Strata schemes in 2004 - the further issues

DISCUSSION PAPER

NSW GOVERNMENT
August 2004
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1. **BACKGROUND TO 2004 REVIEW**

The strata schemes management and related laws in NSW have been undergoing some examination and refinement in recent years. This followed a National Competition Policy (NCP) review of the *Strata Schemes Management Act 1996 (the 1996 Act)* during 2000 and 2001 and public consultation on a Government Issues Paper *Living in Strata Developments in 2003* which was released in May 2003.

Amendments to the *1996 Act* were passed by Parliament in November 2002 following the NCP review. These changes dealt mainly with caretaker contracts, proxy voting by caretakers and strata managing agents and the use of priority voting rights by mortgagees.

The *Living in Strata Developments in 2003* Paper covered a wide range of issues on which the Government sought public input including issues confronting large high-rise schemes, more sophisticated planning for sinking fund needs, the powers of executive committees, the process to terminate strata schemes and interpretation of common property. The Paper also included the recommendations from the NCP review that were not incorporated in the 2002 amendments. A public consultation process on the Paper was carried out during the May – October period of 2003.

Following this consultation, the *Strata Schemes Management Amendment Act 2004* was passed by the New South Wales Parliament. This Act includes amendments relating to:

- Large schemes (100 lot plus)
- Sinking fund planning
- Commencement of legal action by owners corporations
- Powers of executive committees
- Documents required to be handed over by developers to owners corporations
- Fire safety inspection access
- Transfer of managing agency arrangements
- Alteration of common property
- Streamlining of mediation of disputes
- Disclosure by vendors of exclusive use by-laws in place

However a number of matters require further analysis and this is the reason for this latest Paper – to further consult on possible options to address the remaining concerns and to also seek public comment on several other issues that have arisen in connection with strata schemes and related matters.
Profile of NSW strata schemes
As at 9 June 2004, there were 59,797\textsuperscript{1} strata schemes in NSW. By size category:

- 28% were 2-lot schemes
- 24% were 3-5 lots
- 24% were 6-10 lots
- 15% were 11-20 lots
- 7% were 21-50 lots
- 1.4% were 51-100 lots
- 0.6% were over 100 lots.

\textsuperscript{1} Figures provided by NSW Department of Lands
2. SYNOPSIS OF 2003 REVIEW

In response to the Paper *Living in Strata Developments in 2003*, submissions were received from 113 individuals and organisations as per the following charts.

**Categories of persons/organisations making submissions**

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals</td>
<td>44%</td>
</tr>
<tr>
<td>Strata Managers &amp; Real Estate Agents</td>
<td>12%</td>
</tr>
<tr>
<td>Owners Corp &amp;/or Office Bearers</td>
<td>18%</td>
</tr>
<tr>
<td>Lawyers</td>
<td>6%</td>
</tr>
<tr>
<td>Developers</td>
<td>4%</td>
</tr>
<tr>
<td>Miscellaneous (ie Govt, Assocs &amp; Organisations)</td>
<td>16%</td>
</tr>
</tbody>
</table>

**Location of submission-writers**

<table>
<thead>
<tr>
<th>Location</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Sydney Metro</td>
<td>81%</td>
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<tr>
<td>Outside Sydney Metro</td>
<td>9%</td>
</tr>
<tr>
<td>Unknown</td>
<td>10%</td>
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</table>
While a consensus view emerged on a number of issues, and these were subsequently provided for in the *Strata Schemes Management Amendment Act 2004*, it became clear that further consultation was required on a number of matters before a final position could be determined. The matters that were not possible to resolve in the first round of consultations proved to be:

- Revised process for the termination of schemes
- Issues surrounding the basis of the design and quality of strata building construction
- Installation and assessment of fire safety measures in strata buildings
- Separate category of manager for large schemes
- Modernisation of the by-laws
- Uncertainties over defining common property

Also, a number of other matters have been identified as warranting consideration and consultation:

- The wider application of new sinking fund requirements
- “Seed” funding of owners corporation sinking funds
- The number of persons permitted to occupy residential strata units
- Use of proxy votes
- Community schemes issues
- Access to strata buildings by emergency services

3. **RECENT LEGISLATIVE REFORMS**

Substantial reforms to the strata laws have been made recently, or are in the process of being made, in response to ongoing review of the legislation.

**2003 Reforms**

Legislative amendments came into effect on 10 February 2003\(^2\) on the following matters:

- **Caretaker/building manager contracts**
  - Caretakers specifically defined
  - Maximum period of contracts able to be entered into between owners corporations and caretakers fixed at 10 years
  - A caretaker contract entered into before the first annual general meeting only able to last until that meeting
  - Caretakers not able to transfer the contract to another person without the consent of the owners corporation
  - Disputes over caretaker contracts able to be heard in the Consumer, Trader and Tenancy Tribunal
  - Disclosure of the name of any caretaker already appointed to be in the information disclosed to a prospective purchaser

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\(^2\) via the *Strata Schemes Management Amendment Act 2002*
Proxy voting
- Proxy votes held by a strata managing agent, a caretaker or an on-site property manager not able to be used to enable a financial or material benefit to be obtained by such a person
- All proxies, no matter when given, to have a maximum life of 12 months or 2 consecutive annual general meetings

Priority voting of mortgagees
- Use of priority vote limited to motions relating to insurance, budgeting or fixing levies, special or unanimous resolutions, expenditure above $200 times the number of lots in the scheme
- 2 days’ notice to be given to the lot owner if the mortgagee intends to exercise the priority vote

2004 Reforms
A large package of reforms, as outlined in Chapter 1 of this Paper is included in the Strata Schemes Management Amendment Act 2004 which has been passed by Parliament but not yet commenced. These matters are the remaining issues from the National Competition Policy review that were not dealt with in the 2003 reforms and matters that arose from the consultation associated with Living in Strata Developments in 2003. In brief, the amendments provide for:

Large schemes
Provision is made for special rules for the operation of schemes with 100 lots or more including:
- mandatory annual auditing of accounts
- at least 2 quotes to be obtained for items of higher expenditure
- limiting expenditure of large scheme executive committees to no more than 10% above budget on specific items
- personal notice to be given to all owners about upcoming executive committee meetings and decisions from the meetings
- proxies to be lodged at least 24 hours before any meetings

Sinking funds
- All new schemes will be required to prepare and budget for 10-year sinking fund plans for the life of the scheme
- The plan will have to be regularly reviewed (at least each 5 years)
- Outside assistance may be used by owners corporations in the devising of their sinking fund plans

Alteration of common property
- Owners corporations are given specific power to add to or alter common property or to allow owners to do so
- By-laws giving responsibility for the upkeep of the altered common property to be made

Records of owners corporation
- All records to be kept for 5 years
Managing agents
- Appointment of managing agents by adjudication process streamlined
- The functions of owners corporations that can only be delegated to managing agents clearly specified

Commencement of legal action
- When legal action is contemplated by the owners corporation, all lot owners are to be given the estimated costs and the opportunity to vote on the matter

Executive committees
- There will be a mandatory item on the agenda of each annual general meeting of owners corporations on whether any decision-making restrictions are to be placed on the executive committee
- It will be made clear that the owners corporation is the superior body to the executive committee
- The owners corporation will have a clear power to dismiss its whole executive committee

Fire safety inspections
- Owners corporations will be responsible for organising access for fire safety inspections
- Adjudicators will have the power to make orders to provide access for fire safety inspections

Transfer of management
- Strata managing agents will not be able to transfer the management to another managing agent without the consent of the owners corporation concerned

Documents from developers
- The list of documents that have to be handed over by the developer to the owners corporation at the first annual general meeting is extended and the penalties for not complying are made more severe

Mediation
- More flexibility given to the Registrar to decide which matters must go to mediation prior to adjudication
- Mechanism provided for more mediated settlements to be made into formal orders that could be enforced

By-laws
- Copies of by-laws which grant exclusive use of common property to others in the scheme to be attached to contract of sale given to a prospective purchaser
Retirement villages (that are strata schemes)
- Information required to be disclosed to a prospective retirement village resident to include the amount of the strata levies

4. ISSUES FOR DISCUSSION

THE FURTHER ISSUES

4.1. TERMINATION OF SCHEMES MECHANISM

This matter was raised in Living in Strata Developments in 2003. Of the 113 submissions received in response to the Paper, 30 included comments on the termination process issue. Analysis of the submissions revealed that views were evenly split between those who argued that the current provisions which require a unanimous vote before a scheme can be terminated by resolution of the owners corporation were appropriate, and those who considered that the current provisions were too onerous and should be relaxed. [It should be noted that the legislation currently also allows for the Supreme Court to make an order terminating a strata scheme where the Court considers it appropriate].

There was an obvious polarisation of opinions on the basis of whether people thought that the individual rights of lot owners who did not want to move were paramount, or the betterment of the community through redevelopment of land on which a run-down building stood, was the more important issue.

As no clear way forward emerged from the first round of consultation on this matter, further examination of the available options has been included in this later Paper.

ALTERNATE MECHANISM FOR TERMINATION OF A STRATA SCHEME

A series of snapshots taken in any city or town throughout New South Wales over the last 100 years would reveal a continual process of urban development and renewal. Buildings have been refurbished and extended while others have been demolished to make way for newer developments. Whilst redevelopment was relatively easy when land was less scarce it has become increasingly difficult in our more densely populated urban areas. The problem is exacerbated where strata schemes are involved. Once a building is subdivided by a strata plan numerous owners acquire an interest in the building in place of the original one or two owners.

Add to this the problem of deteriorating buildings in need of refurbishment and a genuine difficulty becomes evident. Many strata buildings are reaching the end of their useful life. A building may be in serious need of repair and
unsightly or impracticable but to demolish or redevelop it requires the unanimous approval of the strata unit owners.

As already noted, this issue was raised in the previous issues paper, Living in Strata Developments in 2003. This Discussion Paper proposes to canvas the ways by which a strata scheme might be terminated with less than unanimous support whilst protecting the interests of the minority objectors. Three alternative methods of terminating a strata scheme have been suggested. These are:

1. Use the current method of termination by the Registrar General but simply reduce the percentage vote required to initiate termination;
2. Introduce a new process of collective sale based on the model used in Singapore;
3. Introduce a procedure by which strata owners can participate in the redevelopment of their strata building through the use of a renewal plan as proposed by the Property Council of Australia.

What level of support should be required to initiate termination?

Before considering each of the three alternative methods of termination proposed, consideration should be given to the appropriate level of support that would be required to initiate termination or redevelopment of a scheme.

The percentage vote required would need to be set at a level that balanced the rights of owners with the need to introduce more flexibility into the termination process. If the percentage required is too high many desirable terminations will continue to be frustrated. If the percentage is too low there will be insufficient protection for unit owners.

Currently the legislation makes provision for the use of a special resolution in connection with significant issues where a simple majority vote would be inappropriate. A special resolution requires that no more than ¼ in value of votes may be cast against a motion (effectively a 75% vote in favour). It may be appropriate to reduce the threshold vote required to approve a termination from a unanimous to a special resolution.

Alternatively, a new standard of resolution could be introduced. In some of the North American jurisdictions that allow for termination with less than unanimous approval, a threshold of 80% is used. Given the significance of a vote to terminate a scheme it may be desirable to require a higher standard of support than a special resolution. Where a motion is put to terminate or redevelop a scheme it may be more appropriate to require 80% support based on value of votes.

It has been suggested that a different percentage should apply depending on the age of the building. The percentage may be, say, 90% for buildings under
10 years or 80% for older buildings. It is unlikely that a scheme would need to be terminated within the first 10 years of its life unless there were compelling reasons to do so. Consequently, there may be little merit in prescribing a different percentage depending on the age of the building.

Consideration will also need to be given to the voting requirements applicable to a vote on termination. Will the usual provision apply which allows only financial members to vote or is it of such importance that a vote should be allowed whether or not a person is up to date with levies? The ability of a mortgagee to use priority voting rights in relation to this issue also requires consideration.

**Alternative methods of Termination**

1. **Termination by the Registrar General with less than unanimous approval of lot owners**

   This option would involve the least change to the current system of strata termination but would reduce the level of protection for the minority owners. The Registrar General would continue to process applications for termination of a strata scheme in accordance with s51A of the *Strata Schemes (Freehold Development) Act* however an application could be initiated with less than the unanimous resolution of the owners corporation.

   The provisions within s.51A dealing with the signing of the application would also need amendment. An application for termination is currently required to be signed by:-

   a) each proprietor of a lot in the scheme;
   b) each registered lessee of a lot; and
   c) each registered mortgagee.

   Unit holders not supporting termination of a scheme are unlikely to cooperate in the formal process of termination. If, however, it were possible to simply dispense with the requirement for the objecting owners to sign the application the objecting owners would have no opportunity to ensure that the termination process was undertaken with propriety and in accordance with the resolution passed.

   One possibility might be to require the Application to be signed by all proprietors, mortgagees and lessees but with the Registrar General having the power to dispense with a particular signature following service of an appropriate notice. This would at least ensure that all owners were aware that the Application for Termination had been lodged.

   Another problem arises with the issue of titles following termination of a scheme. A certificate of title will issue for the parcel in the names of all lot owners as tenants in common in shares equal to their unit entitlement. Unless there is a great deal of cooperation and goodwill between all of the registered
proprietors it would be very difficult to proceed with redevelopment of a site with so many separate owners involved. It would be an extremely complicated task to coordinate all owners and their mortgagees to arrange even the sale of the strata parcel let alone the redevelopment of the site.

The process of termination by the Registrar General is a good one but it is best suited to situations where all owners in a small strata development agree on termination. There is no scope in the provisions for the interests of minority dissenting owners to be properly overseen. Furthermore, the procedure offers no assistance with the redevelopment or resale process and would therefore not encourage many more terminations than at present.

2. **Collective Sale**

Another alternative for termination that provides a more guided approach has been adopted in Singapore. Recent amendments to the Singapore strata legislation make provision for a resolution to be passed by unit holders approving the sale of all units and common property to a purchaser. The whole process is overseen by a Strata Titles Board to guarantee transparency and ensure that the interests of the minority are properly considered.

To initiate a collective sale, or en-bloc sale as it is termed, an extraordinary general meeting would be called to consider the sale proposal. The proposal must be supported by the owners of 90% of the share values if the development is less than 10 years old or 80% if the development is 10 years old or more. The majority owners are then required to appoint no more than 3 owners to represent them in connection with the application.

A valuation report of the whole development is to be obtained. As part of the valuation the valuer is to provide a report on the proposed method of distributing the sale proceeds.

The majority unit owners are required to advertise particulars of the proposed sale and termination of the strata scheme in a local newspaper. Among other things the advertisement is to contain brief details of the sale proposal and will identify a place at which affected parties can inspect the documents for the en-bloc sale.

Notice of the proposed application to the Board for approval of the sale and termination is then to be given. Notice is to be served by registered post on all unit owners as well as every mortgagee and chargee. The notice is also required to be placed under the main door of every unit. In addition, a copy of the notice is to be affixed to the main door of the units whose owners have not agreed in writing to the sale.

The application for approval of the en-bloc sale is to be lodged with the Board within 14 days of the publication of the advertisement. The application must be accompanied by the following:

i) a copy of the advertisement;
ii) the sale and purchase agreement;
iii) a statutory declaration made by the purchaser containing details of his or her relationship, if any, to the unit owners;
iv) the valuation report;
v) the report by the valuer on the proposed method of distributing the sale proceeds;
vi) minutes of the extraordinary meeting at which the proposed sale was approved;
v) a list of the names of the unit owners who have not agreed to the sale in writing plus their mortgagees and chargees.

A copy of the application is also to be lodged with the Singapore Land Registry.

A unit owner who has not agreed, in writing, to the sale can lodge an objection with the Board within 21 days from the date of the notice. The Board will then forward a copy of the objection to the representatives of the majority owners.

Before approving an application the Board must be satisfied that the transaction is in good faith taking into account:–

i) the sale price of the whole development;
ii) the method of distributing the sale proceeds; and
iii) the relationship of the purchaser to any of unit owners (eg whether the relationship is a family or commercial one).

If objections have been filed against the application the Board will not approve an application if it is satisfied that:

1) the unit owner who objects to the sale will suffer a financial loss; or
2) the sale proceeds to be received by a unit owner or mortgagee will be insufficient to redeem any mortgage or charge secured against the unit.

In addition the Board will not approve an application if the sale agreement requires any unit owner who has not agreed in writing to the sale to be a party to any arrangement for the redevelopment of the property.

Where the Board approves an application an order will be made that will be binding on all unit holders and their mortgagees and chargees. Under the order the unit owners must sell their lot in the strata plan to the purchaser in accordance with the sale and purchase agreement. They must produce the certificate of title and any other relevant documents to the representatives appointed by the majority owners for the purpose of the sale. Presumably, if a unit owner refuses to sign or refuses to produce the certificate of title alternative arrangements can be made.
The en-bloc sale procedure used in Singapore offers a structured process by which a strata scheme can be terminated and the land sold to a purchaser. By requiring the application to be accompanied by the contract for sale, valuation and the purchasers statement as to any relationship with the unit owners the transaction is kept transparent. Whilst the Board should not be expected to determine commercial viability of a particular sale proposal the Board will be able to consider the valuation reports and ensure that the manner of proposed distribution of the sale proceeds is fair and reasonable. The Board will also be a safeguard to ensure that no unit owner will suffer a financial loss from the sale.

The Singapore process is aimed primarily at the situation where a strata building is sold as one block to a purchaser who will then redevelop the building without any further involvement with the previous unit owners. The process could, however, also be used where the purchaser proposed to redevelop the building in cooperation with the unit owners. The arrangements for vacation of the building by the unit holders, redevelopment, transfer of remodelled units and the division of any profits could be set out in the sale contract annexed to the application for sale and termination.

3. Renewal Plan

The proposal developed by the Property Council of Australia shares many of the features of the Singapore model but is primarily directed at the situation where a strata building is redeveloped, or “renewed” cooperatively between the unit owners and a developer.

To begin the process a notice of intention to prepare a renewal plan would be served on all interested parties. A renewal plan would usually be initiated by the owners corporation but would not be limited to it. A developer or prospective purchaser could also initiate a renewal plan. The notice would need to indicate who had initiated the process and would contain a general description of what might be achieved through redevelopment.

After notice has been served the renewal plan would be prepared. Ideally, during preparation of the plan there would be consultation between the owners corporation, the developer and the interested parties. The renewal plan would need to contain a description of the proposed redevelopment with enough detail for all of the relevant parties to properly consider the proposal.

Information would include such things as:

- details of work to be undertaken
- estimated cost of the work
- the parties responsible for payment of the works
- a timetable for completion
- details of the various consents required from the local council
- conditions to be satisfied before the strata scheme is terminated
• any relocation arrangements that may be necessary during redevelopment
• the manner in which liabilities are to be shared

After the notice period expires an application would be made to the “Strata Commissioner” to certify the renewal plan. The Property Council of Australia suggests that the certification would be procedural and the Commissioner would not be empowered to approve or disprove a Renewal Plan on its merits. The purpose of certification would only be to ensure that the Renewal Plan contained the required information so that owners were able to make a decision on the merits of the proposal.

Once the Renewal Plan has been certified by the Commissioner the owners corporation would be required to call a general meeting to vote on the proposal and associated termination. The Property Council of Australia suggests that a special resolution would be a sufficient level of support to accept a renewal plan and initiate termination. Whether this is sufficient support will depend on the issues canvassed earlier.

If a resolution was passed accepting the renewal plan the owners corporation would be required to buy out those owners who opposed the redevelopment and did not want to participate in it. Some procedure would need to be put in place to ensure that the objecting owners receive a fair price and are dealt with on fair terms (for instance, independent valuations could be required).

An application for termination of the strata scheme would be made to the Registrar General once all of the Renewal Plan conditions have been met. The required preconditions would have been set out in the Renewal Plan and might be satisfied when, for instance, development consent has been received in respect of the new development. The Application for termination would need to be signed by all owners plus registered mortgagees and chargees.

Following termination of the strata scheme the owners would hold the former strata parcel as tenants in common in shares equal to their former unit entitlement. After redevelopment is finalised the process would need to be completed by lodgement of a new strata plan.

The Renewal Plan is aimed at achieving redevelopment of strata buildings by the owners cooperatively with transparency at each stage of the process. The process is, however, more complex than the process suggested under the Collective Sale proposal. The complexity comes from the fact that the Renewal Plan is aimed at redevelopment of a site cooperatively by the owners whereas the Collective Sale proposal caters primarily for sale of a whole building to a developer. When comparing the Collective Sale proposal with the Renewal Plan, consideration should be given to which of the two redevelopment scenarios is most often likely to occur.

**Issue 1. Is there a better way of providing for the termination of strata schemes than the laws currently provide?**
4.2 DESIGN AND QUALITY OF BUILDINGS ISSUES

The initial discussion paper made reference to the Parliamentary Inquiry into the Quality of Buildings (the Campbell Inquiry) which concluded that system reforms are required to address the identified issues. The identified issues included:

- the community perception that there are significant problems with new residential building construction, including strata title residential developments;
- building certification; and
- building standards.

The paper also advised that most of the Campbell Inquiry recommendations for resolving the identified issues had been acted upon.

Notwithstanding, the paper sought to promote discussion and comment on certain aspects of the building control system under the Environmental Planning and Assessment Act (EP&A Act).

The first was in relation to building certification standards, in particular the standards expressed in the Building Code of Australia (BCA).

The BCA

The paper explained the role of the BCA in the building control system. That is, it is principally a technical design and construct standard for new buildings and new building work (alterations and additions to existing buildings). It is the standard against which this work is assessed.

It also explained that the BCA is a performance based document which allows for one of either two compliance paths to be followed when approval for building work is sought. That is, comply with the Deemed-to-Satisfy (DTS) Provisions of the BCA or, develop an Alternative Solution that complies with the BCA’s prescribed Performance Requirements.

The validity of a building design based on compliance with the DTS Provisions is defined by the building classification system under the BCA.

There are 10 principal BCA building classifications (and some sub-classifications) and these are based on the use of the building. Use reflects, among other things, the degree of hazard and risk, and the needs of the occupants.

Hence most building control systems operating in Australia require that approval be obtained for any proposed change of use involving a change of BCA classification and, that the approval authority give consideration to the impact on existing levels of (fire and structural) safety by the proposed use change. Also, most building control systems require authorities to consider impacts on safety levels in existing buildings when approval is sought for alterations or additions.
The validity of Alternative Solutions on the other hand, can sometimes be defined by different boundary conditions to the BCA classification system. Alternative Solutions under the BCA can range from simple to complex matters. Complex Alternative Solutions are usually specifically designed for a particular building. Some might therefore be justified on specific assumptions such as a limited fire load, a limited building occupancy, an emergency evacuation plan, and/or other unique fire safety measures, being in place at all times.

For example, an Alternative Solution might propose that a sprinkler system not be provided in the car park under a residential strata development, contrary to what is required by the DTS Provisions of the BCA, subject to the fire load (i.e. combustible goods stored) in the car park being limited.

Alternatively, an Alternative Solution might propose that an extended travel distance be allowed provided, among other things, an emergency evacuation plan and other fire safety measures are in place.

The concern that arises is that subsequent changes to a building, or failure to maintain (keep in place) the design/approval assumptions, may mitigate or negate the effectiveness of the Alternative Solution.

Of course physical building changes, and building changes of use, generally require approval before they are carried out.

Also, the law relating to maintenance of essential fire safety measures under the EP&A Regulation requires all fire safety measures on which a building is reliant to be listed in a fire safety schedule, and for copies of this schedule to be given to the council and the NSW Fire Brigades, and displayed in a prominent position in the building. The law also requires the operational performance of these measures to be continually maintained.

It should be noted that the above only applies to buildings captured by the legislation whenever any of the prescribed regulatory triggers are activated. It does not apply to all existing buildings.

However, not all in the community are cognisant of building law and the responsibilities it imposes and hence building changes/lack of maintenance may occur in ignorance. The risk of this occurring increases as time progresses and ownership changes.

Records of building approvals and their design/approval basis are held by councils and this information can be accessed if requested (although this information would have to derived from several documents in the approval file). However, although the person acting on the building approval may be aware, this information is not required to be conveyed to others who should be aware (for example, purchasers of strata title units, subsequent purchasers, and prospective purchasers).
The question raised for discussion in the initial discussion paper was therefore whether owners should be advised of the design basis for their building if it incorporates an Alternative Solution, and how much information should be conveyed.

It is apparent from the submissions that there was a high level of agreement that owners should be made aware. Only 2 respondents disagreed, indicating that provision of this information complicated building management.

As already indicated, the fire safety schedule is required to list all essential fire safety measures serving a building. This includes scope to include not only items of fire safety equipment but also assumptions or limitations critical to the effectiveness of a fire safety Alternative Solution.

The fire safety schedule should therefore be the medium by which owners (current and future) and prospective purchasers can determine whether the design of their building incorporates an Alternative Solution. It may however, require a degree of expertise.

The fire safety schedule is required by regulation to contain certain information. Possibly this needs enhancement and to be made more specific if the design of the building incorporates a fire safety Alternative Solution. Also, there may be a need to better educate practitioners regarding the information required to be contained in the fire safety schedule.

The fire safety schedule is also required by regulation to be displayed in a prominent position in the building. This is being interpreted on some occasions to mean that it can be displayed in, for example, a fire control room out of sight from the public eye. Possibly there is a need for a regulation change to require display in a prominent position readily accessible to the public - where all who visit the building can view the schedule. Also, other means for ensuring information regarding fire safety Alternative Solutions and the responsibilities in connection with the information to be relayed to owners and prospective owners may need to be considered.

**Issue 2:** With regard to quality of building issues, what other means are there for conveying information regarding Alternative Solutions to owners and prospective owners? What is the best mechanism for retaining this information and ensuring it can be readily accessed?

### 4.3 FIRE SAFETY (INSTALLATION AND ASSESSMENT) ISSUES

Once a new building or new building work is complete the responsibility for ensuring the building is kept safe for those who enter or use the building rests primarily with the building owner. This is a common law responsibility, and there are responsibilities under the Occupational Health and Safety legislation.
The law relating to the maintenance of essential fire safety measures under the *Environmental Planning and Assessment Act* simply serves to reinforce these responsibilities - with its particular focus being on building fire safety.

The *Living in Strata Developments in 2003* Paper explained the role of this legislation, and the legislative role and responsibilities of the building owner.

A strata scheme is made up of the individual lot owners who together comprise the owners corporation. The make-up of the owners corporation changes with the passage of time. To begin with, the owners corporation is usually the developer (referred to in the *Strata Schemes Management Act* as the “original owner”). As people buy into the scheme, the owners corporation begins to have more and more “members”. Unless wishing to retain ownership of any of the lots, the developer usually ceases to have any further involvement in the owners corporation once all lots have been sold.

In a strata scheme, the individual lot owners effectively have title to individual airspace. They share common property areas of the complex with the other owners. The “owner” of the building, land and other shared items is the owners corporation. The owners corporation has the responsibility to maintain the building and keep it insured.

Amendments passed in the *Strata Schemes Management Amendment Act 2004* (new section 65C) make it clear that the owners corporation, rather than the individual lot owners, has the responsibility for providing access to the relevant authorities for fire safety inspections. There is a penalty of up to $2,200 for failure to provide access. However, the owners corporation has a defence to a prosecution if it is established that an individual lot owner or occupier refused to allow access to a private lot within the building.

The purpose of the fire safety legislation is to increase the level of confidence that the measures upon which a building is reliant for providing an adequate level of fire safety, will perform to the level expected should a fire eventuate.

The law requires owners to, at least once each year, certify by way of a fire safety statement that their essential fire safety measures have been assessed by an appropriately qualified person, and that person found them to be capable of performing to the required standard. A copy of the statement must be submitted to the council and the NSW Fire Brigades, and a copy must be displayed next to the fire safety schedule in the building.

The law does not prevent owners from carrying out the assessment themselves if they are appropriately qualified to do so. However, this is not always likely to be the case, and therefore they will choose to rely on an appropriate expert or experts.

Expertise is not always a readily apparent quality, and fire safety measures can be complex, hence the previous paper questioned whether the persons relied upon by owners should be accredited or registered?
The submissions indicated very strong support for this proposal.

A possible means for implementation of accreditation is via the Department of Infrastructure, Planning and Natural Resources’ Building Professionals Board. The Building Professionals Board currently administers one of four State Government approved schemes for accrediting building certifiers. That is, practitioners who issue construction, complying development, occupation, compliance or subdivision certificates. The Building Professionals Board will eventually be made responsible for accrediting all building certifiers for NSW and may be expanding its role to accredit other types of building practitioners.

The Building Professionals Board could therefore be approached to consider as part of its expanded role, accrediting fire safety practitioners relied upon by building owners to conduct assessments of their essential fire safety measures.

This however, may not be a simple task and may not be achievable in the short term.

At present, considering the variation of measures which can collectively be called essential fire safety measures, there is no course available through tertiary education establishments which can academically qualify a person in relation to all types of fire safety measures at all levels of complexity. It should be noted that technical expertise alone will not suffice. The practitioner should also have a detailed knowledge of the legislation, and other competencies.

Also, there are no courses specifically devoted to qualifying practitioners with particular expertise (for example, sprinkler systems) to undertake this role.

It is understood that the fire protection industry is taking steps to develop curricula however, this may not be available for some time.

A possible interim step may be to accredit persons to manage on behalf of owners, the processes of organising assessment and certification of essential fire safety measures. These persons could be drawn from the pool of current accredited building certifiers. However, they would need to be assessed for their competence to fulfil this role.

The issue raised in the initial discussion paper relating to maintenance of essential fire safety measures and the difficulty of accessing individual residential strata lots for the purpose of conducting assessments (eg smoke detectors) has been addressed by the amendments to the Strata Schemes Management Act.

The EPA legislation is silent regarding the arranging of access for fire safety assessments. It simply requires owners to submit routine fire safety statements to the local council verifying that each essential fire safety measure serving the building has been assessed by an appropriately qualified person and been found by that person to be capable of working to the
required standard of performance. As previously mentioned, copies of the fire safety statement must also be submitted to the NSW Fire Brigades, and displayed in the building (next to the fire safety schedule).

A problem is that if access is not available for an assessment to be carried out, then the required fire safety statement can not verify what is required to be verified by the due date. The owner's corporation may then be subject to a penalty and/or prosecution for not fulfilling its legislative responsibilities. Failure to provide an annual fire safety statement on time constitutes a separate offence for each week beyond the expiry of that time until the statement is submitted.

The EPA legislation requires that assessments of essential fire safety measures by the appropriately qualified person be conducted within 3 months prior to the issue of the statement. This however, may not be an adequate period of time if an occupier of a unit is away. It might be questioned whether the limitation of 3 months should be extended. If so, it would need to be determined what is a reasonable time period considering, if too excessive the fire safety statement may not reflect the current operational status of the measures certified.

Owners may approach the relevant council, advise of the difficulties they are experiencing and request an extension of time for compliance. The council however, may not agree.

**Issue 3: Are there any remaining fire safety assessment or access issues that need to be addressed in regard to strata schemes?**

**4.4 FIRE SAFETY MEASURES (POSSIBLE CONFLICT OF INTEREST)**

Before a new building or building work (including new fire safety systems in existing buildings) is occupied or used it is required that an occupation certificate be issued by the principal certifying authority (PCA).

Before that certificate can be issued the PCA must be satisfied that the works are satisfactorily completed.

What is needed to be satisfied in order for works to be considered to be complete, is specified under the Environmental Planning and Assessment Act.

This exercise necessarily entails relying on certification from others that fire safety systems have been installed to the necessary standards and have been satisfactorily commissioned (if the PCA is not sufficiently expert itself). The law encourages the use of compliance certificates for this purpose, as compliance certificates can only be issued by accredited certifiers independent of those who carried out the work.
Another pre-condition to the issue of an occupation certificate is that the PCA must receive a fire safety certificate from the building owner or the owner’s agent.

The fire safety certificate is the first certificate in the ongoing submission of certification responsibilities placed on owners under the fire safety maintenance legislation (discussed above). The next and subsequent certificates are referred to as fire safety statements.

The fire safety certificate, like the fire safety statement, can only be signed by the building owner or the building owner’s agent.

The fire safety certificate is of prime importance, particularly when dealing with existing buildings, as it will verify that both new and existing fire safety measures serving the building are capable of functioning in the event of a fire. The fire safety certificate is also the owner’s acknowledgement that they are aware of their maintenance responsibilities.

In order for an owner to be able to submit a fire safety certificate (or fire safety statement) the owner will in turn rely on certification from the appropriately qualified person(s) they have engaged to carry out the required assessment(s) of their essential fire safety measures.

The legislation currently places no restrictions on who that person may be and does not require them to be accredited. Hence, they may be the person who either designed or installed the measure.

This is not consistent with the requirements applied to building certifiers.

**Issue 4: Is there a need to educate building owners of their responsibility to ensure that all essential fire safety measures are assessed by a properly qualified person? Do any other measures need to be taken on this issue?**

### 4.5 LARGE SCHEME MANAGERS

The possible need for a new category of strata manager was aired in *Living in Strata Developments in 2003*. The issue raised for discussion in the Paper centred on the recognition that many large modern schemes had a mixture of financial, administrative and legal management responsibilities that were far beyond those likely to be encountered in the smaller suburban schemes that managing agents were familiar with. Questions left open for discussion included whether the necessary skills and experience for management of such large schemes should be more akin to those likely to be possessed by a Chief Executive Officer or Managing Director of a large company. Financial management of large budgets and dealing with the contractual, legal and insurance issues associated with such substantial enterprises were also cited as specialised functions that may be outside the scope of many licensed strata managing agents.
Since the issue was raised, legislation has been developed (the *Strata Schemes Management Amendment Act 2004*) which defines a large scheme as one comprising at least 100 lots [not counting parking and utility lots]).

Even though a range of comments was received on this issue following the release of *Living in Strata Developments in 2003*, a clear way forward has not as yet materialised. Among the suggestions made were that managers experienced in handling the administration of large schemes be separately identified and perhaps be given an alternate licence status to other managing agents. Others suggested that the qualifications and necessary education levels for managing agents administering the largest schemes should simply be at a higher level and that attaining increased professionalism of managers needed to be an ongoing aim.

Proposals have been received that the minimum level of qualifications for a large scheme manager need to be fixed by legislative means resulting in barriers to entry to the market for managers without the required competency levels. Another point of view was that only managers with access to support services from accountants, engineers, quantity surveyors and building consultants should be permitted to take charge of the 100 lot and over schemes. Another alternative was seen to be for an independent accreditation body to decide on which managing agents were adequately qualified to manage such schemes.

Another option might be for the relevant industry body to develop a pool of managers who would be available, and suitably skilled to be appointed take over the management of the largest schemes.

Whatever the answer is to the effective management of large schemes, either by the individual owners through their own management structure, or through the engagement of a professional person or persons to take on the complex range of responsibilities, it seems that there is a recognition that the current arrangements are sometimes unsatisfactory and alternatives need to be further examined.

The reforms included in the *Strata Schemes Management Amendment Act 2004* have to a certain extent placed a level of corporate governance on owners corporations connected to large schemes by requiring that:

- Annual accounts be professionally audited
- More than one quote be considered for items of higher expenditure
- Executive committees be prevented from commencing most legal proceedings on their own initiative
- Executive committees have expenditure limits
- All lot owners be personally notified of upcoming meetings of executive committees and the decisions made

Some parties may believe that enough has been done through the above legislative proposals to address any concerns over the operation of large
schemes and that the need for a specialised category of manager for large schemes is no longer such a pressing issue.

**Issue 5. Are there any better alternatives available for the effective management of large strata schemes? Are the provisions of the 2003 Bill enough to overcome concerns in this area or does the concept of specially qualified managers for large schemes need to be further pursued?**

### 4.6 BY-LAW MODERNISATION

While the overhaul of the strata management laws which occurred in the 1990s and led to the *Strata Schemes Management Act 1996* took account of the need for more flexibility\(^3\) in the types of by-laws adopted by owners corporations, concerns continue to be expressed over the relevance of some of the current by-laws in use.

Prior to the 1996 Act, there were two levels of by-law. Some were mandatory and others were optional. The reforms brought about by the 1996 Act incorporated the mandatory by-laws into provisions of the Act and the optional ones became separate schedules able to be amended, added to or deleted by the owners corporation concerned. Effectively, any owners corporation with concerns over the effectiveness of any by-law already has the available means to update and modernise by-laws to suit their needs. However, it appears that most owners corporations continue to select by-laws from the choices provided through the 1996 Act and there have been some calls for overhauling the by-laws available for selection.

The standard issues covered by the by-laws include:

- *noise and floor coverings*
- *car parking*
- *installation of security devices*
- *obstructing use of common property*
- *damage to common property*
- *behaviour of residents and invitees*
- *children’s activities*
- *drying of washing*
- *cleaning windows and doors*
- *moving furniture through common property*
- *floor coverings*
- *garbage disposal*
- *keeping animals*
- *appearance of the lot*

For strata schemes that are not residential developments there are also model by-laws that deal with:

\(^3\) model by-laws are provided under Schedule 1 of the *Strata Schemes Management Regulation 1997* for residential, commercial, mixed-use, industrial, hotel/resort and retirement village strata schemes
- provisions of amenities and services (retirement village schemes)
- prevention of hazards (industrial schemes)
- fire safety (hotel/resort schemes)
- hours of operation (commercial/retail & mixed use schemes)

The shortcomings of the current by-laws that are most often identified, relate to residential schemes in regard to:
- noise and floor coverings
- car parking
- drying of washing
- cleaning windows
- garbage disposal

The concerns that have been raised about the by-laws that some people see to be inadequate are:

**Noise and floor coverings**

The current standard by-laws on these issues provide that:
(a) residents must not make noise likely to interfere with the peaceful enjoyment of others in the scheme; and
(b) owners must ensure that all floor space (but not in kitchens, laundries, toilets or bathrooms) is covered or treated to an extent that will prevent the transmission of noise to other lots.

These two by-laws are difficult to consider in isolation. Noise problems arising from occupation of residential units are often accentuated by inadequate or inappropriate floor coverings.

The most common concerns raised about these by-laws is that they are too imprecise and that the floor covering issue in particular needs to be dealt with more firmly. For instance, it has been suggested that the type of material that floors are to be covered with should be clearly specified (eg carpet plus underlay), or the type of material that the floors may not be covered with (eg quarry tiles, slate) be spelt out. The need to have provisions to cater for the installation of “floating floors” and the associated acoustic considerations is another matter that has been raised. Also, the logic of the exclusion of certain rooms of the unit from the floor covering requirements is often questioned.

Some people believe that with the modern technology now available, by-laws could be as specific as defining the level of acceptable noise through the prescription of an allowable decibel level. In a similar manner, the specification of acceptable sound proofing materials has been suggested.

The transmission of tolerable noise from one unit to another in a strata scheme is a subjective matter. Some residents of strata schemes are troubled by it constantly whereas other accept it as part and parcel of living in a close community environment. Whether the strata by-laws can be adjusted to better deal with the issue is likely to be a matter of some conjecture. It may

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4 by-laws 1 and 14 of Schedule 1 of the Strata Schemes Management Act 1996)
5 A wooden surface installed over existing concrete, ceramic tile or particle board flooring usually on a foam underlay.
be that the problem is not so much the by-law itself but the mechanism for resolving disputes over noise when they arise. There is anecdotal information that persons causing disturbance to others through excessive noise often do not realise the extent of the problem until they experience it first hand. Examples have been raised where the person making the noise has been invited to the unit where the noise is heard so that they can gauge for themselves the discomfort that their neighbour endures. In addition to making by-laws relating to noise more workable, perhaps conflict over noise-related issues in strata buildings could be better managed.

Improved sound insulation provisions under the Building Code of Australia came into effect on 1 May 2004 and this will assist in minimising noise problems in future strata buildings. However, disputes over noise in existing buildings are likely to continue.

**Issue 6. How can the strata by-laws relating to noise and floor coverings be made more effective?**

**Car parking**

The parking of cars continues to be a prominent area of dispute within strata schemes. While the ability of owners corporations to deal with cars parked on common property without consent was widened through the provisions of the 1996 Act to allow the serving of “notices to comply”\(^6\), there are frequent representations made that even stronger powers are needed. This is of particular significance in congested urban areas where both public and private parking space is limited and where unapproved parking arrangements cause extreme annoyance and inconvenience to the scheme’s residents. Sometimes it is not only residents of the scheme itself at fault and some owners corporations have also to deal with illegal parking by members of the general community.

Some owners corporations and strata managers have called for drastically strengthened powers to deal with these frustrating problems including the powers to wheel-clamp or even tow away unauthorised vehicles parked on common property. While such activities are not permissible under NSW laws\(^7\), the need to provide owners corporations with more effective means under the by-laws to address the incidence of unauthorised car parking is regularly raised. The current standard by-law on parking provides that vehicles may not be parked on common property without the written approval of the owners corporation.

**Issue 7. How can the strata by-law about car-parking be made more effective?**

**Drying of washing**

This is another area of concern for many owners corporations and particularly, for other members of the community who object to the sight of clothing, bedding and other personal or domestic items being dried on the balconies of

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\(^6\) Section 45 of Strata Schemes Management Act 1996  
\(^7\) Local Government (Parking and Wheel Clamping) Act 1998
strata units in their local area. The standard by-law on this issue\(^8\) prevents washing being hung so that it can be seen from outside the building (other than on lines provided by the owners corporation for that purpose) unless the owners corporation has given written consent.

As with any other by-law breach, there is a power for the owners corporation to serve a notice to comply with the by-law on the person offending. However, anecdotal information indicates that the by-law is very often not enforced and breaches of the by-law are often not regarded as serious issues.

**Issue 8. How can the by-law relating to the drying of washing be made more effective?**

**Cleaning windows**

The standard by-law on this issue\(^9\) requires owners or occupiers of lots to keep all glass in the windows and doors clean, whether common property or not.

In most cases, the windows and doors of strata lots are common property so this by-law in effect passes over a common property maintenance function which would normally be that of the owners corporation, to residents.

In many ways, the by-law is an impractical one as it is usually impossible for a resident of a high-rise strata unit to gain access to the outside of the windows. In any case, the owners corporation would most likely take on this task as part of its building maintenance program.

While the by-law probably remains relevant for single level townhouse and villa developments, its application to many multi-level schemes would appear to be dubious. Retention of the by-law in its current form may have negligible value.

**Issue 9. How can the by-law relating to cleaning of windows be made more effective.**

**Garbage disposal**

The relevant by-law on this matter\(^10\) deals simply with residents keeping a garbage “receptacle” in an appropriate place, placing garbage in the receptacle and putting it out for collection. The by-law reflects garbage disposal methods of earlier times.

The collection and disposal of garbage has become a more sophisticated process since the strata by-laws on the issue were devised. Recycling, green waste disposal and automated collection systems have all come to the fore in recent years. With a greater community focus on environmental issues and the reducing availability of land within local government areas for waste

\(^8\) By-law 10, Schedule 1 of Strata Schemes Management Act 1996  
\(^9\) By-law 11, Schedule 1 Strata Schemes Management Act 1996  
\(^10\) By-law 15, Schedule 1, Strata Schemes Management Act 1996
disposal it is likely that owners corporations of the future will have to adjust to further changes in this area of responsibility.

**Issue 10. How can the by-law on garbage disposal be made more effective?**

**Summary of By-Law Issues**
An alternative approach to re-shaping these standard by-laws to make them more workable could be to remove them altogether and simply require owners corporations to deal with the issues as they see fit. In other words, owners corporations would have to have by-laws about noise, floor coverings, car parking, drying of washing, window cleaning and garbage disposal but there would be no specific guidance provided. Each scheme could mould the by-law to meet their circumstances.

**Issue 11. Should there be less emphasis on standard by-laws on these issues and owners corporations just be required to deal with the matters covered by the by-laws as they see fit?**

### 4.7 COMMON PROPERTY MATTERS

*Living in Strata Developments in 2003* explored the possibility of removing the uncertainty that continues to arise within strata schemes over which parts of the building are common property and which parts belong to individual lot owners. No issue raised in the Paper received a higher level of support than this one although there was a recognition in many of the submissions made that it would be difficult to devise a generic solution.

An owners corporation has responsibility for the management and control of common property. For this reason common property must be able to be identified easily and with certainty. Unfortunately common property is not always readily identifiable.

This Paper proposes to canvass ways in which common property might be more easily categorised.

(a) **A new definition for common property**

The present definition of common property is deceptively simple. It is defined in section 5 of the Act as being “so much of a parcel as from time to time is not comprised in any lot”. As common property is residual, being everything that is not part of a lot, anyone wanting to determine what is common property must consider a number of other definitions including “lot”, “parcel”, “floor plan” and “structural cubic space”.

“Structural cubic space” is an important component of common property. Its definition acknowledges that certain parts of a lot in a strata plan do not have anything to do with the lot itself but provide a function or support service to the lot(s) in the scheme. As such the responsibility for maintenance and repair
resides with the owners corporation. Disputes often arise because these support services are not shown on the location plan and a quick look at the definition of common property in the legislation makes no reference to services. It is difficult to follow through the definitions to arrive at the concept of “structural cubic space”.

It might be helpful to include a definition of common property in a separate section that draws together the various aspects of common property. This approach has been used in Tasmania and South Australia\textsuperscript{11} (see Annexure). Any new section would not change the definition of common property but would add clarity by providing a more comprehensive definition that would be easier to understand.

(b) **Identification of common property on the strata plan**

When determining what is common property it is not sufficient to look only at the legislation. The strata plan must also be considered. The strata scheme regulations require a registered Surveyor to distinguish between common property and lot boundaries in a strata plan by the use of lines, vincula\textsuperscript{12} and statements on the plan.

In an effort to remove doubt it has become common in recent times for surveyors to include notes on the strata plan identifying specific items of common property. By the use of notes a large tree having heritage significance might be classified as common property despite being situated in the courtyard of a lot. Other features that often cause concern, such as planter boxes affixed to patios or railings on balconies, might be specifically identified as either common property or part of a lot to avoid future disputes.

It has been suggested that this informal practice of using notes on a strata plan be formally recognised and encouraged by amendment to the legislation. Provision could be made for an additional sheet to be lodged as part of a strata plan to identify by way of a schedule specific items of common property. The schedule would encourage the surveyor and developer to give greater consideration to the issue of common property at the commencement of the scheme. The schedule could be used to address issues such as tiles, air conditioning and false ceilings.

Such a provision would not be compulsory.

(c) **Additions or deletions of specific items of common property**

Strata schemes evolve and change over time. Re-decorations are made and improvements added. This can affect what is and isn’t common property yet these changes in common property will not be reflected on the strata plan or on the certificate of title for the common property.

\textsuperscript{11} S 28 *Community Titles Act 1996* (Sth Aust) and s 9 *Strata Titles Act 1998* (Tas)
\textsuperscript{12} Bandlike notations uniting two or more parts
New section 65A of the *Strata Schemes Management Amendment Act 2004* (not yet commenced), will enable an owners corporation or lot owner to add to or alter common property if authorised by a special resolution at a general meeting. Perhaps in conjunction with this provision an owners corporation should be able to update from time to time any schedule of common property filed with a strata plan. A schedule could possibly be updated by the making of an appropriate by-law which could be lodged for registration with the Registrar General in the usual way and recorded on the common property certificate of title.

(d) **Identifying specific items of common property in the legislation**

There are a number of items that consistently cause problems for owners corporations when identifying what is and isn’t common property. These are:
- balconies including walls and sliding doors and screen doors
- shower trays/tiles
- waterproof membranes
- trees in townhouse & villa courtyards
- gas & water pipes in common walls
- false ceilings
- floating floors
- wall coverings (ie wallpaper)
- roof spaces
- air conditioning units
- windows & working parts
- intercoms and security systems
- fences in townhouse & villa schemes

It has been suggested that the legislation include a list of some of the most troublesome items, particularly those that are not usually common property. Whilst a list of items might help resolve some areas of doubt it will never address all items of concern. Certain items of common property may differ depending on the circumstances of a particular scheme. Furthermore, it is hoped that if more detail regarding common property is added to the plan there will be no need for a general list to be included in the legislation.

**Issue 12. Should changes be made to the way in which common property is identified in strata schemes? Would a schedule of common property attached to each strata plan help to resolve uncertainties?**
NEW MATTERS FOR DISCUSSION

4.8 SINKING FUND OBLIGATIONS (EXISTING SCHEMES)

The new sinking fund obligations contained within the Strata Schemes Management Act 2004, which require owners corporations to continuously plan ahead for maintenance of buildings and property and replacement of equipment during the forthcoming 10-year period, are some of the most significant legislative reforms of recent years. All owners corporations that come into existence once the amended legislation comes into effect will be required to devise, review and budget for 10-year sinking fund plans for the whole life of their schemes. These provisions received widespread public support during the consultation arising from Living in Strata Developments in 2003.

However, it must be recognised that as the new provisions stand, they only apply to future schemes. They do nothing to address community concerns over the state of strata apartment buildings that have not been well-maintained in past years. On the basis of submissions received by the Office of Fair Trading on the issue, it is apparent that there is a high level of public support for widening the new sinking fund provisions to schemes already in existence. The question is – which schemes?

It would appear that there are a number of options that might be considered. Strata schemes already in existence could be brought within the 10-year sinking fund plan requirements on the basis of:

- Age of building (eg 20 years and over)
- Size of scheme (eg 10 lots)
- Nature of scheme (eg apartment buildings)
- Size of annual budget (eg $50,000 and over)
- Through a decision of the owners corporation concerned
- Through an order by the Consumer, Trader and Tenancy Tribunal

The key issue to be resolved is finding the most effective mechanism to identify those strata schemes where dilapidation and lack of maintenance is most likely to have arisen. Another major matter for consideration will be how quickly any extended provisions would apply to current schemes. Should the provisions be applied on a staggered basis with the older schemes to be brought within the regime first with other schemes to be “brought within the fold” on a progressive footing?

Issue 13. Is there merit in extending the new sinking fund obligations to plan and budget 10 years ahead to schemes already in existence? If so, which additional schemes should be covered and how soon should they be covered? Are there any schemes that should be excluded from the additional sinking fund obligations?
4.9 SINKING FUNDS (SEED FUNDING)

During the public consultation arising from *Living in Strata Developments in 2003*, some views were expressed that the original owner of a strata scheme (usually a developer), should be required to provide some “seed” funding so that the scheme is able to commence the management of its own affairs with some resources already in place.

A common theme behind these views is that the developer should be required to establish a sinking fund with a small operating amount for contingencies that may arise in the early days of the scheme’s life. It is possible that the necessary funds could be underestimated in the first year of operation and the extent of the necessary maintenance costs misjudged. This may be of particular significance in strata schemes with expensive facilities like lifts, swimming pools and gymnasiums that may need regular maintenance and servicing from the outset.

With a sinking fund in place already containing some monies when the first potential purchasers are considering buying into the scheme, it is likely that sales will be enhanced and consumers will be more confident in their investment decisions. While legislative provisions which require developers to contribute “seed” funding to sinking funds may result in a small increase in the cost of buying strata properties, the benefits may well outweigh the impact of such costs.

If “seed” funding is found to be a worthwhile legislative initiative, the precise amount that developers are required to contribute would need to be determined. The most appropriate manner to deal with this issue would probably be to link the amount to the number of lots in the scheme. For instance, the necessary “seed” funding for schemes could be calculated on the basis of $100 per lot in the scheme which would equate to a starting fund of $1,000 in an average 10-lot suburban townhouse development and $35,000 in a 350-lot city high-rise development. Whether such a commencement “float” would be a realistic financial starting point is a matter on which input is specifically sought.

**Issue 14.** What are the benefits or disadvantages of requiring developers and other original owners to contribute towards a starting amount for the owners corporation’s sinking fund? If a “seed” funding obligation is considered to be a good idea, how much, or on what basis should a contribution be required of the developer or other original owner?

4.10 OCCUPANCY OF STRATA UNITS (MAXIMUM PERMISSIBLE NUMBER)

An emerging concern within some strata schemes in recent years, particularly those in coastal or city locations attractive to tourists, has been the use to which some residential strata units have been put by the individual owners.
While this is primarily a planning and local government zoning issue, it is frequently the cause for dispute between resident owners and those who own units for investment purposes. The typical complaint is that a unit in the hands of a non-resident owner is let supposedly as a conventional residential tenancy, but is in fact used for short-term backpacker or holiday accommodation. The high and regular turnover of occupants and the uncertainty over how many persons may be occupying a unit at any one time, causes disturbance to the permanent residents with complaints about noise, behaviour and damage to common property being frequently made. Fire safety concerns are also often raised.

A further concern raised is that services like water and sewerage are being over-used in units where an excessive number of persons are in occupation which is having a detrimental effect on those facilities. However it is not permissible under the strata laws to impose additional levies on lot owners in these circumstances.

Tourists and holiday makers are obviously attracted to apartments in coastal locations such as Manly. On the other hand, local government has to deal with the inherent conflict between the desire of resident owners to enjoy a peaceful lifestyle and the benefits to the local economy that arises from the tourist industry.

While a decision in the Land & Environment Court\(^{13}\) in regard to the use of a unit in a residential strata scheme at Cronulla for short-term accommodation purposes appears to have clarified development consent issues to a certain extent, there are views that the issue is of such importance that public consultation on this concern should continue.

For example, it has been suggested that the strata laws should make specific provision for the maximum number of persons who may occupy a residential strata unit as a means of minimising disputes in this area. One of the difficulties is that it is difficult to pinpoint the precise legislative responsibility in regard to the permissible maximum number of occupants of residential premises generally.

There do not appear to be any specific legislative provisions that would limit the occupancy levels of a residential dwelling in NSW although there are several instances where a level of regulation exists. These areas include:

**Residential Tenancies laws**

The prescribed standard residential tenancy agreement\(^{14}\) provides for the number of persons permitted to reside in the premises involved to be set out in the document. A contravention of the provision would enable the landlord to issue a notice of termination for breach of agreement.

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\(^{13}\) Sutherland Shire Council v Foster & Anor [2003] NSWLEC 2

\(^{14}\) Schedule 1, *Residential Tenancies (Residential Premises) Regulation 1995*
Building Codes
The Building Code of Australia does not specifically address occupancy numbers although refers to it in relation to matters such as widths of exits for emergency evacuation.

Public Health issues
Relevant public health regulations make reference to requirements for rooms used for sleeping accommodation (but not private domestic premises). There is a requirement of 5.5 square metres for “long-term” sleeping accommodation and 2 square metres or more for each person sleeping in the room in other situations.

International models
An option examined was one from the USA. The occupancy standard for a house, apartment or mobile home was found to be based on 80 square feet for the first occupant and 60 square feet for each additional occupant. The permissible occupancy rate for other city zonings were based on one family or one person more than the number of bedrooms up to 5 people. The number of available car parking spaces appears to also have some relevance. A second USA model from Texas in regard to tenancy situations provides that the landlord can limit the number of occupants who live in the house or apartment rented. The maximum number depends on how many bedrooms there are and the age of the occupants. Texas law generally limits occupancy to 3 adults (persons over 18) for each bedroom of the dwelling.

Informal “rule of thumb”
A standard that has been used in the past as a general principle at times for residential park occupation in NSW is 2 persons per the number of bedrooms in the premises.

The issue that needs to be determined is whether the desirable occupancy rate of residential strata premises is a matter for the strata management laws to address or whether this is more a local government, planning or health issue.

While providing for a maximum number of occupants in residential buildings may have support, an issue to be kept under consideration is the situation where extenuating circumstance arise (eg a baby is born or relatives with a sudden need for accommodation arrive). Under the Texan tenancy laws, there are provisions protecting couples occupying a 1-bedroom apartment from being required to move should a baby be later born.

Issue 15. Is it appropriate for the strata laws to make any provisions connected with the number of persons who may occupy a residential strata lot and the minimum period of occupation or do these matters remain as fundamentally local government and planning issues?

15 Public Health Regulation 2002 (clause 22)
16 Municipal Code Maximum Occupancy - City of Ames
17 As provided by Texas Low Income Housing Information Service
Issue 16. On what basis could permissible occupation levels be worked out?

4.11 USE OF PROXY VOTES ON MATTERS INVOLVING A FINANCIAL INTEREST

Recent reforms\textsuperscript{18} to the strata management laws, changed the way in which certain persons connected with strata schemes could exercise proxy votes. Under clause 11 (7A) of Schedule 2 of the \textit{Strata Schemes Management Act 1996} proxy votes can no longer be exercised by a strata managing agent, caretaker or an on-site residential property manager on matters that would obtain a financial or material benefit on the proxy-holder (eg in the case of a strata managing agent, any proxies held by the managing agent could not be used to vote on a resolution in connection with extending the managing agent’s term or increasing remuneration).

A number of views were expressed in response to \textit{Living in Strata Developments in 2003} that the new proxy voting restrictions on strata managing agents, caretakers (often known as “building managers”) and on-site residential property managers, should be extended to all persons using a proxy vote.

The suggestion is that no-one connected with a strata scheme should be able to use a proxy vote on decisions that would result in them gaining some financial benefit or advantage.

Conflict of interest

Another concept which may be worthy of consideration is whether any party involved in an owners corporation vote on a matter of any nature, and who has a potential conflict of interest in the matter under consideration, should be required to declare a possible conflict of interest prior to the vote taking place. To make such a provision effective, it would probably need to apply to not only the primary vote-holder, but also to anyone holding a proxy from such a person. A provision of this nature could have particular significance in owners corporation decisions on entering into contracts for the supply of goods or services where individuals within a strata scheme might have personal or business connections with the providers under consideration.

A point for discussion on conflict of interest matters is how disputes over the issue could be handled and what sanctions should apply where a conflict of interest declaration is not made, or for misuse of a proxy vote in this situation.

Restriction on the number of proxies held

Under the NSW strata laws, there is no specific limit on the number of proxies any person may hold. On many occasions over recent years views have been expressed that changes to the laws should be made on this issue. A common

\textsuperscript{18} \textit{Strata Schemes Management Amendment Act 2002} – commenced 10 February 2003.
theme has been that no-one should hold more than a specified number of votes, or percentage of total votes. Suggested proxy-holding limits have often been in the range of 5-10 votes or 5%-10% of the total voting capacity of the strata scheme concerned.

A counter-view to that advocating for limits to be placed on the volume of proxies able to be held, is that lot owners should be free to give their vote to whoever they choose no matter how many other proxies the person already has. There has also been a recognition that quorums would often be difficult to obtain for many owners corporation meetings without the inclusion of proxies in calculating the minimum 25% of persons eligible to vote to make up the quorum.

In the case of strata managing agents, perhaps the persons most likely to hold the bulk of proxies given, the potential misuse of proxies has been substantially minimised by the 2002 legislative amendments which prohibit proxies being exercised on matters where a financial or other material benefit might be obtained by the managing agent. The prescribed proxy voting form\textsuperscript{19} makes specific provision for an instruction to be given on how a proxy is to be exercised by a managing agent when voting on a resolution on whether that managing agent is to remain in office or be further appointed.

Some of the persons who made submissions after the release of \textit{Living in Strata Developments in 2003} identified proxies held by developers as another area of concern. Others highlighted executive committee members and office-bearers as individuals who also, because of the potential influence they could have on decision-making which potentially involved conflicts of interest, should not have unlimited proxy-holding capacities.

\textbf{Priority voting rights}

Under the \textit{Strata Schemes Management Act}, priority voting rights\textsuperscript{20} are given to the mortgagees of strata lots. The rationale behind the provision is that the strata lot is security for the lender and a right to vote over the borrower at owners corporation meetings is available should the security be placed at risk through any potential decision under consideration by the owners corporation.

The priority voting provisions were modified by the 2002 amendments\textsuperscript{21} and under clause 7(1) of Schedule 2 of the \textit{Strata Schemes Management Act} priority votes may now only be exercised on resolutions relating to:

- insurance
- budgeting or fixing levies
- any matter requiring a unanimous or special resolution
- expenditure above $200 times the number of lots in the scheme

Also, the priority vote holder must now give the lot owner at least 2 days' written notice of an intention to exercise a priority vote for it to be effective.\textsuperscript{22}

\textsuperscript{19} Form 3, Schedule 2, \textit{Strata Schemes Management Regulation 1997}
\textsuperscript{20} Clause 7(1) of Schedule 2 of the \textit{Strata Schemes Management Act 1996}
\textsuperscript{21} \textit{Strata Schemes Management Amendment Act 2002}
\textsuperscript{22} Clause 10 of Schedule 2 of \textit{Strata Schemes Management Act 1996}
In every review of the NSW strata management laws, the continuing justification for the retention of priority voting rights is raised and debated with some vigour. The question is whether any further limitations should be placed on the circumstances when priority voting is able to be exercised by mortgagees. An example commonly used by those who favour reduction of priority voting rights and even its elimination from the legislation altogether, is that a developer who also provides finance to purchasers is able to have an excessive influence on the owners corporation’s decisions. The greatest concern is that a developer with priority voting rights over sufficient lot owners in a strata scheme, could effectively block any attempts by the owners corporation to take action against the developer over matters of self-interest such as alleged building defects or other related matters. The priority voting right exists until the last dollar of the loan under mortgage has been paid.

Comment is invited on the possible need to restrict priority voting further to the controls already in place and whether any limitations placed on proxy voting procedures should be extended to priority voting arrangements. What must be taken into account though is that priority voting is intended to protect the interest of the mortgagee where the circumstances warrant it. Whereas a proxy holder may have a personal interest in the decision being considered by the owners corporation, those with a priority vote always have an interest as the lot in the scheme is the security for the loan.

The impact on lending institutions, and their willingness to extend loans to purchasers of strata lots, should any consideration be given to removing the concept of priority voting rights, may need to be taken into account.

**Issue 17. Do the current proxy voting and the priority voting rights provisions of the Strata Schemes Management Act need any refinement?**

**Issue 18. Is there a need to provide in the legislation for conflict of interest situations in the voting process at owners corporation meetings?**

### 4.12 COMMUNITY SCHEMES

While there are far more strata schemes in existence in NSW than community schemes, many of the issues that arise are common. While the focus of legislative reforms in recent years has been on the strata management laws, there is recognition that equivalent refinement to the legislation applying to the development and operation of community schemes is probably warranted.

It is proposed that a more detailed Paper prepared jointly by the Department of Lands (which administers the community schemes development legislation)

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23 Dept Lands figures at 9 June 2004 – 59,797 strata schemes, 1,262 community, precinct & neighbourhood schemes
24 Community Land Development Act 1989 and Community Land Management Act 1989
and the Office of Fair Trading (which administers the community schemes management legislation) will be released later in 2004 for public consultation purposes. However, the opportunity is provided now for some preliminary input on strata reforms which are appropriate to bring across to the community schemes legislation.

Some of the apparent inconsistencies between the strata and community schemes laws, either already in existence or yet to start, which may need to be examined include:

- Caretaker contract provisions
- Priority and proxy voting
- Differing provisions for large schemes (100 lots plus)
- New 10-year sinking fund requirements
- Responsibility for providing building access for fire safety checks
- Distribution of jurisdiction for adjudication of disputes (whether Adjudicators or the Consumer, Trader and Tenancy Tribunal should have the prime responsibility)
- Restrictions on powers of executive committees

It may also be opportune to discuss whether other recent issues arising in the strata schemes area and covered in this Paper such as the types of managers suitable for the management of the largest schemes, access for emergency services and the process for terminating schemes are also relevant to the community schemes scenario.

**Issue 19. Which of the reforms made to or proposed for the strata schemes laws are appropriate to be applied to the community schemes laws?**

### 4.13 PLANNING ISSUES

Some medium density developments of a strata scheme nature, are approved under State Environmental Planning Policy 5 (SEPP 5), on the basis of them being intended for occupation by older persons. SEPP 5 is intended to deal with balancing the increasing demand for urban renewal and concerns over maintaining the character of local neighbourhoods.

Concern has been expressed by the Minister for Infrastructure and Planning, and Minister for Natural Resources the Hon Craig Knowles MP in Parliament[^25] that some developers had effectively introduced medium density housing by taking advantage of the system intended to provide for over 55’s. Mr Knowles announced that SEPP 5 was to be replaced by a new State Plan for Seniors Living which will set higher standards, require greater compliance with occupancy restrictions (to over 55’s) and generally minimise abuses by developers.

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[^25]: NSW Legislative Assembly - 18 February 2004
This issue is relevant to strata schemes approved under SEPP 5 in that disputes may arise over the occupation of lots in the scheme by persons who are clearly not over 55 years of age. The new State Plan is intended to assist owners corporations in dealing with breaches of planning approval in this regard.

**Issue 20. What difficulties have owners corporations faced with contravention of SEPP 5 development approvals (regarding occupancy being restricted to over 55’s) and what powers do they need to resolve disputes over these matters?**

4.14 **EMERGENCY ACCESS TO STRATA BUILDINGS**

The NSW Coroner has identified an issue of concern regarding access by emergency services to high security apartment buildings. While this is an issue wider than just strata schemes, it is raised in this Paper since a majority of the buildings concerned are likely to be covered by strata legislation.

The Coroner reported that a case brought to attention involved ambulance officers being unable to gain access to a building after a person had called for help while suffering an asthma attack. By the time access was obtained after a short delay, the person had died. The Coroner queried whether there could be some means of averting the security arrangements in such circumstances.

Many strata buildings have advanced security arrangements in place and if there is no-one available to provide access to emergency services upon their arrival, it can be difficult to gain entry if the person needing help is incapacitated to a sufficient extent.

Discussion between the Police, Ambulance and Fire services, the State Rescue Board and the Office of Fair Trading has taken place to examine options to consider the Coroner’s comments and to consider possible options to minimise the likelihood that such a tragedy would occur again.

The conclusion was that there were a number of protocols already in place for emergencies of the type raised by the Coroner and there was no single effective solution that would apply to all situations. However, it was agreed that owners corporations connected with buildings that had sophisticated security arrangements should be encouraged to discuss the development of strategies that would ensure that residents had access to emergency assistance when it was needed. This was of particular importance to those residents who lived alone.

**Issue 21. Are there any ways in which an effective balance can be devised between the desire of residents to feel safe and secure in their strata building and the ability of emergency services to reach residents in need of urgent medical help or other emergency assistance?**
4.15 MISCELLANEOUS ISSUES

A variety of additional matters have been raised since the release of Living in Strata Developments in 2003 and during the development of the Strata Schemes Management Amendment Bill 2003. The opportunity has been taken for these matters to be included in this Paper to enable further views to be sought on them.

ELIGIBILITY FOR ELECTION TO EXECUTIVE COMMITTEE

There is an apparent anomaly in the Strata Schemes Management Act which provides that a person who has not paid their levies loses the right to vote at owners corporation meetings yet can be nominated for and elected to the executive committee and have full voting rights in this capacity.

Several suggestions have been made to remedy this situation including:

v ensuring that persons who are behind on their levies are ineligible for nomination to the executive committee
v allowing such persons to be elected to the executive committee but denying them the right to vote at meetings of the committee until such time as they are financial again

SECRET BALLOTS

A number of comments were made in response to Living in Strata Developments in 2003 on this issue and it is again raised for discussion. While there is nothing to prevent any owners corporation adopting a secret ballot mechanism should the majority wish to have such a system in place, there are those who believe that secret ballots should be a universal requirement. Views have been expressed that some people feel intimidated at meetings where a show of hands is required and are much more likely to express their real opinions through a secret ballot. Comments were received that this might be a particular issue in some strata retirement villages.

While some practical difficulties would arise through secret ballots being required, (eg when a “poll” is called, a voter’s unit entitlement has to be determined and so they would have to be identified), further comment is sought on the need for, and practicality of, secret ballot procedures.

REZONING APPLICATIONS

The Strata Schemes Management Act 1996 provides for different levels of voting approval depending on the issue being considered by the owners corporation. These levels are:

? unanimous (where no-one votes against)
? special (where no more than 25% vote against)
? simple majority

26 Clause 10(8) Schedule 2 Strata Schemes Management Act 1996
27 Clause 2(4) Schedule 3 Strata Schemes Management Act 1996
Most decisions of the owners corporation are able to be made by simple majority but some require unanimous resolutions (eg distribution of surplus funds) or special resolutions (eg making or changing a by-law).

From time to time, suggestions are made that some decisions of owners corporations are of sufficient importance to warrant more than just a simple majority to give them effect. One such issue is a rezoning application to local government authorities which, if successful, would change the nature of a scheme from purely residential to one which allowed commercial activity such as short-term holiday letting. There are arguments that changing the purpose for which a strata scheme was originally developed, has a significant impact on individual lot owners and that a special resolution at least should be required for such matters.

There may be persons with an interest in this issue who wish to express a view on the matter.

**PROVISION OF INFORMATION BY THE OFFICE OF FAIR TRADING**

One of the reforms arising from the 1996 overhaul of the strata management legislation was that the Commissioner for Fair Trading was given specific responsibilities under section 212 of the Strata Schemes Management Act to make available appropriate information to all those with an interest in strata matters. In compliance with the provision, the Office of Fair Trading produces booklets such as “Strata Living” (which is also available in several community languages) and “Buying into a Strata Scheme”. Factsheets on mediation and dispute resolution are also produced.

While the current publications are popular and in constant demand, it may be that there is other information that needs to be disseminated to the strata community in the interests of the smooth operation of schemes. Practical hints to assist executive committees, in particular, in the day to day administration of their schemes may be of benefit. Possible items that could be included might be:

- How to run meetings effectively
- How to put budgets together
- How to arrange insurance
- How to ensure that only appropriately qualified experts are engaged for building reports, sinking fund preparation and other significant issues

To assist in ensuring that the Office of Fair Trading’s continuing education program on strata issues remains relevant and effective, there may be views that additional information needs to be made available to the strata community.

**Issue 22. Are there any views on the miscellaneous issues raised in the Paper. Are there any other miscellaneous issues that need to be considered?**
4.16 MATTERS FOR THE REGULATIONS

The Strata Schemes Management Amendment Act 2004 provides that the details of a number of the initiatives may be dealt with more specifically in the Regulations. While appropriate consultation will be carried out on these matters before any Regulations are drafted and finalised, this Paper provides an opportunity for interested parties to express their views at an early stage of the process and constructive comment will be helpful in the devising of any proposed new Regulations.

The additional areas for which the Regulations may provide (which are outlined in more detail below) are:

- functions of owners corporations that may only be delegated to licensed strata managing agents
- the class or classes of existing strata schemes which the new sinking fund requirements can be extended to
- the amount of expenditure for which large scheme owners corporation must obtain at least 2 quotations
- the type of legal action that does not require to be taken to a meeting of the owners corporation before commencement
- the class of strata schemes that can be excluded from the dispute resolution provisions of the Strata Schemes Management Act
- procedures for meetings of large scheme owners corporations
- delegation of functions of large scheme owners corporations
- types of decisions that may or may not be made by large scheme executive committees
- functions of office holders of large scheme owners corporations
- management of large scheme administrative or sinking funds
- information to be brought to the attention of owners and executive committee members regarding the provision of legal services
- the additional documents that have to be handed over to the owners corporation by the original owner at the first annual general meeting

Functions delegated to licensed strata managing agents

The latest round of legislative amendments has specifically identified those functions of the owners corporation that can only be delegated to a strata managing agent, should an owners corporation elect not to carry out the tasks itself. The new section 29A of the Strata Schemes Management Act 1996 will provide that it is necessary to use a managing agent if the following tasks are to be delegated:

- preparation of financial estimates
- levying of contributions
- receiving, receipting and banking of monies
- having custody of monies
- taking out insurance
- conducting meetings
- handling correspondence
- maintenance of records
The question is whether any other functions of the owners corporation are of sufficient importance that only managing agents should be permitted to undertake them under delegation.

**Classes of schemes to which new sinking fund provisions should be extended**
This issue has been dealt with at 4.8.

**The level of expenditure in large schemes where 2 quotes necessary**
The owners corporations of schemes with 100 lots or more will be required to obtain at least 2 quotes before undertaking significant expenditure. The Regulations provide for the determination of the appropriate figure.

Rather than prescribe a figure that applies to all large schemes, it may be appropriate to link the figure with the number of lots in the scheme. A possible figure that could be prescribed is $200 times the number of lots in the scheme. So for a 100-lot scheme, at least 2 quotes would have to be obtained and considered when expenditure of $20,000 was being contemplated whereas for a 650-lot scheme the amount would be $130,000.

Comment is invited on whether a lesser or greater amount than $200 per lot or whether any other method is appropriate.

**Legal action not required to be determined by full meeting of owners corporation**
The new section 80D of the *Strata Schemes Management Act 1996* effectively provides that legal services must not be engaged by executive committees and a general meeting of the owners corporation will first be required. However, there is a regulation-making power to exclude certain legal action from the new requirements.

There are several circumstances where it may be either unnecessary or inappropriate to involve all of the lot owners in a decision about obtaining legal advice or commencing legal action. Such circumstances might be:

- building work being carried out by a lot owner where urgent injunctive proceedings may be necessary to prevent structural damage to the building
- commencement of proceedings for recovery of overdue levies
- legal action or advice that involves only a small amount of expenditure (the Regulation could provide that any legal action or advice which would cost $1,000 or less [or alternatively $100 or $200 times the number of lots] is exempt from the requirement to be approved by the owners corporation and could be dealt with by the executive committee)
- obtaining urgent legal advice on proceedings taken against the owners corporation
- legal action or advice in circumstances of emergency

Comments on other situations where legal action might not need to be decided at a general meeting of the owners corporation and could be left within the executive committee’s powers are invited.
Class of strata schemes excluded from dispute resolution provisions
While no specific class of strata scheme has been identified as being necessary to exclude from the dispute resolution provisions of the *Strata Schemes Management Act*, such a decision may possibly be made in the future. For instance, it is possible that it will be determined more appropriate for complex commercial scheme disputes to be dealt with through the customary court process rather than through the mediation and adjudication mechanism provided for in the *Strata Schemes Management Act*. Whether there are any other classes of strata schemes that should possibly be excluded from the dispute resolution procedure of the Act is open for comment and discussion.

Procedures for meetings of large scheme owners corporations
The meeting procedures provided in the legislation cover the required notice for meetings (7 days), quorums (25%), adjournments, proxy and priority voting, the use of unit entitlements in voting (polls) and election of executive committees. The question open for discussion is whether the provisions of the legislation dealing with owners corporation meetings, which apply to all strata schemes irrespective of size, need to be further varied in any way to take account of the special needs of large schemes.

Delegation of functions of large scheme owners corporations
As referred to earlier, new section 29A of the *Strata Schemes Management Act* clarifies the powers of owners corporations that can only be delegated to licensed strata managing agents. A matter for discussion is whether any additional matters need to be considered in relation to large schemes. For instance are there financial or managerial tasks connected with large schemes that might be able to be delegated to persons other than strata managing agents?

Types of decision that may not be made by large scheme executive committees
While the latest legislative reforms have already restricted certain matters from the decision-making powers of executive committees of large schemes (ie spending limited to no more than 10% above budget, 2 quotes before expenditure on more expensive items), there may be additional matters that parties wish to raise for consideration. For instance, there may be an argument that the provision of the *Strata Schemes Management Act* which allows owners corporations to borrow money, should not be available to executive committees of large schemes.

It is pointed out that after the latest reforms there will be a mandatory item for consideration at every annual general meeting relating to the agreed powers of the executive committee for the year ahead. Accordingly, each owners corporation will have the flexibility to decide the extent of the decision-making ability of the executive committee for the upcoming year. Nevertheless, there may be some persons who believe that specific additional limitations need to

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28 Section 110
be placed on the operating powers of executives connected with large schemes.

Functions of office-holders of large scheme owners corporations
The functions of the secretary and treasurer of an owners corporation are clearly set out in the *Strata Schemes Management Act*. The role of the chairperson is to be found in Schedule 2 of the Act.

The secretary’s functions are linked with the preparation and distribution of minutes, maintenance of the strata roll, arranging inspection of the owners corporation’s documents as required, answering correspondence, convening meetings and other administrative tasks.

The functions of the treasurer include notifying owners of contributions levied on them, receiving, receipting and banking money paid to the owners corporation and keeping accounting records and preparing financial statements.

The chairperson has fewer defined functions but they include presiding at meetings, announcing the names of persons entitled to vote and declaring the results of votes.

For discussion is whether any variation to these duties is appropriate for office-bearers in large schemes.

Management of large scheme administrative and sinking funds
The latest legislative amendments provide an opportunity to review whether the existing provisions of the Act regarding the management of administrative and sinking funds need to be varied in any way to take account of the special circumstances of large schemes. For instance, consideration might be given to whether the provision of the *Strata Schemes Management Act* introduced in 1996 allowing a 10 per cent discount for levies paid before they are due, continue to be appropriate for large schemes.

Information regarding the provision of legal services
The latest round of legislative amendments require the estimated costs of proposed legal action to be brought to the prior attention of lot owners. There is a power for the regulations to prescribe other information about legal services that must be brought to the attention of owners. Comments are invited on any other matters about legal services that might need to be made known to lot owners.

Additional documents to be handed over by developers
Under the revised provisions of the *Strata Schemes Management Act* developers will be required to hand over additional documentation to the owners corporation by the time of the first annual general meeting. The extra

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29 Sections 22 and 23
30 eg Clauses 15, 16 and 20
31 Section 79(4)
32 Schedule 2clause 4(1)(a1)
documentation includes development consents, compliance certificates and warranties. There is a greatly increased penalty for contravention of the new provisions.

Provision is made for additional documentation to be prescribed by regulation. The question is whether any further documentation (eg occupation certificates from local government authorities) should be included in the list of material that owners corporations are entitled to receive from the developer or other original owner.

Comment is invited on each of these Regulation-making powers to assist in the framing of draft proposals.

**Issue 23. Are there any views and ideas relating to the new regulation-making powers that need to be considered?**
5. SUMMARY OF ISSUES RAISED

Issue 1. Is there a better way of providing for the termination of strata schemes than the laws currently provide?

Issue 2: With regard to quality of building issues, what other means are there for conveying information regarding Alternative Solutions to owners and prospective owners? What is the best mechanism for retaining this information and ensuring it can be readily accessed?

Issue 3: Are there any remaining fire safety assessment or access issues that need to be addressed in regard to strata schemes?

Issue 4: Is there a need to educate building owners of their responsibility to ensure that all essential fire safety measures are assessed by a properly qualified person? Do any other measures need to be taken on this issue?

Issue 5. Are there any better alternatives available for the effective management of large strata schemes? Are the provisions of the 2003 Bill enough to overcome concerns in this area or does the concept of specially qualified managers for large schemes need to be further pursued?

Issue 6. How can the strata by-laws relating to noise and floor coverings be made more effective?

Issue 7. How can the strata by-law about car-parking be made more effective?

Issue 8. How can the by-law relating to the drying of washing be made more effective?

Issue 9. How can the by-law relating to cleaning of windows be made more effective.

Issue 10. How can the by-law on garbage disposal be made more effective?

Issue 11. Should there be less emphasis on standard by-laws on these issues and owners corporations just be required to deal with the matters covered by the by-laws as they see fit?

Issue 12. Should changes be made to the way in which common property is identified in strata schemes? Would a schedule of common property attached to each strata plan help to resolve uncertainties?
Issue 13. Is there merit in extending the new sinking fund obligations to plan and budget 10 years ahead to schemes already in existence? If so, which additional schemes should be covered and how soon should they be covered? Are there any schemes that should be excluded from the additional sinking fund obligations?

Issue 14. What are the benefits or disadvantages of requiring developers and other original owners to contribute towards a starting amount for the owners corporation’s sinking fund? If a “seed” funding obligation is considered to be a good idea, how much, or on what basis should a contribution be required of the developer or other original owner?

Issue 15. Is it appropriate for the strata laws to make any provisions connected with the number of persons who may occupy a residential strata lot and the minimum period of occupation or do these matters remain as fundamentally local government and planning issues?

Issue 16. On what basis could permissible occupation levels be worked out?

Issue 17. Do the current proxy voting and the priority voting rights provisions of the Strata Schemes Management Act need any refinement?

Issue 18. Is there a need to provide in the legislation for conflict of interest situations in the voting process at owners corporation meetings?

Issue 19. Which of the reforms made to or proposed for the strata schemes laws are appropriate to be applied to the community schemes laws?

Issue 20. What difficulties have owners corporations faced with contravention of SEPP 5 development approvals (regarding occupancy being restricted to over 55’s) and what powers do they need to resolve disputes over these matters?

Issue 21. Are there any ways in which an effective balance can be devised between the desire of residents to feel safe and secure in their strata building and the ability of emergency services to reach residents in need of urgent medical help or other emergency assistance?

Issue 22. Are there any views on the miscellaneous issues raised in the Paper? Are there any other miscellaneous issues that need to be considered?

Issue 23. Are there any views and ideas relating to the new regulation-making powers that need to be considered?
6. **HOW TO HAVE YOUR SAY**

Comments on any of the matters raised in his Paper are welcome. Please send them by **10 September 2004** to:

**By Post**  
Project Manager Strata Discussion Paper, Office of Fair Trading,  
PO Box 972 PARRAMATTA NSW 2124

**By Fax**  
(02) 9338 8918

**By e-mail**  
Policy@oft.commerce.nsw.gov.au

To enable a quicker assessment of your comments, please make reference to the Issue Number you wish to respond to in your submission.
“COMMON PROPERTY” DEFINITIONS (SA & Tasmania)

COMMUNITY TITLE ACT 1996 (SOUTH AUSTRALIA)

Common property
28. (1) The common property created by a community plan comprises -
(a) those parts of the community parcel that do not comprise or form part of a lot; and
(b) the service infrastructure (except for any part of the service infrastructure that is vested in a Minister of the Crown or other authority or person and the parts of the service infrastructure that provide a service to only one lot); and
(c) in the case of a strata plan—those parts of the building that are not part of a lot; and
(d) any building that is not for the exclusive use of a lot and was erected before the deposit of the community plan; and
(e) any building erected by the developer or the community corporation as part of the common property; and
(f) any other building on the community parcel that has been committed to the care of the community plan as part of the common property.

(2) The common property may be used for any lawful purpose including a commercial purpose.

(3) Any income arising from the use of the common property must be paid into the administrative fund or the sinking fund.

(4) If a plan of community division indicates that members of the public have access to the common property, or a part of it, then members of the public are entitled to use the common property, or the relevant part of it, in accordance with the by-laws.

(5) Despite any Act or law to the contrary, uninterrupted use by the public of common property under subsection (4) does not vest the public or any local or State government authority any rights in respect of the common property.

STRATA TITLES ACT 1998 (TASMANIA)

Division 3 - The common property

Common property
SECT. 9. (1) Subject to subsection (2), the common property consists of –

(a) parts of a site (including buildings or parts of buildings and improvements) that are not within a lot; and

(b) the service infrastructure.

(2) A part of the service infrastructure within a lot, and solely related to supplying services to the lot, is common property only if it is within a boundary structure separating the lot from another lot or from common property.
Section 3 Interpretation

SECT. 3

... "service infrastructure" means cables, wires, pipes, sewers, drains, ducts, plant and equipment by which –

(a) water, gas, electricity, heating or conditioned or unconditioned air is supplied to a lot or the common property; or

(b) a lot or part of the common property is connected to a telephone, fax, cable television or other telecommunication service; or

(c) a lot or part of the common property is connected to a sewerage or drainage system; or

(d) a system for the removal or disposal of waste is provided; or

(da) a system designed for fire safety for more than one lot or for the common property is provided; or

(e) other systems or services designed to improve the amenity, or enhance the enjoyment, of the lots or common property are provided;