

PROPOSAL TO AMEND THE  
*STRATA SCHEMES*  
*MANAGEMENT ACT* 1996  
("THE ACT") AND RELATED  
LEGISLATION

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## (A) DICTIONARY

“**Act**” means the *Strata Schemes Management Act 1996*.

“**BMC**” means the Building Management Committee.

“**CTTT**” means the Consumer, Trader & Tenancy Tribunal.

“**DA**” means Development Application.

“**EP&A Act**” means the *Environmental Planning and Assessment Act 1979*.

“**FAGM**” means the First Annual General Meeting of an Owners Corporation.

“**LEP**” means a Local Environmental Plan issued by a statutory authority pursuant to the *Environmental Planning and Assessment Act 1979*.

“**LPI**” means the Office of Land and Property Information.

“**SMS**” means a Strata Management Statement.

## (B) DEVELOPMENT

### 1. Delivery of documentation by original owner

#### Proposal

- 1.1 Section 3, Part 1, Schedule 2 of the Act should be amended to require the Owners Corporation to present a report at the First Annual General Meeting (**FAGM**) detailing the documentation delivered by the original owner to the Owners Corporation. The report should detail the extent to which delivery of the documentation complies with the requirements imposed on the original owner pursuant to section 4, Part 1, Schedule 2 of the Act. A decision of the Owners Corporation should be made at the meeting as to whether or not it will pursue the matter if inadequate delivery has been made by the original owner. The original owner should not be entitled to vote in respect of its own lots or to exercise a proxy and persons connected with it in relation to this motion.
- 1.2 A certificate by a reputable engineer should be provided to the FAGM as part of the documentation required to be provided by the original owner, which certificate shall identify whether or not the building has been satisfactorily constructed in accordance with the development plans approved by the private certifier or the local statutory authority.
- 1.3 Section 4 (1) (a1), Part 1, Schedule 2 of the Act should be amended to specifically require the provision of an updated Diagram of Sanitary Drainage, a 10 year sinking fund plan and a valuation, being a valuation of the *replacement cost* of the building.
- 1.4 There should be a specific requirement that there be a motion at the FAGM to record the extent of the original owner’s compliance with the delivery obligation referred to in section 4 (1), Part 1, Schedule 2 (including the engineer’s certificate & Sanitary Drainage Diagram) and the resolution should list the documents handed over highlighting any classes of documents which have been omitted or are deemed unsatisfactory and the steps which are proposed to be taken to obtain them.

## **Comment**

- 1.5 There is a current obligation imposed on an original owner of a strata scheme pursuant to Clause 4, Part 1 of Schedule 2 of the Act to deliver to the Owners Corporation at its FAGM all plans, specifications, certificates, diagrams, and other documents (including insurance policies and accounting records) relating to the parcel and the building. The original owner frequently fails to deliver some or all of these documents and the list of documents required to be handed over by the original owner is inadequate. A list of the documentation which is required to be handed over by the original owner at the FAGM by Clause 4 as follows:
- All plans, specifications, certificates (other than certificates of title for lots), diagrams and other documents (including policies of insurance) obtained or received by the owner or lessor and relating to the parcel or building.
  - All development consents, complying development certificates and related endorsed plans, "as built" drawings, compliance certificates (within the meaning of the EP&A Act, fire safety certificates and warranties obtained or received by the owner or lessor and relating to the parcel or any building, plant or equipment on the parcel.
  - The certificate of title for the common property, the strata roll and any notices or other records relating to the strata scheme, if they are in the owner's or lessor's possession or under the owner's or lessor's control.
  - The accounting records and the last preceding financial statements prepared.
  - Any other document or item relating to the parcel or any building, plant or equipment on the parcel that is prescribed by the regulations for the purposes of this subclause.
- 1.6 The following documentation and records are essential items which should be included in the agenda of the FAGM pursuant to Clause 4:
- A report detailing the documentation delivered by the original owner to the Owners Corporation.
  - An engineer's Certificate certifying that the building has been satisfactorily constructed in accordance with the development plans and relevant approvals.
  - An updated Sanitary Drainage Diagram.
  - A 10 year sinking fund plan.
  - A valuation, being a valuation of the *replacement cost* of the building.
  - A record of the extent of the original owner's compliance with the delivery obligation referred to in Clause 4 and any steps required to complete sufficient delivery.
- 1.7 Without the original documentation relating to the inception of the strata scheme, an Owners Corporation is faced with certain hardships when carrying out its

management functions and duties. An issue may arise where building defects are detected and the Owners Corporation is required to file evidence to substantiate its claim, either against the original builder or its insurer. It is near impossible and made considerably more expensive for the Owners Corporation to properly assess the defects without the original construction plans for the building.

- 1.8 Quite often the Owners Corporation will be required to consult the original documentation as it is confronted with issues in relation to the building. These issues may range from problems associated with exclusive use rights to common property conferred on specific owners, parking within the scheme, assessing works to the common property unlawfully carried out by lot owners, or the more serious issue of building defects.
- 1.9 Original owners can retain control of the affairs of the Owners Corporation where they refuse to hand over the original documentation for the strata scheme.

## **2. Preservation of the original documentation of the Owners Corporation**

### **Proposal**

- 2.1 There should be an obligation on the Owners Corporation to permanently retain the original documentation delivered by the original owner and documents of a like nature created following the registration of the Strata Plan.
- 2.2 The Owners Corporation should report at every Annual General Meeting in relation to the original owner's documentation and any additions made to the original documentation relating to the building subsequent to the original owner's initial delivery at the FAGM.
- 2.3 A record similar to the record containing particulars of all Orders and Notices served on the Owners Corporation pursuant to Section 101, Division 2, Part 5 of the Act, should be kept by the Owners Corporation detailing all original and subsequent documentation relating to the parcel and the building.

### **Comment**

- 2.4 It is essential that all this material be preserved and accessible to the Owners Corporation and individual lot owners when the need arises.
- 2.5 An Owners Corporation will tend to replace its appointed strata managing agent from time to time. Frequently, the documentation of the strata scheme, which is normally held by the strata managing agent, will become misplaced when a new strata managing agent is appointed. This is due to the omission by the previous strata managing agent to hand over to the newly appointed strata managing agent all of the strata scheme's documentation and records.
- 2.6 A strata scheme is often subject to change from the date of its inception. Major refurbishment is sometimes necessary to preserve the building, either due to the building's deterioration over time or exposed defects. In addition, owners may carry out works to their lots, changing the structural nature of the building or the Owners Corporation may effect similar modifications to the common property. The original documentation, therefore, becomes outdated and it becomes necessary for the Owners Corporation to retain all accumulated plans and documentation relating to the building modifications (whether effected by an owner or the Owners Corporation).

### **3. Penalty for failure to deliver original documentation or to retain records**

#### **Proposal**

- 3.1 The penalty referred to in section 4 (1), Part 1, Schedule 2 of the Act imposed on an original owner should be increased (from \$11,000) to \$50,000.00.
- 3.2 A penalty of \$5,000.00 (50 units) should be imposed on a strata managing agent for misplacing or failing to permanently retain the original documentation of the strata scheme.

#### **Comment**

- 3.3 The current penalty is not severe enough to deter original owners from failing to deliver the original building documentation to the Owners Corporation. This is of particular concern having regard to the seriousness of the failure to deliver up the documentation and the very considerable cost of obtaining the documentation otherwise (sometimes impossible).
- 3.4 If the strata managing agent is faced with the threat of a penalty for failing to permanently retain the original documentation of the strata scheme, it will be more inclined to keep its records intact, up to date and in order. This will allow for the effective management of the strata scheme.

### **4. Development Applications and Applications for Building Certificates**

#### **Proposal**

- 4.1 The Owners Corporation should be vested with a power to grant consent to building Development Applications, Construction Certificate applications and applications for Building Certificates where those applications extend beyond the boundaries of a lot or affect common property. In exercising the power, the Owners Corporation should be required to act reasonably in accordance with the test contained in section 140 of the Act in relation to the making of a By-Law. Any variation of the original Development Application to which the Owners Corporation has granted consent should itself require the consent of the Owners Corporation as should any section 96 application pursuant to the *Environmental Planning and Assessment Act 1979* to vary the original development consent.
- 4.2 The Act should make clear that the granting of owner's consent to the making of a Development Application (**DA**) is not consent to the carrying out of the works shown in the development consent which should be the subject of a further application to the Owners Corporation in respect of which the Owners Corporation again must act reasonably.

#### **Comment**

- 4.3 The requirement that an owner submit a DA to a local statutory authority to carry out development is a requirement imposed pursuant to Part 4 of the EP&A Act. Pursuant to section 49 and 280 of the *Environmental Planning and Assessment Regulation 2000*, the owner of the land must provide its consent to a DA or Application for a Building Certificate affecting the respective land. In the circumstances where an owner intends to carry out or has affected works to his or her lot, it is almost always the case that the common property of the strata scheme will be or has been affected by the works. As such, the Owners Corporation as the owner of the common property of the strata scheme must consent to the DA.

- 4.4 Pursuant to the EPA Act and the decision of the Supreme Court of New South Wales in *The Owners-Strata Plan No. 37762 v Dinh Phuong Dung Pham and Anor* [2006] NSWSC 1442 (22 December 2006) there is no jurisdiction by which a lot owner can compel the Owners Corporation to provide its consent and affix the common seal to any DA, it is merely a requirement imposed by the EP&A Act that an owner must apply to local government for a DA.
- 4.5 In the absence of a power in the Act for an Owners Corporation to consent to a DA or other statutory certificates, lot owners wishing to carry out works or proposing to obtain Building Certificates for past works can be thwarted by a refusal by the Owners Corporation and find that they have no recourse to the Consumer, Trader & Tenancy Tribunal (CTTT) to require the Owners Corporation to act reasonably.

## **(C) ADMINISTRATION**

### **5. Proxies**

#### **Proposal**

- 5.1 To add to the proposed amendments to section 11(7), Part 2, Schedule 2, a provision prohibiting the strata managing agent or caretaker or any person or body in a commercial relationship with the Owners Corporation or the original owner from holding proxies cumulatively totalling more than 25% of the unit entitlements.
- 5.2 Section 11(2)(b), Part 2, Schedule 2, to be amended to include a requirement that the prescribed proxy form make provision for the giving of instructions on how the person appointing the proxy wants the proxy to vote on any budget consisting of the remuneration of the strata managing agent.

#### **Comment**

- 5.3 This amendment will prevent an abuse of power and conflict of interest between the strata managing agents, caretakers and original owners, and the minority lot owners (holding the least unit entitlements for the scheme).
- 5.4 Where a strata managing agent, caretaker or original owner holds more than 25% of the owners' proxies, they have the deciding vote on most of the decisions made on behalf of the scheme at the general meetings of the Owners Corporation. This may be detrimental to the minority owners, particularly where the strata managing agent, caretaker or the original owner wish to acquire a personal or financial gain at the expense of the scheme.

### **6. Meetings and procedure**

#### **Proposal**

- 6.1 An additional section to the Act (similar to sections 22 and 23) to define the powers of the chairperson which should include provisions relating to:
- Motions out of order;
  - amending motions;

- points of order; and
- adjournments.

### **Comment**

- 6.2 The procedures for general meetings require elaboration for certainty and clarity. The Act is a tool for non-legal practitioners such as strata managing agents, Executive Committee members and owners to assist with the management of a strata scheme. Quite often the chairperson will be unsure of the correct procedures for the general meetings in relation to motions that are out of order, amending motions, points of order and adjournments. The Act is silent in respect to the actual conduct of the chairperson or the secretary in relation to these issues when holding the meetings or recording the minutes. Section 15, Part 1 of Schedule 2 of the Act is unclear as to whether or not the strata managing agent, if present at a general meeting, has the power to chair the meeting notwithstanding the presence of the chairperson and whether the strata managing agent's power to chair the meeting supersedes that of the chairperson.

## **7. Constitution of Executive Committee**

### **Proposal**

- 7.1 To amend section 3A, Part 1, Schedule 3, to impose an ongoing duty on a person elected as a member of the Executive Committee to disclose a connection (professional, family or economic nature) with the strata manager or the proposed strata manager for the scheme.
- 7.2 The requirement that a member of the Executive Committee disclose a connection to the original owner, caretaker or strata managing agent should be backed by the sanction of a penalty.

### **Comment**

- 7.3 The recent amendments to the Act as contained in the *Strata Management Legislation Amendment Act 2008* now require the Executive Committee members to disclose professional, family or economic connections to the caretaker or the original owner of the strata scheme. This is to prevent these persons or entities from obtaining personal or financial gains as a result of the Executive Committee members (with the connection) exercising their voting powers at the Executive Committee meetings. Such exercise or abuse of power is normally at the expense of the strata scheme and the minority lot owners.
- 7.4 The strata managing agent, subject to its form of appointment, usually has conferred on it pursuant to the terms of its strata management agreement, all the functions of the Owners Corporation including those of the secretary, chairperson and treasurer. As such the strata managing agent usually has determining powers in respect to the management of the scheme. Where the strata managing agent has a connection to a caretaker or the original owner, it too is in a position to confer certain benefits on these entities at the expense of the strata scheme or the minority lot owners. This amendment will impose controls on this type of conduct.

## **8. Strata Roll**

### **Proposal**

- 8.1 Section 98 to be amended by adding section 98(2)(f) relating to the granting of current licenses under section 65B.

### **Comment**

- 8.2 Section 98 of the Act outlines which items must be recorded in the strata roll of an Owners Corporation. Such record includes the owner's names and Australian address for service, names of tenants and details relating to those persons having an interest in the lot, such as a mortgagee or an executor, administrator or liquidator of an estate. The strata roll must also contain information in relation to the common property such as the Strata Plan number and address of the building, the name of the original owner of the strata scheme and the strata manager, the total aggregate unit entitlement for the scheme and the unit entitlement allocated to each lot, and particulars in relation to insurance.
- 8.3 From time to time, owners or third parties may enter into licence agreements with the Owners Corporation to use a particular area of common property. One example would be where a commercial lot owner who carries on the business of a restaurant from his or her lot obtains a licence to use part of the common property courtyard as an al fresco dining area in conjunction with the restaurant. In the circumstances the lot owner will pay a licence fee to use the area subject to specific terms and conditions regulating that use. Another example is where the Owners Corporation enters into licenses with third parties in relation to the use of the roof of tall buildings for transmitters.
- 8.4 It would be beneficial to record in the strata roll all licenses entered into by the Owners Corporation with lot owners or third parties. In this way, all owners and persons reviewing the strata roll have notice that a specific part of the common property is subject to use rights and is not available for use by all the owners in the strata scheme. This will prevent an unwitting proposed purchaser of a unit in the scheme from discovering upon completion of their purchase that parts of the common property are not available for use by him or her. It is also a good way of keeping a record of licences involving exclusive rights to common property.

## **9. Inspection of records of Owners Corporation**

### **Proposal**

- 9.1 Section 108 (1) of the Act should be amended to include any person having a proprietary interest. Any other person wishing to have access to inspect the records of the Owners Corporation must have the written authority of the person having the proprietary interest.

### **Comment**

- 9.2 Section 108 (1) currently provides that an owner, mortgagee or covenant chargee of a lot, or a person authorised by the owner, mortgagee or covenant chargee may request the Owners Corporation to allow an inspection to be carried out under the section.

- 9.3 The proposed amendment expands on those persons entitled to view the records to include any person having a proprietary interest in the lot. Any person not holding a proprietary interest in a lot will require the consent of those persons who do.

## **10. Registration matters relating to service of documentation**

### **Proposal**

- 10.1 There should be an additional provision pursuant to section 235 of the Act requiring the details of the strata managing agent (or the secretary, chairperson or treasurer of the Owners Corporation where there is no appointment of a strata managing agent) to be registered on the common property Certificate of Title for the strata scheme, which details should be required to be updated from time to time where the strata managing agent is replaced or the contact details of the secretary, chairperson or strata manager are subject to change. The changes should be amended and registered within one (1) month from the date the change occurred. A penalty of \$1,100.00 (10 units) should be imposed on an Owners Corporation or managing agent as applicable where it is in default of this requirement.
- 10.2 Section 235 of the Act should be amended to provide as an additional method of service:
- (a) leaving the document at the address for service recorded in the folio of the Register comprising the common property; and
  - (b) delivering it to the managing agent of the Owners Corporation.

### **Comment**

- 10.3 Section 235 sets out the procedures for service of documents on an Owners Corporation. The details registered on the Certificate of Title for the common property of the strata scheme are the address for service of documents on the Owners Corporation.
- 10.4 Where a person wishes to serve legal documents on an Owners Corporation he or she must do so by leaving the documents with the chairperson or secretary of the Owners Corporation or with a member of the Executive Committee (s.235 (1)).
- 10.5 It is common practice for persons wishing to serve legal documents on an Owners Corporation, to not have the contact information of the members of the Executive Committee of a strata scheme. Such information can be obtained upon the issue by the strata scheme of a Certificate pursuant to section 109 of the Act. The cost to obtain such a Certificate, however, is currently \$99.00 (plus GST) which is a considerable expense to incur for the purpose of serving a legal document.
- 10.6 Although the present section 235(1) allows process to be served by leaving it with the chairperson or secretary of the Owners Corporation or of the executive committee or with a member of the executive committee, the identity and addresses of these persons are not recorded on the Certificate of Title to common property and may not be able to be ascertained by the person wishing to serve the originating process. It is accordingly essential to ensure that service of process is not thwarted and it is proposed that there be an additional method of service which involves leaving it at the address of the Owners Corporation as recorded in the folio of the Register for the common property and leaving it with the managing agent.

## 11. Registration matters relating to updating records

### Proposal

- 11.1 The *Strata Schemes (Freehold Development) Act 1973*, the *Strata Schemes (Leasehold Development) Act 1986*, the *Strata Schemes Management Act 1996* and the *Community Land Development Act 1998*, the *Community Land Management Act 1998* and all similar or related legislation should be amended to make more user friendly amendments to By-Laws, Community Management Statements and Strata Management Statements. Each Act should require that, upon the making of an amendment, there be attached to the resolution a copy of the relevant document as updated by the resolution. Upon registration of the Notice of Change, reference to all earlier versions of the document and amendments to it should removed from the register page.

### Comment

- 11.2 Over time, a By-Law and SMS can be amended (by the registration of the appropriate instrument in the office of Land & Property Information). In these circumstances, the By-Laws as registered must be individually read and checked to ascertain applicability, while an SMS will assume unnecessary and unwarranted voluminousness by the continued attachment of Amendment of Management Statement forms, which must also be read and checked. At Liberty Grove, for instance, the Community Management Statement has been amended some 15 times in 14 years, resulting in a very unwieldy document.

## 12. Use of electronic technology for meetings

### Proposal

- 12.1 A definition should be provided for references to electronic technology.
- 12.2 The Act should be amended to provide up to date definitions for electronic documentation and electronic meetings.

### Comment

- 12.3 The Act is currently out of date in respect to the use of electronic technology, particularly in relation to email and telephone conferencing which is a common and predominant form of communication.

## 13. Service of documents under *Strata Schemes (Freehold Development) Act, 1973*

### Proposal

- 13.1 The *Strata Schemes (Freehold Development) Act, 1973* should be amended to provide that notices and service of documents arising under an Strata Management Statement (**SMS**) will be effective only if served on the party at the address shown in the SMS or last notified by the member to each other member or, if the Building Management Committee (**BMC**) has a managing agent, to the managing agent.
- 13.2 An individual member of a BMC should have the power to unilaterally amend the SMS only to the extent of changing their address for service of notices and documents. This document should be registered without the production of any Certificate of Title and should be recorded on the register of each folio relating to a lot

in the stratum plan of subdivision (including the folio in respect of the common property of any strata scheme which is a member of the BMC).

- 13.3 Each member of the BMC shall have an obligation to keep his address for service of notices and documents up to date. This will be effected by each member unilaterally lodging a notice of change of address for the purposes of the strata management statement. That document shall be registered without the necessity for the production of any Certificate of Title and shall be recorded on the folio of the register relating to each parcel of land subject to the strata management statement.
- 13.4 Service of notices and documents will only be effective when served upon the party to the SMS at his or its address for service as shown in the most recent notice of address registered by that party in relation to the SMS.
- 13.5 Except pursuant to an order of a Court or Tribunal, service of a party at any address other than the address shown in that notice will not be effective.

#### **Comment**

- 13.6 A BMC is not an Owners Corporation and great confusion arises as to how the members relate to each other, serve ordinary documents on each other and serve legal process on each other. This amendment is intended to clarify the method of service and to simplify the method of amending the SMS in respect only of the address for service of a party.

### **14. Entry into management contracts**

#### **Proposal**

- 14.1 Section 113(1)(c) of the Act should be amended to prevent an Owners Corporation from appointing a strata managing agent or caretaker 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 second anniversary of the first annual general meeting of the Owners Corporation.

#### **Comment**

- 14.2 At the present time, the developer will, in the ordinary course of events, cause the Owners Corporation to appoint a strata managing agent and, where appropriate, a caretaker. Further, it is not uncommon for the developer to sell the caretaking contract on the open market. The proposal is that there should be an amendment to section 113 of the Act which restricts certain acts during the initial period to extend the duration of an initial contract. Owners will not usually be in a position (particularly by way of experience), at the first annual general meeting, being the present relevant time at which the restriction applies to, to make an objective and informed decision as to the effectiveness and worthiness of such an appointment. An additional period of two years will provide owners with the experience necessary for them to make a decision with respect to contracts which can have a significant impact on the amenity of the strata scheme and which can involve the considerable expenditure of money.

### **15. Commission and fees**

#### **Proposal**

- 15.1 Sections 27 and 40B of the Act should be amended to provide for a statutory warranty requiring disclosure of any commission or fees paid for or in respect of an

agency agreement relating to strata management and caretaker services respectively.

**Comment**

- 15.2 In *Community Association DP No. 270180 v Arrow Asset Management Pty Ltd* (2007) NSWSC 527, the NSW Supreme Court held that a failure to disclose the sum paid by the management company to the developer for the caretaking rights, which had not been disclosed to owners, was a breach of fiduciary duties on the part of the developer. Given that there can be significant sums of money involved in strata management and caretaking contracts, a statutory warranty should be provided to ensure that there is complete transparency and openness with respect to the entry into such significant contracts.

**16. Executive Committee training**

**Proposal**

- 16.1 Clause 2 of Schedule 3 to the Act should be amended to provide that Executive Committee members standing for re-election to the Executive Committee requiring that such candidates undertake an appropriate course relating to strata management.

**Comment**

- 16.2 In large strata schemes there are frequently involved complex and financially significant decisions required to be made. Executive Committee members, even though well-intentioned, may not have the requisite degree of knowledge and experience to undertake and make such informed decision making for the benefit of the Owners Corporation. Just as strata managing agents are obliged, by virtue of the *Property, Stock and Business Agents Act 2002*, to undertake certain education throughout the year to be eligible for the issuance of a licence pursuant to that Act, Executive Committee members standing for re-election should be obliged to undertake a similar course of training, albeit perhaps of lesser duration but with respect to subjects directly associated with the management of an owners corporation. Such a requirement will ensure that Executive Committee members are adequately equipped, from a knowledge perspective, to make informed and reasoned decisions with respect to the issues coming before the Executive Committee.

**(D) FINANCE**

**17. Sinking fund analysis**

**Proposal**

- 17.1 The developer should as part of the disclosure documents attached to a contract for sale include an initial 10 year sinking fund budget and have a liability for the accuracy of that budget.

**Comment**

- 17.2 It is the perception of those involved in the industry that developers underinsure buildings in order to keep down the recurrent levy charges. It is essential that purchasers buying into new developments have a clear idea of the initial costs of administration of the strata scheme and the ongoing costs of maintenance and repair and replacement. It will only be possible if developers are forced to present accurate

administrative and sinking fund figures to purchasers and this will be assisted by a requirement that compulsory disclosure documents in contracts for sale by developers include an initial 10 year sinking fund plan which will amount to a representation by the developer.

## **18. Ten year sinking fund plans**

### **Proposal**

- 18.1 Pursuant to section 75A of the Act, there should be a requirement that Owners Corporation or the original developer must appoint a professional or expert assistant such as a quantity surveyor to prepare the plan of anticipated major expenditure of the strata scheme, which expenditure is to be met from the sinking fund over the 10 year period (commencing on the FAGM of the Owners Corporation).

### **Comment**

- 18.2 The Act currently provides that the Owners Corporation must prepare a 10 year budget comprising of all anticipated major expenditure to be met from the strata scheme's sinking fund for a 10 year period commencing on the FAGM of the Owners Corporation.
- 18.3 The 10 year budget is often prepared by inexperienced people who lack the necessary expertise to assess the projected expenditure. The consequence is that the completed 10 year budget is not always a true reflection of the anticipated costs for each item of major expenditure. Section 75A (6) of the Act states that the Owners Corporation *may* engage expert assistance in the preparation of the plan.
- 18.4 A quantity surveyor would have the necessary expertise to be able to understand the true nature of the specific items requiring major expenditure over the ten year period and be able to provide an accurate reflection of all costs associated with those items.
- 18.5 A proposed purchaser making inquiries in relation to the anticipated levies for a lot pursuant to a Contract for Sale would be in a better informed position.
- 18.6 Existing owners would be more informed to better manage their finances and would not be commonly subjected to "surprises" when the strata scheme requires the owners to pay additional contributions (also known as "special levies") for unforeseen items of expenditure.

## **19. Time of payment of levies**

### **Proposal**

- 19.1 Section 78 of the Act should be amended to define the date upon which a levy is paid. Payment should be effected when the contribution is received into the funds of the trust account of the Owners Corporation not at the time when they are paid by the owner i.e. at the Post Office or via Bpay.

### **Comment**

- 19.2 At the present time owners use various methods to pay their levies, especially before General Meetings of Owners Corporations, and arrive at the General Meeting flourishing their receipt and demanding to vote. In fact, the Owners Corporation has not received the payment and may not receive it. Levies should only be regarded as

having been paid when the payment reaches the account of the Owners Corporation or managing agent.

## **20. Reduction for early payment of levies**

### **Proposal**

- 20.1 The provision relating to a 10 per cent reduction in owners' contributions (levies) for early payment should be removed.

### **Comment**

- 20.2 This option is circular, nonsensical and oppressive towards those owners who pay their levies on the date on which they become due and payable. If an Owners Corporation specially resolves to allow for the 10 per cent reduction to be applied to the owners' contributions then the scheme will not be in a position to meet its financial obligations for the year if most owners pay their contribution before the due date. As such, should the Owners Corporation adopt the procedures referred to in clause 79 (4) of the Act, they would have to increase owners' contributions to account for the revenue lost in the early payment reductions. Any owner who has paid their levy when it falls due will suffer because they are paying a higher levy than necessary when the annual levies are adjusted to reflect the reductions arising from early payments. The provision also creates administrative difficulties and impracticalities for strata managers and secretaries administering the finances of the strata scheme.
- 20.3 If all owners in a strata scheme pay their levies one day before they become due and payable, then the Owners Corporation will receive 10% less levies and will have 10% less than it has budgeted as necessary to run the Owners Corporation for the year.

## **21. Unit entitlements**

### **Proposal**

- 21.1 The proposal is that, in common with the provisions of the Victorian legislation, there should be two different Schedules of Unit Entitlement, one for the unit for the purpose of raising administrative and sinking fund levies, and the second to be used for the purpose of calculating owners' entitlements on destruction or termination of the strata scheme. It is proposed that the unit entitlement for the purpose of calculating levies should be based on the size of the lot and construction costs unrelated to its market value and that the unit entitlement for the purpose of destruction of the building or termination of the strata scheme should be based upon the market value of the lot prior to its destruction or termination of the scheme.

### **Comment**

- 21.2 At the present time, the Act is silent as to the basis of valuation for the purpose of allocation and reallocation of unit entitlements. The CTTT has held that the correct valuation basis is market value at the date of registration of the Strata Plan. This provides an inequity between lot owners in that owners of identical lots making identical demands upon common services and receiving identical benefits from the common services pay disparate levies related exclusively to the market price of their units. The basis of the levies should be the relative size of the units and the cost of constructing them which will reflect the appropriate proportions for sharing levies. It is only when the building is destroyed and the strata scheme is terminated that the

respective market values of the units becomes relevant and this should be provided for in a different Schedule of Unit Entitlement.

## **22. Valuations**

### **Proposal**

- 22.1 The Act should be amended to insert a right of access to a valuer instructed in relation to an application for the reallocation of unit entitlements which could be similar to the right of access of registered surveyors pursuant to section 18 of the *Surveying Act, 2002*. This can be achieved by an amendment of section 65 of the Act.

### **Comment**

- 22.2 The Act requires that in circumstances of an application for reallocation of unit entitlements, the Act (as interpreted in *Riana Pty Ltd v The Owners-Strata Plan No.22336* [2007] NSWSC 1033 (21 December 2007)) has the effect that the valuer must obtain access to and value each unit in the strata scheme. If a valuation of each lot is to be required, then the valuer must have a right to obtain access which should be enshrined in the legislation.
- 22.3 Consideration should be given to the present requirement (as interpreted by the CTTT) that when a valuation is being made for the purposes of reallocation of unit entitlements, the valuer must obtain physical access to each lot in order to be able to prepare a valuation of that lot.
- 22.4 There are reports of a number of instances where valuers have prepared valuations in very large strata schemes without having obtained access to every lot within the strata schemes and this evidence has been rejected by the Court.

## **23. Insurance**

### **Proposal**

- 23.1 That section 85 of the Act should be amended to replace the requirement for five yearly valuations to a requirement for two yearly valuations.

### **Comment**

- 23.2 It is the experience of strata managing agents that a significant majority of strata schemes are significantly undervalued. This arises in two circumstances:
- (a) where the developer takes out the initial insurance based upon the cost of the development as distinct from the replacement cost of the development; and
  - (b) in a time of rapidly escalating building costs (the Master Builders Association advises that building costs have increased over the past five years), all buildings will be significantly undervalued by the beginning of the fourth year and at least 50% undervalued by the end of the fifth year.
- 23.3 In order to maintain insurance at adequate levels, it is essential that the periods between valuations be reduced significantly and it is suggested that a period of two years is appropriate.

- 23.4 It should be a requirement that the developer hand over at the FAGM the first valuation being a valuation of the replacement cost of the building.

## **(E) RESIDENT AMENITY**

### **24. Short term lettings and breach of the law**

#### **Proposal**

- 24.1 Section 49(1) of the Act should be amended by the addition of a proviso that the prohibition in this section does not apply so as to prevent the making of a By-Law prohibiting “short-term letting” which should be defined as lettings in residential strata schemes which are less than three months in duration.
- 24.2 There should be an optional Schedule By-Law in terms which prohibit short-term lettings defined in the same manner. The By-Law may be adopted by a strata scheme depending on its preference to either restrict or allow short term letting.
- 24.3 The Act should be specifically amended to empower the Owners Corporation to obtain an order prohibiting the use of a lot for a purpose which is either:
- (a) prohibited under an LEP or under any other law; or
  - (b) permissible under an LEP with consent which consent has not been obtained.

#### **Comment**

- 24.4 Section 49(1) states that “*no by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.*”

This provision poses a problem for an Owners Corporation wishing to restrict short term letting within the strata scheme. It is the effect of section 49(1) and the law relating to “class rights” as that law applies to strata schemes, that an Owners Corporation may not make a By-Law which prohibits a use or a lease for a purpose even if that use or purpose is specifically prohibited under the relevant LEP.

- 24.5 An option should be available to 75% of the owners in a block to prohibit short-term lettings or any use which is prohibited under the LEP. The interests of owners of more than 25% of unit entitlements will be protected by the necessity for a special resolution to introduce such a By-Law and the requirement for the votes of 75% in favour of the By-Law will ensure that the considerable majority within a building can take action to maintain the residential amenity of the building.
- 24.6 The common complaint is that short term letting has an undesirable environmental impact such as negative impacts on residential amenity. Such complaint is usually that increased volumes of occupants to the building are more likely to cause higher incidences of:
- noise
  - traffic (both vehicular and foot)
  - trespass to owner’s car spaces
  - obstruction of common property

- theft
  - damage to common property such as lifts or foyers where occupants carry their luggage through the building
  - building deterioration (by the increased demands on the scheme's resources),
  - building maintenance (and associated costs)
  - reduction in the value of lots in the scheme (due to the above factors)
- 24.7 Generally, where the use of a lot for short term accommodation is prohibited by law, Council has the power to make certain Orders pursuant to the *Environmental Planning and Assessment Act 1979 (EP&A Act)* preventing short term lettings from occurring within a building. The power to prevent short term lettings, however, should be given to an Owners Corporation to enable it to retain a certain level of control over the operation and functionality of the building.
- 24.8 The requirement prohibiting "short term letting" which is proposed to be defined as "lettings in residential strata schemes for a period of less than three months in duration" is consistent with the definition given to these words by Pain J in *Sutherland Shire Council v Foster* [2003] NSWLEC 89 (7 June 2001). In this case the Land and Environment Court restrained the owner of a lot in a residential strata scheme from using his unit for holiday and short term accommodation. The zoning for the scheme entitled a lot owner to use his or her unit as a permanent home or to rent the lot under a residential lease. An injunction was obtained against the owner which required him to cease using the unit for the purpose of short term letting. In the orders the expression "short term accommodation" was understood to mean accommodation provided to an occupant for any period of less than 90 consecutive days.
- 24.9 Breach of a Local Environmental Plan (**LEP**) or any other law – The amendment in this regard is proposed so as to enable the Owners Corporation to take direct action (rather than relying upon the Council to take action) in circumstances where the use of a lot is prohibited by the LEP or any other law or use is permissible under the LEP with consent but such consent has not been obtained. This will permit Owners Corporations to take direct action in circumstances where councils decline to enforce the provisions of the LEP or other authorities decline to enforce the provisions of any other relevant law.

## **25. Exclusive use or other use of visitor's or emergency or service car spaces**

### **Proposal**

- 25.1 An exclusive use By-Law or other right created in relation to a visitor's or emergency or service car space, whenever created, should not have effect and a visitor's or emergency or service car space shall not be inhibited or converted to any other use unless the local government authority of the area in which the strata scheme is created shall give its consent to the making of that By-Law either, in relation to By-Laws or rights created after the date of this amendment, prior to the making of the By-Law or the creation of the right and, in relation to the By-Law or right created prior to the date of the amendment, within two years from the date of this amendment.
- 25.2 A visitor's, emergency or service car space means a car space identified as such in the plans to which a development consent relates, or a car space to which a

condition of a development consent relates and which identifies that space as being for use by a visitor, emergency or service vehicle attending the strata scheme.

### **Comment**

- 25.3 This amendment will prevent owners in the scheme from obtaining exclusive use rights and special privileges over common property where such use is in direct contravention with local government consent conditions for the building. It will also prevent the Owners Corporation from converting a visitor's or emergency or service car space to any other use or inhibiting its use for its intended purpose.

## **26. Owner liable for damage occasioned to common property**

### **Proposal**

- 26.1 In a similar fashion to sections 116 and 117 of the Act, and By-Law 5 of the Schedule 1 By-Laws, there should be a provision in the Act providing that an owner or occupier should not cause damage to the common property. In the case where an owner or occupier does cause damage to the common property they should be held liable for their actions and be required to pay the costs and be responsible for rectifying that damage.
- 26.2 The Act should make provision for owners to be held liable for the actions of their tenants where a tenant causes damage to the common property.

### **Comment**

- 26.3 Owners should be held accountable and required to pay for damage caused to the common property as a result of their actions whether wilful, reckless or otherwise negligent and whether the action relates to common property or their own property and the liability should exist whether or not the Owners Corporation is granted permission for the work to be carried out. This would, in effect, create a statutory indemnity on the part of an owner in favour of the Owners Corporation in respect of all work which he or she carries out on his or her property or on the common property and whether it is approved or not approved.
- 26.4 Owners should be liable, in the same manner, for any actions of their tenants and invitees of the owners and their tenants, and should have a right of indemnity against the tenant in respect of any liability of the owner.
- 26.5 The Owners Corporation should have the power to carry out any necessary rectification works and to recover the cost from the owner.

## **27. Identity of occupants of units**

- 27.1 At present there is no provision within section 119 of the Act which enables the Owners Corporation to obtain the identity of a person who is neither a lessee nor a sublessee, in particular a person who is a mere occupier.

### **Proposal**

- 27.2 It is proposed that a new section 119(3A) of the Act be inserted to read:

*“(1) If a person other than a lessee or sublessee or assignee is in occupation of a lot, an owner or lessee must give notice, in accordance with this section, within three days after the owners*

*corporation delivers to the lot a notice requiring the owner or lessee to provide details of the occupant.*

- (2) *A person is deemed to be in occupation of a lot if he or she resides in the lot for more than three consecutive nights.”*

### **Comment**

- 27.3 This amendment is intended to address a common problem where persons other than owners or tenants reside in a lot and create disturbance within the building or the external common property and the Owners Corporation is powerless to identify them in order to take effective action against them.

## **28. Trees**

### **Proposal**

- 28.1 The Owners Corporation should be granted the power in the Act to enter any lot or part of the parcel of the strata scheme to lop or remove trees growing outside of the cubic space or boundary of a lot or where the roots from a tree situated on a lot are causing damage to the common property or any other property.
- 28.2 The provisions referred to in paragraph 23 hereto should apply to damage caused to the common property as a result of damage arising from the roots of any tree belonging to an owner.

### **Comment**

- 28.3 Owners should be held accountable for damage caused to the common property or any other property as a result of their actions whether wilful, reckless or otherwise negligent.
- 28.4 Trees are a common cause of damage to common property or neighbouring properties. If unattended, trees have the capacity to grow outside the cubic lot space and boundary of a lot, whereby they can interfere with the common property structures or services, or the views of other occupants in the strata scheme thus causing a nuisance.

## **29. Visitors car spaces**

### **Proposal**

- 29.1 To add to the Act a definition of “visitor” as being the person who resides in the building for more than three consecutive nights.

### **Comment**

- 29.2 This proposal is made in order to address the frequent problem which arises when persons who are clearly in residence in a flat deny that they are residents and say that they are merely visitors and accordingly occupy car spaces which are intended for short-term use by genuine visitors to the building.

### 30. Pets

#### Proposal

- 30.1 Clause 16 in the Schedule 1 By-Laws to the *Strata Schemes Management Regulation 2005* should be amended with respect to option C to permit an owner or occupier to keep an animal in a situation where a person on demonstrable evidence being adduced, can establish that the keeping of an animal will be in that person's health and well-being.

#### Comment

- 30.2 Upon the lodgement of a strata plan for registration, the selection of an option for the keeping of animals in the strata scheme may be made. Current option C provides a blanket prohibition of animals. It is submitted that the option, as currently drafted, is too restrictive in a situation where a person's health or well-being may be adversely affected by the inability to keep an animal upon the lot.

## (F) JURISDICTION

### 31. Dispute resolution

#### Proposal

- 31.1 The dispute resolution provisions contained in sections 124 and 125 of the Act to be amended so as to remove the requirement for mediation where the issue in dispute relates to proxies. The CTTT should be vested with original jurisdiction to consider matters involving proxies, in a way similar to readjustment of unit entitlements in section 183.

#### Comment

- 31.2 Proxies are ordinarily provided either immediately before or at the meeting to which they relate. In these circumstances, the mediation process is not practicable given the time constraints involved in such process. Resolution of proxies requires urgent and often immediate resolution. For this reason the CTTT should have the ability to deal with any argument concerning proxies without the fetter of the time constraints which are invoked in the mediation process.

### 32. Strata Plans, By-Laws and Declaratory Orders by the Supreme Court

#### Proposal

- 32.1 The amendment should provide for the definition of areas referred to in By-Laws by reference to a plan prepared to Land and Property Information (LPI) survey standards and for vesting in the Supreme Court of the power to make declaratory orders in respect of the meaning of or the definition of boundaries of lots within Strata Plans and areas affected by By-Laws including by way of plans.
- 32.2 Section 135A of the *Real Property Act 1900* should be amended to include determinations in relation to boundaries in Strata Plans and By-Laws.
- 32.3 The interrelationship of decisions made under section 135A of the *Real Property Act 1900* and decisions of the Supreme Court should be clarified and decisions of the Supreme Court should be given priority over the less structured decisions of LPI.

**Comment**

- 32.4 From time to time lot owners will enter into disputes about the ownership of their lot space, which ownership is determined by the lot and common property boundaries in the strata scheme. The matter is often complicated by a surveyor's notation on the Strata Plan which may cause a lot owner to retain certain proprietary rights in specified parts of the common property. For example, such notation may read: "*all structural features including walls, floors, ceilings and roofing of Pt 11 form part of the lot excluding common service lines*".
- 32.5 The common property boundaries may be uncertain which is problematic for an Owners Corporation when assessing which parts of the building it must maintain, which it is required to maintain, or when an owner wishes to carry out works to his or her lot.
- 32.6 The LPI currently has the jurisdiction to determine boundaries of lots and common property, but it takes the view, probably correctly, that it does not have the authority pursuant to section 135A of the *Real Property Act* 1900 to determine the boundaries within a strata scheme.

**33. CTTT competency****Proposal**

- 33.1 The CTTT should appoint senior or experienced legal practitioners who have practiced predominantly in the area of strata law, to sit on a rostered panel to assess and make determinations on applications made before the CTTT pursuant to the Act.

**Comment**

- 33.2 Decisions of the CTTT on strata matters are of variable quality (to use a neutral term) and the customer dissatisfaction with the general performance of the Office of Fair Trading recently published is equally reflected in customer dissatisfaction with processes and decisions of the CTTT on strata matters. This is reflected, in part, in the 2008 NSW Auditor-General's report. The processes for making submissions do not require an applicant or respondent to serve copies of submissions on the other parties thus denying natural justice to both sides impartially. This problem is often only recognised once the decision of the CTTT is received which reveals that the CTTT took into account submissions which one party or the other has never seen and in many cases submissions which are factually wrong and could easily have been corrected before an incorrect CTTT decision based upon them is made. It is essential that the processes of the CTTT be amended to require that all submissions are available to all parties so as to ensure natural justice and to avoid the necessity of appeals to the CTTT to reverse decisions made upon clearly erroneous grounds.
- 33.3 The existing Adjudicators in the CTTT are not necessarily experienced in the field of strata law and indeed may have little or no knowledge of it and very few could be described as experienced in strata law. This can be particularly frustrating for applicants who feel their case has not been properly heard or understood and who often receive unfair or contradictory Orders as a result of their applications. It is common for Adjudicator's Orders to leave no real resolution to a substantial number of complaints by owners and Owners Corporations, particularly in relation to those matters having greater complexity. An applicant, will therefore, exhaust all his or her avenues in the CTTT with no real outcome and then be required to transfer the proceedings to the Supreme Court, at a much greater expense, in order to obtain a comprehensive and effective resolution to his or her matter.

- 33.4 There would be great benefit in Adjudicators giving their reasons and briefly indicating the outcome which they think is appropriate and for the parties then to be given the opportunity of bringing in draft orders and if necessary arguing those draft orders before the Adjudicator so that the Adjudicator's final Orders are full and effective to resolve the issues in dispute. The practice in this regard of the Equity Division of the Supreme Court should be replicated in the CTTT and this would, in our view, considerably reduce the number of appeals from orders which fail appropriately to resolve the real issues in dispute between the parties or to establish a regime which is practical to implement.

## **34. Powers of the Supreme Court**

### **Proposal**

- 34.1 Having regard to paragraph 29 and the decision of *The Owners Strata Plan 30695 v Stratacorp* [2005] NSWSC 405 (7 April 2005) (**Stratacorp**), the Supreme Court should be given clear jurisdiction on significant issues (such as major illegal building works) so that an Owners Corporation or an effected owner can obtain immediate and effective injunctive relief rather than the present requirement for obtaining from the CTTT an Interim Order (with no teeth) and thereafter following the mediation and adjudication processes which causes significant delays in reaching a resolution in respect of the immediate issue including defects arising out of illegal building works.

### **Comment**

- 34.2 In *Stratacorp*, McDougall J declined to grant the interim relief sought by the plaintiff because he held that the Act provides for its own dispute resolution procedure which sets up a structure for determining disputes namely the a specialist Tribunal (CTTT) and a panel of Adjudicators. Such structure further provides for an appeal from Adjudicator's determinations. McDougall J, further held that a court of general jurisdiction, such as the Supreme Court, may withhold relief on a discretionary basis where a party has not availed itself of the services offered by the specialist Tribunal. In this case, the plaintiff had failed to utilise the resolution procedures under the Act as supervised by the CTTT and was refused a remedy by the Supreme Court.
- 34.3 The CTTT lacks the requisite expertise and knowledge to resolve complex disputes involving strata issues which quite often involve significant claims for damages and costs.
- 34.4 In addition, the CTTT does not have the general power to award costs leaving applicants "out of pocket" as a result of legal costs expended in pursuing their claim or dispute, notwithstanding a successful Order in their favour.
- 34.5 The inability of strata schemes or individual owners to have recourse to the Supreme Court to obtain effective injunctions to restrain illegal work often means that the work continues (despite orders made by the CTTT) to finality without the Owners Corporation having the power effectively to prevent illegal works which might endanger the structure of the building.

## **35. Strata Management Statements (SMS)**

### **Proposal**

- 35.1 The amendments should permit proceedings to be initiated in either the CTTT or the Supreme Court on questions involving the construction and interpretation of an SMS.

**Comment**

- 35.2 The Act does not currently provide mechanisms for the CTTT to resolve disputes in relation to the construction and interpretation of an SMS. An SMS is registered pursuant to the *Strata Schemes Freehold Development Act 1973* and regulates a stratum scheme. A stratum is a progressive and more recent form of community development which is governed by the rules contained in the SMS. The courts have determined that the SMS forms a contract between the varying components in the stratum (such as between coexisting commercial and residential schemes), and dictates how the components interrelate and function (an example is where rules prescribe architectural standards for the stratum building).
- 35.3 At the present time, there is confusion as to what steps might be taken to clarify an SMS in situations where owners other than Owners Corporations are members of the BMC. In these cases, the CTTT has no jurisdiction which is undesirable.

**36. Contempt power****Proposal**

- 36.1 Section 198 of the Act should be amended to add to the categories of contempt, disobedience of any Order made by an Adjudicator. The penalty should be increased to 50 penalty units to provide an effective deterrent. The penalty units for an original owner should be increased to twice the penalty units than those imposed on a subsequent lot owner.

**Comment**

- 36.2 The Act currently provides that a person must not wilfully, insult the CTTT or misbehave in proceedings before the CTTT, or wilfully and without lawful excuse interrupt proceedings before the CTTT or disobey a direction of the CTTT during proceedings.
- 36.3 Orders of the CTTT will often require a person or the Owners Corporation to do or refrain from doing, a specified act. Regularly, Orders are not complied with, particularly where a lot owner is ordered to do or refrain from doing something. Ordinarily, the only remedy which the original applicant has in the case of non-compliance is to apply to the CTTT for a further Order requiring the person to pay a pecuniary penalty for non-compliance with the original Order.
- 36.4 The amendment proposes to clearly identify non-compliance with an Order as contempt of the CTTT, which is a criminal offence and can lead to imprisonment for a period of up to 6 months. The availability of the contempt power and the increase in pecuniary penalties will render Orders by the CTTT more effective as a deterrent against non-compliance with an Adjudicator's Order and will ensure the efficacy of Orders of the CTTT.

**37. Vexatious applicants****Proposal**

- 37.1 The provisions in the *Supreme Court Act, 1970* for dealing with vexatious litigants should be duplicated (with modifications) in the Act.

**Comment**

- 37.2 There are numerous incidents of serial vexatious applicants in strata schemes and some regime must exist which enables the CTTT to refuse to accept applications from them and, in the event that such applications are made with the leave of the CTTT, for costs orders to flow against the applicant almost as a matter of course on a full reimbursement basis.