

STRATA SCHEMES MANAGEMENT ACT 2015

SUSTAINABILITY INFRASTRUCTURE BILL 2020

Background

The implementation of sustainability measures for strata is a desirable and current issue which coincides with the increased awareness of the importance of reduction of energy and water and reduction of pollution and waste.

The Owners Corporation Network (OCN) supports the encouragement of strata communities to make practical, sustainable measures to implement sustainability.

The OCN is calling upon the government to refer the propositions identified in the Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020 to the review of the *Strata Schemes Management Act 2015 (NSW)* currently underway.

The OCN submits that the proposed legislation will have great difficulty achieving its purpose for the following reasons.

Strata Governance and financial disincentive

Strata subdivision is a creation of the NSW Parliament in 1961 (*Strata Titles Act 1961*). One of the urban myths created by Parliament in 1961 is that the certificate of title the Registrar General issues for a strata lot is just like the title to land. It is not. Title to a strata lot is no more than title to cubic airspace — all six external boundaries (**common property**) of which are:

1. co-owned with all other owners in the scheme strata;
2. by virtue of legal title to common property being vested in the Owners Corporation (**OC**) — created at the time of registration of the strata plan;
3. the OC holding legal title to common property title as trustee for all owners; and,
4. an owner's interest in the common property being expressed as the level of "unit entitlement" (**UE**) ascribed to the relevant lot upon registration of the strata plan.

The ATO treats owners corporations differently in each state. In New South Wales, any income earned by the OC is treated as mutual income and must be distributed to the owners in proportion to their unit entitlement. For example, if a telco (Telstra) approaches an OC to put mobile towers on the roof of a building:

1. that tower will be on common property;
2. for which owners in general meeting must agree to lease the use of the common property; but,
3. the revenue generated (rent) is not income of the collective — the ATO sees the OC as receiving the income as trustee for every owner who must carry the amount earned, whether significant or not to their individual tax return.

The ATO scenario is a disincentive to owners corporations becoming involved in any "enterprise" — no matter how valuable to the strata collective or the public interest generally.

The ATO position, based upon the Commissioner's best understanding of current public policy, suffocates any sense of working collaboratively or collectively.

Thus, in the example of the installation of solar panels, the energy produced results in income to the OC which needs to be distributed to the owners. Many schemes do not have the administrative capabilities to achieve this.

Furthermore the increase in "income" for which the owner receives no actual payment, may tip pensioners into an income or asset position which deprives them of a part or all of their benefit. It may adversely affect the ability of investors to maintain their investment.

In many stratas the owners do not have the financial ability to invest in projects which would produce a measurable benefit to the object of sustainability.

For example, even the preparation of a report into sustainability infrastructure, may be beyond the means of many stratas.

The importance of By-laws

By-laws are the equivalent of the Constitution of apartment buildings – they are a significant factor that guides whether people do or don't buy into the building.

By-laws also regulate everything from short-term letting to pet ownership, parking and renovations.

The reason behind the requirement that a change of bylaw requires a special resolution is that a change in the governance of a building is a major occurrence which requires the community to consider carefully whether the proposed change is for the long term benefit of the structure and the community.

There has been no evidence provided that the implementation of sustainability measures has been hampered by the requirement for a special resolution to change the use or modification of common property.

Furthermore, the changing of the nature of the special resolution of one type of bylaw is a dangerous precedent and is not good policy as it removes the ability of communities to regulate their conduct in relation to their own circumstances from time to time. Strata communities understand the nature of special resolutions and having different tests is confusing.

There has been a suggestion in responses to requests to the Greens and Animal Justice Party to explain the reason for this proposed amendment to the legislations that the amendment will facilitate the ability of tenants to keep animals in apartments. This is a grave misunderstanding of the contractual tenancy agreement which is a totally unconnected to a strata's by-laws.

Policy and Strategy

Encouraging strata to implement sustainability measures will not, in the opinion of the OCN, be achieved by the current proposed amendment.

Strata communities would benefit from a programme of education and assistance such as the current programme implemented by Sydney City Council for the reduction of household waste and recycling of food waste, which programme has already produced a significant

amount of green energy. This programme was implemented by an advertising campaign and presentations to the stratas who indicated a willingness to be involved.

The addition of tanks to collect storm water run off for irrigation and car washing is another achievable strategy for even small stratas.

The following additional measures need to be considered in relation to any change in the legislation which encourages sustainability infrastructure. These measures can be fully explored and articulated in the context of the Strata review currently underway:

1. Consideration of the ways in which the mutual income in strata is viewed by the ATO.
2. An education programme to assist small and medium stratas to understand the types of sustainability infrastructure available in their own circumstances.
3. Financial incentives to encourage strategies for sustainability infrastructure.
4. A requirement that all stratas include in their 10 year capital works programme at least one project which includes sustainability incentives.

The proposed amendment to the Sustainability Infrastructure Bill by the Animal Justice Party

The inclusion of this amendment is inappropriate where the Bill purports to address sustainability infrastructure.

The recent decision of the Court of Appeal in the *Horizon* case provides an all-encompassing guideline for stratas in relation to bylaws regulating the keeping of animals

The widespread publicity surrounding the decision means that it will now be impossible for a bylaw to “unreasonably” prohibit the keeping of animal on a lot.

The proposed addition of a regulation making power is overkill and does not acknowledge that what is reasonable in one strata may be unreasonable in another. There is ample opportunity for aggrieved owners to test, for reasonableness, any decision by the OC in NCAT.

The regulation making power would be a one-size fits all mistake where there are so many different types of strata in New South Wales.

Since the introduction of the government’s bill and the amendment hurriedly added in the Upper House, the Strata Review has begun and, once again, the review provides a rigorous system for the consideration of any changes to the legislation, in particular to determine in a considered way the unintentional side effects of any proposed changes.