REINSW
for members since 1910

Strata Schemes Management Act 2015 (NSW), Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Regulation 2016 (NSW)

The Real Estate Institute of New South Wales Limited

Submission in response to the Consultation Paper on the Statutory Review of the *Strata Schemes Development Act 2015* (NSW) and the *Strata Schemes Management Act 2015* (NSW)

20 February 2023

TO: **Strata Review Policy Team**
Better Regulation Division
Department of Customer Service
4 Parramatta Square, 12 Darcy Street
Parramatta NSW 2150

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

1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to NSW Government's Consultation Paper in relation to the Statutory Review of the *Strata Schemes Development Act 2015* (NSW) and the *Strata Schemes Management Act 2015* (NSW) (**Consultation Paper**).

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

This submission has been prepared with the assistance of the REINSW Strata Management Chapter Committee which comprises agents who are licensed real estate professionals with experience and expertise in the strata management sector. This allows them to offer an expert working knowledge about how the *Strata Schemes Management Act 2015* (NSW) (**SSM Act**), the *Strata Schemes Development Act 2015* (NSW) (**SSD Act**) and the *Strata Schemes Management Regulation 2016* (NSW) (**SSM Regulation**) applies in practice. This submission outlines issues and recommendations for the Department of Customer Service (**Department**) to consider and implement based on questions raised in the Consultation Paper that relate to the Minister's report tabled in Parliament in November 2021.

2. Recommendation 76: Further consideration be given to whether the fee charged in Roden necessitates an amendment to the Management Act

Question 1: What is your view of the options outlined above?

REINSW recommends that the status quo should be maintained to allow owners corporations to set fees and bonds in by-laws, as outlined in option 3 of the Consultation Paper. REINSW notes that this process has long been standard practice and works well because there are costs associated with calling an Extraordinary General Meeting (**EGM**) (for example, if a lot owner wished to seek permission to undertake renovations).

Furthermore, REINSW's view is that lot owners often request services involving the owners corporation for personal benefit rather than for the benefit of the owners corporation collectively. However, these services still incur expenditure which, were it not for the charge, would have to be borne by lot owners as a whole. Additionally, sometimes lot owners, or their tenants, will make changes to common property without the approval of the owners corporation. This can have unintended consequences and can cause the owners corporation unnecessary expense.

A common example is where a lot owner or tenant changes a lock, or adds a deadlock to a fire security entrance door. While this seems like a simple alteration, it can cause the owners corporation to incur significant expense such as:

- replacement of the security door (up to $2,200 and 2 months wait for a non-standard door);
- costs of any additional re-inspections by a fire inspector before a certificate of compliance can be issued;
- fines of up to $110,000 if, as a result of the delay, the owners corporation cannot lodge their annual fire safety statement on time; and
- in worst case scenarios, costs of an application to NCAT for an access order which, as this process can take months, often also results in fines for late lodgement of the annual fire safety statement already mentioned.

REINSW's view is that it is reasonable for owners corporations to pass on fees and charges incurred for the personal benefit of one lot owner or tenant rather than the collective benefit of the owners corporation, or where one lot owner or tenant's actions have caused the owners corporation considerable unnecessary expense. REINSW believes that the SSM Act already provides a recourse to challenge "excessive and unfair" fees and bonds under section 139(1) of the SSM Act, which prohibits "harsh, unconscionable or oppressive" by-laws. Section 150(1) of the SSM Act allows a lot owner to apply to the NSW Civil and Administrative Tribunal (**NCAT**) to challenge a by-law about a fee or bond on this basis and so there is sufficient statutory protections in place to prevent against unfair or excessive fees or bonds.

REINSW's view, however, is that the Department should re-assess the by-law registration and amendment processes because they are currently costly for an owners corporation through the Property Exchange Australia (**PEXA**). It is lawyers who need to register, or to make any amendments to the by-laws through the platform and there are sometimes also additional administrative fees which can add up. For example, it costs an owners corporation approximately $480 for even a simple amendment such as a change of address. **REINSW recommends** implementing a registration and amendment process where a strata manager can register or amend straight forward by-laws without the need for legal representation, as this will both simplify the process and eliminate unnecessary fees. Owners corporations would, of course, still be able to engage legal representation in complex scenarios which call for specialist expertise but it would prevent owners corporations from incurring unnecessary fees where the by-law registration process, or the amendment to by-laws, is straightforward.

Question 2: How will the proposal affect the operation of schemes?

Were the Department to implement options 1 or 2 outlined in the Consultation Paper (respectively, limiting the fees and bonds chargeable or only allowing fees specified in the SSM Act), REINSW's view is that the costs associated with such bonds and charges would be indirectly charged to owners corporations by way of increased management fees. The fees and bonds in these by-laws reflect the work associated with, or potential damage which could arise from, certain by-laws in practice.

For example, fees for calling an EGM reflect the work that a strata manager must perform in the lead up to, before and after that meeting. There can also be administrative application fees for renovation works as it can take a lot of time, and liaising back and forth with a lot owner, before a renovation application is complete and ready to be raised at the meeting. In these circumstances, REINSW believes that fees of this nature are reasonable and, if they were

prohibited, the time taken to complete these tasks would still need to be charged but would simply be factored into the overall management fees.

Furthermore, it is simply not practical to set a prescribed list of fees and bonds as often these are unique to the needs of each strata scheme and there are regularly new services requested, for which a fee or bond might be required, which could not be practically captured by an exhaustive, legislative list.

REINSW recommends against implementing options 1 or 2 outlined in the Consultation Paper and that option 3 (maintaining the current practice whereby owners corporations can set out fees and charges in their by-laws) is the best approach.

Question 3: What fees and bonds should an owners corporation be allowed or not allowed to set?

As mentioned in relation to question 1 above, **REINSW recommends** that owners corporations should be allowed to continue setting fees and bonds in by-laws, as per the current practice, so that they can be tailored to the needs of the individual strata scheme. However, some examples of common by-law fees and bonds, which in REINSW's view are reasonable for the maintenance and upkeep of common property, include:

- **bonds for renovation works**: to rectify any damage to common property arising out of renovations; such bonds are refunded after the completion of works, provided no damage has occurred;
- **bonds for signage**: to ensure that the installation process for the sign doesn't damage the garden or other common property (for example, where a sign is accidently driven through a water pipe);
- **bonds for security keys and swipe cards**: refundable once the relevant security device is returned;
- **parking bonds**: for example, where boom gates are damaged or grease needs to be treated with acid to remove from driveway areas;
- **fees and bonds associated with large complexes**: larger strata schemes might have fees and bonds in connection with the use or maintenance of gymnasiums, swimming pools, advertising billboards, signage on buildings or telecommunication towers;
- **meetings for lot owner's personal purposes**: fees and charges are sometimes necessary where meetings are convened to personally benefit one lot owner. For example, to approve renovations involving use of common property or the keeping of animals. The owners corporation can incur significant costs and time where a meeting has to be convened for the benefit of one person, as opposed to the benefit of the collective scheme; and

- **miscellaneous fees and charges**: for example, attaching services such as satellite dishes to common property, obtaining a certificate of currency of insurance for refinancing purposes, seeking the owners corporation's consent to use common property parking or storage on a temporary basis and bonds for damage caused by removalists (for example, damaged paintwork or soiled carpets) or other occupiers activities.

3. Recommendation 108: Introduce further specific requirements regarding the content of the initial maintenance schedule, with consideration given to the development of a standard form Management Act and Regulation

Question 4: Do you agree that the additional matters proposed above should be included in initial maintenance schedules? Why or why not?

REINSW supports the inclusion of the list of additional items proposed to be included in clause 29 of the SSM Regulation, namely, "lifts, electronic vehicle charging stations and associated infrastructure, solar panels and associated equipment and any other sustainability infrastructure and any dedicated accessibility infrastructure".

REINSW's view is that it is important for the initial maintenance schedule to be detailed because this document often forms the basis for other important strata scheme documents (for example, the capital works fund plan) and can influence levy contributions. At the beginning of a strata scheme, developers and builders have the fullest understanding of the building and common property items which might require maintenance and the kind of infrastructures and assets which have been installed, whereas strata managers are limited as to the assets they are able to identify.

REINSW also recommends that for new strata schemes, which don't have the benefit of data from previous years, a 5-10% contingency percentage should be factored in. This is because builders and developers will usually price the cost of repair and maintenance of items at a discounted industry rate as opposed to the retail rate.

Question 5: Are there any other items or information that you think should be included in initial maintenance schedules to assist owners corporations to estimate their levy contributions and prepare the capital works fund plan?

REINSW recommends that clause 29 of the SSM Regulation also prescribe the following items for inclusion in the initial maintenance schedule:

- **glass cleaning and maintenance requirements**: REINSW is aware of a glass panel, in an apartment building located near a beach, which exploded due to salt corrosion, and so it would be good for the initial maintenance schedule to contain any requirements necessary to maintain the glass in a strata scheme building, especially if located near the ocean;

- **the life of balconies and balustrades and concrete spalling**: balconies can develop concrete cancer but are rarely checked unless something looks untoward;

- **the servicing of SUMP and basement pumps**: if such pumps are not regularly serviced, and they fail, it can cause flooding in the basement areas of strata schemes causing damage (including to vehicles). Many owners corporations are servicing such pumps every 12 months but, in fact, they need to be serviced every 3 months to ensure that they continue to work properly;

- **maintenance of driveways**: Some driveways don't have a base layer beneath them which can cause them to move and crack, which is a tripping hazard, can damage cars and can end with the whole driveway needing to be replaced (which is costly); and

- **Sewers and storm water lines**: these items, and CCTV footage of sewers and storm water lines, should be included in the initial maintenance schedule to ensure that they are well maintained to prevent against flooding and burst sewage pipes.

Furthermore, **REINSW also recommends** that the initial maintenance schedule (or, alternatively, the apartment handover documents from the developer) should clearly list items that a lot owner is required to maintain upon hand over. This will clarify the distinction between common property and private property maintenance and who is responsible for it. REINSW proposes that this non-exhaustive list could include the following:

- waste drains and sink/basin traps
- timber flooring and carpets
- internal walls and ceiling finishes
- light bulbs, internal electrical fittings, power points, sockets and appliances
- taps, mixers, washers, air-ratters, sink, plugs and internal pipes
- dishwasher, washing machines, whitegoods and their hoses/connections
- locks, door stops, hinges, any extra keys & swipe fobs
- laminate and stone finishes
- all painted areas including ceilings, walls, doors, architraves, skirtings, jambs and windows, stairs, handrails
- window and door sills – cleaning and lubrication
- toilet system parts, toilet roll holders, towel rails, bathtubs, shower screens and vanities
- carpentry, joinery, benchtops, cupboards and catches
- battery operated smoke alarms
- range hood, air conditioning filter and internal parts.

4. Recommendation 109: Require that an independent review and certification of initial maintenance schedules and levy estimates set by developers is undertaken and provided to owners corporations at the

first AGM, with the qualifications of expert reviewers to be set following further sector consultation.

Questions 6 and 7: Which professionals or experts do you think should be responsible for undertaking independent reviews and certification of initial maintenance schedules and levy estimates set by developers? Why? What qualifications do you think these professionals or experts need to have?

REINSW supports the recommendation for an independent review and certification of initial maintenance schedules and levy estimates or, alternatively, **REINSW recommends** that an independent expert is given statutory access to the building and records. While it is the original owner (usually, the developer) who must prepare the initial maintenance schedule under the SSMA, developers often do not have building experience or qualifications and rely on industry experts to provide that guidance. Furthermore, it is builders who have the most visibility over the work of their sub-contractors and know what infrastructure and assets have been installed. REINSW's view is that an independent expert would have the experience necessary to ensure the preparation of a detailed, accurate initial maintenance schedule and could help ensure that the building is constructed to a high standard and that the integrity of the building's structure has not been compromised by cutting costs to improve profit margins during the construction phase.

REINSW recommends that the initial maintenance schedules and levy estimates should be reviewed, and a certificate given by, a person who is an experienced, third party quantity surveyor. Such professionals already deal with such matters and are also the same experts who calculate Capital Works Fund Forecast Plans.

REINSW also recommends implementing different levels of licences for quantity surveyors similar to the tiered approach taken for electricians (for example, there are different classes of licences depending on an expert's level of experience and qualifications). **REINSW recommends** that only the highest level of licence holder should be able to provide an independent review of, and certify, initial maintenance schedules and levy estimates. This independent expert should also be required to hold the appropriate level of professional indemnity cover.

5. Recommendation 111: Prescribe greater detail on minimum requirements for capital works fund plans and consider mandating an approved form of plan.

Question 8: Should the Regulation include a list of all items of common property which could require maintenance, repair, renewal or replacement over the next 10 years to assist owners corporations to prepare accurate capital works fund plans? Why or why not?

In REINSW's submission in response to the statutory review of the NSW Strata Laws Discussion Paper dated 7 April 2021 (**enclosed as Annexure A** to this submission) (**Strata**

Laws Submission), it recommended amending section 80(1) of the SSM Act to clarify what the capital works fund plan is expected to cover.

As a result **REINSW would support** a list, in the SSM Regulation (for ease of amendment in case of technological developments), of common property items which could require maintenance, repairs, renewal or replacement in a 10-year period provided it could be tailored to the needs of each strata scheme. In fact, **REINSW recommends** implementing a standardised capital works fund plan template, which could be customised as necessary, to clarify the contents of this document and the ambiguous "so far as practicable" reference in section 80(7) of the SSM Act. REINSW's view is that this list, or standardised template, should be prepared by a qualified quantity surveyor.

REINSW's view is that a comprehensive capital works fund plan will help owners corporations better plan ahead to ensure they have the funds required to meet any major works to common property. For example, getting a professional to carry out a full CCTV of a sewage line or an electrician to provide a full report of the main switchboard's safety requirements will help an owners corporation more accurately anticipate, and account for, the cost of works required in the next 10 years. Furthermore, clarifying the items to be included in the capital works fund plan will also better manage consumer expectations about the capital works fund plan and the requirements for any additional, separate maintenance plans and reports.

As REINSW raised in its Strata Laws Submission, section 80(1) of the SSM Act only addresses expenditure, not how such works are to be funded. REINSW's view is that it would be beneficial for the capital works fund plan to also include the annual savings required to meet the works that are anticipated during these 10 years and to provide certainty that the owners corporation can address these works if, and when, they are likely to arise.

REINSW recommends:

a) including in the SSM Regulation guidelines for items which should be included in the capital works fund plan in the form of a customisable capital works fund plan template or, alternatively, a non-exhaustive list of the common property items that should be included in the capital works fund plan; and

b) amend section 80(1) of the SSM Act (and in any capital works fund plan template, as recommended in paragraph a) immediately above) to require owners corporations to include how the funds required to pay for any major capital expenditure in that 10-year period will be raised.

Question 9: If so, what additional items to those listed above or additional information do you think should be included in capital works fund plans to help owners corporations to plan for future repairs and maintenance? Why?

REINSW recommends adding the following items to the list of common property items proposed on pages 11-12 of the Consultation Paper:

- switchboards,
- downpipes, skylights and anchor points
- awnings, screens, louvres
- décor features

- waterproofing balconies and waterproofing membranes
- Co2 and mechanical ventilation systems
- fire shutters, fire panel, fire dampers
- basement drainage systems and line marking
- security related and technological items which might require repairs and maintenance (including, security access, intercom systems, CCTV, alarms, surveillance equipment, TV and Foxtel antennas and NBN and FTTB points. However, **REINSW recommends** using appropriate wording for such items so that new technology can be taken into account without requiring amendment.
- sewage and storm water lines (including CCTV footage of such items)
- concrete spalling
- pool, gym, tennis court, marina and other facilities
- landscaping, composting, worm farm, bee house, irrigation systems
- items relating to windows and walls should also include painting, façade and washing frequency.

In relation to waterproofing membranes, these items are difficult to check because they are sealed under floors and in walls. However, REINSW's view is that they should still be included in such a list or template so that a contingency amount can be set aside for this work in case they need maintenance or replacement during the 10-year period, or if any older strata schemes are updating bathrooms, kitchens or laundries which previously did not have water-proofing membranes and now require them.

As mentioned above, REINSW's view is that any template/guideline or list needs to be customisable and recommends including a "catch all" phrase for the inclusion of any other items, specific to a strata plan, not already included in the template or list and that any template or list should be not so prescriptive as to preclude technological advancements which might become common place in the future. In this regard **REINSW recommends** using wording which is non-exhaustive (for example, "should include but not be limited to") so that any list or template can be adapted as required.

6. Recommendation 115: Prohibit by-laws that block sustainability infrastructure due to appearance and examine any necessary exemptions to this requirement.

Question 10: Do you think the prohibition should apply to all forms of sustainability infrastructure as defined under section 132B of the Act or should it be limited to certain infrastructure? For example, limited to infrastructure relating to solar panels and solar hot water systems (like the Queensland laws). Why?

REINSW opposes a prohibition on all by-laws which block sustainability infrastructure for appearance reasons. REINSW's view is that sustainability infrastructure should be treated like any other addition to common property and the decision should be left to the owners corporation. Appearance can be an important factor for lot owners when buying into a strata scheme and, as it is lot owners who have the financial interest in a scheme, they should be able to decide about whether they want sustainability infrastructure which will impact the appearance of the building.

Heritage listed buildings, or buildings of historical or cultural importance, are good examples as to when the aesthetics of a strata scheme is very important and where sustainability infrastructure which impacts the appearance of a building might not be appropriate. This does not mean lot owners are necessarily opposed to sustainability infrastructure per se and might even want to consider other sustainability measures within the building. However, this should be a decision made collectively by the owners corporation on a case-by-case basis which takes into account the individual features and circumstances of a particular strata scheme**. REINSW recommends against** the prohibition of by-laws which prevents the installation of sustainability infrastructure due to appearance.

Question 11: Should there be exceptions to the prohibition? That is, in what circumstances would it be reasonable for by-laws to prevent the installation of sustainability infrastructure due to appearance?

As mentioned above, **REINSW recommends against** a prohibition on by-laws which prohibit sustainability infrastructure for appearance reasons. Heritage listed buildings, or buildings of historical or cultural importance, are clear examples where the appearance or aesthetics of a strata scheme is important. However, there might be other reasons, specific to a particular strata scheme, as to why lot owners don't want sustainability infrastructure installed because of the way it will look and REINSW's view is that they should have the prerogative to make that decision collectively, as an owners corporation, given that lot owners invested financially into the strata scheme.

7. Recommendation 119: Redraft section 132A of the Management Act to provide greater clarity and certainty regarding its use.

Questions 12 and 13: What do you think should be included in the definition of utility? Are there any other matters that we should consider in clarifying the operation of section 132A of the Act?

While REINSW is of the view that the current definition of "utility" and section 132A of the SSM Act is generally working well in practice, **it does not oppose** the proposed broader definition of "utilities" proposed in the Consultation Paper.

However, even though the Consultation Paper notes that the proposed definition is to clarify that "utility" applies to utilities supplied via embedded networks, **REINSW recommends** the new proposed definition of a 'utility' explicitly states that it applies to embedded networks for the avoidance of any doubt, especially for persons who many not be especially familiar with the SSM Act and its application.

REINSW wishes to highlight the fact that embedded networks can present competition and consumer risks because the embedded network supplier owns the whole network and it can lock owners corporations into contracts with unfavourable terms and conditions that the owners corporation might not be subject to with other providers. REINSW's view is that where these risks outweigh benefits associated with embedded networks, the Department might wish

to review some of the issues around embedded networks and consider options as to how they might be resolved, including potentially banning them from future developments.

8. Recommendation 121: Explore the feasibility of allowing certain longer initial contracts in cases where they are required to deliver sustainability measures. Such sustainability measures would need to ensure a minimum building rating of NABERS 5 star and be demonstrated as delivering positive benefits for the owners corporation over the duration of the contract.

Question 14: Do you think the Act should allow longer initial contracts in cases where they will deliver sustainability measures? Why or why not?

REINSW recommends that more data on the average time required to install and deliver sustainability measures should be obtained by government or collated before a decision on the appropriate initial contract length can be made. While REINSW is not necessarily opposed to longer initial contracts, if legitimately required to deliver such sustainability measures, it is of the view that there is currently insufficient information available to make this decision.

Question 15: If so, do you think there is a need to define 'sustainability measures' in the Act or set a threshold for when these longer initial contracts are allowed?

Yes. **REINSW recommends** defining "sustainability measures" in the SSM Act but refers the Department to its response to Question 14 in that more information needs to be obtained before such a definition can be settled.

Question 16: Do you think that a NABERS 5-star rating is an appropriate threshold test for these longer initial contracts? Why or why not? Are there any alternatives?

Yes. REINSW's position is that 5 stars is an appropriate threshold for such contracts. However, sustainability infrastructure is continuously being updated to be made more effective and efficient as technology evolves. Infrastructure which might meet a NABERS 5-star rating several years ago, might not today and for this reason **REINSW recommends** that owners corporations be required to have their NABERS 5-star rating renewed every 5 years to ensure it meets the ever-evolving sustainability standards and new technologies.

Question 17: If longer initial contracts were permitted, what do you think the term limit for these contracts should be? Why?

REINSW refers the Department to its response to Question 14 above. REINSW is of the view that there needs to be more data available about the average time taken to deliver sustainability measures before it can comment on an appropriate initial contract length. **REINSW recommends,** subject to such additional data on installation timeframes, that any initial contract should be capped at a maximum period of 5 years.

Question 18: Do you think any further conditions should apply to these contracts?

Without seeing an example of the initial contract for sustainability measures, REINSW is unable to know what terms it would contain and so it is difficult to comment, even as professionals in the strata sector, on what further conditions should apply. **REINSW recommends** providing an example contract before or during the public consultation phase so that stakeholders can provide more substantive feedback on relevant conditions.

Nevertheless, the longer the duration of an initial contract, the greater the costs that the owners corporation will have to bear. If longer initial contracts were permitted for sustainability measures, REINSW is of the view that contractors need to be held accountable so that the sustainability measures are delivered promptly without undue delays. Noting that REINSW has not seen a sustainability measures contract, **REINSW recommends** that the following two conditions should apply to ensure transparency throughout the process:

- Regular reporting, including via the Strata Hub and having a contractor, or their representative, attend AGMs so that owners corporations can ask questions, including about delivery timeframes and potential delays.

- The requirement to provide adequate explanations if delivery timeframes are delayed or if there are any additions which have been overlooked.

9. Recommendation 122: Introduce a requirement that, as part of any sale of strata scheme units, including off the plan sales, there is plain English disclosure of which services are provided as an embedded network, their ownership structure and what this will mean for residents, including in relation to access to alternative providers and ongoing capital costs.

Question 19: Which option or combination of options do you prefer? Why?

REINSW notes that the existence of embedded networks is only applicable to a small portion of strata schemes. However, of the four options set out in the Consultation Paper, **REINSW recommends** that option 1 (that is, amending the conveyancing laws to require the vendor or developers to disclose embedded networks to prospective purchasers) is the best disclosure method. REINSW's position is that it is important that a prospective purchaser is informed in plain English about what embedded networks are, and how they will be impacted by them, before entering into a contract for sale. A conveyancer or solicitor is best placed, as part of a prospective purchaser's due diligence process, to explain this information and is also the most qualified to answer any questions a prospective purchaser might have. Similar to other due diligence processes, such as searches of the strata scheme's records, this is a legal issue and should be handled by the solicitor or conveyancer with specific disclosures of any embedded networks contained in the proposed contract for sale.

If a strata scheme was given a NABERS rating, notice of the embedded network could be uploaded onto the Strata Hub, as suggested by option 4 in the Consultation Paper. However, this wouldn't provide prospective purchasers with details about the embedded network, associated costs or how it might impact them. REINSW also notes concerns raised in the Consultation Paper that prospective purchasers might not necessarily check the Strata Hub, nor would it apply to residential off the plan contracts.

REINSW recommends that option 2 should not be implemented. A real estate agent can only disclose embedded networks as a material fact, or through advertising, if they have been made aware by the vendor or developer (or ought reasonably know) that there is an embedded network in the property. Furthermore, real estate agents are engaged to act in the best interests of vendors and so it is not appropriate for them to be providing prospective purchasers with advice, which could be legal in nature or have legal implications, on issues such as what embedded networks are, and how they might affect the prospective purchaser if they chose to buy into the strata scheme, or answering any questions that the prospective purchaser might have. REINSW's view is that disclosure of an embedded network is a legal issue which is appropriately dealt with by a solicitor or conveyancer during the due diligence processes prior to the exchange of contracts.

In addition, REINSW's view is that option 3 is too late in the sale process for disclosure to occur as a certificate pursuant to section 184 of the SSM Act is only issued after contracts have been exchanged. **REINSW recommends** that disclosure occurs before exchange of contracts which is why it recommends disclosure by amending the conveyancing laws.

For these reasons, **REINSW recommends** that option 1, amending the conveyancing laws to require a solicitor or conveyancer to disclose embedded networks in a strata scheme, is the most reliable way to ensure that a prospective purchaser is aware of this service before entering a contract for sale.

10. Recommendation 126: Consult further with the strata sector to determine the appropriate limitation on contract terms for building managers.

Question 20: What limitations on contract terms for building mangers do you think are appropriate? Why?

REINSW refers the Department and its response to question 130 of its Strata Laws Submission. The current maximum term of appointment for building managers is 10-years which, in REINSW's view, is too long given that strata managers have more risk and responsibilities and are subject to a maximum 3-year term. **REINSW recommends** that building managers should be subject to the same 3-year contract term as a strata manager and that the building manager's initial term of appointment should be 12 months.

Question 21: Aside from limiting contract terms, are there any other strategies that could be used to ensure the independence of building managers from developers?

REINSW recommends that section 71 of the SSM Act should be expanded so as to require building managers and strata managers to provide the owners corporation with a declaration as to how many of the developer's buildings they are currently managing. REINSW's view is that this would provide owners corporations with more transparency when ensuring the independence of building or strata managers from developers.

REINSW refers the Department to its response to questions 128 and 129 in its Strata Laws Submission where it supported proposals to introduce into the SSM Act a duty of care for building managers to act in the best interests of the owners corporation and for building managers to be subject to the same level of regulation as managing agents. REINSW re-iterates it support for such proposals and recommends that this be reflected in the strata management legislation.

Question 22: Do you support longer initial contract terms for building managers with mechanisms in place to allow the contract to be ended in circumstances where a conflict of interest/and or incompetency becomes apparent? Why or why not?

REINSW **refers the Department to its recommendation** in response to Question 20 above, namely, to limit a building manager's initial term of appointment to 12 months. However, REINSW's view is that, in general, the SSM Act should require building managers' contracts to contain mechanisms which allow them to be ended in circumstances of conflict of interest or non-performance. This is because REINSW is aware that not all building managers' contracts currently contain clauses allowing for termination. Such a requirement should not be prescriptive though, and it should be left to the parties to negotiate commercially as to the content and wording of any such termination clause for conflict of interest and non-performance. **REINSW recommends** that the SSM Act require building managers' contracts to contain a termination clause, but that the parties should have the freedom to negotiate the substantive content and wording of any such clause.

11. Recommendation 127: Redefine other contractors who undertake work assisting the owners corporation to manage the common property as common property contractors and consult further with the strata sector on what the appropriate limitations on contract terms for these contractors should be

Question 23: Should the contract terms for common property contractors be the same as for building managers? Why or why not?

REINSW opposes prescribing any contractual term for common property contractors. In practice, services performed by common property contractors are often undertaken on an ad hoc or case-by-case basis and in these situations there are no written contracts in place. This approach has been working well in practice. It is REINSW's view that, in circumstances where

there are written contracts for common property contractors, parties should have the freedom to contract and negotiate the terms of the work based on the individual strata scheme and the particular set of circumstances. Strata schemes' common property contractor requirements can vary greatly depending on the individual features of the scheme and so a "one size fits all approach" isn't appropriate. For example, some schemes might have swimming pools whilst others might have squash courts, and some are a mixture of residential and commercial. To set a prescribed contract term for common property contractors is to invite practices such as sham contracting. **REINSW recommends** against implementing contract terms for common property contractors.

Question 24: If you think that the contract terms should not be the same, what limitations on contract terms for common property contractors do you think are appropriate? Why?

REINSW refers the Department to its recommendation in Question 23 above that there should be no prescriptive contract terms for common property contractors.

Question 25: Do you think there is a need for the Act to define 'common property contractor'? If so, what do you think needs to be included in the definition?

REINSW refers the Department to its recommendation in Question 23 above that there should be no contract terms for common property contractors. Therefore, there is no need to define "common property contractors".

12. Accessibility Infrastructure

Question 26: What is your experience of owners not being able to install accessibility infrastructure in strata schemes? Please provide examples.

As discussed in the additional comments section (paragraph 3.4 and pages 59-60) of REINSW's Strata Laws Submission, older strata schemes may not already have accessibility infrastructure installed (for example, lifts and ramps). This means that where a lot owner or other occupier has, or subsequently develops, a disability, it can prevent them from accessing their home unless an owners corporation agrees to install this infrastructure. The difficulty is that sometimes owners corporations have difficulty reaching a consensus about the installation of, and ongoing maintenance costs associated with, sustainability infrastructure. Where an owners corporation refuses to consider, or install, accessibility infrastructure, the only recourse a person with a disability has is legal action which is expensive, prolonged and time consuming.

One main example that REINSW can share is a personal example of its current President, Peter Matthews. Peter has shared the difficulties that an owner can experience when requesting to have accessibility infrastructure installed in a strata scheme. He owns an apartment which was initially used for short-term rental accommodation until this was prohibited through a by-law. Peter has a child with a disability and so wanted to offer the apartment, for free, to the Cerebral Palsy Alliance so that parents and children with disabilities could stay there. However, the apartment building cannot be accessed by a wheelchair due to lack of a ramp to the foyer. There is sufficient space for a ramp to be built but the strata

committee refused to commission reports or install ramp access which would make the foyer accessible by wheelchair. Legal action was the only avenue available to him, which for the reasons above, is not ideal.

Questions 27 and 28: Should the Act be amended to make it easier to install accessibility infrastructure in strata schemes? Why or why not? If the Act should be amended, what changes might be required?

REINSW recommends that legislative changes should occur to make it easier to install accessibility infrastructure in strata schemes and to ensure that new strata schemes take accessibility into account during the development and construction phase of a new strata scheme to ensure that apartments are accessibility friendly. **REINSW also recommends** providing a clearer pathway or roadmap when it comes to an owners corporations' decision-making process about the installation of accessibility infrastructure.

However, **REINSW further recommends** that the Legislature is best placed to make decisions about the mechanics of such amendments given this is a complex area which also overlaps with the disability and anti-discriminations laws (even though accessibility infrastructure in strata schemes are not specifically addressed by such laws).

13. Other REINSW recommendations

While not specifically addressed in the Consultation Paper, REINSW would also like to take the opportunity to raise with the Department additional recommendations which, in its view, should be made to the SSM Act because of the benefits it will have for the effective management of strata schemes in NSW. REINSW hopes that the Department will consider these recommendations in any amendments to the SSM Act that it might make when implementing recommendations made by the Minister.

a) Clarifying the strata manager's term of appointment

Section 50(1)(b) of the SSM Act states that a strata manager's term of appointment expires "at the end of the period of 3 years following the appointment". **REINSW recommends** that this section should be amended to specify that this is the maximum term of appointment, not the minimum, as this will clarify that shorter terms of contract are permitted by the legislation.

b) Annexures to the agenda for works or project considerations

Part 2 of Schedule 1 to the SSM Act addresses strata meeting agendas, nominations, and notices. **REINSW recommends** that this Part be amended to require any annexures relating to works or consideration for projects to be attached to the agenda. This will ensure that lot owners have access to relevant information about the work or project under consideration at the meeting.

c) Audits

Section 95(1) of the SSM Act requires the auditing of a large strata scheme's accounts and financial statements before an AGM where the "annual budget exceeds $250,000". Pursuant to clause 21 of the SSM Regulation, "budget" includes annual contributions levied (regardless of whether they have been paid), other income sources or other amounts held by an owners corporation. This definition can lead to scenarios in practice where an owners corporation must be audited even if they haven't raised any levies for the year because their account holds more than $250,000, or where they have only raised $20,000 but this takes the owners corporation's total account over the threshold sum prescribed by section 95 of the SSM Act. REINSW also understands that this differs from how such a provision has, in fact, been administered in practice. **REINSW recommends** amending this provision to clarify when a large strata scheme needs to be audited so that strata schemes are not put to this expense unnecessarily.

d) Meetings for tenants

REINSW's view is that section 33 of the SSM Act and clause 7 of the SSM Regulation, in relation to the convening of a meeting for the purpose of nominating a tenant representative before an AGM where at least half the lots in a scheme are tenanted, is not working well in practice. **REINSW recommends** that these provisions should be reviewed.

e) Grace period for the implementation of the amendments to the SSM Act

REINSW recommends that the Department provide the industry with a transitional period of at least 6 months to allow consumers, industry stakeholders and strata managers to adjust to the new legislation.

The SSM Act is a fundamental piece of legislation for the strata scheme industry. The recommendations proposed in the Minister's Report as a result of the statutory review, of which there were 139 in total across the SSM Act and the SSD Act, are wide sweeping and will involve significant changes to the current regulatory framework which governs the many strata schemes in New South Wales. REINSW is concerned that consumers, owners corporations (self-managed and those with strata managers), strata management professionals, industry stakeholders and registered training providers will need time to familiarise themselves with the legislative changes and how it might affect them. Lot owners, and strata committee members will also need time to understand how the changes affect the day-to-day running of their strata scheme to ensure that they stay up-to-date and compliant.

These legislative changes will also affect strata management related forms and strata management agency agreements which are used by the industry on a day-to-day basis and REINSW, as a major industry provider of such template documents, is concerned about the impact these changes will have on its templates and the industry as a whole. As REINSW has previously raised with the Department, when new legislative reforms occur, REINSW must cease trading old forms and agreements for compliance reasons. However, REINSW cannot start updating new copies of these forms and agreements until it sees a final copy of the new strata management legislation. This will make it extremely difficult for REINSW to provide

compliant template forms and agreements to the market if there is no transitional period between the publication of the final amended legislation and its commencement.

This issue is not unique to REINSW but will affect other industry providers of template forms and agreements and REINSW is concerned that without a transitional period there would be a lack of compliant template forms and agreements for the industry to use. Since such forms and agreements are used in everyday practice, this would cause significant concern and turmoil within the industry.

REINSW recently welcomed the grace period provided by NSW Fair Trading in relation to the changes made to the *Property and Stock Agents Regulation 2022* (NSW) which has greatly aided in the smooth transition and implementation of such reforms. REINSW's view is that the industry would also benefit from a similar grace period with respect to any amendments made to the strata management legislation as a result of this statutory review.

REINSW recommends that the strata management industry be provided with a minimum 6-month transitional period so that it can be educated and prepared for the new legislative changes, whilst industry providers have time to update their forms and agreements so that they are compliant by the end of the transitional period.

14. Summary

Below, is a brief overview of REINSW's recommendations in relation to the Department's proposed changes outlined in the Consultation Paper.

Recommendation 76: REINSW recommends:

- that the status quo should be maintained to allow owners corporations to continue to set fees and bonds in by-laws, as outlined in option 3 of the Consultation Paper;
- against implementing options 1 or 2 but, notwithstanding this, REINSW has outlined, in its response to Question 3 in the Consultation Paper, some common fees or bonds which it views as reasonable for the maintenance and upkeep of common property; and
- implementing a by-law registration and amendment process where a strata manager can register or amend straight forward by-laws without the need for legal representation, as this will both simplify the process and ensure unnecessary fees are not incurred.

Recommendation 108: REINSW:

- supports including in clause 29 of the SSM Regulation the items outlined in the Consultation Paper in response to the Minister's recommendation, namely "lifts, electronic vehicle charging stations and associated infrastructure, solar panels and associated equipment and any other sustainability infrastructure and any dedicated accessibility infrastructure";
- recommends that for new strata schemes, a 5-10% contingency percentage is factored into any initial maintenance schedule since such schemes don't have the

benefit of previous data, and builder and developer cost of repairs can be at a discounted, rather than retail, rate;

- recommends that clause 29 of the SSM Regulation also prescribes that the following items should also be included in the initial maintenance schedule: glass cleaning and maintenance requirements, the life of balconies and balustrades and concrete spalling, the servicing of SUMP pumps and basement pumps the maintenance of driveways and sewer and storm water lines; and

- including in the initial maintenance schedule or apartment handover documents from the developer, a non-exhaustive list of items that the lot owner will be responsible for maintaining.

Recommendation 109: REINSW:

- supports the recommendation that the initial maintenance schedules and levy estimates should be reviewed, and a certificate given by a quantity surveyor or, alternatively, REINSW recommends that an independent expert is given statutory access to the building and records; and

- recommends implementing different tiers of licences for quantity surveyors and that only the highest level of licence holder should be permitted to sign off on initial maintenance schedules reviews and certifications. This professional should also hold appropriate professional indemnity cover.

Recommendation 111: REINSW recommends:

- including in the SSM Regulation, guidelines for common property items which should be included in the capital works fund plan (such as a non-exhaustive list of items or a template which is customisable);

- amending section 80(1) of the SSM Act (and in any capital works fund plan template) to require owners corporations to include how the funds required to pay for any major expenditure in that 10-year period will be raised;

- adding the following items to the list of common property items proposed on pages 11-12 of the Consultation Paper: switchboards, downpipes, skylights, anchor points, awnings, screens, louvres, décor features, waterproofing balconies, Co2 and mechanical ventilation systems, fire shutters, fire panel, fire dampers, basement drainage systems and line marking, security access and intercom systems, CCTV, alarms and surveillance equipment, TV and Foxtel antennas and NBN and FTTB points, pool, gym, tennis court, marina and other facilities, landscaping, composting, worm farm, bee house, irrigation systems and waterproofing membranes; and

- that items relating to windows and walls should also include painting, façade and washing frequency and that references to technological items should be worded appropriately to factor in technological advancements.

Recommendation 115: REINSW recommends:

- against the prohibition of by-laws which prohibits the installation of sustainability infrastructure due to appearance as this should be the decision of the owners

corporation. Heritage listed buildings and buildings of historical or cultural importance are examples of where the aesthetics of a strata scheme are very important, but there can be other reasons, individual to a particular strata scheme, as to why lot owners don't want sustainability infrastructure installed due to how it will look. The owners corporation should be able to make this decision on a case-by-case basis.

Recommendation 119: REINSW:

- does not oppose the broader definition of "utility"; and
- recommends that this proposed definition of "utility" should explicitly state that it relates to embedded networks for the avoidance of any doubt.

Recommendation 121: REINSW:

- recommends that more data, on the average time required to install and deliver sustainability measures, should be obtained or collated before a decision on the appropriate initial contract length can be made;
- recommends that subject to such additional data on installation timeframes, any initial contract should be capped at a maximum period of 5 years;
- recommends defining "sustainability measures" but that, again, more information needs to be obtained before such a definition can be settled;
- supports a 5-star NABERS rating as an appropriate threshold where longer initial contracts are implemented, but recommends that owners corporations should be required to have their NABERS 5-star rating renewed every 5 years to ensure it meets ever-evolving sustainability standards and new technologies;
- recommends providing an example contract during the public consultation phase so that more substantive feedback on terms and conditions can be provided; and
- recommends that initial contracts for sustainability measures should include conditions which requires the contractor to report to the owners corporation via the Strata Hub and at AGMs, and to provide adequate explanations for delayed timeframes or additions which were overlooked. However, REINSW notes that it has not seen an example initial contract and would have to view such a document before it could determine whether any further conditions should apply.

Recommendation 122: REINSW recommends:

- that option 1 in the Consultation Paper in response to the Minister's recommendation # 122, namely, amending the conveyancing laws to require the vendor or developers to disclose embedded networks to prospective purchasers, is the best disclosure method.

Recommendation 126: REINSW:

- recommends that building managers should be subject to the same maximum 3-year contract term as strata managers and that the initial term of appointment for building managers should be 12 months;

- recommends that section 71 of the SSM Act should be expanded to require building managers and strata managers to provide the owners corporation with a declaration about how many developers' buildings they are currently managing;

- recommends that the SSM Act should introduce a duty of care for building managers to act in the best interests of the owners corporation and for building managers to be subject to the same level of regulation as strata managing agents as per questions 128 and 129 of its Strata Laws Submission; and

- re-iterates its recommendation that the initial term of appointment for building managers should be 12 months. However, in general, REINSW recommends that the SSM Act should impose a non-prescriptive requirement for a building manager's contract to contain a termination clause allowing the contract to be ended in circumstances of non-performance or conflict of interest.

Recommendation 127: REINSW recommends:

- against implementing contract terms for common property contractors.

Accessibility infrastructure: REINSW recommends:

- that legislative changes should occur to make it easier to install accessibility infrastructure in strata schemes and to ensure that new strata schemes take accessibility into account during the development and construction phase of a new strata scheme to ensure that apartments are accessibility friendly;

- the industry be provided with a clearer pathway or roadmap when it comes to an owners corporation's decision-making process about the installation of accessibility infrastructure; and

- that the Legislature is best placed to make decisions about the mechanics of such amendments given the complexity of the legislation around accessibility issues.

Other recommendations: REINSW recommends:

- amending section 50(1)(b) of the SSM Act to clarify that 3 years is the maximum, not minimum, period of a strata manager's appointment;

- amending Part 2 of Schedule 1 to the SSM Act to require annexures relating to work or consideration for projects to be attached to the meeting's agenda;

- clarifying when a large strata scheme needs to be audited pursuant to section 95(1) of the SSM Act;

- reviewing section 33 of the SSM Act and clause 7 of the SSM Regulation in relation to convening a meeting prior to an AGM for the purpose of selecting a tenant representative, where half the strata scheme's lots are tenanted, as the current provisions don't work well in practice; and

- providing the strata management industry with a minimum 6-month transitional period so that it can be educated and prepared for the new legislative changes and allow

industry providers time to update their forms and agreements so that they are compliant by the end of the transitional period.

15. Conclusion

REINSW has considered the Consultation Paper and has provided its comments above, aiming to provide input on as many pertinent aspects of the Consultation Paper as possible. However, REINSW's resources are very limited and, accordingly, it does not have the capacity to undertake a thorough review and is unable to exhaustively investigate all potential issues in this submission. Nonetheless, REINSW has identified a number of matters that it believes will cause significant consumer detriment, some of which appear above.

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

Yours faithfully

Tim McKibbin
Chief Executive Officer

Annexure A

The following pages include REINSW's submission in response to the statutory review of the NSW Strata Laws Discussion Paper dated 7 April 2021.

REINSW | for members since 1910

The Real Estate Institute of New South Wales Limited

Submission in response to the
Statutory Review of the NSW Strata Laws Discussion Paper

Date: 7 April 2021

To: Strata Schemes Statutory Review
Policy & Strategy
Better Regulation Division
Department of Customer Service

Delivered: Email to stratareview@customerservice.nsw.gov.au

1. INTRODUCTION

This submission has been prepared by The Real Estate Institute of New South Wales Limited (REINSW) and is in response to the *Statutory Review of the NSW Strata Schemes Laws* Discussion Paper released in November 2020.

REINSW is the largest professional association of real estate agents and other property professionals, with more than 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. In doing so, REINSW believes it has a substantial role in the formation of regulatory policy in New South Wales.

This submission has been prepared in consultation with members of the REINSW Strata Management Chapter Committee, who are licensed real estate professionals with longstanding knowledge and experience in the practice of strata management and strata development. REINSW considers it to be prudent to avail this expertise to legislators for consideration in the formation of regulatory policy.

Since 2016, REINSW and members of the Strata Management Chapter Committee have been collaborating in a series of meetings regarding the anticipated statutory review of strata legislation. The issues raised in these meetings formed the basis of REINSW's initial submission, which outlined REINSW's recommendations for necessary amendments to the *Strata Schemes Management Act 2015* (NSW) and the *Strata Schemes Development Act 2015* (NSW), as well as the relevant Regulations. This initial submission was lodged on 8 October 2020 and is attached at **Appendix A**.

This current submission sets out REINSW's answers to the questions posed in the Discussion Paper. It is REINSW's hope that this submission will be implemented to create an improved strata management and strata development framework for New South Wales.

REINSW looks forward to continuing to consult with expert practitioners and the NSW Government on these issues.

2. REINSW'S RESPONSES TO QUESTIONS SET OUT IN THE DISCUSSION PAPER

2.1 *Strata Schemes Development Act 2015*

2.2.1 OBJECTS OF THE ACT

QUESTIONS 1-4

REINSW has had the benefit of conferring with Massons Commercial Property Law in relation to Questions 1-4 regarding the objects of the *Strata Schemes Development Act*, and we fully support the answers they have provided in their submission. See **Appendix B** for the Massons submission.

2.2.2 STRATA RENEWAL: COLLECTIVE SALE AND REDEVELOPMENT

Built in safeguards and protections

QUESTIONS 5-8

REINSW has had the benefit of conferring with Massons Commercial Property Law in relation to Questions 5-8 regarding the built-in safeguards and protections in relation to strata renewal under the *Strata Schemes Development Act*, and we fully support the answers they have provided in their submission. See **Appendix B** for the Massons submission.

Compensation

QUESTIONS 9-12

REINSW has had the benefit of conferring with Massons Commercial Property Law in relation to Questions 9-12 regarding the compensation in relation to strata renewal under the *Strata Schemes Development Act*, and we fully support the answers they have provided in their submission. See **Appendix B** for the Massons submission.

Limited uptake of renewal process

QUESTIONS 13-15

REINSW has had the benefit of conferring with Massons Commercial Property Law in relation to Questions 13-15 regarding the limited uptake of strata renewal under the *Strata Schemes Development Act*, and we fully support the answers they have provided in their submission. See **Appendix B** for the Massons submission.

Strata renewal case studies

QUESTIONS 16-19

REINSW has had the benefit of conferring with Massons Commercial Property Law in relation to Questions 16-19 regarding the strata renewal case studies set out in the Discussion Paper, and we fully support the answers they have provided in their submission. See **Appendix B** for the Massons submission.

REINSW | for members since 1910

2.2.3 PART-STRATA DEVELOPMENTS: MIXED USE AND LAYERED SCHEMES

Strata management statements and easements relating to part-strata parcels

QUESTION 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?

Feedback from members of the REINSW Strata Management Chapter Committee is that strata management statements are generally effective. However, there are certain aspects of the process that are onerous in practice.

REINSW notes that strata management statements can be quite lengthy. While there will be differences from scheme to scheme, there are also many aspects that are very similar; for example, the process for electing the committee, meeting processes, apportionment of costs, shared facilities, dispute resolution etc.

REINSW recommends that, on the basis that there are certain mandatory requirements for strata management statements, the legislation include a set of model terms that can be adopted, specifically those matters set out in clause 2 of Schedule 4 to the *Strata Schemes Development Act*.

QUESTION 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?

REINSW notes that a strata management statement may not be necessary where the commercial lot area is relatively small in comparison to the residential strata scheme. In such cases, folding the commercial lots into the strata scheme may be appropriate.

However, if this is not the case and a simple strata management statement is required, then the adoption of model terms (as recommended in our answer to **Question 20**) may be an efficient alternative, particularly where the requirements are not complex or convoluted. This could help to reduce the length of the strata management statement and minimise the costs involved in drafting and finalising the statement.

Requirements for strata management statements

QUESTION 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?

REINSW believes that the information that must be included in a strata management statement, as set out in clause 2 of Schedule 4 of the *Strata Schemes Development Act*, is sufficient and comprehensive. These are the matters that REINSW envisages could be the subject of model terms (as recommended in our answer to **Question 20**).

As is the case with model by-laws, ***REINSW recommends*** a default position of adopting model terms, with the option to vary or tailor them.

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

REINSW believes that the rights between lot owners are already adequately balanced and that no amendment is required.

While we acknowledge that developers can tailor strata management statements to work in their favour and to achieve certain outcomes, it doesn't serve them to do so in a way that undermines market value. By having model terms in place (as recommended in our answer to **Question 20**), it will be easier for people to understand how a standard scheme operates and to identify aspects that deviate from the norm.

Building management committees and conflicts of interest

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

REINSW believes the provisions relating to the governance of building management committees and their meeting processes are working well in practice and do not require any amendment.

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

There are certain protections in the *Strata Schemes Management Act* relating to the fact that strata managers can't take gifts and benefits. ***REINSW recommends*** that similar provisions be applied to the managers of building management committees.

QUESTION 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?

REINSW believes the current provisions are working well in practice and do not require any amendment.

QUESTION 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 contracts? What would be a reasonable restriction?

Similar time limits which apply to the appointment of strata managers under the *Strata Schemes Management Act* could be applied in relation to the appointment of managing agents by a building management committee under the *Strata Schemes Development Act*.

REINSW recommends that time limits under the *Strata Schemes Development Act* for appointment of a managing agent by the building management committee be the same as those under the *Strata Schemes Management Act.*

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

Just as a duty of good faith exists for strata managers under the *Strata Schemes Management Act*, so too should it exist for strata managers and building management committees under the *Strata Schemes Development Act.*

REINSW recommends that the duty of good faith under the *Strata Schemes Management Act* also be reflected in the *Strata Schemes Development Act.*

Shared facilities

QUESTION 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? If not, why not?

REINSW does not believe that the requirement for strata management statements to provide for the fair allocation of shared expenses and the obligation to review that allocation should apply retrospectively. Where a scheme is happy with the strata management statement in place, they should not be forced to accept new and different terms. REINSW draws the analogy to by-laws and we point to our answer to **Question 85**.

To the extent that a scheme is happy to continue with the strata management statement in place prior to the reforms, they should simply be able to do so.

REINSW recommends that schemes should be able to continue with the strata management statement they had in place under the previous law (to the extent that they are not inconsistent with the current law).

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

REINSW recommends that the legislation include a provision that the default position for shared facilities is a 50:50 split. This will account for those instances where something is not specifically detailed in the strata management statement and will ensure that everything is captured.

Expense allocation and voting rights

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

REINSW believes that the current provisions are working well in practice and do not require amendment. We note that it is an unusual circumstance where voting rights do not reflect relative contribution. However, in instances where this is not the case, there is generally a good commercial reason.

QUESTION 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?

REINSW believes the legislation adequately provides for the balancing of interests between commercial and residential lot owners in mixed-use developments and ensures fair decision-making.

QUESTION 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)?

REINSW believes that rights and protections similar to those under the *Strata Schemes Management Act* should be included in the *Strata Schemes Development Act*, specifically:

- Time limits for appointment of a strata manager by the building management committee should be the same as those under the *Strata Schemes Management Act*
- Time limits for contracts for electricity, gas or other utilities should be the same as those under the *Strata Schemes Management Act*.

Dispute resolution

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

Strata management statements are commercially-negotiated agreements and incorporate specific dispute resolution provisions.

REINSW does not believe that there should be a purpose-built tribunal for these disputes; that is, as per the *Strata Schemes Management Act*. However, having model terms for dispute resolution available (see our answer to **Question 20**), would assist in the more efficient resolution of disputes as it would provide an example of a balanced dispute resolution regime.

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

REINSW believes the legislation adequately protects residential owners in relation to the rectification of complaints, and that no amendment is required.

2.2.4 VALUATION OF UNIT ENTITLEMENTS

Requirements for schedules of unit entitlement

QUESTION 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?

REINSW is satisfied that the requirement for a qualified valuer's certificate to determine unit entitlements is working well in practice and no amendment is required.

QUESTION 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?

REINSW does not believe that unit entitlement valuations are too costly.

QUESTION 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?

REINSW believes that a proposed subdivision has the potential to impact all owners in some way. For example, a proposed subdivision may have financial implications for owners, or it may also have lifestyle impacts or change access to or usability of common property. When buying into a strata scheme, lot owners are entering into a community living arrangement and, as such, they should be entitled to have a say in how that community operates.

Therefore, REINSW believes that owners should have the right to object to such a proposal in all circumstances.

QUESTION 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?

All lots in the scheme should not need to be valued in all circumstances. If the subdivision does impact the entire scheme, it makes sense for the unit entitlements of all lots to be valued. However, where, for example, a subdivision only affects certain lots in the scheme, only those lots should be required to be revalued.

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

REINSW is satisfied with the current provisions.

2.2 *Strata Schemes Management Act 2015*

2.2.1 OBJECTS

QUESTION 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?

REINSW believes that the objects set out in section 3 of the *Strata Schemes Management Act* remain sound, relevant and valid, and there is no need to include further objectives (such as those that guided the 2015 reforms).

2.2.2 MANAGING THE SCHEME

Strata Committees

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

REINSW recognises the vital function of the strata committee and its office holders, and the essential role they play in the effective management of the owners corporation.

While the positions held by office holders are voluntary, it must be acknowledged that filling these positions comes with important duties and responsibilities. It is essential that these duties and responsibilities are understood by individuals prior to volunteering to become an office holder. However, it is the experience of REINSW members that, all too often, office holders have a limited understanding of what their position on the strata committee entails.

REINSW recommends that NSW Fair Trading compile an information pack (available via www.fairtrading.nsw.gov.au) explaining the role of the strata committee, and the duties and responsibilities of each office holder. REINSW envisages that the information pack could take a number of different forms; for example, a series of fact sheets or short videos. Strata managers can then make this information pack available to office holders and anyone considering volunteering for a position.

REINSW believes that the availability of such an information pack will positively contribute to the functioning of strata committees, because office holders will understand their duties and responsibilities, and the parameters of their powers and the decisions they can make. This will, in turn, help with the smooth and efficient management of the strata scheme. Should an issue or problem arise (for example, the strata committee seeking to exercise a power that needs to be conferred upon them, but has not been), the information pack can be referenced to resolve the issue.

REINSW notes that many strata managers already provide fact sheets and information to the strata committees of the schemes they manage. However, we believe there is value in having an information pack that is uniform across New South Wales. This pack could potentially include information about:

- The roles and responsibilities of each office holder and strata committee member
- The decisions the strata committee can and can't make
- Guidance about how they should interact with lot owners and tenants in order to achieve the best outcomes.

As an alternative to the information pack (or perhaps in addition to the information pack), REINSW suggests that NSW Fair Trading consider providing a short training course for office holders, and potential office holders and strata committee members.

However, we note that while there will be some individuals who will embrace the idea of attending a training course (whether in person or online), there will inevitably be others who will not be willing to devote the time to completing such a course.

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

Section 30 of the *Strata Schemes Management Act* allows the owners corporation to establish a strata committee of no less than three members and up to nine members.

REINSW believes that a strata committee of nine members is, in the majority of cases, not warranted. While having a nine-member committee in place may serve some large strata schemes well, for most others it can have the adverse impact of making the management of the scheme unwieldy and inefficient, and will inevitably slow down decision making.

REINSW recommends that the number of strata committee members required be tiered according to the number of lots in the strata scheme. For example:

- Up to 49 lots (small schemes) – Three members
- Between 50 and 99 lots (medium schemes) – Up to five members
- More than 100 lots (large schemes) – Up to nine members

Putting such tiers in place, will assist with the smooth and efficient management of the strata scheme, and help facilitate timely decision-making.

As an additional point, REINSW feels that the wording of section 30 requires some clarification. Specifically, section 30(1) states that the strata committee "is to consist of the number of persons *determined* by the owners corporation (not being more than nine)" [emphasis added].

REINSW has become aware of a number of circumstances where owners corporations have pre-determined the number of members they want to elect to the strata committee. Then, when a sufficient number of members are not elected to fill that pre-determined number, the unfilled position or positions are then elected as "vacant" (with the potential to be filled at a later date). A member of the REINSW Strata Management Chapter Committee reports of a case where the owners corporation of a strata scheme under their management wanted seven people on the strata committee, however only six people volunteered to be elected for the positions. The owners corporation then proceeded to elect a vacant position. The Chapter Committee member received legal advice that the legislation did not preclude this outcome.

REINSW does not believe this is the intention of the legislation. On a practical level, it does not make sense to elect a vacant position.

REINSW recommends that the wording of section 30(1) be amended to: "The strata committee of the owners corporation is to consist of the number of *elected* persons determined by the owners corporation (not being more than nine)." This minor amendment will clear up any ambiguity.

QUESTION 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?

Section 37 of the *Strata Schemes Management Act* sets out that strata committee members have a duty to carry out their functions, so far as practicable, for the benefit of the owners corporation and with due care and diligence. Further, section 260 provides committee members with protection from personal liability if they act in good faith and for the purpose of executing a function under the *Strata Schemes Management Act* or any other Act.

REINSW believes that, generally speaking, the provisions relating to the duty and liability of strata committee members are appropriate and working well in practice.

However, REINSW is aware that there are circumstances where individuals elected to strata committees seek to act in a self-interested way. For example, a lot owner may have tried for years to obtain permission to install air-conditioning in their lot, but to no avail. That lot owner then successfully seeks election to the strata committee and is, therefore, in a position to influence a consent in their favour.

REINSW notes that it can be difficult for strata committee members to separate what is in the best interests of the strata scheme and what is in their own best interests; these interests are intrinsically linked. There are, however, instances where a particular member's self-interest far outweighs or is in opposition to the interests of the strata scheme, so much so that their removal from the strata committee is warranted.

While a person can be elected to the strata committee by ordinary resolution at a meeting of the owners corporation, they can only be removed by special resolution. REINSW questions the disparity in this threshold.

REINSW recommends that the threshold for removal of a member from the strata committee should be lowered, so it is the same as election to the committee; i.e. a person can be removed from a strata committee by ordinary resolution at a meeting of the owners corporation.

QUESTION 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?

REINSW believes that a Code of Conduct for strata committee members should be put in place. Further, we believe that this Code of Conduct should be mandatory and included in the *Strata Schemes Management Regulation*, so there is no question regarding the standards to which strata committee members are being held.

Each incoming member of the strata committee should receive a copy of the Code of Conduct and sign an acknowledgement that they have read and understood it, and agree to accept its terms.

REINSW recommends that a mandatory Code of Conduct be adopted. Having such a Code of Conduct in place will assist owners corporations when it comes to the conduct and actions of strata committee members. In the event that the owners corporation wants to remove a member of the strata committee, the Code of Conduct will provide a concrete reference for grounds for removal.

Further, ***REINSW recommends*** that the industry be consulted regarding the content of the Code of Conduct. We point to, as an example, the consultation process undertaken in relation to the *Code of Conduct for the Short-term Rental Accommodation Industry.*

Just as strata committee members should be expected to adhere to a Code of Conduct, so too should they need to prove themselves as "fit and proper" persons to sit on the committee. Strata committees make important decisions, very often with significant financial impacts on all lot owners. Therefore, it is not unreasonable to expect that they meet the standard of being a "fit and proper" person. For example, omeone who has committed a significant crime or a financial fraud should be excluded from sitting on a strata committee.

REINSW recommends that every member of a strata committee sign a declaration each year that they are a "fit and proper" person and, if necessary, disclose any details of out-of-bounds behaviour.

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

REINSW believes that the eligibility requirements for election to the strata committee are sufficient and work well in practice. However, we refer to our answer to **Question 42** and reiterate our recommendation that NSW Fair Trading compile an information pack explaining the role of the strata committee, and the duties and responsibilities of each office holder.

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

REINSW notes that there are no grounds set out in the *Strata Schemes Management Act* for the removal of an office holder or strata committee member. However, we do not believe a list of grounds should be prescribed in the legislation. Every strata scheme is different and it should be up to each owners corporation to decide if an office holder or strata committee member is acting in the best interests of the scheme.

In this context, however, REINSW refers back to our answer to **Question 44** and reiterate our recommendation that the threshold for removal from the strata committee should be lowered, so it is the same as election to the committee; i.e. a person can be removed from a strata committee by ordinary resolution at a meeting of the owners corporation.

Meeting procedures

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

REINSW believes that the changes to meeting procedures introduced in 2020 in response to the impact of the COVID-19 pandemic are working well. We particularly note the ability to convene meetings electronically without the need to first pass a special resolution at a meeting of the owners corporation. These changes have allowed for the effective management of strata schemes to continue despite the changed environment.

In relation to meeting procedures, REINSW would also like to point to the provisions relating to meeting quorums.

Clause 17(2) of Schedule 1 to the *Strata Schemes Management Act* sets out that a quorum is present at a meeting where not less than one-quarter of people entitled to vote are present either personally or by proxy (see clause 17(2)(a)) or where not less than one-quarter of the aggregate unit entitlement is represented by people entitled to vote who are present either personally or by proxy (see clause 17(2)(b)). However, in the case of smaller strata schemes where the quorum calculated under clauses 17(2)(a) and 17(2)(b) is less than two people,

clause 17(2)(c) sets out that a quorum will be constituted by two people entitled to vote who are present either personally or by proxy.

REINSW has concerns in relation to reaching a quorum at meetings.

Why is a strata scheme with 100 lots treated differently to a strata scheme with two lots? In the case of the latter, both lot owners must be present at the meeting for there to be a quorum. This isn't always achievable due to timing and scheduling conflicts, which means that important matters impacting the strata scheme, such as raising levies and insurance matters, may not be able to be progressed.

REINSW also notes that clause 17(4)(b) sets out that the chairperson may, after 30 minutes, declare a quorum to be present at a meeting. While the legislation attempts to address the issue of what happens if there isn't a quorum, it's still unclear. Does it mean that if there are only two lots in a strata scheme, a single owner present at the meeting can constitute a quorum?

To overcome any potential confusion, ***REINSW recommends*** that clause 17(2) of the *Strata Schemes Management Ac*t be redrafted. This will ensure that it is clear what happens if a quorum is not met at a meeting, particularly in the case of small strata schemes.

QUESTION 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?

The impact of the COVID-19 pandemic has shown that we all need to be adaptable and flexible in order to deal with the changing environment around us. We cannot predict what the future will hold, either in relation to the ongoing impact of the pandemic or other circumstances that may arise. Therefore, we need to be able to quickly change the way we operate if required.

The provisions relating to meeting procedures are set out in Schedule 1 to the *Strata Schemes Management Act*, and REINSW notes that the procedure to change an Act is rigid and sometimes time consuming, making it difficult to respond to change quickly if the need arises. The procedure to make changes to a Regulation is far less onerous.

Therefore, ***REINSW recommends*** that the provisions relating to meeting procedures be removed from the *Strata Schemes Management Act* and added to the *Strata Schemes Management Regulation*. This will allow for changes to be made in a simpler, faster and more responsive manner.

Meetings and voting

QUESTION 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?

In the face of the impact of the COVID-19 pandemic, many strata schemes were left in a position where they were unable to function because they had not passed an ordinary

resolution authorising electronic meetings and voting. For obvious reasons, this was untenable and the emergency measures passed in May 2020 to temporarily by-pass the requirement for an ordinary resolution were welcomed by REINSW and the industry.

REINSW believes that a strata committee should be able to choose how they want to meet and vote, whether that be in person or electronically, without the need to pass an ordinary resolution. The operation of emergency measures has proven highly effective. Members of the REINSW Strata Management Chapter Committee report that feedback from the owners corporations they work with about electronic meeting and voting processes has been overwhelmingly positive.

REINSW recommends that the changes passed in emergency legislation to temporarily allow strata schemes to meet and vote electronically should be made permanent. There should not be the need to first pass an ordinary resolution.

REINSW notes that clause 71(3) of the *Strata Schemes Management Regulation* requires that, where electronic meetings and voting have not been adopted by ordinary resolution, the secretary of the owners corporation (or the strata managing agent) must take "reasonable steps" necessary to ensure that all lot owners are able to participate in and vote at meetings.

It's unclear just what "reasonable steps" are in this context. The phrase is too broad and may lead to unnecessary confusion amongst strata managers, owners corporations and strata committees. What one person deems as reasonable may be quite different to the views of another person, leading to inconsistent outcomes.

To provide clarity about what constitutes "reasonable steps" for the purposes of clause 71(3), ***REINSW recommends*** an amendment to include a non-exhaustive list of examples detailing the steps that may be taken to ensure that all meeting attendees have adequate opportunity to electronically participate and vote, including that the chairperson should:

- Provide clear instructions about how attendees can access the meeting electronically
- Provide multiple options to access the meeting (e.g. via telephone, video and other electronic means)
- Keep a record of discussions leading up to an including the voting process.

Providing a specified framework for what constitutes "reasonable steps" will enhance the chairperson's or strata manager's ability to ensure that each person attending a meeting electronically has the ability to participate and vote.

REINSW would also like to note that there seems to be some confusion amongst practitioners about some of the nuances of electronic voting in practice. For example, the fact that unit entitlements must be included on voting papers in the case of electronic voting for a special resolution. Also, if electronic voting is in place, *all* votes must be received electronically; i.e. a vote received via post should not be counted.

To alleviate this confusion and to ensure that all strata managers are adhering to the legal requirements, ***REINSW recommends*** that NSW Fair Trading provide more guidance to practitioners about electronic voting.

Further, REINSW notes that not all lot owners have access to email and, therefore, are excluded from electronic voting because voting papers received via post should not be counted. This is unfair, particularly in the case of the elderly, many of whom do not have ready access to a computer.

REINSW recommends that, in such cases, voting papers received via post should be able to be counted (provided the papers are received by the due date). A variety of means of voting

should be permitted in order to allow all lot owners an avenue to vote, using the method they prefer. It will also ensure that those who have difficulty with electronic voting are not unfairly disadvantaged; for example, the elderly and those with limited internet access.

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

Technology is always evolving and there is no way to predict what developments are just around the corner. Equally, different owners corporations will naturally prefer different methods for electronic meetings and voting.

Therefore, ***REINSW recommends*** that the provisions relating to electronic meetings and voting should be flexible enough to accommodate both technological developments and the preferences of different owners corporations.

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

Clause 14(1)(a) of the *Strata Schemes Management Regulation* sets out that, in relation to elections, the owners corporation or strata committee may resolve to allow electronic voting by eligible voters while they are remotely participating in a meeting; i.e. voting must be in 'real time'. However, pursuant to clause 14(1)(b), electronic voting for elections cannot extend to "pre-meeting" voting.

REINSW notes that this means that voting for elections cannot occur prior to the commencement of the meeting. This is because eligible voters need to be present at the meeting and are required to electronically vote in 'real time'.

Unfortunately, due to the current wording of clause 14(1), confusion can sometimes arise as to when electronic voting is an option and when it is not, resulting in the allowance of pre-meeting electronic voting for elections.

REINSW recommends that clause 14(1) be amended for clarity. A clearer use of language will ensure a better understanding and will ultimately result in better compliance by strata managers.

QUESTION 53
How well are the limits on proxies working and are any changes needed? If so, what changes?

REINSW notes that the reforms to the *Strata Schemes Management Act* made in 2015 to address the issue of proxy farming are working well.

The proxy limits work well in practice and ensure that lot owners can exercise their right to vote without the risk of their voice being subverted by an individual or small group of persons seeking to skew votes for their own benefit. REINSW does not believe that any further changes need to be made.

Further, REINSW has no objection to the provision in the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* that allows the owner of multiple lots to appoint a single proxy for all of their lots.

Improving tenant participation

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

REINSW strongly objects to the inclusion of tenants as parties entitled to receive notices of, and to attend, meetings of the owners corporation. Tenants have no financial interest in the strata scheme, may only be a resident for a short period of time and have no right to vote. Therefore, they are an impediment to the proper management of the strata scheme and lot owners' rights to deal with their property as they determine.

REINSW also notes that, yes, the legislation sets out that tenants must leave the meeting when financial matters are discussed. However, it must also be acknowledged that the vast majority of items on the agenda relate to financial matters. Which leads us to ask: What is the utility of tenants being present in the first place?

Lot owners commonly engage a property manager, so they do not have to deal with tenants directly. Entitling tenants to receive notice of and attend meetings has the potential to cause conflict between tenants and these lot owners; for example, frictions may reach boiling point in any face-to-face meetings.

In addition, REINSW believes that tenant participation can act as a deterrent for some investors, as it discourages them from the purchase of properties in strata schemes.

REINSW recommends that all references to tenants receiving notices of meetings and attending meetings be removed from the *Strata Schemes Management Act* (including sections 14(3)(b) and 33, and clauses 11 and 21 of Schedule 1, as well as any other references).

REINSW notes that tenants have other avenues available to them. There is nothing to prevent tenants, if they have particular issues or concerns that they want raised with the owners corporation, asking their property manager to contact the strata committee on their behalf. Further, tenants are able to raise issues and seek resolutions via the Strata Mediation Portal.

2.2.3 STRATA MANAGING AGENTS

Appointment of managing agents

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

REINSW believes that the current notice period for termination of a strata manager is appropriate, however we make the following comments in relation to appointment.

Section 50(1)(a) of the *Strata Schemes Management Act* sets out that where a strata manager is appointed at the first Annual General Meeting of the owners corporation, the term of appointment is 12 months.

REINSW strongly believes that this limitation on the term of appointment poses practical problems. Twelve months is a very short period of time, particularly in the early stages of a building's lifecycle. It takes time to get the records for a strata scheme up and running, and to start to understand any issues that may be impacting the building.

The reality is that the second Annual General Meeting will likely be held outside the 12-month term of appointment. Therefore, in order to have the authority to do things like prepare the annual accounts and other documentation, issue meeting notices, and then convene and run that second AGM, the strata manager's appointment needs to be extended.

Successive three-month extensions to the strata manager's term of appointment are possible by virtue of section 50(4), however, in each case, there must be a meeting of the strata committee to do so. Having to convene these meetings at such short intervals for the sole purpose of extending the strata manager's term of appointment imposes an unnecessary administrative burden. It also results in more management fees being charged to the owners corporation.

REINSW recommends that section 50(1)(a) of the *Strata Schemes Management Act* be amended to extend the term for a strata manager appointed at the first Annual General Meeting to 15 months.

Doing so will overcome some practical difficulties, including the onerous step of convening a strata committee meeting for the sole purpose of extending the strata manager's term of appointment by three months. It will remove the unnecessary administrative burden, reduce unwarranted management fees and provide the strata manager with sufficient time to prepare for the second Annual General Meeting.

Importantly, there's no downside for lot owners in making this amendment, as it will allow for more efficient and effective management of the strata scheme.

Further, where a strata manager is appointed for a term of three years, REINSW notes that the same issues may arise. For example, during COVID-19 many strata committees struggled to hold their Annual General Meetings within the necessary timeframes (and even with the three-month extension), thereby necessitating the extension of the strata manager's term of appointment.

Therefore, ***REINSW recommends*** that the term of appointment of the strata manager should be three years or the date of the third Annual General Meeting, whichever is the longer.

QUESTION 56
Do you think the developer should have to present the owners corporation with a choice of three managing agents at the first annual general meeting?

REINSW acknowledges that there are instances where a developer presents a strata manager at the first Annual General Meeting because they have an ongoing connection with them. However, this does not mean that the strata manager is necessarily the best option; for example, they may not be the most cost effective or efficient when it comes to the management of the particular strata scheme.

However, REINSW notes the limitation on the appointment of the first strata manager to 12 months (or 15 months following a three-month extension). This ensures that the owners corporation is not locked into a long-term agreement with a potentially unsuitable strata manager.

REINSW does not believe that it is appropriate to have three potential strata managers attend and present proposals at the first Annual General Meeting, as it will be extraordinarily time consuming. The first Annual General Meeting generally has an extensive agenda. Adding the presentation of proposals by three potential strata managers to the agenda will add unnecessary time and management fees for the owners corporation.

REINSW recommends that, following election at the first Annual General Meeting, the strata committee must convene a meeting within 14 to 21 days for the purpose of appointing a strata manager.

This will give the strata committee an opportunity to call for and assess proposals from three potential strata managers and conduct any necessary due diligence. Further, it will reduce costs for the owners corporation and avoid any potential conflict of interest that may exist between a developer and their nominated strata manager.

QUESTION 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.

Section 49(3) of the *Strata Schemes Management Act* sets out that the developer of a strata scheme (or a person associated with the developer) cannot be appointed as the strata manager for the scheme until the end of 10 years after the date of the registration of the strata plan.

The provision was introduced to address concerns relating to the administration of building warranties under the *Home Building Act 1989* (NSW). But the restriction placed on appointment is at odds with the building warranty period itself. Why is a strata manager prohibited from managing their own development for 10 years, when the building warranty period is only six years under section 18E(1)(b) of the *Home Building Act*?

Section 49(3) also fails to account for a range of common situations.

For example, a strata manager may develop a building for investment purposes, retaining all the lots for their superannuation or a family trust. It is REINSW's view that section 49(3) unnecessarily precludes the beneficial owner, being the strata manager, from managing the strata scheme – a job they are certainly qualified to carry out. An accountant is allowed to manage the financial affairs for their own company. Why shouldn't a strata manager be allowed to manage their own strata building?

As another example, a strata manager may develop a building in conjunction with associated parties, such as family members, and then retain some lots and sell others to those family members. Those associated parties may want the strata manager to manage the building, but they are legally prevented from doing so, as the strata manager is also the developer. This should be possible, however section 49(3) does not allow for it.

REINSW believes that section 49(3) should be amended so that it achieves its regulatory purpose without unfairly preventing a strata manager managing a building they have developed.

REINSW recommends that section 49(3) be amended so that the restriction period does not exceed the building warranty period of six years under the *Home Building Act*. This will ensure that the *Strata Schemes Management Act* is not at odds with the *Home Building Act.*

Further, ***REINSW recommends*** that, where a strata manager retains beneficial ownership of all lots in a building they have developed, the restriction period on appointment as the building's strata manager should commence 10 years from the date of expiration of the initial period (rather than 10 years from the registration of the strata plan). Of course, if REINSW's first recommendation is accepted, that restriction period would be for six years.

Finally, ***REINSW recommends*** that section 49 be amended to include an exemption allowing a strata manager who has developed the building to manage the strata scheme, despite retaining a beneficial interest, where there is unanimous consent by the owners corporation.

By adopting these recommendations, section 49(3) will continue to adhere to its initial regulatory purpose, while also accounting for practicalities in the market.

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

REINSW notes that the Discussion Paper states that "[s]takeholders have suggested the Government amend the legislation to restrict or prohibit certain contract terms on the basis they are unfair."

REINSW requests clarification as to what these unfair terms are. Without this clarification, we are not in a position to comment on whether they should be restricted or prohibited.

REINSW notes that different strata managers have different fields of expertise and may offer a different range of services. For example, a strata manager may be licensed as a financial advisor or a chartered accountant, and the services offered by the strata manager stemming from these qualifications may be viewed as valuable by a particular strata scheme. If a standard agreement was prescribed by the legislation, the strata manager would be precluded from differentiating their service offering.

Further, strata schemes are diverse and varied. Therefore, there will be different services, clauses and terms required in each agreement.

REINSW also notes that there is no prescribed agency agreement for residential property management in the *Residential Tenancies Act 2010* (NSW), nor is there one for residential sales in the *Property and Stock Agents Act 2002* (NSW). Therefore, why should there be a prescribed agency agreement for strata management in the *Strata Schemes Management Act*?

REINSW opposes any proposal to include a prescribed agency agreement for strata management in the legislation.

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

As the peak industry body for real estate in New South Wales, REINSW strongly believes that it is best practice for all strata schemes to be professionally managed by a strata manager.

However, we understand that consumers have the right to choose to self-manage and, therefore, it is not appropriate to legally mandate a requirement for professional management.

Having said that, for the purposes of consumer protection, REINSW does believe that the legislation should include 'triggers' for the requirement for professional management to be activated. These triggers should be two-fold, linked to the number of lots in the strata scheme or the amount of money managed by the owners corporation.

REINSW recommends that where a strata scheme has more than four lots *or* an owners corporation is managing more than $150,000 (the threshold for GST registration), that strata scheme must be professionally managed. Having such triggers in place recognises the complexity of managing a strata scheme and the depth of knowledge that is required to discharge the obligations and responsibilities set out by law.

Minimising conflicts of interest

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

As set out in our answer to **Question 44**, REINSW is aware that there are circumstances where individuals elected to strata committees seek to act in a self-interested way. Further, we recognise that it can be difficult for strata committee members to separate what is in the best interests of the strata scheme and what is in their own best interests, as these interests are intrinsically linked. There are, however, instances where a particular member's self-interest far outweighs or is in opposition to the interests of the strata scheme, so much so that their removal from the strata committee is warranted.

In this context, ***REINSW recommends*** that the threshold for removal of a member from the strata committee should be lowered, so it is the same as election to the committee; i.e. a person can be removed from a strata committee by ordinary resolution at a meeting of the owners corporation.

We further note our answer to **Question 45**. ***REINSW recommends*** that a mandatory Code of Conduct be adopted. Having such a Code of Conduct in place will assist owners corporations when it comes to the conduct and actions of strata committee members. In the event that the owners corporation wants to remove a member of the strata committee, the Code of Conduct will provide a concrete reference for grounds for removal.

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

REINSW believes that the provisions in the *Strata Schemes Management Act* relating to gifts and commissions are difficult to understand for a number of reasons.

First, the parameters of the prohibition are not clear. REINSW appreciates that the aim of the prohibition is to enhance transparency and accountability, and address the potential for conflicts of interest. However, it can be difficult for strata managers to adhere to the prohibition in practice.

By way of example, is it feasible for a strata manager to know the value of a gift without any documentation or proof of its value? Common examples of gifts received by strata managers are gift hampers, party invitations and educational seminars, most of which can be estimated to exceed the $60 limit.

This leads to another question: What constitutes a 'gift' within the meaning of section 57(2) and what amounts to an expression of gratitude? If a satisfied client brings a bunch of flowers to say thank-you and the strata manager accepts them, does this amount to a breach of the prohibition?

REINSW recommends that the definition of "gift" in section 57(4) be better defined; for example, what amounts to a gift, rather than an expression of gratitude.

Further, REINSW notes that it is unclear who the prohibition in section 57 applies to. Does it only apply to licensed strata managers (as they are responsible for the day-to-day functions and operations of the strata management agency)? Or does it also apply to Certificate of Registration holders? Or does it apply to the agency as a whole?

REINSW recommends that the legislation be amended to make it abundantly clear that the prohibition applies to each licensed strata manager (rather than to each Certificate of Registration holder or agency).

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

One of the reasons owners corporations engage a strata manager is to access their expertise and part of this expertise is the strata manager's network of connections with service providers. So it is not unreasonable that the strata manager should be relied upon for their ability to connect the owners corporation with the most appropriate services to do the job in question.

By way of example, consider tradespeople. In most cases, there is an acute shortage of qualified tradespeople and they can be hard to come by. Particularly in the case of emergency repairs, it can be a case of 'take what you can get'. Further, it's not always a case of referring to who is quoting the best price, but rather who can provide the best quality service.

REINSW notes that tradespeople are a reflection of a strata manager's business. Repairs and maintenance are generally the majority of a strata manager's work in the management of a strata scheme, and if a tradesperson is not doing good work, then it reflects badly on the strata manager where the owners corporation is unhappy with the outcomes.

REINSW recommends that while multiple quotes should be obtained for high-value services, this is often unnecessary and should not be required for lower-value, regular and routine services where the strata manager has an ongoing relationship with a tradesperson who carries out good work at a good price (even if it is not the lowest price).

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

It is REINSW's view that this issue is already sufficiently covered by provisions in the *Strata Schemes Management Act*, including:

- Section 60, which covers the disclosure of commissions and training services
- Section 71, which requires interests to be disclosed by potential strata managers or building managers
- Section 132A, which covers agreements for the supply of electricity, gas or other utilities.

Functions of strata managing agents

QUESTION 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?

It is REINSW's view that there is no need for such rules to be included in the legislation. Under the agency relationship in place, the strata manager (as agent) is required to always act in the best interests of the owners corporation (as principal).

QUESTION 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?

In accordance with section 57(1) of the *Strata Schemes Management Act*, a strata manager can be held liable for a breach of the legislation where, as a consequence of their delegated functions, a duty of the owners corporation has not been discharged.

This section is problematic, as there is the potential for strata managers to be held liable for circumstances that are out of their control.

There may be instances where the strata manager is simply not able to carry out a delegated function because the owners corporation refuses to provide or approve the funds necessary to discharge that delegated function.

Under the agency agreement, the strata manager has responsibility for the repair and maintenance of common property. This is generally straightforward enough, but what if a problem arises regarding the common property and the owners corporation refuses to release the funds necessary to address the problem?

For example, a communal clothesline might be broken or cracked flooring tiles in the foyer may give rise to a tripping hazard. The strata manager has a responsibility to fix the problem. If they do nothing, they're in breach of their obligations under the *Strata Schemes Management Act*. But if the owners corporation won't release the funds to carry out the necessary repairs, what can they do? They're literally stuck between a rock and a hard place.

REINSW recommends that there be an amendment to account for the situation where an owners corporation effectively leaves the strata manager with their hands tied. In circumstances where the owners corporation refuses to release or raise the necessary funds to enable repairs and maintenance to be carried out, the strata manager should not be held to be in breach of the legislation.

QUESTION 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.

The following real-life examples have been provided by members of the REINSW Strata Management Chapter Committee. Further examples are included in REINSW's initial submission (see **Appendix A**).

Example 1
A strata manager gives the example of a strata scheme comprising 12 lots under their management. Window safety locks have not been installed, despite the fact that the March 2018 installation deadline has long since passed. The strata committee initially refused to move forward on the basis that they were going to have all of the windows in the building replaced. Even though quotes have been gathered, the windows are yet to be replaced and, due to their dreadful state of repair, window safety locks cannot be installed.

The strata manager reports that the item is included on the agenda of every meeting, however the strata committee refuses to move forward.

Example 2
Another strata manager points to the fact that there are many people who are buying lots who simply don't understand the obligations that come with buying into a strata scheme (for example, the need to pay levies and secure insurance for the building as a whole). This means that it is extremely difficult for the strata manager to effectively manage the strata scheme and discharge their responsibilities.

To address issues like this, ***REINSW recommends*** that some basic information about the strata scheme be included in the contract for sale; for example, attaching the section 184 certificate to the contract for sale. By doing this, a person buying into the strata scheme cannot claim they had no knowledge of the obligations that come with being a lot owner.

Example 3
In another instance, a sewage pipe broke due to the penetration of large tree roots. The building is on the side of a hill and the lower units were badly impacted. The strata manager tells of a dying lot owner wanting to return home from hospital, but couldn't because the breakage of the sewage pipe had resulted in flooding to her lot and extensive damage. The owners corporation didn't want to cover the cost of repair and refused to recognise their duty to repair and maintain the building, despite the serious health implications flowing from the failure to repair.

While the repairs were eventually carried out, in the interim, the strata manager was in breach of their duty through no fault of their own.

Accountability of managing agents

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

REINSW believes that the laws relating to the accountability of strata managers are working well in practice and remain sound, relevant and valid; they do not require any amendment. If they weren't working well, no doubt there would be many more consumer complaints to NSW Fair Trading regarding the performance and conduct of strata managers.

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

REINSW believes that the legislation is straightforward in this regard and no amendment is required.

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

REINSW believes that the rules of conduct for strata managers are working well in practice and are appropriately balanced. No additional rules of conduct are needed.

REINSW notes that the Discussion Paper sets out that "[c]omplaints about the performance and accountability of managing agents still make up a large proportion of the strata consumer complaints received by Fair Trading" and "[c]omplaints against managing agents also make up a majority of applications to the Tribunal under the Management Act."

While acknowledging the comments in the Discussion Paper, REINSW contends that the majority of cases that go before the Tribunal do not in fact stem from the conduct of the strata manager, but rather a misunderstanding by the applicant of what the strata manager has actually been engaged to do. For example, a strata committee may contend that the strata manager has not carried out a particular service, but reference to the agency agreement reveals that the service in contention is not one that the strata manager has been engaged to carry out.

To address this situation, ***REINSW recommends*** that strata committees (and, indeed, all lot owners) need to be educated about what strata managers are responsible for and what they are not responsible for.

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

Strata management is an extremely complex area and REINSW encourages all strata managers to strive for the highest levels of professionalism and competency through ongoing education and training. Strata managers who are members of REINSW are focused on

professionalism and competency, and the ability to access our education and training services to achieve these ends is just one of the reasons they pay their membership fees each year.

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

REINSW is focused on ensuring the highest standards of education and training for strata managers, both at a qualification level and for CPD. To this end, we are working closely with ARTIBUS (the skills service organisation that is responsible for the review of the Strata Community Management training package) on the units of competency that should be included in the qualification for strata managers. Further, we are committed to providing tailored CPD training for strata managers to fulfil their elective hours, as well as skills-based training aimed at helping strata managers develop the practical skills they need to effectively do their job. REINSW continually strives to provide relevant and up-to-date information for strata managers.

REINSW also refers back to our answer to Question 42 and our ***recommendation*** that NSW Fair Trading compile an information pack (available via www.fairtrading.nsw.gov.au) explaining the role of the strata committee, and the duties and responsibilities of each office holder. Strata managers can make this information pack available to office holders and anyone considering volunteering for a position.

REINSW believes that the availability of such an information pack will positively contribute to the functioning of strata committees, because office holders will understand their duties and responsibilities, and the parameters of their powers and the decisions they can make. This will, in turn, help with the smooth and efficient management of the strata scheme. Should an issue or problem arise (for example, the strata committee seeking to exercise a power that needs to be conferred upon them, but has not been), the information pack can be referenced to resolve the issue.

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

REINSW acknowledges that strata managers play an important role in the management of building defects, however does not believe that they should be required to have specialist knowledge in this area. Strata managers are responsible for managing the common property. They are not building professionals or structural engineers and do not have the expertise, qualifications or experience in relation to building defects that enables them to form an opinion that could or should be relied upon by the owners corporation. Therefore, in circumstances where a building defect arises, it is necessary for the owners corporation to engage an appropriately qualified professional to assess the defect and recommend remedial action.

REINSW recommends that, in all cases where a building defect arises, an appropriately qualified professional should be required to be engaged to assess the defect and recommend remedial action. This will ensure that the responsibility for the after-effects of any defects and remedial action taken is not unfairly laid at the feet of the strata manager.

QUESTION 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?

For the reasons set out in our answer to **Question 72**, ***REINSW opposes*** any proposal that certain licensees be accredited as strata building defects management specialists.

2.2.4 FINANCES AND LEVIES

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

Section 74(4) of the *Strata Schemes Management Act* sets out the amounts that can be paid from the capital works fund. However, this list is both general and quite restrictive. The number of items that are necessarily paid from the capital works fund is quite extensive, yet the items specified in section 74(4) as payable are limited.

Members of the REINSW Strata Management Chapter Committee note that it is not uncommon for a strata committee to query certain payments made by a strata manager from the capital works fund, asserting that they should instead have been made from the administrative fund.

For example, capital works are carried out in the building pursuant to a fire safety order and the invoice includes an amount for supervision and project management of the works. The strata manager pays the entire invoice from the capital works fund, however the strata committee contends that the amount for supervision and project management should have been paid from the administrative fund. This type of situation can lead to unnecessary conflict, because the legislation is far too general.

REINSW believes that the legislation should include more detail about what items can and can't be paid from the administrative fund, rather than the capital works fund, and vice versa.

REINSW recommends that the legislation include a non-exhaustive list of items that can be paid from the administrative fund and the capital works fund. This will provide both strata managers and strata committees with better guidance in relation to management of disbursements from these funds and alleviate any potential conflict.

QUESTION 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?

REINSW believes that there should be flexibility in relation to the temporary transfer of money from one fund to the other, because there are instances where the issue is not a lack of funds, but rather a temporary cash flow matter.

For example, the annual strata insurance may be due, but there are insufficient funds in the administrative fund to pay the invoice and money has to be transferred from the capital works fund. However, the quarterly levies are due in three weeks and the money transferred from the capital works fund can be quickly reimbursed.

REINSW recommends that transfers between the administrative fund and the capital works fund should be possible where the issue relates to temporary cash flow, rather than a complete lack of funds. In such cases there should not be a need to raise a special levy to fund the reimbursement.

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

Section 83(3) of the *Strata Schemes Management Act* sets out that contributions levied by the owners corporation are due and payable at least 30 days after the date set out in the notice.

This 30-day payment period can be problematic in the case of special levies, particularly where they are being raised for emergency repairs. Previously, special levies were due and payable within seven days. However, under the reforms introduced in 2016, receipt of funds has been prolonged and, in many instances, lot owners will wait until the final day before the due date to pay.

Funds for emergency works need to be readily available when required. Consider, for example, a burst sewer pipe or a collapsed wall due to termite damage. These are repairs that simply cannot wait. Further, many of these sort of emergency repairs are not covered by insurance and must instead be funded via a special levy. And taking out a loan is not a solution, as that will often take longer to gain approval than the current 30-day payment period.

REINSW agrees that the 30-day payment period for contributions in relation to planned works is suitable, however believes that there should be a mechanism that allows for contributions to be raised quickly when necessary.

In the case of emergency works, the 30-day payment period is simply impractical. This is particularly the case where delaying works may result in health and safety risks. Emergency works need to be carried out as soon as possible, but can't start if the necessary funds aren't on hand.

REINSW also notes that the owners corporation has a strict liability to repair and maintain common property. If funds are not available to carry out emergency works, then a breach occurs.

To resolve these issues, ***REINSW recommends*** that the legislation be amended to allow special levies to be raised quickly in certain situations, such as when emergency works are required.

In addition, REINSW would like to raise the issue of accrual of interest on unpaid levies.

Section 85(1) of the *Strata Schemes Management Act* states that, where a levy is not paid by the date it is due and payable, interest accrues at a rate of 10 per cent until it is paid. The application of this section gives rise to problems from an administrative perspective.

More and more, rather than paying early, lot owners will leave payment of their levies until the date they are due. It then usually takes up to three days for those funds to clear. From the lot owner's perspective, the levies have been paid. However, from the strata manager's point of view, they haven't because the money doesn't appear in the strata scheme's bank account until several days after the due date.

This inevitably leads to disputes arising between owners, who argue they paid by the due date, and strata managers, who hold that the funds were received after the due date and start to apply interest. Strata managers spend a considerable amount of time sorting out these disputes and then reversing interest applied due to the clearance time lag.

REINSW recommends an amendment to section 85(1) to change the word "paid" to "received". Making this change means that interest will accrue where the payment is not received by the date it is due and payable, therefore overcoming the administrative issues that may arise due to any clearance time lag. The efficiency gains that will be achieved for strata managers and, in turn, owners corporations, are self-evident.

Finally, REINSW believes that the due date for payment of levies should be reduced from 30 days to 14 days, so that the strata laws reflect the legislative and contractual norms of other industries.

By way of example, many contractors in the building and construction industry require payment within 15 days of the date of invoice, as per section 11(1A) of the *Building and Construction Industry Security of Payment Act 1999* (NSW). Why should payment terms be any different in the case of strata levies.

REINSW recommends that the strata laws be amended, so that payment terms reflect those in other industries; that is, the payment of levies should be reduced from 30 days to 14 days.

In addition to all the points above, REINSW points to the difficulty strata managers have when attempting to enforce the payment of levies. This has particularly been the case during the COVID-19 pandemic, when the limit for bankruptcy proceedings has been raised to $20,000 (up from the previous $5,000 limit). Members of the REINSW Strata Management Chapter Committee note many, many instances where lot owners simply refused to pay outstanding levies, because the knew that action couldn't be taken against them until the outstanding amount reached $20,000. Thought the limit for bankruptcy proceedings is now $10,000 (as of 1 April 2021), the fundamental issue still remains. The fact that these levies have not been received has inevitable knock-on effects in relation to the efficient and effective management of the strata scheme; e.g. ensuring sufficient funds are available when budgeted expenses arise.

Whether the bankruptcy limit remains at $10,000 or reduces again to the previous $5,000, ***REINSW recommends*** that effective enforcement measures (other than commencing bankruptcy proceedings) be put in place to allow for the timely recovery of outstanding levies.

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

REINSW believes that the Statement of Key Financial Information is not necessary. It is difficult to understand and, in the vast majority of cases, not referred to at all by the strata committee or owners corporation. Rather, reference is made to the Balance Sheet and the Profit and Loss Statement.

REINSW recommends that the legislation be amended so that the Statement of Key Financial Information is no longer required.

QUESTION 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?

REINSW believes that the budgetary threshold of $250,000 for compulsory audits to be carried out is too high. Further, we think the audit threshold should be the same as the 'trigger' for the requirement for professional management (see our answer to **Question 59**).

REINSW recommends that the threshold for compulsory audits to be carried out should be a $150,000 budget, as this is the threshold for strata schemes to register for GST.

2.2.5 BY-LAWS

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

REINSW believes that the process for making by-laws is generally working well, however notes that there was previously no ability to lodge by-laws electronically for registration. We note that this changed in March 2021 and welcome the new process.

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

REINSW believes that the requirement to lodge by-laws with Land Registry Services within six months is reasonable.

QUESTION 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?

REINSW believes that the current process is working well and there is no need for any changes to the Registrar General's power.

QUESTION 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?

REINSW requests clarification as to what amounts to an "unreasonable" by-law. Without this clarification, we are not in a position to comment. However, if such a prohibition moves forward, REINSW suggests that the legislation set out a non-exhaustive list of by-laws that are considered to be "unreasonable".

QUESTION 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?

REINSW notes while tenants are required to comply with by-laws, they are not entitled to seek an order from the Tribunal to invalidate a by-law on the grounds that it is harsh, unconscionable or oppressive because they are not entitled to vote.

REINSW believes that this is entirely appropriate. As set out in our answer to Question 54, tenants have no financial interest in the strata scheme and may only be a resident for a short period of time. Why should they have the right to seek an order directly from the Tribunal challenging a by-law?

If a tenant thinks a by-law is harsh, unconscionable or oppressive and wishes to challenge it, they can certainly raise this with their landlord (or the landlord's property manager), who can then raise the issue with the strata committee. REINSW believes this is the most appropriate course of action, rather than allowing them to seek an order themselves from the Tribunal.

Therefore, ***REINSW recommends*** that the law should not be changed to allow tenants to seek Tribunal orders challenging by-laws on the basis they are harsh, unconscionable or oppressive.

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

REINSW notes that the process to enforce by-laws is bureaucratic and time consuming. There is often a lengthy wait to secure a Tribunal hearing, which is particularly problematic in circumstances where a tenant may only be residing in the building for a shorter period of time.

Members of the REINSW Strata Management Chapter Committee also raised concerns about the ability to enforce Tribunal orders regarding by-laws. For example, a party may refuse to comply with an order, yet the Tribunal does not impose a fine for this failure to comply.

Failure to comply with a Tribunal order should have consequences and ***REINSW recommends*** that fines should be imposed in instances of non-compliance.

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

In the case of pre-1996 strata schemes, section 134(3) of the *Strata Schemes Management Act* effectively forces owners corporations to accept the new model by-laws (as set out in the 2015 reforms).

Many owners corporations of pre-1996 strata schemes do not want their schemes to be governed by these new model by-laws. Rather, they want to continue with their previous by-laws, but to do so they need to take a series of onerous, costly and time-consuming steps (including convening a general meeting, repealing the new model by-laws, passing a resolution to adopt their old by-laws, and then re-registering the old by-laws with Land Registry Services).

All owners corporations were required to review their by-laws within 12 months of the commencement of the 2015 reforms. With this review completed, REINSW believes that where the owners corporation of a pre-1996 strata scheme is happy to continue with the by-laws they had in place under the previous law, they should simply be able to do so. They should not be forced to take a series of pro-active steps to re-adopt them.

To the extent that an old by-law made under the previous strata laws is inconsistent with the current law, then it simply will not apply (see section 136(2)).

REINSW recommends that pre-1996 strata schemes should be able to continue with the by-laws they had in place under the previous law (to the extent that they are not inconsistent with the current law), without the need to re-adopt them.

QUESTION 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?

REINSW is aware that there are instances where lot owners undertake voluntary work in relation to the common property. They may do this to save the owners corporation money, or simply because they have the time and inclination to carry out the work. However, there are a range of risks that attach to voluntary work and implications of an accident or injury can be potentially disastrous for an owners corporation.

REINSW points to a case that is currently before the courts where a lot owner in a strata scheme comprising a number of villas took it upon himself to change a light globe in the common property driveway. He was electrocuted and suffered brain damage, and the owners corporation is now being sued. This may seem like an extreme case, however it illustrates the risks that attach to unqualified volunteers carrying out work on common property.

REINSW recommends that the model by-laws include a by-law that prohibits lot owners and residents from undertaking any form of voluntary work where that work should be undertaken by an appropriately qualified and licensed professional. In addition, where voluntary work is undertaken, it is done at the person's own risk and the owners corporation's liability is limited to the insured cover (to the extent that it exists).

As an additional point, REINSW notes that under the *Strata Schemes Management Regulation 2005*, a range of model by-laws were in place, including:

- Model by-laws for residential schemes (Schedule 1 of the 2005 Regulation)
- Model by-laws for retirement village schemes (Schedule 2 of the 2005 Regulation)
- Model by-laws for industrial schemes (Schedule 3 of the 2005 Regulation)
- Model by-laws for hotel/resort schemes (Schedule 4 of the 2005 Regulation)
- Model by-laws for commercial/retail schemes (Schedule 5 of the 2005 Regulation)
- Model by-laws for mixed use schemes (Schedule 6 of the 2005 Regulation).

However, under the *Strata Schemes Management Regulation 2019*, there are only model by-laws for residential schemes. Why were these other model by-laws removed?

REINSW recommends that the model by-laws for other schemes (as set out in the 2005 Regulation) be reviewed, updated and reinstated. Having these model by-laws in place will aid in adjudication of issues and consistency in decision-making.

Pets and assistance animals by-laws

QUESTION 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?

REINSW believes that the legislation is straightforward in this regard and working well, and that no amendment is required. Members of the REINSW Strata Management Chapter Committee note that they have never received a complaint from the strata schemes they have under management about an assistance animal.

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

REINSW believes that the owners corporation should be allowed to request proof that an animal is an assistance animal to verify that the animal is, in fact, an assistance animal.

QUESTION 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?

REINSW does not believe that an exhaustive list of the kinds of evidence an owners corporation can request to prove an animal is an assistance animal should be included in the legislation. Different owners corporations will be satisfied with different types and levels of evidence, and they should be able to determine what is acceptable for the purposes of their own strata scheme.

QUESTION 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.

REINSW believes that an owners corporation should have the option to ban pets completely from their strata scheme.

It's the experience of members of the REINSW Strata Management Chapter Committee that there are many owners corporations that simply do not want to allow pets in their strata scheme. This may be for any number of reasons. Perhaps they don't want the noise and smells associated with some pets. Maybe access to lots is limited to use of a common elevator and they don't want animals in the lift. Or there could be some lot owners who have specific pet allergies. The list goes on and on. Further, there are some strata schemes that simply do not lend themselves to the keeping of pets; for example, the lots are small and confined, or there are no outdoor areas. Having invested in the strata scheme, lot owners should be entitled to determine what behaviour is or is not allowed, including whether pets are allowed.

REINSW recommends that both section 139 of the *Strata Schemes Management Act* and section 137B of the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* (NSW) be amended to include an exception to allow an owners corporation to pass a special resolution to ban pets completely from a strata scheme.

Other specific by-law making powers

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

REINSW believes the existing restrictions on the power to make by-laws are working well in practice and remain sound, relevant and valid; they do not require any amendment.

2.2.6 RECORDS, TENANCY NOTICE AND SERVICE

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

Section 55(1) of the *Strata Schemes Management Act* sets out that where a strata manager exercises a function on behalf of the owners corporation, they must make a record of the fact immediately after they exercise a function.

REINSW believes that this section lacks clarity. What is it that strata managers are actually being asked to record? Is the intention of section 55 to require strata managers to keep a separate record each and every time they exercise a delegated authority?

In effect, every function that strata managers carry out is exercised as a delegated authority of the Chair, Secretary or Treasurer of the strata committee. For example, every time a strata managers pays an invoice or issues a receipt for a levy payment, they are exercising a delegated authority on behalf of the Treasurer. When a strata manager receives and replies to correspondence, including via email, they are exercising a delegated authority on behalf of the Secretary. This list goes on and on.

REINSW suggests that the intention of section 55(1) is surely not to require strata managers to minute every action they take, but rather ensure that accurate, timely and appropriate records are kept.

To require a separate record to be made each time a delegated authority is exercised, specifying the function and manner in which it has been exercised, imposes a significant and untenable administrative burden. Also important to note is that the cost of complying with such an onerous level of records management will, ultimately, be passed on in the form of management fees.

The systems used by most strata managers already track all the various activities carried out and store the relevant documents. Levy payments, work orders and anything else you can think of are already recorded and strata managers can pull down reports of these activities. Why then do they need to keep a separate record as seems to be required by section 55(1)? Surely things like work orders, notices, emails and other correspondence constitute records of

functions, without the need to produce a separate record. In essence, REINSW is not clear about what section 55(1) actually requires.

Further, section 55(2) requires that a strata manager give a copy of all records for the preceding 12 months to the owners corporation at least once each year. Again, what records is the section referring to? Does the section mean that the owners corporation must be provided with every record, including receipts, payments, correspondence, emails, file notes, invoices and more?

REINSW suggests that, as the majority of work carried out by strata managers is under delegated authority, current record keeping practices – such as keeping copies of meeting notices and minutes, filing receipts, and storing correspondence, emails and other file notes – are acceptable from a compliance perspective and no additional steps need to be taken.

Notwithstanding this, ***REINSW recommends*** that the requirements of section 55(1) be clarified by including a precise definition of "record". First, what does section 55(1) require strata managers to keep when they exercise a function on behalf of the owners corporation? And second, what records are strata managers required to provide to the owners corporation on an annual basis in accordance with section 55(2)?

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

While REINSW strongly supports the keeping of electronic records, we do not believe that they should be made compulsory. While it is common practice for strata managers to keep electronic records, there remain many strata schemes across New South Wales that are self-managed. These self-managed strata schemes may not have the skills or tools available to keep electronic records. Why should they be forced to do so? Different strata schemes will inevitably have different ways of keeping their records.

Therefore, ***REINSW recommends*** that electronic records should not be made compulsory for all strata schemes. However, where a strata scheme is professionally managed by a strata manager, the keeping of electronic records should be encouraged, but paper should be optional.

In relation to electronic records, REINSW also makes the following points.

Section 176 of the *Strata Schemes Management Act* sets out that the strata roll, as well as other required records, "may be made or stored in the form determined by the owners corporation."

While section 176 is broad enough to cover the use of an electronic records management system, approved by way of ordinary resolution, there are instances that are not captured.

For example, as the composition of the owners corporation changes over time, there's the potential for difficulties to arise in relation to the management and retrieval of records. Multiple sets of records may exist in both hard copy and electronic form, because, at any given time, the owners corporation may change its method of record keeping. The inevitable result is a disorganised records management system and the potential for records to be lost.

REINSW recommends that section 176 be amended, so that it is clear that keeping records in electronic form is always acceptable, rather than only when determined by an ordinary resolution of the owners corporation.

REINSW is also concerned that there's no statutory requirement for strata managers to back-up their electronic records.

Yes, it is best practice to do so to ensure there's no loss of data, either inadvertently or intentionally. However, this best practice is not adopted by all strata managers, because they're not legally required to do so.

The inability to identify the records that are, and should be, in existence is a further issue that causes confusion and angst for strata managers.

At present, there's no requirement for the owners corporation to keep an overall index of the records that are in existence. Without such an index, it's almost impossible to determine whether certain records have gone missing. For example, an Extraordinary General Meeting may have been held, but if the minutes of that meeting are not readily available in hard copy or electronic form, how is anyone in the future to know that the meeting took place and what was resolved?

A simple way around this issue is to require an index of records to be kept.

REINSW recommends that the *Strata Schemes Management Act* be amended to require strata managers to back up their electronic records and maintain an index of all records. This will secure the integrity of strata records and ensure that they are readily available at all times in the future.

Finally, REINSW points to the problems that regularly arise when records are passed to a new strata manager. It's not at all uncommon for records to be missing where management of the strata scheme changes hands. There's no accountability when it comes to the transfer of records and the incoming strata manager is often left to unravel the gaps in the records that have been handed over. This inevitably impacts their ability to efficiently and effectively manage the building.

REINSW recommends that there be a provision in the *Strata Schemes Management Act* to hold strata managers accountable for the transfer of records during a change in management.

Availability of records

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

REINSW believes the existing provisions relating to the inspection of records are working well in practice and do not require any amendment.

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

REINSW believes the existing provisions relating to strata information certificates are working well in practice and do not require any amendment.

However, we do reiterate our recommendation for **Question 66** that the section 184 certificate should be addended to the contract for sale. By doing this, a person buying into the

strata scheme cannot claim that they had no knowledge of the obligations that come with being a lot owner.

QUESTION 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?

Members of the REINSW Strata Management Chapter report that, in many instances, it is left to the last minute to contact them for a copy of the by-laws. This is both disruptive and inconvenient for strata managers.

REINSW recommends that NSW Fair Trading provide further education to landlords regarding the need to have an up-to-date copy of the by-laws on file at all times.

REINSW also believes that the by-laws should be attached to the residential tenancy agreement at the time of signing, rather than having up to 14 days after signing to provide them to the tenant.

QUESTION 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 it be improved? If so, how?

Members of the REINSW Strata Management Chapter Committee report that, in the majority of instances, landlords are simply not providing this notice to strata managers.

REINSW believes it is absolutely essential that strata managers have details of all tenants in the strata schemes under their management, particularly if an emergency arises. A member of the Chapter Committee gave a recent example where there was a gas leak impacting a strata scheme under her management; a gas pipe had been pierced and was ready to explode. She was contacted by both the police and fire services to immediately evacuate the building. Identifying and contacting all the tenants was extremely difficult. While the situation was resolved without incident, this situation clearly illustrates what may potentially go wrong if strata managers do not receive the required notice.

REINSW recommends that NSW Fair Trading provide further education to landlords regarding the need to notify tenant details to the strata manager.

Further, ***REINSW recommends*** that the obligation to notify tenant details to the strata manager be strictly enforced by NSW Fair Trading. This means that the strata manager will be able to keep the strata roll up to date with all relevant details in accordance with section 178 of the *Strata Schemes Management Act*.

QUESTION 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.

REINSW believes the existing provisions relating to the service of notices and other documents are working well in practice and do not require any amendment.

2.2.7 COMMON SEAL

QUESTION 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?

Section 273 of the *Strata Schemes Management Act* requires the seal of the owners corporation to be affixed to instruments and documents.

REINSW believes this is a redundant requirement. We point to the emergency measures put in place due to the COVID-19 pandemic as evidence that the requirements of section 273 are outdated and unnecessary.

It's been proven that not requiring the owners corporation's seal to be affixed to instruments and documents works well. It's an archaic practice, particularly in light of electronic transactions legislation, and causes a raft of practical issues.

REINSW recommends that section 273 be repealed. The emergency measures put in place due to the COVID-19 pandemic are working well in practice and should continue to operate as per the emergency legislation passed in May 2020.

Removing the need to affix the owners corporation seal to instruments and documents, and simply requiring the signatures of members of the strata committee will create efficiencies and takes account of the current environment we now live and work in.

QUESTION 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?

While REINSW supports the introduction of the strata portal, we do not believe that the personal details (including names and contact details) of strata committee members and lot owners should be made publicly available via any publicly searchable register. We refer to our commentary at **paragraph 3.3**.

2.2.8 INITIAL PERIOD

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

REINSW believes the existing provisions relating to the initial period are generally working well in practice and do not require any amendment.

In relation to the initial period, and specifically regarding developer documents, REINSW also makes the following points.

In accordance with section 16(1) of the *Strata Schemes Management Act*, certain documents must be provided by the developer to the owners corporation ahead of the first Annual General Meeting of the strata scheme. These documents include (amongst other things) the building plan, occupation certificate, depreciation and maintenance schedules, as well as the certificate of title for the common property and the strata roll.

Unfortunately, all too often, some or all of these key documents simply can't be located by the time the first Annual General Meeting comes around. Even when they are available for the first Annual General Meeting, they can go missing in later years, as the management of the building changes hands one or more times.

This has been an issue of concern for strata managers for quite a number of years. Specifically, who should hold particular documents relating to the development of a strata scheme. Put simply, there are far too many circumstances where key documents that should have been provided by the developer simply can't be found down the track.

All too often, developers believe that they have fulfilled their obligations when they provide documents to the strata manager when the development of the building is completed. This is all well and good, but what happens when the owners corporation changes strata managers before the first Annual General Meeting? It's not an uncommon occurrence and is cause for concern, particularly when the warranty period still applies to the building.

And the issue extends far further than new developments. Where management of an established strata scheme changes from one strata manager to another, the original strata manager may not be able to provide all of the documents set out in section 16(1) to the new strata manager. Similarly, where a strata scheme has been self-managed, it's likely that some or all of these documents will have gone astray.

To solve these issues, ***REINSW recommends*** that the *Strata Schemes Management Act* be amended to require the developer to provide the documents set out in section 16(1) when they apply for registration of the strata plan.

What we would like to see, in essence, is that a 'developer pack', comprised of the documents required by section 16(1), is lodged when the developer is applying for registration of the strata plan. All these documents will be registered on the Common Property Certificate of Title and the original held by Land Registry Services, rather than the developer handing them over to the strata manager or the person self-managing the strata scheme.

This means that all the relevant documents will be easily available, regardless of when they are required – whether for the first Annual General Meeting or at some point down the track. Lost documents for these newly registered strata plans will become a thing of the past.

A large administrative burden borne by strata managers would be relieved through implementation of this recommendation. For strata managers, it's all too common to spend a lot of time chasing around for documents when taking on the management of a new building. Being able to order a 'developer pack' at the same time as ordering a title search is both practical and convenient, and will certainly save time.

By requiring a 'developer pack' of the documents required by section 16(1) to be lodged and registered on the Common Property Certificate of Title, everything will remain accessible at all times.

REINSW notes that the issues set out above may be addressed by the proposed strata portal. If the documents we suggest be included in the 'developer pack' are available via the strata portal, we welcome the development.

2.2.9 MANAGING COMMON PROPERTY IN A STRATA SCHEME

QUESTION 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?

REINSW believes the existing provisions relating to responsibility for ongoing maintenance when lot owners make changes to common property in connection with their lots are working well in practice and do not require any amendment.

QUESTION 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.

REINSW believes the existing provisions regarding the approvals needed when making changes to common property are easy to understand and are working well in practice, and do not require any amendment.

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

Section 110(3)(c) of the *Strata Schemes Management Act* sets out that a minor renovation includes "installing or replacing wood or other hard floors".

REINSW believes that the wording of this section is far too broad. For example, there are no parameters regarding the type of underlay that should be used, acceptable acoustic rating or noise transmission. Nor is there any requirement to provide evidence that certain standards have been met in terms of the materials used or the method of installation. To add to the issue, a by-law is not required in relation to the installation of wood or other hard floors by lot owners.

Members of the REINSW Strata Management Chapter Committee report of ongoing issues in many strata schemes relating to the installation of wood or hard floors. Complaints from neighbouring lots regarding noise are not at all uncommon.

To address these issues, ***REINSW recommends*** that the installation or replacement of wood or other hard floors should not be classified as a "minor renovation" in section 110. Instead, it should fall under section 108. As a more substantial and significant change that impacts common property, the installation or replacement of wood or other hard floors should require a special resolution.

Similarly, section 110(3)(e) sets out that a minor renovation includes "work involving reconfiguring walls".

REINSW believes that reconfiguring walls should not be considered to be a minor renovation under any circumstances. While some walls in large high-rise buildings can be reconfigured without compromising the structural integrity of the building overall, this is often not the case in smaller buildings; in a typical two, three or four storey smaller walk-up block, all walls in the lots will be load bearing. The potential for structural issues is obvious and any changes to the configuration of walls should not be allowed unless and until an inspection is made by a structural engineer and a report is provided to the strata committee.

REINSW recommends that the reconfiguration of walls should not be classified as a "minor renovation" in section 110. Instead, it should fall under section 108. As substantial and significant change that impacts common property, any reconfiguration of walls should require a special resolution.

QUESTION 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?

REINSW believes the existing provisions regarding decision-making about minor renovations are working well in practice and do not require any amendment. Whether the power is conferred upon the strata committee by an ordinary resolution or by virtue of a by-law, REINSW sees no issues with the current system.

QUESTION 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?

REINSW believes that it should not be mandatory for a strata committee to provide reasons to a lot owner as to why their request for work or renovations has not been approved. The reality is that when these decisions are made, some committee members may vote 'yes' and others may vote 'no', and they will likely do so for a wide variety of reasons (some of which may be motivated by self-interest). Further, there will be committee members who do not want to disclose their reasons for voting 'no' (and you can't make them give a reason if they don't want to).

REINSW recommends that giving reasons where a request for work or renovations is refused should be voluntary; each strata committee should be able to make their own determination in the circumstances.

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

In accordance with section 110 of the *Strata Schemes Management Act*, a lot owner can carry out minor renovations to common property that is in connection with the owner's lot. The owners' corporation must approve these renovations by resolution at a general meeting.

While things like kitchen and bathroom renovations, adding or removing power points, installing a split system air-conditioner, and changing light fittings are for the benefit and maintenance of the individual lot, they also impact the common property.

By way of comparison, REINSW points out that in the case of general works carried out to common property, a by-law must be registered. This discloses the works to new lot owners and, in particular, highlights responsibilities going forward.

However, there is no similar requirement for minor renovations carried out to common property under section 110 and this can present significant problems for future lot owners and the owners corporation.

To illustrate the problem, REINSW gives the following real-life example.

A lot owner was given approval to renovate their kitchen. The renovation involved replacement of all tiles on the floor and walls. The wall tiles cracked following the renovation. Some years later, a subsequent owner of the lot claimed the owners corporation was responsible for the cost of repairs, as the tiles were attached to an external wall and were, therefore, part of the common property. Unfortunately, some of the owners corporation's records had been lost over the years and, consequently, there was no record of the approval of the kitchen renovation or any conditions attaching to that renovation. Nor was there a by-law in place specifying that repair and upkeep following the renovation was the owner's responsibility. Ultimately, to avoid a drawn-out dispute, the owners corporation agreed to equally share the cost of repairing the tiles. A by-law was also registered to ensure that future responsibility for repairs fell to the lot owner.

REINSW notes that disputes of this nature are not at all uncommon.

In the example above, the relevant records had been lost. However, in other cases, such records are simply not available because information about minor renovations only needs to be kept for seven years. This means that where a lot is sold more than seven years after minor renovations occurred, the buyers are unlikely to be made aware of any conditions attaching to the approval of those renovations, unless a by-law has been registered.

To overcome these issues, ***REINSW recommends*** that there be a register of minor renovations maintained by the owners corporations under section 110.

REINSW envisages that the register will be prescribed as a mandatory requirement by the *Strata Schemes Management Regulation*. The register will need to be completed by the lot owners or strata manager, as the case may be, and include any details of minor renovations carried out, including any conditions.

Keeping this register will serve to protect the interests of the owners corporation and any future lot owners, and will help strata managers better fulfil their duties.

REINSW notes that while registering a by-law in relation to instances of minor renovations is an option, by-laws can be lengthy and are not as efficient or cost effective as a register to manage records regarding minor renovations.

A register will ensure greater transparency by virtue of bringing together all records of minor renovations and ensuring the details are available beyond the current seven-year requirement. When compared to by-laws, which in these instances are created for the purposes of recording individual minor renovations, a register will significantly improve both time and cost efficiencies.

Of course, improved record keeping for minor renovations through the introduction of a register will also benefit consumers, as potential buyers of strata lots will be well-informed of their responsibilities.

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

REINSW believes the existing provisions relating to common property rights by-laws are working well in practice, and do not require any amendment. In practice, it comes down to the wording of the by-law itself; some are drafted well and others are drafted poorly.

QUESTION 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.

Members of the REINSW Strata Management Chapter Committee report that, in the vast majority of instances, these agreements with local councils in relation to strata parking do not work well in practice.

There are rare cases where a strata scheme is of such a large scale that the council will patrol the area subject to the agreement and enforce parking conditions. However, in the remainder of cases, they are simply not interested.

REINSW recommends that where such agreements are in place, there should be a greater focus on enforcement. Without enforcement, why have the agreement in place at all?

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

The parking of vehicles on common property is a regular issue and strata managers face many issues when seeking their removal.

REINSW recommends that, where the owner of a vehicle parked on common property has been given reasonable notice (e.g. seven days) and they have failed to remove it, the owners corporation should have the right to physically remove the vehicle. Further, the owners corporation should be able to carry out this removal without incurring any potential liability for damage caused to the vehicle as a consequence of the removal.

Further, ***REINSW recommends*** that the removal must be carried out by an appropriately qualified person (e.g. a towing service) and the vehicle should be removed to the closest safe position off the common property. The person removing the vehicle should not be subject to

any potential charges of theft and nor should the owners corporation be liable to parking fines where the vehicle is left on the street.

Maintenance and repair of common property

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

REINSW believes the existing provisions to ensure owners corporations comply with their duty to properly maintain and repair common property are working well in practice, and do not require any amendment.

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

REINSW does not have any concerns with the statutory duty to maintain and repair common property. Where an owners corporation does not comply with this duty, action can be taken against them.

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

REINSW believes the two-year time limit for making a claim for damages for breaching the statutory duty to maintain and repair common property is appropriate and does not require amendment.

QUESTION 114
Is it appropriate for the owners corporation 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?

REINSW acknowledges that there are circumstances where it is appropriate for an owners corporation to remove parts of the common property from the ambit of the statutory duty to maintain and repair common property. We are not aware of any situations where the ability to do this has been misused.

QUESTION 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 it has been misused?

REINSW believes that it is appropriate that an owners corporation can defer compliance with the statutory duty to maintain and repair common property in circumstances were they are taking action against an owner for damage to that property.

QUESTION 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?

REINSW notes that there are circumstances where maintenance and repair to common property cannot be carried out in accordance with the statutory duty because there is a defects claim in progress. Providing living conditions and the health and safety to residents is not impacted, then maintenance and repair may need to be deferred as a matter of necessity.

REINSW recommends that the legislation be amended to clarify that the statutory duty to maintain and repair common property is not breached where the maintenance or repair is delayed or deferred because a defects claim is in progress and on the proviso that liveability and health and safety are not impacted.

Initial maintenance schedule

QUESTION 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?

The initial maintenance schedule prepared by the developer is a useful document, as it is a starting point for preparation of both a strata scheme's ongoing budget and the capital works fund plan. In this early stage of the life of a strata scheme, the developer is in the best position to provide guidance about the items that need to be considered. However, REINSW recognises that the detail included in initial maintenance schedules varies greatly on a case-by-case basis.

Therefore, ***REINSW recommends*** that the legislation provide more guidance about what needs to be included in the initial maintenance schedule. We suggest that a template schedule be created to help developers identify the items that need to be considered for the purposes of the initial maintenance schedule, including details of any warranties, when items should be replaced, how often maintenance should be carried out etc. Having this template in place will create uniformity and also help owners corporations better plan and budget for future expenditure, maintenance and replacement.

QUESTION 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?

REINSW is not aware of any difficulties in terms of obtaining the initial maintenance schedule or information about estimates and levies determined during the initial period. In this context, however, we do reiterate our concerns regarding the level of detail included in the initial

maintenance schedule (see our answer to **Question 117**) and the sometimes unrealistic levies set by the original owner or developer (see our answer to **Question 119**).

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

REINSW is concerned by the fact that there are developers who prepare improper costings, which result in initial levies for the strata scheme being set too low and leave the first owners exposed to financial risk.

Levies being set at an incorrect level is a practice that can mislead and deceive lot owners buying into a strata scheme. Levies are a key financial consideration for owners when buying into a strata scheme, particularly when it comes to budgeting for ongoing expenses related to the property.

Where the initial levies are set too low by the developer and then are increased following the establishment of the owners corporation, it can potentially lead to dire financial consequences for some owners. In the most drastic cases, the increase may even result in the owners being unable to retain the property going forward because the new levies now put the property out of their financial reach. Had the lot owners known what the true level of the levies would be, they would not have purchased the property in the first place.

It's also not unknown for developers to wind up their business after completing the development in order to avoid responsibility for any potential financial fallout.

REINSW notes that owners do not currently have any recourse where incorrect initial levies lead to financial distress. Yes, the NSW Civil and Administrative Tribunal can make orders regarding compensation to the owners corporation from the developer if levies during the initial period were set too low for the strata scheme's costs. But applying to NCAT is not a desirable avenue open to everyone.

To resolve the problem, ***REINSW recommends*** that an independent party (for example, a quantity surveyor or registered valuer) should assess and sign off on the levies that are initially set by the developer and certify that those levies are reasonable in all the circumstances.

Further, given the disadvantageous consequences, ***REINSW recommends*** that penalties should be introduced into the legislation where a developer sets the initial levies too low or too high, regardless of whether this was done inadvertently or in a devious manner.

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

Further to our answer to **Question 117**, ***REINSW recommends*** that utilities be included in the initial maintenance schedule. By doing so, the schedule will be a more holistic snapshot of the strata scheme's budget and levies can be more accurately match to the required outgoings.

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

Section 80(1) of the *Strata Schemes Management Act* requires an owners corporation to prepare a 10-year capital works fund plan. This plan must set out anticipated major expenditure to be met from the capital works fund in the 10 years following the first Annual General Meeting.

REINSW believes that section 80(1) is not clear what a 10-year capital works fund plan is expected to cover. Our concern is that consumers have unbridled expectations and want a 10-year capital works fund plan in addition to separate maintenance plans, dilapidation reports, building reports and more. Further clarity will assist in managing these expectations and remove any confusion.

REINSW requests clarification about what the 10-year capital works fund plan is expected to cover.

The fact that section 80(1) only refers to expenditure is also a concern, because it is only one side of the equation. Logic dictates that for money to be paid out, there must be money coming in. The section sets out that the 10-year capital works fund plan must include the anticipated major expenditure to be met. However, there's no consideration given to where the money for that expenditure is actually coming from.

There needs to be some recognition in the section of the annual savings required to fund the anticipated future expenditure. Without this, there's no surety that works will be able to be paid for and the capital works fund plan is essentially useless.

REINSW recommends that section 80(1) be broadened, so that annual savings requirements are included in the 10-year capital works fund plan. This will ensure that anticipated expenditure can be adequately funded and everyone has certainty about where the money is coming from.

The issues above are exacerbated by the vague wording in section 80(7), which sets out that the owners corporation must implement the capital works fund plan "so far as is practicable".

The words "so far as is practicable" leave room for interpretation. What is the policy intention here? On one hand, there's a requirement to anticipate major expenditure. But, on the other hand, there's no mention of how the money to meet that expenditure is to be raised. If the owners corporation is only expected to implement the plan "so far as is practicable", does that mean they're off the hook if there are not sufficient funds available?

Without clear guidance, it's hard to determine the level of detail required to provide a satisfactory outcome.

REINSW also notes that individual strata schemes vary significantly in terms of size, structure and amenities. This certainly has an impact on what matters a capital works fund plan needs to include in each case. The matters that need to be considered for inclusion in a plan for a two-lot strata scheme will differ from those for a 100-lot strata scheme.

REINSW recommends that, once the section is amended to include annual saving requirements, a capital works fund plan template should be introduced. This template should be designed in such a way that it can be tailored to suit the requirements of each strata scheme.

Further, to help in the effective implementation of the requirements set out in section 80, ***REINSW recommends*** that the section include a guidance note to explain who is qualified to prepare a capital works fund plan. Having a guidance note will encourage standardised procedures and promote best practice. It will also ensure that capital works fund plans have been formulated in a way that raises sufficient funds to meet anticipated expenditure, therefore reducing the need for special levies. The guidance note should provide direction about the various items that need to be considered and account for the variances between individual strata schemes.

Sustainability infrastructure

QUESTION 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?

REINSW supports the steps being taken by the NSW Government to encourage strata schemes to install sustainability infrastructure, though we note that the measures largely relate to new and bigger strata schemes. REINSW would like to see further measures put in place to encourage older and smaller schemes to similarly install sustainability infrastructure where appropriate.

Insurance

QUESTION 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?

REINSW asks why the requirement to obtain a building insurance valuation every five years has been removed from the legislation. There's no doubt that the removal gives owners corporations the flexibility and autonomy to decide how often the building is valued. However, this benefit is outweighed by the fact that many strata schemes are now potentially under-insured because their coverage doesn't accord with the current replacement or reinstatement cost of the building.

A knock-on effect relates to premiums. If the current value of the building is not accurately assessed, how can the insurance premium possibly be appropriate in the circumstances?

When it comes to a damage policy, section 161(1)(a) of the *Strata Schemes Management Act* requires that the building be insured "for at least the amount determined in accordance with the regulations."

Who determines this amount? Owners corporations are not qualified valuers and, if the building is under-insured, the insurance is compromised.

REINSW also points to the requirement in section 161(1)(c) of the *Strata Schemes Management Act* for *reinstatement* to be included when calculating the insurance limit in

accordance with the damage policy, as is required by clause 39(2)(a) of the *Strata Schemes Management Regulation*.

Previously, the legislation only required the building insurance valuation to consider *replacement* of the building on the assumption of total destruction. Now, the legislation requires that the valuation includes both *replacement*, as per section 161(1)(b), and *reinstatement*, as per section 161(1)(c). *Reinstatement* assumes that some parts of the building are damaged, but not destroyed, and is always considered to be a much higher cost than a *replacement.*

Unfortunately, there's no definition of, or method of calculating, *reinstatement* in the legislation.

REINSW is of the opinion that there are few professionals in the industry who understand how the relevant provisions of the *Strata Schemes Management Act* and the *Strata Schemes Management Regulation* should be applied in practice. This lack of understanding leads to an industry-wide confusion, resulting in an increase in the cost of valuations. Further, there's a consequential increase in the amount insured, which can be in the order of an uplift of 30 to 100 per cent, and therefore a significant increase in premiums. While this may benefit insurers, it is certainly detrimental to consumers.

To overcome these issues, ***REINSW recommends*** that the requirement for the building to be valued by a registered valuer be reinstated. We believe that the vast majority of owners would agree their building should be valued by a registered valuer, so it makes sense for this requirement to be included in the *Strata Schemes Management Act* for the purposes of clarity.

Further, ***REINSW recommends*** that the manner in which insurance limits are calculated under damage policies be amended.

Clause 39(2)(a) of the *Strata Schemes Management Regulation* should be amended to exclude the application of section 161(1)(c) of the *Strata Schemes Management Act*. Currently, clause 39(2)(a) of the Regulation refers to the entirety of section 161 of the Act, and therefore factors in both *replacement* and *reinstatement*. REINSW suggests that clause 39(2)(a) be amended so that only the *replacement* value pursuant to section 161(1)(c) where the building is damaged but not destroyed.

An amendment to this effect is consistent with the previous version of the legislation, which worked well in practice.

Utility supply contracts

QUESTION 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?

REINSW believes the time limits on contracts for electricity, gas or other utilities set out in section 132A(1) of the *Strata Schemes Management Act* are appropriate and do not require amendment.

QUESTION 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?

REINSW believes that embedded electricity networks should not be exempt from the time limits on contracts set out in section 132A of the *Strata Schemes Management Act*.

There are many reasons why embedded networks should be subject to the same time limits as other agreements for the supply of electricity, gas or other utilities. For example, if a strata scheme has a 10-year contract with an embedded network, the lot owners are locked into using that provider. What if electricity prices change? What if a lot owner prefers another provider? Or what if another provider has better service levels? The choice of provider is taken away from the lot owner, who has no ability to price compare and may find themselves paying more than they would with an alternate provider.

REINSW recommends that section 132A(4) be repealed, so that agreements with embedded electricity networks are subject to the time limits set out in section 132A(1). This is appropriate for the same reasons the time limits were introduced for all other agreements for the supply of electricity, gas and other utilities.

2.2.10 BUILDING MANAGERS

QUESTION 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?

REINSW believes that the reasons for termination of a building manager, as set out in section 72(3) of the *Strata Schemes Management Act*, are appropriate and no further grounds need to be added.

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

At present, the *Strata Schemes Management Act* does not make it clear who can and who can't be appointed as a building manager. ***REINSW recommends*** that the legislation be amended to provide clarity.

QUESTION 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 or why not?

REINSW supports the proposal to introduce a duty of care on the building manager to act in the best interests of the owners corporation. Just as a strata manager must act in the best interests of the owners corporation, so too should a building manager be required to and this should be spelt out in the legislation.

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

Like sales agents, property managers and others working in the real estate industry, strata managers were subject to the raft of reforms starting in April 2020 relating to qualifications and ongoing training in order to elevate standards. REINSW has long been a vocal proponent of the need for higher qualifications and a better standard of ongoing training, and supported these reforms. Why should building managers be exempt?

REINSW supports the proposal that building managers be subject to the same or similar level of regulation as strata managers. They are responsible for the building and therefore should hold an appropriate level of qualification (for example, Assistant Agent level) and be obligated to complete continuing professional development each year.

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

While a building manager can be appointed for a term of up to 10 years, In the case of strata managers the term is limited to no more than three years. REINSW questions this disparity. Strata managers take on far more responsibilities and are subject to more risk, yet have lesser tenure.

REINSW recommends that agreements with building managers should be subject to the same term limits as those with strata managers. This will ensure that owners corporations are not locked into long-term contracts with building managers who may not be performing to the level expected or who may not be providing the desired range of services.

QUESTION 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?

REINSW believes that building managers should have a statutory duty of care with responsibility for the safety of the building.

However, as set out in our answer to Question 72, just as strata managers should not be required to have specialist knowledge in relation to building safety, nor should building

managers. Building managers do not have the expertise, qualifications or experience in relation to building safety issues that enables them to form an opinion that could or should be relied upon by the owners corporation. Therefore, in circumstances where a building safety issue arises, it is necessary for the owners corporation to engage an appropriately qualified professional to assess the issues and recommend remedial action.

REINSW recommends that, in all cases where a building safety issue arises, an appropriately qualified professional should be required to be engaged by the building manager to assess the defect and recommend remedial action.

2.2.11 RESOLUTION OF DISPUTES

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

Members of the REINSW Strata Management Chapter Committee note that now, with every matter going to hearing, the dispute resolution process is taking much longer. One Chapter Committee member points to a matter that will ultimately take up to nine months to resolve. Previously, when written submissions were required, waiting times were much less.

REINSW believes an NCAT Member should be able to look at written submissions and then simply make a decision in appropriate cases, without the need to call a hearing. While there will certainly be instances where a hearing is needed (for example, if verbal testimony is required or in more complex cases), there are most certainly other instances where written submissions are sufficient for the purpose of making a decision.

REINSW recommends that NCAT Members be able to make a decision based on written submissions alone, so that every matter does not need to go to a hearing. Not only will this save time for the parties, but it will also save time, costs and resources for NCAT.

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

Members of the REINSW Strata Management Chapter Committee note the process for directly managing disputes between people does work in some cases, but not in others. For the most part, this comes down to the people involved, including their personalities and willingness to embrace the process and invest time and effort.

There are many instances where this voluntary process for resolving disputes fails. REINSW points to the lack of costs and the fact that there are no consequences underlying this failure. For example, a tenant may bring a matter to the owners corporation. Unlike making an application to NCAT, there's no application cost. Further, they can drag the matter on for as long as they wish to, without incurring additional costs. Because it's not costing them anything, there's little incentive to come to a swift and amicable solution. But, where things drag out, it's the owners corporation that bears the costs (in the form of additional management fees).

To address these issues, ***REINSW recommends*** that there be an application fee in place for bringing a dispute to the owners corporation for resolution. By having such a fee in place, the

potential for frivolous claims being made will be reduced and the resolution of disputes in a timely and efficient manner will increase, because parties are invested in the process.

Further, ***REINSW recommends*** that time limits be put in place for the resolution of disputes, so matters do not drag on with no foreseeable end in sight.

QUESTION 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?

Feedback from members of the REINSW Strata Management Chapter Committee is that the strata mediation process is not particularly useful.

While REINSW acknowledges the aim is to encourage early and cost-effective resolution of strata disputes prior to commencing formal proceedings, we believe that this aim is not being fulfilled. Certainly, there are cases where the mediation process is helpful. However, in many, many more cases it is not.

REINSW believes that there is a need to incentivise people, so they want to resolve matters at mediation. At present, the strata mediation process involves little investment. With a traditional mediation, the parties spend money on engaging a professional mediator, securing a room to conduct the hearing and more. Because of this monetary outlay, all parties (including the mediator) are more invested in the process in terms of time and effort. In the case of strata mediation, there is no similar investment. Chapter Committee members point to instances where the other party simply fails to attend the mediation at all. They also provide many examples of instances where the mediator was extremely busy and the amount of time scheduled for the mediation was completely insufficient.

REINSW acknowledges the intent of minimising costs by providing mediation for consumers, however believes the effectiveness of the process needs attention. Participants need to be incentivised to resolve their issues at mediation; at present, it seems more like a box to be ticked on the way to a formal hearing.

REINSW recommends that, in order to make it a viable process, further resources (including mediators, time, venues and other resources) be allocated to strata mediation. Investing in a functioning and outcomes-driven process upfront will have the knock-on effect of easing the load on the Tribunal.

Jurisdiction and powers of the Tribunal

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

REINSW notes that not all Tribunal decisions are publicly available. ***REINSW recommends*** that there should be access to a wider publicly available database of decisions. This comprehensive access will ensure that strata managers and others appearing before the Tribunal are better prepared and will encourage consistency in decision making.

QUESTION 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.

Following on from our answer to **Question 135**, REINSW believes there is a need for more consistency in the decisions made by the Tribunal. In the absence of such consistency, we see the ability to award damages for breaches of statutory duties under the *Strata Schemes Management Act* as problematic. Strata managers are already in the situation where it is difficult to predict what decision a Tribunal member will make on any given day. Adding the ability to award damages increases this unpredictability.

REINSW recommends that the Tribunal should not be able to award damages for breaches of statutory duties under the *Strata Schemes Management Act*.

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

The ability to pursue outstanding levies is an ongoing issue for strata managers – particularly over the last six months, given the increase of the debt threshold for bankruptcy purposes from $5,000 to $20,000 as part of the COVID-19 emergency measures, and which is currently a threshold sum of $10,000. Members of the REINSW Strata Management Chapter Committee can relate many, many instances where lot owners are simply refusing to pay their levies, secure in the knowledge that strata managers cannot take recovery action against them until the debt hits $10,000.

The implications are obvious. Without money, a strata scheme cannot operate – so the inability to pursue outstanding strata levies in a timely and efficient manner is extremely problematic.

REINSW recommends that the Tribunal have authority to allow strata managers to pursue outstanding levies in a way that is legally enforceable and that sits outside the bankruptcy legislation.

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

REINSW does not believe that there needs to be a cap on the size of the claim the Tribunal can consider.

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

REINSW believes that the penalties for breach of orders made by the Tribunal are adequate, however the enforcement of those penalties is not.

REINSW recommends that effective measures be put in place to allow for the timely recovery of penalties and enforcement of Tribunal orders.

NSW Fair Trading's role and functions generally

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

In answer to this question, REINSW would like to raise the following issues.

a. Property Services Commissioner

Residential real estate is a $107 billion industry annually in New South Wales. In the 2017-18 financial year alone, stamp duty contributed $8.4 billion to the state economy from 220,313 property transactions. The industry is the largest employer, directly and indirectly, in New South Wales and every person is a stakeholder because shelter is an essential human necessity.

Yet, for years, the NSW Government has shown an inability to provide for our industry – and indeed the wider property services industry – with a consistent and coherent approach to policy, regulation and taxation.

REINSW believes it is time for the NSW Government to step up and the best way forward is to bring the real estate, building and construction, planning, surveying and conveyancing sectors together under the umbrella of a single Office of the Commissioner for Property Services.

- **Real estate transactions are different.** Overseeing more than 40 different trades and services – including tattoo parlours, funeral directors, tow truck drivers and hairdressers – NSW Fair Trading's role is too broad and generalised. The department's consumers protection functions are almost entirely focused on low cost, high volume transactions. How can a property transaction worth hundreds of thousands, or even millions, of dollars be compared with getting a haircut?

- **Focused attention is a must.** Property services industries are regulated by complicated regulatory frameworks. Real estate, in particular, is regulated by an extremely complex web of legislation governing conduct, training and service delivery. Focused attention is needed to enhance the industry's regulatory framework to ensure the best outcomes for stakeholders.

- **Specialist expertise and experience is needed.** All property transactions are complex and strata is extremely complex. Indeed, there are solicitors who specialise in strata management and strata development exclusively.The complexity of property services industries demands a commissioner who has industry experience and the expertise to deliver better outcomes for the consumers, professionals and businesses operating in the sector.

Consumers deserve a higher level of skill and professionalism from someone selling their home than that required from the person styling their hair or providing any other trade or service overseen by NSW Fair Trading.

Equally, the real estate industry deserves a higher level of focus and commitment to improving the level of service and consumer protection than NSW Fair Trading has delivered to date.

REINSW recommends that the real estate industry be moved away from NSW Fair Trading and that a Property Services Commissioner be appointed to regulate real estate and other property services industries.

b. NSW Fair Trading Helpline

It has come to our attention (via the REINSW Helpline and members of the REINSW Strata Management Chapter Committee and our wider membership) that advice received by consumers from the NSW Fair Trading Helpline is sometimes inconsistent or erroneous; for example, it does not accord with legislation and/or is different to information set out on the NSW Fair Trading website. Upon receiving this advice from the NSW Fair Trading Helpline, it is not unusual for callers to then approach their strata managers (or indeed the REINSW Helpline), who are then left to explain why the advice is wrong and what the legislation actually sets out. We note that REINSW invests significant resources in ensuring that every person on our Helpline team are always up-to-date with the latest legislation and industry practice, and we pride ourselves on providing the best possible advice to our members.

REINSW emphasises the importance of having properly trained staff, who know the current legislation and who know the right questions to ask of callers so they can give the quality and consistent advice that callers require.

REINSW recommends that those staffing the NSW Fair Trading Helpline undergo increased and ongoing training to ensure they are always up to date with current legislation and are able to give callers advice that is both accurate and consistent. This will, undoubtedly, improve consumer outcomes.

3. ADDITIONAL COMMENTS

In addition to our answers to questions set out in the Discussion Paper, REINSW would like to raise the following issues.

3.1 Window safety devices

In late 2013, the NSW Parliament passed legislation requiring the installation of window safety devices in residential strata buildings. Under the legislation, owners corporations were given until 13 March 2018 to install these devices.

Since then, owners corporations and strata managers have struggled with a raft of practical issues that have rendered implementation of the legislative requirements problematic.

The current apportionment of liability in section 118 of the *Strata Schemes Management Act* needs to be reconsidered.

As it currently stands, the legislation is both a source of confusion and a potential danger to tenants, because of the possibility for sub-standard and ill-maintained window safety devices. It's a safety issue. We need to protect against both children and adults falling out of windows, causing serious injury and even death.

At present, liability is murky at best. Who is responsible for ongoing maintenance of window safety devices? Can the owners corporation delegate responsibility for maintenance? How often should the devices be inspected for compliance? What happens if a lot owner or tenant interferes with or damages a device? There's simply too much left up in the air and we need clarification through the legislation.

To clarify liability, ***REINSW recommends*** that window safety devices be designated as common property where they have been installed by the owners corporation. Time and again, we've seen the dangers of leaving responsibility for window safety devices with lot owners and tenants. For example, leaving keys in the window safety devices, which allows the owner occupier or tenant to unlock the devices and then slide the windows completely open.

REINSW would also like to point to a number of practical issues that are not currently catered for by the legislation.

- **Potential for interference.** The current parameters of section 118 leave open the possibility for owners or tenants to interfere with window safety devices, without the need to notify the owners corporation. This may result in the owners corporation being unaware of any tampering with the devices. REINSW believes that the owners corporation should be notified of any adjustment or interference with any window safety device, so that access by a licensed professional can be organised to assess whether the device remains compliant.

- **Responsibility for maintenance.** In accordance with section 118(1), the owners corporation is responsible for the initial installation of window safety devices. REINSW believes that this effectively renders them common property for the purposes of section 106, even where the devices have been adjusted or interfered with by an owner or tenant, however this is not made clear by section 118. Responsibility for ongoing maintenance of window safety devices needs to be clarified.

- **Installation by lot owner.** Under section 118(3), a lot owner may install window safety devices and section 118(4)(b) requires that the installation is completed in a "competent and proper manner". However, there is no guidance as to what constitutes installation in a "competent and proper manner". REINSW believes that installation of window safety devices should only be carried out by an appropriately qualified and licensed professional, and this should be stipulated in the legislation.

- **Ongoing inspections.** There's no requirement or obligation in section 118 for window safety devices to be inspected on a regular basis; for example, annually. This leaves the owners corporation vulnerable in circumstances where the devices may have been adjusted or interfered with by an owner or tenant. How is the owners corporation to know if all window safety devices in the building remain compliant? This has the potential to pose serious issues if a claim for personal injury or death is linked to the failure of a window safety device. REINSW believes that the legislation should include an obligation for annual inspection by an appropriately qualified professional of all window safety devices.

- **Right of exclusive use and enjoyment by-law.** Section 142 allows for a by-law to confer upon a lot owner a right of exclusive use and enjoyment of a part of the common property. It's conceivable that such a by-law may require the relevant owner to fit and maintain window safety devices, however the legislation does not cater for this type of situation. As it currently stands, it appears that even if such a by-law is adopted under section 142, the owners corporation remains responsible for the maintenance of window safety devices, notwithstanding that the by-law makes the lot owner responsible. REINSW believes that without statutory clarification, this undermines the intent of implementing a right of exclusive use and enjoyment by-law under section 142

that confers obligations of installation and maintenance of window safety devices on the lot owner.

- **Delegation of maintenance responsibility.** REINSW believes that the legislation should enable an owners corporation to delegate the ongoing maintenance of window safety devices to lot owners by way of a by-law. This means that ongoing compliance would become the responsibility of lot owners. Further, REINSW believes that the legislation should clarify the implications where an owners corporation passes a special resolution not to maintain window safety devices after they have been satisfactorily installed.

- **Reporting damage and malfunctions.** The legislation is silent on what should be done if a window safety device is damaged in some way or malfunctions. In circumstances where the ongoing maintenance of window safety devices remains the responsibility of the owners corporation, REINSW believes that the lot owner should have a responsibility to report any damage to or malfunction of a device as soon as they become aware of it, therefore allowing the owners corporation to promptly attend to repairs.

- **Insurance implications.** In the event that a window safety device fails due to interference by a lot owner or tenant and results in personal injury or death, the owners corporations' insurer may deny a claim on the basis that the owners corporation has a statutory obligation to ensure that devices are functional at all times. This has the potential to place the owners corporation – and, therefore, all owners in the strata scheme – in the position of facing a substantial personal injury claim with no insurance cover. This may further result in the necessity to raise a special levy to cover legal costs and damages, which individual lot owners may not be in a financial position to pay. This underlines the necessity to clarify responsibility for ongoing maintenance of window safety devices.

All of these things serve to underline the pressing need for further clarification in the legislation. At present, there's simply far too much left up in the air and too much confusion – all of which leave strata managers exposed in the delivery of their services.

3.2 Items requiring statutory warranty

Clause 6 of Schedule 1 of the *Strata Schemes Management Act* requires certain items to appear on the agenda for each Annual General Meeting. Specifically, clause 6(d) requires an item to be included in the agenda to consider building defects and rectification, where the building is within the statutory warranty period under the *Home Building Act*.

REINSW believes that this provision needs to be clarified. Does the requirement apply only to new buildings? Or does it also apply to existing buildings where the initial warranty period has expired, but the owners corporation or a lot owner has carried out new works that are subject to warranty? Guidance in relation to the application of the provision would be helpful.

REINSW recommends that further guidance be provided in relation to clause 6(d) of Schedule 1 of the *Strata Schemes Management Act*.

In this context, a guidance note would be helpful. This note could include details regarding warranties, such as the two-year period for minor works and the six-year period for major works, as well as guidelines on time limits. It could also set out what is considered to be a significant repair or renovation, and the relevance of the dollar value of any repair or renovation.

Providing such a guidance note would avoid confusion and help to clarify the aim of including this item on the AGM agenda, so that owners corporations are alerted to the need to take action to identify defects and the need for rectification work to be done before a statutory warranty period expires.

3.3 Privacy of owners' details

REINSW has concerns about personal details, including email addresses, being available for inspection via the strata roll and other records. We believe that section 182(3) of the *Strata Schemes Management Act* is far too broad; that is, the provision of such a wide range of records with the potential to disclose personal details of owners is simply not necessary in all circumstances.

Specifically, REINSW has become aware of a number of circumstances where individuals have taken advantage of the fact that personal details are available via the strata roll. For example, a member of the REINSW Strata Management Chapter Committee tells of an incident where a man posed as a potential buyer for a unit in a strata scheme under their management for the sole purpose of gaining access to the strata roll and to obtain personal contact details for his ex-partner. It later transpired that there was a history of domestic violence between the man and his former partner and the circumstances involved a significant risk for the safety of the former partner.

Section 178(1) sets out all the details that must be included on the strata roll, including an email address (see subsection (1)(c)). Specifically, an email address must be provided if the owner has one; there is no ability for the owner to 'opt out' of providing their email address.

REINSW recommends that section 178(1) is amended to remove the requirement that an email address *must* be provided.

Further, ***REINSW recommends*** that it should not be necessary for all of the records set out in section 182(3) to be provided in every instance. For example, if a prospective buyer is considering the purchase of a single lot in a 20 lot strata scheme, they should only receive the strata roll details pertaining to that lot. Why do they need access to all personal contact details for owners for every lot? Stronger safeguards need to be put in place to ensure that information viewed during an inspection of strata records is not misused.

In this context, REINSW notes the risks associated with the launch of the Strata Portal. While we look forward to the efficiencies that will come with having key information about strata schemes available from a single source, we do wish to emphasise the importance of protecting the privacy of lot owners. Therefore, ***REINSW recommends*** that the personal details of lot owners not be available via the Strata Portal.

3.4 Disability access

REINSW would also like to raise the issue of disability access to strata buildings. While new buildings are certainly built with the requisite facilities to enable access (e.g. lifts and ramps), there are many older buildings that are not accessible to those with disabilities.

By way of example, someone may purchase a second-floor lot in a small strata scheme that is only accessible via stairs. Later they suffer an injury that confines them to a wheelchair. The building does not have a lift or ramps. How do they access their home?

REINSW acknowledges that not every older building can be retro-fit to accommodate accessibility. However, at present, there is no pathway forward other than legal action that can compel an owners corporation to seriously consider options.

An REINSW member provides a personal example. He purchased a unit in Manly and, for a number of years, let it out via Airbnb. The owners corporation subsequently passed a resolution prohibiting short-term letting. As the father of a child with a disability, the REINSW member then decided to offer the apartment to the Cerebral Palsy Alliance, free of charge, for use by both parents and children with disabilities. However, while the building has an internal lift, the foyer itself is not accessible by those in a wheelchair. It seems that the building and its surrounds has sufficient area to accommodate a ramp, however the strata committee has refused to commission the relevant reports and is steadfast in its refusal to consider any modifications for accessibility purposes. To move the matter forward, the REINSW member has no other option than to take legal action, which is obviously not the preferred avenue.

This is just one example and members of the REINSW Strata Management Chapter Committee can point to many more instances where requests are made for modifications for accessibility purposes and they are quickly dismissed with little to no consideration.

While REINSW recognises that the issue is, in general, covered by both the disability and anti-discrimination laws, there is nothing in these frameworks that specifically deals with accessibility in the case of strata schemes. We also note that the silence in the strata framework leads to confusion and potential roadblocks for both lot owners and owners corporations about the steps that can and should be taken to resolve these not-uncommon issues.

REINSW recommends that the strata legislation reference accessibility and provide a pathway or roadmap for parties to follow in terms of decision making in such situations.

4. FINAL COMMENTS

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

Over the last four years, REINSW has collaborated regularly with its Strata Management Chapter Committee to identify the many practical issues facing both consumers and strata managers and develop recommended solutions for Government consideration.

REINSW appreciates the opportunity to provide this submission and welcomes discussion of the issues raised.

Yours sincerely,

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of New South Wales Limited

REINSW | for members since 1910

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)

8 October 2020

To: [redacted]
Real Estate and Housing
Regulatory Policy
Better Regulation Division
Department of Customer Service

By email: [redacted]

REINSW | for members since 1910

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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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]

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

[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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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-

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

> *(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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

(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]

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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.

(I) 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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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,

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

(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,

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

(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.

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"**).*

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

(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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

(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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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;

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

(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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

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]

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

[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.

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

REINSW | for members since 1910

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

Yours faithfully

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of New South Wales Limited

30-32 Wentworth Avenue Sydney NSW 2000 PO Box A624 Sydney South NSW 1235
Phone (02) 9264 2343 Fax (02) 9261 3364 Email info@reinsw.com.au www.reinsw.com.au
ABN 51 000 012 457

APPENDIX B

Massons

Statutory Review of the NSW Strata Schemes Laws

Strata Schemes Development Act 2015 (NSW)

Strata Schemes Management Act 2015 (NSW)

Submission from:

Massons Commercial Property Law Pty Ltd

By Email to: stratareview@customerservice.nsw.gov.au

6 April 2021

In response to

Discussion Paper || November 2020

Our Ref: LDA:AH

Massons, No.5, The Upper Deck, 26-32 Pirrama Road, Jones Bay Wharf, Sydney
T +61 2 8923 0900 F +61 2 8569 0904
massons.com

Introduction

This submission has been prepared by Massons in response to the Government's review of the NSW Strata Scheme Laws and the accompanying Discussion Paper released in November 2020.

Massons is a premium law firm specialising exclusively in Australian commercial property law. Led by Jodie Massons and Leisha de Aboitiz, Massons has a high profile within the real estate industry and a sophisticated client base built on long-term relationships.

Massons has a particular specialisation and interest in strata law and complex titling, including strata renewal and collective sales, strata management and compliance and stratum subdivision.

Strata Renewal - Collective Sales

We are currently advising on various early stage and well progressed collective sales. We are instructed by developers, owners corporations as well as lot owners with a majority or minority interest. We advise on all aspects of the sale, including process and compliance requirements in the context of a Part 10 renewal, as well as management requirements, development of the strata renewal plan, agency and marketing arrangements, planning and valuation input and the court order approval process.

Strata management and advisory services

We regularly advise on all aspects of strata management documentation (eg by-laws, management statements, architectural codes etc). Massons advises owners corporations, large corporate entities and lot owners on common property rights, strata leasehold and freehold arrangements, stratum subdivision, scheme establishment and termination and sales and acquisitions of strata lots and schemes.

Submission – Strata Schemes Development Act 2015 (NSW)

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

The current objectives are sound and still valid. However we submit that consideration should be given to amending s3 of the Development Act to more accurately reflect the express intention of the Government to facilitate urban growth and enhance democratic decision making having regard to majority consensus (refer to page 14 of the Discussion Paper).

We note that whilst this intention has been expressed and is implied in this Discussion Paper and elsewhere in media communications from Government, it is not expressly stated within the Development Act. If this is the true object of the statutory reform, then we are of the view that the Development Act should expressly state this object to encourage interpretation and implementation in this context.

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

Whilst we agree that the Development Act sets out a statutory framework for achieving the objectives in s3 of the Development Act, we do not believe that the existing framework for strata renewal enables industry participants to achieve the intended objectives. We fully support the objectives and the intended reform but are of the view that modifications to the renewal process are warranted to make it more accessible. The existing framework is complex and expensive, and the court order process is considered unpredictable and high risk by relevant stakeholders. The case law statistics for renewal since implementation of the Development Act reflect this (ie only 1 x court order which was entirely uncontested). Please refer to our submission response at question 8 below.

We strongly believe that a simplified and streamlined process for strata renewal would be a more successful way to fulfil the objective at s3(c) of the Development Act. We have proposed alternate frameworks/mechanisms for streamlining this process in our response at question 8 below.

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

Yes, refer to our response in question 1 above regarding proposed expansion of s3(c) of the Development Act to contemplate an objective focused on urban growth and renewal particularly in relation to ageing or dilapidated schemes.

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

A simplified and streamlined process for strata renewal as contemplated in our response to question 8 below.

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

Whilst the intention and strategic direction of the strata renewal reform is sound, it is our view that the key steps and safeguards for strata renewal are too costly, are unnecessarily complex and in many cases are unworkable. We are of the view that significant reform is required to improve the strata renewal process in order to achieve the Government's long-term objectives for urban growth and renewal in a manner that is fair and has regard to democratic consensus. Please refer to our specific observations below and our proposals for an alternate (simplified) regime in question 8 below.

5.1 Land and Environment Court review

In our experience the court order process is considered by most schemes, lot owners and purchasers/developers to be uncertain, risky, costly and complex. It is a significant commercial deterrent and is the most expensive and unpredictable aspect of the process. We submit that the rigid framework (and just the prospect of requiring a court order as a default position) is the primary cause for renewals that do not proceed. In this respect, we are of the view that the court order process introduced for renewal is proving to have the same draw backs that were experienced with

the introduction of the court order process under Part 9 Division 3 of the Development Act and which led to the introduction of the more pragmatic and streamlined Registrar-General application (Part 9 Division 4).

We refer to the below extract from the Strata & Community Title Law Reform Discussion Paper, NSW Fair Trading, September 15, 2012 confirming applicable statistics:

"According to LPI records, 826 schemes have been terminated since the strata legislation began, which is a small percentage compared to the 71,000 strata schemes in NSW.

Almost all of these terminations have been made following an application to the Registrar-General unanimously signed by the lot owners, with only 5 schemes being terminated by Supreme Court orders."

Whilst we agree that an appropriate court appeal process should exist in certain to ensure a fair process for dissenting owners in certain circumstances, it is our view that this should only be triggered in particular circumstances (ie it should not be a default position) and that alternate methods of dispute resolution should be introduced depending on the matter at hand (eg expert determination for valuation disputes, Tribunal order for unit entitlement variations etc) to simplify and streamline the process and make it both accessible and fair.

Further, we are of the view that compliance with process (in the absence of a dispute) could be dealt with outside of the Court process (eg via the Registrar-General in a "tick a box" fashion – similar to the process in Part 9 Division 4 but subject to appeal entitlements – see question 8 below). We note that the only decision in this space (*Application by the Owners – Strata Plan No 61299* [2019] NSWLEC 111) related to a strata renewal that was not challenged. Despite their being a consensus amongst the applicants and there being no dissenting owners, the Court was still obliged to carry out a comprehensive review of the documentation to confirm compliance with the requisite process per the requirements of the Development Act. We understand that the Court relied on statutory declarations, minutes of meetings etc. It is our view that the additional expense associated with a Court review in circumstances where compliance with process was not contested seems unnecessary.

It is our view that a parallel (and purely administrative) compliance validation process would reserve the use of the Court process for contentious cases. It would also prevent proponents who have not validly complied with the requirements in the regulations from advancing to the Court and needlessly incurring costs for lot owners and other interested parties in the process, as they will be notified of their non-compliance at an earlier opportunity.

It is also unclear to us why the Land and Environment Court has been selected as the presiding court for strata renewals? We note that strata disputes are not typically the domain of the Land and Environment Court.

Whilst we understand and appreciate the rationale for introduce the Court order process as a means of safeguarding the interests of more vulnerable lot owners, it is our experience that it is not generally these owners seeking to rely on the court order process. In most instances the more vulnerable groups (eg elderly or lower economic means) are generally pushing for renewals which will deliver a significant market value uplift (eg generally 2 to 3 x existing market value). The persons relying on the safeguards in the legislation are in our experience looking to exploit the system and seek a "hold-out" value by using the leverage of a difficult court order process as leverage or are looking to safeguard an alternative developer interest (ie by retaining a blocking interest). Accordingly, whilst we agree that vulnerable groups should be protected the practical implementation of the legislation over the past 5 years demonstrates that the protections are not necessarily working in the manner intended.

Please refer to our suggestions in question 8 below.

5.2 Lapsing of proposal

We understand that the lapsing concept is intended to protect an owners corporation from time and expense of dealing with an over-bearing or persistent proponent (eg so that it is not obliged to keep considering a proposal that has legitimately lapsed). However, we are of the view that this concept

should be revisited and its practical application taken into consideration. We note that most schemes are quite concerned about their renewal plan or proposal being lapsed "accidentally" simply because a timeframe is missed, or a compliance requirement is not strictly observed.

For example, most schemes are not in a position to progress a strata renewal under the current regime within the 12-month timeframe contemplated in the legislation. This means that they are required to extend the operation of the strata renewal committee on an annual basis which creates a cost and administrative burden on the scheme, and also exposes the scheme to risk (ie if extension of committee operation is overlooked or the deadline is missed). It is our view that if the lapsing concept is genuinely intended to protect the owners corporation from cost/expense or unwanted harassment from eager developers etc then it should operate on a discretionary basis (eg if the committee operation is not renewed beyond the initial 12 months, then the renewal can be lapsed by an ordinary resolution at any time).

We are of the view that the lapsing process should not occur by default – but should be something that an owners corporation is entitled to do in certain circumstances by way of resolution.

5.3 Unnecessary steps

We are of the view that there are certain steps/formalities in the process which are not necessary and just introduce extra complexity. For example:

(a) the requirement for older schemes to "opt in" to the process by simple majority does not seem to serve any real purpose given that a strata renewal proposal cannot be progressed without passing an ordinary resolution – so if the scheme did not want to "opt in" it would simply not pass a resolution to consider a proposal. It is our view that this is a redundant requirement and the legislation should simply just deem Part 10 to apply to all schemes.

(b) certain mandatory timeframes are unworkable in the context of competing timeframes in the SSMA – refer to our comments in question 7 below.

(c) the process does not contemplate instigation of a strata renewal by an Owners Corporation and there are also practical issues where the proponent is an existing owner that is a key stakeholder (ie owns a majority stake already and so only needs to acquire a few lots which mean it is impractical to propose a purchase price for the whole scheme). This creates unnecessary complexity in compliance given that many strata renewals are self-generated by schemes or key stakeholders. Please see our further comments on this issue in question 8 below.

5.4 Safeguards facilitating blocking Interests or rights

In practice we have seen developers/stakeholders seeking out "blocking stakes" in strata schemes (ie 25% + unit entitlements in occupational lots or 25 lots) with the express intention of stopping urban renewal and revitalisation by relying on safeguard thresholds within the legislation. This is obviously contrary to Government's expressed intention for the legislative reform and should in our view be addressed by introducing some kind of mechanism to challenge or prevent behaviour which is contrary to the object of the Development Act. It is for this reason that we strongly recommend varying the objects of the Act in s3(c).

The blocking stakes are acquired for various reasons including:

(a) preservation of existing views by preventing renewal of a neighbouring scheme despite the cost/impact for scheme owners of occupying a dilapidated building without renewal prospects

(b) preservation of a development entitlement in the future

(c) stifling competition (ie preventing a competitor from pursuing a renewal)

(d) driving up the price of a minority stake – this of course simply pushes the renewal process back to where it was prior to statutory reform (eg minority stakeholder holding out to extract an exorbitant price).

Further, we note that s157 can also be used as a means of blocking a genuine strata renewal proposal if key decisions makers in a strata committee are key stakeholders in the scheme or are

personally motivated to prevent renewal, or to put forward an alternative (or affiliated) strata renewal. Whilst we recognise that s157 is intended to assist with weeding out good renewal proposals and managing expenses associated with general meetings (ie not calling a meeting unless a sound offer is received), there is a risk that this safeguard could be used to give strength to a dissenting minority which is not the intention of the legislation.

5.5 Unit Entitlement Revisions

We note that lot owners are eager to revisit their unit entitlements in the wake of a strata renewal in order to secure a premium price for their lot. Whilst we recognise that the intent of the legislation is to allow for unit entitlement adjustment as a means of addressing any imbalance in purchase price apportionment on a unit entitlement basis where unit entitlements may not reflect market values of lots within a scheme. However, we note that the mechanism is not always used as intended and we would suggest that there are better ways to deal with price apportionment (ie other than linking it to unit entitlements).

The issues we see with unit entitlement adjustment to recoup a better price is that lower unit entitlements usually have the obvious benefit of a lower contribution to annual levies within a scheme. Accordingly, it is often more favourable for a lot owner to have a lower unit entitlement allocation as it leads to a proportionate reduction in contributions. Accordingly, we are seeing lot owners enjoy the benefits of lower contributions for many years (in some cases many decades), but seek to re-allocate unit entitlements when strata renewal comes into play. In short, they want to "have their cake and eat it too". Whilst it may technically be appropriate to revise unit entitlements in these circumstances it does not seem fair that a lot owner will enjoy the benefits of lower levies for decades and then revisit the matter just prior to a collective sale in order to enjoy the benefit of a higher entitlement for the purposes of purchase price apportionment.

We would suggest that the Government addresses this in the revised legislation by simply linking purchase price apportionment to a simpler non-negotiable framework which is distinct from unit entitlements (eg current valuation linked to net lettable area etc).

Alternatively, Government may consider placing a restriction on the opportunity to revisit unit entitlements having regard to the period of ownership, so that long-term owners cannot enjoy the benefits of low levies as well as higher purchaser price apportionment. For example there could be a restriction to prohibit lot owners from seeking to re-allocate unit entitlements if they have owned their lot or more than 2 years, on the basis that it would be unfair to other owners to allow a lot owner to benefit from adjustment of UEs in circumstances where the same owner has benefited from lower levies for more than 2 years.

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?

In our view, the information required to be included in the strata renewal plan is sufficient (and sufficiently flexible).

The structure of each renewal can be quite varied, so we support a framework which is not overly prescriptive.

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

There are several restrictive (and in some cases unworkable) timeframes in the Development Act which in our view hinder the smooth progression of the strata renewal process.

For instance, section 158(1) stipulates that if a strata committee decides that a strata renewal proposal warrants further consideration by the owners corporation, it must, as soon as practicable (but no later than 30 days) after making the decision, convene a general meeting of the owners corporation to further consider the proposal. However, section 19 of the *Strata Schemes Management Act 2015* (NSW) specifies that the secretary of the owners corporations must not convene a general meeting of the owners corporation later than 14 days after receiving a qualified request. Similarly, section 158(4) of the SSDA specifies that each owner must also be provided with

at least 14 days' notice before the meeting. In our experience it is impractical and difficult to ensure that these competing statutory timeframes are met. We note that strata managers need to be briefed in advance of receiving the qualified request so that they can immediately issue a compliant s158 notice – this adds to cost and makes strict compliance complex. Massons acknowledges the necessity for time specific parameters to promote efficiency but queries whether these timeframes may be extended or adjusted to ensure owners corporations and strata committees are not unnecessarily hindered by impractical deadlines.

Similarly, the requirement under section 174(1) that the Notice of an owner's decision to support the strata renewal plan must be submitted within 60 days of receiving a copy of the strata renewal plan is too short. This timeframe should be extended to allow this provision to be utilised more by owners who require additional time to consider the plan. The existing framework requires owners to take an additional practical step to hold an informal pre-meeting to pre-agree documentation and responses ahead of the formal meeting so that timeframes will not trigger automatic lapsing of the plan – this is inefficient and costly. We do not believe that this will

It is also our submission that section 175 should be removed as it encourages poor behaviour, and concerns of withdrawal may be eliminated if owners are simply given a longer period to consider the plan before submitting a Notice.

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

Yes. Whilst we are an avid supporter of the renewal concept and intention, we believe that the knowledge gained through 5 years of practical implementation should be applied towards streamlining and improving the process to better meet the objectives of Government and the Community (ie urban renewal within a fair democratic framework).

Specific suggestions are summarised below.

(a) **Marketing for a strata renewal**

As a practical matter, any strata renewal process which is instigated by the owners corporation (or at the suggestion of an agent) will involve a preliminary marketing period or expression of interest campaign. Whilst it is possible to manage this aspect of the process via specific provisions within a strata renewal proposal and heavily conditioned agency agreements, it is our view that the renewal process in the in the legislation should expressly anticipate and accommodate this aspect of the process so that implementation is cheaper and easier for strata schemes.

(b) **Owners Corporation as proponent**

We suggest that the Development Act is amended to specifically contemplate a scenario where the renewal is instigated by an owners corporation. We note that this is very common and workarounds within the current statutory framework are not ideal. For example, we note that s156(1) provides that a written proposal must be given by a person to the owners corporation (ie it is not clear that a proposal can be given by the owners corporation to itself by itself). In order to avoid a potential compliance risk or later challenge, applications are presently being made in the name of individual lot owners (rather than the owners corporation) so that compliance with s156(1) will not become an issue.

(c) Significant stakeholder – valuation and compliance issues

The requirements to obtain and include valuations for individual lots and the scheme as a whole is problematic when an applicant already holds a significant interest (eg purchase price and valuations should be in respect of the balance of the lots in the scheme). In order to ensure strict compliance with the legislation (which is of course untested) a conservative approach would require a proponent to propose a notional "whole of site" purchase price and apportionment mechanism which simply serves to further complicate an already complex process. For example, an owner that holds 80% of a scheme is still required to specify the purchase price for the whole scheme, when really it should be a requirement to specify the price for the scheme or alternatively any lots not already owned or controlled by the proponent.

(d) **Managing conflicts**

We would like to see more clarification regarding how conflict issues should be addressed/managed where the purchaser is also the majority owner of the scheme. If an owner holds an obvious and disclosed majority interest in the scheme or if they are both a lot owner and the proponent/purchaser then we are of the view they should be entitled to actively pursue and drive the renewal process provided they do so within the framework of the legislation. It should be clear in the legislation that this is permitted and will not trigger any bad faith/relationship issues provided that other lot owners are given an opportunity join the committee and partake in decision making, independent advice and valuations are obtained etc. It is our view that a renewal driven by an interested party is far more likely to be successful and will be undertaken in a far more cost-effective manner.

(e) Manage exploitation of blocking stakes

We would welcome amendments to the legislation to address the blocking stake issues raised in question 5.4 above.

(f) Strata Renewal Committee – workable size

The strata renewal committee is currently capped at 8 members (excluding the chairperson) under section 160(3) of the Development Act. In our experience a committee of this size is not generally warranted and will slow down decision making. All decisions of the committee are ultimately subject to owners corporation approval and so it is our view that the cap should be lowered to assist schemes with creating smaller and more efficient committees that still represent an appropriate cross-section of lot owners. We would suggest a cap of 5 plus a chairperson would be more appropriate.

(g) Simplify replacement of committee members

We have found the re-election process for filling a vacancy in the committee to be unnecessarily cumbersome – refer to s163(2) of the Development Act. As drafted, it is necessary for an owners corporation to call a general meeting to fill a vacancy – this is time consuming and expensive. It is our view that a simpler replacement process should be considered (eg when electing members initially the scheme could elect 2 x additional substitute members that can replace a vacated office if required).

(h) Simplify court order process (appeal rights rather than default position)

As per our comments in question 5.1, we are of the view that the renewal process should be streamlined by significantly revisiting the concept of court order approval in Division 7 of Part 10 (Court Orders to give effect to strata renewal plans), particularly in circumstances where the scheme does not have unanimous consent but there is no active dissent (as was the case in *Application by the Owners – Strata Plan No 61299* [2019] NSWLEC) . Stakeholders in the process are more likely to be incentivised to complete the process where the complexities, delay and cost of a Court order process can be minimised (or ideally avoided).

(i) Pre-approved forms – simplify compliance process

It is our view that the current regime poses significant risks related to non-compliance/good faith/procedure. We query whether a streamlined process involving pre-approved forms for each stage of the process would mitigate this risk and give comfort/certainty to lot owns and proponents/purchases. For example, standardised forms of statutory declaration for a proponent and/or strata manager/advisor to complete in respect of certain stages of the process (eg meeting/notice compliance etc). If forms are standardised and completed/served correctly, then cross-checking compliance could be dealt with as an administrative matter rather than the Court (in the absence of any challenge on the basis of procedural non-compliance). We submit that revisiting the compliance aspect of the process would be helpful in reducing legal costs and litigation risk with a view to making the renewal process more attractive to stakeholders. We query whether this aspect of the process could be administered by the Registrar-General but with a grace period for dissenting owners to contest compliance or raise concerns (eg 2 months) – this would operate in a manner that is similar to advertising and notification obligations for unanimous termination of a scheme per Part 9, Division 4 of the

Development Act. This would also help to narrow the scope of contentious issues to the key/material concerns for a dissenting owner (eg proper value, bad faith, non-compliance etc). Please also review to our comments in question 5.1 above.

We query whether the Registrar-General (or empowered Authority) could then be empowered to perfect a whole of scheme transfer (signed by the owners corporation) if an owners corporation can demonstrate:

(i) compliance with all procedural aspects of the legislation; or

(ii) satisfactory resolution of any objections (refer to alternate dispute resolution processes contemplated below) been complied with and not contested.

(j) Alternate dispute resolution

As contemplated in question 5.1, we would like to see a regime where renewal can be managed administratively in the absence of active dissent, and where there is active dissent, we are of the view that resolution of the dispute should be tailored depending on its context (ie the requirement for a Court order should not be the default position).

We would envisage a process which operates as follows:

(i) compliance with renewal process is demonstrated by way of paper trail and requisite information and notifications being provided to the Registrar-General

(ii) Owners and stakeholders are given a specified period to object (eg 2 months)

(iii) The basis for objection would determine the manner in which it will be resolved. For example, dissenting owners could be asked to specify the basis for objection by returning an approved form notice, with the following dispute resolution outcomes being made available:

(A) Valuation related objection - resolved by a binding expert determination

(B) Unit entitlement adjustment – resolved in the usual way via the NSW Civil and Administrative Tribunal

(C) Other grounds (eg bad faith; conflict of interest; fraud, procedural non-compliance) – it may be appropriate for there to be a preliminary requirement for the matter to first go to mediation before it can be taken to court.

It is our view that a simplified and targeted dispute resolution process would make the whole process less intimidating and more cost effective and expedient. It would also (in our view) allow dissenting owners to more easily (and cheaply) articulate and resolve the matters which form the basis for dissent.

(k) Valuations

In our view, the method for valuing lots under the Development Act should be made clarified. Currently, the Development Act provides that the purchase price offered for a lot under a strata renewal plan must be the “compensation value” of a lot at its highest and best use on the date of the strata renewal proposal. Whilst the meaning of “compensation value” is intended to exclude uplift associated with a collective sale, it is our experience that the wording “highest and best use” is causing confusion amongst dissenting lot owners and giving rise to unnecessary dispute. It is our view that the relevant provisions should be simplified to make it abundantly clear that the compensation value of a lot is calculated by reference to the lot “as is” and without reference to any potential increase in value associated with the strata renewal proposal. In our experience, there is significant potential for confusion amongst lot owners and valuers regarding valuation methodologies which will of course hinder the process and add to cost and delay.

(l) Developer/lot owner - cost contribution conflicts

Complex frameworks need to be established to manage developer contributions towards legal/consultancy costs and developers are at risk of there being a perceived conflict. Many

schemes simply will not progress a renewal without cost security, however developers are put at risk if they meet up-front costs as they cannot request security for performance without there being a perceived conflict which would put the whole renewal at risk. If the court order process was eliminated as we have proposed, then cost recovery arrangements could be far simpler and less conflicted (eg a developer could simply reimburse a scheme for the costs of completing the Registrar-General administrative stage only). If it were challenged, the developer could agree to join as a respondent and carry the bulk of legal costs at that point in time without there being a risk of conflict.

(m) Consultant conflicts

Consultants who act for a proponent in preparing an initial proposal are often best placed to then advise on the plan (eg where the proponent is also the majority stakeholder in the scheme). We suggest that the legislation should make it clear that the owners corporation (by majority resolution) can authorise this if the proponent ceases to instruct the consultant. There is nothing to prevent this in the legislation, but it requires further steps (eg conflict waiver letters) and it would be simpler if an owners corporation could pass a resolution in accordance with the legislation to engage the consultant on specified terms.

(n) Wholly owned scheme

The legislation does not provide for a separate scheme termination process for a wholly owned scheme. Whilst termination via an application to the Registrar-General is possible where there is unanimous consent it is our view that a simpler process should be available in circumstances where a scheme is wholly owned (eg similar to the Registrar-General application but without protections such as the requirement to advertise etc).

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?

Yes. We are of the view that the Development Act should be amended to ensure a clearer distinction is made between residential and commercial tenants, particularly with respect to calculating tenant compensation when a strata renewal plan is approved, and a strata scheme is subsequently terminated.

At present, there is some confusion amongst stakeholders as to the process for calculating commercial tenant compensation (and how this should be managed amongst lot owners) as distinct from residential tenants which is specifically contemplated in the guidance notes within the legislation.

We note that the long-term tenure of many commercial leasing arrangements (eg terms can exceed 5 or 10 years and contemplate options to renew) and the value of a commercial lease (and consequently compensation for early termination) is starkly different to a residential lease.

While the legislation implies that compensation for commercial tenants should be calculated differently and that court orders may be appropriate in this respect, it fails to adequately outline how that calculation should be determined. Further, it is our understanding that any compensation payable to a commercial tenant would be the responsibility of the lot owner and should arguably be factored into the compensation value for the relevant lot. However, we query whether this is an appropriate or sufficient?

We query whether it would be simpler (and less contentious) to set compensation for early termination of a commercial lease at a fixed amount (eg equivalent of 12 months' rent) in the absence of an appropriate break clause. This would encourage landlords and tenants to specifically deal with the matter in leasing documentation or risk an implied compensation arrangement.

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

No. We do not consider that more involvement is necessary or required.

Implementing changes that increase a tenant's involvement in the renewal process would only create additional obstacles for other stakeholders involved in the strata renewal process.

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

Yes. Please refer to our answer for question 9.

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?

Please refer to our answer for question 9.

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

In our experience, the strata renewal process has been effective in encouraging people to progress/start a renewal process as a means of circumventing a minority hold out and reaching a unanimous position on renewal. However, the fact that the current regime is untested and complex makes the renewal process slower and more cumbersome than it should be, and means that renewals are prolonged and expensive when they involve dissenting owners who are misinformed about their rights and entitlements under the regime. This is unfair and burdensome for the majority and contrary to the objectives of the legislation (ie to facilitate urban growth and enhance democratic decision making in strata schemes).

As explored in our responses to other questions (particularly questions 5 and 8), we would welcome a streamlined version of the existing renewal regime to make it more easily accessible to stakeholders and more cost effective and expedient for all involved. It is our view that the process can be streamlined without compromising protection for the minority.

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

We strongly agree that the introduction of the strata renewal regime is encouraging parties to settle in a positive manner in order to avoid protracted disputes. It has introduced a means of stifling minority hold outs and forcing an outcome. However, the process is expensive and the regime is complex and is often stifled or abandoned for these reasons. Accordingly, it is our view that it would benefit the strata community and the community at large to refine the existing regime to make it more streamlined and accessible as proposed in this submission.

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

We are primarily seeing options and conditional contracts as the primary vehicles for achieving collective sales. However, the structure is generally dependent on the proponent, scheme stakeholders and timing requirements. For example, a majority stakeholder may simply propose an unconditional sale contract to acquire a remaining lot.

16. Should the current requirement to act in good faith and to disclose conflicts of interest extend 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?

Yes to both questions. The requirement to act in good faith and disclose conflicts of interest must extend to dissenting owners. The unsuccessful strata renewal at Macquarie Park (as mentioned in the discussion paper) illustrates the need for these requirements to extend to dissenting owners. All persons involved in the process should have an obligation to act in good faith and disclose conflicts so as to avoid disruption to the process, drawn out legal proceedings and unnecessary cost.

The court must consider where a dissenting owner is not acting in good faith or has failed to disclose conflicts because it would be unjust to the proponent or applicant if the dissenting owner's objection was not subject to checks and balances which mirror those being applied to a proponent/applicant.

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?**

Yes. Section 188 should provide that the Court consider if the dissenting owner has objected on unmeritorious grounds when making a cost order, with the owner bearing all of their costs if found to have made a vexatious objection.

As mentioned in our response to question 8 above, we would propose a streamlined dissent process with alternate dispute resolution processes so that Court resources are used wisely and party expenses are minimised. For example, a dissenting owner objecting on the grounds that the property has been undervalued should have their matter referred to an expert valuer.

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))?

Yes to both questions. For similar reasons given in question 16, we submit that it is appropriate for parties to the proceedings to disclose further interests so that the objectives of the Development Act can be achieved in a transparent and fair way. If such interests are not disclosed by these parties, then there may be a conflict of interest that could undermine this stage of the process.

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 it should be possible to resubmit a lapsed strata renewal plan within the 12 month period?

It is Masson's view that the lapsing provisions under section 190 of the SSDA should be amended to give effect to the legislation's drafted intention. Please also refer to our response in question 5.2 which also addresses this issue and the regular extension of the operation of strata renewal committees.

As they currently operate, the provisions create a forced lapsing risk that unnecessarily hinders the ability of an owners corporation to consider a proposal when it may otherwise welcome the opportunity to do so.

While Massons recognises that an owners corporation should not be obligated to consider a proposal in certain circumstances, we query whether the Development Act could be amended to ensure that if the majority of lot owners in an owners corporation decide to proceed with a proposal (despite it being capable of being lapsed for whatever reason) then they may do so with the majority consent.

Questions 20 to 40 (inclusive) of Discussion Paper

We agree with the responses and submissions of the Real Estate Institute of New South Wales (**REI NSW**) in relation to questions 20 to 40 (inclusive) of the Discussion Paper. In addition we make the following submission:

20. Termination of strata schemes by Registrar-General – Part 9, Division 4

This part of the legislation is not considered in the Discussion Paper, however it is submitted that some revision to modernise this part of the legislation is warranted. In particular, it is noted that the advertising requirements in s142(2) of the SSDA (eg publication in daily newspapers) do not serve the intended purpose of alerting the community given the manner in which news media has changed over recent years. We suggest that this is reconsidered and alternative (more relevant) notification obligations are observed.

Questions 41 to 140 (inclusive) – Strata Schemes Management Act 2015 (NSW)

We agree with the responses and submissions of the REI NSW in relation to questions 41 to 140 (inclusive) of the Discussion Paper. In particular, we strongly advocate for the inclusion of a process to facilitate disability access and compliance in older schemes.

Conclusion

The strata renewal regime has been a welcome reform to strata legislation within NSW. However, we are of the view that the existing regime can be streamlined and improved to better execute and implement Government's objectives.

This submission reflects:

(a) insights from practical implementation of the regime across various schemes in our day to day practice; and

(b) feedback received whilst presenting on strata renewal to various industry stakeholders (eg legal industry, real estate agents, valuers, developers, strata schemes)

Massons appreciates the opportunity to provide this submission and would welcome the chance to discuss it further with the Government.

Yours sincerely

Leisha de Aboitiz
Partner
T: +61 2 8923 0903 M: +61 414 107 834
leisha.deaboitiz@massons.com