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Australia's property industry
Creating for Generations

21 April 2021

Strata Schemes Statutory Review
Policy and Strategy, Better Regulation Division
Department of Customer Service
4 Parramatta Square, 12 Darcy Street
PARRAMATTA NSW 2150

To whom it may concern

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

The Property Council of Australia welcomes the release of the NSW Government's public consultation on the statutory review of the Strata Schemes Development Act 2015 and the Strata Schemes Management Act 2015. In particular, we would like to bring attention to the following points in this submission:

- **Raising standards** including knowledge of building managers and owners about maintenance and defects.
- **Integrating concurrent reform agendas** such as the building reform and strata review.
- **Regulation must not be overly prescriptive or specific** to ensure flexibility.
- **Building public confidence** by implementing and communicating future focussed regulation that supports sustainability measures and other lifestyle initiatives.

As we understand the NSW Government will report the findings of the review at the end of 2021, we look forward to attending any discussions that may be held as a result of this paper or the Government response to the review.

Should you have any questions or seek further clarification on any of the above, please do not hesitate to contact Senior Policy Advisor, Sean Conway on 0438 065 924 or sconway@propertycouncil.com.au

Yours sincerely,

Jane Fitzgerald
NSW Executive Director
Property Council of Australia

NSW Property Council Submission on the public consultation on the statutory review of the *Strata Schemes Development Act 2015* and the *Strata Schemes Management Act 2015*

As increasing numbers choose strata living as an attractive, affordable, and sustainable housing option it is incumbent on Government to ensure that the laws and regulations governing development and management are fit for purpose and can accommodate growth and change in consumer demand.

Strata presents a great opportunity for NSW and can be one key to unlocking the housing supply problem that continues to restrain our state. Housing affordability continues to be an issue for many, addressing supply is one important step, as is giving confidence to potential Strata owners that the rules are fair, flexible, and future focussed.

The five-year statutory review of Strata comes at an interesting time in the evolution of Strata governance. During the COVID pandemic the NSW Government introduced temporary measures that amended the legislation governing community schemes and strata management to provide for the use of video conferencing technology to allow AGMs to be taken online as well as the witnessing of documents via electronic means. These were welcome and sensible measures that were entirely necessary given the constraint of a public health emergency. Similarly, when the NSW Government legislated to extend the temporary COVID measures for an additional 12 months in the COVID-19 Recovery Bill 2021 in March 2021, we welcomed this development.

The clear lesson from the COVID period is that legislation and Government must be flexible and responsive. This is the approach the industry would like to see going forward. This will incentivise more players to enter the strata market.

The evidence across many sectors in recent history is that competition at a state, national, and international level will increase choice of product, increase standards and lower cost. These are all desirable outcomes. Having a legislative framework that is current, fit for purpose and future proof will go a long way to supporting this outcome.

About the Property Council of Australia

The property industry is the nation's biggest industry – representing one-ninth of Australia's GDP and employing more than 1.4 million Australians. The largest employer in Australia.

In NSW, the industry creates more than $81.4 billion in flow on activity, generates around 387,000 jobs and provides around $61.7 billion in wages and salaries to workers and their families.

Our members are the nation's major investors, owners, managers, and developers of properties of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play.

The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive and sustainable places.

Property as a pillar of NSW

The property and construction industry also underpins the health and prosperity of the NSW economy. The industry:

- generates over 387,000 jobs – 12% of the workforce,
- provides $61.7 billion in wages and salaries to workers and their families,

- pays $20.9 billion in state taxes, Local Government rates, fees, and charges - the state's single largest taxpayer, accounting for 54.1% of taxes,
- contributes $63.4 billion directly to Gross State Product – 12.7 per cent of total GSP,
- is invested in by 4.5 million NSW residents who have a stake in the industry through their superannuation funds.

The need for integrated reform

At the time of the last major review of strata laws in NSW in 2015 we recognised that our long campaign to secure modern strata laws had paid dividends with new laws passing State Parliament allowing the renewal of office and housing stock.

We said:

"Moving from a unanimous to majority decision will be a game changer for urban renewal in both the CBD and the suburbs and crucial to Sydney's evolution as a global city,"

"It helps deliver the new housing we need, as well as making it easier to aggregate sites in our commercial centres for new stock with larger floorplates and higher sustainability standards."

The primary focus of this submission relates to the Strata Schemes Development Act 2015, its operation, effectiveness, and how fit for purpose it remains in 2021 and beyond. Achieving a flexible, future proof, framework is one of the key desires of industry. This will be the test that we will hold the Strata Schemes Development Act 2015 to in this submission.

Given the public issues in multi-unit residential buildings e.g., Opal and Mascot, restoring trust is key to further confidence in high rise strata living. It is clear there are links between confidence in strata living and building quality. The issue of defects, what is a defect, and who pays is still one of the most pressing issues in strata. We have more to say on this issue in our responses to the questions below.

Industry is very supportive of the reform agenda and is an active participant in the reform journey. There needs to be a clear understanding of how concurrent reforms that will impact the same building types work together. Reviews in one element of buildings, for example strata, must be cognisant of ramifications in other areas, e.g., Class 2 Building Reforms, and vice versa. Industry craves certainty and without it, it is very hard to create confidence or the conditions for growth.

It is clear from the work of the Building Commissioner and Strata Communities Australia that incidents of 'serious defects', namely structural defects affecting a building element, are not as high as some commentators in the media or academia would lead customers to believe.

An unknown for strata going forward is what impact COVID and the lack of international migration will have on strata development. Given the importance of property it is important that Government recognise this challenge and take appropriate action which might include incentives or other appropriate action.

Industry strongly agrees with Government in the discussion paper when it says "strata living holds the key to encouraging growing cities and urban development. As land becomes more of a commodity, subdividing vertical spaces into strata lots holds the key to growing NSW into the future."

It is also incumbent on Government to implement all the recommendations of the 2018 'Building Confidence Report'[1], as known as the Shergold, Weir Report as soon as possible.

We commend the NSW Government on the progress that has been made so far on implementing the report but note that there are several important recommendations that have yet to be fully implemented, including recommendations 20 (post-construction information management) and 21 (building product safety).

Feedback from industry and owners is that a measure such as a digital building manual will help restore consumer confidence and reduce disputes going forward. The manual must be a snapshot in time and provide a simple guide to maintain the building. It is clear from the responses to the specific questions below that the most common cause of dispute is around defects, and specifically waterproofing.

The Property Council suggests convening a roundtable of all stakeholders, including government, industry, and owners to progress these issues.

Conclusion

We look forward to working with Government and all stakeholders in building a strata sector that is resilient, diverse, future focussed and responsive. The NSW Government will report the findings of the review at the end of 2021. Furthermore, we look forward to attending any discussions that may be held as a result of this paper or the Government response to the review.

[1] https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf

Responding to the Questions posed in the discussion paper.

	Question	Property Council Response
1	Are the current objectives of the Development Act still valid? If not, how should they be changed?	Yes, we believe that the objectives of the Development Act are still valid.
2	How successful is the Development Act in fulfilling those objectives?	More work needs to be done to delineate and codify rights and responsibilities. More certainty is required to instil further confidence in the sector. Further work is required to the strata renewal provisions to ensure that the provisions are workable in a cost-effective manner whilst recognising the rights of the lot owners.
3	Are there other objectives that should be included? If so, please identify what these should be and explain why.	No. The objects of the Act remain valid and appropriate. Introducing additional specificity may have unintended consequences, impacting cost, and time or both. The objects as they stand are broad enough and flexible enough to provide for the evolution of the sector. Legislation must not be too rigid or inflexible, if it is it will be quickly lose relevance and inhibit investment and jobs.
4	If the objectives should be expanded, what corresponding measures would be needed in the Development Act to give effect to those objectives?	See above.
5	Are the key steps and safeguards imposed by the legislation appropriate, or are these too complex or costly? Should any of these steps be changed?	The steps and safeguards are too complex, prescriptive, and costly which is evidenced by the very low take up.

		The time frames are too lengthy and the outcome of the process uncertain until the very end. Resulting in scheme being terminated by agreement rather than undertaking the strata renewal process. A complete review of the process is required to simplify the process whilst recognising the rights of the lot owners. We welcome the opportunity to work with government in defining a process which fairly balances the interests of all parties without imposing unnecessary costs.
6	Is the information required to be included in the strata renewal plan enough, or should the legislation require more information? If so, what information should be required for owners to properly assess a strata renewal proposal?	Generally, the information is sufficient it is the process and the timing as to when that information is provided that requires review and change.
7	Are the timeframes imposed in the strata renewal process reasonable, or should any of these be adjusted?	The time frames are too long and uncertain in the way in which the provisions operate together. The value of property changes quickly and when the process is drawn out parties may be disadvantaged by virtue of an increase or decrease in value during the waiting period. A simple timeline should be the starting point with the requirements at each milestone clearly set out. Practical matters such as how notices need to be served must be addressed. The authority of Application by the Owners – Strata Plan No 61299 [2019] NSWLEC 111 highlights the difficultly in serving notices in accordance with the Act, and the expensive (and thorough) process it requires to record the service of valid notices – see obiter of Pain J at [11 and 24].
8	Are other improvements needed to the strata renewal process? Why?	Please see above comments. We are happy to provide a proposed timeline and simplification of the process and work with government to

ensure that this important reform introduced by the government in 2016 is workable and user friendly for the benefit of all relevant parties.

We note from the discussion paper (p17) that:

"Since the introduction of the new regime in November 2016, only 11 strata schemes have notified the Registrar General that they have received the required level of support for a renewal proposal (75%). Of those, three applications were filed with the Land and Environment Court for approval but were withdrawn before an order was made. Only one scheme has had its renewal plan (for collective sale of the building) approved by the Court."

The renewal process is something that the property industry has long called for and welcomed the 2015 reforms. More study is required to understand why the numbers above are low and what can be done about it. For example, it would be a useful exercise to test awareness and consequently engage in an awareness raising campaign.

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

The skillsets, sophistication and end user are very different. Differentiation is important.

In the context of how "compensation value" and "market value" are assessed and determined:

- The definition of "compensation value, should be amended to include the consideration of the commercial factors of a lease agreement.
- The definition of "market value" should be amended to include the consideration of the commercial value of a lease agreement.
- The definition of "independent valuer" should be amended to include that the qualified valuer has the appropriate expertise to undertake valuations of commercial lots

		recognising that valuers are often experienced in residential or commercial valuations and not usually both. No additional protections are required rather it is a matter of getting the valuation process right.
10	Should tenants have more involvement in the renewal process, other than being notified that a strata renewal plan has been developed, for which court approval is being sought (section 178)?	No. It is the lot owner who has taken the risk of capital and provided that the tenant is compensated if it has a legal interest such as a lease in the lot then this is sufficient.
11	Should the Development Act provide more guidance for treatment of leases in strata renewal proceedings?	No, if the valuation process is addressed as referred to in 9 above then this will address the concerns raised in relation to commercial leases.
12	Is more guidance needed on how compensation applies to lot owners and their tenants? Who should be responsible for paying compensation to the tenant?	This will depend on how the lots are valued as referred to in paragraph 9 above. Where there is a lease registered on title then the Act should be clear about how the legal interest of the tenant is compensated if the lease is terminated prior to its expiry date.
13	How successful has the strata renewal process been in encouraging owners to consider collective sale/redevelopment options?	It has been successful in encouraging owners to reach agreement outside of the strata renewal process because of the complexity, cost, and time consuming (including uncertain outcome) process required by the strata renewal process.
14	Are the provisions encouraging parties to settle in a positive manner, or only to avoid protracted disputes?	Provisions such as section 188 encourage dissenting parties to pursue the dispute option given that there is no cost burden for the dissenting.
15	What alternative methods are being pursued to achieve collective sales (e.g., options, interdependent deeds of sale)? How effective are these alternative methods?	Use of options and collective sale agreements entered into by all lot owners are common tools used to achieve a collective sale. Similarly, agreements have been used for strata renewal projects including where common property has been redeveloped and sold to fund the upgrade of the building.
16	Should the current requirement to act in good faith and to disclose conflicts of interest be extended to dissenting owners? Should the	Yes, to both questions. The court should consider all conflicts of interest raised by parties to the proceedings.

	Court be required to consider these aspects in relation to an objection to a strata renewal plan, as well as to the application?	
17	Should section 188 be expanded to provide more guidance to the Court in relation to matters to be considered when making a costs order? How should the legislation deal with a dissenting owner who presses an objection on unmeritorious grounds? Should the dissenting owner be required to bear some or all of its costs?	Yes, s188 should be expanded to provide more guidance to the Court. The court should have the ability to make a costs order against a dissenting owner. Currently there are no consequences where a dissenting owner is making objections simply for the sake of making an objection without having any valid grounds to do so.
18	Section 180 lists those who may lodge an objection to an application to the Land and Environment Court. Should an objecting party be required to disclose if they have or have had any further interests in the court proceedings? Should the same apply for those who may be joined as a party to the proceedings (section 181(6))?	All parties to proceedings should be obliged to disclose all relevant interests.
19	Are the lapsing provisions in section 190 of the Development Act effective, and should any changes be made? Are there any circumstances in which a lapsed strata renewal plan should be able to be resubmitted within the 12-month period?	At a minimum Section 190 should be amended to clarify that section 190 only applies to strata renewal plans that have been put before the court under Division 6, and not to strata renewal plans that have lapsed pursuant to section 177(a)-(c). Greater flexibility is required as there may be good reason particularly in the Sydney market, why a 12-month restriction is too long.
20	Are management statements effective in regulating mixed-use developments and setting out interested parties' rights and obligations? If not, why not, and how could the legislation be improved?	Yes. Mixed use developments are often highly bespoke and individual which can be supported and accommodated through the current management statement regime. Over-regulation of strata management statements and mixed-use developments will result in the legislation not permitting sufficient flexibility to manage these bespoke developments. We think they are adequate and necessary.
21	Are there circumstances where a strata management statement should not be required (for example, where the commercial lot area is relatively small, compared to the residential strata scheme)? If so, how could the various interests in the building be effectively managed without a management statement?	A Strata Management Statement (SMS) should be required. Otherwise, there is a risk that these smaller lots will not be adequately addressed in a development and the alternatives are not as 'user friendly' for the future owners and occupiers of such smaller lots. Developers have options available to them if such a smaller lot exists (e.g., not creating a separate stratum lot, incorporating the lot into one of the strata schemes and

		addressing its specific needs through by-laws). However, if a separate stratum lot is to be created then an SMS addresses the issues regarding the use and costs associated with shared facilities and voting rights. Of course, easements could address use and costs associated with shared facilities, but owners and occupiers of these smaller lots will need to track through these easement rights – which may be created in a variety of plans and refer to different preceding titles.
22	Are the matters set out in Schedule 4 for inclusion in the strata management statement sufficient? If not, what other matters should be prescribed and why?	Generally the matters are sufficient, particularly in light of remedies already available under: (a) the Off the Plan disclosure regime; and (b) the Contacts Review Act which allows for the striking down of provisions which are unjust (including unconscionable, harsh, or oppressive); and (c) the common law fiduciary duty owed by the developer to its purchasers. We also note that the inclusion of a mechanism for resolving disputes is currently mandatory. In terms of the off the plan disclosure regime, the draft strata management statement is required to be annexed to the disclosure statement and the purchaser can rescind or claim compensation if there is a change that will, or is likely to, adversely affect the use or enjoyment of the lot. If a purchaser has notice of the management structure and the rights and obligations upfront, then they can make an informed decision around whether to purchase within a particular development. Notwithstanding the above, we suggest the following improvements: (1) the following matters currently included as 'other matters' in clause 4 of Schedule 4 should be included as mandatory matters in clause 2:

		(a) the optional matters in Schedule 4 section 4(1) (c) & (d) (i.e., meetings of the BMC and the keeping of records); (b) the allocation of voting rights; and (c) details around the BMC's right to appoint a strata manager, a building manager and enter into service contracts (including any limitations). This will ensure that the allocation of rights is properly disclosed upfront and purchasers can make an informed decision whether to buy. (2) a warning could be included as to any rights of veto or a controlling vote that a lot owner has; and (3) arrangements similar to those governing changes to special privilege by-laws could be incorporated for shared facilities so that the change of a shared facility to exclude a lot owner requires consent of that owner.
23	Should the legislation require the management statement to balance the rights of various lot owners in some way? How could this be achieved?	No, because of the bespoke nature of these developments. Over-regulation of strata management statements and mixed-use developments will result in the legislation not permitting sufficient flexibility to manage these bespoke developments. This needs to be considered on a case-by-case basis as is currently the case.
24	What improvements could be made to the governance of building management committees and their meeting processes?	See answer to question 22 above about inclusion of voting, meeting and record keeping prescriptions in the SMS.
25	What measures could be implemented to reduce conflicts of interest and unfair contracting in mixed-use schemes?	An obligation on contractors and committee members to disclose conflicts of interest. Similar to the obligations imposed on the strata committee under s37 of the Strata Schemes Management Act (SSMA) (extracted below). There could also be obligations on the members of the building management committee to carry out their functions for the benefit, so far as is practicable, of the lot owners and with due care and diligence. A

		carve out of personal liability should be available which is similar to s260 of the SSMA (extracted below). Care needs to be taken to balance the management of conflicts with the benefits (financial and practical) of synergies gained by having the same manager/contractor across the development. *37 DUTY OF MEMBERS OF STRATA COMMITTEE* *It is the duty of each member of a strata committee of an owner's corporation to carry out his or her functions for the benefit, so far as practicable, of the owner's corporation and with due care and diligence.* *260 PERSONAL LIABILITY OF OFFICERS OF OWNERS CORPORATION AND OTHERS* *(1) A matter or thing done or omitted to be done by any of the following persons, or a person acting under the direction of any of those persons, does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing functions as such a person under this or any other Act, subject any of the following persons or person so acting personally to any action, liability, claim or demand:* *(a) an officer of an owner's corporation.* *(b) a member of a strata committee.*
26	Should existing contracts negotiated by the building management committee automatically apply to new lot owners as they join the committee? How can the legislation be improved to deal with this issue?	No. In the absence of contracts being entered into with a body corporate with legal standing (such as an owner's corporation) and as a matter of contract law, it is not possible for a new owner to be automatically joined to an existing contract. Current conveyancing practice allows for novation of existing contracts to new lot owners on the sale of an asset by an existing owner. Whilst this involves administration, we do not recommend creating a new legal entity comprising owners of stratum lots.
27	Should there be limits on how long managing agents are appointed for by the building management committee? Should this apply to other types of contract? What would be a reasonable restriction?	Suggest the same arrangements as strata managers (maximum 3 years) and building manager (maximum 10 years) terms that apply to owners' corporations be adopted.

28	Should a duty of good faith be imposed on strata managers and building management committees?	No, rather we suggest this be addressed by including an obligation for strata managers and building management committee members to disclose conflicts and to carry out their functions with due care and diligence (see question 25 above). Inclusion of a 'good faith' obligation or similar can prove problematic as has been the case where it exists in other areas of the law and give rise to uncertainty hampering the execution of the contract by the relevant manager.
29	Should the requirement for management statements to provide for the fair allocation of shared expenses and the obligation to review that allocation, apply retrospectively to schemes registered prior to the commencement of the reforms (November 2016)? If not, why not?	No, the status quo should not be disrupted. Existing allocations are reflected in the value of an asset and any reallocation would involve corresponding windfalls or value reductions to owners. Purchasers buying into existing schemes are able to undertake due diligence prior to purchasing and are fully aware of the allocation and can take that into account when making the purchasing decision.
30	What other improvements, if any, could be made in relation to responsibility for shared facilities and why?	This is a bespoke area and over regulation will hamper the ability to tailor arrangements to schemes (particularly those schemes of bespoke nature).
31	Should voting rights be aligned to the relative contribution of building management committee members to the cost of the shared facilities? Are there any other alternative methods of allocating voting rights that could be implemented?	No, it would be too difficult to regulate all scenarios. Therefore, we suggest this be dealt with as set out in the answer to question 22 above i.e., through voting rights being mandatory matters to be dealt with in the SMS. The off the plan contracts disclosure regime will then be applicable, that is, there is adequate disclosure to buyers upfront providing sufficient protection.
32	What improvements can be made to the legislation that balance the interests of commercial and residential lot owners in a mixed-use development, while ensuring fair decision-making?	No comment at this time.

33	What changes would provide fairer outcomes where strata management statements are in place? Should owners' corporations be provided with rights and protections similar to those set out under the Management Act – for example, by placing limits on service contract terms?	See question 27.
34	How can dispute resolution be better managed in mixed-use developments, balancing the needs of commercial and residential property owners?	No change is required.
35	What, if any, legislative protection is needed for residential owners in the rectification of complaints?	No additional legislative protection is required.
36	Has the requirement for a qualified valuer's certificate to determine unit resulted in fairer apportionment of contributions? Could this process be improved?	No comment at this time.
37	Are unit entitlement valuations too costly for the scheme? If so, what other ways could unit entitlements be calculated that is fair to all owners?	No comment at this time.
38	Should owners have a right to object to a proposal to change unit entitlements without the passing of a resolution, even if they are otherwise unaffected by a strata plan of subdivision?	No comment at this time.
39	Should the legislation provide an exception to the requirement for a valuation of all lots in the scheme in any circumstances? If so, what would those exceptions be? What is the alternative proposed method of altering the unit entitlements in those situations?	No comment at this time.
40	Should there be guidance for valuers in assessing strata plan unit entitlement valuations? If so, what guidance is required?	No comment at this time.
41	Do the objects of the Act remain appropriate? Should further policy objectives such as those that guided the 2015 reforms be added to section 3 of the Management Act?	The Objects of the Act remain appropriate. They are: ***3 Objects of Act*** *The objects of this Act are as follows—* *(a) to provide for the management of strata schemes,*

		(b) to provide for the resolution of disputes arising from strata schemes. As noted in the comments in relation to the Development Act, legislation should not be overly rigid or prescriptive. It must be broad enough to fit future need. No further objects needed.
42	How well have the functions of the committee and office holders been working?	It is not clear from the SSMA what powers are automatically given to the committee versus what powers need to be conferred on the committee by general resolution and it is not all found in one place in the SSMA. The SSMA or the model by-laws could include limits around what the committee may authorise, particularly around costs. Perhaps for smaller strata schemes decisions that will result in a special levy or costs outside the administration and capital works fund should be a function that is left to the owner's corporation
43	Committees can be up to 9 people. Is this size limit working?	This appears to be an effective number. No comment at this time.
44	Under the law, strata committee members have a duty to act in the best interest of the owners corporation and with due care and diligence. How well is this working?	No comment at this time.
45	Are there any other measures that would improve accountability of strata committees? For example by adopting a mandatory code of conduct as in Queensland?	In respect of any measures that would improve accountability of strata committees, it is difficult to hold someone accountable when that person is a volunteer. The point of the committee is that it should comprise multiple people from the owner's corporation (OC) so that there is a cross section of different owners. If one person is "not acting in the interests of the OC" – this should be resolved in itself by the other strata committee members voting against that person.
46	How well have the eligibility requirements for election to the committee operated? How could they be improved?	No comment at this time.
47	Are clear grounds for removing committee members and office holders needed? If so, what should they be?	No comment at this time.

48	How have the meeting procedures been operating and are any changes needed? If so, what changes?	Consider formalising voting by means other than being physically present. The SSMA (definition of 'person present' and schedules 1 and 2) requires alternative means of voting. Given changes to work practices and threat of lock downs, formalising the ability to vote via email would be appropriate. The industry notes the responsiveness of Government to facilitate online AGMS and other legislated meetings. We welcome the extension of the temporary COVID measures and call for them to be normalised as a reflection of changing telecommunications technology.
49	Should the meeting procedures be moved from the Management Act to the Management Regulation so they can be changed more easily? Should any parts remain in the Management Act and, if so, why?	No comment at this time.
50	Should the law be changed to permanently allow electronic voting in all circumstances without the need to first pass a resolution? If so, are additional protections for lot owners needed?	No comment at this time.
51	Are there other alternative methods for electronic meetings and voting that should be considered?	No comment at this time.
52	How have the different ways (teleconferencing, email etc) of voting been working? Are any changes needed? If so, what changes and why?	No comment at this time.
53	How well have the limits on proxies worked and are any changes needed? If so, what changes?	No comment at this time.
54	How well is tenant participation working? How could tenant participation be improved?	No comment at this time.
55	Are the current durations of appointment and termination notice periods for strata managing agents appropriate? If not, how should they be amended?	No comment at this time.

56	Do you think the developer should have to present the owners corporation with a choice of three managing agents at the first AGM?	No, strata managers may be quite involved in the development of the building particularly in reviewing by laws etc with a view that they will be the managing agent. If there is a risk that they may not be appointed as the managing agent, then that raises the question of what incentive is there for managing agents to be involved in the process prior to registration of strata plan. The limited term of the appointment in section 50(1) of the SSMA provides adequate protection for owners.
57	A developer or someone connected with them can't manage a strata scheme in its first 10 years. Is this appropriate? Please tell us why.	No comment at this time.
58	Do you think a standard form stratum managing agent agreement should be included in the legislation? If so, why?	No comment at this time.
59	Should the law require strata schemes of a certain size to be professionally managed?	No comment at this time.
60	Are the current conflict of interest laws working? If not, how should they be changed?	No comment at this time.
61	Are the provisions of the Management Act relating to gifts and commissions easy to understand?	No comment at this time.
62	Should there be a general duty of care in the laws to ensure managing agents obtain goods or services at competitive prices?	No comment at this time.
63	Should the rules be tightened on disclosure of conflicts of interest for owner's corporation contracts?	No comment at this time.
64	The managing agent must follow certain rules when they make a decision for the owners corporation. Are these rules appropriate? If not, how can they be improved?	No comment at this time.

65	Owners corporations have duties and functions that can be delegated to managing agents (section 57 of the Management Act). If the agent breaches their duties, they will have committed an offence. How well is this working?	No comment at this time.
66	Do you have personal experience of managing agents being prevented from carrying out their duties under the Management Act because of disputes with the owners corporation? If yes, please describe your experience.	No comment at this time.
67	In your experience, are the laws to keep the managing agent accountable working well? If not, how can they be improved?	No comment at this time.
68	Is the law sufficiently clear on what information the owners corporation is entitled to request from the managing agent and how they get it? If not please tell us why.	No comment at this time.
69	Do you think the rules of conduct for strata managing agents under the Property and Stock Agents Regulation 2014 are appropriately balanced?	No comment at this time.
70	As a resident in a strata scheme, what do you think about the competency of strata managing agents?	No comment at this time.
71	As a strata managing agent, what additional resources and training do you think you should have access to?	No comment at this time.
72	How important is it for managing agents to have specialist knowledge about building defects?	Yes, if only for new builds. See example below at Q126.
73	What would you think of the proposal for accreditation of certain licensees under the Property and Stock Agents Act as strata building defects management specialists?	No comment at this time.

74	How well is money being managed in the administrative and capital works funds by your owner's corporation? Are any changes needed and why?	No comment at this time.
75	Owners' corporations can use money from one fund to temporarily cover the expenses of the other fund. How do you interpret the rules about repayment of money transferred from one fund to the other fund? What should the rule be?	No comment at this time.
76	How well have the laws on levies and arrears been working? Please explain why and suggest any changes.	No comment at this time.
77	Are any changes needed to how financial records are prepared, for example, deposits and withdrawals for the owners corporation? Are any changes needed?	No comment at this time.
78	Is a $250,000 budget the right threshold for compulsory audits to be carried out? If not, what do you think is the right amount?	No comment at this time.
79	Could we make it easier for owners corporations to make by-laws? If yes, please tell us how.	No comment at this time.
80	By-laws must be lodged with the Land Registry Services within six months. Is this a reasonable time?	No comment at this time.
81	The Registrar General has the power to waive the requirement for by-law changes to be lodged all at the same time, and instead allow changes to be lodged separately. Should there be changes to this power?	No comment at this time.
82	While owners corporations can make their own by-laws for their strata scheme, there are restrictions on the types of by-laws that can be made. What do you think about prohibiting 'unreasonable' by-laws?	We do not see the need for anything further given the existing requirement that by-laws cannot be 'harsh, unconscionable or oppressive' (section 139(1)).

83	If the law was changed to allow tenants to be able to seek orders challenging by-laws on the basis they are harsh, unconscionable or oppressive, how would this work in your strata scheme?	No comment at this time.
84	What is your experience with the enforcement of by-laws?	No comment at this time.
85	Should by-laws made under old strata laws be compliant with the current law? Why, or why not?	No retrospectivity. We do not support retrospective legislation as a matter of principle.
86	Are there any additional model by-laws that should be included in the legislation? If so, what are they and how would they assist?	No comment at this time.
87	Under the law, a by-law cannot ban assistance animals e.g., guide dogs. Are any changes needed to the way the laws govern assistance animals?	No comment at this time.
88	Should owners corporations be allowed to request proof that an animal is an assistance animal?	No comment at this time.
89	Should the Management Act outline what kinds of evidence owners corporations can request as part of proving an animal is an assistance animal? If so, what kinds of information should be taken as proof?	No comment at this time.
90	The NSW Court of Appeal found in 2020, that a by-law imposing a blanket ban on pers was oppressive and therefore invalid under the laws. Should the law allow owners corporations to completely ban pets from a strata scheme? Please tell us why.	No comment at this time.
91	Do the existing restrictions on the power to make by-laws require any changes? If so, what changes and why?	No comment at this time.
92	How has record keeping been working? Are any changes needed and if so, why?	No comment at this time.
93	Should keeping electronic records be made compulsory? Why/why not?	No comment at this time.
94	How is inspection of records working? Are any changes needed and if so, why?	No comment at this time.

95	How are the strata information certificates provisions working? Are any changes needed and if so, why?	No comment at this time.
96	A landlord must provide a tenant with a copy of the by-laws and the strata management statement if there is one. How is this working? Please describe and suggest what changes might be needed.	No comment at this time.
97	If a lot owner leases their apartment to tenants, the lot owner must provide the owners corporation with information about the tenants living in their lot within 14 days. Is this notice working? Could this be improved? If so, how?	No comment at this time.
98	The law sets out how notices and other documents can be served on or by an owners corporation. How is this working? Please describe and tell us if this can be simplified in any way.	See our earlier response about the complexity of serving notices.
99	COVID-19 emergency laws, passed in May 2020, allowed owners corporations to approve official documents with the witnessed signatures of two authorised people, instead of affixing the common seal. If this was permanently included in strata laws, is there anything else that should be included?	No comment at this time.
100	To verify that documents are properly executed, should the details of strata committees and strata managing agents be required to be lodged and made available on a publicly searchable register similar to the ASIC company register?	No comment at this time.
101	How have the initial period provisions been working? Are any changes needed, and if so, why?	It is not clear in the legislation the true impact of the initial period for Building Management Committees (BMC). Given a BMC is not a legal entity, all agreements need to be entered into by all BMC members. Where one of those members is an owner's corporation it is arguable that the owner's corporation is, in entering into that agreement, agreeing to incur a 'debt' in contravention of its initial period restrictions. In a staged development this occurs multiple times. The application of the initial period in these circumstances needs to be clarified in the legislation.

The initial period restrictions are an important consumer protection mechanism which have worked well to date however need to be reviewed in light of:

(a) The obstacle they present from an innovation perspective, particularly in the area of environmental sustainability; and
(b) The December 2019 commencement of the off the plan disclosure regime in NSW.

In terms of item (a) the particular restriction that limits what arrangements a developer can put in place (even if clear benefit can be shown to the customer) is section 26 of the Strata Schemes Management Act (SSMA), extracted below (in particular subsections (1)((a), (b) and (c)). Some examples of sustainability inclusions that are made difficult (if not impossible) by this section include:

(1) Embedded networks which allow for bulk buying of electricity/gas/water and require certain infrastructure to be included in the development from the outset with long-term contracts for operation, maintenance and power purchase to be entered into by the developer which need to be novated to the owner corporation as soon as it is created (i.e. during the initial period)
(2) As a subset of item (1) solar panels and associated technology which optimises the distribution of shared solar (see for example: https://allumeenergy.com.au/about which is focused in Victoria where no similar initial period restrictions exist), which also require agreements as set out above;
(3) Virtual Power Plants.
(4) Electric vehicle charging stations.
(5) Car share arrangements
(6) Recycled water

Other provisions in the SSMA, such as s132A (extracted below) which require agreements for the supply of services to end at the conclusion of the first annual general meeting impact on a developer's ability to install sustainability initiatives in a new development. We suggest that carve out contained in s132A (4) should be expanded beyond embedded electricity networks.

In terms of item (b) above we believe the off the plan disclosure regime could provide a solution to the problem. Consideration should be given to amending the SSMA to exempt arrangements which are adequately disclosed in the off the plan contract for sale/disclosure statement from the initial period restrictions. This approach balances protection of the consumer with the need for flexibility to innovate and put in place long term arrangements that benefit consumers and the environment. We predict that the future will also see developments in social sustainability that will likely require developers to put in place various arrangements that need to be novated to owner's corporations (see for example rating tools such as One Planet Living and Well Rating tool).

26 RESTRICTIONS ON POWERS OF OWNERS CORPORATION DURING INITIAL PERIOD

(1) An owners corporation for a strata scheme must not, during the initial period, do any of the following things unless the owners corporation is authorised to do so by an order of the Tribunal under this Division--
(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, (d) borrow money or give securities. 132A Agreements for supply of electricity, gas, or other utilities (1) An agreement (including any additional term under an option to renew) for the supply of electricity, gas or any other utility with an owners corporation expires (if the term of the agreement does not end earlier or is not ended earlier for any other reason)— (a) at the conclusion of the first annual general meeting of the owners corporation if the agreement was executed before the meeting, or (b) in any other case, 3 years after the date on which the agreement commenced. (2) Nothing in subsection (1) prevents the owners corporation from renewing an agreement for the supply of electricity, gas or any other utility by resolution at a general meeting on or after the expiry of the agreement. (3) An agreement for the supply of electricity, gas or any other utility in relation to a strata scheme that commenced before the commencement of this section expires 10 years after the date on which the agreement commenced (unless the term of the agreement ends earlier or is ended earlier for any other reason). (4) This section does not affect any agreement to supply electricity to residents in a strata scheme through an embedded network.
102	Owners can make changes to common property in connection with their lots if they have authorisation. Either the owner or owners	No comment at this time.

	corporation could be responsible for ongoing maintenance. Should the Act outline that a decision needs to be made about who is responsible for ongoing maintenance before any approvals are given to change common property?	
103	When making changes to common property such as renovations, is it easy to understand what approvals are needed and when? If no, please tell us why not.	No comment at this time.
104	Are any changes needed to the types of work that are considered cosmetic work or minor renovations? Please tell us why.	No comment at this time.
105	Should committees be automatically able to make decisions on minor renovations rather than those decisions being delegated by resolution? Please tell us why.	No comment at this time.
106	Should a lot owner always be told the reasons why their request for work or renovations was not approved? If yes, when should the reasons be provided?	No comment at this time.
107	Do you have any other suggestions on how to improve approval of changes to common property?	No comment at this time.
108	Are the provisions relating to common property rights by-laws clear and working well? Do you have any suggestions for improvement?	No comment at this time.
109	Does your strata scheme have a licence agreement with your local council for a strata parking area? Have you experienced any issues?	No comment at this time.
110	Have you experienced problems due to parking on common property? If so, how might changes to the law help manage this issue?	No comment at this time.
111	How effectively has the law been in ensuring owners corporations comply with their duty to properly maintain and repair common property?	No comment at this time.
112	Do you have any concerns with the statutory duty to maintain and repair common property? How could it be improved?	Whilst we recognise that some buildings may not be fit for purpose at time of handover, there needs to a greater recognition of the need for adequate and appropriate maintenance.

113	Is the two-year time limit imposed on making a claim for damages for breaching the duty appropriate? If not, what would be an appropriate length of time?	No comment at this time.
114	Is it appropriate for the owner's corporation to remove parts of the common property from their duty where it is inappropriate to maintain or repair that part of the property? Can you advise of any situations where this has been misused?	No comment at this time.
115	Is it appropriate that owners corporations can defer compliance with the statutory duty in situations where they are taking action against an owner for damage to the property? Are you aware of any situations where it has been misused?	No comment at this time.
116	Has the duty impacted owners corporations' and owners' pursuit of claims for building defects, or arranging of rectification of building defects? If yes, how could this be addressed?	No comment at this time.
117	The developer must prepare an initial maintenance schedule for the strata scheme's common property to be considered at the first AGM. Do you agree with this? Are the requirements clear? Are any changes needed?	We agree.
118	Have you experienced any difficulty obtaining the initial maintenance schedule, or information about estimates and levies determined during the initial period, from an original owner/developer?	No comment at this time
119	Have you experienced unrealistic levies being set by an original owner/developer?	No comment at this time
120	Do you have any suggestions for improving the initial maintenance schedule?	No comment at this time
121	Are 10-year capital works fund plans clear and effective in helping with maintenance and repairs of common property? If no, how could the 10-year capital works fund plan be improved?	No comment at this time
122	The NSW Government is already changing the law to make it easier for strata schemes to install sustainability infrastructure such as solar panels, batteries, digital meters, hot water systems and electric vehicle	See our response at question 101.

	(EV) charging stations. What other changes to the strata laws could encourage the uptake of sustainability measures in strata and how would they work?	
123	Owners' corporations must maintain an appropriate level of building and workers compensation insurance. How are the laws working? Are any changes needed? If so, how?	No comment at this time.
124	The law places time limits on contracts for electricity, gas, or other utilities to ensure strata schemes aren't locked into long-term contracts. Are any changes needed? If so, what changes and why?	No comment at this time.
125	Embedded electricity networks are privately owned and managed networks that often supply all premises within a specific area or building. Embedded networks generally buy electricity in bulk and then on-sell it to customers inside their network and are currently exempt from the limits on the duration of the contract. Should embedded networks still be excluded from time limits on contracts? If not, what transitional arrangements should be included?	One major hurdle for developers setting up embedded networks and the providers of embedded network services are the initial period restrictions. At the moment developers need to integrate into their building design the embedded network infrastructure and providers are often installing that infrastructure on the assumption that their appointment will be ratified at the first AGM of the owner's corporation. Often this infrastructure cannot be removed without additional cost and/or significant works to common property. Where there has been detailed disclosure upfront in off the plan contracts for sale (and perhaps the form of that disclosure can be specified to ensure a consistent approach) then the initial period restrictions should not apply.
126	The Management Act includes a list of reasons why the Tribunal can vary or terminate a building manager's agreement, for example, for unsatisfactory performance of duties. Should any more reasons be added, and should they be the same grounds as those that apply to managing agents?	See below in case study (listed in the appendix p135).
127	Are the current restrictions on who can be appointed as a building manager appropriate? Why/why not?	We support the 2015 reforms related to the appointment of building managers. We believe that the reforms have strengthened the accountability of building managers and controls around their appointment and engagement. Section 72 of the Act allows an owners corporation a pathway for review of a building management agreement.

128	Do you support changing the law to introduce a duty of care on the building manager to act in the best interests of the owner's corporation? Why/why not?	As we have seen in other areas of reform, difficult to define concepts such as 'Code of Conduct' and 'best interest' prove problematic when applied to legislation. See response in Question 131.
129	Should building managers be subject to the same or a similar level of regulation as managing agents? Which could include licensing?	We support a licensing criterion for building management to be developed. Making a building manager a licensed occupation would add more accountability to the position. We would be happy to be involved in future discussions on what is required for a license or a certificate course. We agree with the comments stated in the review on page 64 "Any proposal would require extensive consultation and consideration of cost and benefits increasing the regulatory burden, including evaluation against the NSW Guide to Better Regulation and the IPART Licensing Framework". Creating the criteria may weed out incompetent and unethical operators. The government should also consider that a qualification may raise the price on building management for the stakeholders.
130	Should the maximum duration of appointment of building managers be further limited in a similar manner to strata managing agents? (Note: managing agents can only be appointed for twelve months at the first annual general meeting and a maximum term of three years after that. The owner's corporation can also renew the agent's appointment.)	We do not agree with the idea of term limits, or that a developer cannot own and operate a building management company. The government should recognize that they are removing a constant variable to a development when entertaining these ideas. An initial term of between three and five years should be proposed if a change is to be considered. However, we would invite the government to look at the QLD model that has been working very successfully for many years. Accordingly, we support the ten years currently allowed in NSW. Base building services are generally in the defect liability period or under warranty at the time of the First Annual General Meeting. A contract cannot be entered into unless it is resolved by the Owners at a General Meeting. The request of most strata committees is to get the "best deal possible". Going to tender for service contracts is a norm and part of the process of being a building manager. The legislation already address' the

		fact that contracts cannot be entered into prior to the First Annual General Meeting.
131	Should building managers have a statutory duty of care with responsibility for the safety of the building, including its fire safety? If so, what would be the appropriate qualifications, licensing, or accreditation requirements?	It is important to reiterate and underline the role of the owners corporation in any discussion about the obligations of the Building Manager. A building manager, just like a strata manager is an employee of the owner's corporation under contract. If an owners corporation fails to follow suggested quotation for repairs, upgrades when required under their capital works fund plans, or raising enough money in their budget to cover compliance expenses, there is a risk that building manager and office bearers may be made responsible for those failures. A building manager does not have the authority to put motions on agendas for meetings of the owners' corporation or Strata Committee. They can make suggestions to a committee but if the committee is unwilling to get works done, then the building managers be made the 'scape goat'. Moreover, Building Managers cannot spend money of the owners without authorisation. Accordingly, any move to have a party such as a building manager, strata manager or office bearer in a strata scheme responsible under the Act, must be accompanied with giving that person authority to make sure compliance can be funded and systems kept in working order. On balance, we would suggest that the current system, ought to be maintained where the owners corporation is accountable for compliance and subject to penalty for failure to comply. However, industry remains ready to have a standalone discussion about the issue and is willing to engage constructively in any forum or inquiry that may arise out of this review.
132	Are the current dispute resolution processes effective? If not, please describe and suggest any improvements.	We believe that the current arrangements are working. The 2015 reforms have significantly improved relations, and the industry view is that

		problems that existed between developers and building managers pre 2015 and no longer evident in meaningful way.
133	Does the process for an owners corporation to directly manage disputes between people work? If no, please describe and suggest any improvements.	No comment at this time.
134	Have you been part of a Fair Trading strata mediation? Are there any changes that could be made to the process? and if so, why?	No comment at this time.
135	Do you have any general feedback on the strata scheme orders available from the Tribunal and how easy it is to get them?	No comment at this time.
136	Should the Tribunal be able to award damages for breaches of statutory duties under the Management Act? Why/why not?	No comment at this time.
137	Should the Tribunal have a general power to order damages, compensation, or other monetary amounts in settling disputes? Why?	No comment at this time.
138	There's no cap on the size of the claim that the Tribunal can consider. Should there be?	No comment at this time.
139	Are the penalties for breach of orders made by the Tribunal adequate? If not, what should they be?	No comment at this time.
140	Do you have any feedback on NSW Fair Trading's role and functions with strata schemes, including any suggestions for improvement?	No comment at this time.

Appendix

Case study

Below we will outline a case study provided by one developer, but it is indicative and emblematic of the consistent feedback from industry with respect to defects and liability periods.

Case study regarding the 2-year Defects Liability Period (DLP) period from a developer & builders' perspective as well as recommended improvements to the Strata Schemes Management Act 2015 for consideration.

Background:

- 162 apartment development in Sydney (plus small amount of retail).
- 2 strata. 1 x residential, 1 x commercial.
- Developer / builder achieved practical completion (PC) in March 2017.
- 2-year defects liability period (DLP) expiry March 2019.

Chronology of events

1. 18 months after practical completion **(PC)** the developer was provided with a consultant report containing 690 defects (of these, the builder agreed to works on 425 items).
2. 23 months after PC (and 1 month prior to minor DLP expiration), the developer was served with an NSW Civil and Administrative Tribunal **(NCAT)** notice. On the NCAT notice, the owners corporation **(OC)** lawyer omitted checking the following boxes:
    a. Had the DLP passed the 24-month period, and
    b. Had mediation been attempted between the parties.
3. At the time of NCAT notice, the developer had completed 383 of the agreed 425 items (or 90%).
4. Immediately after the NCAT notice, the OC lodged a statement of claim in Supreme Court including an additional 2 reports not yet presented to the developer & builder, reserving right to provide further evidence.
5. In response to 4, the developer ceased works on the original list (as many items where work was agreed were in 'good faith') and agreed to mediation.
6. A further 3 reports were provided shortly ahead of formal mediation (taking total reports to 6).
7. ***Result of mediation***; in an attempt to mitigate significant costs for both parties, the developer agreed to the following:
    a) To pay the OC's legal and expert cost (a significant 6 figure sum),
    b) 1,066 items to be logged on deed (including the 383 completed items),
    c) A prescriptive process to close out investigations regarding the majority of remaining items, involving close out with original consultants and a clear escalation process for dispute with separate and independent consultants.
8. ***Implementation of the deed.***
    a) On completion of the first step of the prescribed process (agreed in deed), 44% of the remaining items were deemed not to be defects by the developer.
    b) The developer provided the OC with formal correspondence (including original design consultant supporting documentation and determination), at further considerable expense.
    c) The OC refused to get its consultants to review the developer's formal response instead and again suggesting skipping the mediation process prescribed and rather sending all refuted items to dispute resolution.
    d) At time of writing the dispute resolution process is ongoing with final result trending towards agreement of 43% of items not being a defect

Conclusion

At the time of writing, this development is now approaching 4 years from Occupation Certificate **(OC)** (and 2 years past minor defect DLP), and:

- The developer builder has incurred significant costs (high 6 figure) unrelated to works on site (legal, settlement, consultants, and internal management),
- The OC continues to incur significant costs that are not directly related to the improvement of the building,
- The unit holders and tenants have been subjected to multiple in-apartment investigations and are reasonably frustrated with the lack of activity as works on agreed defects remain on hold (ironically as prescribed by the deed).

This example is unfortunately indicative of experience at the 2-year DLP mark where OC consultants and lawyers are seemingly un-regulated, and the (cooperative) developer has little to no recourse.

The developer builder is kept out of the process with all expert communication run through lawyers whose modus operandi is at odds with efficient closeout.

Recommended improvements to Strata Laws

1. Prescriptive and regulated process for close out of key statutory warranty dates (2 year and 6-year DLP's):
    - The role of all stakeholders (including the developer, builder, and the original design consultants) should be defined.
    - Timing and scope of inspections including service levels for subsequent reports and responses. OC consultant reports are generally submitted months after the site inspection leaving little time for discussion and close out with the developer and / or builder; often leading to ambit commencement of legal proceedings as OCs seek extension of time.
    - Any prescription of process should provide adequate time for escalation and closeout of disagreement ahead of key statutory dates. A prescribed and timely process would provide a legal frame of reference that could be more clearly understood by OCs and would go some way to eliminating the current adversarial nature of the process.
2. Regulation of general and specialist building consultants offering DLP consulting services:
    - Similar to the Design and Building Practitioner reform as part of the Residential Building Act reform it is recommended that this sector of the industry be regulated by way of a registration system or similar, with penalty for not adhering to 1 above.
    - Potential penalties for provision of factually incorrect report findings, or where there has been an obvious lack of comprehensive assessment by the OC's building consultants and ambit, or general claims have been made without reasonable efforts to seek clarifications from the developer and / or builder. There is currently no cost recovery scheme, for example, for OCs and developer builders whose time and money is wasted on poor consultant outcomes (as there would be for design consultants for example).
3. Building Manager Continuing Professional Development (CPD) or similar and subsequent registration scheme to lift capability levels to ensure:
    - Adequate understanding of minor and major defects.
    - Ability to provide basic triage on defect versus occupant's misuse versus maintenance issue.

- Basic literacy with key building documentation [e.g., 'as builts', operation, maintenance, and monitoring (OMMs)].
- A scheme in this space could spell out qualifications required to manage buildings of different sizes (number of apartments) and complexities (residential only versus mixed use; for example).

This is the feedback from one developer but there is a consistent call across industry for higher standards when it comes to building managers. Learning from the good work the Building Commissioner is doing in raising standards for designers and builders. Government should look to take the lessons from this reform agenda and apply the lessons where appropriate to the building management side of strata.