Marrickville Legal Centre
From the inner west, serving NSW

7 April 2021

Statutory Review of Strata Schemes Management Act 2015 (NSW)
Strata Schemes Statutory Review Policy & Strategy, Better Regulation Division Department of Customer Service
4 Parramatta Square
12 Darcy Street
Parramatta NSW 2150

BY EMAIL: stratareview@customerservice.nsw.gov.au

SUBMISSION TO THE REVIEW OF THE STRATA SCHEMES MANAGEMENT ACT 2015

Marrickville Legal Centre welcomes the opportunity to contribute to the review of the *Strata Schemes Management Act* 2015 (NSW).

Marrickville Legal Centre (MLC) is a community legal centre that has been operating in Sydney's Inner West for over forty years. The Centre operates a state-wide strata law service, the Strata Collective Sales Advocacy Service (SCSAS). This service provides advice, advocacy, and legal representation to owner-occupiers and in some cases, tenants throughout NSW in relation to strata collective sale laws as well as strata management issues.

Our submission focuses on the key issues raised by our clients living in strata schemes. It also draws on the experience of our strata solicitors' and the tenants' advocates from our two tenancy services within MLC; the Inner West Tenants' Advice & Advocacy Service and the Northern Area' Tenants' Service. All case studies referred to in the submission are matters that our services have assisted with but deidentified to protect our clients' confidentiality.

Please do not hesitate to contact Justin Abi-Daher – Assistant Principal Solicitor on (02) 9157 6051 if you wish to discuss this submission.

Yours faithfully,
MARRICKVILLE LEGAL CENTRE

Justin Abi-Daher
Assistant Principal Solicitor

Submission – Statutory Review of the NSW Strata Schemes Laws

Marrickville Legal Centre -

Strata Collective Sales Advice & Advocacy Service

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About Marrickville Legal Centre (MLC) and the Strata Collective Sales & Advocacy Service (SCSAS)

Marrickville Legal Centre (MLC) has provided legal services to vulnerable and disadvantaged members of its community for over 40 years. Our vision is to promote social justice – by providing free and accessible legal and related services to people who experience social and economic disadvantage. We provide holistic support to people experiencing disadvantage in our legal system through free legal and related services. We advocate for equal access to justice and the protection of human rights, and we work to improve our local communities.

MLC operates a state-wide strata service known as the Strata Collective Sales & Advocacy Service (SCSAS). The service has been operating since 2016. The SCSAS provides legal advice, casework assistance, legal representation and community legal education to owner-occupiers and in some cases, tenants of strata schemes throughout NSW.

Since 2016, SCSAS has been advocating for strata scheme residents and contributing to strata law reform. MLC has reviewed the Discussion Paper titled 'Statutory Review of the NSW Strata Schemes Laws' produced by NSW Fair Trading and our recommendations are set out below.

Our Centre's has expertise in assisting vulnerable and disadvantaged residents of strata schemes throughout NSW.

Recommendations

SCSAS makes the following recommendations in relation to the *Strata Schemes Management Act 2015* (NSW) **('The Act'):**

By-Law Recommendations

Recommendation 1 – Extend the time period for lodgement of by-laws with NSW Land Registry Services from six months to one year or add a provision for out of time registration.

In order to be legally enforceable, by-laws must be lodged with NSW Land Registry Services within six months of the passing of the special resolution adopting the by-laws. SCSAS has had contact with multiple clients where the by-law (usually, a common property rights by-law) has passed appropriately at a meeting but a strata managing agent has failed to register the by-law within the prescribed period.

To avoid the need to call a further meeting or proceeding to the NSW Civil and Administrative Tribunal ("the Tribunal"), it would be more beneficial to provide a longer time limitation to register the by-law. In the alternative, if an extension is not created then the Act should have provision for circumstances of what can be done for out of time registrations. Our recommendation is to include an option that an owner is able to call a general meeting of the Owners Corporation and have the original special resolution affirmed by way of ordinary resolution. This will re-start the time limit.

Case Study: *A client approached SCSAS after his common property rights by-law was found to be not registered within the six months prescribed in the SSMA. The strata committee was refusing to assist the client with calling a general meeting to affirm the initial approval and requested a further common property rights by-law be created (at cost to our client) and another special resolution to be passed.*

Recommendation 2 – An Owners Corporation should not be allowed to have a by-law completely banning pets in a strata scheme.

It is common for pets to have no effect on the use and enjoyment of other lots and common property, such as where a pet is well-trained, quiet and hygienic. In these circumstances, there is no rational connection between keeping a pet and a negative impact on other owners. In such a case, a complete ban on pets would constitute an unreasonable and unnecessary interference with the ordinary rights of owners over their property. Other by-laws, such as those pertaining to noise restrictions and cleanliness, are adequate to address situations where there *is* an impact on the use and enjoyment of other lots and properties.

In advising clients within our service, a large majority have expressed the importance of a freedom of choice when living within their own property and that a blanket ban on pets is unduly harsh and unreasonable. Following the decision of the New South Wales Court of Appeal in 2020 in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250, an owners corporation is unable to have a by-law implementing a complete ban on pets in a strata scheme, as such a law would be invalid for being harsh, unconscionable and oppressive under the Act. Our recommendation is to amend the Act to reflect this development in the law, so that an Owners Corporation cannot have a by-law completely banning pets.

In addition, there are sufficient provisions in the Act in situations where the enjoyment of other lots and common property *is* affected, and schemes are able to propose by-laws that regulate the behaviour of pets such as rules pertaining to hygiene and noise.

Ultimately, the powers held by an Owners Corporation should not be oppressive. The ordinary property rights of owners over their property and their use and enjoyment of it should not be interfered with out of mere administrative convenience.

Case Study: *A client approached SCSAS in 2021 due to her scheme having a by-law completely banning pets. The client lived alone and wanted some companionship. The Owners Corporation refused to consider amending the by-law and declined participation in mediation. The service continues to assist the client with proceedings being commenced at the Tribunal to invalidate the complete ban on pets.*

Recommendation 3 – Do not remove the restrictions related to unreasonable by-laws.

It is vital to ensure restrictions remain in place in relation to the powers of an Owners Corporation in creating and amending by-laws within a strata scheme. The restrictions set out in Section 139 of the Act place an important check and balance on the powers of Owners Corporation in relation to the implementation of harsh, unconscionable or oppressive by-laws.

The ability for a lot owner to apply to the Tribunal for an order to invalidate a by-law which is harsh, unconscionable or oppressive is of upmost importance in ensuring by-laws are fair for all owners in a strata scheme.

Recommendation 4 – The Act should be amended to allow for tenants and occupiers within a strata scheme to challenge a by-law at the Tribunal on the basis of it being harsh, unconscionable or oppressive.

Under Section 135 of the Act, tenants within a strata scheme are required to comply with the by-laws of the scheme (implied covenant). In circumstances where tenants are being pursued by an Owners Corporation for breach, tenants should equally have a legal right and standing at the Tribunal to challenge a by-law and have it invalidated under Section 150 of the Act.

Case Study: *A tenant approached SCSAS as they have obtained approval for a dog in their residential tenancy agreement with their landlord. However, once they moved into the strata scheme, they noticed there was a complete ban on pets. The tenant received a Notice to Comply with By-Law and the landlord refused to assist or be involved in dealing with the matter. The tenant wanted to challenge the by-law as harsh, oppressive or unconscionable and have it invalidated but was unable to do so. The tenant had just moved into the premises and did not want to have to try challenge the landlord at the Tribunal to terminate early due to the landlord's breach of failing to disclose a material fact. The tenant also did not want to lose their dog and they were in an unfair position.*

Recommendation 5 – The Act should be amended to introduce a document allowing tenants and occupiers within a strata scheme a right of reply in response to a Notice to Comply with a By-Law.

Where there has been a breach of a by-law, occupiers receive a Fair-Trading Notice to Comply with a By-Law document from the Owners Corporation. An additional form should be incorporated in this document providing tenants and occupiers with a right of reply, operating similarly to a Penalty Notice.

This is particularly important in circumstances where the requirement of landlords or agents to provide a copy of by-laws to new tenants is disregarded. Provisions for enforcement of by-laws and penalties for breach should be made clear to tenants, such as by providing a model covering letter from landlords or agents to new tenants. Where a landlord or agent fails to do so and a tenant breaches a by-law, it is important to provide the tenant an opportunity to disclaim responsibility, request a review on the grounds of hardship, or explain that a copy of the scheme's by-laws had not been provided at the start of the tenancy. A breach of a strata by-law can be utilised by a landlord to argue a tenant has breached their residential tenancy agreement and providing a tenant with a more direct mechanism to reply to the alleged breach is crucial.

This proposal would operate in conjunction with a reformation on the way in which by-laws are enforced, as there needs to be better clarity within the legislation as to the difference between warning letters to occupiers for breach of by-laws, and the more formal Notice to Comply with a specified by-law.

Recommendation 6 – By-laws under old strata laws should be required to be compliant with the current law.

Inconsistency can be confusing for owners and tenants and is likely to result in unnecessary and avoidable breaches of by-laws. Thus, by-laws under previous strata laws should be made consistent with the current provisions in the Act to promote justice and equity.

There is a need to clarify by-law requirements in order to make them compliant with the current law, particularly in relation to repairs, and minor or major works to an owner's lot, that does not infringe upon common property.

Recommendation 7 – Amend the model by-laws to include further by-laws on use of common property, renovations, and animals.

It is apparent that the current model by-laws regulating the use of common property in a strata scheme has been particularly emphasised recently following the COVID-19 pandemic, and the lockdowns imposed for the purposes of public health. Model by-laws should be introduced allowing the strata committee to regulate the use of common property to comply with public health requirements without the need to call a meeting of the Owners Corporation.

Importantly, the model by-laws should have more detailed examples of parking by-laws to ensure more effective enforcement.

Furthermore, there is a need to amend the current model by-laws to provide further guidance for renovations, particularly on the requirements for approval under the respective LA and under NSW planning laws and regulations. The model by-laws should provide further clarification on matters such as what a Development Application or Complying Development Application is, when each application is required, and the instances where either a lot owner or Owners Corporation would be responsible for the application.

Additionally, the model by-laws for animals should be amended in line with the New South Wales Court of Appeal judgment in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250, as discussed in Recommendation 2.

Recommendation 8 – Create a template common property rights by-law for owner-occupiers looking to conduct major renovations or obtain exclusive use of common property.

Currently, there is no existing template for common property rights by-laws and owner-occupiers have to seek out private legal assistance for the drafting of a by-law. This causes a socio-economic inequality for

vulnerable and disadvantaged clients such as those on the disability support pension or aged pension who cannot afford private legal fees. All owners within a strata scheme should have the same legal right to seek approval for major renovations or to obtain exclusive use of certain parts of common property, regardless of their financial status.

The creation of a common property rights by-law template can assist in removing the need for owners to seek out private legal assistance and will also provide a resource to community legal centres and Legal Aid NSW to assist vulnerable clients with drafting these by-laws at no cost.

Case Study: *A young client on the disability support pension approached SCSAS as his Owners Corporation had requested, he obtain a common property rights by-law for major renovations within his lot. The strata lot was the client's only asset, and he was in severe financial hardship. A private law firm quoted him $800.00 for the by-law and he simply could not afford this. The client was deterred from proceeding any further with improving his lot due to the fees involved in having a by-law drafted.*

Recommendation 9 – The Act should outline what kind of evidence an Owners Corporation can request as part of proving an animal is an assistance animal. Due care must be exercised to ensure that the evidence required is fair and not onerous on owners or occupiers with disabilities.

If the Act was to be managed to specify types of evidence that can be requested in providing an animal is an assistance animal, it must done so in line with the *Disability Discrimination Act 1992* (Cth) and with direct consultation with the Australian Human Rights Commission.

Many of the clients of the SCSAS have had negative experiences in trying to have an assistance animal within their strata lot. The clients have expressed that their Owners Corporations are requesting extensive bundles of documents for proof their animal is an assistance animal. Many of the requests SCSAS has seen go beyond the test involved in defining an assistance animal under Section 9 of the *Disability Discrimination Act 1992* (Cth). The onerous requests place direct pressure and stress on the owners and occupiers who are already living with a disability that affects their everyday life.

Case Study: *A client approached SCSAS as her Owners Corporation were refusing to allow her to keep her dog in her lot. The client instructed that the dog was an assistance animal for her mental health conditions. The dog was trained to alleviate the effects of her disability and was accredited as meeting the standards of hygiene and behaviour appropriate for an animal in a public place. Rather than accepting this, the Owners Corporation were demanding the client release her medical reports of her diagnosis as well as further personal reports from her psychologist to identify her disability and the need for the dog. The Owners Corporation were requesting a complete accreditation course confirmation which goes*

beyond the test that applies in NSW for an assistance animal under Section 9(2)(c) of the Disability Discrimination Act 1992 (Cth).

Recommendations Related to Lot Damage

Recommendation 10 – Amend Section 106(3) of the Act to require a unanimous resolution for determining whether it is inappropriate to maintain or repair common property.

The current Act allows an Owners Corporation to abuse their powers and pass a special resolution to avoid their strict and absolute obligation to maintain and repair common property. In amending the Act to require a unanimous resolution, it ensures greater protection for lot owners who are being adversely affected by any common property defects.

Case Study: A client approached SCSAS where their owners corporation passed a special resolution holding it is inappropriate for the owners corporation to clean windows in a high-rise building. The responsibility was shifted to each owner which created a hazardous and unsafe situation for all owners and occupiers.

Recommendation 11 – The Tribunal should have a general power to order damages, compensation and other monetary amounts in settling disputes, and;

Recommendation 12 – Section 106(5) should be expanded to allow tenants within a strata scheme to make an application to the Tribunal for reasonably foreseeable loss as a result of an Owners Corporation breach of Section 106(1).

The Tribunal is designed for the effective, quick, cheap and just resolution of strata proceedings. In providing the Tribunal with the jurisdiction to determine strata matters under the Act, there needs to be appropriate consideration of the suitable powers to be given in relation to decision-making. While the Act allows the Tribunal to make general orders to settle complaints and disputes, there is a lack of incentive for respondents to comply with the orders made. Providing the Tribunal with the power to order damages or compensation where appropriate, allows matters to be finalised within the one legal forum, which provides an effective and efficient resolution of the legal issue for the parties involved, as well as the courts and tribunals.

The Tribunal's Consumer and Commercial Division already has demonstrated adequate experience in ordering compensation and the making of money orders, including in the tenancy division, home building

division, and consumer (general) division. The Tribunal's powers should be extended within the strata division to allow for compensation and damages for areas such as:

- Loss suffered by lot owners and tenants due to failures by an Owners Corporation to properly maintain common property (Section 106),
- Damages to an owner's lot caused by an owner's corporation accessing a lot and carrying out work within a lot (Section 122),
- Damages to an owner's property or personal belongings when work is carried out on common property by an Owners Corporation or its agents (Section 122(6)).

As clarified in the recent NSW Court of Appeal decision of Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284, the ability for the Tribunal to award damages saves time, costs and the stress of having to commence two different claims in two different jurisdictions with two different sets of rules. In addition, providing the Tribunal with such powers would avoid duplication of proceedings and remove any inconsistencies in decision making.

Case Study: *A tenant living in a strata scheme approached SCSAS for advice on seeking compensation from the Owners Corporation. The tenant had parked in his car in his exclusive use garage space. The Owners Corporation had organised contractors to fix common property pipes in the basement garage but failed to inform any of the tenants within the scheme of the work before it commenced. When the tenant went to his garage space, his car roof was completed damaged by the contractors with damages amounting to $3,000.00. The landlord refused liability, the Owners Corporation refused liability, and the contractors refused liability. Whilst the matter did resolve through negotiation, the tenant had no avenue at the Tribunal to pursue the Owners Corporation for damages or compensation for their trespass and failure to notify of the works impacting on the exclusive use of his lot.*

Recommendation 13 – An owners corporation should not be allowed to defer compliance with Section 106(1) of the Act under any circumstance.

SCSAS has had many clients approach our service where an owners corporation have deferred compliance with Section 106(1) for many years whilst allegedly taking action against another owner. The owners corporation strict and absolute obligation to maintain and repair common property should be the paramount priority in the Act. The owners corporation have powers under Section 132 of the Act to pursue an owner for the damages caused in separate proceedings. An owners corporation pursuing another owner for damages to common property can cause significant delays in situations where an owner denies access to the lot or fails to reply to correspondence. In turn, this can cause significant issues for other owners and occupiers who are seeking to have common property repairs fixed promptly.

Recommendation 14 – Amend Section 132 to allow lot owners within a strata scheme to make an application to the NSW Civil and Administrative Tribunal for damages caused to their lot by another owner or occupier.

Currently, there is no available avenue under the Act for a lot owner to seek remedies such as money orders from the Tribunal for damages caused to their lot from another owner or occupier. In our experience, the issue of damage caused by another occupier or owner is usually due to unapproved renovations being carried out. In many cases that have come through SCSAS, many Owners Corporations refuse to assist impacted lot owners with taking action against the other owner or occupier who has directly caused the damage to their lot.

The amendment of section 132 to give standing to lot owners to bring an application to the Tribunal will provide a useful and necessary remedy for lot owners who have been unfairly impacted by other owners or occupiers causing damage within a strata scheme.

Case Study: *A client sought advice from SCSAS after an upstairs occupier in her unit block intentionally caused water to run from their balcony into the client's courtyard. This caused significant damage to the client's courtyard tiles and personal property. The client was unable to utilise Section 132 of the Act to her benefit to try and resolve the matter at the Tribunal instead of the Local Court.*

Recommendation 15 – Section 122(6) of the Act requires amendment to provide the Tribunal with direct power to make a specific order for when an Owners Corporation damages an owner's lot.

Currently, Section 122 is silent on whether the Tribunal has any powers to make an order (monetary or work orders) for when an Owners Corporation damages an owner's lot. Many clients have approached the SCSAS instructing that they have experienced damage to their lot as a result of contractors who attended on behalf of the Owners Corporation to fix common property elements within their lot. The majority have expressed that the Owners Corporation make it difficult to rectify damage to their lots and their personal belongings.

Thus, it is recommended that Section 122 is amended to include a further sub-section providing the Tribunal with an actual power to make an order for when an Owners Corporation causes damage to a lot and personal belongings when entering a lot or carrying out work. It is also recommended that a set time limitation is provided when amending Section 122.

Recommendation 16 – Section 153 of the Act requires amendment to provide the Tribunal with direct power to make a specific injunctive order for nuisance and hazard.

In a 15-month period, the SCSAS had 55 enquiries related solely to nuisance under Section 153 of the Act. Clients were commonly frustrated by smoke penetration and excessive noise causing both a nuisance and hazard to their daily living within their scheme. The main frustration expressed by clients of SCSAS is the lack of power to stop a nuisance and hazard from occurring even if the matter proceeds to the Tribunal. Whilst there are general powers set out in Section 232 of the Act, a more direct injunctive type of power should be provided to the Tribunal.

Recommendation 17 – NSW Fair Trading should be given powers to create rectification orders for common property repair issues.

Similar to the powers given to NSW Fair Trading in home building disputes, it is recommended that NSW Fair Trading is provided with more direct powers to create rectification orders during the mediation process between an Owners Corporation and a lot owner in relation to common property repairs. The introduction of rectification orders via NSW Fair Trading will assist in avoiding lengthy litigation for strata disputes and can usefully assist parties in resolving disputes more efficiently and fairly.

In the last 12 months from April 2020 to April 2021, our service had 169 enquiries dealing with common property defects within a strata scheme. In our view, many of these matters could have resolved more effectively and efficiently if NSW Fair Trading were provided with powers to issue rectification orders against an Owners Corporation for common property repair issues.

Levies and Arrears Recommendations

Recommendation 18 – Introduce a provision under Section 85 of the Act to create more certainty as to when interest first accrues.

Currently it is unclear whether interest under Section 85 runs from the date that the contribution became due and payable, or a date at the end of one month after it becomes due and payable.

Case Study: *A client approached SCSAS after failing to pay her levy when it became due and payable. The client paid the levy one month and two days after it was due and payable after some issues with receiving a notice. The client was submitting the interest would only apply for the two days and a major strata managing agent was submitting the interest accrues from the due date of the quarterly contribution. Section 85 of the Act does not clearly set this out.*

Recommendation 19 – Amend the provisions in the Act related to levies and levy arrears, as specified below, and;

Recommendation 20 – Clarify Section 86(2A) costs and create schedule of specific charges capable of being claimed as reasonable expenses under Section 86(2A), that can be placed in the Regulation, so as to be able to be updated as necessary following consultation with stakeholders.

The law around strata levy debt will always need to be a matter of balancing the need of the Owners Corporation to ensure solvency, and the ability by lot owners to pay for the debt. The current scope of the ability for the Owners Corporation to seek unpaid levies, along with the lack of clarity over what can be classified as reasonable expenses under the Act swings the pendulum, not in the interest of the Owners Corporation or lot owners, but instead in the interest of the lawyers, debt collection companies, and strata managing agents ("Debt Collectors"). These actors can then claim excessive fees with limited restriction.

This situation is unique in that per Section 86(2A) the 'reasonable expenses' of the Debt Collectors can be claimed as a debt in and of itself. Reasonable expenses goes beyond that of normal reasonable expenses for legal costs, because it is capable of including the expenses of strata managing agencies and debt collection companies.

Debt Collectors are filing in the small claims division of the Local Court. This is jurisdiction that allows for a more informal resolution of disputes less than $20,000 than the general division of the Local Court. There are no rules of evidence in this jurisdiction. Acknowledging this, and the fact that most people in this jurisdiction are self-represented, this is also a jurisdiction with capped costs. This means that in the event that one party is successful, the amount that they can claim in legal costs is capped up to $1,259.20.

However, because of Section 86(2A) certain Debt Collectors are bypassing the cap on costs by claiming their ordinary fees as reasonable expenses under Section 86(2A). Self-represented owners are unknowingly incurring costs by opening lines of communication with the Debt Collectors to resolve issues which the Debt Collectors are then claiming as Section 86(2A) costs. We have seen circumstances where Debt Collectors have taken action against individual owners, and have included extensive legal fees, such as their original letter of advice to the Owners Corporation, as well as the charges the Owners Corporation incurred in producing a letter of demand to the owner as costs. We have also seen circumstances where Debt Collectors have charged time spent on communication such as emails, telephone calls, and meetings with the owner to discuss the debt, as part of their claimed reasonable costs. These costs don't flow to the Owners Corporation, but instead directly as fees to the Debt

Collectors. At SCSAS we have seen situations where the costs added under Section 86(2A) exceed the amount of the claim, as well as the amount capable of being claimed as costs in the correct jurisdiction.

To resolve this, we propose that there should be a schedule of specific charges that are capable of being claimed as the reasonable expenses under Section 86(2A) for greater clarity for all parties. This schedule should be added to the Regulation to be updated as necessary, following consultation with stakeholders.

Recommendation 21 – Create a second ledger for invoices charged to Owner Occupier. Allow owners the right to allocate payment towards levies or invoices.

Further to the recommendation above we have seen that accounting practices of strata managing agents vary wildly. There is no ability in the Act for owners to determine the correct size of their debts incurred for Section 86(2A) costs versus for unpaid levies – as they are often placed on the same ledger. Further, there is no ability for owners to request allocation of their payments towards either levies or invoices, including Section 86(2A) charges. This results in a "debt cycle" where owners continue to make payments – often in accordance with informal payment plans – but because of how these payments are allocated, they are unable to escape from the continued accrual of interest on the levies, as the payment amounts are split between the legal costs and the overdue levies owed. This process continues, and at SCSAS have seen owners end up with multiple, otherwise avoidable debt collection charges against them under Section 86(2A), in circumstances where had their payments been able to be allocated against the levies only, they would have paid off the levy debt. In circumstances where the aim of the Owners Corporation is to have owners pay for their levies, so that they can continue to manage and maintain the scheme, this practice seems as though it only benefits managing agencies rather than the Owners Corporation.

To avoid this, we propose that a second ledger should be created for invoices, which would remain separate and distinct to the levy ledger. Owners would be permitted to enact a right to request the allocation of payments towards levies, or invoices, to remove the risk of the excessive accrual of interest on unpaid levies for many owners who are unable to escape a cycle of debt. Owners Corporations could always pursue any unpaid Section 86(2A) costs or invoices as debts in the local court - separate and distinct to any unpaid levy debt. This added right, in conjunction with the greater clarity over reasonable costs, would ensure that a lot of debt related matters that would ordinarily be before the Local Court, could be adequately resolved within the scheme, or through Fair Trading's mediation.

Meeting Recommendations

Recommendation 22 – Retaining the ability to conduct electronic meetings, or mixed media meetings for general Owners Corporation meetings or strata committee meetings, without requiring a vote to adopt this within the scheme.

The addition of allowing for meetings to be conducted via electronic means due to COVID-19 has allowed a lot of schemes to continue functioning and is a welcome alteration to conducting meetings where in-person attendance has not been possible. The logistical issues around availability may be alleviated by having general meetings or strata committee meetings conducted in a variety of ways. The notification of each meeting should clearly state the intended meeting method to be used by the scheme for that meeting. This provision should not apply to annual general meetings.

Strata Committee Recommendations

Recommendation 23 – Create stronger and more enforceable duties for members of a strata committee under the Act.

The duty of the committee members under Section 37 typically does not get taken seriously enough. We have had many clients present issues in relation to the conduct of committee members, and their failure to adhere to their duties under the Act, by either acting in a discriminatory way to particularly vulnerable individuals, vindictively attempting to sabotage renovation approvals, or unfairly enforcing alleged by-law breaches, that have yet to be proven. We recommend that a lot of this unwanted conduct would be eliminated or drastically lessened if there were a stricter duty added to committee members, or a code of conduct implemented with compliance requirements. This would particularly assist in relation to neighbourhood disputes, and by-law issues.

A beneficial way to improve the accountability of a strata committee would be to incorporate a requirement that strata committee members abide by a mandatory code of conduct and affirm that they have read the Act and understand the responsibilities of their office and are familiar with NSW Fair Trading's guide to living in a strata scheme.

Recommendation 24 – Tighten the eligibility requirements for election to a strata committee.

The eligibility requirements for election to a strata committee should be stricter and more prohibitive. It is recommended that anyone with connection to the builder or developer of the scheme be outright barred from election. In addition, strata committee members should be required to lodge a declaration of potential and actual conflicts of interest when being appointed to a strata committee. This could take a form similar to the registration process for Not for Profit associations and companies with the ACNC.

Recommendation 25 – Strata committee members should be required to declare potential conflicts of interest.

The current conflict of interest laws is operating insufficiently. Strata committee members should be required to declare potential conflicts of interest, such as with service providers for services and disclosure for Owners Corporation contracts.

Recommendation 26 – Section 238 of the Act should be amended to provide clearer grounds for the removal or committee, and office holders to introduce a minimum attendance requirement.

Currently, the grounds for the removal of committee members and office holders provided in Section 238 are insufficient, broad and undefined. This has led to many owners making applications to the Tribunal to remove office holders for wide ranging issues, including interpersonal issues, and lack of communication. The provision should be amended to provide for clearer grounds for when such removal would be considered by a Tribunal Member.

In conjunction with the above recommendations regarding additional requirements for committee members, a minimum attendance rate should be introduced for committee members, such as a requirement of attending over 80 percent of meetings in one year, and non-attendance by a committee member should be a ground for the removal, or preclusion from re-appointment as a member.

Keeping of Records by the Scheme

Recommendation 27 – The Act should be amended to allow better keeping of electronic records and better provisions for access via electronic means, and.

Recommendation 28 – The Act should be amended to include a provision that prevents the Owners Corporation and/or strata managing agent from citing 'privacy concerns' when there is a clear right to access the records.

In the experience of our clients, the process of inspecting strata records is currently difficult for owners of lots in a strata scheme. Access to records is limited by privacy provisions, which strata managing agents have used to prevent access to records. Despite owners having a clear right to access certain records as prescribed by Section 182(3) of the Act, the experience of our clients has typically been that the strata managing agents refuse to provide records such as strata rolls and cite generic 'privacy concerns'. An

amendment is required in the legislation to prevent this and to be consistent with the recent NCAT Appeal Panel decision of Walker v The Owners – Strata Plan no 1992 [2020] NSWCATAP 192.

Furthermore, another obstacle to owners is the lack of electronic records of minutes for strata committee meetings and Owners Corporation meetings, as well as financial records. A requirement to keep electronic records will improve an owner's access to records by increasing the speed and cost efficiency of searches. Electronic records should be made compulsory to ensure accurate and up to date record keeping and to ensure easier access for owners.

Case Study: *A client approached SCSAS after his strata managing agent refused to provide access to financial records of individual lots on the grounds of "privacy". The client had success at the Tribunal in obtaining access to these records after our advice.*

Renovation Recommendations

Recommendation 29 – The exemptions listed under Section 109(7) and Section 110(7) need to be clearer and the list of cosmetic and minor renovations should be expanded.

The exemptions to cosmetic and minor renovations in the Act need to be better defined for lot owners. In particular, the sub-section related to 'work that changes the external appearance of a lot' is vague, broad, and has caused a barrier to many of the clients who have approached SCSAS with a renovation enquiry in having their works approved as a minor or cosmetic renovation. It would be beneficial to have a list of factors to assist in determining whether works change an 'external appearance' of a lot.

In addition, the prescribed lists of works in Section 109 and Section 110 of the Act should be expanded to include more detail of works as well as further types of renovations. The aim is to minimise the abuse of power by Owners Corporation and strata committee members who continually attempt to force renovations into the major renovation category. In doing so, this creates a lot more onus on a lot owner (including financial) to have renovations completed for their lot.

Case Study: *A client approached SCSAS for advice on whether the installation of a reverse cycle split system air conditioning system was a minor or major renovation. The Owners Corporation utilised the notion that the air conditioning system 'changes the external appearance of a lot' to argue it is a major renovation. The client utilised Regulation 28 in the Strata Schemes Management Regulation 2016 (NSW) and case law to note that this specific air conditioner he was installing was a minor renovation. The dispute remained unresolved for over two-years as a result of the ambiguities.*

Recommendation 30 – Strata committees should be automatically able to make decisions on minor renovations instead of a resolution at a general meeting of the Owners Corporation being required, and;

Recommendation 31 – A lot owner must always be told the reasons why their request for work or renovations was not approved and a strict time limitation should be prescribed in the Act for an approval decision to be made.

Many of the clients of SCSAS have expressed frustration in applying for renovation approval within their strata schemes due to the delay in obtaining approval. In many client experiences, the request for approval is ignored for many months or until the next AGM is scheduled. The current legislation is not adequate in ensuring that strata committees, Owners Corporations, and strata managing agents actually respond to renovation approvals in a reasonable time period.

In addition, when renovations are not approved, in a significant number of cases presented to SCSAS, clients have expressed that they were not provided with any reasoning other than a generic refusal. The approval process in the Act should set out a requirement to provide written notice of a refusal and the specific reasons for the refusal. This will assist lot owners in addressing the refusal issues and aims to avoid unauthorised renovations done out of frustration, as well as minimise the number of matters having to proceed to the Tribunal for work approval orders.

Case Study: A client applied for approval to remove carpets from their lot floors. The client had been engaging in correspondence with their strata committee for over 12 months before approaching SCSAS for advice. The strata committee continually rejected the client's request to remove carpets but failed to provide adequate reasoning for the refusal. The client applied for mediation at NSW Fair Trading to resolve the issue, but the mediation was not successful. Due to a lack of response from the strata committee, the client had to then apply to the Tribunal for orders that the removal of the carpets is a minor renovation and for approval of the works.

Tenants Living Within Strata Schemes

Recommendation 32 – Lot owners should provide electronic notification by email to the Owners Corporation when a tenant moves in.

The SCSAS recommends that there should be a standard electronic or email form that gets filled out to notify the Owners Corporation of a tenant moving into the strata scheme. This may alleviate issues in relation to by-law compliance and common property use and maintenance notification.

Recommendation 33 – Implement a mechanism to inform tenants in a strata scheme that the scheme has reached 50% tenants for participation purposes and remove the permission requirement at meetings.

Many schemes within NSW have large levels of occupancy deriving from tenants, and as a matter of ensuring that they are kept across any changes to the manner in which their building is being managed, it is ideal that this information is appropriately disseminated between all occupants. A significant way in which an issue as to lack of communication can be resolved is by notifying largely tenanted schemes of ways to participate in meetings, so that they can be looped into the decisions being made within the scheme. Allowing tenants to be present at meetings without seeking approval first would alleviate several management related issues that tend to arise, such as the scheduling of structural repairs and works, and changed to common property use.

Recommendation 34 – The Act should incorporate a requirement on an owner to provide a copy of the by-laws to a tenant before the signing of a Residential Tenancy Agreement.

Section 26(2A) of the *Residential Tenancies Act 2010* (NSW) compels landlords or their agents to provide a copy of the by-laws to tenants within strata schemes prior to entering into the agreement. There is a need to ensure consistency across these interlinked legislative provisions, and the addition of a reciprocal section within the SSMA that explains this requirement would ensure this consistency.

Case Study: *A tenant living within a strata scheme contacted SCSAS for advice on common property use. The tenant had been storing outdoor furniture in a common property garden and barbeque area. The Owners Corporation issued the tenant with a notice to comply with a by-law, and it was only at this point where the tenant was made aware of the fact that there was a prohibition on leaving furniture on this part of the common property. After receiving our advice and speaking with the Owners Corporation the tenant was able to obtain a copy of the by-laws and agreed not to store these items there. The tenant was adamant that this issue would not have existed if the landlord had complied with the by-law notification prior to moving in.*

Strata Managing Agent Recommendations

Recommendation 35 – The Act should be amended to include a standard form strata managing agent agreement.

A standard form strata managing agent agreement would assist many owners with understanding the basic rights conferred on managing agents and afford a greater understanding of the roles that typically exist within strata schemes. Operationally it should function similarly to the model by-laws, and the rationale is that smaller schemes can set up a strata managing agent to assist with the administration of the scheme with greater certainty as to the minimum standard of the arrangement. Additionally, it could assist with better understanding the fees that might be charged in accordance with the managing agents exercising the functions of the scheme.

Recommendation 36 – Strata schemes greater than ten lots should be required to be professionally managed.

Larger schemes tend to require more administrative work to be done. In conjunction with many of the recommendations previously made, and the fact that there are undoubtedly changes to the legislation occurring, the need for professional management of strata schemes over 10 lots or larger is apparent. This change would ensure that there is a standard point of contact for larger schemes, and a greater compliance with the legislative requirements. Additionally, placing a strong emphasis on greater expertise for strata managing agents would work to guarantee a higher standard of management is kept, as well as acting as a regulatory mechanism to keep this standard.

In our experience, many schemes with less than 10 lots and with no strata managing agent have experienced a range of financial issues as well as voting blocks and neighbourhood disputes. Professional management can alleviate these issues and assist smaller schemes in ensuring they are functioning satisfactorily.

Recommendation 37 – The Act should be amended to provide guidance in circumstances where managing agents are in dispute with the individual owners, particularly in relation to the duties of the strata managing agent.

From our experience, typically the managing agent is responsible for acting as a conduit for communications between individual lot owners and the Owners Corporation or its strata committee. It is not unusual for SCSAS clients as lot owners to have difficulty in getting responses from the Owners Corporation, the strata committee, or the managing agent to queries or complaints involving common property or by-laws. There is currently an absence of regulation or guide to the duties of the parties in such situations.

Recommendation 38 – The Act should require managing agents to have specialist knowledge, or the ability to provide timely referral to special advice, regarding building defects, by-laws and major remediation contracts.

It is extremely important that managing agents either have specialist knowledge about building defects or can provide speedy referral to specialist advice for remediation of building defects. This is not limited to advice for new schemes. The relevance to older strata schemes can be seen in the context of issues such as concrete cancer and fire protection. Furthermore, specialist knowledge should not be limited to building defects but also include specialist legal advice for by-laws and for major remediation contracts. This also ties to ensuring that Recommendation 35 is appropriately considered, and that managing agent decisions are made for the benefit of the scheme. It may be appropriate to ensure that managing agents are licensed under the Property and Stock Agents Act, and potentially also the master's Builders Association NSW if they are professing to have the requisite expertise.

Recommendation 39 – The Act should list more reasons under Section 237 in relation to applying for a compulsory strata managing agent.

The lack of clarity over the definition of a scheme that is not functioning satisfactorily has led to a lot of owners attempting to appoint compulsory managing agents. In many of these cases that SCSAS have advised, applications have been made to the Tribunal without adequate clarity over the reasoning why such an order should be made.

A more succinct definition or a more stringent criteria for when Section 237 orders may be made by a Tribunal member is necessary to alleviate the Tribunal being clogged with applications that may be misconceived or may not necessarily require a compulsory agent being appointed, because they do not meet the criteria required to show the scheme is dysfunctional.

Case Study: *A client sought advice on how to remove their current strata managing agent and appoint a new managing agent because they had believed the existing agent was not permitting their proposed works to go ahead. After advising the client that this is not necessarily a dysfunction within the scheme to substantiate a claim under Section 237, they withdrew their Tribunal application. This matter could have been resolved prior to the application being made, had the client been aware of the criteria that is required for a Tribunal member to seriously consider a Section 237 compulsory appointment, or if there was greater clarity over what "not functioning or not functioning satisfactorily" under Section 237(3) is intended to mean.*

Other Recommendations

Recommendation 40 – Mandatory participation in mediation by all disputing parties.

The SCSAS recommends that mediation for strata disputes is made compulsory. A significant number of clients who have sought assistance from SCSAS have been in situations where mediation has been declined by the Owners Corporation, without any adequate reasoning. The ability for an Owners Corporation to decline mediation is problematic, and results in higher numbers of applications to the Tribunal for strata disputes for minor issues.

Mandatory participation in mediation (unless exceptional circumstances apply such as safety concerns) will ensure there is a genuine attempt to resolve a matter in good faith between the parties. In addition, it will ensure that the matters proceeding to the Tribunal are not trivial, vexatious and a waste of the Tribunal's resources.

Recommendation 41 – Change the Act to introduce a duty of care on the building manager to act in the best interests of the owners corporation. Building managers should be subject to a similar level of regulation as managing agents.

It is recommended that building managers are held to the same standard as strata committee members. Similar provisions as those set out in Section 37 of the Act should be applied to building managers who assist with the day-to-day management of a strata scheme. As a building manager plays a key role in the operation of a strata scheme, it is vital that they are held accountable for decision making.

Recommendation 42 – A $500,000 jurisdictional limit for Tribunal matters related to strata.

An increase in the jurisdictional limit for matters before the Tribunal to ensure that this is kept in line with the Home Building jurisdictional limit.

Recommendation 43 – Ensure secure funding for strata advisory services in NSW to provide advice to vulnerable and disadvantaged owner-occupiers.

The existence of the strata advice services at Marrickville Legal Centre (SCSAS) and Seniors Rights Legal Service since 2017 have proven to be highly beneficial for vulnerable and disadvantaged owners and tenants in accessing free legal advice, assistance and advocacy for strata related issues. The ongoing funding of these services will ensure that vulnerable owners are made aware of the correct

process to follow before applications to the Tribunal are made, including providing these owners with an assessment on the prospects of their matter, ensuring that owners attempt mediation through NSW Fair Trading, and providing recommendations as to how they should proceed with their claim.

The experience of SCSAS continues to be that there is a strong need in all local communities across NSW for a legal advice and advocacy service that provides assistance to vulnerable, disadvantaged owner-occupiers in relation to collective sales and general strata management issues. SCSAS notes that Law Access NSW, Legal Aid, and Community Legal Centres do not generally provide any advice or assistance on strata law, leaving a large gap in service delivery in an area which is increasingly growing as a form of residence.

Since the establishment of the service at MLC, the solicitors have provided 1671 legal advices to clients living in strata schemes. In providing this service, SCSAS has advocated for and negotiated on behalf of vulnerable and disadvantaged clients with strata managing agents and owners corporations. SCSAS has assisted clients with representation at the NSW Civil and Administrative Tribunal, and the relevant discrimination bodies, and has engaged in a high level of community legal education activities and resources. Currently, there is an uneven balance of powers between individual lot owners, and the Owners Corporation and/or strata managing agent. To ensure procedural fairness in strata disputes, it is vital for vulnerable and disadvantaged clients such as those on the NDIS to have access to free legal assistance.

Case Study: *Client is a 47-year old living with limited English skills in a strata complex that has a by-law restricting animals from living in the scheme. Client is unemployed and suffers from a physical injury due to a car accident as well as psychological disabilities including depression and generalised anxiety disorder. Client approached SCSAAS after receiving an NCAT notice for an application made by the Owners Corporation to issue a penalty for breach of the animal by-law. We advised him on the rules around animals in strata schemes, as well as the rules around assistance animals in line with the Strata Schemes Management Act 2015 (NSW) and the Disability Discrimination Act 1992 (Cth). We then assisted him with a cross-claim at the Tribunal against the Owners Corporation. We prepared his evidence for the Tribunal hearing as well as detailed written submissions about the issues at hand. We represented the client at the Tribunal hearing against the Owners Corporation. The order made was in favour of our client with the Owners Corporation's order for a penalty being withdrawn. An order was also made to allow the client's assistance animal to remain in the strata scheme. The client was extremely grateful for the assistance and representation we provided, as a private lawyer had quoted him several thousands of dollars to assist with the matter. The client said he would never have been able to afford this, and would probably have lost the case without our submissions and representation.*