Report on the statutory review of the *Strata Schemes Development Act 2015* and *Strata Schemes Management Act 2015*

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Glossary

The following is a list of terms and abbreviations used in this document.

Term	Description
ACSL	Australian College of Strata Lawyers
AGM	Annual general meeting
ASIC	Australian Securities and Investments Commission
By-law	A set of rules that owners, tenants and, in some cases, visitors must follow. By-laws cover the behaviour of residents and the use of common property.
CIE	Centre for International Economics
Cooper	*Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250
CPD	Continuing Professional Development
DCS	NSW Department of Customer Service
Discussion Paper	Discussion Paper released in November 2020 for public consultation on the statutory review of the NSW strata schemes laws.
DPIE	NSW Department of Planning, Industry and the Environment
EWON	Energy and Water Ombudsman
Law Society	The Law Society of New South Wales
LRS	NSW Land Registry Services
NABERS rating	National Australian Built Environment Rating System- a rating system for sustainability measurement across building sectors like apartments, shopping centres, offices.
NSW Strata Portal	The online register that collects information from strata schemes across NSW.
OBC	The Office of the NSW Building Commissioner sits within the Department of Customer Service
OC	Occupation Certificate – authorises the occupation and use of a new building or building section
OCN	Owners Corporation Network
ORG	Office of the Registrar General
REINSW	Real Estate Institute of New South Wales
Pets Report	Report under section 276A of the Management Act, *Review of the keeping of animals in strata schemes in NSW*
PSA Act	*Property and Stock Agents Act 2002*
PICA Group	Prudential Investment Company of Australia (PICA)
RAB Act	*Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*
Roden	*Roden v The Owners – Strata Plan No. 55773* [2021] NSWCATCD 61
SCA	Strata Community Association
The 2015 reforms	The NSW Government review of strata laws that regulate strata schemes and commencement of the 2015 Acts.
The Development Act	*Strata Schemes Development Act 2015*
The Development Regulation	*Strata Schemes Development Regulation 2016*
The Management Act	*Strata Schemes Management Act 2015*
The Management Regulation	*Strata Schemes Management Regulation 2016*
Tribunal	The NSW Civil and Administrative Tribunal
UDIA	Urban Development Institute of Australia
UGA	*Uncollected Goods Act 1995*
Vickery	The NSW Court of Appeal's decision in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284

1. Executive Summary

The *Strata Schemes Development Act 2015* (the **Development Act**) and the *Strata Schemes Management Act 2015* (the **Management Act**) jointly provide the regulatory framework for the creation, governance and termination of strata schemes established in NSW.

The Development Act is administered by the Minister for Customer Service and the Management Act is administered by the Minister for Better Regulation and Innovation. Section 204 of the Development Act, and section 276 of the Management Act, require the Ministers to review both Acts within five years of their commencement. This review examines whether the policy objectives of both Acts remain valid and whether their terms remain appropriate for securing those objectives.

Due to the integrated nature of these two Acts, the Department of Customer Service (**DCS**) has conducted their review jointly on behalf of both Ministers. A report on the outcome of the review is required to be tabled in both Houses of NSW Parliament by November 2021.

A Discussion Paper inviting feedback on the operation of the Acts was released on 7 December 2020 for public consultation. This was accompanied by three separate online surveys published on the NSW Government's Have Your Say website. Public consultation was open for a period of approximately four months, closing on 7 April 2021 and receiving a total of 222 written submissions and 2,329 responses to the surveys.

Overall, the review found that the objectives of both Acts remain valid and that the regulatory framework for strata schemes remains appropriate. However, feedback raised through the consultation demonstrated that refinement of some aspects of the laws was needed to more fully realise the policy objectives of the 2015 reforms.

Following careful consideration and analysis of the identified issues, the review makes recommendations for amendments that particularly aim to:

- improve governance through enhanced accountability and transparency,
- better prevent, identify and rectify building defects,
- support competition and minimise costs for consumers, and
- ensure flexible management and administrative arrangements.

The full set of recommendations are listed in Chapter 2 of this report.

2. Recommendations

2.1 Recommendations for the *Strata Schemes Development Act 2015*

Recommendation 1	Retain the objects in section 3 of the Development Act without change.
Recommendation 2	Expand the matters that must be addressed in a strata management statement to include meeting procedures of the building management committee and the keeping of records.
Recommendation 3	Amend section 105(1)(b) of the Development Act so that the strata management statement binds occupiers of a lot, as well as lessees.
Recommendation 4	Clarify the matters that must be considered as part of the five-year review of the allocation of costs within a strata management statement.
Recommendation 5	Specify how amendments of the strata management statement are to be made if a review recommends a change to the shared facilities or their allocation.
Recommendation 6	Clarify that the building management committee is an agent for the lot owners and has decision-making authority to enter into contracts and legal proceedings on behalf of its members.
Recommendation 7	Provide a mechanism to allow existing contracts of the building management committee to be novated to incoming committee members, provided the contracts have been included in the committee's register of contracts.
Recommendation 8	Prescribe minimum standard requirements for record keeping for adoption as terms of the strata management statement.
Recommendation 9	Require the building management committee to maintain a register of all contracts entered into.
Recommendation 10	An owners corporation must appoint a person, being a member of the strata committee, as its representative on the building management committee.
Recommendation 11	At meetings of the building management committee, representatives of an owners corporation must make decisions as directed by the owners corporation, determined by either the strata committee or the owners corporation in general meeting.
Recommendation 12	Introduce a quorum mechanism, similar to strata, to prevent delay or avoidance of decisions by one member of the building management committee not attending a building management committee meeting.
Recommendation 13	Require that where voting rights are determined otherwise than as implied by Schedule 4 of the Development Act, that the method of allocation of voting rights is 'fair'.
Recommendation 14	For managing agents appointed by building management committees, limit the term of appointment to five years.
Recommendation 15	Clarify the powers of the Supreme Court to hear disputes relating to strata management statements and to direct their amendment or variation.
Recommendation 16	Retain existing steps in the strata renewal process without change while continuing to monitor the application of these provisions.

Recommendation 17	DCS will consult with industry stakeholders on ways to incorporate flexibility in current restrictive timeframes in the existing strata renewal steps.
Recommendation 18	Retain current information required to be disclosed in a strata renewal plan without change.
Recommendation 19	DCS will monitor the application of these provisions as more schemes adopt the process, to consider whether the information contained in a strata renewal plan is sufficient or too onerous.
Recommendation 20	Extend the period of operation of the strata renewal committee from twelve months to two years.
Recommendation 21	Provide additional flexibility to timeframes in the strata renewal process where consequences of non-compliance are minor.
Recommendation 22	Permit the Land and Environment Court to extend some time limits in the strata renewal process in some cases where the court considers it reasonable, by ordering that a strata renewal plan will not lapse.
Recommendation 23	Extend existing requirements in the strata renewal process for supporting owners and renewal committee members to act in good faith and disclose conflicts of interests to *all* owners, including dissenting owners.
Recommendation 24	Explore the feasibility of imposing continuous disclosure obligations in the strata renewal process in consultation with industry stakeholders.
Recommendation 25	Clarify that the Land and Environment Court must consider potential conflicts of interest in relation an objection to a strata renewal plan (as well as an application) before making an order approving the plan.
Recommendation 26	Clarify the power of the Land and Environment Court to award costs against the dissenting owner in strata renewal proceedings.
Recommendation 27	Clarify that the Land and Environment Court may, at its discretion, award costs on an ordinary or indemnity basis in strata renewal proceedings.
Recommendation 28	Provide more flexibility in lapsing provisions to allow correction of a minor procedural error, rather than this having the effect of lapsing a strata renewal plan (which is then unable to be resubmitted for 12 months).
Recommendation 29	No change to provisions in relation to treatment of leases or to distinguish between commercial and residential owners in the strata renewal process.
Recommendation 30	Retain without change the requirement for a qualified valuer's certificate to accompany a proposed schedule of unit entitlement in the approved form, certifying that the unit entitlements of the relevant lots are apportioned as required under Schedule 2 of the Development Act.
Recommendation 31	Allow an exception to the requirement to value all lots for a strata plan of subdivision involving common property, where the valuer considers the subdivision will result in changes to common property that are minor and would not impact the proportionate unit entitlement.
Recommendation 32	Retain without change the obligation for the owners corporation to pass a special resolution to approve a change in unit entitlements where common property is involved.

Recommendation 33	Retain without change, the requirement for owners corporations to lodge by-laws with NSW Land Registry Services within six months of the passing of a special resolution adopting those by-laws.
Recommendation 34	The Management Act be amended to provide that a special resolution is required for the consolidation of by-laws, even if no by-laws are being added or amended.
Recommendation 35	Processes around by-law consolidation should be improved and modernised, particularly to enable digital submission and registration.
Recommendation 36	Retain without change, the Registrar General's power to permit a change in the by-laws for a strata scheme to be lodged for registration separately and not in a consolidated version.
Recommendation 37	Omit redundant public notice requirements in the Development Act and, if still necessary, replace newspaper notice rules with an obligation to give notice in an electronic medium such as an online newspaper or on a public website.

2.2 Recommendations for the *Strata Schemes Management Act 2015*

Recommendation 38	Retain the objects in section 3 of the Management Act without change.
Recommendation 39	Establish, in partnership with key stakeholders, a targeted program of support and education for strata residents in strata to build capability in and understanding of strata scheme operation and governance.
Recommendation 40	Codify additional duties and obligations for strata committee members in the Management Act.
Recommendation 41	Lower the threshold to remove a committee member from a special resolution to an ordinary resolution.
Recommendation 42	Introduce provisions for strata committee members to be prohibited from serving on the committee for a specified period of time after being removed.
Recommendation 43	Provide better information to the strata sector about decisions that can be delegated to the strata committee versus those that require a resolution by the owners corporation.
Recommendation 44	Define the office bearer roles, especially the Chairperson, more clearly and comprehensively in the Management Act.
Recommendation 45	Increase maximum size of committees for community land schemes from 9 to 15 members.
Recommendation 46	Explicitly provide for the appointment of sub-committees under both strata and community lands legislation.
Recommendation 47	Move meeting procedures from the Management Act to the Strata Schemes Management Regulation 2016.
Recommendation 48	As part of transferring meeting procedure provisions to the Strata Schemes Management Regulation 2016, review and refine the current requirements to improve clarity.
Recommendation 49	Extend the minimum notice period for annual general meetings (AGMs) from 7 to 14 days.

Recommendation 50	DCS should monitor the impacts of the changes to tenancy notices proposed in recommendations 91-93 prior to any further consideration of tenancy participation provisions.
Recommendation 51	Refine the provisions in relation to proxies to include powers of attorney and company nominees as types of proxies subject to the same restrictions on the maximum number of votes a single person can hold.
Recommendation 52	Enable electronic attendance and voting at meetings of the owners corporation and meetings of the strata committee without the need to pass a resolution prior to their usage. This would not apply to pre-meeting voting.
Recommendation 53	Prescribe reasonable steps that must be taken to ensure lot owners are not disenfranchised by changes to the means of voting chosen by the owners corporation.
Recommendation 54	Permanently enable digital alternatives to the mandatory affixing of the common seal for the execution of documents, while not preventing the ongoing use of the hard copy common seal.
Recommendation 55	Establish, in consultation with the sector, a record-keeping system to enable verification of signatories' status as authorised officers when digital alternatives to the common seal are used.
Recommendation 56	Introduce exemptions for two-lot schemes that allow for: a) the issuing of a notice to comply with a by-law without a resolution by the owners corporation; and b) original owners to maintain their full unit entitlement and voting rights.
Recommendation 57	The Management Act should be amended to include a prohibition on unfair terms in standard form contracts offered to owners corporations, mirroring the principles set out in Part 2-3 of the ACL and aligned with its monetary limits.
Recommendation 58	Guidance on unfair contract terms should be provided for the strata sector.
Recommendation 59	Strata committees and managing agents should be required to undertake specific education on contractual arrangements for strata products and services.
Recommendation 60	The maximum penalty for failure to convene the first AGM within two months of the initial period ending should be substantially increased and aligned with failure to provide documents and records prior to the first AGM. A continuing offence for each day that the original owner remains in breach should also be considered for both offences.
Recommendation 61	Require and enable the mandatory electronic lodgement of first AGM documents, with implementation to involve further work with the sector to identity the most efficient, cost-effective and user-friendly system.
Recommendation 62	Extend the time in which the developer needs to provide all documents prior to the first AGM from 48 hours to instead align with the notice of the first AGM, which is 14 days.
Recommendation 63	DCS should work with the strata sector to explore the development of a plain English statement that provides essential summary information on the items being considered at the first AGM.

Recommendation 64	Revise section 50 of the Management Act to clarify that written notice regarding contract expiry must be provided in the period three to six months before expiry, and to ensure there is more clarity regarding the provisions relating to extensions of strata managing agent contracts.
Recommendation 65	The inclusion of additional mandatory or prohibited terms for strata management agency agreements should be considered as part of the remake of the Property and Stock Agents Regulation in 2022.
Recommendation 66	Introduce a new process that requires managing agents to report on material decisions to the strata committee.
Recommendation 67	Introduce a specific defence for managing agents against a claim for breach of duty where the agent was frustrated in carrying out its duty by the owners corporation.
Recommendation 68	As part of the broader drafting process, and the Property and Stock Agents Regulation remake, examine whether further statutory oversight of strata managing agent contract termination is needed.
Recommendation 69	The Fair Trading strata education and information campaign recommended by this review should prominently include all of the existing disclosure obligations that apply to strata managing agents and building managers as intermediaries. Consideration should be given to backing this campaign with a pro-active compliance program to monitor and enforce compliance with disclosure obligations.
Recommendation 70	DCS should continue working with the Property Services Expert Panel to identify any gaps in managing agent knowledge and develop appropriate mandatory CPD topics.
Recommendation 71	Provide NSW Fair Trading with standing under section 237(8) of the Management Act to apply to the Tribunal to seek the appointment of a compulsory managing agent.
Recommendation 72	As part of the remake of the Property and Stock Agents Regulation, consider extending the existing requirement that an agent cooperate with a new agent in relation to access to records and transfer of management functions to the situation where an agent's contract is terminated, and the owners corporation has decided to self-manage.
Recommendation 73	NSW Fair Trading to ensure that guidance on what expenses can be paid from the administrative and capital works fund is clear, and that the guidance clarifies that capital works expenses include expenses incidental to capital works including project management and supervision expenses.
Recommendation 74	Amend section 76(2) of the Management Act to clarify that, if the owners corporation considers that the amount transferred from the administrative to the capital works fund or vice versa needs to be repaid, the owners corporation has three months to decide on a contribution that will enable the amount to be repaid.
Recommendation 75	That the grace period to pay outstanding levies be reduced from one month to 14 days for special levies being raised for the purposes of carrying out urgent repairs which are necessary for health and safety reasons.
Recommendation 76	Further consideration be given to whether the fee charged in *Roden* necessitates an amendment to the Management Act.

Recommendation 77	For expenditure over $30,000 on any one item, an owners corporation be required to obtain at least two quotes from unrelated entities.
Recommendation 78	Amend section 103 of the Management Act to clarify that, while an owners corporation may choose to place limits on the costs of legal services that it approves, the approval may simply be an approval to obtain legal services that is not limited to a specific cost.
Recommendation 79	The existing threshold in the Management Act for unjust by-laws should be retained without adding 'unreasonable'.
Recommendation 80	New model by-laws should be added to the Regulation covering minor works authorities, renovations, electronic meetings and voting, short-term rental accommodation, and sustainability infrastructure.
Recommendation 81	Model by-laws should be updated to better reflect changes in the law, such as the model by-laws on the keeping of animals.
Recommendation 82	The savings provisions in Schedule 3 to the Management Act should be amended to clarify that although by-laws made under previous Acts can continue in force, they must also comply with the restrictions on by-laws in the current Management Act.
Recommendation 83	Amend the *Community Land Management Act 2021* to harmonise community land schemes with recent strata reforms to the keeping of animals.
Recommendation 84	Specify acceptable forms of evidence that an owners corporation can request to establish of an assistance animal's status, in compliance with the *Disability Discrimination Act* 1992 (Cth).
Recommendation 85	An additional restriction on by-laws should be introduced to section 139 of the Management Act that exempts assistance animal owners from the operation of by-laws to the extent that they would prevent the animal from performing its duty.
Recommendation 86	DCS continue to monitor the operation of the new laws governing pets in strata to determine whether further legislative change is necessary to prevent outcomes that are unjust and defeat the purpose of the reforms. This includes the restrictions on by-laws under section 137A of the Management Act and the circumstances of unreasonable interference prescribed in the Regulation.
Recommendation 87	Require all mandatory strata scheme records to be kept electronically, with an appropriate transition period. This would not be retrospective or prevent an owners corporation from also keeping hard copies.
Recommendation 88	NSW Fair Trading should provide clear guidance on the privacy obligations that can apply to owners corporations and how they apply in relation to access to records under the strata laws.
Recommendation 89	Revise Part 10 of the Management Act, in consultation with the strata sector, to potentially introduce limited exemptions to record access where there are significant privacy or legal concerns, accompanied by a mechanism to dispute the use of such exemptions.
Recommendation 90	Redraft and update the provisions in the Management Act relating to inspections of owners corporation records and documents to provide clarity about how and when remote access to electronic records is to occur, and any limitations or conditions that will apply to such access.

Recommendation 91 Extend the penalty for non-compliance with tenancy notice obligations and providing tenants with by-law information to real estate agents acting on behalf of a lot owner.

Recommendation 92 Enable tenants to provide their own notice to owners corporations, for example by showing proof of a rental bond lodged with NSW Fair Trading.

Recommendation 93 Develop further education material about tenancy related obligation under the Management Act.

Recommendation 94 Revise current provisions in the Management Act to ensure that serving of notice provisions by electronic means is clearly permitted where an email address has been provided for that purpose.

Recommendation 95 Revise sections 108 – 111 of the Management Act to:

a) provide better clarity over the meaning of certain terms, such as "reconfiguring walls" in section 111, and
b) re-classify certain works currently classified as "minor renovations" under section 110 to instead require a special resolution, and incorporate principles-based rules where possible, to better define the general character of minor, cosmetic and other renovations.

Recommendation 96 Amend section 110 of the Management Act to require committees, when delegated the authority to approve, to provide written reasons for refusal to lot owners seeking to undertake minor renovations.

Recommendation 97 If a committee does not provide written reasons for approval within a reasonable time frame, to be determined after further consultation, the committee will be taken to approve the minor renovations.

Recommendation 98 Section 108 of the Management Act should be amended so that a special resolution authorising changes to common property must specify responsibility for ongoing maintenance of that part of the common property.

Recommendation 99 The common property memorandum declared under the Regulation should be reviewed and updated, including in relation to energy meter boards, as part of the next remake of the Strata Schemes Management Regulation 2016 following amendments to the Management Act.

Recommendation 100 The common property memorandum should apply to all new residential schemes' by-laws by default, subject to any substantial objections raised in further targeted sector consultation.

Recommendation 101 Owners corporations be required to keep records of minor renovations approvals for a minimum of 10 years unless they form part of a registered by-law.

Recommendation 102 Repeal or amendment of a common property rights by-law should require consent of the lot owner for whose benefit the by-law was made. The lot owner's consent cannot be unreasonably withheld.

Recommendation 103 Amend the *Uncollected Goods Act 1995* to provide that uncollected goods includes goods left behind on a lot owner's property as well as common property. Owners corporations must seek authorisation from an affected lot owner before taking action to remove the goods.

Recommendation 104 Amend the Management Act to inset *RAB* Act-like powers to order rectification and enter into enforceable undertakings with owners corporations.

Recommendation 105 Introduce into section 106 of the Management Act an offence provision for an owners corporation's breach of its statutory duty to maintain and repair common property, with an appropriate penalty to be set following further consultation.

Recommendation 106 Amend section 106(6) of the Management Act to extend the two year limit on damages claims to six years.

Recommendation 107 Amend section 106(4) of the Management Act to insert preservation of the amenity of the common property, as well as its safety, as a condition for allowing owners corporations to defer compliance with their statutory duty to maintain and repair common property.

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

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.

Recommendation 110 Require that the first 10 year capital works fund plan must have regard to the initial maintenance schedule.

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

Recommendation 112 Future phases of Strata Hub reporting to consider inclusion of further detail on owners corporations' capital works fund plans and progress with their implementation.

Recommendation 113 Clarify the provisions on window safety devices in the Management Act to make it clear that it is an owners corporation responsibility to ensure that the devices are maintained.

Recommendation 114 Develop additional model by-laws for the installation of sustainability infrastructure.

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

Recommendation 116 DCS to work with DPIE on its regulatory impact assessment of mandatory NABERS ratings for strata schemes.

Recommendation 117 Consideration of sustainability within a strata scheme, including annual energy and water consumption and expenditure in common areas, be introduced as a required item for consideration at each AGM.

Recommendation 118 Require owners corporations to consider sustainability infrastructure and any associated upgrades needed (for example, meter boards) as part of their planning for capital works for their scheme.

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

Recommendation 120 Extend the application of section 132A of the Management Act to contracts for the supply of electricity through an embedded network.

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

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.

Recommendation 123 Update Fair Trading strata information to provide additional information on embedded networks in strata schemes.

Recommendation 124 Amend the definition of a building manager in the Management Act to refer to a person who is contracted by the owners corporation to manage the overall maintenance, repair, and/or safety and of a scheme's common property. Conduct further consultation during the drafting of the new definition to ensure that it aligns with industry practice and has the appropriate scope.

Recommendation 125 Impose on building managers the following conflict of interest measures that apply to strata managing agents:

a) requiring disclosure of whether any entity seeking to enter into contracts with the owners corporation is connected to the building manager within the meaning of section 7 of the Management Act,
b) requiring disclosure of any referral fees or other commissions or benefits that a building manager may receive in relation to any contract that the owners corporation is proposing to enter into, before the contract is entered into,
c) prohibiting acceptance of gifts or benefits valued at more than $60 except for commissions and training services approved by the owners corporation,
d) requiring reporting at each AGM of any commissions or training provided over the last 12 months and any expected over the next 12 months, and
e) imposing clear obligations to provide the owners corporation with disclosures about how any owners corporation money is paid out or received.

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

Recommendation 127 Redefine other contractors who undertake work assisting the owners corporation to manage the common property and:

a) consult further with the strata sector on what the appropriate limitations on contract terms for these contractors should be , and
b) continue to require that these contractors be appointed and terminated by a resolution of a general meeting of the owners corporation.

Recommendation 128 Building managers be subject to a statutory duty to act in the best interests of the owners corporation in carrying out their duties.

Recommendation 129 DCS consult with the strata and facilities management industries about ways to improve the expertise of building managers, especially in the management of defects, including the possibility of a licensing framework in the longer term.

Recommendation 130 Building managers be subject to explicit statutory duties to:

a) disclose to the owners corporation the qualifications and experience that make them suitable for the role,
b) familiarise themselves with fire safety and building safety obligations to which the owners corporation is subject,
c) take all reasonable steps to ensure that the owners corporation complies with these obligations, and
d) promptly bring to the attention of the owners corporation any maintenance, repair or safety problems with the building, and provide a proposal for how these could be best addressed.

Recommendation 131 The existing grounds for termination of building manager contracts in section 72 of the Management Act be retained, and a new ground be added, consistent with section 72(3)(d), that a building manager has failed to disclose commissions and training services or has failed to make these disclosures in good faith.

Recommendation 132 Fair Trading should develop additional guidance for owners corporations, in collaboration with key sector stakeholders such as the OCN, on improving their internal resolution of disputes.

Recommendation 133 Section 227 of the Management Act should remain unamended at this stage. The Tribunal Registrar should consider including guidance in the Tribunal's strata fact sheet on when and how the discretion to accept an application without prior mediation will be used.

Recommendation 134 Amend the Management Act to confirm that the Tribunal has the power to order payment of damages.

Recommendation 135 DCS should work with the Department of Communities and Justice to resolve details of the power to award damages, including:

a) whether any monetary limits should be imposed on Tribunal orders for damages or other monetary compensation
b) procedural issues such as rules of evidence and legal representation
c) whether any clarification of the Management Act is necessary to ensure that the Tribunal is able to order apportionment of costs.

Recommendation 136 Monitor the effectiveness of the new section 247A of the Management Act as a means of enforcing Tribunal orders.

Recommendation 137 Review and, where considered appropriate, increase the maximum penalty amounts in the Management Act and Regulation.

Recommendation 138 Review and where appropriate add penalty provisions for obligations where no penalty currently exists in the Management Act or Regulation.

Recommendation 139 Review and where appropriate add further penalty notice offences and increase penalty notice amounts in Schedule 5 of the Management Regulation.

3. Introduction

Strata schemes play an essential part in the fabric of NSW housing, as well as for other uses of the built environment including retail, commercial, industrial and retirement village settings. There are more than 83,000 strata schemes in NSW, and more than 1.1 million people live in strata across the state. Strata continues to grow, with more than 40% of all strata schemes established within the last 20 years[1] and around 1,000 new strata schemes established each year[2]. As more and more people choose to call NSW home and suitable land for traditional housing development remains limited, strata holds the key to supporting growing cities and urban development. It is currently expected that by 2040 over 50% of people in Greater Sydney alone will be living in strata.

Strata schemes are a popular form of property ownership and provide a communal alternative to Torrens Title housing. The strata scheme is set up to allow lot owners to operate as self-governing communities and collectively decide how best to manage the property that they share. Although the most common use of strata schemes is for residential housing, schemes can also be used for the ownership of commercial, retail, industrial or retirement village sub-divisions.

Strata schemes are a form of community living

A strata scheme is a building or collection of buildings that have been divided into lots, like an apartment building, a row of townhouses, or a business park. When a person buys a lot within the strata scheme, they own the inside of the lot and also share in the ownership of common property with other lot owners. This common property is usually areas of communal use or structural importance like gardens, external walls, roofs, driveways and stairwells.

Any person who owns a lot in a strata scheme automatically becomes a member of the owners corporation. The owners corporation is a legal entity made up of all the lot owners who are collectively responsible for taking care of the common property and making key decisions affecting the scheme. The owners corporation elects representatives on a strata committee and all owners contribute to its running by paying money (usually referred to as levies) for an administrative fund and a capital works fund. The capital works fund is then used for future long-term expenses, such as replacing guttering, repainting or repairing buildings.

The strata schemes laws allow the owners corporation to create the rules that people living or working within the scheme must follow. These rules are intended to facilitate harmony within the scheme, however there are limits to what type of rules the owners corporation can make. For example, owners corporations cannot adopt by-laws that are harsh, unconscionable or oppressive. The laws governing strata schemes are separated into two Acts; the Development Act and the Management Act.

3.1 The *Strata Schemes Development Act 2015* and its objects

The Development Act governs the creation, variation, and termination of strata schemes. It sets out requirements for registration of the strata plan, subdivision and consolidation of strata lots, part strata (mixed use) developments, staged development, dealings with lots and common property, certification requirements, apportionment of unit entitlements, and registration of by-laws.

The Development Act was introduced in 2015 to provide a modern and simplified legislative framework for development of lots and common property. It brought together the previously

[1] *Australasian Strata Insights 2020: Report & Infographics* (City Futures Research Centre, UNSW Sydney, June 2020).
[2] NSW Government data, Office of the Registrar General (July 2021).

separate *Strata Schemes (Freehold Development) Act 1973* and *Strata Schemes (Leasehold Development) Act 1986* into one streamlined Development Act.

The legislation was also intended to facilitate urban growth and enhance democratic decision making by introducing a new process for the collective sale and renewal of strata schemes.

Section 3 of the Development Act outlines its main objects, which are to provide for:

1. the subdivision of land, including buildings, into cubic spaces to create freehold and leasehold strata schemes;
2. dealings with lots and common property in strata schemes; and
3. the variation, termination, and renewal of strata schemes.

3.2 The *Strata Schemes Management Act 2015* and its objects

The Management Act sets out a comprehensive governance framework for the life of a strata scheme after it moves out of the development phase. The Management Act provides controls on the developer during the scheme's 'initial period' when the scheme is established. It provides for the rights and responsibilities of owners corporations and governs the ongoing management of the scheme throughout its life. This includes important protections to manage the relationship the owners corporation has with a strata managing agent and a building manager.

The Management Act was legislated in 2015 and commenced on 30 November 2016, replacing the *Strata Schemes Management Act 1996*. Changes in the 2015 Management Act were intended provide adequate safeguards to maintain the freedom of owners corporations to make necessary decisions, while still guarding against unfair practices.

Section 3 of the Management Act outlines its objects, which are to:

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

3.3 The Objectives of the review

The purpose of the statutory review is to ascertain whether the objects of both the Development Act and Management Act remain current, and whether both Acts are effective in achieving their objects.

The changes both Acts brought about in 2015 were also guided by 10 distinct objectives that, while not written into both Acts, are intended to create a higher standard of governance and development of strata schemes in NSW.

These objectives are:

1. empower communities to make their own decisions in a democratic way,
2. encourage participation in meetings and decision-making by residents and owners,
3. foster a culture of community and co-operation,
4. improve governance through greater transparency and accountability,
5. establish flexible administrative and management arrangements,

6. be future oriented with emphasis given to modern technology,
7. help ensure building defects are identified and rectified earlier,
8. provide protection from unfair practices,
9. provide a simple and effective means for resolving disputes, and
10. establish a fair process for the collective sale and renewal of strata schemes.

In addition to both Acts' objects, the review has also engaged with these 10 objectives. They are the benchmark upon which the Development Act and Management Act were measured and analysed. Consequently, it is an additional purpose of this review to uphold these objectives. The review has used them to evaluate the merits of both Acts and consider the changes that are needed to better achieve them.

3.4 Consultation

The Discussion Paper for the statutory review of the Management Act and Development Act was published on the NSW Government's Have Your Say website on 7 December 2020.
The Discussion Paper listed 140 questions about key areas of strata law, including strata committees and meetings, strata managing agents, building managers, by-laws, mixed use schemes, collective sale and renewal, maintenance and repair of common property, sustainability infrastructure and strata dispute resolution.

All stakeholders, including the public, were invited to provide feedback on these issues and any other matter relevant to improving the NSW strata laws. There were 222 written submissions to the review across industry and the public. Of these, 69 related solely to the Management Act and 59 related solely to the Development Act. However, the majority of submissions provided feedback relevant to both Acts.

The Have Your Say website also included three optional surveys. There were 660 responses to a survey on the Management Act and 68 respondents to a survey on the Development Act. An additional survey on the keeping of animals in strata opened in February 2021 for a six week period and received 1,601 responses. A quick-poll on whether strata schemes should be able to ban pets was also added to the Have Your Say website and attracted nearly 22,000 votes.[3]

The consultation period closed on 7 April 2021.

The survey on the keeping of animals was primarily used to inform a separate review specific to the keeping of animals, as required under section 276A of the Management Act. A report on the outcome of this review (the Pets Report) was tabled in NSW Parliament on 20 August 2021.

DCS also sought further input from key stakeholders after identifying several potential reform options. Stakeholders that were engaged for comment on preliminary recommendations include:

- Urban Development Institute of Australia (UDIA),
- Owners Corporation Network (OCN),
- Strata Community Association (NSW) (SCA),
- Property Council of Australia,
- Law Society of NSW,
- Australian College of Strata Lawyers (ACSL),

[3] Quick-poll: "Should strata schemes be allowed to ban pets?" – 21,314 responses; 82% said 'No'; 18% said 'Yes'.

- Tenants' Union of NSW,
- Facility Management Australia,
- Australian Property Institute,
- Association of Consulting Surveyors NSW Inc,
- Institution of Surveyors NSW, and
- NSW Land Registry Services.

DCS has considered all submissions, survey responses and other relevant feedback received from stakeholders during the statutory review. Additionally, the report has been informed by academic research, including reports on building insurance held by owners corporations[4] and on building defects[5]. The report has also been informed by broader media, academic and legal research, and relevant data including information on strata complaints, enquiries and mediation requests received by NSW Fair Trading.

3.5 Aligning community land laws with strata scheme laws

In February 2021 the NSW Parliament passed the new *Community Land Development Act 2021* and *Community Land Management Act 2021*. These Acts repeal the *Community Land Development Act 1989* and the *Community Land Management Act 1989,* and completely modernise and rewrite the community land laws to align with the strata schemes laws. The new Acts and accompanying Regulation will commence on 1 December 2021.

The original community land laws were modelled on the first strata schemes laws as both types of land title are fundamentally similar.

As the new community land laws bring it up to date with the existing strata scheme laws the reforms that are recommended in this report will also need to be applied to the community land laws to ensure that the laws do not fall out of alignment. In preparing the recommendations this review has carefully considered whether any changes proposed for the strata laws are also appropriate to be incorporated into the community land laws. The report accordingly outlines some recommendations that will benefit community lands but does not make a similar recommendation for adoption into strata. This recognises that while the laws are similar there are fundamental differences between the two regimes.

[4] Johnston, N., Lee, A., Mishra, S., Powell, K., Bowler- Smith, M and Zutshi, A. (2021) *A data-driven holistic understanding of strata insurance in Australia and New Zealand*. Deakin University.

[5] *Improving Consumer Confidence: Research Report on Serious Defects in Recently Completed Strata Buildings Across New South Wales* (September 2021, Construct NSW and Strata Community Association (NSW)).

4. Findings of the review – *Strata Schemes Development Act 2015*

4.1 Objects of the Act

A key purpose of this review is to consider whether the objects of the Development Act remain current, and whether the provisions are effective in achieving those objects.

Section 3 of the Development Act sets out the main objects, which are to provide for:

1. the subdivision of land, including buildings, into cubic spaces to create freehold and leasehold strata schemes;
2. dealings with lots and common property in strata schemes; and
3. the variation, termination and renewal of strata schemes.

These statements provide a broad outline of the legislative purpose, although the Development Act deals with other aspects of the development process including staged development, planning approvals and development by way of part-strata parcels in buildings.

The Discussion Paper asked stakeholders and the community to consider whether there are any additional items that should be incorporated into the objects, or whether any of the existing objects should be changed.

NSW Land Registry Services and PICA suggested that the objects could be expanded to include reference to staged strata developments and their purpose. It is not proposed to adopt this suggestion on the basis that these developments fall under the first object in the current legislation.

There was also a suggestion to include an object like section 1.3(g) in the *Environmental Planning and Assessment Act 1979* (**the EPAA**), to promote good design and amenity of the built environment.

However, this appears to be a matter more suitably located in the EPAA and in building codes. Developers and builders would be subject to these legislative and code requirements. Further, on 24 February 2021 the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* made amendments to the Management Act with respect to the installation of sustainability infrastructure.

Overall, stakeholder feedback suggests that these objects are still valid and appropriate. While there are some warranted improvements to provisions that are discussed below, this review reveals that is too early to make any significant changes to the strata schemes development legislation, including to the strata renewal provisions.

Recommendation

1. Retain the objects in section 3 of the Development Act without change.

4.2 Part-strata: mixed use developments

Strata schemes have traditionally been single use buildings accommodating either residential or commercial activities. Increasingly, strata buildings provide more vibrant environments that mix a variety of uses. Residential, retail and hospitality activities combine with utilities like libraries and child-care centres, all within the one development. This mix can provide convenience and vitality but comes with different management challenges.

To accommodate the conflicting needs of various occupants, the Development Act permits registration of a strata plan that divides only part of a building. A building can contain more than one strata scheme and can include areas that are separately owned outside of any strata scheme.

This type of development, known as part-strata, was a focus area of the strata review. Every part-strata development must have a strata management statement for the building that details how the various parts operate together, identifies shared facilities, and sets a mechanism for apportioning costs. Interactions between the non-strata and strata components of the building are not covered by the Management Act, so the management statement will set out the requirements for dispute resolution, record keeping and establishing a building management committee.

The building management committee makes decisions about the management of the building, including administration of the shared facilities. Instead of the legislation providing the governance framework, a committee's duties and obligations are governed by the terms of their own management statement.

A building management committee may appoint a strata managing agent to carry out functions for it, if authorised to do so by the strata management statement. In those circumstances, the agency is governed by the management statement and the underlying agency agreement, rather than the provisions of the Management Act (though strata managing agents will be subject to their existing obligations under the PSA Act).

Overall, consultation feedback found that part-strata arrangements provide a good framework for mixed use developments. The flexibility that the structure provides allows innovation and new types of development suited to modern living. But there is a clear need for reform, particularly in the regulation of building management committees, with decision making, record keeping and dispute resolution areas of particular concern. There also appears a need for more transparency and accountability generally to ensure that purchasers of lots in mixed-use schemes are fully informed before they become bound by a contract for sale.

Corresponding amendments to the *Conveyancing Act 1919* will be needed

Management statements are not only a creature of the strata legislation. Their primary purpose is to regulate a building with multiple owners, one of which may be a strata owners corporation.

Building management statements can also be created under the *Conveyancing Act 1919,* which includes provisions that parallel Schedule 4 of the Development Act. When a strata scheme is registered over part of a building, any existing building management statement will become a strata management statement. It is therefore important that the legislation is aligned. Any changes to the part-strata provisions within the Development Act will need to be reflected by corresponding amendments to the *Conveyancing Act 1919*.

Strata management statements

The strata management statement is the key to a successful part-strata development. The management statement is the instrument that determines meeting procedures and establishes the dispute resolution process, for example. It is also an important disclosure document for prospective purchasers. The information that is required to be included in the strata management statement is therefore critical.

Schedule 4 of the Development Act prescribes the matters that must be included, being:

- the establishment of a building management committee and its functions,
- how the statement can be amended,
- arrangements for settling disputes,

- the fair allocation of costs for shared expenses and the method used to apportion those costs and expenses, and
- a review process for the allocation of costs, to occur at least every five years.

Schedule 4 of the Development Act also lists other matters that could be included. The list of optional matters is provided for assistance only, as the management statement can include any by-law relevant to the scheme. Commonly, it is the original developers who negotiate and agree to the terms of the management statement, and who consequently have a critical role in setting the obligations of the future owners of the various lots.

Considering these aspects, the Discussion Paper raised various questions about management statements, including whether the matters that were required to be included within them were sufficient.

It was generally agreed by stakeholders, including the Law Society of NSW, SCA, and UDIA, that the Schedule 4 matters for inclusion were sufficient but that some amplification was needed. The Property Council suggested that meeting procedures and the keeping of records, both currently optional matters, should be included in the list of required matters. Importantly, stakeholders requested more clarity around how a shared facility agreement is to be reviewed and how amendments to the statement are to be made after a review has been carried out. This is discussed further below.

A further issue that arose from consultation, but not addressed in the Discussion Paper, was that section 105(1)(b), which outlines the effect of a registered strata management statement, should be revised to include parties who may be occupying a lot but are not a lessee. The review makes this recommendation to ensure that *all* persons residing in a strata building are bound by the terms of the management statement.

Recommendations

2. Expand the matters that must be addressed in a strata management statement to include meeting procedures of the building management committee and the keeping of records.
3. Amend section 105(1)(b) of the Development Act so that the strata management statement binds occupiers of a lot, as well as lessees.

Shared facilities and review of management statements

Most part-strata buildings include facilities and services that are used by the building's occupants. These may include car parking, loading docks, lobby areas and security services. Unlike strata, these facilities are not common property. Typically, shared facilities will be physically located within one lot, yet used by the owners of other parts of the building.

The legislation does not specifically apportion responsibility for maintenance and repair of shared facilities – this is governed by the management statement, which is an issue that featured in consultation feedback.

The 2015 reforms imposed a requirement that the management statement must provide for the fair allocation of the costs of shared expenses relating to parts of the building. It must also specify the method used to apportion the costs of shared expenses. These reforms have been well received.

Over time, circumstances may change in a way that makes the allocation of costs inequitable. The type of commercial activities in the building may change from retail to hospitality or residential areas may be further subdivided, with an increase in density. To address this, the 2015 reforms

also required the management statement to include a review process that is triggered whenever there is a change in the shared facilities (with at least one review required every five years). However, the legislation gives no detail about the type of review that is needed. There is also no requirement for the building management committee to adopt any recommendations for change arising from a review.

Stakeholder feedback strongly supported clarification around both of these areas.

Preparation of a schedule of shared facilities and the allocation of costs is an expensive exercise. It is important that the obligation for a five-year review does not place an excessive burden on a building management committee where the owners are generally satisfied with the allocation. With this in mind, it is proposed that the legislation clarify that the purpose of the five-year review is to identify whether circumstances justify a full reassessment of the shared facilities and their allocation. Relevant circumstances could include where there are changes in the way that facilities are used, a change of use within the building, or that the allocation was inaccurate from the beginning. A full reassessment would be triggered at the request of any owner, thus ensuring that one owner, who may benefit from an inequitable allocation cannot veto a review.

If a review of the shared facilities agreement recommends a reallocation, the building management committee must, as soon as practicable, amend the management statement to give effect to the reallocation. Any decision not to amend would need the unanimous agreement of all members of the building management committee.

Recommendations

4. Clarify the matters that must be considered as part of the five-year review of the allocation of costs within a strata management statement.
5. Specify how amendments of the strata management statement are to be made if a review recommends a change to the shared facilities or their allocation.

Building management committees and conflicts of interest

Most stakeholders agreed that building management committees were generally effective but further regulation is needed around meeting procedures, voting and record keeping of committees.

This report recommends a range of reforms to the governance of building management committees that are aimed at consistency, clarity and reducing conflict.

Legal status of the building management committees

A threshold question that needs clarifying is the status of the building management committee. This impacts on the relationship between owners and the ability of the committee to enter into contracts and engage in legal proceedings.

Some responses to the Discussion Paper suggested that building management committees be given corporate legal status, like a strata owners corporation, but this view was not widely supported. The purpose of the part-strata structure is to provide a light touch framework that allows owners to cooperate in decisions about the parts of a building they share.

Others, including the Law Society of NSW, suggested that the building management committee be given limited legal status for the purpose of suing and being sued and for entering into contracts. Others, including ACSL, thought the legislation should make it clear that the committee is the agent of the owners.

This review favours the latter approach. It is proposed that the legislation clarify the committee's role, as agent for the owners, and provide them with decision making authority to enter into contracts and legal proceedings on behalf of its members.

Recommendation

6. Clarify that the building management committee is an agent for the lot owners and has decision-making authority to enter into contracts and legal proceedings on behalf of its members.

Contracts of building management committees

An issue allied to the status of the building management committee is the process needed to bind new committee members to existing contracts. These contracts are entered into for the long-term benefit of the building so need to be transferred from outgoing committee members to new members. Currently, this is achieved through the signing of deeds of novation.

With the status of the committee clarified, it is proposed that the legislation provide a mechanism to allow existing contracts of the building management committee to be novated automatically to incoming committee members. Automatic novation will be conditional upon the contract being included in the committee's register of contracts (see below).

Recommendation

7. Provide a mechanism to allow existing contracts of the building management committee to be novated to incoming committee members, provided the contracts have been included in the committee's register of contracts.

Record keeping and disclosure

As mentioned above, the review has identified a clear need for better record keeping and disclosure of records by building management committees.

Stakeholders, including ACSL and Property Council, raised that building management committees should be required to make disclosures (produce records, accounts and property, and respond to requests for inspections of records) like strata committees under sections 181 and 182 of the Management Act. Further, that record keeping standards would ensure that purchasers of part-strata lots are fully informed before buying into a mixed-use scheme.

It is proposed to introduce minimum standards for record keeping. Building management committees will be required to keep records of all meetings (including notices and minutes) and other prescribed documents. This information would be made available to all committee members, and through them, to prospective purchasers.

GoStrata recommended that, as part of the record keeping requirements, the building management committee must keep a register of all contracts entered into. As well as including a copy of the contract the register should note key information about the contract, including – parties, date and expiry. This register would be made available to prospective new members of the committee, so they are fully informed of any contract that will be automatically novated to them.

Recommendations

8. Prescribe minimum standard requirements for record keeping for adoption as terms of the strata management statement.

9. Require the building management committee to maintain a register of all contracts entered into.

Representative's authority to vote at committee meetings

The legislation makes no mention of how an owner is to be represented at meetings of the building management committee. This is particularly important for corporate members.

It is proposed that an owners corporation's representative must be a member of the strata committee. The representative must make decisions as directed by the owners corporation, determined by either the strata committee or the owners corporation in general meeting. In any disagreement between the strata committee and the owners corporation as to how the representative should vote at a meeting of the building management committee, the decision of the owners corporation would prevail (as required by s 36(2) of the Management Act).

For corporations, the representative must be appointed with clear authority to bind the company.

Recommendations

10. An owners corporation must appoint a person, being a member of the strata committee, as its representative on the building management committee.
11. Representatives of an owners corporation at meetings of the building management committee must make decisions as directed by the owners corporation, determined by either the strata committee or the owners corporation in general meeting.

Voting rights, vetoes and quorums

The voting rights of members are determined by the management statement. The Development Act implies several provisions into a management statement, including that the decision of a majority of the members present and voting at a meeting of the committee is the decision of the committee. Other implied provisions relate to notice and quorums at meetings, and a requirement for the building management committee to meet at least once a year. While these provisions are implied by Schedule 4 of the Development Act, the management statement may override them and provide alternative arrangements. There is no requirement for the management statement to balance the rights of the various types of lot owners in the scheme, with the result that some stakeholders report that voting is unfairly tipped in favour of the commercial owners.

The Discussion Paper asked whether alternative voting rights should be considered, such as aligning voting rights to the relative contribution that each committee member makes to the cost of shared facilities.

Most stakeholders, including ACSL, Property Council, the Law Society of NSW, Holding Redlich, and Phillipa Russell Lawyer, did not support linking voting rights to levies. Contributions are not always the most equitable method of determining voting entitlements (as contributions can vary from year to year). Ultimately, there was no appetite to mandate a particular formula for determining voting rights but some saw merit in the suggestion that voting rights be 'fair'. The legislation currently requires a 'fair' allocation of the costs of shared expenses but with no corresponding requirement for voting rights.

Rather than prescribing a 'one size fits all' voting arrangement, stakeholders were focused more on improving governance and meeting procedures, particularly around quorums and vetoes. Stakeholders provided examples of important decisions being delayed or prevented by one member not attending a meeting. In other circumstances, one member's right of veto could be

used to prevent repair of shared facilities in circumstances where it was plainly unreasonable to do so.

To address this, it is proposed to provide a mechanism to establish a quorum, similar to that provided by clause 17 of Schedule 1 of the Management Act. Under that procedure, where a quorum is not attained at a duly convened meeting, the meeting is adjourned for at least seven days. Members present at the reconvened meeting constitute a quorum for considering the motions put to that meeting.

While this mechanism can be used to prevent a veto by default, it is more difficult to propose a solution where one member unreasonably vetoes important decisions about shared facilities at a duly convened meeting. Each scheme has its own bespoke dispute resolution provisions within the strata management statement. Further discussion with stakeholders will be needed to determine the most effective way to trigger a schemes dispute resolution provisions in the event of unreasonable veto.

Recommendations

12. Introduce a quorum mechanism, similar to strata, to prevent delay or avoidance of decisions by one member not attending a building management committee meeting.
13. Require that where voting rights are determined otherwise than as implied by Schedule 4 of the Development Act, that the method of allocation of voting rights is 'fair'.

Managing agents appointed by building management committees

Currently, the legislation makes no specific mention of managing agents, other than to provide that the strata management statement may include particulars relating to the appointment of them: Schedule 4(2)(b) of the Development Act. There is no limit on the term of their appointment, which can result in unfair contracting.

There were a range of views on the role of managing agents in part strata developments. Some stakeholders thought there should be a prohibition on having the same managing agent act for an owners corporation and the building management committee. Others saw cost savings and co-ordination benefits in retaining the same managing agent for the building as a whole. Balancing these opposing views, it is recommended that schemes be allowed to decide for themselves the arrangement that best suits their needs.

There was general agreement, however, that the term of the managing agent's appointment should be limited, though there were differing views on the length of the appointment. This report recommends the appointment period of managing agent be limited to five years, as supported by most consultation feedback. This appears to be a middle ground between the terms of appointment in the Management Act for strata managing agents (up to three years) and building managers (up to ten years).

Recommendation

14. For managing agents appointed by building management committees, limit the term of appointment to five years.

Dispute resolution

Dispute resolution remains an issue for part-strata developments, particularly where the dispute is between an owners corporation and other members of the building management committee.

Some stakeholders, including OCN and SCA, suggested that a more cost-effective means of dispute resolution should be explored, such as providing the Tribunal with the jurisdiction to review issues of fairness, including members' voting rights. However, strata management statements are already required to contain dispute resolution clause(s) that require alternative dispute resolution such as mediation. It is only if those measures were unsuccessful that a matter would proceed to court.

Not all members of the building management committee are bound by the provisions of the Management Act and disputes about strata management statements can involve significant contractual issues. For these reasons, the Supreme Court remains the most appropriate tribunal to hear disputes about a strata management statement.

The legislation does not, however, provide the Court with a clear set of powers, and it is not clear whether the Court can vary a strata management statement.

This report recommends resolving the uncertainty by specifying the Court's powers to review strata management statements, taking into account the type of considerations provided for in s 9(2) of the *Contracts Review Act 1980*. The Court should also have specific powers to make orders about shared facilities and their allocation, and should be able to direct amendment of a management statement where a provision is unjust.

Recommendation

15. Clarify the powers of the Supreme Court to hear disputes relating to strata management statements and to direct their amendment or variation.

4.3 Strata renewal

The strata renewal process is one of the most significant reforms introduced by the Development Act. This regime, set out in Part 10 of the Development Act, provides an alternative mechanism to enable the collective sale or redevelopment of a strata scheme where not all, but at least 75%, of owners agree.

Previously, termination of a strata scheme could occur upon application to the Registrar General with the unanimous agreement of all owners. The effect of the previous system was that owners who wished to renew or redevelop their scheme could be blocked by just one individual who did not want to participate. If all owners did not agree, the only option available to owners was to apply to the Supreme Court for an order that the strata scheme be terminated. This process was costly, time consuming, adversarial and did not encourage negotiation.

The strata renewal process was intended to overcome barriers to urban renewal created by the rigidity of the previous scheme. It draws on the collective decision-making process that is a hallmark of strata ownership, and offers transparency through several key stages, with a court approval process as a final safeguard.

Limited uptake

Since the introduction of the new regime, only 12 strata schemes have notified the Registrar General of having received the required level of support for a renewal proposal. Only one of those schemes has had its renewal plan approved by the Land and Environment Court.

Initial stakeholder feedback and the relatively low uptake of renewal applications raised concerns that the staged process is too complex for schemes to navigate. The Discussion Paper sought feedback on schemes' experiences using the process to identify whether the new regime has been successful in aiding strata complexes to terminate and renew, and whether any improvements are needed to the process overall.

The limited uptake can partly be attributed to the lengthy timeframes built into the staged renewal process, which schemes must follow sequentially. The procedure involves several key phases and minimum notice periods aimed at ensuring transparency and adequate consultation, and for affected owners to seek appropriate advice on options available to them. While the legislation commenced in November 2016, it was not until almost a year later[6] that the first scheme to pursue the process completed all the relevant steps and notified the Registrar General of having received the required level of support for a strata renewal plan.

Consultation feedback has identified the potential for greater flexibility in some of these timeframes, and minor improvements that could bolster existing safeguards, which are discussed below. However, given the limited number of schemes that have pursued the process so far, the majority of feedback suggests that it is still too soon after the introduction of the new laws to gauge whether any substantial legislative changes to the regime are necessary.

Stakeholders including the Law Society of NSW, UDIA, Property Council, SCA, and Holding Redlich noted that the renewal process has assisted developers starting a conversation with strata schemes about collective sale and renewal, and has encouraged strata owners to consider other options for the future of their strata complex. Despite the limited take up of the Part 10 process, the Discussion Paper reports a significant increase in the number of administrative terminations lodged with the Registrar General since the commencement of the legislation (which require the unanimous approval of owners)[7]. For this reason, the legislation appears to be meeting its objective to facilitate renewal of strata schemes, albeit indirectly.

Key steps and safeguards

Any proposed collective sale or renewal must follow a multi-step process set out in Part 10 that is designed to provide transparency and allow time for consultation. The stages include:

- older schemes 'opting in' to the regime
- establishing a strata renewal committee
- developing a renewal plan that includes certain prescribed information
- a 60-day period for owners to consider the plan
- owners of at least 75% of lots (excluding utility lots) to approve the plan.
- meetings at various stages, each with particular notice requirements.

The final step in the process involves the scheme applying to the Land and Environment Court for an order to approve the plan. Section 182 of the Development Act requires that in making such an order, the court must be satisfied that the steps set out in the legislation have been properly followed.

Noting that the steps are intentionally rigorous, the Discussion Paper sought feedback on whether these remain appropriate or could be improved.

[6] The Registrar General received the first notification that a scheme had received the required level of support for a strata renewal proposal under the new regime in September 2017. That scheme subsequently withdrew from the process and pursued an administrative termination by the Registrar General because the developer had purchased all the lots following private negotiation.

[7] The past four financial years has seen a steady rise in the number of schemes terminated administratively, averaging approximately 74 per year, compared to 54 in the 2015-16 financial year, and only two in 2012-13.

Most responses thought the existing steps and safeguards are still necessary to ensure transparency and to protect vulnerable owners. Several stakeholders, notably ACSL and the Property Council, suggested the steps could be simplified, but most feedback considered it too soon to comment meaningfully on how the steps might be changed when they have only been used in a limited number of cases to date.

Several submissions from the legal industry commented on the rigidity of timeframes in the staged process and suggested this aspect could be improved by incorporating flexibility, which is discussed further below.

Given only one strata scheme has completed the full renewal process since the legislation commenced, and the existing stages take some time for schemes to complete, it is not proposed to add to or remove any of the key steps at this time.

Reponses to the review indicate there is a need to monitor these provisions and consider improvements once more schemes pursue the process. In the meantime, incorporating flexibility in timeframes may assist in take up of the process, giving developers and schemes confidence that a plan will not lapse only by virtue of a minor procedural irregularity.

Recommendations

16. Retain existing steps in the strata renewal process without change while continuing to monitor the application of these provisions.
17. DCS will consult with industry stakeholders on ways to incorporate flexibility in current restrictive timeframes in the existing strata renewal steps.

Information required in the strata renewal plan

To properly consider whether to support a proposed strata renewal, owners must have clear information about what is being proposed and how it will affect them. They are encouraged to seek legal and other professional advice on the plan before deciding if they will support or oppose it. The strata renewal plan is the comprehensive document that provides that information.

The regulations provide that the strata renewal plan must include:

- a general overview of the strata renewal proposal,
- a full and frank statement by the proposed purchaser or developer of their intended use of the strata parcel,
- a breakdown of unit entitlements,
- an independent valuer's report dealing market value,
- compensation values of each lot, and
- specific details relevant to a collective sale or redevelopment.

Preliminary feedback suggested requirements for a strata renewal plan are complex and take a long time for a renewal committee to develop. However, most responses to the Discussion Paper supported retaining the information as prescribed on the basis that all of the information is necessary for owners to make an informed decision. On this basis and given the small number of schemes that have pursued this process to date, it is proposed to retain existing requirements without change, but monitor this aspect as the provisions are used more in the future.

Recommendations

18. Retain current information required to be disclosed in a strata renewal plan without change.

19. DCS will monitor the application of these provisions as more schemes adopt the process, to consider whether the information contained in a strata renewal plan is sufficient or too onerous.

Timeframes

While stakeholders broadly supported retaining the key stages in the renewal process pending further monitoring, several raised concerns about the rigidity of timeframes built into each stage and suggested these should be more flexible to prevent inadvertent lapsing of proposals.

One such example relates to the period of operation of a strata renewal committee established to develop the strata renewal plan. The legislation provides that the strata renewal committee may exercise its function for one year after the day it is established (or longer, if approved by the owners corporation by special resolution). Responses reported that committees will generally need more than one year to develop the renewal plan, necessitating an extension. Legal industry representatives reported concerns from various clients about the risk in having a renewal committee inadvertently dissolved where the owners corporation does not pass the requisite resolution in time.

Extending the period of operation of the strata renewal committee to two years could allow more time for decision making, especially in relation to larger or more complex schemes. However, some feedback noted that committee members may change over a two-year period and an annual review of the committee could ensure that the members remain as accurate representatives of the owners.

Other areas where submissions identified the need for flexibility include the period in which meetings must be convened under Part 10, notice requirements, and the requirements for meeting minutes to be given to owners. Several stakeholders suggested that developers and schemes may have more confidence to pursue a strata renewal if the legislation included a mechanism to allow minor procedural discrepancies to be cured without lapsing, or where the court could allow the continued development of a strata renewal plan that would otherwise lapse for non-compliance with a strict timeframe.

Changes will need to balance the need for owners to have enough time for informed decision-making, against concerns that extended or restrictive time periods are an impediment to the renewal process.

Recommendations

20. Extend the period of operation of the strata renewal committee from twelve months to two years.
21. Provide additional flexibility in strata renewal timeframes where consequences of non-compliance are minor.
22. Permit the Land and Environment court to extend some strata renewal time limits in some cases where the court considers it reasonable, by ordering that the plan will not lapse.

Good faith requirement and disclosure of conflicts of interest

Currently, the strata renewal committee is required to act in good faith in developing a strata renewal plan and to disclose any conflicts of interest. Where a conflict is disclosed, this must be referred to a meeting of the owners corporation to consider whether that committee member should be removed from office, remain on the committee but abstain from voting, or if no further

action is needed. The Land and Environment Court must also be satisfied that a strata renewal plan has been developed in good faith before it can make an order approving it.

The good faith and disclosure provisions were intended to protect vulnerable and dissenting owners by ensuring transparency and fairness as the renewal plan is developed. Preliminary stakeholder feedback suggested that good faith and disclosure obligations should apply to *all* owners, not only those involved in developing the renewal plan.

The Discussion Paper cited as an example a failed strata renewal proposal at Macquarie Park, in which a dissenting owner was a rival developer who was an underbidder in the tender process that resulted in appointment of the applicant. That dissenting developer held several lots in the scheme and was able to adopt a blocking position, drawing out legal proceedings and incurring costs for the owners corporation such that the renewal proposal was ultimately withdrawn. At no point in the proceedings was the dissenting developer required to disclose that it had been an unsuccessful bidder in the tender process. In that case, the renewal plan lapsed, the proposal remains at a standstill and the scheme's future is uncertain.

Feedback to the Discussion Paper suggested this conduct is not uncommon, with legal industry stakeholders reporting examples of developers acquiring lots to take a blocking position while trying to negotiate privately with other owners. Several stakeholders identified examples of other potential conflicts of interest, like a dissenting owner who owns neighbouring property and is seeking to preserve that property's views by objecting to a redevelopment proposal.

Stakeholder feedback has highlighted that not all dissenting owners are vulnerable, and some have been able to manipulate protections to prevent the success of a renewal proposal. In this regard, the good faith and conflict provisions are not working as intended.

To regain an appropriate balance, it is proposed to extend existing good faith and disclosure requirements to all owners, not only those who develop a renewal plan. Some responses, notably ACSL, recognised that information relevant to decision making will change during the course of the renewal process, and has suggested a continuous disclosure regime should apply. There was also strong support for the suggestion in the Discussion Paper that the court should be required to consider these matters for both strata renewal plan applications and objections to a strata renewal proposal.

Recommendations

23. Extend existing requirements in the strata renewal process for supporting owners and renewal committee members to act in good faith and disclose conflicts of interests to <u>all</u> owners, including dissenting owners.
24. Explore the feasibility of imposing continuous disclosure obligations in the strata renewal process in consultation with industry stakeholders.
25. Clarify that the Land and Environment Court must consider potential conflicts of interest in relation an objection to a strata renewal plan (as well as an application) before making an order approving that plan.

Costs of proceedings

The Discussion Paper cites the Macquarie Park case noted above as an example of where a dissenting owner was able to disrupt the renewal process and incur considerable legal costs ultimately borne by the owners corporation.

Currently, section 188 of the Development Act includes a presumption that the reasonable costs of a dissenting owner will be paid by the owners corporation, but it gives no guidance to the court in considering what might constitute “reasonable costs”.

Responses to the Discussion Paper suggest the renewal process could be improved by giving the court flexibility in dealing with any party that raises unjustified or frivolous objections to a strata renewal plan. Feedback suggested that the absence of a cost burden for dissenting owners is currently having the unintended consequence of protracting disputes.

There was overwhelming support from stakeholders including OCN, ACSL, SCA and Law Society for expanding section 188 to provide more guidance to the court on matters to be considered when making a costs order. Stakeholders felt that the court should be able to issue a costs order against a dissenting owner who imposes transaction costs on the majority owners and the developer by making objections which the court considers to be unreasonable. Feedback suggested that the absence of a cost burden for dissenting owners is currently having the unintended consequence of protracting disputes.

It is proposed that clarifying that the court may award costs on an ordinary or indemnity basis, similar to section 98 of the *Civil Procedure Act 2005,* will address these concerns.

Recommendations

26. Clarify the power of the Land and Environment Court to award costs against the dissenting owner in strata renewal proceedings.
27. Clarify that the Land and Environment Court may, at its discretion, award costs on an ordinary or indemnity basis in strata renewal proceedings.

Lapsing provisions

Currently, the strata renewal plan may lapse if the steps prescribed by legislation are not properly followed. Once a strata renewal plan lapses, the same proposal (or one substantially similar) cannot be resubmitted for at least 12 months.

The Discussion Paper sought feedback on the effectiveness of the lapsing provisions and asked whether any circumstances should permit a strata renewal plan being resubmitted within the 12 month period.

Responses to this question were varied. Some feedback supported retaining the existing lapsing provisions with no change, pending further consideration as more schemes adopt the renewal process. Most responses considered the lapsing provisions to be unreasonably restrictive and serve as a barrier to the progression of strata renewal proposals. Several legal industry stakeholders felt that there should be some flexibility for plans to be resubmitted where they have lapsed only by virtue of a minor procedural error.

This report proposes to address these responses by recommending more flexibility in the lapsing provisions and providing the court with power to extend or vary time limits, so that alternatives to lapsing can be considered where reasonable.

Recommendations

28. Provide more flexibility in lapsing provisions to allow correction of a minor procedural error, rather than this having the effect of lapsing a strata renewal plan (which is then unable to be resubmitted for 12 months).

Involvement of tenants in the process and treatment of leases in proceedings

The Discussion Paper sought feedback on how the renewal process affects owners of leased properties and their tenants. Existing provisions envisage that leases will be terminated in accordance with their terms, which will vary in each case, and the legislation permits the court to make ancillary orders relating to compensation to a person because a lease is terminated.

Most stakeholders considered the renewal process to be a matter for owners, whose proprietary interest in the property is superior at law to that of the tenant. Some responses felt that involving tenants in the renewal proceedings has the potential to protract an already lengthy process and noted that lease terms will govern any termination arrangements.

Stakeholder feedback on the treatment of leases in the renewal process was varied. Preliminary feedback and responses to the paper identified complexities posed by long term commercial tenancies, with some comments considering that an owner's liability to a long-term tenant may not be easily determined at the time of the renewal proceedings. However, most responses felt that these issues will be governed by the terms of the lease and should be managed by the owner and tenant outside the renewal process.

Tenants Union NSW suggested long term renters should be compensated under the renewal process, taking into account moving costs and potential hardships in securing alternative accommodation. A lot owner's responsibility to a tenant will be a cost attributable to the sale and included in the compensation value an owner receives. The legislation already permits the court to make ancillary orders relating to compensation to a person because a lease is terminated.

Given the provisions have only been tested through a small number of renewal plans to date, and there was limited support for any change, it is proposed to retain current provisions and continue to monitor this aspect of the regime.

Distinguish between commercial vs residential strata owners

The current legislation does not distinguish between commercial and residential owners in the renewal process. All owners in a collective sale, and dissenting owners in a redevelopment, must receive a minimum payout under well-established compensation principles. The Discussion Paper recognises that commercial and residential lot owners will have different expectations as to compensation.

Most stakeholders did not see a need to distinguish between commercial and residential stakeholders in the renewal process.

Property Council did not see the need for additional protections for commercial or residential owners but did identify the distinction between the two as being relevant to determining value. Property Council suggested the legislation should include the requirement that commercial matters be taken into account in assessing market value. However, the current process for determining compensation value refers to principles set out in the *Lands Acquisition (Just Terms Compensation) Act 1991*, which considers commercial aspects where relevant in determining the market value, special value and disturbance components of compensation.

Given limited support for any distinction between commercial and residential owners, as well as existing valuation requirements, it is not proposed to make any change to the legislation in this regard.

Recommendation

29. No change to provisions in relation to treatment of leases or to distinguish between commercial and residential owners in the strata renewal process.

4.4 Valuation of Unit Entitlements

Requirements for schedules of unit entitlement

The schedule of unit entitlement sets the basis for the apportionment of contributions and voting rights within the scheme.

Prior to the 2015 reforms, each lot was given a unit entitlement based on the developer's estimate of the market value of that lot at that time. This was open to manipulation and resulted in disproportionate allocations that did not accurately reflect the relative values and sizes of each unit.

To remedy this inequality, the 2015 reforms introduced a requirement for unit entitlements to be determined by a qualified valuer on a market value basis, as set out in Schedule 2 of the Development Act. This change was intended to provide an impartial allocation of unit entitlements, and a fairer basis for assessing levies.

The Discussion Paper sought feedback on whether this requirement has resulted in fairer apportionment of contributions and whether this process could be improved. Some stakeholders expressed that it is too early to comment on this point, but most stakeholders commented that the current valuation requirements, including the valuer's certificate process, are working well and are appropriate. However, there was a consensus that the provisions for valuing unit entitlements with a strata plan of subdivision need attention to address the disproportionate cost of valuation. This is addressed below.

Recommendation

30. Retain without change the requirement for a qualified valuer's certificate to accompany a proposed schedule of unit entitlement in the approved form, certifying that the unit entitlements of the relevant lots are apportioned as required under Schedule 2 of the Development Act.

Strata plans of subdivision

Where lots are subdivided after the scheme has been established, a strata plan of subdivision must be accompanied by a new schedule of unit entitlement determined by a qualified valuer.

Currently, where the subdivision does not involve common property, only the newly subdivided lots need to be valued. Alternatively, where the plan will create or subdivide common property, all lots in the scheme need to be revalued, which can be very costly to larger schemes.

The Discussion Paper sought feedback on whether valuations are too costly for the scheme and if so, what other ways unit entitlements could be calculated that is fair to all owners. Many stakeholders agreed that there should be an exception to valuing all lots in a scheme where the changes to common property would be minor (in value or size) and would not affect the proportionate unit entitlements, such as adding a retaining wall or the transferring of a car space.

However, views differed on what the exception would look like.

Some stakeholders, including the Law Society of NSW, recommended applying a presumption that all existing unit entitlements for lots created prior to the registration of a strata plan of subdivision are accurate, with the valuation being limited to the variation in value of the affected lots. API, a professional industry body for property valuers, recommended a mechanism allowing the valuer to make a minor adjustment to the schedule of unit entitlements without the need to value all lots, where that valuer considers the proposal would only make a minor change to the common property. In those instances, it is proposed that a minor change would be based on a percentage of the relevant strata area, or a percentage of the change between that valuation and the last valuation calculated. However, the requirement for a comparative valuation would require some expenditure.

As the valuer is the qualified expert who would be best placed to make such a determination, this report recommends an exception that provides the qualified valuer with some discretion; allowing that valuer to decide and certify if a valuation is not warranted in the circumstances.

Recommendations

31. Allow an exception to the requirement to value all lots for a strata plan of subdivision involving common property, where the valuer considers the subdivision will result in changes to common property that are minor and would not impact the proportionate unit entitlement**.**
32. Retain, without change, the obligation for the owners corporation to pass a special resolution to approve a change in unit entitlements where common property is involved: Schedule 2(4) of the Development Act.

4.5 By-Laws

By-laws are not legally effective until registered on title for the common property. Currently, schemes must lodge by-laws for registration with NSW Land Registry Services within six months of passing a special resolution to adopt them.

The 2015 reforms to the Development Act introduced a requirement for all changes to by-laws to be registered on title as a consolidated list, rather than each separate change being registered in isolation. This change has ensured that the land titles register concisely records in a single and readily accessible instrument all the by-laws of a strata scheme.

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

Lodgment period

The Discussion Paper questioned whether the current six-month lodgment period is reasonable. Some stakeholders, including ACSL, NSW LRS, and OCN, submitted that the lodgment period for by-laws should be reduced from six months to two or three months, with some suggesting this could encourage owners corporations to regularly review their by-laws. ACSL raised concerns about purchasers being unaware of new by-laws given the lengthy time taken to register changes to by-laws. This group suggested an earlier lodgment requirement might inform those buyers about new by-laws sooner than currently applies. OCN also commented that a shorter lodgment period would mean that owners would be able to act on a by-law without controversy (e.g. for a renovation) as that by-law would be enforceable.

Alternatively, PICA and SCA submitted that 12 months would be a more achievable lodgment timeframe to account for the administrative and registration process. This would be helpful to

smaller schemes that have less resources and would avoid the owners corporations having to pass another resolution if a shorter lodgment period was missed. Anecdotal evidence suggests that it is not always the case that by-laws are drafted and ready for lodgment immediately following the passing of the special resolution.

However, most stakeholders, including the Law Society of NSW, Holding Redlich, UDIA, REINSW and Gostrata Consulting, supported the current six-month period as reasonable and adequate in ensuring that current by-laws are recorded on the Torrens Register. This approach is a middle ground between the above-mentioned stakeholder positions.

Given the varying feedback on the required period to lodge changes of by-laws, and the likely adjustment period to new electronic lodgement requirements, it is not proposed to change the existing six-month lodgment period at this stage.

Recommendation

33. Retain, without change, the requirement for an owners corporation to lodge by-laws for registration with NSW Land Registry Services within six months of the passing of a special resolution adopting those by-laws.

Consolidation of by-laws and digitisation

The Development Act requires that when changes to any by-laws or new by-laws are submitted for registration, they must be in a consolidated list. This means that all of the scheme's by-laws must be provided to LRS in one document, not just those being changed or introduced.

Overall, the review found that there was confusion relating to the consolidation of by-laws, with process and legislative improvements needed. Section 141 of the Management Act sets out the procedure for changing the by-laws, which requires a special resolution. However, the section does not specify if a special resolution is also required to consolidate all of a strata scheme's by-laws into one set. This report recommends that the Management Act be amended to clarify that a special resolution is required for the consolidation of by-laws, even when no by-laws are being added or amended. The consolidation of by-laws can be a complex process that involves the interpretation of historical documents, so it is necessary for consolidated by-laws to have the same high level of support from the owners corporation that is required to adopt any by-law.

At the same time as considering clarifications, the review also notes that processes around by-law consolidation could be improved and modernised particularly to enable digital submission and registration. Submissions and survey responses showed consistent support for this option, and the review finds it would make sense alongside other recommendations, such as removing the need to affix the common seal to execute documents. Together, these reforms should help facilitate the emergence of digital submission of by-laws.

Recommendation

34. The Management Act be amended to provide that a special resolution is required for the consolidation of by-laws, even if no by-laws are being added or amended.

35. Processes around by-law consolidation should be improved and modernised, particularly to enable digital submission and registration.

Registrar General's power to waive consolidation

The Discussion Paper asked whether there should be any changes to the Registrar General's discretion to permit by-law changes to be lodged separately rather in a consolidated version. Some stakeholders submitted that all by-law changes should be lodged in consolidated form and therefore that this power should be removed.

However, the existing provisions recognise that there are instances where it would be appropriate for by-law changes to be lodged separately. For example, if an owner requires a by-law to install an air conditioner to their lot, it may be unreasonable for that owner to bear the cost of lodging a consolidated version of *all* by-laws affecting the scheme. The discretion is limited: in order to waive the requirement for consolidation, the Registrar General (via LRS) needs to be satisfied that it would be too onerous for a consolidated version to be lodged, and that there are no more than five such separate changes recorded on the folio.

Recommendation

36. Retain, without change, the Registrar General's power to permit a change in the by-laws for a strata scheme to be lodged for registration separately and not in a consolidated version**.**

4.6 Miscellaneous

Amendments to allow for electronic/digital processes

A matter not addressed in the Discussion Paper is the need for general amendments to allow for electronic or digital processes, such as the method or medium by which public notice requirements must be published.

Section 142 of the Development Act (Application to the Registrar General to terminate a strata scheme) requires the applicant to publish, at least 14 days before the application is made, details of the proposed termination and a statement of intention. Currently, the prescribed medium is in a daily newspaper circulating generally in the State and in a local newspaper circulating generally in the area in which the parcel is situated. Compliance with this section in a literal sense is difficult or at times impossible where a newspaper has ceased circulating (in any form). Many regional and rural newspapers have ceased circulating (in any form) due to the impact of the COVID-19 pandemic.

To address these practical difficulties, this report proposes to omit redundant public notice requirements and, if necessary, require publication via an electronic medium.

Recommendation

37. Omit redundant public notice requirements in the Development Act and, if still necessary, replace newspaper notice rules with an obligation to give notice in an electronic medium such as an online newspaper or on a public website.

5. Findings of the review – *Strata Schemes Management Act 2015*

Overall, the review has found that the intent and objects of the Management Act remain valid. The strata laws offer a robust and mature framework fostering rapid growth in strata living.

Drawing on the feedback to the review, it is clear that there are also opportunities to enhance the operation of the Act. The following sections explore a range of proposed changes to the Management Act that aim to further improve both the regulatory framework and the lived experience of people in strata.

Many of the review recommendations seek to tighten or clarify the laws, rather than introducing that a fundamental shift in policy. There has been no general escalation of complaints to Fair Trading or more formal disputation in the Tribunal, despite the rapid growth in the number and size of strata schemes in NSW since these new laws commenced in November 2016.

While many of the recommendations involve specific reforms, others identify issues where further consideration or consultation is required. This is because some issues require more detailed analysis or evidence to further diagnose problems, or to ensure that there is adequate opportunity for stakeholder input and engagement on specific issues.

Alongside feedback on key issues, the review also received several sensible suggestions for minor wording, language or provision location amendments that would assist in interpreting the Management Act or clarifying the meaning of provisions. While not all of these are discussed in detail in this report, they will be further considered and incorporated as part of the drafting of legislative amendments.

Useful feedback on matters in the *Strata Schemes Management Regulation 2016* was also provided in several submissions. While some of these issues are noted in the following sections, not all of them are discussed as a potential immediate reform. Instead, they will instead be considered in detail when the Regulation is remade in its entirety following passing of amendments to the principal Act resulting from this review.

Recommendation

38. Retain the objects in section 3 of the Management Act without change.

5.1 Managing the scheme

5.1.1 Strata scheme resident knowledge and support

Strata schemes are a particular form of land title where lot owners need to work together to manage their buildings and their communities. The Management Act provides an essential set of safeguards and obligations to support scheme governance, but at the heart of these processes are the many people who live in the schemes. They are people who volunteer their time to participate in the governing process and may have little previous knowledge of strata schemes or the complexities involved in their operation.

The review has heard consistent feedback about the need for greater support and education for strata residents to help them participate effectively in the management of strata schemes and to provide appropriate oversight of their owners corporation and their managing agent. Feedback to the review also highlighted some specific areas where better information and education was needed, alongside amendments to the laws themselves. This included education and training for

strata committee members, as well as the development of further guidance on matters such as privacy, unfair contracts and disclosure of conflicts of interest, commissions and other benefits.

While these specific areas are discussed in the following sections of the report, the review has, more broadly, recognised the need to establish a targeted program of education and support for strata residents and owners corporations. This could occur in partnership with key sector stakeholders and would include the use of the new Strata Hub as a central location of strata education materials, as well as a key source of information for lot owners about their scheme.

This approach aligns with feedback from the OCN, the City of Sydney, Waverly Council as well as many individual lot owners and owners corporations, all of whom called for improved education, support and capacity-building for strata residents.

Recommendation

39. Establish, in partnership with key stakeholders, a targeted program of support and education for strata residents in strata to build capability in and understanding of strata scheme operation and governance.

5.1.2 Committees, meetings, and voting

The Management Act establishes the governance processes for meetings of the owners corporation, as well as for the establishment of a strata committee.

Meetings of the owners corporation are for lot owners to make key decisions about the governance of the strata scheme, including approving the annual budget and levies, approving contracts and works to the building, and adopting by-laws.

Procedures for holding meetings are in Schedule 1 to the Management Act, including how electronic voting can be used and the different types of resolution needed to make decisions. After a resolution is adopted at the meeting, it is considered to have been executed when the common seal of the owners corporation is affixed to an instrument or document.

The Management Act also requires that an owners corporation appoint a strata committee, with its members to be elected at the first AGM. The strata committee is responsible for the day-to-day running of the strata scheme, with decisions of the committee taken to be decisions of the owners corporation so long as they do not conflict, in which case the owners corporation decision prevails. The committee appoints from its number the office bearers of chairperson, treasurer, and secretary. The 2015 reforms provided greater clarity about the expectations of committee members by defining office bearer roles and placing certain duties on the committee members. This was supported with protection for committee members from liability where they acted in good faith.

The Discussion Paper sought feedback on the effectiveness of the current arrangements, including changes made in 2015, and for reflections on how the law could be further improved, especially given the issues that emerged in the context of the COVID-19 pandemic. Overall, the review has identified several issues that need to be addressed, including:

- a need for greater clarity in the performance of committees and office bearers,
- a need to increase the maximum permitted size for committees in community land schemes,
- improvement of standards and accountability of committee members,
- difficulties in updating meeting procedures, and
- electronic solutions needed for voting and common seals.

The following sections explore those issues in more detail and the proposed reforms.

Committees and accountabilities

Accountability and Code of Conduct

Section 37 of the Management Act states that it is the duty of each member of a strata committee to carry out his or her functions for the benefit, so far as practicable, of the owners corporation and with due care and diligence. Given committee members are responsible for making significant decisions on behalf of the owners corporation, the Discussion Paper sought feedback on the effectiveness of existing duties.

The review received some feedback that outlined concerns and doubts about whether committee members are always complying with these duties, and the risk of this contributing to poorer governance in some schemes, increased disputes and potentially unjust outcomes for some lot owners. However, while high standards and robust accountability measures for committee members are desirable, it is also important to note that committee members are nearly always volunteers. This means that it would not be generally appropriate to hold committee members to the same standard as may exist, for example, for a licensed professional like a strata managing agent.

The Discussion Paper noted that different approaches are taken in some other jurisdictions and sought feedback as to whether the law should include additional accountability measures, such as a mandatory code of conduct for committee members, as required under Queensland's strata laws. Over half of the survey responses supported the adoption of a statutory code of conduct, as did several stakeholder groups, including OCN, ACSL, PICA, REINSW, and UDIA. There was also strong support from OCN for requiring committee members to undertake an approved training course on their duties to ensure that they are understood, as a condition of serving on a strata committee.

The Discussion Paper also asked whether there should be clear grounds for removing committee members, like in Queensland. While 68.7% of survey respondents supported this idea in principle, it was noted by the ACSL that requiring specific grounds be met prior to voting for removal could in fact make it harder to remove poor performing committee members and likely to lead to legal disputes over whether there was sufficient evidence.

PICA and REINSW suggested that an alternative would be to change the resolution needed to remove a committee member from a special resolution to a simple majority vote. This could then be combined with a prohibition on the person re-nominating for election for a period of time. A reduction in the threshold to remove committee members would ensure they retain majority support among lot owners and preventing a vocal minority from retaining a committee member who has lost confidence of the majority.

On consideration of the feedback and further analysis of reform options, the review has concluded that an exact copy of the Queensland code may not be appropriate due to differences in regulatory regimes. In particular, while the Queensland code plays an important role in providing grounds for removing non-performing committee members, in NSW, committee members can be removed by passing a special resolution without referencing specific grounds. Importantly, as discussed below, there is no intention to introduce such grounds at this time.

However, the review considers that additional statutory duties and obligations have merit and should be applied to committee members. The obligations that would be similar to those in the Queensland code of conduct and would include the following:

- understand and comply with the Act,
- act with honesty, fairness, and confidentiality,
- act in the owners corporation's best interests,
- disclose any conflicts of interest and recuse themselves from consideration of matters affected by a conflict of interest,

- not cause or permit a nuisance within the scheme, and
- undertaking an approved training course on their duties and strata legislation.

Such an approach would provide greater clarity about the duties and obligations for committee members, and the expectations an owners corporation could have of them.

At the same time, the review has concluded that while the reason for removing committee members should remain within the discretion of the owners corporation, it is recommended that the threshold for removing a committee member be lowered to an ordinary resolution. Alongside this, those committee members who are removed by a vote would be prohibited from serving on the committee for 12 months after being removed.

Finally, feedback to the review indicated that there is still confusion and ambiguity about the roles on a committee, especially the chairperson, and which specific matters can legally be delegated to committees. Some survey responses suggested this confusion could be contributing to the poor performance of some strata committees and suggested a need for both refined definitions for key roles, as well as greater education and understanding of the functions of committees, including the permitted delegated decisions.

In response to these comments, the review is proposing that further clarity be provided for the definition of the Chairperson to clearly specify what the role and functions are attached to this office. In addition, the review recommends that NSW Fair Trading provide more comprehensive information to help inform owner corporations on powers that can be delegated to the committee. Both measures are designed to support committees to operate more effectively and help reduce uncertainty in the sector.

Recommendations

40. Codify additional duties and obligations for strata committee members in the Management Act.
41. Lower the threshold to remove a committee member from a special resolution to an ordinary resolution.
42. Introduce provisions for strata committee members to be prohibited from serving on the committee for a specified period of time after being removed.
43. Provide better information to the strata sector about decisions that can be delegated to the strata committee versus those that require a resolution by the owners corporation.
44. Define the office bearer roles, especially the Chairperson, more clearly and comprehensively in the Management Act.

Strata committee size

The Discussion Paper sought feedback on the size of strata committees, which is currently capped at a maximum of nine members under section 30 of the Management Act. The feedback from survey respondents was mixed on how well this cap has worked, with many stakeholders, including ACSL, PICA, Property Council, REINSW and SCA, being generally supportive of the current maximum.

A common concern raised was that the existing cap is too high and that large committees are inappropriate. This commentary appears mostly focused on the size of a nine-member committee relative to a smaller strata scheme. However, the review notes that the Management Act provides nine members as a maximum, and that the election of a smaller committee to reflect the size of the scheme can be more suitable and is already available to owners corporations.

However, feedback to both this review and in the preparation of the new community land laws indicated that the nine-member cap may be too small for large strata schemes that have over 100 lots and for large community land schemes. In these larger schemes the owners corporation or association faces complex and time-consuming matters that can overwhelm a nine member committee. These larger schemes also have a larger pool from which volunteers can be drawn. Some schemes report that they find it difficult to achieve adequate representation across the whole scheme when limited to a maximum of nine committee members.

An alternative option suggested by some stakeholders, including the OCN, was that rather than increasing the committee size, a more practical avenue could be for the Act to recognise and empower the formation of sub-committees. The Management Act is currently silent on sub-committees, so while they are not prohibited, they are also not specifically facilitated, which means that there are questions about how these would function and what authority they would have. The review considers that adopting sub-committees could be a useful way to allow owners corporations to draw in interested lot owners into specific projects, without committing to the responsibility of the committee and without making the strata committee overly large and unwieldy in an ongoing way. For example, a sub-committee could be formed to manage the gardens of the owners corporation or to examine what options are available to improve the sustainability of the scheme.

Drawing on this feedback, the review is recommending two changes for committee size. The first is that the maximum committee sizes available to community land schemes should be increased to 15, with no change to the maximum size in strata schemes. This is because community land schemes, especially with their tiered management structure of subsidiary schemes, are often larger and more complicated organisations that warrant a larger committee.

The second change proposes providing for sub-committees in both strata and community lands laws, which can be made up of committee and non-committee members. This would include providing that the sub-committee decisions must be endorsed by the committee or the owners corporation or association before being adopted.

Recommendations

45. Increase maximum size of committees for community land schemes from 9 to 15 members.
46. Explicitly provide for the appointment of sub-committees under both strata and community lands legislation.

Meetings and proxies

Meeting procedures

The meeting procedures for owners corporations and strata committees are contained in Schedules 1 and 2 of the Management Act. Requirements around convening annual general meetings (AGMs) and other general meetings are also contained in sections 18 and 19.

These procedures are important in ensuring the effective functioning of owners corporations and committees, consistency across different schemes within NSW and to encourage active engagement by lot owners. However, due to the many different circumstances of individual meetings and individual owners corporations, NSW Fair Trading often receives comments and complaints from the public and industry asking for more clarity on how the meeting procedures and notice provisions operate.

Feedback to the review indicated that some of the drafting in the procedures should be clearer. This related to both the meeting procedures listed in the Schedules and section 19 of the Management Act. Particular areas of concern included how meetings are convened, how quorum

is reached, how meetings are to be chaired, the timing for items to be listed on the agenda before a meeting and procedures for sub-committees. Feedback to the review also suggested that the current notice period of seven days for regular AGMs is insufficient. This is because the notice period can be difficult for some lot owners to make necessary arrangements to attend the meeting and to review the important information that accompanies the notice.

Drawing on this feedback, the review proposes to review and refine the current drafting of these schedules, as well as section 19 of the Management Act. The review also proposes, as part of this process, to move the meeting procedures contained in Schedules 1 and 2 of the Management Act to the Regulation. This option was raised in the Discussion Paper and received considerable support, including from OCN, ACSL, PICA, REINSW, and SCA. Such a change would ensure that the procedures are still legally binding but there would be more flexibility for the NSW Government to adjust them as circumstances change. A need for such agility has particularly been highlighted during the COVID-19 pandemic, where the need to introduce temporary measures to assist owners corporations to continue to function could not be implemented as quickly as desired.

In relation to the feedback around notice periods for AGMs, the review is proposing to extend the minimum notice period to 14 days. This approach will both provide more time for lot owners to arrange to participate and align with the notice period required for the first AGM.

Recommendations

47. Move meeting procedures from the Management Act to the *Strata Schemes Management Regulation 2016*.
48. As part of transferring meeting procedure provisions to the *Strata Schemes Management Regulation 2016*, review and refine the current requirements to improve clarity.
49. Extend the minimum notice period for annual general meetings (AGMs) from 7 to 14 days.

Tenant participation

The 2015 reforms, through section 33 of the Management Act, enabled a tenant representative to be nominated to represent all tenants in a scheme. The tenant representative can only be nominated if at least half the lots in the scheme are tenanted, which is determined by tenancy notices submitted to the owners corporation. The representative may attend meetings of the owners corporation but are not entitled to vote, move resolutions, hold office or count in determining a quorum.

The Discussion Paper sought feedback on the how well these provisions have worked to improve tenant participation and whether any changes are necessary, such as reducing the 50% threshold. Survey responses indicated that the provisions for tenant participation have not been effective in achieving their desired outcome. Thirty-five percent of respondents thought they were operating poorly or very poorly, and a majority of respondents were unsure of their effectiveness.[8]

Written submissions were more divided over whether these provisions should be removed, amended or remain as they are. Proponents for removing the provisions noted the very low adoption rate and argued that tenants' lack of financial interest in a scheme should prevent their participation. Conversely, other submissions stated that the provisions were working well and noted the importance of maintaining a voice for tenants especially as tenancy rates in strata buildings continue to climb.

[8] Responses to question 54 – "How well is tenant participation working?": 5% said 'Very Well'; 7% said 'Well'; 53% said 'Unsure'; 13% said 'Poorly'; 22% said 'Very Poorly'.

Stakeholder submissions from PICA and the Tenants' Union provided additional insight into this issue. They noted that the widespread failure of landlords to submit tenancy notices to the owners corporation is likely to have affected the adoption of tenant representatives. If tenancy notices are not submitted, the strata roll is inaccurate and many schemes that have a majority of lots tenanted are not recorded as reaching the minimum 50% threshold that would enable the election of a tenant representative. Section 5.1.7 of this report examines the issues around tenancy notices in detail and makes recommendations to improve compliance in this area, including providing tenants with the ability to serve notice of their tenancy directly to the owners corporation where the landlord or agent has failed to do so.

Given the low compliance to date, the review finds that the 2015 reforms have not been able to work as intended. The review considers that the recommendations in section 5.1.7 should improve the accuracy of strata rolls and provide more schemes with the opportunity to nominate a tenant representative. Once in place, these changes should, in turn, deliver a better indication of how provisions for tenant participation are functioning. A better assessment can then be made of the level of interest in tenant representation and whether the threshold should be changed.

The Discussion Paper also asked whether changes were needed to improve tenants' participation in general meetings. The Management Act provides that notice of general meetings must be given to tenants at least seven days prior, and must include the agenda and other documents for the meeting. Although tenants can attend this meeting if they have received the notice, they cannot vote unless they hold a proxy.

Submissions that were divided on this issue expressed the same reasoning both for and against as that used in discussion of the tenant representative. The ACSL and Tenants' Union advocated for expanding these provisions to allow tenants to nominate themselves for election to the strata committee or as an officeholder. In contrast, REINSW and UDIA proposed removing the provisions for tenant participation entirely. However, the prevailing opinion of stakeholders was that the current provisions are sufficient, and no changes are necessary.

This aligns with the finding of the review that tenant participation in committees or meetings should not be expanded at this time. The Management Act already allows for a lot owner to assign their tenant as a proxy, including for nomination of election to the committee. Likewise, little evidence was presented to demonstrate sufficient need for removing provisions for tenant attendance at general meetings from the Management Act. The review notes that other recommendations, such as the ability to provide notices of meetings electronically, when combined with improvements to tenancy notice, may also improve tenant awareness of meetings

The Discussion Paper also included a question about whether tenants should have the ability to challenge a by-law, on the basis that the by-law is harsh, unconscionable, or oppressive. Forty-seven percent of survey respondents preferred that tenants are not able to challenge by-laws.[9] This opposition was also reflected in the majority of written submissions. Stakeholders and survey respondents noted tenants do not have the same financial interests in the scheme as owners – tenants by definition are not members of the owners corporation. Enabling tenants to challenge by-laws could lead to conflict over by-laws that protect lot owners' interests. They also noted that tenants are generally more mobile than homeowners and can relocate if they disagree with a scheme's by-laws. Concern about the potential for frequent vexatious challenges to by-laws was also raised.

[9] Responses to question 83 – "If the law was changed to allow tenants to be able to seek orders challenging by-laws on the basis that they are harsh, unconscionable or oppressive, how would this work in your scheme?": 47% were opposed; 32% were in favour; 20% were unsure or the response was unclear. Figures do not add up to 100 due to rounding.

Although 32% of survey respondents supported the proposal for tenants to be able to challenge by-laws, there was minimal support in written submissions, with a notable exception being the Tenants' Union. Proponents in favour took the view that it was fair for tenants to be able to challenge by-laws that they are equally subject to in their day-to-day lives. Some suggested the ability to challenge by-laws could be refined by limiting it to long-term tenants only. However, even those in support noted impediments to its execution, such as the potential for conflict between a landlord and tenant as a result of challenging a by-law to prevent tenants from actually using this ability.

The review has not recommended the adoption of this proposal. The by-laws adopted in a scheme result from a collective decision by the lot owners. As lot owners bear the financial interest in the scheme, tenants should not be given standing to challenge by-laws in the Tribunal.

Recommendation

50. DCS should monitor the impacts of the changes to tenancy notices proposed in recommendations 91-93 prior to any further consideration of tenancy participation provisions.

Proxies

A proxy is an authority given by a lot owner to another person, granting them the right to exercise the lot owner's vote on their behalf at a meeting. The 2015 reforms introduced limits to curtail proxy farming (or 'harvesting'), which had previously been found to allow some individuals or small groups of people to wield disproportionate control over a scheme. The practice undermined democracy and disenfranchised other lot owners who participated in the governance of the scheme in good faith.

The Discussion Paper sought feedback on whether the new restrictions have been effective, with over 50% of survey respondents indicating that they are working 'well' or 'very well'.

However, feedback to the review also raised concerns that some people use powers of attorney or company nominee arrangements to circumvent the limits imposed in 2015 and effectively engage in proxy farming. These comments are supported by complaints received by NSW Fair Trading ahead of the review. Victoria recently amended its strata laws, imposing restrictions on powers of attorney and company nominees to avoid the intent of the limits on proxies.

This review recommends amendment of the Management Act to impose similar restrictions on powers of attorney and company nominees in line with the existing proxy restrictions.

Recommendation

51. Refine the provisions in relation to proxies to include powers of attorney and company nominees as types of proxies subject to the same restrictions on the maximum number of votes a single person can hold.

Electronic voting and the common seal

Electronic voting

The 2015 reforms made electronic voting and meetings available to owners corporations for the first time, provided they were authorised by an owners corporation resolution before those alternative means of voting were implemented. However, COVID-19 has demonstrated owners corporations need more flexibility in this regard, with the NSW Government passing temporary

laws that allow owners corporations to meet and vote electronically regardless of whether a resolution has been adopted. The current temporary measures are due to expire in January 2022.

The Discussion Paper sought feedback on whether these changes should made permanent, with strong support for change: over 61% of survey respondents supported the proposal as well as many stakeholders, including SCA, REINSW, the Law Society, ACSL, UDIA and PICA. However, the OCN cautioned that owners corporations should not be *required* to move to electronic means of meeting and voting; a choice should remain in the hands of each strata scheme to decide what is best for them.

The Law Society and ACSL further suggested that ongoing protections for lot owners may be needed to ensure that a permanent shift to electronic voting does not result in disenfranchisement of vulnerable persons or the adoption of inappropriate technologies.

A key input to this part of the review has been an analysis of digital solutions adopted during the COVID-19 pandemic, commissioned by NSW Treasury, and conducted by the Centre for International Economics (CIE). The costs and benefits of making permanent a range of COVID-19 digital processes, including the electronic voting measures introduced for strata, were assessed, and found to provide a net benefit, with some caveats.[10]

CIE found that that it was likely a majority of strata schemes had already adopted a resolution to hold electronic meetings or planned to do so prior to the current COVID-19 measures expiring in January 2022. The CIE analysis concluded that owners corporations would likely gain net benefits if all meetings could be held electronically and supported making automatic access to electronic meetings a permanent feature of strata laws.

However, CIE also identified risks with automatically allowing pre-meeting electronic voting, in that lot owners can be deprived of the opportunity to debate proposals during a meeting (whether in-person or online), ask questions of the committee or managing agent and therefore make more informed decisions. Accordingly, CIE recommended that pre-meeting electronic voting should continue to require an explicit resolution from the owners corporation prior to its use.

In line with these findings, the review recommends that electronic meetings and voting be allowed for use without needing an authorising resolution, but that any pre-meeting electronic voting still needs to be explicitly authorised by the owners corporation. This change would mean that electronic participation and voting during meetings, including elections, would be enabled for use by any owners corporation. However, an owners corporation would still need a resolution to approve pre-meeting electronic voting. Such an approach seeks to address the feedback received; ensuring that meetings are still the primary decision-making forum for lot owners, while providing them with flexibility in how they meet. This approach would also not require owners corporations to meet electronically, and so will not prevent owners corporations from holding meetings in person or in a hybrid fashion, as best suits their situation.

In this context, the review also appreciates the need to ensure that all lot owners are able to participate in owners corporation meetings and processes and seeks to ensure that any use of electronic or digital systems does not inhibit involvement. On this basis, in allowing the general use of electronic voting and meetings, the law will also be amended to include a non-exhaustive list of reasonable steps that must be taken to ensure all lot owners can participate and exercise their vote.

[10] *Digital processes: regulatory impact statement,* The Centre for International Economics, September 2021

Recommendations

52. Enable electronic attendance and voting at meetings of the owners corporation and meetings of the strata committee without the need to pass a resolution prior to their usage. This would not apply to pre-meeting voting.
53. Prescribe reasonable steps that must be taken to ensure lot owners are not disenfranchised by changes to the means of voting chosen by the owners corporation.

Common seal

The common seal is the official stamp of the owners corporation and must be affixed to documents for them to be validly executed. Due to the need for the seal to be physically affixed to a document in the presence of multiple people where a scheme does not have a strata managing agent, the NSW Government, in response to COVID-19 restrictions, has temporarily allowed documents to be signed instead of authorised under common seal. The temporary measures allowed documents to be signed and witnessed via audio visual link. These measures are also due to expire in January 2022.

The Discussion Paper sought feedback on this temporary change and whether the law should be permanently changed to allow owners corporations to execute documents without affixing a common seal. At the same time, the Discussion Paper recognised verification issues and fraud risks, noting that there still needs to be a means of authenticating the identities of the signatories and verifying they are authorised to execute the document on behalf of the owners corporation. In this context, the Discussion Paper sought feedback on whether there should be a publicly searchable register, similar to the ASIC companies register maintained by the Commonwealth, to allow third parties to confirm who is authorised to act on behalf of the owners corporation.

Overall, there was broad support among survey respondents and major stakeholders for the idea of adopting an electronic alternative to the common seal, while retaining the ability of owners corporations to use a seal if they choose to do so. In relation to the development of a possible register, while the around half of all survey respondents supported this proposal (54.2%), there were also a range of concerns raised by several key stakeholders, such as PICA, Law Society, SCA, ACSL, UDIA, and REINSW, including that such an approach would be overly burdensome, was unnecessary or could raise privacy issues.

The potential for removing the mandatory use of the common seal was also considered as part of the CIE cost benefit analysis work discussed in the previous section. CIE concluded that the ability to sign and witness documents as an alternative to affixing the seal of the owners corporation would bring net benefits to strata schemes and should be permanently retained.

Given feedback to the review, the CIE analysis, and the desire to balance protections with streamlined processes for owners corporations where possible, the review has concluded that while a permanent change should be made to remove the mandatory use of common seals by owners corporations, this will need to be accompanied by suitable authentication processes. Given the feedback highlighted above, the review does not propose a public register but instead is recommending that any owners corporation that decides to no longer use a common seal would need to maintain a record of the ‘authorised officers’ who can execute documents and require that this record can be made available, on request, to third parties seeking to verify a document or decision.

Recommendations

54. Permanently enable digital alternatives to the mandatory affixing of the common seal for the execution of documents, while not preventing the ongoing use of the hard copy common seal.

55. Establish, in consultation with the sector, a record-keeping system to enable verification of signatories' status as authorised officers when digital alternatives to the common seal are used.

Resolutions in 2-lot schemes

Strata schemes with 2-lots tend to work differently from other schemes as both lot owners need to work closely together and generally decide issues unanimously. This requirement can make it difficult to access the Tribunal and other dispute resolution mechanisms unless both owners agree, which may not always be practicable, for example, if there is a dispute about complying with by-laws. While the treatment of resolutions in 2-lot schemes was not explicitly raised in the Discussion Paper, a range of feedback was received on this issue.

One of the key issues raised was the way current restrictions relating to the voting entitlements of original owners applies in a two-lot context. The Management Act currently limits voting power of original owners (commonly the developer), when they own 50% or more of the lots, by reducing their unit entitlement by two-thirds. This applies to both special and general resolutions and is designed to ensure that they do not have unfair influence in the future development of the scheme compared to other owners. In general, this limitation is broadly supported but can result in unjust outcomes when applied in two-lot schemes. For example, if a developer retains ownership of one lot, such as an owner-builder who builds a duplex and continues to reside in or lease one of the lots, their unit entitlement is reduced in accordance with the general rule. This then inadvertently provides a controlling interest in the scheme to the other lot owner, which is an unintended consequence.

The other main issue raised with the review related to access to the Tribunal when breaches of a scheme's by-laws are alleged. Under the Management Act at present, an owners corporation is only able to apply to the Tribunal for a civil penalty for continued breaches of by-laws if they have first issued a notice to comply with a by-law and this notice was agreed to by a resolution of the owners corporation. Given there are only two lot owners, the review has heard that this process can become unworkable, with one of the parties refusing to agree to a resolution that would issue a notice to cease a breach, preventing the owners corporation from applying to the Tribunal in cases where the breach continues.

In light of this feedback, and subsequent stakeholder discussion, the review recommends some changes to improve the operation of the Management Act for two-lot schemes. In particular, the review is proposing that exemptions be provided to two-lot schemes for the general reduction in unit entitlement for developers in two-lot schemes and from the requirement to pass a resolution prior to issuing a notice to comply with a by-law under section 146 of the Management Act.

This approach should ensure that two-lot schemes can still function under the Management Act without one lot owner gaining a controlling interest or preventing another owner from accessing to the Tribunal for by-law enforcement. The proposed approach on by-law enforcement would still require a notice to comply with a by-law but allow for this notice to be given in the absence of a general resolution.

Recommendation

56. Introduce exemptions for two-lot schemes that allow for:

a) the issuing of a notice to comply with a by-law without a resolution by the owners corporation; and

b) original owners to maintain their full unit entitlement and voting rights.

5.1.3 Initial period

The initial period of a strata scheme is essentially its development phase, which:

- commences on the day the owners corporation is constituted (by registration of a strata plan by the original owner), and
- ends on the day there are owners of lots in the strata scheme (other than the original owner) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlements for the whole scheme.

The first AGM of the owners corporation must be held within two months of the expiry of the initial period.

The developer, as original owner of the scheme, has control of the owners corporation during the initial period while they are in the process of selling lots to prospective investors and owner occupiers. Those new owners will become the members of the owners corporation during its management phase. Given the owners corporation is the same legal entity throughout the strata scheme's life, the developer's control before it is 'handed over' to its new owners has the potential to commit them to detrimental arrangements.

Section 26 of the Management Act prohibits the owners corporation from doing any of the following things during the initial period, unless authorised by an order of the Tribunal:

a) alter any common property or erect any structure on the common property otherwise than in accordance with a strata development contract,

b) incur a debt for an amount that exceeds the amount then available for repayment of the debt from its administrative fund or its capital works fund,

c) appoint a strata managing agent or a building manager or other person to assist it in the management or control of use of the common property, or the maintenance or repair of the common property, for a period extending beyond the holding of the first annual general meeting of the owners corporation, or

d) borrow money or give securities.

The Discussion Paper asked how well the initial period restrictions were functioning and whether change was needed. Feedback suggested many strata residents were unsure how to answer this question. This may be unsurprising given that generally, only strata residents who had bought into a strata scheme either off the plan or soon after completion of construction would have any experience of how initial period restrictions work, for example by having attended the first AGM.

Respondents who did provide specific feedback, including the OCN, raised a range of concerns and suggested further controls were needed to prevent unfair outcomes for owners corporations. Some of the issues raised included that:

- the maximum penalty against the developer for failing to convene the first AGM within two months of the end of the initial period is insufficient at 10 penalty units ($1,100). Such a low penalty does not deter non-compliance given the financial resources at the disposal of a strata property developer and it should be substantially increased,
- there is insufficient recourse for owners corporations bound by contracts entered into during the initial period which have not been struck on competitive terms, involve undisclosed connections to the developer, or are otherwise unfair,

- there should be a stronger mechanism to ensure preservation of critical documents the developer is required to give to the owners corporation prior to the first AGM, and
- building management committees in part-strata developments are making decisions during the initial period of the strata scheme which would be unlawful if they had been made by an owners corporation acting alone.

Contracts entered into during the initial period

Only two types of contracts automatically expire at the first AGM: a strata managing agency agreement and a building manager's contract, with specific recommendations on those contracts discussed elsewhere in this report.

The Discussion Paper canvassed a possible reform that would require developers to present an owners corporation with a choice between three different managing agents at the first AGM. Feedback on this reform was largely unsupportive, with a few exceptions. Having considered the feedback received, the review considers imposing this requirement would be cumbersome and its costs and would be likely to outweigh potential benefits. It would generally be difficult for lot owners other than the developer at the first AGM to make an informed choice between the three agents being presented, with the principal point of difference between each potential agent being the contract price. Submissions also pointed out that it is not necessarily in the owners corporation's best interests to change their managing agent at the first AGM, so long as that person has been appointed in accordance with the law, because they are familiar with the scheme and should be well placed to manage its transition out of the initial period.

The Management Act also prohibits managing agents who are connected to the developer from being appointed in the first 10 years after registration of the strata plan. The managing agent appointed at the first AGM also has their term limited to a maximum of 12 months. The owners corporation is in a much better position at the second AGM to consider appointing an alternative managing agent if they want.

Accordingly, the review does not recommend proceeding with the reform raised in the discussion paper that developers should be required to present a choice between three different managing agents at the first AGM.

Only one other type of contract has a statutory limit on its duration, with utility supply contracts limited to a maximum of three years since the commencement of section 132A on 1 October 2019. Contracts for electricity supplied to residential strata schemes through an embedded network are currently exempt from that limit, which is discussed further in chapter 5.2.4 – Utilities.

A developer in control of an owners corporation during its initial period can otherwise enter into a contractual arrangement on any terms and for any length of time, so long as it does not breach section 26 of the Management Act.

Indeed, many strata schemes are occupied during their initial period and contracts for its normal functioning need to be in place, such as cleaning, waste and building maintenance services, which were the focus of important feedback to the review.

Some submissions argued that these contracts are sometimes not in the best long-term interests of the owners corporation, especially where they involve developer connections undisclosed displacement of what would be expected to be the developer's capital costs (e.g. installation of embedded networks) onto the owners corporation in the form of long term, ongoing operational expenses. The OCN suggested that contracts should be more easily terminated, such as with 90 days' notice - a practice which applies in the United States. The essence of the OCN sentiment was echoed in many other responses to the Discussion Paper, and in consistent feedback to NSW Fair Trading through complaints and correspondence in previous years.

However, this particular solution may not necessarily be the most effective public policy response. First, transplanting a particular legal provision from another jurisdiction's strata laws – a right to terminate contracts with 90 days' notice – carries risks of unintended consequences if not properly considered in the appropriate context. Second, amending the law in a prescriptive, piecemeal fashion to retrospectively address each concern after it arises plays a game of regulatory catch-up.

Instead, the widespread concern over owners corporations being vulnerable to inflated cost and due to uncompetitive or exploitative arrangements, and unfair arrangements due to their vulnerable position in the market, calls for consideration of a principles-based approach.

Australian Consumer Law prohibition on unfair contract terms for small businesses

Since its inception in 2010, the Australian Consumer Law (ACL), in Schedule 2 of the *Competition and Consumer Act* (Cth) and applied in NSW by the *Fair Trading Act 1987*, has included a prohibition on unfair terms in standard form consumer contracts. Unfair terms can be declared to be void by a relevant court or Tribunal. In November 2016, the prohibition was extended to cover small businesses. However, the definition of small business in the ACL does not include owners corporations.

Under the ACL, a contract term is *unfair* if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract, or
- is not reasonably necessary to protect the legitimate interests of the party that would benefit from the term, or
- would cause detriment (financial or otherwise) to a small business if it were to be applied or relied on.

The ACL also includes examples of types of unfair contract terms, including those that:

- permit one party, but not the other, to avoid or limit performance of the contract, or to terminate or vary the terms of the contract, to penalise the other party for a breach or termination of the contract, or to renew or not renew the contract,
- permit one party to unilaterally vary the upfront price of the contract without the right of the other party to terminate,
- permit one party to unilaterally vary the characteristics of the goods or services to be supplied, or to determine whether the contract has been breached or to interpret its meaning,
- limit one party's vicarious liability for its agents, or limits one party's right to sue the other party,
- permit one party to assign the contract to the detriment of the other party without the other party's consent,
- limit the evidence that one party can adduce in proceedings in relation to the contract, or that imposes an evidential burden on one party in proceedings relating to the contract.

A standard form contract is one that has been prepared by one party to the contract (the one offering the good or service) without negotiation between the parties – essentially where it is offered on a 'take it or leave it' basis.

In determining whether a contract is a standard form contract, a court must consider whether:

- the business offering the product or service has all or most of the bargaining power relating to the transaction,
- the contract was prepared by the business before any discussion with the small business about the transaction,
- the small business was in effect required to either accept or reject the contract as it was offered (i.e. on a 'take it or leave it' basis),
- the small business was given an effective opportunity to negotiate the terms of the contract, and
- the terms of the contract take into account the specific characteristics of the small business or the particular transaction.

The ACL only applies to small business contracts with an upfront price payable that does not exceed $300,000 – or $1 million if the duration of the contract is more than 12 months.

The review notes at the time of writing the Commonwealth Treasury was conducting consultation on possible amendments to the unfair contract terms provisions of the ACL as they apply to small businesses. However, this consultation did not include consideration of whether other entities, such as owners corporations, should be covered by the law. The consultation included other proposals such as raising the monetary threshold for application of the prohibition.

On this basis, rather than seeking to have owners corporations covered by the ACL, the review is proposing that the Management Act be amended to include a prohibition on unfair terms in standard form contracts offered to owners corporations, mirroring the principles set out in Part 2-3 of the ACL and aligned with its monetary limits. Such protections would address some of the concerns raised in the review about the types of contractual arrangements to which owners corporations are bound in the strata services market.

In this market, owners corporations as a collective of individual property owners and governed by a committee of volunteers, are vulnerable to potentially unfair contract terms. They are not legal experts and may not understand the legal or financial implications of contractual terms until they are in operation. Moreover, where standard form contracts are offered with unfair terms included, owners corporations can be left with very few alternatives if they decide not to accept the ‘take it or leave it’ offer. In regional areas where there may be fewer strata services owners corporations may feel the effects of unfair contract terms more acutely. These changes would also be complemented by the proposed reforms in relation to utility supply contracts, which are discussed in section 5.2.4.

Education for strata committees and managing agents

The review also recommends better education for owners corporations both on the new unfair contract terms prohibitions, as well as contractual arrangements in general. Many of the contracts entered into by owners corporations can in fact be negotiated and they are not entirely without bargaining power.

The ACCC produces guidance about unfair terms for all parties to small business contracts. NSW Fair Trading should build on this guidance to include the proposed new provisions in the strata laws for owners corporations and their suppliers.

Strata committees, managing agents and building managers have an important role in this regard. Proposed new mandatory educational material for committee members would need to cover this in detail, while managing agents could be required to learn about the issue through their compulsory continuing professional development topics under the PSA Act.

Although this policy option was not canvassed in the Discussion Paper, in principle stakeholder support has been forthcoming from the organisations consulted during the review. The idea of extending the ACL unfair contract term prohibition to owners corporations (or inserting equivalent

provisions, as proposed here) is not new, having been previously raised in discussions among some strata stakeholders.

Recommendations

57. The Management Act should be amended to include a prohibition on unfair terms in standard form contracts offered to owners corporations, mirroring the principles set out in Part 2-3 of the ACL and aligned with its monetary limits.
58. Guidance on unfair contract terms should be provided for the strata sector.
59. Strata committees and managing agents should be required to undertake specific education on contractual arrangements for strata products and services.

Holding the first AGM

Section 14 of the Management Act requires an original owner of a strata scheme to convene the first AGM no later than two months after the initial period has ended. Feedback to the review argued the maximum penalty for non-compliance at 10 penalty units ($1,100) is an inadequate deterrent given the substantial financial resources often at the disposal of strata property developers, who may have an interest in delaying the first AGM and the consequences of denying lot owners access to the critical documents required to be provided prior to the first AGM.

This penalty is one-tenth of the maximum penalty for failure to provide documents and records prior to the first AGM. The review agrees with the feedback raised and is proposing that the maximum penalty be substantially increased and further consideration also given to the development of a continuing offence for each day that the original owner remains in breach.

Recommendation

60. The maximum penalty for failure to convene the first AGM within two months of the initial period ending should be substantially increased and aligned with failure to provide documents and records prior to the first AGM. A continuing offence for each day that the original owner remains in breach should also be considered for both offences.

Documents and records to be provided to the owners corporation prior to first AGM

At least 48 hours prior to the first AGM, the developer is required under section 16 of the Management Act to provide to the owners corporation with important, foundational documents and records about the strata scheme, including:

- all plans, specifications, occupation certificates or other certificates (other than certificates of title for lots), diagrams, depreciation schedules and other documents (including policies of insurance) relating to the parcel or any building on the parcel, which must include, at a minimum –
    - all planning approvals, complying development certificates and related endorsed plans, approvals, “as built” drawings, compliance certificates (within the meaning of the *Environmental Planning and Assessment Act 1979*), fire safety certificates and warranties relating to the parcel or any building, plant, or equipment on the parcel, and
- the certificate of title for the common property, the strata roll and any notices or other records relating to the strata scheme, and
- the initial maintenance schedule, and

- any interim report or final report of a building inspector prepared under Part 11 of the Management Act and relating to any building on the parcel.

The records and documents can be provided in either hard copy or electronic form, or a combination of both.

Over time those documents and records can be lost, destroyed or difficult to retrieve from the person who held them, such as a former committee member or a managing agent whose engagement has ended.

The REINSW submission proposed that this problem could be addressed by requiring the developer to lodge these records with the Strata Hub using the regulation-making power in section 271(2A) of the Management Act. The review considers that this proposal has merit given mandatory lodgement of first AGM documentation would serve to permanently preserve an electronic copy of all the foundational documents and records. It would also give NSW Fair Trading unprecedented regulatory oversight of developers' compliance with their obligations at this critical stage of a strata scheme's life.

However, analysis of this proposal has also highlighted that there can be substantial complexities in simply requiring a direct upload of documents. This can be due to their size, varied formats and resolution, and may not always enable the desired outcome of easier access to documents due to these constraints. On this basis, the review is recommending that mandatory electronic lodgement of first AGM documents should become a requirement, but also notes that implementing this proposal will need to involve further work with the sector to identity the most efficient, cost-effective and usable ICT approach, including exploring possible linkages with the Strata Hub.

The review also received feedback that the time period in which documents are provided to the lot owners prior to the first AGM was not long enough. As noted above, all the documents can currently be provided as close as 48 hours prior to the meeting. Given many of these documents are complicated and lengthy, 48 hours is not sufficient time to allow lot owners to properly consider these matters prior to the meeting, or to seek advice on them if that is their preference. Moreover, the review has consistently heard of the challenge facing lot owners, especially new owners, in understanding the complex nature of strata scheme management and operation. This is likely to be particularly relevant at the first AGM, where the volume of complex documentation is substantial.

Drawing on these comments, the review proposes two further reforms. The first of these is to recommend that key documents for the first AGM must be provided at the same time as the notice. This approach would provide more certainty, as well as give lot owners 14 days to consider the documents and to formulate questions or propose alternatives.

The second reform recommends that DCS work with the strata sector to develop a mandatory statement that could be provided alongside the full documents, and provide a plain English summary of the key information, much like a Product Disclosure Statement does for financial products. This statement would support new owners in understanding the key matters being brought to their attention, while continuing to have access to the detailed documents.

Recommendations

61. Require and enable the mandatory electronic lodgement of first AGM documents, with implementation to involve further work with the sector to identity the most efficient, cost-effective and user-friendly system.
62. Extend the time in which the developer needs to provide all documents prior to the first AGM from 48 hours to instead align with the notice of the first AGM, which is 14 days.

63. DCS should work with the strata sector to explore the development of a plain English statement that provides essential summary information on the items being considered at the first AGM.

5.1.4 Strata managing agents

The strata managing agent plays a vital role in the management and functioning of many strata schemes in NSW. A managing agent can be engaged by an owners corporation to make life easier for lot owners by handling the day-to-day management of the scheme, providing advice to the committee and by helping the scheme to comply with the law.

The 2015 reforms made major changes to the regulation of strata managing agents, aiming to improve their accountability to the owners corporation and to provide more choice to owners corporations. This was achieved through imposing controls on the appointment of managing agents, including contract term lengths, reporting requirements and conflict of interest disclosures.

Alongside the requirements under the strata laws, managing agents also need to comply with their obligations under the licensing legislation – the PSA Act and *Property and Stock Agent Regulation 2014* (the PSA Regulation), which includes mandatory Rules of Conduct.

The Discussion Paper sought feedback on the effectiveness of the above measures as well as some options for reform. Feedback to the review suggested that the current provisions have broadly been successful in helping to improve standards in the industry and deliver improved outcomes for owners corporations. However, managing agents are still the subject of a significant number of complaints to Fair Trading and disputes in the Tribunal, with the feedback to the review identifying the following issues as the most in need of further consideration:

- better clarity about renewals and terms within managing agency agreements,
- further improvements to accountability and record handling obligations, and
- maintaining appropriate education of managing agents to reflect changes in the market and the law.

The review also notes that the PSA Regulation is being remade in its entirety in 2022. This will provide a further opportunity to examine the regulation of strata managing agents, including the current Rules of Conduct.

Strata managing agent contracts

Contract terms and renewal

A key reform from 2015 was the imposition of contract length limits under section 50 of the Management Act: a 12- month limit for managing agents appointed at the first AGM and three-year limit thereafter. These contract length limits have strong support, with 69.2% of survey respondents supporting them as well as a range of major stakeholders.

Other survey respondents and stakeholder groups, such as PICA, SCA and UDIA, suggested a possible change to the initial term to two years on the basis that the current 12 months is too short to adequately set up the processes, plans and finances that are needed for the owners corporation to effectively function, including consideration of any matters that would fall within the two year statutory warranty period. These stakeholders advised that the amount of work and the lack of certainty on whether a three year contract will be awarded at the second AGM can also act as a deterrent to some agents taking up this job. While the review appreciates these concerns, extending the initial term beyond 12 months needs to be balanced with the ability of the lot owners to review and reconsider the direction of the owners corporation early in its life.

One of the reasons a short initial contract was adopted is due to the potential vulnerability of lot owners at the first AGM, where many lot owners may not yet be involved, and there can be uncertainty around what is being considered and agreed to (an issue also discussed in Chapter 5.1.2). The 12 month initial contract allows lot owners to carefully consider the managing agent's performance and allow for a new agent to be appointed if found to be unsatisfactory. On this basis, the review recommends that no change be made on the length of contracts at this time.

Section 50 also requires an agent to provide written notice of the end of the term of appointment at least three months prior to its expiry and the way in which a contract can be extended. The notice is intended to allow the owners corporation enough time to consider appointing an alternative managing agent before the current contract expires. The review heard some concerns from lot owners and stakeholders that the current notice period is not working effectively, a concern that aligns with some complaints previously received by NSW Fair Trading. In particular, feedback suggested that some managing agents are providing notice of the expiry at the start of the contract, that is, up to three years in advance. This means that owners corporations can be caught unaware when the contract automatically renewed or expires. The review also heard, including from the SCA and UDIA, that the current provisions relating to extensions are confusing, have resulted in diverse legal interpretations and would benefit from re-drafting for more clarity and to minimise the risk of inappropriate use.

The review appreciates that such behaviour is unlikely to be widespread, but also that the detail of section 50 of the Management Act should be clarified to ensure it works as intended. On this basis, the review recommends revising the drafting on extensions and specifying that a notice regarding the expiry of a contract must be sent to the owners corporation in the period three and six months prior to the expiry of the contract. This is unlikely to impose a substantial administrative burden and will ensure owners corporations are more prepared to consider either renewing their agent's appointment or instead exploring alternatives.

Recommendation

64. Revise section 50 of the Management Act to clarify that written notice regarding contract expiry must be provided in the period three to six months before expiry and to ensure there is more clarity regarding the provisions relating to extensions of strata managing agent contracts.

Standard form contracts and contractual terms

The Act does not prescribe the form of contract that is to be in place between a managing agent and the owners corporation, although Schedule 14 to the PSA Regulation includes mandatory and prohibited terms for strata managing agency agreements. The Discussion Paper sought feedback on whether a standard form managing agency agreement should be prescribed in law. This would be similar to the way in which the NSW Government prescribes a standard form contract for residential tenancy agreements.

There was strong support among survey respondents (78.8%) for the idea as well as within many submissions. However, a number of stakeholder groups, including SCA, REINSW, UDIA, ACSL and the Law Society, expressed concern that prescribing a standard contract would be a significant intervention into the market and that the nature of the agreement between a managing agent and an owners corporation is very different to that which exists between a tenant and a landlord.

Having considered the feedback, the review considers that prescribing a standard form agreement in legislation at this point may not be necessary and notes that the PSA Act does not impose standard form agency agreements on other agents regulated under that Act (real estate agents and stock and station agents). There are other ways to improve the regulation of contractual arrangements. Moreover, based on the feedback received, it appears that the key driver for much

of the support for standard agreements is a concern with what are perceived to be unfair clauses in some strata managing agency agreements. It was suggested to the review by several stakeholders including the Law Society, ACSL, UDIA and PICA, that instead of prescribing a standard form agency agreement, terms of concern could be addressed through a prohibition on their inclusion in management contracts.

This latter approach is already in place through Schedule 14 of the PSA Regulation and ensures a baseline level of protection and consistency for contracts without being overly prescriptive. A project to remake the PSA Regulation has recently commenced and is due to be completed by 1 September 2022. The remake process will involve the broader examination of the provisions under Schedule 14 and provides an ideal opportunity for an exploration of the inclusion of any additional mandatory or prohibited terms in Rules of Conduct.

Recommendation

65. The inclusion of additional mandatory or prohibited terms for strata management agency agreements should be considered as part of the remake of the Property and Stock Agents Regulation in 2022.

Accountability for managing agent functions

Clearer oversight of managing agents by committees

Managing agents are required to keep written records of their actions each time a function is performed on behalf of the owners corporation. Section 55 of the Management Act requires the managing agent to record the manner and function in which they exercise a delegation. A copy of the records must be kept for the preceding 12 months and be provided to the owners corporation at least once per year. The managing agent can also be requested to provide information about financial transactions or records on any other matters by the owners corporation, which is intended to improve transparency and accountability in decision-making.

Committees play an important role in monitoring managing agent functions on behalf of the owners corporation. However, as committees are made up of volunteers who usually do not have detailed expert knowledge in many of the areas being administered by the agent, the committee may lack the necessary experience and knowledge to conduct this oversight role effectively. The review has heard that, in some cases, substantial decisions are being made by managing agents with little information being provided to the strata committee or the owners corporation in a timely manner. While such decision making may be legitimate, and an appropriate use of delegated functions, the review does agree that there is scope to ensure that owners corporations have more regular oversight and knowledge of how their functions are being exercised.

In this context, the review proposes to amend the Management Act in order to require more proactive and timely reporting of material decisions. This should support owners corporations better understand and oversee the operation of their schemes. This recommendation would, in effect, reverse to some extent the onus on an owners corporation needing to request information and instead require the managing agent to proactively provide certain information, unless they are instructed not to by the owners corporation. The review acknowledges that many decisions taken by managing agents can be minor in nature and it is not proposed that the new arrangement would capture them, which will already be reported under section 55. Instead, the focus of the new requirements would be material decisions and would include the ability for the committee to opt out of this process or to set a monetary threshold or other condition that would determine which decisions needed to be reported.

Recommendation

66. Introduce a new process that requires managing agents to report on material decisions to the strata committee.

Management of breaches by strata managing agents

The 2015 reforms added new accountability measures to the Management Act that sought to better regulate the exercise of functions delegated to a managing agent by an owners corporation. Section 57 of the Management Act provides that if a managing agent has been delegated a function, breaches their delegated duty, and this would be an offence if committed by the owners corporation, then the agent is guilty of an offence for any breach of the duty by the agent while the delegation remains in force.

The Discussion Paper noted that there is some concern that section 57 does not currently provide for situations where a managing agent breaches a statutory duty for reasons outside of the agent's control. A typical example is when an agent is prevented from exercising a delegated function because an owners corporation or strata committee refuses to release the required funds. The Discussion Paper suggested that one way forward on this matter could be to introduce a specific defence in the legislation to cover such situations. This proposal was largely supported, including by the SCA, OCN and the Law Society, and the review recommends its implementation.

Related to the issue of how breaches are managed, the review also received feedback, notably from ACSL as well as OCN, that there is a concern around the limited statutory oversight of managing agent termination, particularly in cases where a managing agent breaches a requirement under the Act. This is because governance of terminations is largely left to the terms of contracts between an owners corporation and a managing agent as well as the instrument of appointment. The Act allows an owners corporation to apply to the Tribunal for an order terminating the agreement under section 72 of the Management Act.

The review has heard that some agency agreements do not contain terms allowing for a termination in the case of a breach and that while penalties can be pursued for a breach under section 57, there can be limited ability for an owners corporation to terminate even after such a breach is established. Even in the absence of a breach, the lack of termination oversight has been noted as making it difficult for some schemes to end their agent's appointment, with some managing agents refusing to accept a termination. In the context of this latter situation, ACSL has suggested the introduction of a power for the Tribunal to declare a termination has been validly executed.

Given the limited feedback received on this issue of terminations, the review considers that further input and sector engagement is needed before a final position is taken. The review proposes that, as part of drafting other identified amendments, consideration be given to whether further statutory oversight of terminations is needed, either through the Act itself, or through the PSA Regulation. This could include the introduction of mandatory terms regarding termination, an option which can be examined as part of the review of the PSA Regulation discussed in the previous section. If such reforms are pursued, consideration would also be given to their application to building managers.

Recommendations

67. Introduce a specific defence for managing agents against a claim for breach of duty where the agent was frustrated in carrying out its duty by the owners corporation.

68. As part of the broader drafting process and the Property and Stock Agents Regulation remake, examine whether further statutory oversight of strata managing agent contract termination is needed.

Accountability of strata managing agents

The Act includes a range of provisions that impose disclosure and accountability requirements on managing agents. Section 71 of the Management Act requires the disclosure of any interests to the owners corporation, including any connection the agent may have to the original owner of the scheme and any direct or indirect pecuniary interest in the strata scheme. The Management Act also regulates the procurement of services, gifts, benefits and commissions to prevent the potential inducement of the managing agent to act other than in the owners corporation's best interests.

Agents are also required to comply with obligations under the PSA Act. This includes a requirement under the Rules of Conduct that an agent must not, in relation to any referral to a service, falsely claim to be independent of the service - that is, claim to be without a personal or commercial relationship. If an agent is not independent, then they must disclose the nature of the relationship as well as the nature and value of any benefit from the referral, such as a commission.

The Discussion Paper sought feedback on the effectiveness of these requirements and whether there was a need for further obligations. Overall, a range of submissions, including from the SCA, the Law Society and UDIA, considered the existing provisions to be working effectively. While concern about both conflicts of interest and gifts were raised by some survey respondents and stakeholders, there also was limited awareness that managing agent behaviour is regulated by statutes other than the Management Act.

Managing agents are specifically regulated by both the Management Act and the PSA Act. The *Fair Trading Act 1987* also applies to strata managing agents and building managers, and was amended in 2018 to impose new disclosure obligations on intermediaries across the whole consumer marketplace.

Section 47B of the *Fair Trading Act* requires an intermediary to take reasonable steps to ensure the consumer who will be supplied with goods and services that involve a financial incentive for the intermediary is aware of the arrangement that provides for the financial incentive. An 'intermediary' in that law is simply a person who arranges contracts for the supply of goods or services as an agent or refers consumers to another supplier of goods or services.

The *Fair Trading Act* provides a maximum penalty where this provision is contravened - $11,000 for an individual and $22,000 for a corporation.

Feedback to the review and other anecdotal evidence suggests that a significant number of managing agents and other members of the strata sector are unaware of the full array of mandatory disclosure obligations under the abovementioned laws. Many submissions and survey responses advocated for additional disclosure obligations on managing agents related to the commercial arrangements they enter into on behalf of the owners corporation, seemingly unaware that robust disclosure obligations and prohibitions on false or misleading representations are already in place.

This suggests that an education and information campaign, backed by a proactive compliance program, is needed to improve sector conduct and lift transparency standards to the level required by law.

Some submissions, including the OCN, proposed that the laws go further to prohibit commissions entirely, or in relation to specific contracts such as insurance. While the review appreciates that

there may be circumstances where the receipt of commissions can place the managing agent in a real or perceived conflict of interest, it is also noted that commissions are not inherently damaging so long as managing agents are open about what benefits they are receiving. When an owners corporation has this knowledge, it can make an informed decision on whether to endorse or reject the contracts and services being proposed by the managing agent.

Recommendation

69. The Fair Trading strata education and information campaign recommended by this review should prominently include all of the existing disclosure obligations that apply to strata managing agents and building managers as intermediaries. Consideration should be given to backing this campaign with a pro-active compliance program to monitor and enforce compliance with disclosure obligations.

Education and training for strata managing agents

The PSA Act sets out the eligibility requirements for obtaining a strata managing agent's licence, including education and experience. The Minister for Better Regulation and Innovation has also appointed a Property Services Expert Panel, to provide direct advice and input on the sector's educational needs, including mandatory topics for annual CPD.

The education level of managing agents was raised in the Discussion Paper, with feedback specifically sought on the current arrangements, as well as whether any changes were needed. The Paper also asked whether there was a need for more education on building defects and on the possibility of specialist certifications.

The responses received generally supported the need for the education requirements to be continually updated to reflect the ongoing changes in the industry and changes in different laws. It was suggested that such updates are essential to ensure managing agents continue providing effective services for their clients. Feedback has also suggested that the current requirement to only be undertaking a Certificate IV may be insufficient for assistant agents. This is because assistant agents do a significant proportion of the day-to-day work in agencies and imposing CPD requirements alongside this training would ensure that assistant agents have the appropriate skills and knowledge.

In response to whether managing agents should have building defect knowledge requirements 78.5% of survey respondents supported this being part of a managing agent's education. However, some stakeholder groups, such as the SCA and REINSW, were concerned that due to the highly technical nature of building safety this should be left to specialist engineers and lawyers. Other groups, such as the Law Society, ACSL and UDIA, suggested that while detailed knowledge of building defects may not be appropriate there is a case for a minimum level of knowledge being required to ensure managing agents can properly identify issues that need escalation and expert advice.

Drawing on the feedback received, the review considers that while no major reforms are needed, ongoing review and consideration of training and CPD topics should continue to occur. The Department already engages with the Property Services Expert Panel on mandatory CPD topics, and the feedback to the review highlights the importance of this process to ensure that CPD is targeted on the key issues facing the sector. The review recommends that the Government continues to work with the industry to identify the gaps in knowledge and how these gaps can best be addressed.

Recommendation

70. DCS should continue working with the Property Services Expert Panel to identify any gaps in managing agent knowledge and develop appropriate mandatory CPD topics.

Empower NSW Fair Trading to seek appointment of compulsory strata management

The Management Act currently enables strata schemes to appoint a strata management agent but does not require one to be appointed. The Discussion Paper sought feedback on whether strata schemes should be required to have a managing agent once it is above certain size. The reform option was raised in the Discussion Paper because NSW Fair Trading has observed that some self-managed strata schemes have had significant issues with record keeping and financial management. One of the reasons this is thought to be occurring is that committee members are volunteers that lack sufficient knowledge and skills to effectively manage the owners corporation, particularly larger schemes.

There was strong support among survey respondents and stakeholders for this proposal, with 71.5% supporting this idea. However, there were diverse suggestions on what size a scheme should be and whether the need for a compulsory agent should be linked to the number of lots or the size of budget. Feedback to the review also highlighted that mandating managing agents to all schemes above a certain size does not necessarily resolve the issue. This is because, for example, some large schemes with over 100 lots can be very well and effectively managed without a managing agent, while smaller schemes with a dozen lots can be very poorly managed. This suggests that a 'one size fits all' approach that mandates all schemes above a certain size be required to have a managing agent may not be appropriate. There was also some opposition to the proposal, including from OCN on the basis that the focus should be on ensuring owners corporations and strata committees better understand their roles and are then able to make an informed choice about their need for an agent.

On the basis of the feedback and further consideration, the review has identified an alternative option that seeks to balance the diverse suggestions received. Instead of mandating the appointment of a manager for schemes of a certain size, the review recommends that NSW Fair Trading is provided with legal standing to seek the appointment of a compulsory managing agent in prescribed circumstances. Under section 237 of the Management Act, the Tribunal can appoint a managing agent to take over the functions of the owners corporation and this can occur whether the scheme already has a managing agent or is self-managed. However, such orders are only able to be sought by lot owners.

Empowering Fair Trading to seek the compulsory appointment of a managing agent under this provision would allow it to respond to the most serious situations of mismanagement regardless of the size of the scheme or whether the scheme has a managing agent or is self-managed. This would not remove the existing ability of lot owners to seek this order themselves but would allow for regulatory intervention in the worst cases. This approach is designed to enable all schemes to continue to make independent choices about their management in the first instance, while ensuring protections can be introduced where needed. This approach is also consistent with a similar power under the *Property and Stock Agents Act 2002*, under which Fair Trading can appoint a manager to assume control of a licensed property agency business under certain circumstances of concern.

Recommendation

71. Provide NSW Fair Trading with standing under section 237(8) of the Management Act to apply to the Tribunal to seek the appointment of a compulsory managing agent.

5.1.5 Finances

Sound financial management of the owners corporation is crucial if a strata scheme is to be properly managed and maintained. Specific financial functions of the owners corporation can be exercised by the treasurer, strata managing agent and other persons who have delegated authority.

Strata laws on finances have not changed significantly for many years, with only modest changes being made in 2015, for example the renaming of the sinking fund as the capital works fund.

The feedback to the review indicated broad satisfaction with how the Management Act provides for the financial management of strata schemes. There is a good understanding of how the existing financial management processes work and the issues raised in feedback to the review were focused on providing clarity and improving how these existing provisions work, rather than seeking more thorough changes.

Administrative and Capital Works Funds

The feedback to the review indicated that 65.7% of respondents think the laws governing finances and accounts are working 'well' or 'very well'. While this was the general view expressed, feedback also identified some areas for improvement and clarification.

Managing agent handling of money

Section 78 of the Management Act provides that an owners corporation must pay any amounts that are received by it (and are not otherwise invested in accordance with the Act) into an account established in an authorised deposit-taking institution in the name of the owners corporation. However, this requirement does not apply to an owners corporation that has appointed a strata managing agent to whom the duty of the owners corporation under this section is delegated.

Some submissions raised concerns about strata managing agent trust accounts where owners corporation money is held. These submissions reported that there have been instances where the managing agent's contract had been terminated but the owners corporation had difficulties accessing its money as the account was in the name of the agent.

The ACSL suggested that the Management Act should therefore be amended to require that trust accounts in which owners corporation money is held be in the name of the owners corporation.

However, section 86 of the PSA Act prescribes very clear steps on how managing agents are to handle money held in trust for their client and includes rules on the naming of accounts. Section 86(2) and (3) of the PSA Act require that a trust account is to be in the name of the licensee (either the corporation licensee, the agent licensee or the firm of licensees), and the account name and description of the account in books, records and cheques:

- must include the name of the licensee corporation, licensee or firm of licensees in whose name the trust account is kept, and
- must include the words "Trust Account", and
- may include, at the end of the account's name, a name or other matter to identify the person on whose behalf money in the account is held.

Section 86 of the PSA Act also clearly states that money held on behalf of a person in a trust account is to be paid to the person or disbursed as the person directs.

Given the account is that of the agent holding money on behalf of the client, the review does not consider it appropriate that the owners corporation be the sole name on the account, particularly as this may not be acceptable to the authorised deposit-taking institution.

It is unclear from the submissions whether the issue of an owners corporation being unable to access money in a bank account after termination of an agent's contract is simply that there was no alternative account immediately available into which to transfer the money or whether it was a failure by the agent to pay the funds to the owners corporation or as directed by the owners corporation. The latter would be a breach of the PSA Act and is a compliance issue.

The ACSL submission has suggested that the existing rule in clause 1 of Schedule 6 of the PSA Regulation (which provides that an agent who is no longer acting for an owners corporation cooperate with a new agent in relation to access to records and transfer of management functions) be extended to requiring cooperation with the owners corporation in circumstance where an agent's contract has been terminated and the owners corporation has decided to self-manage. The review supports this suggestion and recommends that it be considered as part of the current review of the PSA Regulation.

Recommendation

72. As part of the remake of the Property and Stock Agents Regulation, consider extending the existing requirement that an agent cooperate with a new agent in relation to access to records and transfer of management functions to the situation where an agent's contract is terminated and the owners corporation has decided to self-manage.

Uses of administrative and capital works funds

The REI and Law Society have raised the issue of confusion over what expenses can be paid from each of the administrative and capital works funds. The REI provided the example of an agent paying expenses relating to supervision and project management of capital works from the capital works fund, but the strata committee arguing that these amounts should have been paid from the administrative fund.

The review considers that there may be benefit in clarifying in guidance issued by Fair Trading that capital works expenses include expenses that are incidental to capital works expenses, such as supervision and project management expenses.

Recommendation

73. NSW Fair Trading to ensure that guidance on what expenses can be paid from the administrative and capital works fund is clear, and that the guidance clarifies that capital works expenses include expenses incidental to capital works including project management and supervision expenses.

Transfer of funds between accounts

Section 76 of the Management Act offers owners corporations flexibility in managing their funds, by providing that they can use money from either the capital works or administrative funds to cover expenses from the other account, or transfer money between the funds. Section 76(2) of the Management Act provides that the owners corporation has three months to determine the amount to be levied as a contribution to repay the amounts that were removed from either of the funds. The Discussion Paper sought feedback on how the public is interpreting these provisions.

As part of the COVID-19 temporary laws introduced in 2020 the NSW Government extended the time period to make a decision on paying back funds from three months to six, to provide additional flexibility. However, during this process DCS received feedback that, in practice, there were differing interpretations on how section 76(2) operates. It appears that some stakeholders are interpreting section 76(2) to require that money that has been transferred from one fund to another must be repaid in full within three months. It seems that these stakeholders not only believe that the money must be repaid within three months, but that the full amount must always be repaid. This means that, even, for example, where lot owner contributions are due, so the money does not need to be repaid, some stakeholders are interpreting section 76(2) as requiring a levy for repayment of the exact amount.

Due to the importance of having clarity on managing the finances of the owners corporation, the review recommends that section 76 be amended to clarify that the owners corporation is only required to make a decision within three months on the amount to be levied, and only if the owners corporation considers that the amount needs to be repaid.

Recommendation

74. Amend section 76(2) of the Management Act to clarify that, if the owners corporation considers that the amount transferred from the administrative to the capital works fund or vice versa needs to be repaid, the owners corporation has three months to decide on a contribution that will enable the amount to be repaid.

Levies and late payments

The review sought feedback on how levies are calculated and how arrears payments are being managed. 62.5% of survey respondents said that the provisions governing these issues are working 'well' or 'very well'.

Stakeholders, including PICA, UDIA and REINSW, argued that the grace period of one month to pay outstanding levies is too long. These submissions argued that some lot owners wait the full month before paying levies, which can adversely affect the cash flow of the owners corporation and make management of recurrent expenditure more difficult. A shorter period of 14 days was suggested as being an appropriate alternative.

While the review appreciates that receiving payment of routine levies earlier is always preferable from a cash flow perspective, shortening the time available to pay outstanding levies is likely to have adverse impacts on lot owners, especially in the context of the economic impact of the COVID-19 pandemic. The review does not consider that there is sufficient justification to shorten the grace period at this time.

However, the review does consider there is merit in the suggestion from the REI that the grace period be reduced in some instances where a special levy is being raised to pay for urgent repairs, especially where the failure to carry out these repairs would have an adverse health and safety impact.

Recommendation

75. That the grace period to pay outstanding levies be reduced from one month to 14 days for special levies being raised for the purposes of carrying out urgent repairs which are necessary for health and safety reasons.

Other fees charged by owners corporations

A recent decision by the Tribunal on 30 August 2021, in *Roden v The Owners – Strata Plan No. 55773* [2021] NSWCATCD 61 (***Roden***), raised the issue of the types of fees that an owners corporation can require from lot owners. In *Roden*, the owners corporation passed a by-law requiring payment of a $300 administration fee for an application to keep a pet and a separate application (together with another $300 fee) for each additional pet. This fee was ostensibly for the cost of processing the application, however it has been suggested to DCS that the $300 fee payment may not have been connected to any actual administration costs, but rather was being collected as a non-refundable contribution to a special fund to over any damage that a pet could cause to common property.

The fee was required under the scheme's by-laws, however the Tribunal found that the fee did not make the by-law harsh, unconscionable or oppressive under section 139(1) of the Management Act.

The Management Act currently only specifically provides for an owners corporation to charge a fee for two things:

(i) inspection of records under section 182 ($31 and an additional $16 for each half-hour or part of half-hour after the first hour of inspection) and

(ii) generating a strata information certificate under section 184 ($109 and an additional $54 for a further certificate for a lot comprising a garage, parking space or storeroom, if it is the first request).

If the fee in *Roden* could be characterised as a levy, it would need to comply with the requirements applying to levies in Part 5, Division 2 of the Management Act.

The review considers that the issue of how fees such as this one should be characterised and how such fees may affect the ability of strata residents to keep pets requires further investigation and consideration of whether any amendments to the Management Act are required.

Recommendation

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

Controls on spending by owners corporations

Oversight of large expenses

The Discussion Paper asked whether managing agents should be subject to a general duty to ensure that obtain goods and services obtained on behalf of the owners corporation are obtained at competitive prices and on competitive terms. While this question received a high level of support from survey respondents, feedback from submissions highlighted the difficulties with such a requirement. The Law Society expressed concern about the vague nature of terms such as "competitive price" and "competitive terms". PICA and UDIA pointed out that agents already have a duty under the rules of conduct to act in the best interests of the owners corporation and that competitive price is only aspect of obtaining goods and services – with quality and timeliness also important.

The Law Society argued that a better option would be require multiple quotes for goods and services over a prescribed value, with the power to exclude certain transactions. This would assure the owners corporation of the competitiveness of the price being obtained.

The review considers that there is merit in this suggestion and that it should be extended beyond transactions where the managing agent is involved and applied generally to large expenditures by owners corporations. Under section 102 of the Management Act, large strata schemes of 100 lots or more are required to obtain at least two quotes for any proposed expenditure over $30,000, and the review recommends that this requirement extend also to smaller schemes.

In order to further ensure that a range of market providers has been considered, the review recommends that the quotes be obtained from unrelated business entities.

Recommendation

77. For expenditure over $30,000 on any one item, an owners corporation be required to obtain at least two quotes from unrelated entities.

Legal expenses

Section 103 of the Management Act provides that an owners corporation must not obtain legal services for which a payment may be required without a resolution at a general meeting, unless:

a) the owners corporation is of the opinion that urgent action is necessary to protect the interests of the owners corporation, and
b) the cost of the legal services does not exceed $15,000.

Approval under section 103 is not required for the following:

(a) to obtain legal advice before commencing legal action
(b) to take legal action to recover unpaid contributions, interest on these or related expenses
(c) for a non-urgent matter if the cost of the legal services does not exceed $3000.

Some submissions argued that section 103 as currently drafted is difficult to understand and apply and possibly unnecessary. The OCN submission contended that section 103 is often interpreted to mean that legal services are only approved up to a certain cost ceiling that is identified in advance. The OCN recommends removing the reference to the legal services being services 'for which any payment may be required'. The ACSL argued that recent Tribunal decisions mean that section 103 is unnecessary as an owners corporation already has the power to approve obtaining legal services, and recommended that, if it is retained, it should refer to estimated costs.

The review considers that there is value in retaining an explicit provision about owners corporation approval for legal services and recommends that section 103 be amended to clarify that the owners corporation may choose to place limits on the costs that are approved but that the approval need not be limited to a specific cost but can be a general approval to obtain certain legal services.

Recommendation

78. Amend section 103 of the Management Act to clarify that, while an owners corporation may choose to place limits on the costs of legal services that it approves, the approval may simply be an approval to obtain legal services that is not limited to a specific cost.

Financial reporting

Financial statements and audits

Section 92 of the Management Act provides that the owners corporation must cause financial statements, and a statement of key financial information, to be prepared for each reporting period for the administrative fund, the capital works fund and any other fund kept by the owners corporation. The financial statements are to set out, among other things, the income and expenditure for each fund, and the particulars of each transaction, and monies owing.

Section 95 of the Management Act provides that the owners corporation for a large strata scheme (with over 100 lots), or a strata scheme for which the annual budget exceeds $250,000 (or another amount prescribed), must ensure that the accounts and financial statements of the owners corporation are audited before presentation to the annual general meeting. The owners corporation for any other strata scheme may also determine that the accounts and financial statements of the owners corporation are to be audited. An audit of the accounts and financial statements of an owners corporation must be carried out in accordance with the Australian Auditing Standards.

The Discussion Paper sought feedback on whether the compulsory audit threshold of $250,000 was adequate. Feedback was mixed with several stakeholders recommending the threshold be reduced to $125,000 or $150,000.

The review does not consider that the case has been made for a reduction in the threshold given the possible expenses of auditing. Any scheme below the 100 lot or $250,000 threshold is able to choose to have its accounts audited should they wish to do so.

Statement of Key Financial Information

The statement of key financial information for the administrative or capital works fund must be in the form approved by the Secretary and include:

a) the fund, and the reporting period, for which it is prepared,
b) the balance carried forward in the fund from the previous period,
c) the total income of the fund received during the period,
d) the total interest earned by the fund during the period,
e) the total contributions paid to the fund during the period and the total of all arrears in contributions payable to the fund,
f) the total expenditure for maintenance from the fund during the period,
g) the total expenditure for administration costs from the fund during the period,
h) the balance of the fund, and
i) the principal items of expenditure for maintenance proposed during the next year.

Several stakeholders, including the UDIA, PICA and REI questioned the usefulness of the statement of key financial information, arguing that owners corporations prefer to see the full financial accounts. The statement was adopted to provide a snapshot of the financial position of the owners corporation that is easy for lot owners to read and understand.

While the review notes the feedback on the usefulness of the statement, it is reluctant to remove a means for owners to access and understand financial information about their scheme and consider that the statement may be of use to some owners.

5.1.6 By-laws

By-laws are a critical element in the governance of strata schemes. The by-laws that an owners corporation adopts can cover the management and administration of the scheme, as well as the control, use or enjoyment of lots and the common property. Importantly, by-laws are also used to govern acceptable behaviour and often set out the limits of such behaviour for residents. This allows a scheme's by-laws to facilitate harmony and the effective administration of the scheme.

The Discussion Paper sought feedback on whether changes are needed to the making, recording and enforceability of by-laws. It also asked whether current protections in the law – such as the protection against harsh, oppressive, or unconscionable by-laws – were sufficient or require extension.

The review found that by-laws are governed well overall by the Management Act, however there was substantial feedback that more could be done to simplify the adoption and registration of new by-laws.[11] There was also confusion about the way the Act applies to the consolidation of by-laws and to by-laws made prior to commencement of the 2015 Act on 30 November 2016.

Further, the commencement of new laws on 25 August 2021 has changed how by-laws can regulate animals entering and being kept in a strata scheme. The review received a considerable amount of feedback on the possible effects of these new laws, which was explored in detail in the Pets Report.

Following the Pets Report, the review has identified some further areas where the laws governing assistance animals in strata schemes can be refined.

The current threshold for the prohibition on unjust by-laws remains appropriate

One of the key 2015 reforms to strata by-laws was the introduction of an overarching restriction in section 139(1) of the Management Act that by-laws could not be harsh, oppressive, or unconscionable. This was to ensure that the Management Act provides sufficient safeguards against unjust outcomes, especially for minorities, and prevents owners corporations from granting themselves inappropriate powers. The Management Act also gave the Tribunal and Courts the power to invalidate any by-laws that were found to meet these criteria.

The Discussion Paper asked if the additional criterion of 'unreasonable' should be introduced into the threshold for an unjust by-law. Prohibiting by-laws from being 'harsh, oppressive, unconscionable or unreasonable' would substantially broaden the grounds on which a person could challenge a by-law, lowering the current threshold. Feedback from survey respondents was in favour of this, with 63% supporting the change.[12] Written stakeholder submissions to the review were split, with a slight majority against.

Generally, those in favour stated that the current terms of section 139(1) are ambiguous and are not easily understood by the people who rely on them for protection or by owners corporations, whereas 'unreasonable' is said to be a more widely used and understood term. Further, it was suggested that without this change unreasonable by-laws would be permitted under the law. Those against stated that the current protections have been shown to be sufficient, and that judgements of 'reasonableness' are too subjective and should not be determined by Tribunals or Courts.

The review has found insufficient evidence to justify broadening the terms of section 139(1). Importantly, the restrictions in section 139(1) were recently subjected to a rigorous test, when a

[11] Responses to question 79 – "Could we make it easier for owners corporations to make by-laws?": 67% said 'Yes'; 17% said 'No'; 16% said 'Unsure'.

[12] Responses to question 82 – "What do you think about prohibiting 'unreasonable' by-laws?": 63% support; 16% oppose; 21% said they needed more information or were unsure.

case regarding the keeping of pets in strata was finalised in the NSW Court of Appeal in October 2020. The decision in *Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250* (***Cooper***) provided a general ruling on how the prohibition on harsh, oppressive, or unconscionable by-laws is to be applied. The Court ruled that a by-law setting a blanket ban on the keeping of pets is oppressive and therefore invalid.

The outcome of *Cooper* confirmed that the current threshold in the Management Act is working as intended to protect occupants and that it should be maintained.

Recommendation

79. The existing threshold in the Management Act for unjust by-laws should be retained without adding 'unreasonable'.

The list of model by-laws should be expanded

The Management Act allows for model by-laws to be prescribed in the regulations. The model by-laws provide standard wording that can be adopted by owners corporations instead of having to pay for legal drafting services. The model by-laws can be changed or added to by owners corporations, so long as the by-laws do not conflict with the Management Act or any other law. If an owners corporation does not adopt any by-laws, then the model by-laws apply by default.

Model by-laws also have a role in setting community standards in that they provide widely acceptable solutions to commonly encountered issues, which in 2016 when the model by-laws were last updated included smoke penetration and the keeping of animals. Model by-laws have been subjected to community consultation and passed into legislation following expert legal input.

Stakeholder submissions confirmed that the current process for making by-laws is working well and an amendment to the Management Act, such as changing the voting threshold for adopting a new by-law, is not necessary. Instead, the review found that discontent about the making of by-laws is largely not centred on the processes or limitations set out in the Management Act. Instead, survey responses indicated that much of the cost and complexity in creating new by-laws comes from the need to seek legal advice and expertise to draft new or amended by-laws. The foremost suggestion to mitigate this cost and complexity was to expand the model by-laws to address several other issues.

Some examples of common or emerging issues that were raised as an option for the model by-laws included the delegation of minor works authority, renovations, short-term letting and permitting of electronic meetings and voting. There were also suggestions for model by-laws governing the installation of sustainability infrastructure, which is discussed further in the sustainability section of this report.

Recommendations

80. New model by-laws should be added to the Regulation covering minor works authorities, renovations, electronic meetings and voting, short-term rental accommodation, and sustainability infrastructure.

81. Model by-laws should be updated to better reflect changes in the law, such as the model by-laws on the keeping of animals.

All by-laws should comply with the current law

The review recommends that all by-laws, including those registered prior to commencement of the 2015 Act, be required to comply with the current law. In particular, all by-laws should clearly be

subject to the restrictions outlined in section 139 of the Management Act, including the restriction on by-laws being harsh, unconscionable, or oppressive which was introduced with the 2015 Management Act. This will address widespread confusion about whether current protections apply to by-laws in older schemes.

Many strata schemes established their by-laws before the 2015 Management Act commenced, and many others before the 1996 Act commenced. The 2015 Act includes a savings provision in clause 4(2) of Schedule 3 that, despite any other provision of the Act, a by-law continued in force is taken to be valid if it was valid immediately before the 2015 Act commenced.

The savings provisions also included a requirement for all NSW owners corporations to review their by-laws within 12 months of commencement that is, by 30 November 2017. This review was intended to encourage owners corporations to update their by-laws, for example to reflect the new model by-laws about the keeping of animals or smoking in schemes.

However, as it was accompanied by clause 4(2) preserving existing by-laws as valid, many owners corporations took this to mean that they were not required to take any action should their existing by-laws be found to conflict with new protections in the 2015 Act. Also, the requirement to review the by-laws was not accompanied by an enforcement mechanism and there were no consequences for schemes that either did not conduct a review or did review but made no updates to their by-laws. DCS has no reliable or efficient way of knowing how many owners corporations conducted the required review or if they did, what changes arose.

The savings provisions have led to confusion about whether the restriction against unjust by-laws applies to the by-laws of older schemes. This confusion was confirmed by feedback provided to the review from some stakeholders and owners corporations about the decision in *Cooper*. In *Cooper*, a by-law setting a blanket ban on animals in a strata scheme was found to be invalid because it contravened the restriction against unjust by-laws in section 139(1) of the Act. However, some owners corporations writing to the review questioned whether their own no-pets by-law possibly remained valid because it was made prior to that restriction being introduced in 2015.

Feedback through the survey showed majority support for aligning the law as it applies to new and old schemes.[13] Respondents in favour of this noted that the law changes to reflect changing community standards, and that by-laws should also keep up to date and reflect those standards. They also noted that the law, and protections under the law, should apply equally and that making it clear that all by-laws must comply would address the current confusion.

Written stakeholder submissions were predominantly opposed to applying the current law across all schemes. Those opposed were concerned about the effect of the retrospective application of the law, but little evidence was presented to demonstrate or describe possible adverse effects. Stakeholders also stated that purchasers make the decision to enter a scheme based on its by-laws and that requiring all by-laws to comply with the current law will infringe on the property rights of people who made that decision.

However, this argument does not account for the fact that by-laws are not a static instrument and they may be amended through a special resolution of the owners corporation at any time – before, during or after a particular person obtains an interest in the scheme. It would be unreasonable to guarantee to any new or prospective purchaser of a strata lot that the by-laws will remain as they were at the time they signed a contract of sale. Likewise, purchasers do not surrender their right to challenge or change existing by-laws because they were aware of the scheme's by-laws before finalising a contract of sale.

[13] Responses to question 85 – "Should strata by-laws made under old strata laws be compliant with the current law? Why or why not?": 63% support; 16% oppose; 22% unsure. Figures do not add up to 100 due to rounding.

Requiring all by-laws to comply with the current law does not mean that all older by-laws are invalid. The validity of a by-law does not depend on its age, but rather its content. Specifically, a by-law would be invalid if its content is inconsistent with the 2015 Act. This will reinforce the 2015 reforms and confirm that the law applies clearly and equally across all schemes in NSW.

The review does not propose that all schemes should be required to re-establish their by-laws. Only legally invalid by-laws would need to be removed or updated. Further assistance and guidance for owners corporations will be provided, for example informing them that updated by-laws do not apply retrospectively and would only apply from when they are made.

Recommendation

82. The savings provisions in Schedule 3 to the Management Act should be amended to clarify that although by-laws made under previous Acts can continue in force, they must also comply with the restrictions on by-laws in the current Management Act.

Pets reforms should be harmonised across strata schemes and community lands

Reforms to the laws governing the keeping of animals in strata schemes commenced on 25 August 2021. An owners corporation cannot now prohibit the keeping of an animal unless the animal causes an unreasonable interference to another resident's use and enjoyment of their lot or the common property.

Although the pets reforms are intended to apply equally across strata schemes, residents in strata schemes that are subsidiaries within a community or precinct scheme may still encounter difficulties in keeping a pet. This is because the *Community Land Management Act 2021* does not include the same restrictions against unreasonable pet prohibitions, instead providing that a community management statement overrides an owners corporation's by-laws wherever they are in conflict.

In order to harmonise the approach to the keeping of animals across both strata and community schemes, the review recommends amendment of the *Community Land Management Act 2021* so residents within a subsidiary strata scheme or neighbourhood scheme on community lands enjoy equal property rights to those in other strata schemes with regard to pets.

Recommendation

83. Amend the *Community Land Management Act 2021* to harmonise community land schemes with recent strata reforms to the keeping of animals.

Protections for owners of assistance animals to be extended

The 2015 Act altered protections for the owners of assistance animals so that an owners corporation is permitted to request evidence of an assistance animal's status. The Discussion Paper sought feedback on whether this ability should remain[14], and whether the law should specify what types of evidence can be requested.[15] There was consistent feedback in support of both proposals.

The review recommends that the Act be amended to specify acceptable forms of evidence of an assistance animal's status. The RSPCA provided examples where owners corporations have

[14] Responses to question 88 – "Should owners corporations be allowed to ask for proof that an animal is an assistance animal?": 65% support; 27% oppose; 8% unsure.

[15] Responses to question 89 – "Should the Management Act outline the kind of evidence owners corporations can request to prove an animal is an assistance animal?": 64% support; 23% oppose; 13% unsure.

asked for assistance animal owners to produce proof of their disability by requiring private medical records. These medical records are then accessible via a search of the owners corporation's records under section 182 of the Management Act. The move to prescribe what information can be requested will ensure that assistance animal owners can maintain their privacy and will better align the evidence provided with Commonwealth disability laws.

Recommendation

84. Specify acceptable forms of evidence that an owners corporation can request to establish of an assistance animal's status, in compliance with the *Disability Discrimination Act 1992* (Cth).

The review also recommends that an additional restriction on by-laws be introduced to manage how they apply to assistance animals. The review found that although existing protections prevent owners corporations from refusing permission for assistance animals, other by-laws that govern how animals are kept within a scheme may be unfair to owners of assistance animals. For example, a by-law requiring that animals be carried through common areas would unfairly affect a vision-impaired resident who relies on a guide dog. Extending the current protections would limit the way in which animal management by-laws apply to owners of assistance animals where those restrictions would adversely affect the ability of the assistance animal to perform its duty.

Recommendation

85. An additional restriction on by-laws should be introduced to section 139 of the Management Act that exempts assistance animal owners from the operation of by-laws to the extent that they would prevent the animal from performing its duty.

Monitoring the impact of August 2021 pets reforms

Further changes to the newly commenced pet reforms were advocated through written submissions to the review. This included suggestions from stakeholders to better accommodate persons and animals escaping domestic or family violence by altering approval processes and allowing more leniency for disruptions. As the pets reforms are newly commenced, there has not yet been enough time to form a definitive view on whether further changes are needed. However, DCS has been monitoring the operation of the new pets laws since their commencement on 25 August 2021 and has become aware of some practices that may defeat the purpose of the reforms and produce unjust outcomes

The *Roden* case discussed in 5.1.5 Finances concerned the charging of a $300 fee for each application to an owners corporation to keep a pet, as well as a further $300 fee each time an occupant hosts a visitor to the strata scheme who brings a pet. While the Tribunal did not consider the by-law that required the $300 payment to be harsh, unconscionable or oppressive, its cumulative effect would appear to make it prohibitive for many strata occupants who wish to keep an animal.

This issue goes beyond the fees charged in the *Roden* case, as DCS is aware that the charging of (refundable) pet bonds is occurring in some strata schemes. The Act does not regulate the payment of such bonds. By contrast, the *Residential Tenancies Act 2010* prohibits charging tenants of any form of security beyond a rental bond, which is set at a maximum of four weeks' rent.

Recommendation

86. DCS continue to monitor the operation of the new laws governing pets in strata to determine whether further legislative change is necessary to prevent outcomes that are unjust and defeat the purpose of the reforms. This includes the restrictions on by-laws under section 137A of the Management Act and the circumstances of unreasonable interference prescribed in the Regulation.

5.1.7 Records

Part 10 of the Management Act requires that an owners corporation keep numerous key records and to produce notices that are issued to lot owners to advise of meetings or to pass on legal documents. The records that must be kept include meeting minutes of meetings, financial statements, correspondence, and notices issued by the owners corporation. Part 10 of the Management Act also governs access to these records by various parties.

These matters are generally of a routine nature and frequently undertaken by a managing agent, if appointed. The Discussion Paper sought feedback on how well Part 10 of the Management Act is working and whether any changes are needed. While feedback indicated that the provisions are generally working effectively, it also highlighted some possible areas that could benefit from further consideration, including:

- the use of electronic records and notices and electronic access to these documents;
- non-compliance with various obligations to provide tenancy notices, and
- privacy of lot owners and residents when owners corporations records are searched.

The following sections discuss these matters and proposed recommendations.

Electronic records

Section 176 of the Management Act allows owners corporations to choose the form in which records are made and kept. This means that an owners corporation can choose to have electronic or hard copy records. The flexibility to choose has been retained as some owners corporations have preferred to keep hard copies, and as long as the records were being kept the law was agnostic on the format.

However, changes in technology and ICT systems mean that primarily or solely relying on electronic records is increasingly feasible and even desirable. The use of greater electronic processes brings multiple benefits, including making it easier and potentially cheaper to disseminate and search for required documents. Most recently, the value of using electronic records has been demonstrated during the COVID-19 pandemic, where accessing hard copy records and conducting searches were both more difficult while complying with restrictions on gatherings and stay-at-home orders.

In this context, the Discussion Paper asked whether the keeping of electronic records should become compulsory – an idea that was supported by a substantial majority of survey respondents (84.5%). At the same time, feedback was also provided that cautioned against making change too rapidly, with some submissions, including from the SCA, noting that a transition period would be needed to allow owners corporations to obtain the appropriate systems to create and store the records.

Noting these considerations, the review recommends that the keeping of electronic records be made compulsory, accompanied by a transition period to allow owners corporations to obtain the appropriate software and processes. However, the review does not recommend that this be applied retrospectively; in other words, owners corporations will not be required to convert all

existing records into electronic format. The costs to convert these records would be likely to outweigh the benefit, by imposing both disproportionate expense and administrative burden. In making electronic records compulsory, the review also notes that this approach will not prevent an owners corporation also maintaining hard copy records if it so chooses.

Recommendation

87. Require all mandatory strata scheme records to be kept electronically, with an appropriate transition period. This would not be retrospective or prevent an owners corporation from also keeping hard copies.

Inspecting records

The Management Act provides a process to allow lot owners and prospective lot owners to conduct inspections of the records of the owners corporation. The ability to conduct inspections is central to maintaining accountability and to enabling prospective buyers to understand the current situation within an owners corporation. The feedback to the review was evenly split on whether the current laws needed to be changed or not, with the main concerns raised relating to the accessing of personal and privileged information via these searches and the conducting of inspections via remote access.

More specifically, as the records of the owners corporation can be inspected for nominal fees, there are concerns that confidential information is being accessed and copies of these details potentially being made or used inappropriately – a concern noted by several key stakeholders, including the SCA, OCN and REINSW. In particular, the strata roll, and financial records can contain confidential information such as lot owner names, addresses, phone numbers, and email addresses that could be potentially misused. On the other hand, the review also received feedback that information which is permitted under the Management Act to be accessed by lot owners is being withheld where there are concerns that sharing the information would involve a breach of privacy.

The issue of lot owners' access to records also arose in relation to privileged legal advice that was obtained by the owners corporation. In such circumstances, it would be appropriate for all lot owners to have access to full and frank advice that has been received in relation to legal matters. However, one concern raised with the review was that when an owners corporation is in a legal dispute with one or more lot owners, those lot owners are still able to access the privileged information and advice that has been provided to the owners corporation on the dispute. Such a situation could undermine the protections provided by legal professional privilege, the legal case of the owners corporation and is a clear indication of a conflict of interest.

The above feedback highlights to the review that there is scope to refine the current provisions under Part 10 of the Management, and to provide greater clarity on their operation. In relation to privacy, the review recommends the development of clearer guidance for owners corporations about how privacy is to be handled as well as how privacy legislation applies.

With regard to accessing records, the review proposes that this be refined to potentially introduce restrictions on, or exemptions to, access, where appropriate. This would include circumstances where it relates to privileged legal advice or personal or commercially sensitive information. Given the limited evidence available to the review on the extent to which inappropriate access occurs, the review also proposes to engage closely with the sector during the drafting of amendment legislation to ensure that the introduction of any exemptions to record access are appropriately targeted and proportionate, and do not risk undermining the more general principle of broad access that is supported by this part of the Management Act. Such exemptions would also need to be accompanied by appropriate dispute resolution mechanisms to ensure they were not misused.

Together with issues about the kinds of information that is accessed, the review also heard a range of feedback around *how* records are accessed. This issue has been exacerbated in the context of the COVID-19 pandemic where a rapid shift from physical inspections to electronic remote access was adopted. The increased use of remote access, as well as different interpretations of what such access means, has raised concerns, including from PICA and the SCA, as the current drafting of the Management Act does not provide sufficient clarity or oversight. Several parties have observed that this lack of clarity has resulted in what they consider to be inappropriate access and use of records, as well as in currently ongoing legal action. On top of this, as noted by the SCA, the proposed shift to mandatory electronic records further raises the potential need for the Act to clarify processes around how records are to be accessed in future, especially on a remote basis.

Such feedback highlights a clear gap in the Management Act's current operation in relation to record access; a gap that has particularly grown with the hastened use of remote access due to COVID-19. In this context, the review recommends redrafting of section 183 of the Management Act so it is updated to reflect the changing nature of access to owners corporation documents and records, including electronic and remote access. The redrafted section should be clear about how and when remote access to electronic records is to occur, and any limitations or conditions that will apply to such access.

Recommendations

88. NSW Fair Trading should provide clear guidance on the privacy obligations that can apply to owners corporations and how they apply in relation to access to records under the strata laws.
89. Revise Part 10 of the Management Act, in consultation with the strata sector, to potentially introduce limited exemptions to record access where there are significant privacy or legal concerns, accompanied by a mechanism to dispute the use of such exemptions.
90. Redraft and update the provisions relating to inspections of owners corporation records and documents to provide clarity about how and when remote access to electronic records is to occur, and any limitations or conditions that will apply to such access.

Tenancy notice and provision of strata information to tenants

Tenancy notices must be provided to the owners corporation by a lot owner or their agent when the lot is being leased. This notice must include the name of the tenant occupying the lot and their address. Both residential tenancy and strata scheme laws also require that tenants are provided with copies of a scheme's by-laws to ensure disclosure of and compliance with the rules governing the scheme.

Feedback to the review highlighted concerns about non-compliance with both of these requirements, especially where a lot owner is not leasing through a real estate agent. Such non-compliance, particularly with the tenancy notice obligation, confirms previous research and feedback received by Fair Trading. In considering possible reasons for non-compliance, the review heard, including from REINSW and ACSL, that there are both lot owners and property managers who are unaware of their current obligations. Other feedback also suggested that there was insufficient consequence or incentive for the landlord to ensure a tenancy notice is given. In relation to by-laws, the Tenants' Union observed that there is fairly good compliance with the requirement in both tenancy and strata law that the by-laws be provided at the start of the lease, there tends to be non-compliance with the obligation for the lot owner to provide a tenant with new by-laws when they are updated. This could lead to disputes among residents as tenants could be unknowingly breaching by-laws that have changed since they moved in.

Several possible changes to address non-compliance with both the tenant notice obligation and the obligation to provide updated by-laws were proposed and considered. One of the main options put forward was to extend the penalty for failing to issue the notice to the agent of the landlord. Currently the penalty can only be applied to the landlord, however, in most cases the landlord delegates much of the responsibility on these matters to the agent and is often not aware of what should or should not be done. Penalising the agent for failing to issue the notice would encourage compliance by real estate agents.

A second option in relation to the tenant notice would be to empower the tenant to provide the notice themselves to an owners corporation, subject to providing proof of tenancy within the strata scheme. The review is recommending both of these options for the tenant notice given their potential to improve the current situation and provide new avenues for ensuring an owners corporation has a clearer picture of its current residents.

Alongside these statutory proposals, there would also appear to be a more general need for education as well as improvements in administrative processes to support compliance. For example, the ACSL suggested that annual reminders about tenant notices and by-law updates could be attached to AGM meeting notices. Given the growing number of people living in strata, and the large number of renters, such awareness-raising is supported by the review. Information about tenancy notices and the obligations in relation to providing tenants with by-law information should be included in the new education materials that have been recommended throughout this review.

Recommendations

91. Extend the penalty for non-compliance with tenancy notice obligations and providing tenants with by-law information to real estate agents acting on behalf of a lot owner.
92. Enable tenants to provide their own notice to owners corporations, for example by showing proof of a rental bond lodged with NSW Fair Trading.
93. Develop further education material about tenancy related obligations under the Management Act.

Serving notices

Several different provisions in the Management Act work together to explain how notice is to be given to and by the owners corporation, this includes sections 262 and 263 as well as Schedule 1. The provisions to effect notice are important in ensuring that meetings and votes are validly held, and that legal notices of matters in the Tribunal and the courts are provided. The current provisions include an allowance for service by email in cases where an email address is held on the strata roll.

Overall, feedback to the review suggested that the current notice provisions were working well. However, the review did hear that while many people support notices being served by email, there remains confusion about when and how emails can be used, as well as whether hard copies must also be mailed to the recipient. As with other electronic and digital processes discussed elsewhere in this report, the need for clearer requirements on the use of electronic means for the service of notices has been highlighted due the COVID-19 pandemic. Stay-at-home orders under the Public Health Orders prevented managing agents and owners corporations from being able to access the facilities needed to issue hardcopy notices, and resulted in the introduction of a temporary measure allowing owners corporations to validly issue notices by email, irrespective of whether it was listed on the strata roll. As with the other COVID-19 temporary measures discussed earlier in the report, this arrangement is also due to expire in January 2022.

In considering this issue, the review has drawn on the analysis by CIE about the costs and benefits of making permanent a range of the temporary COVID-19 digital processes. This analysis

included consideration of allowing for notices to be issued by electronic means. In the case of this measure, CIE found that owners corporations would likely enjoy net time and material benefits from issuing notices electronically, and that the current temporary measure should be made permanent.

On this basis, as well as the feedback provided, the review is recommending that the provisions in the Management Act on the issuing of notices to be revised to provide that service of notices can always be validly issued by electronic means.

Recommendation

94. Revise current provisions in the Management Act to ensure that serving of notice provisions by electronic means is clearly permitted where an email address has been provided for that purpose.

5.2 Managing the property

5.2.1 Common property and defects

Part 6 of the Management Act governs the management of the property of a strata scheme, including:

- the owners corporation's duty to maintain and repair common property,
- procedures, rights and obligations relating to additions, alterations or changes to common and lot property,
- preparation of an initial maintenance schedule by the original owner,
- dealings with property,
- work carried out by the owners corporation, including window safety devices to protect children,
- orders about property, and
- miscellaneous issues such as utilities supply contracts, which are addressed elsewhere in this report.

What is common property?

Almost the entirety of the built form of a strata scheme is the common property of the owners corporation or is directly accessible from or through the common property. Prospective apartment purchasers are sometimes warned that they 'are buying a cube of air space', which describes the relationship between a lot owner's property and the common property of the strata scheme.

The Development Act defines common property simply as any part of a strata parcel that is not comprised in a lot, including any common infrastructure. Common infrastructure includes structural elements and pipes, wires, cables or ducts that are not for the exclusive benefit of one lot and the structures that enclose those elements.

Disputes over common property are not only among the most numerous in strata schemes, they can also be the most protracted and difficult to resolve. Unlike many other types of disputes in strata, non-compliance with laws about property management can be far more serious because of the potential for compromises in building safety, including fire safety.

Alterations to common property vs prevention of defects – two major themes

There are two major elements to this chapter of the report. The first relates to procedures, rights and remedies relating to changes to common property. The second responds to one of the key goals of the 2015 reforms, which was earlier identification and rectification of building defects.

While rectification remains a challenge for many owners corporations, the NSW Government has undertaken landmark reforms to improve compliance outcomes in the residential building sector under the Construct NSW program of work led by the NSW Building Commissioner. A major theme emerging from this review is the need for both the strata legislation and Fair Trading's role as regulator to go beyond rectification of defects and to address their prevention at any point in the life of a strata scheme.

Changes to property – cosmetic works, minor renovations, common property works

The 2015 reforms introduced more flexibility into the approval process for undertaking work affecting common property by creating a three-tiered approval regime:

- **Cosmetic works** – works in connection with a lot that do not need approval, for example, painting the walls, laying carpet, and installing blinds,
- **Minor renovations** – these require approval by resolution of the owners corporation, which cannot be unreasonably withheld but can be subject to conditions. Examples include renovating a kitchen and installing cables and wiring, and
- **Other proposed changes** affecting common property that require approval by special resolution.

The Discussion Paper sought feedback on the effectiveness of this tiered system and on related other matters such as delegation of decision-making, responsibility for maintenance and reasons for refusal. The review received consistent feedback from survey respondents and in major stakeholder submissions that key improvements to the law are needed to address:

- inconsistencies and inappropriate categorisation of some types of works, such as those that will impact the waterproofing, being captured in minor renovations,
- a substantial degree of confusion about the laws applying to property management which would be reduced by improved drafting of the laws, accompanied by enhanced educational materials, and
- the need for greater certainty about ongoing responsibility for maintenance following approval of work and the benefits of providing lot owners with clear reasons for refusal of permission for them to undertake works.

Approvals and records

<u>Works classifications and approvals</u>

The Discussion Paper sought feedback on whether the various tiers of approval required for cosmetic changes, minor renovations or other changes to common property were easy to understand. The responses indicated that there is significant confusion and concern about inconsistency between each of these tiers. Stakeholders, including the Law Society, SCA, PICA, REINSW, ACSL and OCN, all said that the drafting of the law was unclear and that there were works inappropriately classified as minor renovations that, due to the nature of the work, should require approval by special resolution of the owners corporation.

It was put to the review that the current categories allow works as minor renovations where it would be more appropriate for it receive a special resolution because of the potential detrimental impact of the work on other lot owners or on the scheme as whole. These works, it was argued, should undergo a more rigorous process and be approved by special resolution. Examples of such works include the installation of hard floor coverings which can cause negative impacts on neighbouring lots and the common property. Installation of reverse cycle air conditioning and kitchen renovations were also highlighted as renovations that can, if not done properly, adversely impact the

waterproofing of the building and cause damage to common property and individual lots. PICA also observed that works approvals should be required to address whether any other approvals are needed, such as from a planning authority. PICA cited the example of installation of air conditioning above the ground level requiring local council approval.

Drawing on the above feedback, the review is proposing to revise these sections of the Act to provide greater clarity and reclassify certain works that have the potential for substantial impacts.

Recommendation

95. Revise sections 108 – 111 of the Management Act to:

a) provide better clarity over the meaning of certain terms, such as "reconfiguring walls" in section 111, and

b) re-classify certain works currently classified as "minor renovations" under section 110 to instead require a special resolution, and incorporate principles-based rules where possible, to better define the general character of minor, cosmetic and other renovations.

Committee decision-making: automatic delegation and provision of reasons for refusal

The Discussion Paper asked whether committees should automatically be delegated authority to make decisions on minor renovations, rather than requiring the owners corporation to adopt a resolution delegating that authority. There was strong support for this measure with 69.5% of the survey respondents in favour. However, caution was expressed by some stakeholders, including the Law Society, SCA, OCN, and REINSW, who raised the risk of reduced flexibility and choice for owners corporations that desire these decisions to be made by the owners corporation as a whole.

Due to the lack of evidence that automatically delegating this authority to the committee would improve the speed or quality of decision-making, as well as the risk of decision-making authority being taken out of the hands of lot owners, the review does not recommend any change to the law in this regard.

The Discussion Paper also asked for feedback on whether owners corporations should be required to provide reasons when approvals for works are refused as this is a common source of frustration and complaint for lot owners. If approval is withheld and reasons are not provided then lot owners are uncertain about what, if anything, needs to change to ensure a future request is approved. Further, a lot owner will be much better placed to decide whether to make an application to the Tribunal for an order consenting to their proposed works if they understand the reason for the owners corporation's refusal.

Respondents to public consultation provided examples of repeated refusals to approve works without reasons being provided, creating a sense of uncertainty, discontent and a breakdown of trust within the owners corporation.

An overwhelming 94.4% of survey respondents supported a requirement in the law for owners corporations to provide reasons for refusal. However, feedback also raised concerns that practical difficulties could arise if the requirement was applied to decisions made by owners corporations at a general meeting where many different lot owners are voting and may have different reasons for their opposition. By contrast, committees are better placed to provide meaningful feedback about their decisions on minor renovations as they have deliberated over it together and reached a committee decision. Accordingly, the review recommends that reasons for a decision only need to be provided when the decision is made by the committee.

Recommendations

96. Amend section 110 of the Management Act to require committees, when delegated the authority to approve, to provide written reasons for refusal to lot owners seeking to undertake minor renovations.

97. If a committee does not provide written reasons for approval within a reasonable time frame, to be determined after further consultation, the committee will be taken to approve the minor renovations.

Maintenance responsibility, common property memorandum and records of minor renovation approvals

The Discussion Paper sought feedback on whether there should be mandatory consideration of responsibility for the ongoing maintenance of works when they are being considered for approval. This received strong support with 86.6% of survey respondents in favour.

The existing law provides that if a decision is not made then responsibility defaults to the owners corporation. The law also allows for owners corporations to adopt a common property memorandum as part of its by-laws that specifies whether an owner of a lot or the owners corporation is responsible for the maintenance, repair or replacement of any part of the common property.

The common property memorandum that may be adopted by owners corporations is declared under the Regulation and may be modified only to provide that it does not apply to specified items. These items are not common property for the purposes of the particular strata scheme or that are the subject of a common property rights by-law or a by-law made under section 108 of the Management Act.

The review found no reliable way of knowing how many owners corporations have adopted a common property memorandum. However, feedback to the review strongly suggested that adoption of either the memorandum declared under the Regulation, or a similar by-law, benefited the good governance of owners corporation property and helped to reduce disputes.

A small number of survey respondents went further and proposed that the common property memorandum should apply by default to all residential strata schemes. Although this idea was not raised in the Discussion Paper, the review considers it has merit but that further consultation with the strata sector on the idea of upgrading the status of the memorandum would be required before implementation.

The review also endorses feedback stating that owners corporations should be required to decide on responsibility for ongoing maintenance of works as part of a resolution approving works. If an owners corporation has adopted the common property memorandum it will be able to simply refer to this in the resolution as outlining the division of responsibility between the lot owner and the owners corporation.

Specific consideration should also be given to the status of energy meter boards in the review of the common property memorandum prescribed under section 107 of the Management Act. While lot owners' individual meters are the responsibility of the energy retailer, responsibility for maintenance and upgrade of meter boards is unclear under the Act. Maintenance responsibility for meter boards would logically sit with the owners corporation, given that the boards service more than one lot.

Recommendations

98. Section 108 of the Management Act should be amended so that a special resolution authorising changes to common property must specify responsibility for ongoing maintenance of that part of the common property.

99. The common property memorandum declared under the Regulation should be reviewed and updated, including in relation to energy meter boards, as part of the next remake of the Strata Schemes Management Regulation 2016 following amendments to the Management Act.

100. The common property memorandum should apply to all new residential schemes' by-laws by default, subject to any substantial objections raised in further targeted sector consultation.

The length of time that records are being kept on approvals for works was also raised in feedback from the REINSW and the Law Society. Disputes can arise about responsibility for maintenance when there had been a change in lot ownership and the records detailing responsibility have not been retained.

This problem can arise because most of the records and documents that belong to owners corporations are only kept for seven years. Only those records required to be lodged with the LRS are kept in perpetuity.

If a change to common property is made that includes the adoption of a common property rights by-law, the record is held in perpetuity. But minor renovations approvals records outlining the conditions of approval may be destroyed after seven years. Due to the disputes that can occur, the review recommends that records recording conditions of minor renovation approval should be kept by the owners corporation for a longer period of time – a minimum of 10 years is suggested.

Recommendation

101. Owners corporations be required to keep records of minor renovations approvals for a minimum of 10 years unless they form part of a registered by-law.

Common property rights by-laws

The Discussion Paper sought feedback on how well the common property rights by-law provisions of the Management Act were working and received mixed responses.

The main concern identified was a lack of clarity over the repeal or amendment of common property rights by-laws. If a common property rights by-law has been adopted for the benefit of a particular lot owner, who is likely to have been paying higher levies for those rights over common property, the review heard that it is unclear whether is their consent needed before that by-law is repealed or amended.

Presently, sections 142 -146 of the Management Act are clear in terms of the making of a common property rights by-law and the types of privileges, rights and obligations that can flow from it. As with most by-laws, adoption of a common property rights by-law requires a special resolution of the owners corporation, which is uncontentious. However, feedback to the review raised the potential for disputes over unjust outcomes where a subsequent special resolution repeals the by-law against the wishes of the benefiting owner.

Recommendation

102. Repeal or amendment of a common property rights by-law should require consent of the lot owner for whose benefit the by-law was made. The lot owner's consent cannot be unreasonably withheld.

Uncollected goods

The issue of uncollected goods, sometimes referred to as abandoned goods or goods left behind, was not specifically raised in the Discussion Paper. However, the review has received feedback about abandoned goods on strata property, including in the context of the review of the *Impounding Act 1993* conducted in 2021 by the Office of Local Government within the Department of Planning, Industry and Environment.

The Management Act previously provided a process for managing goods that were left uncollected on the common property of the strata scheme. However, as part of the streamlining and repeal of various statutes under the NSW Government's Better Business Reforms of 2018, uncollected goods provisions from various regimes, including strata, retirement villages and residential tenancy, were consolidated into uniform procedures under the *Uncollected Goods Act 1995*.

Some stakeholders, notably the ACSL, expressed a desire for a return to the previous strata-specific provisions. The review notes these concerns, but the NSW Government remains committed to maintaining a consolidated and simplified law. Instead of reinstating the uncollected goods provisions into the Management Act, the review recommends an amendment to the *Uncollected Goods Act*.

As that Act only provides for owners corporations to manage goods abandoned on common property, the review has heard of difficulties faced by some owners corporations in dealing with goods that are abandoned by unrelated third parties on property that forms part of a lot, such as in car parks and storage spaces. Providing owners corporations with access to the procedures under the *Uncollected Goods Act* would be beneficial here, so long as owners corporations commence the process for removal of goods from a lot owner's property with their consent.

Recommendation

103. Amend the *Uncollected Goods Act 1995* to provide that uncollected goods includes goods left behind on a lot owner's property as well as common property. Owners corporations must seek authorisation from an affected lot owner before taking action to remove the goods.

Ensuring ongoing safety and amenity of strata buildings: the owners corporation's statutory duty to maintenance and repair common property

The maintenance and repair of common property is a critically important duty of the owners corporation, particularly in ensuring the ongoing safety and amenity of strata buildings throughout their life. The importance of this issue has been enshrined the Management Act through:

- a duty on owners corporations to maintain and repair common property and any personal property vested in the owners corporation,
- the preparation of a 10 year capital works fund plan, and
- an obligation on developers to prepare an initial maintenance schedule and provide it with other foundational documents for the strata scheme prior to the first AGM.

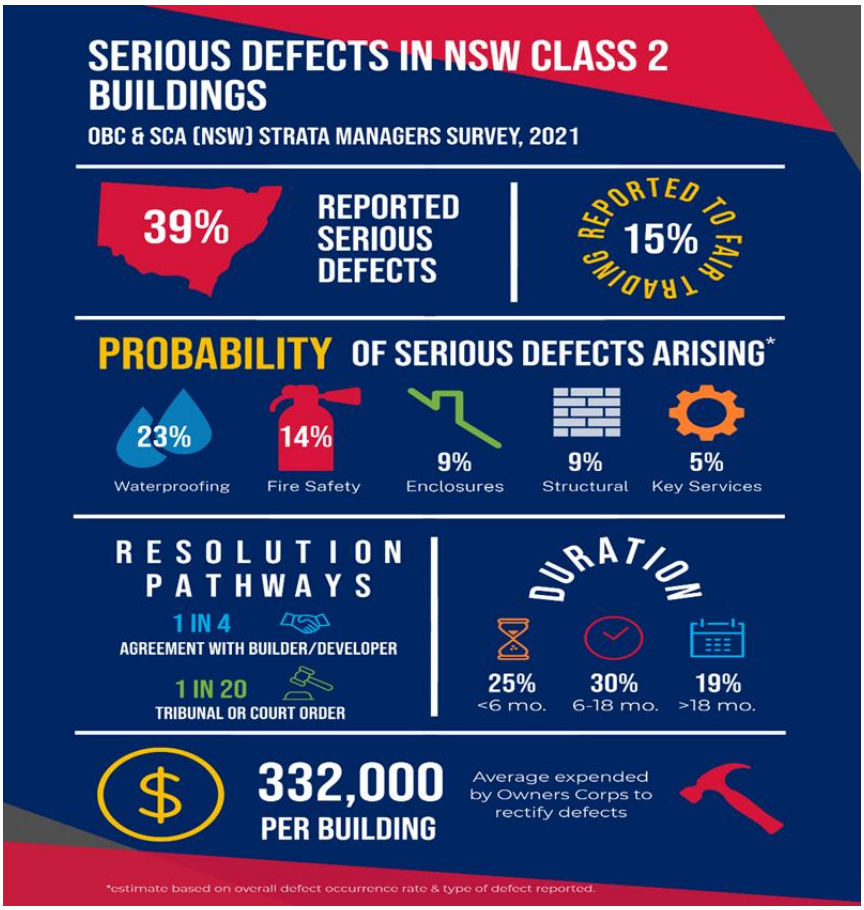
Public consultation feedback overwhelmingly confirmed that there is widespread frustration in the strata sector about owners corporations' alleged failure to properly maintain and repair the common property. Particular lot owners face damage and a loss of amenity in their lot while in dispute over their owners corporation's failure to maintain and repair the common property, for example due to water ingress from a compromised waterproofing membrane. In addition, all lot owners are burdened with escalating costs due to rising insurance premiums and the imposition of special levies to fund remedial works that could have been dealt with in a more cost-effective manner, if they were addressed earlier or proper planning prevented their emergence at all.

'Improving Consumer Confidence': a report by Construct NSW and SCA

There is also concern from regulators, including Fair Trading and the NSW Building Commissioner that the safety of the built environment is being compromised by these failures.

The Office of the Building Commissioner and SCA worked together in 2021 to produce a peer-reviewed report on defects in NSW class 2 buildings, called *Improving Consumer Confidence*[16]. This report has added an important evidence base to the findings of this review.

The infographic below is extracted from the report and provides key insights into serious defects in NSW class 2 buildings.



[16] *Improving Consumer Confidence: Research Report on Serious Defects in Recently Completed Strata Buildings Across New South Wales* (September 2021, Construct NSW and Strata Community Association (NSW)).

Remedies for an owners corporation's failure to maintain and repair

As discussed at the start of this chapter, the review has concluded that a fundamental shift in the role of Fair Trading as the NSW building regulator is needed, backed by legislative amendments. Two key reasons underpin this argument. First, the existing structure of remedies under the Management Act essentially relies on litigation after harms have occurred, whether that be compensation for inadequate levy estimates by the developer or claims for damages against the owners corporation due to loss suffered by individual lot owners. Second, the Office of the Building Commissioner has found that the poor condition of many strata buildings that are not new builds (that is, outside of their six year statutory warranty period) is often due to the failure of the owners corporations to properly maintain and repair the building over time, rather than defective building work.

Both of the abovementioned reasons recognise the need for a stronger focus on the prevention of defects, with an uplift of compliance in both developers' and owners corporations' areas of responsibility. The following sections outline a number of reforms proposed in this respect.

Stronger enforcement of existing laws of the NSW Government

The impetus for a stronger role for NSW Fair Trading in enforcing compliance with owners corporations' statutory duty to maintain and repair the common has emerged as an extension of the successes of the Construct NSW strategy led by the Building Commissioner. The Building Commissioner has publicly indicated that addressing myriad failures by developers, builders and other professionals on new builds is only one part of the journey to restore consumer confidence in the construction of NSW apartment buildings. The logical next step is to address the ongoing maintenance and repair of those buildings by their permanent custodians – owners corporations – to ensure their safety and amenity over the long term.

Under the Management Act, lot owners seeking to hold their owners corporation to account for failures under section 106 need to first suffer a loss and then seek an order from the Tribunal for damages. However, submissions to the review highlight the inadequacy of wholly relying on those types of remedies. Submissions to this review have shared their experience where lot owners successfully apply to the Tribunal on multiple occasions for orders, only to have the owners corporation effectively ignore or delay compliance, which results in further damage and loss of amenity.

Drawing on the success of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (the RAB Act), the review proposes amendments to the Management Act that would give Fair Trading similar compliance powers to those under the RAB Act to bolster compliance with owners corporations' statutory duties. However, instead of issuing orders to developers, Fair Trading would have the power to compel owners corporations to act on their failure to prevent the building falling into a state of disrepair during the life of the building.

Under the RAB Act, Fair Trading is empowered to issue:

- **prohibition orders** – prohibiting the issuing of an occupation certificate or the registration of a building as a strata scheme,
- **Stop work orders** – ordering the developer to ensure building work stops due to the likelihood of significant harm or loss to the public or occupiers, or significant damage to property, and
- **Rectification orders** – ordering the developer to carry out or refrain from carrying out building work to eliminate, minimise or remediate serious defects or potential serious defects.

Fair Trading can also enter into enforceable undertakings with developers under section 28 of the RAB Act. Such undertakings require the developer to do either, or both, of:

- refrain from conduct that constitutes a contravention of the Act or the regulation,
- take action to prevent or remedy a contravention of this Act or the regulations.

Two of the above powers are especially suitable for inclusion in an enhanced enforcement regime under the Management Act: rectification orders and enforceable undertakings. The carefully targeted use of those powers by Fair Trading would help to overcome common barriers to resolution of defects within apartment buildings, which were identified in the *Improving Consumer Confidence* report as:

- sourcing funds to address the defects,
- lack of awareness about rights and responsibilities, and
- disagreements among lot owners on the approach that should be taken to resolve the defects in their building.

In failing to make these hard decisions, the owners corporation risks the safety of its buildings and in most cases incurs higher costs for its lot owners over time as the deferred costs and insurance risks escalate.

The intent of the proposed new enforcement powers would fit within an expanded dispute resolution role for Fair Trading, which would at every possible stage seek to work with the owners corporation in the first instance to resolve issues identified. For example, Fair Trading can provide advice and guidance to owners corporations about the detail and funding of their capital works fund plans. The issuing of penalties and rectification orders will provide new tools, along with the proposed ability for Fair Trading to apply for a Tribunal order for the mandatory appointment of managing agent in dysfunctional strata schemes, discussed in section 5.1.4.

Recommendations

104. Amend the Management Act to inset RAB Act-like powers to order rectification and enter into enforceable undertakings with owners corporations.

105. Introduce into section 106 of the Management Act an offence provision for an owners corporation's breach of its statutory duty to maintain and repair common property, with an appropriate penalty to be set following further consultation.

Claiming damages for the owners corporation's breach of its statutory duty

Time limits for making claims

A lot owner's main remedy to date for an owners corporation's failure to comply with its statutory obligation to maintain and repair is set out in section 106(5) of the Management Act. This provision allows them to recover, as damages, any reasonably foreseeable loss suffered by the owner. However, a lot owner may not bring an action for recovery of loss more than two years after they first become aware of the loss.

The Discussion Paper asked whether the existing two year time limit in which lot owners can make damages claims remains appropriate. Feedback from major stakeholders on this issue was mixed. Some major stakeholders, such as the Law Society, SCA and REINSW, suggested that the time limit was adequate while others, like the ACSL and Holding Redlich, argued for a longer period of six years that would align with other common law claims for damages.

The Construct NSW-SCA report *Improving Consumer Confidence* report provides important insights in this regard. The report identified that if strata schemes were able to resolve serious defects in their buildings, a protracted process was required that often stretched out over more than 12 months. The time taken to resolve defects varied:

- Less than six months – 25%
- Six to 12 months – 11%
- 12 to 18 months – 19%
- More than 18 months – 19%

On balance, this review concurs with respondents who argued that two years is insufficient time to enable lot owners to first try and resolve the issue with the owners corporation, while also preserving their right to make a claim for damages in the Tribunal if the dispute cannot be resolved internally.

Many respondents also believe the two year limit is counterproductive in that it encourages lot owners to escalate their matter quickly to ensure that the right to make the claim is preserved.

The review notes that extending the time limit for claims may add uncertainty to the owners corporation due to the longer window of possibility when claims can be made but also considers that this is mitigated by providing more time for a negotiated solution, which could minimise the need for matters to proceed to the Tribunal or court. The longer claim time could also encourage owners corporation to proactively manage the duty as it will be harder for the time limit to be waited out. With these considerations the review recommends extending the time limit to make a claim to six years.

Recommendation

106. Amend section 106(6) of the Management Act to extend the two year limit on damages claims to six years.

Deferral by owners corporations of maintenance and repair obligation when in dispute

Section 106(4) of the Management Act allows an owners corporation to defer compliance with its statutory duty to maintain and repair common property if it has taken action against a lot owner or another person in respect of damage to the common property. Owners corporations may only exercise this option if deferral would not affect the safety of any building, structure or common property within the scheme.

The Discussion Paper sought feedback on the whether this option for the owners corporation to defer compliance remains appropriate. Feedback to the review, including from OCN and ACSL, suggested that the provision should be tightened to further reduce the circumstances in which deferral can occur. Given the protracted nature of many disputes over damage to common property, especially where legal action is initiated, risks of degradation of the condition of the building are heightened.

The review recommends further restricting the owners corporation's ability to defer works to only include circumstances where both the safety and amenity were not compromised, without affecting the owners corporation's right to recover costs from the lot owner or other person who had damaged the common property.

Recommendation

107. Amend section 106(4) of the Management Act to insert preservation of the amenity of the common property, as well as its safety, as a condition for allowing owners corporations to defer compliance with their statutory duty to maintain and repair common property.

Initial Maintenance Schedules

The Discussion Paper sought feedback on the effectiveness of the initial maintenance schedule that must be prepared by developers for the owners corporation to provide information on the costs and obligations in maintaining the common property.

Research undertaken by the Office of the Building Commissioner and demonstrated in feedback to the review reveals significant problems with the condition of apartment buildings older than six years, which are outside the statutory warranty period. In some cases, the safety of the building is compromised, and costs are inflated by a failure of the owners corporation to proactively comply with its statutory obligation to maintain and repair common property. This is in contrast to an 'as-built' defect where developers or builders should be held liable. A critical element in owners corporations' compliance with its statutory duty is ensuring they are provided a robust and reliable initial maintenance schedule (IMS) by the developer as the foundation of the first 10 year capital works fund plan.

The sheer variability of the quality in IMS means that the initial levies set can be far too low and not provide a realistic indication to potential purchasers about the likely ongoing costs for a lot owner. If the initial levies set by the developer, and confirmed at the first AGM, are later held inadequate the owners corporation can apply for a Tribunal order for compensation from the developer. However, this claim must be made within three years of the expiry of the initial period. Feedback to the review also recognised that lot owners' awareness of their rights in this regard needs improving as many people may not know how to go about exercising those rights without extensive and expensive legal advice. Further, while the Management Act states the owners corporation is not legally obliged to implement the initial maintenance schedule, that document is critically important in the transition from developer to lot owners' control of their built assets.

The review has considered a range of options to ensure schemes have a robust and reliable IMS from the beginning, which in turn, translates into a meaningful capital works plan. Three preferred options have been identified. The first relates to the content and coverage of the IMS. Clause 29 of the Regulation currently prescribes the minimum requirements of the IMS. The review considers that this could be enhanced and recommends that the legislation prescribe greater detail on the minimum standard to which the initial maintenance schedule must be held. This could include either providing more detail into the legislation or mandating an approved form.

The second recommendation is that the IMS must be considered as a minimum baseline for preparation of the owners corporation's first 10 year capital works fund plan.

Finally, the review recommends that the IMS and the initial levies set by the developer be reviewed and signed off by an independent specialist. The specialist can then confirm to the lot owners present at the first AGM that the IMS is reasonable and the levies are sufficient to meet the future needs of the owners corporation. These three preferred options are designed to help ensure that schemes start their management journey with the best possible information on the state of their scheme and what they need to do to maintain it.

Recommendations

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

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.

110. Require that the first 10 year capital works fund plan must have regard to the initial maintenance schedule.

Capital Works Fund Plans

The Discussion Paper sought feedback on whether the requirements in the Management Act for ten year capital works fund plans were helping with maintenance and repair of the common property. The feedback received indicated that there were significant divergences in the quality of the plans that were being prepared.

Feedback highlighted that while some owners corporations are taking the time and resources to ensure that they have good quality plans, others were doing the bare minimum to comply. Some responses to the review indicated that capital works fund plans are too often treated as a 'tick the box' exercise, inevitably leading to 'kicking problems down the road'.

This leads to suggestions that the law should specify more detail about the minimum standards for plans and details that should be included to ensure that owners corporations are adequately planning and saving for future works. PICA also raised that after going through the time and expense of preparing the plans, they can often be underutilised and only re-examined as part of mandatory five year reviews. This suggested that both more regular reporting and consideration by the owners corporation of how it is meeting the plan should be considered, as well as better tracking of how well contributions to the capital words fund compare to expected costs over time.

Drawing on this feedback, the review recommends that the Management Act prescribe greater detail of the minimum requirements of capital works fund plans, again with consideration of a standard form prescribed by legislation.

The review notes that it is likely that potentially at-risk buildings will be identified by initial reporting of capital works fund balances and insured values to Fair Trading through the Strata Hub if the approach to mandatory reporting is implement as proposed. In this context, the review suggests that future phases of Strata Hub reporting should consider inclusion of greater detail on owners corporations capital works fund plans and how well they are being implemented.

Recommendations

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

112. Future phases of Strata Hub reporting to consider inclusion of further detail on owners corporations' capital works fund plans and progress with their implementation.

Window safety devices

Mandatory window safety devices for strata schemes were legislated in 2013 as a preventative measure to protect people, particularly children, from falling out of high windows and suffering injury or death. The measure required that owners corporations install these devices within five years to provide sufficient time to comply. These devices and the related requirements were not raised in the Discussion Paper, however, feedback was received from SCA, PICA and ACSL on the mandate.

The feedback indicated that while compliance rates with installation requirements appear to be reasonable, there is a lack of clarity around who is responsible for the ongoing maintenance of the devices once installed. It was also suggested that there needed to be a form of compliance monitoring by owners corporations, such as conducting annual checks similar to fire safety checks combined with further oversight by NSW Fair Trading to ensure that the audits were occurring.

On this matter, the review recommends that the law mandating window safety devices be amended to make it clear that it is an owners corporation responsibility to ensure that the devices are maintained in compliance with the Management Act. This could include a requirement to conduct an annual inspection similar to annual fire safety inspections.

Recommendation

113. Clarify the provisions on window safety devices in the Management Act to make it clear that it is an owners corporation responsibility to ensure that the devices are maintained.

5.2.2 Sustainability infrastructure

The NSW Government made an election commitment in early 2019 to make it easier for people in apartments to install sustainability infrastructure. A key part of that commitment was to reduce the level of agreement required for owners corporations to approve sustainability infrastructure installations to a simple majority. As foreshadowed in the Discussion Paper, the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* made this change to the Management Act by inserting a new section 132B, which includes definitions of 'sustainability infrastructure' and 'sustainability infrastructure resolution'. These amendments to the Management Act commenced on 24 February 2021.

Another key part of the Government's election commitment was to review any other regulatory barriers to apartments becoming more sustainable. Relevant recommendations from that review were incorporated in the Discussion Paper as possible further areas of reform. The Discussion Paper sought feedback on these and any other possible reforms that may facilitate the uptake of sustainability infrastructure in strata schemes.

Generally, the public consultation feedback received was supportive of changes to assist the uptake of sustainability infrastructure in strata, with specific feedback focussing on how to encourage explicit consideration of such measures, as well as the role of by-laws to support them.

Feedback received on the various reform options and the recommended reforms is discussed further below.

Developing additional model by-laws to support sustainability measures in strata

Installation of sustainability infrastructure often requires a by-law to be prepared by an owner or owners corporation (depending on its purpose) and approved by the owners corporation.

By-laws are often drafted or reviewed by lawyers and therefore involve legal costs. Model by-laws could make it easier and less expensive for owners corporations to install certain kinds of sustainability infrastructure. Stakeholder feedback indicated support for model by-laws relating to sustainability infrastructure. Some submissions suggested there should be by-laws for a range of types of sustainability infrastructure, while noting that tailored by-laws may still be required for certain situations. Waverley Council suggested there should also be sample resolutions and templates provided.

Having readily available by-laws for sustainability infrastructure that can be adopted by owners corporations could be beneficial. It could potentially make the process for owners corporations to approve, install and manage sustainability infrastructure easier. The review is already recommending that additional model by-laws be developed (see section 3.2.5 By-laws), and proposes to include development of some by-laws specifically to support sustainability infrastructure as part of that process.

Recommendation

114. Develop additional model by-laws for the installation of sustainability infrastructure.

By-law restrictions that inhibit the installation of sustainability infrastructure

Under the Management Act, a by-law can be legally made which could restrict installations of sustainability infrastructure on the basis of appearance. In contrast, Queensland laws[17] prohibit by-laws that prevent lot owners installing solar panels solely to enhance or preserve the external appearance of the building. The Queensland laws also recognise that there will be circumstances where preventing the installation of solar panels is reasonable. The Discussion Paper sought feedback on whether NSW would benefit from similar requirements.

Overall, there was support[18] for a prohibition on by-laws that prevent the installation of sustainability infrastructure, such as solar panels, solely to preserve the external appearance of a building, similar to the Queensland laws. The City of Sydney Council's submission suggested there needed to be reform to prevent the blocking of sustainability infrastructure, including by Strata Management Statements.

The review appreciates that schemes may desire to preserve the external appearance of buildings in their scheme and determine how their scheme should look. However, this desire needs to be weighed against the Government's goals to make schemes more sustainable and to make it easier for people living in strata to access the benefits of sustainability infrastructure, such as potentially cleaner energy and lower power bills. There are significant opportunity costs for strata residents and the general community if schemes that are suitable for sustainability infrastructure, such as solar panels, are unable to take it up on the basis of appearance alone.

The review does note that there can be valid reasons for schemes to prohibit sustainability infrastructure and to pass by-laws containing such prohibitions. For example, not all roof space in strata schemes may be suitable or safe for the installation of solar panels, or there may be unreasonable impacts on residents, such as noise, that might make the installation of sustainability infrastructure in certain places in a scheme unsuitable.

For these reasons, the review recommends drawing on the provisions in Queensland to develop an amendment to the Management Act to prohibit by-laws that unreasonably prevent the

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

[18] Stakeholders included South Sydney Councils, the City of Sydney Council, Waverley Council, Kingsford Legal Centre and NABERS (DPIE).

installation of solar panels (and possibly other sustainability infrastructure) in strata schemes solely to preserve the external appearance of a building. This reform would be developed in consultation with stakeholders and any need for exceptions would also be considered as part of this process (for example, this may be required in the case of some heritage buildings).

Recommendation

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

Mandating consideration of water and energy assessments and ratings

There is currently no requirement for existing strata schemes to consider or obtain any water and energy assessments. In contrast, the Commonwealth currently requires commercial offices over a certain size to obtain and disclose a building's energy performance when they are sold or leased. A recent review of the Commonwealth Scheme undertaken by the Centre for International Economics found that this scheme had substantial benefits, and that there was a strong conceptual case for making NABERS ratings mandatory for residential apartment buildings.

In this context, the Discussion Paper sought feedback on whether, as a first step, consideration of an audit of the energy and water usage in a scheme's common areas should become a mandatory agenda item for annual general meetings. Feedback on this matter was largely supportive. Several submissions made additional suggestions, such as mandatory reporting at the AGM on the annual costs borne by an owners corporation for water and energy consumption in common areas, or sustainability being a general standing item at every AGM.

At the same time, several submissions, such as those from the City of Sydney, Waverly Council, OCN and NABERs, argued that it would be preferable for the Government to go further and mandate NABERS ratings for some, or all, strata schemes or even set minimum NABERs ratings of five stars for new buildings. However, several of these submissions also noted that such a step would be costly for schemes, as well as potentially inhibited by existing infrastructure, such as old or incompatible metering systems. This highlighted the need to resolve both these issues together with any step to require water and energy assessments.

The review has considered the feedback, as well as engaged closely with the Department of Planning, Industry and the Environment (DPIE) on the proposed way forward. The potential value of requiring NABERS ratings is recognised, in terms of both improving sector sustainability and potential financial savings for schemes through reduced water and energy consumption, especially given the success of mandating equivalent ratings in the commercial buildings space. However, such an approach also brings potential considerable costs, both from the assessment itself and from upgrading infrastructure, such as metering, to enable these assessments to occur effectively.

As a result of the NSW Government's review of barriers to sustainability infrastructure in apartments, DPIE is considering the future role of NABERs for apartments. DPIE is planning to undertake an assessment of the regulatory impacts if NABERS ratings for strata schemes were to be mandated. The review considers that completion of this assessment is an essential first step before any decision on mandating is made. The review proposes to work with DPIE and share the input provided to this review as part of that process. It is also noted that the new Strata Hub mandatory reporting scheme proposes to collect NABERS ratings from strata schemes who have them. This data will also provide a useful input to the DPIE assessment by providing a picture of the extent to which schemes are already choosing to voluntarily participate.

While the above work is underway, the review considers that there is merit in encouraging strata schemes to explicitly consider how their schemes could become more sustainable. Feedback to

the review recognises that improving sustainability is a key concern for those involved in strata, but also needs to be considered and addressed differently, as appropriate, in each and every scheme. On this basis, the review proposes that a new required agenda item for AGMs be introduced to consider sustainability within the scheme, including current expenditure on water and energy in common areas. This approach is designed to encourage regular consideration of sustainability and consumption, while not prescribing the form in which such consideration must take place.

Recommendations

116. DCS work with DPIE on its regulatory impact assessment of mandatory NABERS ratings for strata schemes.

117. Consideration of sustainability within a strata scheme, including annual energy and water consumption and expenditure in common areas, be introduced as a required item for consideration at each AGM.

Requiring consideration of sustainability infrastructure in 10-year capital works fund plans

The Management Act prescribes several requirements in relation to considering and funding capital works within a scheme. Section 79 of the Act sets out the various aspects of capital works that an owners corporation must consider and estimate expenditure for at each AGM. Section 80 requires that an owners corporation must prepare a 10 year plan of anticipated major capital works expenditure at the first AGM and for each following 10 year period. The Act currently includes no specific requirements in relation to considering or including sustainability in such plans.

The Discussion Paper sought feedback on whether this should be changed to require explicit consideration of installing sustainability infrastructure as well as its costs, including associated upgrades or changes, such as electricity meter board replacement. Feedback to the review highlighted that metering can inhibit certain sustainability measures. This is due to the structuring of metering systems within a scheme and the age of meter as this can be incompatible with or unable to support certain installations. Overall, there was general support for requiring owners corporations to include sustainability infrastructure in their 10-year capital works fund plans.

Stakeholders proposed a range of suggestions for how this could occur. Suggestions included requiring the plan to include sustainability considerations or a section on sustainability infrastructure. Suggestions also included requiring owners corporations to consider specific sustainability infrastructure upgrades (including replacement of electricity meter boards) in the plan (NABERS) or requiring the plan to specifically address sustainability infrastructure upgrades.

Drawing on this feedback, the review considers that the introduction of a requirement to make the costs of sustainability infrastructure an explicit consideration in capital plans and planning would have merit. In making this recommendation, the review notes that consideration of sustainability infrastructure as part of capital works plans needs to be about both what specific sustainability measures a scheme would like to consider installing as well as the extent to which existing infrastructure, particular aging or outdated items such as old metering, may need to be upgraded if it is inhibiting the feasibility of such measures. Making sustainability infrastructure an explicit head of consideration would not mean that schemes were required to include or implement any specific sustainability measures, but would ensure it was an active consideration, complementing the proposed inclusion of sustainability as a general agenda item at AGMs, as discussed above.

ACSL and OCN, as well as some individual submissions, have also highlighted the financial challenge that adopting sustainability improvements can pose for scheme. Coupled with the diversity of needs, goals and existing infrastructure within schemes, the review is of the view that the Act should not be prescribing the inclusion of specific upgrades or requirements at this time. As

noted in the section on water and energy assessments, the review team has been working with DPIE on these issues and is conscious of the intersection of this review with the broader work relating to sustainability in apartments being led by DPIE. In this context, the review recommends that any specific upgrade requirements to facilitate sustainability be considered following the more detail regulatory impact assessment work undertaken by DPIE.

Recommendation

118. Require owners corporation to consider sustainability infrastructure and associated upgrades needed (for example, meter boards) as part of their planning for capital works for their scheme.

Feedback received on other potential areas for reform

Another potential reform raised in the Discussion Paper was enabling the owners corporation's function of approving sustainability infrastructure resolutions to be delegated to the strata committee. There was some stakeholder support for a limited delegation of this function to the strata committee. For example, the City of Sydney Council suggested it might be suitable for some minor improvements with a cap on the amount of expenditure able to be approved and NABERS also supported it with limits on cost and/or type if required. However, South Sydney Councils opposed this proposal as they considered it might risk undermining strata owners' support for sustainability infrastructure.

In view of the limited support for this proposed reform and concerns raised by South Sydney Councils, the review does not recommend implementing this proposal. As noted above, obtaining approval from an owners corporation for sustainability infrastructure is now significantly easier due to the reduction in the voting threshold required. Some of the feedback received by the review was concerned about owners corporations retaining control over decisions relating to sustainability infrastructure. The review notes that requiring sustainability infrastructure to be approved at general meetings of the owners corporation may also help raise awareness of the issue within strata schemes.

5.2.3 Insurance

Part 9 of the Management Act governs insurance requirements for strata schemes, with the 2015 reforms largely carrying over the provisions of the 1996 Act, including a penalty of five penalty units for an owners corporation's failure to obtain a policy of insurance in accordance with the Act.

Owners corporations are required to obtain insurance of two general kinds:

1. a damage policy to insure the scheme buildings, and
2. other mandatory insurance including public liability insurance for not less than $20 million cover for each event for which claims may be made, and workers compensation insurance.

Feedback to the review on the insurance provisions in the Management Act largely confirms the stability of the status quo, with 57.6% of survey respondents stating that the current laws work 'well' or 'very well'.

Almost all major stakeholders were either in support of the status quo or made no comment about the insurance requirements, including UDIA, PICA, SCA, Holding Redlich and Meriton. The Law Society suggested the strata sector needed assistance to better understand the insurance exemption available to certain two-lot strata schemes under section 160(4). ACSL noted the difficulties owners corporations face in paying insurance premiums when lot owners are in arrears

on their levies. While no reforms are proposed in relation to insurance, the following section discusses some of the key matters raised with the review.

Regular insurance valuations

The most substantial comments came from REINSW, whose submission argued for the previous requirement for owners corporations to obtain an insurance valuation at least once every five years to be reinstated. That requirement was previously in section 85 of the 1996 Act and repealed by the *Regulatory Reform and Other Legislative Repeals Act 2015* in the context of that Act's repeal of the *Valuers Act 2003*.

Best practice in the insurance industry suggests owners corporations should obtain an insurance valuation about every three to five years, to ensure they retain adequate insurance cover in the event of damage or destruction of the building. Only two jurisdictions in Australia mandate strata insurance valuations – Victoria and Queensland. Further evidence in NSW of widespread neglect of regular insurance valuations in the strata sector would be needed before a case for regulatory re-intervention could be made.

Comprehensive building insurance: reinstatement and replacement cover

REINSW also proposed removal of the requirement for policies of strata insurance to include reinstatement cover as well as replacement cover, stating that such comprehensive coverage pushes up premiums and that previous strata legislation did not require insurance for both scenarios.

However, the 2015 reforms did not change the requirement in the Act for strata insurance policies to cover both reinstatement (building damaged but not destroyed) as well as replacement (building destroyed), as both were included in section 82 of the 1996 Act immediately before its repeal by the 2015 Act. The review notes that the new 2016 Regulation did differ slightly from the previous Regulation, in that the method of calculating insurer liability was broadened to include the costs to restore the building if it was damaged, as well as covering replacement.

While this may appear to place the consideration of this aspect of insurance requirements out of scope for this review, it is worth considering further in light of a recent study of strata insurance in Australia and New Zealand.[19]

The SCA-commissioned report by Deakin Business School, published in September 2021, conducted a jurisdictional comparison of mandatory strata building insurance policies. The report found that NSW laws required the most comprehensive coverage and provided the most specific guidance to insurers about the costs that those insurance policies must cover.

Strata insurance difficulties in general: affordability and availability

Feedback to the review noted general difficulties in obtaining strata insurance for NSW strata schemes, especially in relation to building damage policies, with affordability an ongoing concern. The SCA-Deakin Business School report found that "it is very evident that availability is problematic for strata schemes in the northern parts of Australia, for very large complex schemes, and schemes impacted by building defects, including combustible cladding". The report also noted that approximately 3.5% of the strata managing agents surveyed for the report indicated they had a scheme under their management that was either not currently insured or had been uninsured for a period during the past 12 months.[20]

[19] Johnston, N., Lee, A., Mishra, S., Powell, K., Bowler- Smith, M and Zutshi, A. (2021) *A data-driven holistic understanding of strata insurance in Australia and New Zealand*. Deakin University.
[20] *Ibid*, p. 86.

The NSW Government is addressing those concerns about availability and affordability of strata insurance with law reforms, compliance and enforcement action, and targeted programs to restore confidence in the apartment construction sector. Principal elements of this Construct NSW strategy have included the appointment of the NSW Building Commissioner in 2019, passage of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and the *Design and Building Practitioners Act 2020* and Project Remediate to assist strata schemes to remove external combustible cladding from their buildings.

Restoring confidence in the apartment building industry by ensuring the accountability of all practitioners in the design, development, construction, and certification of NSW apartment buildings should place downward pressure on insurance premiums and improve availability of coverage for owners corporations in NSW.

The NSW Government will continue to closely monitor developments in the strata insurance industry as implementation of the Construct NSW strategy continues. One of the keys to this is better access to data about strata schemes, which is being addressed through development of the Strata Hub mandatory reporting scheme. Proposed data points released for public consultation in October 2021 include date of last insurance valuation and the current insured value of the strata buildings.

5.2.4 Utilities contracts

Since the passage of the 2015 reforms, NSW Fair Trading has seen increasing public concern about utility supply contracts that are viewed as being unfair or involving insufficient disclosure. In 2018 the NSW Government inserted section 132A into the Management Act, which commenced on 1 October 2019. Section 132A provides that contracts for electricity, gas or other utilities will expire either at the first AGM or after three years for contracts entered into after this section commenced and expire after no more than ten years for contracts entered into before its commencement.

However, section 132A (4) explicitly excludes contracts for the supply of electricity to residents of a strata scheme through an embedded network. One of the reasons for this exemption was that, at that time, there was a national electricity market reform project underway examining the regulation of embedded networks.

The Discussion Paper sought feedback on whether these provisions were working as intended, as well as sector views on whether the exemption for contracts relating to electricity in embedded networks should remain or be removed.

Feedback to the review on section 132A endorsed the intention to provide flexibility and limits to these contracts. However, feedback also noted that there has been confusion about how it works in practice. In particular, concerns were raised, including by the SCA and PICA, around how it applies to what are often complex contracts, the need for a definition of ‘utility’, the need to have a general meeting to make a resolution about future and its silence on a range of issues, such as its application to rolling or indefinite contract, and how to renew or enter into new contracts. Feedback also highlighted some confusion around its application to contracts for other types of embedded networks, such as for water, internet, gas, and sewerage.

On the specific issue of the current exemption from this section for contracts for electricity in embedded networks, there was strong support for ending this arrangement. Many respondents, including the Energy and Water Ombudsman (EWON), OCN, REINSW, UDIA and the Law Society, supported the removal of this exemption. They argued that lock-in contracts initiated by developers should not be permitted, that such contracts can result in high costs for owners corporations and that such contracts can limit the ability of owners corporations to enter into more competitive contracts for the provision of utilities. However, at the same time, complications that could arise from simply deleting the-provision were highlighted, particularly in relation to the

management of upfront capital costs and in terms of potentially inhibiting the installation of infrastructure that could have long term sustainability benefits for a strata scheme, such as solar panels and water recycling systems.

The complexity of these latter points was highlighted by the Property Council, ACSL and the City of Sydney. The Property Council observed that providers of embedded networks often install their embedded network infrastructure on the assumption that their subsequent service contract will be ratified at the first AGM. The review heard that, as part of such an arrangement, developers often reduce their upfront costs (and offer a lower upfront price to unit purchasers) by deferring the upfront capital cost for embedded network infrastructure and instead spreading it over the term of an embedded network contract; a contract that is typically won by the initial provider of the network. The Property Council flagged concerns that directly imposing the limitations of this section, especially alongside the restrictions that already exist for contracts and arrangements during the initial period, could prevent developers from continuing to adopt upfront innovative practices and solutions, especially for making buildings more sustainable, such as through solar panels. This is because a three year contract may be too short, with longer term contracts needed to spread the capital costs of installing the infrastructure and achieve a return on investment.

Similarly, the City of Sydney submission highlighted that not all lock-in contracts linked to embedded networks are necessarily detrimental. They noted that the review should consider developing principles that must be met for any lock-in contract, such as that an embedded network must show a positive cost benefit ratio, improve building performance and ensure a positive and fair outcome for the owners corporation.

These comments highlight both the risks and benefits of embedded networks for electricity and for other utilities. On one hand, they have the potential to offer innovative and cheaper energy supply through the co-ordinated bulk purchasing power. On the other hand, this model also has the potential to reduce competition and consumer choice, and has been the subject of complaints, to both EWON and Fair Trading, in cases where the potential benefits are not being realised.

The review has considered all feedback and, overall, is of the view that the policy intent of section 132A remains valid. However, given the issues raised in the review, it is also recommended that this section be redrafted to reflect the complexity of utility contract arrangements in place. Redrafting will also provide more certainty in relation to the regulation and restrictions that apply to different contracts and the related processes, including how new contracts can be entered into. The process of re-drafting section 132A will allow for further sector engagement to ensure the revised version works better in practice.

The review also recommends that, in redrafting this section, it should clarify that it applies equally to all utility contracts, including those related to the supply within an embedded networks. The existing exemption for electricity embedded networks alone creates potential inconsistencies and the review considers it is likely to be resulting in adverse outcomes for owners corporations in terms of their access to competitive prices and contract options.

Recommendations

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

120. Extend the application of section 132A of the Management Act to contracts for the supply of electricity through an embedded network.

In making this recommendation, the review appreciates that such a change may have implications for how the upfront costs of some infrastructure installations will need to be managed. However, for

many aspects of essential utility infrastructure, the review is of the view that there are likely to be a range of ways of ways of structuring and managing such costs that already exist alongside the identified model of deferring costs into long-term service provision contracts, and therefore the proposed reform should be manageable.

Notwithstanding the above comments, the review is conscious of the potential risks to the uptake of sustainability infrastructure from this reform. Feedback to the review on sustainability more generally, which is discussed in Chapter 6.3.2, has highlighted a desire for schemes to be able to adopt sustainability measures more easily and the review is aware that the installation of sustainability infrastructure will often be substantially more cost effective at the initial development stage rather than for a scheme to retrofit or add on at a later stage.

Given such sustainability measures can also be accompanied by a diverse range of contract and ownership arrangements, the review is concerned to ensure that the proposed reform does not prevent their delivery in cases where they will deliver genuine benefits for a scheme. On this basis, the review is recommending, as part of the revised drafting of section 132A, that consideration is given to allowing longer initial terms for utilities contracts that are required to deliver a NABERS rating of at least five stars, and which can be demonstrated to deliver a positive cost benefit ratio for a scheme. DCS would work in partnership with the sector and DPIE to finalise any conditions that would apply to such arrangements.

Recommendation

121. Explore the feasibility of allowing certain longer initial utility 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.

Finally, the review notes that some respondents also suggested that greater disclosure around embedded networks could be used as an alternative, or in addition to, removing the exemption for electricity. While the review is not of the view that increasing disclosure obligations alone will necessarily provide an appropriate resolution to the issues identified, the review does agree that there is scope for more information provision about embedded networks alongside the above recommendations.

Embedded networks and their implications for service provision are often not well understood by the public, who may be used to organising their own supplier for essential services and having access to retail market competition for many services, such as electricity and internet. The review considers that there could be benefits for new entrants to a strata scheme in having a better initial understanding of the nature of utility services in a strata scheme, especially if they involve embedded networks and what they mean for purchasers. The review considers that reaching such an outcome is likely to need to involve a combination of mandatory disclosure as well as more general education.

In this content, the review recommends a new disclosure obligation to require, as part of any sale of a strata scheme unit, including off the plan sales, a plain English statement of which services are provided as an embedded network and what this will mean for residents, including in relation to access to alternative providers and ownership of the infrastructure. This mandatory disclosure could also be accompanied by additional education material, including on the Fair Trading website, that explains what embedded networks are and how they can operate within a strata scheme.

Recommendations

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.

123. Update Fair Trading strata information to provide additional information on embedded networks in strata schemes.

5.2.5 Building managers

Under section 66, the Management Act defines a building manager as a person who assists in exercising any one or more of the following functions of the owners corporation:

a) managing common property,
b) controlling the use of common property by persons other than the owners and occupiers of lots,
c) maintaining and repairing common property.

The 2015 strata reforms limited building manager contracts to a maximum of 10 years and provided that both entering into and terminating contracts of building managers had to be approved by a resolution of a general meeting of the owners corporation. The reforms also provided that appointments of building managers by the developer cannot extend beyond the date of the first AGM (section 68(1)), and that a building manager must disclose any connection with the developer or any direct or indirect pecuniary interest in the strata scheme (section 71).

The current definition of a building manager encompasses a wide range of contractors, including concierges, gardeners, handypersons, and cleaners, all the way to facilities managers who take of the facilities, maintenance and safety (including fire safety) in a complex multi-storey building.

Simple strata schemes engage contractors as needed to undertake repairs and maintenance of the common property. However large, complex, multi-storey schemes may engage a person as a building manager whose role is to manage the safety and maintenance of the building as a whole as well as facilities including gyms, pools, lifts, and carparks. This latter type of building manager can hold a position of significant trust and influence in a strata scheme. In large and complex buildings, the owners corporation's reliance on both the managing agent and the building manager is likely to be greater, due to the greater expertise necessary to effectively manage these buildings. Feedback suggests that in some schemes the building manager also has authority to expend owners corporation funds.

The position of trust held by building managers in large schemes has led to suggestions that building managers should be subject to the same controls as strata managing agents. This would guard against conflicts of interest and ensure that schemes are not locked into contracts with building managers who are not competent or acting in the best interests of the owners corporation.

This can be particularly important in schemes where building defects are being managed. In new buildings the building manager appointed at the first AGM is usually the person put forward by the developer, who may be keen to win future work from the developer. In buildings where there are issues with defects, feedback suggested there is sometimes a perception that the building manager may provide advice about defects, defect identification and rectification which is beneficial to the developer.

Responses to the review overwhelmingly supported extending the major accountability and conflict of interest controls that currently apply to managing agents to building managers. The review

considers that, in light of the trusted role that is increasingly played by building managers, subjecting them to many of the same controls as managing agents is warranted.

These controls would include:

- requiring disclosure of whether an entity seeking to enter into contracts with the owners corporation is connected with the building manager within the meaning of section 7 of the Management Act,
- requiring disclosure of any referral fees or other commissions or benefits that the building manager may receive in relation to contracts that the owners corporation is proposing to enter into, before the contract is entered into,
- prohibiting acceptance of gifts or benefits valued at more than $60 except for commissions and training services approved by the owners corporation,
- requiring reporting at each AGM of any commissions or training provided over the last 12 months and any expected over the next 12 months, and
- imposing clear obligations to provide the owners corporation with disclosures about how any owners corporation money is paid out or received.

While managing agents are subject to limited contract terms of 12 months for the first appointment at the first AGM and three years thereafter, feedback has suggested that limiting initial terms for a building manager to 12 months is not practical. This is because the building manager may not commit to properly setting up the systems and processes to manage the property if they have no security of appointment beyond 12 months. Other submissions, including from the Property Council and Facilities Management Association of Australia, argued that the limitation of contract terms for building managers to three years is too short, arguing that it is in the interests of the owners corporation for the term to be longer.

While the review appreciates these concerns, as with managing agents, the concerns need to be balanced against the need to allow lot owners to reconsider the direction of the scheme in its early life, particularly given the vulnerability and lack of knowledge of lot owners at the first AGM. However, the role of the building manager is different to that of a managing agent, with different considerations applying. The review therefore recommends that there be further consultation with the strata sector on what the appropriate limitations on contract terms for building managers should be.

While the Management Act currently prohibits a person connected with the developer from being a strata managing agent for a scheme for the first ten years, the review does not recommend this prohibition apply to building managers. Developers often operate their own building management businesses, which are part of the overall development package and can offer savings and innovative services to owners corporations.

The review also considers that the controls listed above should apply only to building managers who have overall responsibility for the management of the maintenance, repair, or safety and of a scheme's common property, and not to contractors who are responsible for individual aspects of common property management such as cleaning or gardening or acting as a concierge. This will require a change to the definition of a building manager in the Act.

The review considers that further consultation should occur during the drafting of the new definition of a building manager to ensure that it aligns with industry practice and has the appropriate scope.

While the review does not consider that other contractors should be subject to all the controls listed above, there may be merit to providing for these contractors to be subject to the limits on contract terms, in order to safeguard the ability of the owners corporation to decline to renew contractual arrangements that are not delivering the expected benefits. However, as with building managers,

the review recommends further consultation with the strata sector on what the appropriate limitation on terms for such contractors should be.

Recommendations

124. Amend the definition of a building manager in the Management Act to refer to a person who is contracted by the owners corporation to manage the overall maintenance, repair, and/or safety and of a scheme's common property. Conduct further consultation during the drafting of the new definition to ensure that it aligns with industry practice and has the appropriate scope.

125. Impose on building managers the following conflict of interest measures that apply to strata managing agents:

    a) requiring disclosure of whether any entity seeking to enter into contracts with the owners corporation is connected to the building manager within the meaning of section 7 of the Act

    b) requiring disclosure of any referral fees or other commissions or benefits that a building manager may receive in relation to any contract that the owners corporation is proposing to enter into, before the contract is entered into

    c) prohibiting acceptance of gifts or benefits valued at more than $60 except for commissions and training services approved by the owners corporation

    d) requiring reporting at each AGM of any commissions or training provided over the last 12 months and any expected over the next 12 months

    e) imposing clear obligations to provide the owners corporation with disclosures about how any owners corporation money is paid out or received.

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

127. Redefine other contractors who undertake work assisting the owners corporation to manage the common property as common property contractors and:

    a) consult further with the strata sector on what the appropriate limitations on contract terms for these contractors should be

    b) continue to require that these contractors be appointed and terminated by a resolution of a general meeting of the owners corporation

Duties of building managers

Duty to act in the best interests of the owners corporation

Some stakeholders have argued that, in addition to conflict of interest controls, building managers should be subject to an explicit statutory duty to act in the best interests of the owners corporation.

Managing agents are licensed professionals who are already subject to a fiduciary duty and an explicit duty to act in the best interest of their client, both prescribed in the Rules of Conduct in Schedule 1 of the *Property and Stock Agents Regulation 2014*.

Some submissions argued that building managers would already be subject to common law duties, but these are variable by contract and may depend on individual circumstances.

The review considers that there would be benefit in imposing a duty on building managers to act in the best interests of the owners corporation. This would make explicit the expectation that the overriding principle in carrying out their duties is to ensure that they serve the owners corporation.

Recommendation

128. Building managers be subject to a statutory duty to act in the best interests of the owners corporation in carrying out their duties.

Duty in relation to safety of strata buildings

As outlined in chapter 5.2.1, the maintenance and repair of common property is a critically important duty of the owners corporation, in order to ensure the ongoing safety and amenity of strata buildings throughout their life. The importance of this issue has been enshrined the Management Act through:

- a duty on owners corporations to maintain and repair common property and any personal property vested in the owners corporation,
- the preparation of a 10 year capital works fund plan, and
- an obligation on developers to prepare an initial maintenance schedule and provide it with other foundational documents for the strata scheme prior to the first AGM.

In response to widespread frustration in the strata sector about owners corporations' alleged failure to properly maintain and repair the common property, chapter 5.2.1 recommends:

- Fair Trading be empowered to issue orders requiring rectification of maintenance and repair issues, and to enter into enforceable undertakings with owners corporations, and
- the Management Act include an offence provision for breach by an owners corporation of its duty under section 106 to maintain and repair common property.

In complex, multi-storey strata buildings, the owners corporation of necessity relies more on the building manager (as well as the managing agent) than in simpler buildings for expert advice on managing defects, safety, repairs and maintenance. The lack of expertise of the owners corporation when dealing with issues of building defects, fire safety and maintenance has led to suggestions that overall management of maintenance and repairs should rest with an accredited or licensed building manager who is subject to statutory duties to ensure the upkeep and safety of the building.

Responding to this issue in the Discussion Paper, some stakeholders questioned whether imposing such a duty on the building manager would remove the obligation to maintain and repair the common property from the owners corporation. Many submissions considered that this duty should remain with the owners corporation. On the other hand, the Facilities Management Association of Australia (FMAA) has argued for the licensing of facilities (or building) managers and for a requirement to engage a suitably qualified building manager for buildings of a certain complexity. Other submissions were concerned that placing such a duty on a building manager would be unfair if, for example, they requested approval for repairs or upgrades but were refused by the owners corporation.

The review considers that any proposal to delegate the obligation of the owners corporation to maintain and repair the common property to a building manager would require suitably qualified building managers supported by a licensing scheme and compulsory qualification requirements. Without such uniformity and oversight of qualifications, imposing such a duty could be unfair to

some building managers who would not have the right expertise, and could risk dangerous practices and owners corporations placing their trust in unsuitable candidates.

However, at this time there is a lack of a properly recognised qualification in the vocational educational framework that could be used to support such a scheme. Further, developing and implementing a licensing scheme would involve substantial costs which would be borne by the Government, the industry and owners corporations as the end consumer. The review therefore does not consider that a licensing scheme is a viable or supportable option at this time.

Nevertheless, the review recognises that there is substantial support for improving the expertise of building managers, especially in the management of defects. The review therefore recommends that DCS continue to consult with the strata and facilities management industry on ways to improve the expertise of building managers, including the possibility of a licensing framework in the longer term.

Recommendation

129. DCS consult with the strata and facilities management industries about ways to improve the expertise of building managers, especially in the management of defects, including the possibility of a licensing framework in the longer term.

The review also considers that there are other ways to improve the role of building managers in the management of defects and the ongoing maintenance of a building and enable owners corporations to rely on their expertise to help them manage these issues.

Given the lack of a recognised qualification that can be recommended at this time, the review recommends that, prior to entering into building management contract, a potential building manager be required to disclose to an owners corporation the qualifications and experience that make them suitable for the role. While such disclosure may already be common in practice, mandating it will ensure that all owners corporations are required to explicitly consider the qualifications of a prospective building manager.

The review also considers that a building manager should be subject to explicit statutory duties to:

- familiarise themselves with fire safety and building safety obligations to which the owners corporation is subject,
- take all reasonable steps to ensure that the owners corporation complies with these obligations, and
- promptly bring to the attention of the owners corporation any maintenance, repair or safety problems with the building, and provide a proposal for how these could be best addressed.

Recommendation

130. Building managers be subject to explicit statutory duties to:

a) disclose to the owners corporation the qualifications and experience that make them suitable for the role,

b) familiarise themselves with fire safety and building safety obligations to which the owners corporation is subject,

c) take all reasonable steps to ensure that the owners corporation complies with these obligations, and

d) promptly bring to the attention of the owners corporation any maintenance, repair or safety problems with the building, and provide a proposal for how these could be best addressed.

Grounds for termination

Section 72 of the Management Act provides that the Tribunal may make an order terminating or varying a strata managing agent or building manager agreement on the grounds that:

a) the strata managing agent or building manager has refused or failed to perform the agreement or has performed it unsatisfactorily,
b) charges payable by the owners corporation under the agreement are unfair,
c) the strata managing agent has failed to provide trust account information and contravened section 58(2),
d) the strata managing agent has failed to disclose commissions or training services (including estimated commissions or value of training services or variations and explanations for variations) in accordance with section 60 or has failed to make the disclosures in good faith,
e) the strata managing agent or building manager has failed to disclose a connection with the developer or direct or indirect pecuniary interest in the strata under section 71,
f) the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

The Discussion Paper asked whether any further grounds for termination of building manager agreements should be added or if the grounds should be the same as those for managing agents.

Submissions supported the current grounds for termination of building managers in section 72 and the review recommends their retention. Given the recommendation that building managers be subject to the same requirement to disclose commissions and training services that applies to managing agents, the review recommends that the Tribunal should also be able to terminate a building manager's contract on the grounds in d) above – that the building manager has failed to make these disclosures or has failed to make them in good faith.

Recommendation

131. The existing grounds for termination of building manager contracts in section 72 of the Management Act be retained, and a new ground be added, consistent with section 72(3)(d), that a building manager has failed to disclose commissions and training services or has failed to make these disclosures in good faith.

5.3 Dispute resolution and enforcement

One of the objects of the Management Act is to provide for the resolution of disputes arising from strata schemes. Strata schemes continue to generate a significant volume of disputes, many of which proceed through formal channels involving Fair Trading, the Tribunal and the courts. However, the Discussion Paper noted there has been no general increase in the numbers of strata disputes since the commencement of the 2015 reforms, despite the rapid growth in the size and number of NSW strata schemes.

This chapter focuses on the processes as set out in the Management Act for the resolution of strata disputes.

Changes made under the 2015 reforms

The 2015 reforms made significant changes to the dispute resolution processes provided in the Management Act. Under the 1996 Act, there was a three-tiered system – for most applications, mandatory mediation first, followed by referral to an adjudicator for determination. Applications for certain orders specified in the Act, any applications referred by adjudicators and appeals against adjudicator orders were dealt with by the Tribunal.

The 2015 reforms streamlined the dispute resolution framework by reducing it from a three-tiered system to two tiers for most strata disputes – mediation and the Tribunal. The role of adjudicators was removed and the role of the Tribunal in resolving disputes was broadened. Compulsory mediation for most matters as a first step was retained to encourage early settlement of disputes and reduce the number of matters requiring the Tribunal.

The courts also have a role in relation to certain matters, for example, recovery of unpaid levies under section 86(2A), matters outside the Tribunal's jurisdiction and hearing appeals against Tribunal decisions.

General findings and recommendations about the current dispute resolution processes

Overall, the feedback suggests the current two step formal dispute resolution process for most strata disputes (that is, mediation first and then recourse to the Tribunal if required) is generally working effectively.

However, at the same time, stakeholder feedback indicated some dissatisfaction with certain aspects of the current dispute resolution processes and suggested a range of possible suggested. Concerns were raised by some stakeholders, such as ACSL, about varying quality and slowness of the dispute resolution process, both with respect to Fair Trading mediation and the Tribunal. Some feedback also raised concerns about restrictions on costs orders the ability to have legal representation in the Tribunal. Other stakeholders, such as Property Council and UDIA, considered the current processes were generally working well.

In relation to the initial parts of the dispute resolution process, stakeholder suggestions included:

- creation of a strata commissioner or ombudsman as the first point of contact for disputes,
- Fair Trading having an arbitration power and greater enforcement powers with respect to breaches, and
- reinstating the adjudicator process for minor matters.

Stakeholder feedback about the dispute process in the Tribunal included the following suggestions:

- having a specialised strata division and a Commercial and Property List separate from consumer matters in the Tribunal,
- the Tribunal should run compulsory conciliation, and
- the Tribunal should be able to make decisions on the papers and only hold hearings if necessary.

Having considered all feedback, the review does not consider there is sufficient evidence to warrant the introduction of additional decision-makers such as a strata commissioner or ombudsman, or Fair Trading as an arbitrator or adjudicators as per the previous legislation, as suggested by some stakeholders.

The data suggests[21] that Fair Trading mediation has a good success rate. Fair Trading mediation provides the wide range of persons who may be involved in strata disputes with a service that is free and accessible. Some improvements to Fair Trading's mediation process have been considered in light of feedback to the review, which are discussed below.

Having an arbitration or other adjudication process in addition to the existing process in the Tribunal, or to replace that process, would add considerable complexity to the current framework, even if it was limited to 'minor matters'. An adjudication process is already available in the Tribunal. One of the objectives of the 2015 reforms was to make the dispute resolution process simpler.

Stakeholders have raised concerns about the time it can take for a matter to be mediated or determined by the Tribunal. Any additional adjudication process would likely need to have an appeal or review mechanism, which might be limited to certain matters or might allow for a complete re-hearing of a matter. Either way, introducing such a process would not address delays. Having more than one adjudication process may also give rise to more inconsistency in how strata disputes are determined. For these reasons, the review does not recommend that another adjudication process be introduced into the current dispute resolution framework.

The Tribunal's jurisdiction in strata matters is set out in both the *Civil and Administrative Tribunal Act 2013* (CAT Act) and the Management Act. The CAT Act contains procedural provisions that are relevant to strata matters in the Tribunal, including how applications are made, legal representation and costs orders. The Management Act gives the Tribunal power to make certain orders specifically in relation to strata matters.

Some of the feedback from stakeholders related to issues governed by the CAT Act, including availability of legal representation and costs orders in Tribunal proceedings. The CAT Act is administered by the Department of Communities and Justice and is outside the scope of this review.

The processes in the Tribunal, including the management of proceedings, are generally a matter for the Tribunal. The Tribunal does maintain separate lists in the Consumer and Commercial Division. In relation to the suggestion that the Tribunal should run compulsory conciliation, the review notes the Tribunal does have conciliation – whether or not that is ordered in a particular proceeding is a matter best determined by the Tribunal, taking into factors such as whether the parties have already engaged in a dispute resolution process. The review also considers that the issue of whether the Tribunal should be able to make decisions on the papers is best left to the Tribunal, taking into account the parties' submissions. In matters where there are contested facts, procedural fairness may be best served by allowing the parties to be able to cross examine each other.

In terms of matters that are within the scope of the Management Act and this review, the review has identified several areas for potential reform to improve the current processes and address some issues raised in feedback. These are discussed in the following sections.

Internal dispute resolution

The 2015 reforms introduced a new section (section 216) recognising that owners corporations may establish a voluntary dispute resolution process for their scheme. The section provides that participation or not in such a process is not to be considered in any mediation or other proceeding under the Management Act and does not prevent mediation or proceedings being taken.

[21] Fair Trading strata mediation data indicates that during the 2018, 2019 and 2020 financial years, over 60% of mediations conducted by Fair Trading resulted in a matter being fully resolved at mediation.

Stakeholder feedback to the review suggested that an internal dispute resolution process is either not used by many schemes or it is ineffective. Around 60% of survey respondents felt the owners corporation did not manage disputes effectively. A strong theme in the survey feedback was that dispute resolution requires an impartial third party and it is not appropriate for owners corporations or strata committees to be resolving disputes within a strata scheme. The feedback noted concerns about owners corporations (or committees) having control or power over determination of disputes, and other issues including bias, bullying, personality conflicts and disharmony.

In contrast, feedback to the review on the keeping of animals in strata schemes[22] suggested reasonable support for internal resolution, at least for animal disputes.

The variations in the feedback received may reflect different understandings of what is meant by internal dispute resolution. The feedback suggests that few schemes have established a formal process aimed at resolving disputes internally. The reasons for this are unclear but it may be due to concerns, such as those reflected in the feedback to the review, or a lack of knowledge about setting up an appropriate process. The section allows an owners corporation to set up a process 'by any means it thinks fit'. Schemes may not know how to do this or there may be concerns about the process or what it should address.

Not having such a process may have led to disputes either remaining unresolved, or proceeding to mediation or the Tribunal, with associated delays and costs. Strata policy in NSW has largely established a democratic, self-governing framework for shared living. Although there is a clear need for external processes to resolve disputes, given the time, costs and stress often involved in those processes, the legislation should, where possible, facilitate early resolution of issues and disputes within schemes.

The review recommends that Fair Trading develop better guidance for owners corporations, in collaboration with key sector stakeholders such as the OCN, on improving their internal resolution of disputes.

Recommendation

132. Fair Trading should develop additional guidance for owners corporations, in collaboration with key sector stakeholders such as the OCN, on improving their internal resolution of disputes.

Strata mediation

Currently, section 227 of the Management Act requires all disputes to be mediated before an application is made to the Tribunal, with some exceptions, which are applications for orders:

- appointing a strata managing agent
- waiving an initial period restriction
- allocating unit entitlements
- giving an owners corporation access to a lot to inspect or repair common property
- requiring a former strata managing agent to give records to an owners corporation
- allowing inspection of an owners corporation's records
- imposing a monetary penalty
- varying or revoking an order that varies or revokes another Tribunal order.

Feedback to the review suggested that for many disputes mediation is generally a helpful step in attempting to reach a resolution before more formal proceedings are started. However, it has also

[22] Ibid.

been suggested by some stakeholders, including SCA and OCN, that mediation is not an appropriate or useful requirement for some types of disputes not currently in the list of exceptions. They suggest it only causes delay and unnecessary use of resources in those situations.

One reason for this may be because mediators do not make rulings or orders and, as such, mediation may not be of assistance in certain matters, for example, where the applicant is seeking a legally binding determination. Suggestions for disputes that should be considered for exclusion from the mediation requirement are those questioning the validity of meeting and voting processes, whether a motion or proxy was valid or whether a resolution was passed at a meeting.

However, there can still be value in mediation on those types of issues, for example to explain the operation of the law to the parties in dispute and how other similar matters have been determined in the past.

In the absence of compelling evidence that there should be more specific matters on the list of exclusions from the mandatory mediation, the review recommends no change to section 227 at this stage. The goal of the 2015 reforms to resolve disputes without recourse to a judicial setting, where possible, should be preserved. Further, the Tribunal registrar already has the discretion, under section 227(1)(c), to accept an application without prior mediation if the registrar considers that mediation is unnecessary or inappropriate in the circumstances. The review considers there is scope for the Tribunal Registrar to provide guidance on whether and how it will use the discretion to accept an application without prior mediation.

Recommendation

133. Section 227 of the Management Act should remain unamended at this stage. The Tribunal Registrar should consider including guidance in the Tribunal's strata fact sheet on when and how the discretion to accept an application without prior mediation will be used

The Tribunal's jurisdiction and its powers to make orders

Stakeholder feedback to the review also highlighted a number of areas of the Tribunal's jurisdiction and order-making powers needed consideration by the review.

Orders for payment of damages for breach of statutory duties under the Management Act

The Discussion Paper noted there was uncertainty as to whether the Tribunal had jurisdiction to make an order for damages under section 106(5) of the Management Act due to a number of inconsistent decisions on this issue by Appeal Panels of the Tribunal.

The NSW Court of Appeal's decision in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284 (***Vickery***) on 11 November 2020 confirmed (by a 2:1 majority) that the Tribunal has power to make an order for damages against an owners corporation for breaching its statutory duties under section 106 of the Management Act. The Court held that the general power in section 232 of the Management Act gave the Tribunal jurisdiction and power to hear and determine a claim for damages under section 106(5) of the Management Act.

In their judgment, the Court of Appeal commented[23] that the Tribunal's powers under the Management Act, particularly its powers to order damages or compensation, should be made clearer in the legislation. This is also supported by feedback to the review.

[23] For example, at [2], [66] and [190]

The Discussion Paper asked whether the Tribunal should have power to order damages for breaches of statutory duties under the Management Act.

There was a mixed response from stakeholders to this question. Although there was overall support in principle for the Tribunal having power to order damages for breach of the statutory duties under section 106, some stakeholder support was qualified, raising certain issues they felt should be considered in relation to the Tribunal having such a power. For example, the Law Society's submission suggested that as well as providing the Tribunal with certain powers to order damages, including damages for breach of the statutory duty under section 106, the legislation should provide for rules of evidence, a right of cross-examination and a right of legal representation to apply to such claims for damages. SCA has also raised concerns about the types of damages claims that might potentially be able to be brought in the Tribunal if it had this power. REINSW also opposed the Tribunal having this power, citing inconsistency in Tribunal decisions as a reason.

As noted in the Discussion Paper, there are also rights to claim damages for breach of statutory duty under sections 26(2), 26(3) and 140(2) of the Management Act. Those rights are in very similar terms to section 106(5) and do not explicitly state that the Tribunal has power to order those damages. However, the Tribunal may not be held to have power to order those damages under section 232 based on the reasoning applied in *Vickery*.

Section 232 and whether the Tribunal should have a general power to order damages or compensation or other monetary amounts

As noted above, the Court of Appeal in *Vickery* found that section 232 gave the Tribunal power to order damages on the basis that the dispute related to an owners corporation's failure to exercise a function under the Management Act.

Section 232 confers power on the Tribunal to make an order to 'settle a complaint or dispute' about certain specified matters listed in section 232(1). The Court of Appeal judges in *Vickery* criticised the lack of clarity in some of the language in section 232 which they interpreted in different ways.

The Discussion Paper asked whether the Tribunal should have a general power to order damages, compensation or other monetary amounts in determining strata disputes.

Overall, feedback to the review generally supported the Tribunal having power to order damages. There was some stakeholder support for retaining and clarifying the power in section 232. For example, the Law Society of NSW suggested it should give the Tribunal power to order damages for breach of any exercise or failure to exercise a function conferred or imposed on an owners corporation under the Management Act or any other Act (including damages for tortious claims). However, that support was qualified by the same concerns discussed above in relation to rules of evidence, cross-examination and legal representation.

Some stakeholders were concerned about the appropriateness of the Tribunal having a general power to order damages, in addition to any specific powers, as it does not have the processes of a court of original jurisdiction. These stakeholders also raised concerns about inadequacies or inconsistencies in some processes in the Tribunal, particularly around application of rules of evidence, availability of cross-examination and ability to have legal representation.

To ensure clarity and certainty, the review recommends that the Act be amended to specifically confer on the Tribunal a power to order damages, and that consideration be given to the issues related to the exercise of that power raised by stakeholders.

Recommendation

134. Amend the Management Act to confirm that the Tribunal has the power to order payment of damages.

Cap on the Tribunal's monetary jurisdiction

There is currently no cap on the amount the Tribunal may order where it does have power to award monetary amounts, including damages or compensation, under the Management Act.

The Discussion Paper asked whether there should be a cap and, if so, what amount would be appropriate. There was mixed feedback to this question. While some stakeholders (including PICA, ACSL and OCN) supported a cap, others did not (including Law Society of NSW and REINSW). There were also varying suggestions from stakeholders about the amount of any cap that should be imposed. OCN and ACSL supported a cap of $100,000 but there was also support in other feedback for a lower cap.

Imposition of a cap would mean that parties who wish to make a monetary claim in a strata dispute above the cap amount would have to file that claim in an appropriate court.

A cap may therefore impact the courts' caseload and, because of different rules that apply in the Tribunal and the courts, there may be impacts on parties, for example, a higher risk of an adverse costs order if the claim is not successful and determined by a court.

A key reason for a cap is to ensure that a claim against a party for a monetary amount is heard and determined in an appropriate forum, for example, one with processes appropriate for determination of a claim of that size. A larger monetary claim can obviously have a more significant impact on the party against whom the claim is made, if it is successful.

Given the varying feedback received by the review on this issue and the potential impacts a cap might have, the review recommends further consideration be given to whether or not a cap should be imposed on the Tribunal's monetary jurisdiction under the Management Act in conjunction with the review of the Tribunal's monetary powers discussed above. As part of that review, further consultation should take place with relevant stakeholders.

Powers to order apportionment of costs or other monetary amounts

There are several sections currently in the Management Act and the CAT Act relevant to the apportionment of costs and other monetary amounts in strata disputes. One of the reasons for these sections is that, in some cases where an owners corporation has a costs or other monetary order made against it, or incurs costs itself in relation to proceedings, it may not be appropriate for all owners in the strata scheme to bear the burden of those amounts equally.

In *Vickery*, the Court of Appeal noted sections 90 and 104 of the Management Act, and suggested (per White JA at [190]) that the powers of the Tribunal and the courts relating to apportionment of monetary amounts, including costs, may need to be reviewed and clarified.

The relevant provisions in the legislation include:

- Section 90(2) of the Management Act, which allows a court, but not the Tribunal, to order in proceedings between an owners corporation and one or more lot owners that any money (including costs) ordered to be paid by the owners corporation be paid from contributions levied on certain lots only and in the proportions specified in the order.
- Section 104 of the Management Act, which prohibits an owners corporation from levying a contribution for its costs in Tribunal proceedings on another party who is successful in

those proceedings. It also provides that an owners corporation that is unsuccessful in Tribunal proceedings cannot pay any of its costs in the proceedings from the administrative or capital works fund, but it can make a levy for that purpose.

- Section 254(4) of the Management Act, which provides that a contribution required to be made by one lot owner to another owner in relation to a judgment debt in proceedings relating to common property is to be in the same proportion to the judgment debt as that owner's unit entitlement is to the aggregate unit entitlement.
- Section 90(4) of the CAT Act, which allows the Tribunal to determine by whom, and to what extent, costs are to be paid, if it awards costs in proceedings.

ACSL's submission to the review proposed that the power in section 90(2) of the Management Act be extended to the Tribunal and that section 254(4) be amended to enable the Tribunal or a court to order different contributions where lot owners are impacted differently.

The review notes that the issue of apportionment of costs is currently the subject of two appeals before the Tribunal. Given the potential relevance of this issue to the power of the Tribunal to order damages, compensation or other monetary amounts, the review recommends that the Act be clarified if necessary, to ensure both the courts and the Tribunal have appropriate apportionment powers.

Recommendation

135. DCS should work with the Department of Communities and Justice to resolve details of the power to award damages, including:

    a) whether any monetary limits should be imposed on Tribunal orders for damages or other monetary compensation,

    b) procedural issues such as rules of evidence and legal representation, and

    c) whether any clarification of the Act is necessary to ensure that the Tribunal is able to order apportionment of costs.

Penalties under the Management Act

Penalties for breaches of Tribunal orders

Stakeholder feedback generally supported penalties for breaches of orders made by the Tribunal and more effective enforcement of Tribunal orders. Some feedback suggested there should be higher penalties or automatic penalties for non-compliance.

As foreshadowed in the Discussion Paper, the new section 247A in the Management Act enabling the Tribunal to order payment of a monetary penalty of up to $5,500 for breaches of its orders on application by a party commenced on 1 July 2021, after submissions to this review closed. This section ought to provide an easier mechanism for parties to enforce orders when they are breached.

It is too early to assess the effectiveness of this provision as a means of enforcing Tribunal orders where there is non-compliance. The operation and effectiveness of section 247A should be monitored before any other changes are considered. The maximum penalty in section 247A could be reconsidered if the penalties in the Act are reviewed as a whole, as discussed below.

Penalties for offences in the Management Act and Regulation

The penalties provided in the Management Act have either not been changed since it commenced or, in some cases, have been added by subsequent amendments. Further, some provisions in the Management Act impose obligations but do not presently include penalties for non-compliance. For example, the requirement to hold an annual general meeting every financial year under section 18 is not an offence provision.

Penalties are an important tool in enforcement of obligations, particularly where breach of those obligations can have significant consequences for owners and residents in strata schemes.

The importance of adequate offence provisions is highlighted by the situation where an owners corporation's functions have been delegated to a strata managing agent. Section 57(1) of the Management Act makes an agent guilty of an offence for a breach of an owners corporation's duty where that function has been delegated to the agent. Unless there are adequate offence provisions for breaches of the owners corporation's duties in the legislation, Fair Trading has limited enforcement options both against an owners corporation and, where functions have been delegated to the agent, the strata managing agent.

Some stakeholders, for example, OCN and UDIA, supported higher penalties in the legislation, with OCN suggesting that all penalties should be doubled. In contrast, while REINSW considered enforcement powers were insufficient, current penalties were suggested as being adequate.

In view of stakeholder feedback that penalties should be higher, including the penalty under section 247A, the review recommends the penalties in the Management Act and Management Regulation be reviewed in 2022 and raised where appropriate.

Recommendations

136. Monitor the effectiveness of the new section 247A of the Management Act as a means of enforcing Tribunal orders.
137. Review and, where considered appropriate, increase the maximum penalty amounts in the Management Act and Regulation.
138. Review and where appropriate add penalty provisions for obligations where no penalty currently exists in the Management Act or Regulation.
139. Review and where appropriate add further penalty notice offences and increase penalty notice amounts in Schedule 5 of the Management Regulation.

NSW Fair Trading's role and functions

The Discussion Paper sought feedback about Fair Trading's role and functions in relation to the Management Act. Section 256 of the Management Act sets out the broad powers and functions of the Secretary (defined as the Commissioner for Fair Trading) in relation to strata schemes. The functions include assisting with the resolution of complaints, investigating possible offences under the Management Act (and Management Regulation), taking enforcement action and providing relevant information to the public.

Overall, the feedback to the review suggests stakeholders consider that Fair Trading is generally effective in exercising its functions. While no recommendations for reform are proposed, the following sections highlight a number key areas of feedback.

Property Services Commissioner

Some stakeholders, including REINSW, OCN and City of Sydney, suggested the creation of a Commissioner for Strata Living or a broader Property Services Commissioner.

The review notes that the NSW Government announced in June 2021 that it would soon appoint a Property Services Commissioner whose brief will take in strata as part of the regulation of all real estate and property agents regulated under the PSA Act. At the time of writing this review the Commissioner had not yet been appointed.

Strata mediation service

One aspect of Fair Trading's role is the provision of a free mediation service under Part 12, Division 2 of the Management Act. In general, stakeholders consider Fair Trading's mediation service is valuable but one main concern raised was how long the process can take. The review notes recent improvements in this regard with the adoption of telephone and video-conferencing mediation sessions in response to the COVID-19 pandemic restrictions on movement and gathering.

Complaints and enforcement

Stakeholders suggested Fair Trading's enforcement powers should be strengthened and Fair Trading should have a greater role in either obtaining certain orders from the Tribunal in respect of breaches of the legislation or being able to issue certain orders.

The review has recommended a major new role for Fair Trading to assist in the resolution of building defects and enforce compliance by owners corporations with their statutory duty under section 106 to maintain and repair the common property. The review considers that is the area of strata living most in need of stronger regulatory intervention and where it would be most appropriate.