert practitioners and NSW Fair Trading on these issues for the purpose of proposing pragmatic recommendations based on industry practices.

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2. Matters for Consideration

(i) *Strata Schemes Management Act 2015* (NSW)

(a) Developer Documents

REINSW is of the view that a significant improvement for both consumers and industry professionals could be achieved by introducing a requirement into the SSMA for developers to register relevant documents, being those set out in section 16(1) of the SSMA (that is, documents and records to be provided to the owners corporation at the first AGM), which could then be attached to the strata plan at the time of its registration.

REINSW raises this issue due to the lack of clarity with respect to where liability, accountability and responsibility is placed, particularly with regards to the content and availability of developer documents. REINSW has been notified by its members that many developers have stated that they fulfill their obligations when all documents are given to the strata manager at the time when the development of the building has completed. However, in reality, owners corporations change strata managers such that the current strata manager may not be the original one who received the developer documents. Of course, this causes concern but particularly during the time in which the warranty period still applies to a building and the developer documents may be required. If a new strata manager is unable to obtain all the relevant documents from a previous strata manager or the original strata manager (as the case may be), and the developer is unwilling to assist, it appears unreasonable for liability, accountability and responsibility to rest with the new strata manager who has taken over the management. Similarly, this issue is particularly problematic in instances where strata managers are appointed to take over strata schemes that were previously self-managed and those self-managing were less experienced in ensuring that all developer documents related to the scheme are stored correctly (for example, in a document management system or even in a transferable format).

To resolve this issue, REINSW proposes that when a Building Management Certificate (**BMC**) is created, it is registered together with the Strata Management Statement (**SMS**) on the Common Property Certificate of Title for the first strata plan. At the same time the strata plan is registered, the concept of a 'developer pack' could be lodged and registered on the common title, so that all developer documents relevant to the building is registered (such as a BMC and SMS) and originals held by the NSW Land Registry Services, not strata managers nor people self-managing strata schemes. The developer documents would then be easily available regardless of when they are required. Further, REINSW envisages that

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the costs involved would be incorporated as part of the cost of lodging the documents.

An administrative question would also be solved with this change, that is, when a strata scheme changes from the initial period to the owners corporation phase, are all developer documents (including the initial maintenance schedule) available at that time, or are they available shortly thereafter? The Council would presumably have the documents on file, however, obtaining them is time consuming. REINSW proposes that it would be extremely beneficial for all parties if a 'developer pack' containing all developer documents is introduced and required to be registered on the building's common title. The records would be easily available and never lost. Further, there is benefit in the practicality and convenience of a strata manager (who has taken over the management of a building) ordering the developer pack at the same time as they order the title search.

[redacted]

On a related note, REINSW would like to see section 16(1)(a) of the SSMA amended to specifically include the 'engineering specification' as a separate item in that section. REINSW contends that the 'engineering specification' document is a prime example of a crucial document that must always be protected and made available , and the developer pack would cover this vital need for owners and strata managers. This need is highlighted by the structural failure of the Mascot Towers building and, for that reason, REINSW recommends that the concept of a registered 'developer pack' be introduced into the legislation and for section 16(1)(a) to be amended to specifically include the engineering specification as a separate item.

With respect to section 16(1)(d) of the SSMA, REINSW is of the view that its requirements are not well understood most likely because there is no definition of an "*initial maintenance schedule*". To improve clarity and compliance with the legislation, REINSW suggests that the requirement to deliver the initial maintenance schedule to the owners corporation under section 16(1)(d) be integrated with the requirement under section 80 of the SSMA to prepare a ten-year capital works fund plan so that section 80 covers both the initial maintenance schedule as well as the ten-year capital works fund plan, both to be made available at the first annual general meeting rather than being commissioned after the event.

(b)Appointment of developer/related person as strata manager

Section 49 Appointment of strata managing agents

(1) An owners corporation for a strata scheme may appoint a person who is the holder of a strata managing agent's licence under the

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Property and Stock Agents Act 2002 to be the strata managing agent of the scheme.

(2) (The appointment is to be made by instrument in writing authorised by a resolution at a general meeting of the owners corporation.

(3) The developer of a strata scheme, or a person connected with the developer, is not entitled to be appointed as the strata managing agent of the scheme until after the end of the period of 10 years commencing on the date of registration of the strata plan.

(4) A reference in this section to a strata managing agent's licence under the Property and Stock Agents Act 2002 includes a reference to a corporation licence under that Act that authorises the holder to act as, or carry on the business of, a strata managing agent.

(5) An owner who is seeking appointment as a strata managing agent is not entitled to vote or cast a proxy vote on the appointment at a meeting of the owners corporation.

REINSW suggests that section 49(3) of the SSMA should be amended so that it achieves its regulatory purpose without unfairly restricting strata managers/developers from managing strata schemes.

If the provision was introduced to address concerns relating to the administration of building warranties under the *Home Building Act 1989* (NSW), REINSW questions why under section 49(3) a strata manager is prohibited from managing their own development for a 10-year period when the limitation in section 18E of the *Home Building Act 1989* (NSW) relating to statutory building warranties operates for a period of 6 years.

It is REINSW's view that currently section 49(3) fails to account for a variety of ad hoc situations. For example, where a licensed strata manager develops a strata building for investment purposes and retains all lots in the strata plan in their superannuation fund or in a family trust and, consequently, retains all lots for a period extending beyond the 10-year period. Considering this, REINSW views the limitation imposed under section 49(3) as an undue penalty that unnecessarily precludes the beneficial owner of all the lots from managing and administering the strata scheme, which they are qualified to do. In effect, this limitation is tantamount to an accountant being precluded from managing the financial affairs of their own company; an outcome which is entirely incongruent with the principles of free trade.

Alternatively, REINSW recommends section 49(3) be amended so that in instances where the developer of a strata scheme or person connected with the developer retains beneficial ownership of all lots in the scheme, that individual is not entitled to be appointed as the strata managing agent until after the end of

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the period of 10 years commencing **on the date of expiration of the initial period** rather than on the date of registration of the strata plan.

Furthermore, REINSW also recommends amending section 49 to include an exemption that accounts for instances where the strata manager/developer is given unanimous consent by the owners corporation to manage the scheme despite having an interest in the scheme.
Given the unnecessary implications of section 49(3), REINSW recommends that if the section is to remain it should:

A. not exceed the statutory warranty period of 6 years under the *Home Building Act 1989* (NSW);
B. be amended by replacing "*until after the end of the period of 10 years commencing on the date of registration of the strata plan" with* "*until after the end of the period of 10 years commencing on the date of expiration of the initial period"*; to provide an exemption in instances where the strata manager/developer retains beneficial ownership of all lots within the strata plan; and
C. provide an exemption where, subject to the unanimous consent of the owners corporation, the strata manger/developer is authorised to manage the scheme despite holding an interest in that scheme.

[redacted]

(c) Term of Appointment of Strata Managing Agents

Section 50(1) Term of appointment of strata managing agents

(1) The term of appointment (including any additional term under an option to renew) of a strata managing agent for a strata scheme expires (if the term of the appointment does not end earlier or is not ended earlier for any other reason)—
(a) if the strata managing agent is appointed by the owners corporation at the first annual general meeting, at the end of the period of 12 months following that appointment, or
(b) in any other case, at the end of the period of 3 years following the appointment.

It is REINSW's view that the current 12-month term of appointment of strata managers following the owners' corporations first annual general meeting is too short and should be extended to 15 months. While the term of appointment for a strata managing agent may be extended by the strata committee for successive periods of up to 3 months under section 50(4), this period is too short to warrant a strata manager's administrative burden of holding a strata committee meeting. Holding strata committee meetings in such short intervals solely for the purpose of extending the strata manager's appointment term incurs an unnecessary amount

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of administrative time and work which, in turn, results in greater management fees being charged to lot owners.

Further, REINSW notes the difficulty and time constraints currently experienced by strata managers having to prepare annual accounts in time for the second annual general meeting, noting that they must also give 7 days' written notice of that meeting to which the accounts must be ready and included.

Accordingly, REINSW recommends amending section 50(1)(a) of the SSMA to extend the 12-month term of appointment to 15 months, as this will subsume the additional and onerous step of holding a strata committee meeting simply to extend the strata manager's term of appointment for a further 3 months. Amending section 50(1)(a) in this way will remove an unnecessary administrative burden and, as a result, will improve efficiency, reduce unwarranted fees and allow strata managers sufficient time to prepare for the second annual general meeting.

(d)Strata Managing Agent to Record Exercise of Functions

Section 55 Strata managing agent to record exercise of functions

A strata managing agent who exercises a function of the owners corporation or of an officer of the owners corporation must, immediately after its exercise, make a record specifying the function and the manner in which it was exercised.

REINSW questions whether the policy intention of section 55(1) is to require a separate record to be kept by a strata manager every time they exercise a delegated authority. The reason for this query is because REINSW submits that every function of a strata manager is exercised as a delegated authority of either the chairman, secretary, treasurer or strata committee. REINSW wishes to highlight this point by way of the following most common examples of a strata manager exercising a delegated authority:

A. the issue of a receipt for every levy payment and the payment of every account as well as the issue of an information certificate, which are each an exercise of the delegated authority of the treasurer;

B. the arrangement of every repair, which is an exercise of the delegated authority of the strata committee; and

C. the receipt, processing and issue of correspondence (including emails) as well as telephone communications (often involving instructions to service providers that need to be recorded), which are each an exercise of the delegated authority of the secretary.

REINSW's view is that the intention of section 55(1) is not to minute every action carried out by strata managers but to ensure that they keep accurate, timely and

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appropriate records of their functions. A strict reading of section 55(1) supports the intention to require separate records to be made each time a delegated authority is exercised, specifying the function and manner in which it has been exercised. Consequently, a significant administrative burden is unnecessarily placed on strata managers who must employ a considerable number of staff to comply with this high level of record management. This requirement increases administrative costs, which are ultimately borne by the consumer in the form of strata management fees. Further, REINSW is concerned that under the current wording there is a possibility that courts could interpret section 55 strictly and literally, potentially rendering every strata manager in New South Wales in breach of the section.

REINSW not only considers this requirement to be an inefficient and impractical use of strata managers' time and resources, but it questions the purpose and necessity of recording every activity when there is delegated authority to act that way in the first place. REINSW queries why when issuing an information certificate, for example, a photocopy or scanned copy kept in the file does not constitute the relevant record of that activity, despite there being no separate record of the specific function having been exercised.

Essentially, REINSW is not clear on what this section requires of strata managers, despite it being a long-standing requirement in the legislation. [redacted] REINSW recommends that this be clarified in the legislation by either amending section 55(1) or by introducing a guidance note. With respect to the latter, REINSW [redacted] to discuss the issue further with the aim of preparing a factsheet or guidance note to assist strata managers to comply with the requirements of section 55(1). [redacted]

55 Strata managing agent to record exercise of functions

(2) The strata managing agent must give a copy of the records kept for the preceding 12 months to the owners corporation at least once each year.

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REINSW notes that the expression 'records' is not clearly defined in the SSMA. As such, there is confusion around which records are applicable to section 55(2). For instance, does it mean that the owners corporation must be provided with every record, including (without limitation) receipts, payments, correspondence, emails, file notes, service invoices, records of telephone conversations (including teleconferences and videoconferences), etc? REINSW requests clarification with respect to the precise definition of '*record'* in the drafting of the SSMA.

REINSW also notes that it is unclear as to how section 55(2) operates where a strata manager has been appointed by the Tribunal to administer the strata scheme under compulsory appointment. In these circumstances, the registered address of the strata scheme is the strata manager's office. Therefore, a strict reading of section 55(2) requires the strata manager to provide themselves with a copy of their own records every twelve months. Not surprisingly, this imposes a significant and unnecessary administrative burden on the strata manager (particularly in terms of time and cost), and results in the owners corporation having to pay increased management fees without receiving any apparent benefit. REINSW doubts that this outcome is the Government's intention, particularly since the records are required to be held in a trustee capacity by the strata manager and can be easily accessed by any strata committee member or proprietor during business hours and is already addressed in sections 58-65 of the SSMA. With that in mind, REINSW recommends that section 55(2) be amended to take into account the circumstance where a strata manager is appointed by the Tribunal to administer the strata scheme under compulsory appointment (for instance, to remove that circumstance from the application of the section).

(e) Delegated Functions and Gifts

Section 57 Breaches by strata managing agent

(1) If a strata managing agent has been delegated a function by an owners corporation and a breach of the duty by the owners corporation would constitute an offence under a provision of this Act, the agent is guilty of an offence under that provision (instead of the owners corporation) for any breach of the duty by the agent occurring while the delegation remains in force.

(2) A strata managing agent must not, in connection with the provision of services as a strata managing agent or the exercise of functions as a strata managing agent, request or accept a gift or other benefit from another person for himself or herself or for another person.

REINSW would like to see a carve out in section 57(1) of the SSMA to account for the circumstance where an act of the strata manager requires funding which is being withheld by the owners corporation's refusal to raise sufficient funds to enable the strata manager to carry out that delegated function. For example, this

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issue commonly arises in instances where a term in an agency agreement stipulates that a strata managing agent has a responsibility to repair and maintain common property but the owners corporation refuses to raise or release funds in order for the strata managing agent to fulfil that duty. Such a scenario is particularly problematic in instances where monies are required to address repair issues of considerable urgency.

[redacted] REINSW sent [redacted] the **enclosed** examples, which set out practical challenges facing strata managing agents where owners corporations refuse to raise or release funds, inhibiting performance of their duties. These examples were formulated by drawing on the collective depth of experience from REINSW's Strata Management Chapter Committee with the intention of providing Government with greater perspective on how the current legislative arrangement under section 57(1) of the SSMA is adversely affecting the ability for strata managers to effectively fulfil their obligations.

Alternative to the above proposal is introducing a carve out in section 57(1) to address situations where a levy has been raised but proprietors are withholding the funds which, in turn, prevent the strata manager from carrying out their necessary functions.

REINSW also has concerns over the prohibition on strata managing agents to request or accept gifts or other benefits above $60, in accordance with section 57 of the SMAA and clause 63 of the SSM Regulation.

REINSW has raised the issue with NSW Fair Trading that it is unclear in the legislation as to whether section 57 applies to licensed strata managers and/or holders of a certificate of registration. [redacted] The issue is that consumers are not as familiar with the SSMA as NSW Fair Trading is and so there is an unawareness amongst consumers (including strata managers) in the industry on the application of this prohibition. REINSW is of the view that section 57 should be amended to clarify that the prohibition only applies to licence holders and not certificate of registration holders.

REINSW has also queried with NSW Fair Trading whether the prescribed monetary threshold with respect to gifts applies to each strata manager or on a per company basis. [redacted] this is not clear in the legislation which has resulted in confusion in the market. REINSW is aware that other stakeholders appear to have differing views on this issue. To avoid any further industry confusion, REINSW would be appreciative if NSW Fair Trading clarified this issue with those other

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stakeholders and published their positions on NSW Fair Trading's website. If the policy intent of the restrictions in section 57 applying to individual strata managers was made known to the public, then professionals would have access to the correct interpretation, minimising confusion. In addition, REINSW proposes an amendment to the legislation to make it abundantly clear that the threshold applies to each strata manager as opposed to each certificate of registration holder or agency.

REINSW appreciates that the prohibition aims to enhance transparency and accountability, and to address the potential for conflicts of interest to arise if a gift served as an inducement for a strata manager not to act in their clients' best interest. However, REINSW acknowledges that it is difficult for professionals to adhere to the prohibition in practice. It does not seem feasible that a practitioner can accurately know the value of a gift without any documentation or proof of its value. Additionally, REINSW's members have raised queries as to why it is capped at a $60 value. Common examples of gifts received by our members include Christmas party invitations, educational seminars (including food and drink) and gift hampers, all of which would be estimated to exceed the $60 limit as per clause 63 of the SSM Regulation. If Government does not intend to amend this section of the legislation, REINSW seeks an understanding from NSW Fair Trading on why the restrictions are in place and the type of gifts that can be accepted.

On the issue of the type of gifts captured by the section, REINSW recommends that a better definition of "*gift*" be included in section 57(4) on the basis that consumers may not know how to locate the definition in the *Electoral Funding Act 2018*. REINSW suggests that the definition of "*gift*" in the SSMA needs to explain what constitutes a gift, for example, an expression of gratitude as opposed to an inducement.

Finally, [redacted] the gift threshold is inclusive of GST on the basis that *A New Tax System (Goods and Services Tax) Act 1999* (Cth) states that any price quoted must be inclusive of GST, REINSW recommends that the SSMA make this clear so that consumers do not need to refer to two separate pieces of legislation to obtain the answer.

(f) Capital Works

Section 80 Owners corporation to prepare 10-year capital works fund plan

(1) An owners corporation is to prepare a plan of anticipated major expenditure to be met from the capital works fund for a 10-year period commencing on the first annual general meeting of the owners corporation.

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REINSW seeks clarity on the interpretation of section 80(1) and, in particular, what a 10-year capital works fund plan is and is not expected to do. REINSW's concern is that consumers have unbridled expectations, expecting a 10-year capital works fund plan in addition to maintenance plans, dilapidation reports, building reports, etc. Providing an interpretation of the section will assist in managing expectations and removing confusion in the market as to what is required.

Further, REINSW recommends broadening section 80(1) to include a requirement for the owners corporation to include the annual savings requirements in the 10-year capital works fund plan to ensure that the anticipated major expenditure can be adequately funded. Focusing on how the owners corporation will save the required funds will support the words "to be met" in section 80(1) and will provide a more complete and comprehensive process to achieve the intended outcome of having a 10-year capital works fund plan in place. This is because it will ensure that the owners corporation's anticipated income is considered and not just its anticipated major expenditure.

[redacted]

Section 80 Owners corporation to prepare 10-year capital works fund plan

(7) An owners corporation is, so far as practicable (and subject to any adjustment under this section), to implement each plan prepared under this section.

It has been brought to REINSW's attention that this legislative provision has caused much confusion in the industry with most owners corporations unable to follow a practical approach when it comes to capital works planning. In particular, and as abovementioned, without the requirement for the owners corporation to include the annual savings requirements in the capital works fund plan, the anticipated major expenditure cannot be adequately funded and, hence, the plan is fruitless. Further, REINSW is of the view that the words "*so far as practicable*" are vague and leaves open room for interpretation. Is the policy intention of a capital works fund plan to create a savings plan, or is it aimed at providing a building dilapidation report or maintenance plan? The current language could be interpreted to mean that all or either of these dissimilar documents are required. REINSW's concern is that, without clear guidance, it is difficult to determine the level of detail required to provide a satisfactory outcome and to avoid potential fines, penalties and lawsuits.

REINSW has sought guidance from NSW Fair Trading on this issue [redacted]

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[redacted]

REINSW acknowledges that individual strata schemes can vary significantly in terms of size, structure, and amenities and this will impact on what matters a capital works plan will need to include. Therefore, REINSW recommends that, once section 80(7) is clarified to include annual savings requirements in capital works fund plans, a capital works fund plan template should be introduced that is designed to be amended and tailored to suit each strata scheme, perhaps with the inclusion of a guidance note reminding owners corporations to consider the scheme's individual circumstances when preparing the plan.

Alternatively, and more preferably, REINSW is of the opinion that section 80 requires the inclusion of a guidance note to explain who is qualified as an expert to prepare a capital works fund plan. Such a guidance note will encourage a standardised practice across the industry and will promote best practice. A guidance note will also ensure that the plans are appropriate to raise sufficient funds, reducing the need for special levies. By implementing a guidance note instead of a pro forma template, it can direct industry professionals to consider various items in a scheme, such as (without limitation) lifts and plant equipment that require regular maintenance. REINSW's view is that the guidance note must account for variances in the strata schemes (for instance, a two-lot scheme vs. a 100-lot scheme). In doing so, it will operate to hold strata schemes accountable without imposing a statutory penalty for non-compliance. REINSW believes that it would be highly beneficial to introduce a standardised benchmark for strata schemes to follow, to achieve a base level which considers the common property items required for maintenance and repair.

[redacted] However, a guidance note would make capital works fund plans easier for strata schemes and professional service providers to develop.

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Finally, the consequences of not preparing a proper capital works fund plan or not raising the appropriate level of funds should be communicated to strata schemes. In this regard, REINSW believes that section 106 of the SSMA (which deals with the owners corporation's duty to maintain and repair property) can assist to clarify a strata scheme's responsibility under the legislation. For example, perhaps guidance notes could be introduced into section 106 indicating:

A. that there may be a common property memorandum registered as a by-law indicating whether the owners corporation or a lot owner is responsible for maintaining, repairing or replacing part of the common property; and
B. the implications of not preparing a capital works fund plan or not raising the appropriate level of funds where an owners corporation is required to repair and maintain the common property and personal property vested in it.

(g)Initial Contributions Set by Developers

REINSW is concerned with the practice of developers improperly preparing costings and leaving consumers at a disadvantage. The incorrect setting of levies is a practice that can mislead and deceive owners buying into a strata scheme. This is compounded by the practice of developers subsequently winding up their business to avoid responsibility. When levies are not appropriately set, the first purchasers are at the greatest risk, prior to the establishment of the owners corporation.

[redacted]

REINSW is of the view that this could be remedied via the legislative requirement of an independent party (for example, a quantity surveyor or valuer) to sign off on the levies set initially by the developer. There is currently no recourse for consumers where incorrectly set levies lead to financial distress. REINSW notes that NCAT can make orders regarding compensation to the owners corporation from an original owner if levies during the initial period were set too low to meet the strata scheme's costs. However, applying to NCAT is not a desirable avenue open to all consumers and, having regard to the disadvantageous consequences of this practice, REINSW contends that there should be penalties introduced into the legislation for such devious or even inadvertent acts.

It is routine practice for developers to engage a quantity surveyor to advise on their developments and assist in preparing a ten-year capital works plan subsequent to the first annual general meeting (as permitted by section 80(6) of the SSMA). Because of this, REINSW suggests that developers should be imposed with a mandatory legislative requirement to present the preparation of the preliminary ten-

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year capital works fund plan at the first annual general meeting as this will assist purchasers in determining their levies at that meeting.

[redacted]

(h)Special Levies and the 30-Day Payment Requirement

Section 83 Levying of contributions

(1) An owners corporation levies a contribution required to be paid to the administrative fund or capital works fund by an owner of a lot by giving the owner written notice of the contribution payable.

(2) Contributions levied by an owners corporation must be levied in respect of each lot and are payable (subject to this section and section 82) by the owners in shares proportional to the unit entitlements of their respective lots.

(3) Any contribution levied by an owners corporation becomes due and payable to the owners corporation on the date set out in the notice of the contribution. The date must be at least 30 days after the notice is given.

(4) Regular periodic contributions to the administrative fund and capital works fund of an owners corporation are taken to have been duly levied on an owner of a lot even though notice levying the contributions was not given to the owner.

REINSW seeks clarification on the policy intention behind section 83(3) of the SSMA.

The previous system allowed for a special levy to be due and payable within 7 days, which enabled emergency works to the building to be done. The current legislation prolongs the receipt of funds from lot owners for potentially as long as 60 days (which is too long for emergency works to be carried out) because there is a requirement to give 30 days' notice of the due date for payment of the contribution and then interest is not accrued until a calendar month after the due date (pursuant to section 85(2) of the SSMA). It is common practice for proprietors to pay the relevant levy one day prior to the expiration of a calendar month after the levy due date. That is, leaving their payment until the very last day before incurring interest. Unfortunately, this practice has now become far more common since the COVID-19 pandemic. The legislation needs to be amended to address this permitted delay in payment, particularly where emergency works are concerned.

Funds for emergency works need to be readily available when required because many events requiring such works (for example, a burst sewer or collapsed wall due to termite damage) are generally not covered by insurance and must instead

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be paid for through the raising of special levies. Loans are not a solution in these circumstances because it takes longer to obtain funds through that avenue.

Emergency works need to be carried out as soon as possible and the work cannot be carried out without having available funds. Further, tradespeople like to be paid within 7 to 14 days after carrying out works.

Whilst REINSW acknowledges that the due date for payment with respect to planned works to the building should be in accordance with section 83(3) of the SSMA, REINSW submits that there should also be a requirement that allows for special levies to be raised quickly. This is imperative where the 30-day payment requirement is impractical. For instance, the requirement to pay not less than 30 days after the levy notice is served should not apply to emergency works that need to be done to a building. This is particularly so where the delay of such works could result in health and/or safety risks to consumers.

Finally, there is a strict liability of the owners corporation to maintain and repair common property. If there are no funds available to maintain and repair, then breaches occur. This issue is resolved with a legislative requirement that allows special levies to be raised quickly, for instance, in emergency situations.

(i) Interest, Discounts on Contributions and Payment Plans

Section 85 Interest, discounts on contributions and payment plans

(1) A contribution, if not paid when it becomes due and payable, bears until paid simple interest at an annual rate of 10% or, if the regulations provide for another rate, that other rate.

(2) Interest is not payable if the contribution is paid not later than one month after it becomes due and payable.

(3) However, an owners corporation may by resolution determine (either generally or in a particular case) that a contribution is to bear no interest.

(4) An owners corporation may, by resolution at a general meeting, determine (either generally or in a particular case) that a person may pay 10% less of a contribution levied if the person pays the contribution before the date on which it becomes due and payable.

(5) An owners corporation may, by resolution at a general meeting, agree to enter into payment plans, either generally or in particular cases, for the payment of overdue contributions. A payment plan is to be limited to a period of 12 months but a further plan may be agreed to by the owners corporation by resolution.

(6) The regulations may prescribe requirements for payment plans.

(7) The existence of a payment plan does not limit any right of the owners corporation to take action to recover the amount of unpaid contributions.

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> *(8) The Tribunal or a court may, on application by an owner, order that no interest is chargeable on a specified contribution if the Tribunal or the court is satisfied that the owners corporation should reasonably have made a determination not to charge interest for the late contribution.*

REINSW recommends that section 85 of the SSMA be amended so that the word "*paid*" is replaced with the word "*received*".

Currently, a growing number of owners will pay their levies on the last day before interest starts to accrue. From a practical and commercial perspective, the result of this delay is that the strata industry loses a significant proportion of time due to managing late payments which must, in turn, be recovered by increased management fees. Given the financial issues stemming from the COVID-19 pandemic and related economic downturn, this issue is likely to worsen.

A significant cause of this issue is the practice of levies not actually being received until the day after (or, in some circumstances, up to 5 days after) interest starts to accrue on outstanding amounts. It usually takes 3 business days for funds to clear. Consequently, this causes an increasing number of unnecessary disputes between strata managers and their clients, as strata managers must expend a considerable amount of time removing interest accrued because of the late receipt of payments after their due dates.

Accordingly, REINSW suggests changing the terminology in sections 85(1) and (2) from 'paid' to 'received' as follows (emphasis added):

> *(1) A contribution, if not **received** when it becomes due and payable, bears until **received** simple interest at an annual rate of 10% or, if the regulations provide for another rate, that other rate.*
>
> *(2) Interest is not payable if the contribution is **received** not later than one month after it becomes due and payable.*

It is REINSW's view that implementing these amendments would facilitate the efficiency of strata managers by mitigating against the practical and commercial implications outlined above.

An alternative to amending section 85 in this way is to amend the SSMA so that the overdue payment of levies must be paid at least 3 business days before interest starts to accrue because, as mentioned above, it usually takes 3 business days for funds to clear.

More generally, REINSW raises the question as to whether due dates for payment of levies should be reduced from 30 days to 14 days so that the strata legislation reflects the legislative and contractual requirements of other industries. For example, many contractors in the building and construction industry require

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payment within 15 business days of the date of invoice as per section 11(1A) of the *Building and Construction Industry Security of Payment Act 1999* (NSW). Therefore, REINSW recommends amending the strata legislation so that it reflects the commercial practices, requirements and contractual agreements of these other industries. This will also minimise potential breaches by owners corporations of payment terms, particularly where they need to wait until levies are received before payments are made.

In REINSW's view, amending the SSMA in line with the above recommendations would likely create a greater incentive for levies to be paid more promptly and, thus, improve efficiency, and reduce administrative costs and management fees.

(j) Minor Renovations

REINSW believes that it should be a statutory requirement to register minor renovations to common property carried out by lot owners under section 110 of the SSMA. The form of register could be prescribed by the SSM Regulation, completed by lot owners and held by the relevant strata manager. REINSW envisages that this could be a minor works public register (including any conditions) with a requirement to keep records up to date. It should be maintained in parallel with the by-laws. This would serve to both protect future lot owners and facilitate strata managers to better fulfil their duties. Alternatively, the SSMA could require the registration of a by-law in relation to minor renovations.

In the case of general works carried out to common property, a by-law is required to be registered which discloses to new lot owners the works that have previously been carried out and their responsibilities going forward. Currently, this is not the case for any works carried out to common property under section 110 and it presents considerable problems for prospective purchasers and purchasers alike. For instance, any information regarding minor renovations is only required to be retained for 7 years such that, when inspecting a strata lot for purchase, prospective purchasers are unlikely to be made aware of any minor renovations that occurred prior to 7 years ago. Further, new owners can be held financially responsible for ongoing costs that they could not have reasonably foreseen because there is no requirement to register the works that were carried out. REINSW's solution is for a register to be maintained (which also creates time and cost efficiencies) or to require the registration of a by-law in relation to minor renovations, although REINSW notes that by-laws can be lengthy and not as efficient as a register to manage the process. Another benefit of having a register is that it ensures any rectification of a defective minor renovation involving common property is borne by the lot owner making the renovation as opposed to the owners corporation.

REINSW wishes to highlight this issue in a real-life example which it became aware of by a member. It involves the approval to renovate a kitchen under the minor

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works section of the SSMA. This renovation involved the replacement of all tiles on the walls and floor. Unfortunately, the wall tiles cracked during the renovation. To make matters worse, the records kept in relation to the minor works had been lost during a change in strata managers, leaving no record of the approval of the minor renovations. The lot owner claimed the owners corporation was liable to make the repairs and pay for them as the original tiles were attached to an external wall and were, therefore, part of the common property. A real problem arises where there is no record of the minor renovation and no by-law in place which makes the repair and upkeep the owner's responsibility. Ultimately, the owners corporation agreed to equally divide the cost of the tile repair and the lot owner avoided having to pursue the dispute at NCAT. To prevent instances such as this from occurring in the future, a by-law was subsequently registered to ensure that renovations and/or repairs of this nature will be the responsibility of lot owners.

If a register of minor renovations or the requirement to register a by-law was introduced for works carried out under section 110 of the SSMA, disputes such as this could be avoided. REINSW is of the view that the register or by-law would bring clarity as to which party is responsible for any upkeep and future repairs to the relevant common property. They would also ensure that a newly appointed strata manager would be equipped with all the information necessary to properly inform lot owners of their obligations in relation to the minor renovations. In addition, not only would introducing a register ensure greater transparency by having all records of minor renovations stored in a central location and not disposed of after 7 years, it would also improve efficiencies of time and cost. Indeed, when compared to by-laws which in these instances are often unnecessarily created for the dominant purpose of recording individual minor renovations, a simplified register would significantly reduce the unnecessary expenditure of administrative time and, in turn, costs. This is because it might be too difficult to search records for minutes that record renovations or because lot owners would be better positioned to manage ongoing repairs and maintenance obligations with greater efficiency. Of course, improved record keeping for minor renovations through the establishment of a register would invariably also benefit consumers as those purchasing a strata lot would be well informed as to their responsibilities by simply accessing the register to view previous minor renovations that were carried out.

(k) Window Safety Devices

Section 118 Window safety devices-child safety

(1) An owners corporation for a strata scheme to which this section applies must ensure that there are complying window safety devices for all windows of each building in the strata scheme that are windows to which this section applies.
Maximum penalty—5 penalty units.

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(2) An owners corporation is to carry out work related to its functions under this section at its own expense and may, for the purposes of this section, carry out work on any part of the parcel.

(3) An owner of a lot in a strata scheme to which this section applies may install a complying window safety device on a window to which this section applies (other than a window on another owner's lot).

(4) An owner of a lot who installs a window safety device under this section must—

(a) repair any damage caused to any part of the common property by the installation of the device, and

(b) ensure that the device is installed in a competent and proper manner and has an appearance, after it has been installed, in keeping with the appearance of the building.

(5) An owners corporation or an owner of a lot may carry out work authorised by this section despite any other provision of this Act, the regulations or any by-law of the scheme.

(6) The regulations may make provision for or with respect to the following—

(a) the strata schemes and windows to which this section applies,

(b) the devices or other things that are complying window safety devices for the purposes of this section,

(c) notification to the owners corporation by owners who install window safety devices.

(7) A regulation may apply this section to a window located on any part of a parcel.

REINSW is of the view that current apportionment of liability regarding section 118 of the SSMA ought to be reconsidered as it is both a source of confusion and potential danger to consumers because of substandard and ill-maintained window safety devices. REINSW recommends that the legislation treat window safety devices as common property, as this would clarify liability. For REINSW, this is a safety issue to protect children and adults from falling out of windows, causing death or serious injury. REINSW's view is that this needs to become the responsibility of the owners corporation because time has proven that there are dangers with leaving owners and residents responsible for window safety devices (for instance, they may leave the keys in the window locks and undo the windows to slide them back/up). Consumers who install a window safety device would then remain responsible for its maintenance and repair. [redacted]

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Furthermore, the following are practical issues noted by the REINSW Strata Management Chapter Committee and REINSW recommends that they be addressed/rectified in the legislation [redacted]

1. The parameters leave potential for tenants and owners to interfere with window safety device installations, without notifying the owners corporation, resulting in the owners corporation remaining unaware of any tampering of the installation. If the owners corporation is, in fact, notified then access would need to be arranged for an authorised representative to check and ensure statutory compliance, placing further costs and higher levies on the owners corporation.

2. The owners corporation is responsible for the initial installations, rendering the installations common property wherein it must be maintained by them under section 106 even if the installations have been interfered with by the owner or occupant of the property.

3. With respect to section 118(4)(b) of the SSMA, there is no stipulated qualification requirement or guidance indicating how a "*competent and proper manner*" of installation is achieved.

4. There is no legislative guideline or regulation that provides an obligation for how or when (for example, annually) these installations should be inspected to ensure ongoing compliance. This puts the owners corporation in a state of vulnerability if the installations are tampered with by an unauthorised, unidentifiable third party, should a claim for personal injury or death result.

5. No consideration appears to have been given to the provisions of section 142 of the SSMA under which a lot owner can be provided with the right of exclusive use and enjoyment, including obligations of maintenance, by way of a by-law that requires the lot owner to fit and maintain window safety devices.

6. As it currently stands, it appears that if a by-law is adopted under section 142, the owners corporation will remain responsible for the maintenance of the installations notwithstanding that the by-law has made the lot owner responsible. REINSW believes that without statutory clarification, this serves to undermine the policy intent of implementing a section 142 exclusive usage and obligations of maintenance by-law to each lot owner for the installation and/or ongoing maintenance of window safety devices.

7. The legislation should enable the owners corporation to delegate the responsibility for maintenance by way of a by-law, in addition to the installation, to lot owners who would then become responsible for the ongoing maintenance of the devices.

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8. Clarification in the legislation is required as to the implications of the owners corporation passing a special resolution not to maintain the locks after satisfactory installation is completed.

9. The owner or occupier should be responsible for the maintenance of the window safety device or, alternatively, they should have an obligation to report any malfunction promptly after becoming aware of it.

10. Since it is not part of a ten-year budget expense as detailed under section 80 of the SSMA, the acquisition of the additional common property required before the installation can proceed would then need to be addressed by way of a special levy, having future budgets adjusted in order to take into account the prudent cost of an annual operational compliance inspection.

11. As the installation is a statutory requirement, in the event of a failure arising from unauthorised interference by an owner or occupier resulting in injury, the owners corporation's insurer may deny the claim as the owners corporation has a statutory obligation to ensure that the locks are functional at all times. This could result in the actions of an individual placing the owners corporation and, therefore, all the owners in a position of facing a substantial personal injury claim with no insurance cover. This may further result in the necessity to raise special levies to meet legal costs and damages which individual owners may not be in a financial position to pay.

(l) Insurance Valuations

REINSW questions why the requirement to obtain building insurance valuations every 5 years has been removed from the legislation. REINSW appreciates that this removal permits owners corporations the flexibility and autonomy to decide the frequency in which buildings are valued. However, REINSW considers this benefit is greatly outweighed by the negative consequence of many strata buildings being underinsured and not having sufficient cover in the event they need to make a claim. Further, they are paying higher premiums because they are not required to get an insurance valuation every 5 years. No doubt NSW Fair Trading would agree that this undesirable outcome is detrimental to consumers.

Under section 161(1)(a) of the SSMA, the damage policy must provide for the building to be insured for at least the amount determined in accordance with the regulations. REINSW questions who determines this amount because the owners are not qualified valuers and if the building is underinsured then the insurance is compromised. REINSW is aware that most owners agree that the building should be valued by a registered valuer and, therefore, recommends that this be a requirement in the legislation, for clarity purposes.

Further, REINSW would appreciate clarification on the policy intent of introducing the requirement of "*reinstatement*" in the manner of calculating the insurance limit

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in accordance with the damage policy. There is no definition of, or method of calculating, "*reinstatement*" in the legislation and REINSW questions why the insurers are dictating the manner of calculation. To assist, REINSW **encloses** a memorandum which it has provided to NSW Fair Trading on two separate occasions. It compares the current legislative approach to the previous legislative approach where the manner of calculation was separate and independent of the insurer. REINSW is of the opinion that there are only a few professionals in the industry who actually understand clause 39(2)(a) of the SSM Regulation and how it should be applied. This lack of understanding leads to an industry-wide confusion, an increase in the cost of valuations as well as an increase in the amounts insured (around a 30%-100% increase to the recommended sum insured with the consequential significant increase in premiums for each strata scheme, depending on the property type). This benefits the insurance companies and valuers but is detrimental to consumers and cannot be the Government's intention. Additionally, REINSW is concerned that there has been no guidance on how to value "*reinstatement*", particularly in complicated circumstances. For example, where a building is partially destroyed by fire, and where town planning has changed for a parcel of land making the reconstruction of a building on that land no longer permissible. The owners corporation would be required to either sell the existing parcel, purchase another and reconstruct the building, or undergo a much more expensive renovation type of reinstatement.

A further example is where, with respect to those affected by the 2019-2020 fire season, the cost of rebuilding under the current building standard now includes various forms of local council zoning for fire ratings ranging from nil to BAL15, all the way to Flame Zone. At present, these replacement costs are not taken into account and, in turn, substantially increase the cost of rebuilding the equivalent square meterage that existed before the fire damage occurred.

[redacted] To assist with rectifying the problem, REINSW recommends a legislative solution by amending the manner in which insurance limits under damage policies is calculated. Namely, clause 39(2)(a) of the SSM Regulation must be amended to exclude the application of section 161(1)(c) of the SSMA. Currently, clause 39(2) refers to all of section 161, which factors in both replacement and reinstatement value. However, REINSW's suggested change to the clause will ensure that only the replacement cost of the relevant building pursuant to section 161(1)(b) will be taken into account where the building is destroyed and not the replacement value pursuant to section 161(1)(c) where the

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building is damaged but not destroyed. This position is consistent with the previous legislation, which worked well in practice.

(m) Record Keeping

176 Form of records

A strata roll or any other record required to be made or stored by an owners corporation may be made or stored in the form determined by the owners corporation.

REINSW has previously discussed the issue of storing electronic documents with NSW Fair Trading due to concerns over the challenges surrounding electronic record keeping. In relation to strata management agency agreements, the question that REINSW proposed to NSW Fair Trading was whether it is sufficient for strata managers to retain only scanned original documents, saving them as an electronic file, and discarding hardcopies.

[redacted] Whilst REINSW appreciates that this section is broad enough to cover an electronic record management system by general resolution of the owners corporation, there are instances (detailed below) which are not covered by this section such that it is insufficient and too limited in scope.

If an owners corporation changes throughout time, there is potential for the occurrence of difficulties in record management and retrieval. Multiple sets of records can be kept in both electronic and hardcopy form and, at any given time, the owners corporation may change its method of keeping records. This could result in a disorganised office and record management system, and potentially a loss of records. To address these issues, REINSW recommends re-drafting section 176 to make it clear that the use of electronic record-keeping is always an acceptable form, and not just when determined by general resolution of the owners corporation.

A further concern for REINSW is that there currently appears to be a lack of statutory consideration that requires strata managers to back-up their records. Common industry practices require a third-party system for electronic filing. This ensures that data is backed up so that it cannot be lost, and that no data is intentionally or inadvertently deleted by a strata manager or other person. However, this is currently just industry best practice and is not adopted by all strata managers because they are not legally required to do so. Accordingly, REINSW proposes that the SSMA be amended to require strata managers to back-up their records.

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REINSW is also of the view that a statutory requirement for data redundancy would align with a manual index of records, which offers an easy reference to, for example, the type of meeting held, inclusive of the date and time. It is near impossible to determine whether records are missing due to no document management system in place or poor record keeping practices with no requirement for an index to be maintained. REINSW's proposal to introduce such an index not only promotes transparency but, if legislated, could place an obligation on strata managers to correctly record minutes, benefitting all consumers involved.

Moreover, the issue of storing electronic documents is partially related to section 188 of the SSMA, which permits NCAT to order the supply of records if it considers they have been wrongfully withheld. As such, REINSW proposes that section 176 should be expanded to deal with the consequences of strata managers breaching the legislation should they fail to accurately store records electronically or wrongfully withhold them. This legislative change would ensure that strata managers stay compliant with the record keeping requirements in the legislation and simultaneously minimise the potential need for, and difficulty with, retrieving lost data.

REINSW would also like to see strata managers being held accountable for the transfer of records during a change of management, as this is found by many industry professionals to be a difficult process with the current lack of statutory obligation and guidance. Accordingly, REINSW recommends the legislation be amended to hold strata managers accountable in these circumstances.

(n)Affixing of Seal of Owners Corporation

Section 273 Affixing of seal of owners corporation

(1) The seal of an owners corporation that has only one owner or 2 owners must not be affixed to any instrument or document except in the presence of the owner or owners or the strata managing agent of the owners corporation.

(2) The seal of an owners corporation that has more than 2 owners must not be affixed to any instrument or document except in the presence of—

(a) 2 persons, being owners of lots or members of the strata committee, that the owners corporation determines for the purpose or, in the absence of a determination, the secretary of the owners corporation and any other member of the strata committee, or

(b) the strata managing agent of the owners corporation.

(3) The strata managing agent must attest the fact and date of the affixing of the seal—

(a) by his or her signature, or

(b) if the strata managing agent is a corporation, by the signature of the president, chairperson or other principal

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officer of the corporation or by any member of staff of the corporation authorised to do so by the president, chairperson or other principal officer.

(4) A strata managing agent who has affixed the seal of the owners corporation to any instrument or document is taken to have done so under the authority of a delegation from the owners corporation.

(5) Subsection (4) does not operate so as to enable a person to fraudulently obtain a benefit.

(6) A person is taken not to have fraudulently obtained a benefit from the operation of subsection (4) if the benefit was, without any fraud by the person, obtained before the seal was affixed.

REINSW is of the view that section 273 of the SSMA should be repealed because, in the current technological environment, there is no need to affix the seal of the owners corporation to any instrument or document. The COVID-19 pandemic is testament to the fact that not requiring the use of a common seal works well. With the introduction of the electronic transactions legislation, REINSW questions the need for the archaic practice of affixing seals, particularly when it causes practical issues (including the seal being lost) and can be quite time-consuming when signing a document.

Bearing in mind that the *Corporations Act 2001* (Cth) does not require a seal to be affixed when a company signs documents and that the signature of two directors is sufficient, REINSW proposes that a possible solution may be to require the signature of two members of a strata committee to sign a document in instances where two or more have been elected and only one signature where one committee member has been elected.

(o)AGM - Items requiring statutory warranty

Clause 6, Schedule 1 to the SSMA Required items of agenda for AGM

The agenda for each annual general meeting must include the following items—

(a) an item to decide if any matter or type of matter is to be determined only by the owners corporation in general meeting,

(b) an item to prepare or review the 10-year plan for the capital works fund,

(c) an item to consider the annual fire safety statement (if one is required for the building) under the Environmental Planning and Assessment Act 1979 and arrangements for obtaining the next annual fire safety statement,

(d) until the end of warranty periods for applicable statutory warranties under the Home Building Act 1989 for buildings of the strata scheme, an item to consider building defects and rectification,

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(e) an item to consider any agreements for the supply of electricity, gas or any other utility relevant to the scheme.

With respect to clause 6(d) of Schedule 1 to the SSMA, REINSW is of the opinion that the clause applies to existing buildings as well as to new buildings. Any item of defects and rectification would, therefore, require a statutory warranty and will need to be included on the agenda at each AGM until the warranty expires. Further, REINSW has been advised by an industry professional that this will also include repairs and replacements in excess of $20,000, which would require Homeowners Warranty Certification. REINSW sought clarity from NSW Fair Trading on whether this clause applies only to new buildings or to all buildings, as no clear definition of "*defects*" is available.

[redacted]

Accordingly, REINSW would welcome a guidance note on this issue. The guidance note could include detail on warranties such as the two-year period for minor works and six-year period for major works along with guidelines on time limits, what is considered a significant repair and renovation, the relevance of the dollar value of the repair or renovation and it can also provide more clarity around the aim of the mandatory agenda item. Further, the guidance note could also set out the level of investigation a scheme should explore and how far back records must be investigated. Alternatively, an amendment to the legislation could be made to reflect the policy intention of this clause. The guidance note or legislative amendment would avoid any further industry confusion[redacted]

(p)Quorum

Clause 17(2) of Schedule 1 to the SSMA

A quorum is present at a meeting only in the following circumstances:

(a) if not less than one-quarter of the persons entitled to vote on the motion or election are present either personally or by duly appointed proxy,

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(b) *if not less than one-quarter of the aggregate unit entitlement of the strata scheme is represented by the persons who are present either personally or by duly appointed proxy and who are entitled to vote on the motion or election,*

(c) *if there are 2 persons who are present either personally or by duly appointed proxy and who are entitled to vote on the motion or election, in a case where there is more than one owner in the strata scheme and the quorum otherwise calculated under this subclause would be less than 2 persons.*

REINSW has concerns in relation to reaching quorum at meetings, resulting in potential uncertainty in the industry.

REINSW has asked NSW Fair Trading, with respect to where quorum is concerned, why a strata scheme with 100 lots is treated differently to a strata scheme with 2 lots? With regards to the latter, both lot owners must be present at a meeting. However, this is not always achievable given timing and schedule conflicts, which in turn could render the scheme open to not progressing important matters, such as the raising of levies to meet insurance premiums.

[redacted]

REINSW's position is that the legislation attempts to address this issue, but it falls short as it is very unclear and non-prescriptive. Therefore, REINSW proposes that clause 17(2) of Schedule 1 be redrafted to clarify to all consumers what happens if quorum is not met at a meeting.

(ii) *Strata Schemes Management Regulation 2016 (NSW)*

(a) Pre-Meeting Electronic Voting for an Election

Clause 14 Other means of voting--owners corporation and strata committee

(1) *An owners corporation or strata committee may, by resolution, adopt any of the following means of voting on a matter to be determined by the corporation or committee:*

(a) *voting by means of teleconference, videoconferencing, email or other electronic means while participating in a meeting from a remote location,*

(b) *voting by means of email or other electronic means before the meeting at which the matter (not being an election) is to be determined by the corporation or committee (**"pre-meeting electronic voting"**).*

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(2) Without limiting subclause (1) (b), the other electronic means of voting may include requiring voters to access a voting website and to vote in accordance with directions contained on that website.

(3) If a matter may be determined partly by pre-meeting electronic voting, the notice of the meeting must include a statement that the relevant motion may be amended by a further motion given at the meeting after the pre-meeting electronic voting takes place and that consequently the pre-meeting vote may have no effect.

(4) A motion that is to be determined wholly by pre-meeting electronic voting may not be amended at the meeting for which the pre-meeting electronic voting is conducted.

(5) A motion that is to be determined partly by pre-meeting electronic voting must not be amended at the meeting for which the pre-meeting electronic voting is conducted if the effect of the amendment is to change the subject matter of the original motion.

(6) If a motion that is to be determined wholly or partly by pre-meeting electronic voting is amended at the meeting for which the pre-meeting electronic voting is conducted, the minutes of the meeting distributed to owners must be accompanied by notice of the change and a statement setting out the power to make a qualified request for a further meeting under section 19 of the Act.

REINSW advocates for clearer language in clause 14(1) of the SSM Regulation [redacted]. This interpretation is that, in accordance with clause 14(1)(a), for an election of any kind, an owners corporation or strata committee may, by resolution, allow voting by electronic means if it is in "*real time*". However, pursuant to clause 14(1)(b), in respect of an election, neither an owners corporation nor a strata committee can resolve to use electronic options to conduct "*pre-meeting*" voting. This means that voting at elections cannot occur prior to the commencement of the meeting, because the eligible voters need to be physically present at meetings and are required to vote in "*real time*" by electronic means approved by the owners corporation or strata committee (as applicable).

[redacted] However, REINSW recommends that clause 14(1) be amended for clarification purposes and to ensure a better understanding of the legislation which will ultimately result in better compliance amongst strata managers.

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(b) Altered arrangements for convening and voting at relevant strata meetings

Clause 70 Altered arrangements for convening relevant strata meetings—section 271A(1)(a) of Act

Notice of, or any other document in relation to, a relevant strata meeting may be given to a person by email to an email address specified by the person for the service of documents.

Clause 71 Altered arrangements for voting at relevant strata meetings—section 271A(1)(b) of Act

(1) The means of voting specified in clause 14 may be used to determine a matter at a relevant strata meeting even if the owners corporation or strata committee (as the case may be) has not, by resolution, adopted those means of voting.

(2) Clauses 14–17 extend to the use, under this clause, of those means of voting.

(3) If those means of voting are to be used and have not, by resolution, been adopted, the secretary of the owners corporation (or, if a strata managing agent may exercise the functions of the secretary under clauses 14–17, the strata managing agent) must take reasonable steps necessary to ensure that each owner of a lot in the strata scheme or each member of the strata committee (as the case may be) can participate in and vote at the relevant strata meeting.

(4) To avoid doubt, this clause—

(a) applies despite any requirement in the Act for a vote at a relevant strata meeting to be exercised in person, but
Note. *See clause 28(1) of Schedule 1, and clause 10(1) of Schedule 2, to the Act.*

(b) does not permit pre-meeting electronic voting to be used for an election.

(5) A person who has voted, or intends to vote, on a motion or at an election at a meeting by a permitted means other than a vote in person is taken to be present for the purposes of determining whether there is a quorum for the motion or election.
Note. *For quorum requirements for relevant strata meetings, see clause 17 of Schedule 1, and clause 12 of Schedule 2, to the Act.*

It is REINSW's view that the SSM Regulation should be amended to permanently include sections 70 and 71 to allow for altered arrangements for convening and voting at relevant strata meetings. Having first been introduced in response to the COVID-19 pandemic, sections 70 and 71 have enabled members of owner's corporation's and strata communities to send electronic notices to convene strata meetings and to attend and vote at those meetings online and over the phone

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where physical attendance was simply not feasible given social distancing requirements.

While initially some had difficulty in adjusting to a new means of attending and voting at meetings, it has now become routine practice for meetings to be held by altered means. In fact, in some cases attendance has been noticeably higher and meetings often shorter than was previously the case, the result being a more connected and efficient strata community.

Allowing for notices of meetings to be electronically served and meetings to be held easily by altered means, has ensured that owners corporations and strata committees have been far better facilitated to deal with the expenses, essential services, insurance premiums and overall management involved with running a strata scheme.

REINSW is of the view that given that the Secretary is the person who has the duty and authority to convene strata committee meetings and general meetings, it would seem most appropriate that the Secretary should also be delegated the authority to determine how the meeting should be held (for instance, by way of teleconference, skype, etc).

Further, REINSW seeks clarification as to what constitutes 'all reasonable steps' within the context of clause 71(3) of the SSM Regulation.

As per our submission lodged 21 May 2020 in response to the draft *Strata Schemes Management Amendment (COVID-19) Regulation 2020* (NSW) and draft *Community Land Management Amendment (COVID-19) Regulation 2020* (NSW), REINSW remains concerned that the requirement to take 'all reasonable steps' is too broad and may lead to unnecessary confusion amongst strata managers, owners corporations and strata committees. In particular, REINSW believes that such ambiguity may expose the chairperson or strata managing agent operating as chairperson to unnecessary risk. Indeed, given that there is neither precedence nor sufficient guidance as to what constitutes 'all reasonable steps' in this context, the extent to which chairpersons/strata managers ensure that each lot owner or strata committee member can participate and vote in strata meetings may vary greatly and, as a result, produce inconsistent outcomes across different strata schemes.

Accordingly, REINSW recommends that section 71(3) be amended to include a non-exhaustive list of examples detailing what requisite steps should be taken to ensure that all meeting attendees are given adequate opportunity to participate and vote through alternate means. Some of these examples might include, but are not limited to, the following:

(a) chairpersons should provide clear written guidance as to how attendees access meetings electronically;

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(b) chairpersons should provide multiple options to access the meeting if a lot owner cannot access a proposed medium (either through telephone, video, or other electronic means); and

(c) chairpersons should keep a record of the discussion leading up to and including the voting process by members.

In REINSW's view, providing a specified framework elaborating on what constitutes 'all reasonable steps' would greatly facilitate a chairperson or strata managing agent's ability to ensure that each of those attending a meeting by altered arrangements are able to vote and participate.

Finally, REINSW would like to reiterate that Government should be mindful that electronic voting may not be an appropriate voting method for all meeting attendees. Although REINSW recognises the necessity to vote electronically, it also recommends the introduction of paper voting by post as an option to vote. If voting by post is also permitted then all lot owners are afforded a viable avenue to vote, using the method they most desire. This would also ensure that those who may have greater difficulty using electronic means of voting are not unfairly disadvantaged when voting through altered arrangements (including the elderly, those who are not technologically savvy, and those with limited or disrupted internet access - particularly in regional or rural communities).

(iii) *Strata Schemes Development Act 2015 (NSW)*

[redacted]

[redacted]

(b)Strata Renewal

A. Dissenting Landlord of Long-Term Leas

REINSW recommends that the SSDA set out what happens to a dissenting party with a long term lease in place (say, 10 plus years) if there is a required level of support (that is, 75% of lots (other than utility lots) in the strata scheme) in favour

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of selling the strata scheme to a developer to dissolve it? REINSW also recommends that the SSDA provide guidance on the compensation that is applicable to both the relevant lot owner and tenant in those circumstances.

B. Lapsed Strata Renewal Proposals

Section 190 Limitation on submitting strata renewal proposal

(1) If a strata renewal proposal or a strata renewal plan for a strata renewal proposal lapses under this Part, a person cannot give the proposal, or another strata renewal proposal that is substantially similar to that proposal, to an owners corporation within 12 months after the day the proposal or plan lapses.

(2) An owners corporation is not required to deal with a strata renewal proposal under this Part if it is given in contravention of this section.

In accordance with section 190(1) of the SDDA, a person cannot submit to an owners corporation a lapsed strata renewal proposal or plan within 12 months of it lapsing. Despite this prohibition, REINSW is of the view that section 190(2) of the SSDA is an exception to the rule, giving owners corporations discretion to consider a lapsed strata renewal proposal submitted within 12 months of it lapsing. However, it is unclear from section 190(2) whether this interpretation is correct and so REINSW recommends that the section be amended to clarify whether such a discretion is given to owners corporations.

It is also unclear from the legislation whether a lapsed strata renewal proposal which an owners corporation decides to reconsider under section 190(2) needs to go through the process in Part 10 of the SSDA from the very beginning or whether the proposal can be reconsidered from the point in time when it lapsed. For example, if a special resolution failed because there were not enough supporting owners present at the relevant meeting, would the process need to start from scratch or could the owners corporation resolve to call a further general meeting with more owners present in an attempt to pass the special resolution?

C. Tenant Compensation

REINSW notes that there is considerable confusion in the market around tenant compensation under Part 10 of the SSDA where a strata renewal plan is approved and a strata scheme is terminated. This is particularly so in the context of a commercial strata scheme with long term, high value tenancies (for instance, 10 year leases with options to renew) and where compensation would be significant and difficult to ascertain if it is not specified in the lease.

Moreover, the termination of a lease under the SSDA is expressly stated to not affect a right or remedy a person may have under the relevant lease, and it appears

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to be intended that leases will generally be terminated in accordance with their terms or legislation relevant to the lease in question (for example, the *Residential Tenancies Act 2010* (NSW)), rather than under the SSDA.

To protect tenant rights and remedies, the SSDA further empowers the Court to make ancillary orders regarding the payment of compensation to a person whose lease is terminated where there are no express terms to allow for the termination and there is a dispute about compensation between the parties. It is assumed, although REINSW believes it is unclear, that the order to pay compensation to a tenant would be imposed on the relevant lot owner, and not the lot owners collectively, and that compensation payable to the tenant would come out of the compensation payable to that specific lot owner.

REINSW assumes that the legislature intended for tenant compensation to be factored into the determination of compensation for that lot owner during the valuation process. The calculation of compensation value for a lot should take into account the compensation value which would likely be payable to an incumbent tenant using the same principles which are linked to section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). This means that a landlord in a scheme may inadvertently end up with a much lower profit margin than other lot owners, however, there is little that landlord can do if its allocated portion of the purchase price paid to the scheme (that is, per its unit entitlement) is greater than the compensation value for the lot. In essence, the issue is that where a lot is owner occupied then the compensation received by that lot owner is the full compensation to which they are entitled whereas where the lot is tenanted then the lot owner's compensation is reduced to account for the cost of having the tenancy terminated. Further, where vacant possession of the lot is required on settlement and difficulties arise in having the tenant vacate, the lot owner may potentially receive no compensation once the tenant has been paid compensation.

In all fairness, REINSW suggests that the purchaser should be responsible for bearing the cost of paying compensation to the tenant as opposed to the lot owner.

REINSW has raised these concerns with NSW Fair Trading, [redacted] REINSW [redacted] suggests that the SSDA be amended to clarify the calculation of compensation payable to tenants.

(iv) Residential Tenancies Legislation

[redacted]

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[redacted]

3. Final Comments

REINSW is committed to assisting Government with the ongoing development and improvement of the strata schemes management and development legislation governing residential, commercial and industrial strata schemes. REINSW believes there is substantial room for improvement regarding legislative clarity, guidance for best practice, and protections for consumers.

Over the past 4 years, REINSW has regularly collaborated with its Strata Management Chapter Committee to present in this submission the many practical issues facing consumers in the industry as well as recommended solutions for Government's consideration.

It is REINSW's intention to make this submission ahead of the strata legislation's statutory review consultation process with the aim of allowing Government time to consider the proposals herein and to include them in the relevant consultation/discussion paper for further consideration by the broader stakeholder community.

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REINSW appreciates the opportunity to provide this submission and would be pleased to discuss it further.

Yours faithfully

Tim McKibbin
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