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Strata Title Law Reform

The New South Wales government has released a position paper in relation to proposed reform of NSW strata title laws. This follows extensive consultation and numerous submissions by interested parties. A copy of the paper and submissions received can be found at the following link.

The position paper outlines numerous proposed amendments to the Strata Schemes Management Act 1996 ("Act") and Strata Schemes Management Regulation 2010 ("Regulation"). It is advisable to consider their impact as soon as possible, as many of these reforms necessitate a review of procedures and arrangements before they are implemented. However, it is important to note that these remain proposals and that the government's position may change before the proposed reforms become law. It is also important to note that the precise impact of many of the reforms will not be known until legislation implementing the reforms has been drafted.

The proposed reforms and our views are set out below. In our view, the five most significant reforms are as follows:

- Limitation of executive committee liability – reform 1.3
- Restrictions on strata managing agents receipt of insurance commissions – reform 1.15
- Provision for developers to provide a bond to fund defect rectification works – reform 2.3
- Provision for collective sale/renewal – reform 2.7
- Increased penalties for breach of by-laws – reform 4.11

There are a number of proposed reforms in relation to which we have not commented, on the basis that they are unnecessary, generally because they reflect the current law, but not problematic.

It is unfortunate that a number of helpful reforms suggested by Ms Clover Moore and Strata Community Australia (NSW) were not adopted, including prohibiting developers/builders from being appointed as strata managing agents and further reforms in relation to homeowner warranty insurance and governance principles.

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Governance

'1.1 Allow schemes to choose alternative methods of attendance at meetings including social media, video and teleconferencing or other methods which may become available in the future. Schemes will also be allowed to accept postal or electronic votes from owners who are not physically in attendance.'

Improved flexibility and clarity is welcome, but this is not a meaningful reform, as the Electronic Transactions Act 2000 and the common law already provide for conduct of meetings by electronic means, with the agreement of persons entitled to attend. The discussion paper suggests that owners corporations will be able to use measures such as postal and electronic voting. However, the discussion paper also suggests that safeguards will be introduced "to ensure that individuals who are not willing or able to engage electronically can continue to participate in decision-making", suggesting in turn that the reform will simply restate the current law.

If physical meetings will still be required, because one or a small number of lot owners require them, an opportunity will have been lost. There would be many advantages associated with a full transition to electronic meetings, including enhancing safety, meetings frequently involving irate and aggressive participants and sparing owners corporations the substantial costs associated with meetings, which are ultimately borne by lot owners through levy contributions. The perception that there are persons "unable to engage electronically" is misconceived. There may still be people without access to a computer, mobile phone or internet café, but they represent an increasingly small group, who are unlikely to own strata lots and the interests of the strata community as a whole would be far better served by permitting this increasingly small group to vote by post.

'1.2 Provide greater recognition for modern forms of communication by allowing documents to be held and distributed electronically'.

The discussion paper suggests that owners corporations will, for example, be permitted to issue meeting notices by e-mail, if the recipient has agreed to this form of communication. As the recipient's agreement will be required, this is not a meaningful reform, as the Electronic Transactions Act 2000 and common law already permit service by e-mail with the recipient's consent.

An opportunity may have been lost, as there would be many advantages associated with a full transition to electronic service, i.e. not requiring agreement, including sparing owners corporations the substantial costs associated with mail outs, which are ultimately borne by lot owners through levy contributions.

'1.3 Include an exclusion of personal liability clause for committee members who act in good faith for the purpose of executing their functions under the Act'.

This is another area where the precise impact of the reform may not be known until legislation implement in the reform has been drafted. For example, it is unclear what the relationship will be between this reform and the reform listed below as 1.10, which suggests that additional duties will be imposed on committee members.

The reform represents a lost opportunity to make office bearers liability insurance mandatory. As drafted, the reform appears to render office bearers liability insurance redundant, as acts in good faith would be protected by the statutory exclusion and as acts not in good faith are typically excluded from cover under such policies.

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This reform could further complicate an already complicated issue concerning liabilities when committee members deal with third parties on behalf of owners corporations. Presently, the type of owners corporation approval required, whether an owners corporation can rely on a transaction entered into without approval and whether committee members are personally liable in relation to transactions entered into without approval will depend on circumstances such as the type of transaction and amount involved.

'1.4 Introduce options for conducting secret ballots.'

We have doubts as to whether this reform is consistent with the stated purposes of the review process, which included improving transparency in governance of owners corporations.

We also have concerns as to how in practice this reform would be implemented. Secret ballots would extend meeting times and present a time and monetary cost to owners corporations, so appropriate limits and procedures would be required.

We also have concerns as to how decisions made by means of secret ballot would be reviewed.

'1.5 Enhanced opportunities for tenant participation in schemes'.

The proposed reform will allow tenants to attend and participate in owners corporation meetings (but not vote) and allow them to appoint a representative to the committee if they occupy more than 50% of the lots in the scheme.

This reform will increase administration costs, as additional parties will need to be notified of meetings and as meeting times will be extended. This on its own may be justifiable, in terms of enhanced communication within the scheme. However, care needs to be taken not to cause bigger problems than increased costs.

Implementation of the reform could be as simple as requiring that meeting notices be copied to tenants who have so requested, on the basis that this will not be a requirement for a meeting to be validly convened. If the reform were to go further, significant issues arise. Who would be required to notify tenants of meetings and how would that notice be given? Would the secretary and/or strata managing agent be required to ensure up-to-date records in relation to tenants occupying lots within the scheme and if so how? What would be the effect of not notifying a tenant of a meeting, i.e. would this invalidate the meeting or the business transacted at the meeting?

'1.6 Change the name of the 'executive committee' to 'strata committee'.

'1.7 Provide that the office bearers (chairperson, treasurer and secretary) are to be directly elected by the owners corporation at each annual general meeting.'

'1.8 Provide for written nominations for office bearers and committee members ahead of a general meeting.'

This is another area where careful implementation of the reform is important, if practical problems are to be avoided. Implementation of the reform could involve imposing a timetable involving a period of notice of a proposed meeting, a period for submission of nominations for offices and a period for circulation of nominations

received. However, this would involve a trade-off between transparency and flexibility and increase the cost and complexity of convening general meetings.

'1.9 Allow schemes to appoint as many people as they wish to the committee provided that at least three people are appointed to the committee in large schemes.'

'1.10 Provide that committee members are to carry out their functions without favour, for the benefit of all owners and to act with due care, skill and diligence.'

This is a significant reform, as there is presently doubt as to the duties owed by office bearers. The position appears to be that office bearers owe duties similar to company directors, but this is not certain and increased certainty is welcome. However, it remained unclear how these proposed duties will interrelate with the proposed exclusion of liability under reform 1.3.

'1.11 Require committee members to disclose any conflict of interest in a matter to be considered by the committee.'

This is another significant reform, which we see as interrelated with reform 1.10.

'1.12 Prohibit non-owners with a financial interest in the scheme (for example, managing agents, letting agents and building managers) from being a member of the committee.'

We are not convinced that this is necessary or even desirable, given the contribution which non-owners, with special skills or knowledge, might be capable of making to the committee.

'1.13 Require all motions considered at a meeting to be accompanied by a short explanatory note that also identifies the person who submitted the motion.'

This would increase consistency between the Act and the Community Land Management Act 1989, which contains a similar provision.

'1.14 Limit the number of proxies able to be held by any person to 5 percent of the lots if the scheme has more than 20 lots, or one if the scheme has fewer than 20 lots.'

Use of proxies is an ongoing source of controversy, with a tension between achieving a quorum at meetings and preventing abuse of proxies. To be effective, the permitted maximum number should apply to a person and their related entities.

'1.15 Introduce a new regime of disclosure and accountability for strata managing agents seeking commissions from third parties'.

This moderates a position previously considered by the government, involving an outright ban on receipt of commissions, after a transitional period. The present proposal appears to involve enhanced disclosure requirements being imposed on agents, schemes deciding at each AGM the extent to which their strata managing

agent may receive commissions over the next 12 months and otherwise banning non-monetary benefits and gifts from third parties.

We have concerns about this proposed reform. In particular, as presently drafted it is unclear how the owners corporation and its strata managing agent would go about preserving a fee plus commission income fee model and the position might not be clarified until the amending legislation has been drafted. The discussion paper could be read as suggesting that an owners corporation will make an annual decision, at its annual general meeting, whether the strata managing agent will be permitted to receive commission income in addition to fees.

'1.16 Provide that the term of a strata management contract cannot be longer than three years.'

The reform also proposes prohibition of automatic rollovers, which are no longer common anyway.

'1.17 Enable the Tribunal to make orders with respect to strata management agency agreements similar to those relating to caretaker agreements under section 183A of the Strata Schemes Management Act 1996.'

This is a significant reform, as it would enable the Tribunal, on application by an owners corporation, to make far-reaching orders in relation to an agency agreement, including termination, variation of terms or payment of compensation. This can be based on a variety of grounds, including the Tribunal considering the agent's performance to be unsatisfactory or the terms of the agreement to be unreasonable.

This would significantly undermine an agent's ability to rely on an agreement on a long-term basis and undermine the benefit to an agent of a long-term agreement, potentially resulting in increased fees.

'1.18 Clearly provide that agency agreements are to be made available for inspection by an owner, on request.'

'1.19 Streamline the information required to be kept by the owners corporation and improve access to this information.'

The primary purpose of this reform appears to be to facilitate the conduct of inspections under section 108 of the Act by electronic means, e.g. by permitting the person requesting the inspection to request that the information be provided by e-mail or online.

In view of the considerable number of such inspections which take place, including as part of the conveyancing process pertaining to strata units, the lack of uniformity relating to such records and the considerable time and monetary cost associated with such inspections, this reform is welcome.

The discussion paper also suggests that fees payable for inspections under section 108 of the Act and providing certificates under section 109 of the Act will be reviewed. Those fees are presently widely regarded as being inadequate.

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'1.20 Give owners corporations more flexibility about when they hold AGMS.'

This is a sensible reform.

'1.21 Allow the chairperson to declare a quorum, if after 30 minutes a quorum has not been achieved.'

This is a sensible reform.

'1.22 Remove the requirement for an election to be called to fill a vacancy on a strata committee.'

This is a sensible reform.

Managing the built environment

'2.1 Include defects and rectification as a compulsory agenda item for discussion at each AGM until the expiry of the statutory warranty periods under the Home Building Act.'

This reform is a sensible measure and one which should already be regarded as good practice. It emphasises prompt attention to rectification of defects in new buildings, a step which can easily be overlooked until after relevant time limits have expired.

'2.2 Provide that an independent defects report be prepared for the owners corporation.'

As a measure aimed at assisting owners corporations in dealing with building defect issues, this reform is welcome. At the least, it will reduce the cost to the owners corporation of conducting an early review of building defect issues. However, the real benefit of this measure remains uncertain. In particular:

- It is uncertain whether and to what extent the cost of such reports will end up being passed on to owners through increased prices.

- The extent to which the report will assist in resolving issues between the parties will depend on the way in which the reform is implemented and particularly the role the report will play in evidencing defects. In the likely event of disagreement between the parties as to the appropriate expert, the expert will be appointed by Fair Trading, presumably from a panel. Some defect areas are highly specialised and the report will have little value if the expert does not have the requisite specialist skills. Further, if the dispute between the parties escalates to proceedings, further reports may be required in any event.

- The reform contemplates the report being prepared between 12 and 18 months after the building is completed and it is common for many defects to present after that period.

'2.3 Provide that the developer of a high-rise strata building is to pay a bond, which will be held in trust until the independent inspector agrees that the identified defects have been fixed.'

This reform is also welcome, but its real benefit is limited. In particular:

- 2% of construction costs is not a substantial amount when dealing with building defect issues, the rectification cost of which will generally exceed that amount considerably.

- The bond would be retained until the expert who prepared the independent report referred to in reform 2.2 agrees that the defects identified in that report have been rectified. As a result, the bond will only cover defects which presented before the report was prepared and it is common for defects to present after that period.

Accordingly, this reform should be regarded as a partial measure only, which is no substitute for a proper process for resolution of building defects and no substitute for homeowner warranty insurance.

'2.4 Restrict the right of the developer and people connected to the developer from voting on matters relating to building defects'

This is another welcome reform, limiting developers' ability to frustrate resolution of building defect issues by continued ownership of lots. However, the reform should go further and require that the developer not be present for the vote, i.e. leave the meeting room for the vote.

'2.5 Require the builder/developer to prepare a maintenance schedule to help the owners corporation understand their obligations and the likely costs associated with maintaining the common property.'

The real benefit of this reform is uncertain. It may assist in determining whether levy contributions are realistic (see reform 3.2). However, its role in resolving building defect issues is uncertain, i.e.:

- Whether an alleged defect is in fact a defect or a maintenance issue is a common source of conflict between developers and owners corporations.

- The discussion paper suggests that the schedule will not remove a developer's liability for building defects, but states that the schedule can be used in evidence in subsequent proceedings and it is unclear how those two propositions will be reconciled.

'2.6 Introduce an obligation for developers to provide any documents that are reasonably necessary to enable or assist the owners corporation to run the scheme and maintain the building.'

This is another welcome reform and should assist owners corporations in various ways, including determining the date of completion of the building, pursuing building defects matters and properly assessing maintenance requirements.

'2.7 Introduce a process to facilitate the collective sale or renewal of a strata scheme where there is less than unanimous support from the owners.'

Reform in this area is necessary, as it is becoming increasingly common, as strata buildings age, for maintenance costs to become uneconomic, but for there to be no practical means of addressing the underlying issue, i.e. reconstruction of the building, either by the existing owners or developer.

However, the issue is controversial, having already been the subject of numerous press articles and the perception in some quarters appears to be that the reform will facilitate compulsory sale of homes, particularly those of economically disadvantaged persons. That appears to be unfounded.

The reform involves a staged process, involving a resolution to enter into discussions, a further resolution to appoint a strata renewal committee. Ultimately, for the process to be completed, a resolution supported by a majority of more than 75% will be required, on a simple lot basis, rather than on a unit entitlement basis. However, there are conflicting references in the discussion paper to support of 75% and support of more than 75%, which is a significant issue, e.g. it would produce a different result in a 4 lot scheme if one owner objected.

In theory, this could result in a lot owner being required to sell a lot which they do not wish to sell. However, the reform proposes various safeguards, including oversight by a Land and Environment Court Commissioner (although it does not specify the criteria to be taken into account in undertaking that oversight) and provision for conciliation and mediation.

In a scenario involving a building, the age and dilapidation of which of has rendered maintenance costs uneconomic, one needs to weigh the advantages and disadvantages of this proposal against the advantages and disadvantages of the current legal position, which could involve an application to the Supreme Court to terminate the scheme and for partition of the property and/or appointment of a receiver for sale. It is difficult to determine whether the proposed reform is superior in the absence of detail, particularly as to the criteria to be taken into account by the Commissioner.

Common property, repairs and responsibilities

'2.8 Provide that scheme can adopt a maintenance by-law that will be based on a memorandum to be developed by the Strata Industry Working Group to assist in clarifying who is responsible for what.'

It is not possible to comment meaningfully on this proposal without details of what precisely is proposed. The position paper suggests that the reform will involve formulation of a model by-law, which would not change the definition of common property or displace maintenance obligations in relation to major components of common property, but would allocate maintenance obligations in relation to "everyday items".

'2.9 Establish new requirements with regard to owner renovations, so that:

- **An owner does not need approval to make minor or cosmetic changes to the common property inside a lot (for example, inserting a picture hook, painting a wall or installing handrails around the house to assist elderly people);**

- **Notice must be given to the strata committee before changes are made to common property inside a lot that are not minor or cosmetic (for example, refitting a bathroom or installing recessed light fittings); and**

- **Owners corporation approval is needed for all renovations that change the external appearance of the lot, are structural or permanent, that require development consent or are likely to have a significant impact on the amenity of other residents (for example, installing hardwood floors,**

knocking out an internal wall, installing air conditioning unit, or installing access ramps to the front door).'

In order for this reform to operate correctly and in particular for it not to result in increased litigation between lot owners and owners corporations, precise drafting will be required when implementing the reform. For example, there is obvious scope for divergence of opinions on what would have a "significant impact on the amenity of other residents".

'2.10 Amend the definition of "structural cubic space" so that it provides a more effective statutory easement for pipes, wires and other services that run through lots and common property.'

'2.11 Allow an easement to be created without the need for a special resolution where the easement benefits the common property and does not impose any obligation on the owners corporation.'

'2.12 Provide that when an owner/resident causes damage to the common property, the owners corporation may seek an order from the Tribunal requiring the damage be rectified or to recoup repair costs.'

'2.13 Provide certain new exceptions from the obligation on the owners corporation to maintain common property, including when damage is subject to a claim against a builder or an owner/resident, or when the building is the subject of a collective sale/renewal plan.'

We have concerns about this reform, particularly with the concept of maintenance being deferred, pending other matters being pursued, such as pursuit of a claim against another party or completion of a collective sale/renewal plan. Failure to attend to maintenance issues can greatly increase their scope and can pose safety concerns.

'2.14 Establish process, similar to those that exist under residential tenancies law, for dealing with abandoned goods.'

'2.15 Enable an owners corporation to lease a strata lot within the scheme or to lease non-contiguous land outside of the scheme, provided it is 'relevant' to the scheme.'

'2.16 Provide that a registered Building Management Statement remains in place if a part of the building is subdivided by a strata plan. There will be no need for registration of a further Strata Management Statement.'

'2.17 Require all new strata and building management statements to provide for allocation of the cost of shared facilities and to disclose the cost apportionment method used to allocate shared expenses.'

This represents a lost opportunity to provide for review of existing and future arrangements, no provision currently being made for such review.

'2.18 In a staged strata scheme, enable a strata development lot to be subdivided by a further strata development lot.'

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Budgets and levies

'3.1 When registering a scheme, unit entitlements must be determined based on an independent valuation.'

'3.2 Require realistic levies to be set in the initial period and for the first year after the initial period ends. The budget is to account for the supplied maintenance schedule.'

This is a significant amendment, giving an owners corporation increased rights against a developer if it can be demonstrated that the developer used its influence to set unrealistically low levies in order to facilitate sales. In practical terms, the owners corporation can obtain compensation if the Tribunal determines that the budget and levy amounts were not adequate, taking into account various matters.

'3.3 Require schemes to identify how the 10-year sinking fund plan will be funded.'

This is another significant reform, tightening owners corporation's obligations in relation to funding of the sinking fund plan.

'3.4 Require strata committees to prepare and distribute key financial information (one page) to all owners ahead of each Annual General Meeting.'

This is a useful measure, but no substitute for proper consideration of full financial statements, which will remain available.

'3.5 Schemes with an annual budget of more than $250,000 to have their accounts audited each year.'

'3.6 Allow for income earned by a scheme and any special levy to be paid into either the administrative fund or sinking fund.'

This is another useful measure, reducing unnecessary accumulation of funds in the sinking fund.

'3.7 Establish a stepped process to allow schemes to recover outstanding levies, including by seeking an order in the Tribunal.'

This reform proposes various measures by which owners corporations ability to recover arrears levies will be enhanced. This is a welcome measure, as recovery of arrears levies is a constant problem for owners corporations, the cost of which ultimately falls on other owners. However, there are some practical difficulties with the proposal, including as to how an order of the Tribunal would be enforced. Presumably, the matter would need to be pursued in the Local Court, which appears inconsistent with one of the apparent objectives of the review, being to reduce the involvement of the courts and to increase the involvement of the Tribunal.

By-laws

'4.1 Establish broad principles in the Act for the setting of by-laws, including that they cannot be unreasonable, oppressive or discriminatory.'

'4.2 Require the secretary of a scheme (or delegated strata managing agent) to keep a consolidated set of the by-laws and require a consolidated set to be lodged with the Registrar General each time an amendment is made.'

This could be a considerable task for some owners corporations which have had numerous amendments to their by-laws.

'4.3 Require schemes to review their by-laws and consider whether any changes are needed within 12 months of the legislation coming into force.'

'4.4 Allow schemes to voluntarily adopt a charter that outlines the 'spirit' of the strata community.'

This is an unnecessary amendment, reflecting the current law.

'4.5 Amend the current residential model by-laws to deal with the impacts of cigarette smoke on other residents.'

This is an unnecessary amendment, reflecting the current law.

'4.6 Amend the current residential model by-laws to require owners corporation approval to install wooden or other hard floors (other than in a kitchen or bathroom).'

This is an unnecessary amendment, reflecting the current law.

'4.7 Amend the current residential model by-laws to allow pet ownership with permission, which can not unreasonably be refused and also provide that certain small pets can be kept without permission.'

This is an unnecessary amendment, reflecting the current law.

'4.8 Provide that schemes can adopt a by-law to limit the number of people who can occupy lots on an ongoing basis.'

'4.9 Clarify that ignorance of the by-laws does not constitute a defence in the Tribunal.'

'4.10 Provide that if a by-law has been repeatedly breached and the Tribunal has previously imposed a penalty in the last twelve month period, that the owners corporation can apply directly to the Tribunal for a further penalty without having to issue a new notice to comply or undertake mediation.'

'4.11 Increase penalties for by-law breaches to give the Tribunal scope to escalate penalties for repeat offences.'

This is a significant reform, addressing the difficulty experienced by owners corporations in enforcing by-laws.

'4.12 Provide that penalty payments are to be payable to an owners corporation rather than to the Commissioner for Fair Trading and provide that penalties owed by an owner can be added to the owner's levy account.'

This is a significant reform, addressing the difficulty experienced by owners corporations in enforcing by-laws. Reform 4.11 and this reform 4.12 present a significant opportunity to enforce by-laws which have not in the past been practical to enforce.

'4.13 Amend the Conveyancing (Sale of Land) Regulation 2011 to require that a copy of all registered by-laws (not just exclusive use by-laws) must be annexed to the contract for sale of land. Both landlords and their agent will be responsible for ensuring a copy of the by-laws is provided to tenants.'

'4.14 Establish a regulatory framework that allows schemes to better manage disputes about parking, including establishing conditions of use and arranging for penalties to be issued for non-compliance.'

This is a significant reform, addressing the difficulty experienced by owners corporations in this area.

Managing disputes

'5.1 Recognise internal dispute resolution mechanisms within schemes in the Act.'

'5.2 Further encourage attendance by parties at mediation by allowing the Tribunal to issue cost orders against the party that does not attend.'

'5.3 Remove certain provisions relating to Tribunal processes and how matters are heard from the strata law and include them in the Consumer, Trader and Tenancy Tribunal Act 2001. Ensure greater consistency between the strata law and the laws governing the Tribunal.'

'5.4 Establish a duty advocate service to assist parties in preparing for mediation sessions and Tribunal hearings.'

'5.5 Extend the Tribunal's jurisdiction to deal with the majority of strata disputes, including actions to recover outstanding levies.'

'5.6 Enable the Commissioner for Fair Trading to issue penalty notices for appropriate offences under the Act.'

'5.7 Remove the assumed right to legal representation in mediation and in the Tribunal. Instead allow parties to apply for leave to be legally represented, consistent with Tribunal legislation.'

Lawyers can currently appear in the Strata Division of the Tribunal on behalf of owners and owners corporations without leave needing to be obtained. In the Home Building Division of the Tribunal, leave can only be sought in matters where the disputed amount exceeds $30,000.

The proposed amendment will remove this right and lawyers will have to seek leave to appear. However strata disputes can be very complex , involving many difficult areas of law. Owners corporations could be represented by trained and knowledgeable strata managers, who are intimately acquainted with the legislation or by legally trained lot owners or executive committee members. It is arguably unfair in situations such as these that a lot owner is not entitled to be legally represented.

'5.8 Provide additional options for resolving dysfunction in schemes, including enabling Tribunal orders to remove persons from strata committees, require new elections of office holders, limit the matters that committees can make decisions about, put certain decisions of the committee to a vote of the owners corporation, and require self managed schemes to appoint their own agent.'

This is another significant reform, addressing a problem frequently experienced by owners corporations.

'5.9 Enable a summons or other legal process to be served on the owners corporation by post to the address recorded in the Register folio.'

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