6 April 2021

Strata Schemes Statutory Review
Policy and Strategy
Better Regulation Division
Department of Customer Service
4 Parramatta Square
12 Darcy Street
PARRAMATTA NSW 2150

Dear Amy and Lachlan

OCN Submissions on the Strata Scheme Management Act 2015 - Review 2020

Introduction

The Owners Corporation Network of Australia Limited (**OCN**) is the peak independent consumer body representing residential strata and community title owners.

There is no dispute that strata is the fastest growing form of residential property ownership in Australia. Accordingly, the legislation which regulates and assists in the proper management of strata schemes should be drafted to assist but not over prescribe the dealings of both the individuals with each other and the individuals and the collective, in the strata environment.

For many people, a residential property is their biggest asset[1] and the largest purchase they will ever make; however, lack of accurate and accessible information impedes their ability to make decisions to invest or to manage their strata lot and the common property.

The Strata Schemes Development Act 2015 (**Development Act**) and the Strata Schemes Management Act 2015 (**Management Act**) (collectively the **Legislation**) provide the backbone and framework for the management of strata schemes. Yet, notwithstanding the number of amendments to and reviews of the legislation, there are still issues which require adjustment and this is recognised and reflected in the scope of the Discussion Paper issued in November 2020.

OCN believes that there are two solutions that can be applied to almost every one of the issues addressed in the Discussion Paper which would provide a focus and a very substantial stepping off point for an effective process for the management of strata issues. These are:

1. Government focus of resources on the strata sector, which could be achieved by the establishment of a Commissioner for Strata Living and the allocation of strata matters to a senior ministerial portfolio.

   It is fair to say that the strata sector is characterised by a lack of transparency, not just at the initial point of purchase of a strata lot but through the lifetime of a residential strata scheme.

[1] Australian Bureau of Statistics, Household Income and Wealth, available at: https://www.abs.gov.au/statistics/economy/finance/household-income-and-wealth-australia/latest-release#key-fingings

The nature of strata property ownership and much of how the strata sector operates is opaque to the general public.

An oversight body such as a Commissioner for Strata Living to provide focussed support to current and potential strata owners for what is generally their largest investment is urgently needed to safeguard owners' rights.

2. Education of owners as to their rights and obligations as strata owners, and education of strata committees as to their duties and obligations. Many of the questions and issues addressed by OCN on a daily basis would be resolved if prospective owners understood the difference between owning a house and owning a lot in a strata community. A simple one page document outlining these differences could be attached to every contract for the sale of a strata lot.

   The document should be in a variety of community languages given the recent data indicating that a significant proportion of purchasers of residential strata lots are born outside Australia and speak a language other than English in the home.[2]

   OCN often receives complaints relating to issues which have arisen due to the delegation of duties to Strata Managers. The Strata Manager's role is to assist in advising the owners corporation/strata committee to keep the Strata Plan compliant with the various government acts and importantly the record-keeping and filings associated with statutory obligations.

   It is important to note that Strata Managers generally do not do anything until after the event. They are reactive and retrospective. They are, by and large, processors not instigators. The essence of good management is to be proactive.

   It is not the Strata Manager's job to "run" the strata, this is the responsibility of the owners.

   To run a Strata Plan successfully the owners must hold successful meetings. That means a clear agenda and clear actionable minutes. Running the meetings and writing the minutes are core building blocks to 'taking control'

   It is not the Strata Manager's job to guide or make decisions regarding budgets, levies and or spending priorities other than with respect to legal strata requirements; this is the responsibility of the owners.

   These are the matters upon which an owner must be educated in order for there to be an harmonious and productive community and not one in which there is exasperation and inefficiency.

   Likewise, strata committees would be more easily able to undertake their duties if owners were provided, as a statutory obligation, with more information and education on becoming members of a strata committee.

   Through the last 12 months, there has been an explosion of the quality of online training. There are benefits of in-person training, however, an online program – utilising infographics, video animations, reading, short talks, self check questions, multi choice tests and even a certificate at the end has a lot of advantages. An online self-paced program can be done any time, anywhere, could be delivered in modules (specific modules for office holders) and is almost infinitely scalable for minimal marginal cost. No physical facilities would be required

[2] (Australasian Strata Insights 2020 – city Futures Research Centre UNSW June 2020

and attendees would not require travel time, parking etc. to undertake the course. There would also be consistency of delivery.

Mandatory participation in education by recognised bodies such as OCN or Strata Answers (rather than strata managers who sometimes have a conflict in this area) should be undertaken within 3 months of election to a strata committee.

This would avoid the situation suffered by many schemes, where committee members are accused of exceeding their powers or not enforcing by-laws or maintaining common property.

The preparation of this education requires a funding commitment by government which would be offset by fewer conflicts requiring intervention by dispute resolution bodies. This education should be provided without charge to the individual or the owners corporation.

OCN has always advocated for the ability of individual strata schemes to manage, as much as possible, their affairs to suit the owners and the circumstances of the particular strata. OCN's experience is that there is so much diversity in the nature of strata communities that it is impossible to mandate a one size fits all policy. This would result in a regulation which suits one type of community while affecting others adversely. For example, what might be wise and just for an older strata might be oppressive for a newer build and vice versa. Large structures require different considerations to smaller builds and those in city centres differ from those in suburban or regional settings.

Given the very large variety of stratas, whether by size, age, location or many other factors, it may be time that the strata legislation recognises the split between small (1-50 lots), medium (50-99 lots), large (100+ 300) and maxi (400+) to provide more focused regulation.

Using the headings and, where necessary, the question numbering adopted in the Discussion Paper, OCN makes the following submissions to assist in the review and amendment of the Legislation.

Strata Schemes Development Act 2015

Strata Renewal

16. The process for strata renewal or collective sale has been made necessarily stringent, to protect dissenting owners. The legislation currently requires the owners corporation to pay the legal costs of the dissenting owner. However, it is critical that the dissenting owner be required to act in good faith. OCN is aware that developers have been buying a lot in buildings either going through or with the potential for collective sale, and using this provision to their advantage to force a distressed sale.

    The provision that an owners corporation must pay the legal costs of the dissenting owner is also unfair when the dissenting owner has not acted in good faith.

17. Yes s88 should be expanded. And if a dissenting owner lodges an objection on unmeritorious grounds the Court should have the ability to issue a cost order.

18. Yes.

Part-Strata Developments: mixed use and layered schemes

20. OCN fields many complaints about the inequality vested in the management statements by developers, which often favour the commercial use strata over the residential portion/s.

This is particularly important in relation to the contracts entered into with management companies, tradespersons and utilities where a conflict of interest is often undisclosed.

It is very rare that the review process for the allocation of costs does in fact occur every five years and it is often the case that the smaller members of the building management committee are not even aware of the review provisions.

This is an example of the requirement, discussed in detail below, for access to education of owners and committee members.

Building Management Committees

24. The processes for the government of mixed use schemes continues to be problematic, particularly in smaller schemes where the developer retains control of a retail scheme to the detriment of those in the residential scheme.

    OCN has a case study which is attached as Appendix 1. It involves a small scheme in Erskineville. The problem discussed in this case study is repeated in many other small complexes and illustrates the wastage in having multiple managers. The issue of conflict of interest is also highlighted, with the developer maintaining control because of the retention of the retail strata.

    Many of the issues which are exposed in mixed use schemes could be solved by a limit on the influence of the retail scheme in the building management committee and a time limit on the ability of a developer to control the management committee.

27. All contracts entered into by the building management committee should be identical to the time limit imposed for contracts for individual owners corporations – one year at the 1st AGM and three years thereafter.

Strata Schemes Management Act 2015

Introduction

Throughout the discussion paper there are some key points that OCN would like to highlight in order to establish and maintain a focus on what the OCN believes are priorities for the Review:

1. **Sustainability.** There are few more important global issues than sustainability. Via the Management Act and the Strata Management Regulation 2016 (**Regulation**) the Government can establish a leadership position to ensure those who live in strata commit to contribute. The Government via its Sustainability Infrastructure Bill has intended to make sustainability projects easier for owners corporations to gain approvals. OCN is of a view that there are further opportunities and the Management Act should, at a minimum, legislate for:
    a. NABERS to be mandated for all strata schemes in a phased way, including assistance with funding for assessments,
    b. All new buildings should be a minimum of 5-star NABERS rating,
    c. EV Charging infrastructure should be mandated in all new buildings. At the very least, developers should be required to provide sufficient power supply for retro fitting of EV charging infrastructure.
    d. The Model By-Laws should include a model for the installation of sustainability infrastructure.
    e. The 10 year capital works plan should include a section explicitly naming this for consideration.

2. **Democratic Right to Decide**. It appears that there has recently been a highjacking of the by-law processes, particularly with an undue focus on pets in strata. This undue focus on pets (for example, the number of questions about pets in this review) has distracted the community from the bigger picture and has the prospect of overturning a key element of strata living; the use of by-laws.

   Owners corporations need to have confidence that their democratic right to decide on their own living conditions has the support of the legislation to ensure this is protected.

   The attempts to enforce a one-size-fits all policy is unjustified given the variety of stratas in New South Wales.

3. **Reasonableness**. The previous review of the Management Act made many changes that were directed towards protecting the rights of individual owners.

   In the process there is an unintended consequence that some unscrupulous owners flaunt these rights and simply exhaust and frustrate hard working committees. OCN has examples of an owner submitting over 200 owner's motions to an AGM and, in another case, insisting on weekly inspections of strata records.

   This concept, which is hard to understand for most owners, should not lead to a situation where any owner whose wishes do not accord with the majority of the community can claim to be "oppressed".

   The review has introduced the term "reasonableness" in the context of a test for by-laws. OCN is of a view this same term needs to be applied to many more areas such as record inspections and owners motions.

4. **Contractual Agreements.** Owners corporations are often unable to negotiate effectively with service providers either due to lack of competition or lack of power in the relationship. There needs to be more protection against unfair contracts, particularly those of unreasonable length or those entered into by the developer prior to the first AGM.

   The ability of an owners corporation to manage the common property relies on the transparent and competent co-operation between the strata committee, the building manager (where one exists) and the strata manager. All too often OCN has been informed of the breakdown of that relationship with the parties working against each other. Although this problem can arise at any time during the life of a strata, it is most often at the beginning on hand-over from the developer when a very obvious and dangerous conflict arises between the new owners and the developer-appointed managers.

   There should be provisions to protect against lock-in contracts initiated by developers including the associated issues of on-selling of management contracts, locking in expensive contracts for utilities and, of course, prohibiting any form of commissions for managers. The United States has for years permitted the owners corporation to terminate developer appointed contractors with 90 days' notice.

RESPONSES TO THE SUBJECT HEADINGS IN THE REVIEW DISCUSSION PAPER

Objects

41. OCN agrees that the policy objectives which guided the 2015 reforms should be added to section 3 of the Management Act to enshrine the clear standards of governance required to enable efficient and effective management of strata living.

Managing the Scheme

Strata Committees

42. OCN receives many requests for assistance regarding the operation of strata committees. These enquiries are equally from members of committees and from owners who require assistance in understanding the powers and duties of the strata committee (**SC**).

OCN submits that there should be a requirement that every owner elected to an SC should be required to participate in an education program, conducted by recognised bodies, within the first three months of election.

There should be specialist education for office holders to ensure that every committee member understands the duties and limits of the office. Although the Management Act defines the roles of Treasurer and Secretary, there is no clear guidance for the role currently defined as Chairperson. This can lead to power plays and conflict.

OCN submits that the present definition of the functions of a chairperson are inadequate and should be linked to the directions provided by the Australian Institute of Company directors[3] as follows (adapted with reference to the Chairperson of an SC):

The chair is responsible for leadership of the SC including:

- facilitating proper information flow to the SC;
- facilitating the effective functioning of the SC including managing the conduct, frequency and length of SC meetings;
- communicating the views of the SC to the Owners and residents.

In performing his/her role, the chairperson's responsibilities also include:

- In consultation with the secretary:
  - setting the agenda for the matters to be considered by the SC;
  - seeking to ensure that the information provided to the SC is relevant, accurate, timely and sufficient to keep the SC appropriately informed of any developments that may have a material impact on the SC and the performance of its duties;
  - seeking to ensure that communications with owners and residents are accurate and effective;
- Seeking to ensure that the SC as a whole has the opportunity to maintain adequate understanding of the owners corporation's financial position, strategic performance, operations and affairs generally and the opportunities and challenges facing it;
- Facilitating open and constructive communications amongst SC members and encouraging their contribution to the committee's deliberations;
- Liaising with and counselling, as appropriate, SC members.

Re-election should be prohibited unless the education program has been completed.

Committee members should be required to attend at least 60% of committee meetings (without reasonable excuse) in order to renominate.

[3] https://aicd.companydirectors.com.au/

45. There are several simple ways to enlighten strata owners and reinforce the duties of an SC as to accountability.

A Code of Conduct

Since 2007 a simple form Code of Conduct has been adopted in Queensland which addresses the main duties of committee members, which are:

1. To be committed to acquiring an understanding of the Act, including the Code.
2. To act honestly and fairly and not to unfairly or unreasonably disclose information held by the body corporate, including information about an owner, unless authorised or required by law to do so.
3. To act in the best interests of the body corporate, unless it is unlawful to do so.
4. To take reasonable steps to comply with the Act, including the Code, in performing their duties.
5. Not to cause a nuisance on scheme land or otherwise behave in a way that unreasonably affects a person's lawful use or enjoyment of a lot or common property.
6. To disclose to the committee any conflict of interest the member may have in a matter before the committee.

Education of committee members

OCN submits that there should be a requirement that every owner elected to an SC should be required to participate in an education program, conducted by recognised bodies, within the first three months of election.

This can be achieved by an online program – utilising infographics, video animations, reading, short talks, self-check questions, multi choice tests and even a certificate at the end has a lot of advantages. An online self-paced program can be done anytime, anywhere, could be delivered in modules (specific modules for office holders) and is almost infinitely scalable for minimal marginal cost. No physical facilities would be required and attendees would not require travel time, parking etc. to undertake the course. There would also be consistency of delivery.

There should be specialist education for office holders to ensure that every committee member understands the duties **and** limits of the office.

Ineligibility of a second joint owner of a lot

The Management Act currently prohibits joint owners of a single lot both being members of the SC. It appears that the intention was that only one joint owner would have the right to self-nominate, but the Management Act as drafted prevents the second joint owner being nominated by another unrelated lot owner in the scheme.

S31 of the Management Act requires clarification in plain English.

<u>Meeting Procedures</u>

48. The Management Act should include a provision which requires the Secretary to notify owners of the cut-off date for the submission of motions for inclusion in the Annual General Meeting agenda.

OCN is frequently told of situations where the agenda for the AGM has been issued without warning to the owners, also by strata managers without consultation with the SC.

There should be a limit on the number of agenda items which can be included by a single lot owner. OCN knows of a case where over 40 items were included by an owner and an instance of an AGM taking over 5 hours due to the number of single owner motions.

Individual owners should be allowed to submit no more than four motions at each general meeting.

49. Meeting Procedures - While the Management Act addresses some aspects of meeting procedures (quorum, timing, adjournment, decision making) it is silent on actual meeting procedures (ie if a seconder is required or not, managing debate, points of order). Taking meeting procedures out of the Management Act into a regulation or by reference to another act or regulation, provides more options and flexibility.

Meetings and voting

50. OCN supports the efficiency which can sometimes be achieved using electronic means of voting. However, OCN is aware that in many stratas not all owners can access technology for a number of reasons including language, finances, remote connection.

Thus, many owners may not be aware of issues being raised if notification occurs only by electronic means, or be unable to respond in a timely manner to calls for electronic voting.

OCN **does not support** any move to legislate for pre-meeting electronic polling, as this process removes the arena for debate and discussion in an open forum and may lead to abuses when important changes to the strata rules are proposed. Pre-meeting polling can also lead to fraud and many strata managers do not have the means to provide failsafe processes to check vote security.

51. OCN sees a difficulty in the removal of proxy votes if electronic voting is used. This is because an owner may be out of contact by electronic means – for example in a remote area without good connections but still wants to vote on a particular issue. Thus, if electronic voting is adopted in any particular strata scheme, proxies should still be available.

Proxies are an important safeguard to ensuring balanced voting and discussion (for example many people want to be engaged but are shy or lack confidence to engage. Providing their proxy to a trusted person can overcome this issue). It is important to maintain proxies and control of proxies. The current controls are a good balance.

53. The limits on proxies appear to have removed some of the worst vices in proxy farming; however, there is still an issue if a strata managing agent, caretaker or original owner has more than 25% of the votes by proxy or otherwise and may have an unfair control over the decisions made at owners corporation meetings.

This remaining issue could be resolved by prohibiting a person in a commercial relationship with the owners corporation, to hold more than 25% of all votes.

Voting rights for Storage and Car Spaces

OCN fields enquiries from Strata Committees and owners regarding the rights of lot owners who hold only a very small percentage of the unit entitlements – for example a title to a car space, and do not have a residential lot.

OCN sees a difficulty when these lot owners seek to influence the management of the strata by nomination on the committee or by gathering proxies to push for changes to common property, such as allowing annexation of spaces adjacent to their lot.

OCN submits that voting rights for car spaces and storage spaces where the owner does not also own a residential lot in the strata, should not be permitted.

Improving Tenant participation

54. OCN believes the current arrangements are sufficient.

Appointment of Managing Agents

55. OCN supports the extension of the period of appointment after the first AGM from 12 months to 15 months.

OCN agrees with the proposed amendment to s50 (6)(a) of the Management Act which should cure the problem identified, to provide that a termination notice cannot be given in fine print at the beginning of the engagement, and suggests the following words "no more than 6 months and no less than 3 months from the end of the term of the agreement". This would allow notice 6 months out which gives an owners corporation time to tender for a new agent.

56. OCN agrees with the proposal that the developer should have to present the owners corporation with a choice of three managing agents at the first AGM.

57. OCN supports the continued prohibition on the appointment by a developer of a strata manager with connections to the developer (s49(3) Management Act). In the light of the ongoing issues regarding the identification of and prosecution of defect claims, the developer clearly would be in a position of conflict if its "appointee" were to be in charge of this process.

An anonymised case study attached as Appendix 2 illustrates the issues which arise at the first AGM when new owners are pressured by a developer appointed strata manager.

58. The strata management agreement is perhaps the most important contract entered into by an owners corporation. Currently, most strata managers use the agreement produced by the strata managers' industry association (SCA) which is skewed in favour of strata managers. Many owners corporations do not have the expertise or bargaining power to negotiate more suitable terms.

OCN supports the inclusion in the legislation, as a Schedule, a Standard form of strata management agreement.

The current industry agreement is incomprehensible to all but a few highly experienced owners. Any contractual document needs to be in plain English and expressed in a manner that owners can understand, clearly defining what is included in the Agreed Fee and what services are extra. The agreement can be amended by mutual consent of the parties.

The exclusion of liability clauses in the agreement in current use by many strata managers in relation to which OCN has fielded many enquiries is too broad.

Smaller schemes have difficulty extracting themselves from onerous contractual relationships when the Strata Manager refuses to accept termination. This would be avoided if the contractual document was not biased in favour of the managing agent.

59. OCN is aware that certain groups with self-interest are advocating that managing agents are mandated for certain sized schemes. Irrespective of the size of the scheme, the Management Act should make prospective owners corporations aware of the benefits and otherwise of engaging a managing agent OR being self-managed, and the owners

corporations should be free to make their own decisions based on what best meets their needs.

Minimising conflicts of interest

60. Current conflict of interest laws are insufficient. Owners corporations are often heavily reliant on their strata manager obtaining the best pricing and quality of service, but in many cases the strata manager is conflicted as they may receive a commission based on the cost of the service. Strata managers are not governed by APRA rules (they should be) and may promote or engage a product or service based on the amount of commission they receive.

    Insurance Commissions is a major source of conflict of interest as typically strata managers claim between 18%-24% commission for arranging insurance. Therefore it is not in the strata manager's interest to promote ways to reduce the premium such as increasing the excess, which is often a nominal amount which encourages trivial claims and inflates the premium.

    Furthermore, having the strata manager commission grossed into the premium inflates the statutory charges of emergency services levy (ESL), stamp duty and GST so that for every $100 the strata manager receives in commission the owners corporation will incur approximately $50 extra in statutory charges. The ACCC Northern Australia Insurance Inquiry November 2020 recommended prohibiting conflicted remunerations for insurance brokers.

    OCN recommends commissions to strata managers be replaced with a fixed fee/ invoiced fee charged separately from the insurance premium.

    Other services facilitated by strata managers should also be remunerated by a fee or time billing charge other than a commission for the same reasons.

    Strata managers often quote low retainer fees and rely on opaque commissions for their profitability. OCN's position is that strata managers should quote a realistic fee that supports the viability of their business instead of relying on conflicted payments.

    OCN also recommends that strata managers should be subject to APRA regulations.

61. OCN believes there is a high risk of corruption when gifts and commissions are involved. The current penalty is too low and should be increased.

62. OCN strongly supports the requirement of a duty of care for strata managers when acting or procuring goods and services to obtain the best pricing and quality. Our comments in section 60 to ban commissions and replace with fee for service also apply.

63. There is a growing trend for strata management companies to become a one stop shop providing multiple services to owners corporations. These include:

    - Facilities management
    - Insurance brokerage
    - Legal advice
    - Debt collection
    - Cleaning and other maintenance services

    As the strata manager should be acting in the best interests of the owners corporation, there are major conflicts of interest if other service providers are related entities or have overlap of shareholders. At a minimum related parties must be declared.

Functions of strata managing agents

65. Strata Managing Agents know that the likelihood of being found guilty and suffering a penalty for overstepping their delegated authority is very low. Increase the penalties and speed up the dispute resolution process to enable owners corporations to function effectively. This is particularly pertinent to smaller schemes which do not have resources or time to waste.

66. OCN has knowledge of a situation, which escalated into protracted and expensive litigation, where an owner was able to overturn the strata committee to stymie capital works which had been ordered by City of Sydney and which were issues of public safety. [4]

Subsequent strata managers were unable to hand over documents due to the strata committee refusing to co-operate.

Another reported case involved the payment of legal fees in circumstances where an owner was in conflict with the owners corporation and managed to overthrow the sitting committee and then directed the strata manager not to pay the legal fees properly incurred and levied. Once again this resulted in a lengthy dispute with the lawyers adding further unnecessary costs to the owners.

OCN supports an amendment to s57 of the Management Act to include a defence for an alleged breach by a managing agent who has been unable to carry out a duty in circumstances where the owners corporation has refused to release funds that have been levied and are necessary for the duty to be carried out.

<u>By-Laws</u>

80. OCN supports a change from 6 months to 2 months. 6 months is too long and much damage can be done when the by-law is not enforceable. Likewise, an owner wishing to start a renovation, which affects common property and has approval from the owners corporation by special resolution, should be able to act on that by-law without controversy. There is no reason why a new or amended by-law should not be lodged for registration immediately.

82. s139(1) Management Act already contains a prohibition against any by-law which is contrary to the terms of the Act or is harsh, unconscionable or oppressive.

OCN considers that the terms "harsh, unconscionable or oppressive" are ambiguous in the context of the regulation of conduct by strata communities and not easily understood by owners.

In the recent case of *Cooper*[5], Fagan JA stated:

> *91* *I do not consider that by-law 14.1 falls within the description "harsh". I do not find it necessary for present purposes to envisage what characteristics or operation of any by-law might engage that statutory description in this context of residential strata plan governance. Where that word appears in s 139(1) it does not convey a meaning that is sufficiently clear to influence the proper interpretation of the associated word, "oppressive".*
>
> *92* *The context of strata plan management does not readily suggest what features or scope of operation of a by-law might make it "unconscionable". As Basten JA has*

[4] https://www.commercialrealestate.com.au/news/strata-stoush-at-iconic-broadway-building-sees-more-than-1-million-in-legal-fees-spent-994102/ and *Unilodge Australia Pty Ltd v The Owners Strata Plan 54026* [2020] NSWCATCD

[5] *Cooper v The -Owners Strata Plan 68058* [2020] 250

pointed out at [25], that term is generally understood in equity as concerned with a stronger party to a transaction exploiting some special disadvantage of a counterparty. By-laws are added, amended or removed by voting in accordance with unit entitlements at a general meeting of the owners corporation, not by negotiation or by the making of a transaction between persons with greater or lesser bargaining strength or special disadvantage. I do not regard the word "unconscionable" as applicable to the present by-law.

83. OCN does not support any extension to tenants of the right to test by-laws by application to NCAT. Owners have a large financial investment in their lot and have the right to contribute to the regulations which manage the use and enjoyment of the common property. Tenancy agreements are contractual between the parties to that agreement and outside the ambit of the Management Act.

84. One of the largest areas of complaint fielded by OCN relates to the inability of owners corporations to deal efficiently and economically with breaches of by-laws. The processes are already complicated by the fact that the parties are in close residential contact and animosity is sometimes very high. The difficulty of then waiting months for adjudication of any complaint exacerbates the animosity and the breaches continue.

    As identified on page 44 of the Discussion Paper, the enforceability of by-laws against long term tenants is also problematic, and more so with short term lets. OCN would support discussion on the possibility of making a landlord lot owner vicariously liable for any serious breach of by-laws.

    OCN will enlarge on this subject in relation to questions 132-140 of the Discussion Paper which address the resolution of disputes and the Tribunal and NSW Fair Trading.

85. The amendments to the Management Act in 2015 preserved the by-laws in place at that time but directed each strata to review their by-laws to ensure that they reflected the current wishes of the individual communities.

    OCN's position is and always has been to support the rights of communities to regulate their own living conditions and would not support any attempt to erase current by-laws with the stoke of a legislative pen.

    There has been recent discussion about the so-called difficulty in challenging by-laws due to the fact that a special resolution requires "not more than 25% of the value of votes are cast against it".

    It is a complaint that it is difficult to get critical mass to approve a change in by-laws. This is a misunderstanding of the nature of strata communities. Over time communities change in many ways. Constituency changes in terms of age, number of householders in the lots, professions or even due to the age of the structure itself.

    Thus, the by-laws in any particular strata will adapt according to the needs of the community so long as the legislation encourages frequent reviews of by-laws.

86. OCN supports the inclusion in the model by-laws of a by-law for processes for retro-fitting of hard floors and for air-conditioning. This would reinforce the need for protocols for each of these and also minimise prolix additional by-laws each time there is a motion by an individual lot owner for alteration to common property for these purposes.

    OCN will enlarge this submission in the response to questions 102-108 regarding alterations to common property.

The updating of the model by-laws is a very large topic which requires a separate submission. OCN would welcome targeted consultation on this issue.

Pets and Assistance Animal By-Laws

88. OCN agrees that an owners corporation can and should request proof that an animal is an assistance animal. OCN is aware of instances where it has been alleged that an animal is an "assistance animal" simply to avoid registration under a by-law requiring permission for the keeping of an animal on a lot.

    It is good management for a strata to be able to keep proper records of animals, in case of damage to common property or nuisance. In smaller schemes this may not be relevant as all of the owners are aware of each other and the animals living in the building; however, in principle it is a good process to have records.

89. OCN would support a regulation to outline evidence which should be given as proof that an animal is an assistance animal. OCN is aware of circumstances where the "proof" provided is simply a letter from a friendly GP. This is not adequate to allow an SC to make an informed decision.

90. OCN supports the rights of a strata community to make by-laws, including by-laws regarding the keeping of animals, which reflect the views of the owners and the circumstances of each strata.

    On pages 47 and following, the discussion paper identifies 4 options which could be considered for a specific provision in the Management Act regarding the keeping of animals.

    OCN supports Option 1, which is to allow owners corporations to make their own by-laws.

    OCN does not support Option 2 as this option includes the use of the term "unreasonably", which is a term open to misinterpretation and does not take into account the circumstances of a particular strata. It is not possible to define "reasonableness" as a one-size-fits-all proposition. For example, there are some commentators who consider that there is no reason which could prohibit an owner from keeping an animal on their lot. In some circumstances this has led to applications for the keeping of excessively large animals in very small lots. To the aforesaid commentators, any refusal of an application is unreasonable as they believe that it is not the owners corporation's business to have regard to the safety and welfare of the animal.

    OCN supports option 3 as it preserves the rights of owners to regulate the living conditions of their own buildings. Prospective purchasers can choose a strata with a pool or without a pool, which allows animals or does not allow animals, has a gym or does not have a gym. Forcing all stratas to have pools and gyms because these facilities are "good for you" is as irrational as forcing owners who have chosen to live in an animal free environment to live in an environment which includes animals.

    It is as unconscionable to force owners to live with animals, as it is for a pre-existing right to have animals taken away by a change in by-law.

    OCN does not favour Option 4 which is an amendment to "enshrine" the effect of the decision in *Cooper* in the Management Act. OCN believes that every strata should make its own by-laws.

Further submission consequent upon the amendment to the SSMA in relation to the requirement that the Minister review the strata management laws as they relate to the keeping of animals in strata and to table a report in both Houses of Parliament by August 2021

The amendment requires the Minister to review the SSMA as it relates to the keeping of animals on lots in strata schemes, including by addressing the following matters—

(a) the circumstances in which it is reasonable to prohibit the keeping of animals,

(b) the impacts of kept animals on the health and wellbeing of residents,

(c) the barriers faced by residents in the keeping of animals and by persons who require assistance animals, including vulnerable persons,

(d) the welfare of kept animals,

(e) how to limit any adverse impacts of kept animals on common property, including the adequacy of existing laws to deal with this,

(f) how to resolve disputes about the keeping of animals,

(g) the effects of a change to the by-laws for a scheme that prohibits the keeping of an animal that was lawfully kept on a lot before the change.

OCN has been contacted by members who have experience with examples which may be helpful to formulate the regulations and is aware of several studies which address some of these issues and requests an opportunity to make further submissions on this topic.

<u>Other Specific by-law making powers</u>

91. The current commentary in relation to the concept of "property" rights in the context of strata, misunderstands the very nature of strata as a community.

    By-laws are added, amended or removed by voting in accordance with unit entitlements at a general meeting of the owners corporation, and as such they reflect the wishes of the community (albeit not necessarily unanimously) and the right for that community to control their living conditions. The example of short-term letting is a case in point. Strata communities are not hotels, but owners who want to exploit the ownership of their lot and burden the common property cannot be charged higher levies although their use of their lot by short term tenants necessarily affects the living conditions of the other owners. The OCN has always supported the right of owners to make their own by-laws, consistent with the terms of the Legislation.

    Short term letting issues still occupy the time and energy of many owners corporations. There remain several gaps and unresolved strata legal policy questions that are challenging individual schemes. The initiatives discussed in 2019-2020 have also not been fully implemented, in particular, the registration of properties and coordination with by-laws of individual schemes.

    It is important the strata policy issues are addressed and the registration system is not rushed through without sufficient consultation simply in order to meet the initial start date of mid-2021.

    OCN requests an opportunity to make further submissions on this topic.

Records, tenancy notices and service

92. OCN is aware that owners corporations struggle to identify tenants due to widespread failure by agents and owner investors to provide up-to-date lease details.

    The current sanction of 5 penalty points, which is $550.00, is inadequate and very rarely actioned by strata managers or owners corporations as the process for enforcing the penalty

is more expensive than the penalty itself. This was recently highlighted in the discussions concerning the amendments to the Management Act regarding short-term letting.

The liability for the penalty should be extended to include the manager of the tenanted property. This requirement could be added to the Property, Stock and & Agents Act.

93. OCN supports the proposition that all strata managers should be required to keep electronic records. The transfer of records in old schemes could be problematic, however the ease of searching and the accuracy of record keeping would be enhanced if there were provision in the Management Act for all stratas, newly established and already existing, to move to electronic record keeping within 6 months of the amendment to the Management Act.

Furthermore, where a strata manager has email addresses for all lots, they should not be entitled to mail additional copies in order to charge the owners corporation for unnecessary postage.

Availability of Records

94. OCN members have reported a number of difficulties with the availability and scope of inspection of records.

Records which are not in electronic form can be very difficult to inspect and much depends on the sophistication of the strata manager's record keeping facilities. This issue would be alleviated by requiring the introduction of electronic record keeping by all strata managers, using the same or compatible software.

Since the advent of legislation allowing email addresses for the delivery of notices there have been circumstances where an owner with a gripe has used the email addresses obtained by strata search to flood the other owners with unwanted correspondence. OCN has a case study where the correspondence issued contained dangerous mis-information and material which was possibly defamatory.

OCN has fielded enquiries from owners who have been denied access to the email addresses of owners citing 'privacy reasons'.

This also relates to the availability of unlisted and mobile phone numbers.

If an owner communicates personal or sensitive health or financial information to the strata manager it should not be available for inspection.

There is a strong argument that information provided to strata managers for the sole purpose of facilitating efficient delivery of notices should not be available to other owners, as there is potential for mis-use or for personal gain. The contra argument is that the availability of email addresses facilitates the ability of owners to contact other owners and provide arguments in favour of or in opposition to motions to be decided at general meetings.

There should be a clear statement of what information should be available to owners searching strata records.

There may arise a situation where it is difficult to contact other owners to provide information about issues such as defects which are not being actioned by the strata committee or strata manager or about allegations of mismanagement by the strata committee or the strata manager.

OCN, having weighed the alternatives, believes that while mailing addresses should be available, email addresses and telephone numbers should not be available to other owners.

OCN also submits that there should be a limit on the number of requests for inspection of strata records (s182) and that the request must be reasonable – that is a restriction on the number of documents or the scope in time of the records. If the preparation of the inspection takes more than 30 minutes there should be an additional charge in 30-minute units.

97. See response to question 92 regarding difficulty enforcing the obligation to provide details of tenancies. OCN submits that the penalty (currently 5 penalty points) should be increased and in cases where there is a real estate agent managing the property, the real estate agent should be made liable to provide the information.

98. Serving of notices is simple and well laid out in the Act. Most can use email so hard copy mail should only be used when an email address is not provided. It is not reasonable to allow email delivery **only** when the strata manager has 100% of the owners' email addresses (which is the case presently).

Managing common property in a strata scheme

102. OCN agrees that any motion for changes to common property in connection with renovation of a lot, **should** include a provision for the ongoing maintenance of the changed conditions.

OCN would go so far as to say that the default position should be that the owner requesting permission to alter common property which abuts the lot, should be responsible for the ongoing maintenance of the changes to common property.

For example, an owner applying for a bathroom renovation which involves lifting the tiles, should be required to take responsibility for any future issues arising from the waterproofing.

103. OCN fields many enquiries regarding the failure of individual strata owners to make proper applications for changes to lots and lots and common property. The regime set out in ss.109-111 of the Management Act needs clarification.

There is a need for further education of owners and of strata committee members regarding the different types of work and the different rights and obligations to undertake those works.

104. The "definition" in the heading of s111 should be changed to "Major works – including changes to common property". This would be consistent with the difference between small changes to the interior of the lot, minor changes which require skilled tradespersons, and major changes which require development and building permissions and which affect common property, such as structural changes.

s.110 Minor renovations – the example of "installing or replacing wood or other hard floors" should be removed from this section.

The problems of inadequate sound proofing and insufficient consideration of the flow-on effect of changing the height of flooring which can lead to problems with fire doors and fire safety issues (which is a common property obligation) means that this type of work should be included in s111 as a major work.

OCN submits that a hard floor specification should be included in the model by-laws to make it easier for owners corporations to adopt well worded regulations for the installation of hard floors.

The example of "work involving reconfiguring walls" should be removed as it is misleading to suggest that **any** wall could be removed without a special resolution. The removal or reconfiguration of walls also has ventilation and fire safety considerations and OCN has examples of owners enclosing balconies and removing the former outside wall, which has far reaching fire safely issues.

s.111 should be amended to remove "(a) under this Part" as this is misleading to owners who cannot interpret statutory language without the assistance of a lawyer.

105. "Minor" renovations are often significant in terms of cost and organisation. It is difficult for stratas which do not have full time facilities managers to oversee works, even those defined as "minor" under the Management Act. For example, a kitchen renovation may involve noise, carriage of tools and equipment and materials across common property and the other owners in the strata need to be fully aware of the works to manage known impacts.

    Although it may be frustrating for an owner to wait for a general meeting called by the owners corporation, or to call and pay for a general meeting in order for the work to be approved, the process ensures the proper oversight of the renovations, the avoidance of doubt as to the approval and conditions of work, and also protects the strata from unauthorised work which may affect common property and for which proper authorisation has not been sought.

    Delegating this approval to a strata committee has the potential for abuse where an owner has the ear of committee members who may then authorise works without the rest of the owners knowing the full details.

    OCN does not support a change to the process outlined in s110 of the Management Act.

106. OCN is of the view that owners should always be told of any decisions regarding renovations, irrespective of whether the renovations were approved or not, with reasons why. That communication should always be as soon as possible after the decision is taken and not later than the minutes of the respective meeting where the decision was taken.

107. OCN has significant engagement in EV charging. There are a number of different solutions available for retrofitting to existing buildings and even when an owner uses their own electricity supply, there is an impact on building load, electrical safety and load management. All applications for systems for EV charging, whether using common property or personal power supply, should require a resolution of the owners corporation, whether as part of the process in s108 or s109 of the Management Act.

108. The recent Court of Appeal decision in *Cooper* has reinforced the general misunderstanding of the relationship between the rights of owners in their individual lots and the rights of the owners corporation to make by-laws affecting "lots and common property".

    OCN is strongly of the view that the democratic right to decide is a foundation tenet of strata law and the Management Act needs to be explicit and strengthened to ensure by-laws and the democratic right of owners to decide, are maintained.

110. The problems with illegal parking continue. It would be of considerable assistance to owners corporations having to manage this issue if they were provided with an explicit right to impose modest fines on residents for breaches of visitor parking by-laws, for breaches by themselves or their guests. This would cover most situations. However, further consideration is needed in relation to visitor parking that can be accessed easily by the general public. In this latter situation police action should be expressly available when requested by the owners corporation.

Maintenance and Repair of Common Property

115. OCN submits that, in general, owners corporations should not be permitted to defer compliance with the statutory duty to maintain and repair common property in a situation where they are taking action against an owner for damage to the property.

However, the situation that arises when owners move into a defective building creates a serious dilemma for owners corporations, particularly when the defects are extensive. This is very much a case of the owners corporation being 'between a rock and hard place' that is not of their making. As discussed further under the next point some form of statutory and/or financial relief for owners corporations faced with common property repairs is required in these situations.

116. There have been several very high-profile cases regarding building defects where it would not have been possible for the owners corporations to take action to repair the common property unless and until all of the defects were discovered and the methodology and cost of repair ascertained.

These cases, while all too familiar as they attract a large amount of publicity, are not representative of the vast majority of cases were an owners corporation fails to maintain and/or repair common property. See for example the case study provided at the answer to question 66 above.

Of course, the problem would be resolved if apartment buildings were built to proper standard and/or builders are diligent in meeting their statutory warranty obligations. Unfortunately, this is still not the case and is unlikely to be the case for some years to come, despite the building reforms currently being implemented.

Even now the issues of special purpose vehicles (the so called $2 companies) being set up to serve as the building companies responsible for honouring statutory warranties for building defects only to liquidate when the claims roll in remains a stain on the apartment construction sector. As such the reality of owners corporations having to meet unfunded repair bills not of their making remains all too common and this will persist for some time.

In these latter situations the fledgling owners corporations do not have the funds to make the necessary repairs and, even if they did, they risk compromising claims against the builder including by voiding warranties. Claims against developers, builders and other liable third parties often develop into protracted legal disputes while defects persist. In these situations, there needs to be some options for relief from the obligations to maintain and repair and/or financial assistance. The nature and form of this relief is a challenging policy issue.

One option could be to include the establishment of a relief fund paid for by levies on developers to be used by owners corporations to carry out emergency repairs in situations in new buildings with rectification requirements.

Another option could be to increase the bond lodged by developers from 2% to 10% to be drawn on in the event of the builder becoming financially unviable before statutory warranty obligations are met. This requirement could be waived if the builder has adequate home owner warranty insurance cover, providing a market mechanism to favour builders meeting performance measures and criteria being established by the Building Commissioner.

Statutory relief could also be provided via the owners corporation being able to apply to the Tribunal or to the Building Commissioner for an exemption from their duty or at least a temporary moratorium. This is an area where a Strata Commissioner could provide assistance.

This is a vexed issue but it is patently unreasonable to expect owners corporations to meet repair bills for defects which are not of their own making. Some form of statutory and/or financial relief arrangement is required in these situations.

Initial Maintenance Schedule

117. OCN has fielded many complaints and enquiries concerning the inadequacy of the requirement for the developer to prepare and hand to the owners corporation a maintenance schedule. Regulation 6 of the Strata Schemes Management Regulation *2016 (**Management Regulation**) requires the developer to hand over:*

(a) if a building is required to be insured under Division 1 of Part 9 of the Act, any valuation of the building,

(b) maintenance and service manuals,

(c) all service agreements relating to the supply of gas, electricity or other utilities to the parcel,

(d) copies of building contracts for the parcel, including any variations to those contracts,

(e) the most recent BASIX certificate (issued under the Environmental Planning and Assessment Act 1979) for each building on the parcel.

Regulation 29 of the Management Regulation requires the developer to include in the initial maintenance schedule details of the manufacturer and installer of any of the systems and equipment, manuals and maintenance requirements provided by the manufacturers, warranty documents etc.

OCN has found that these Regulations are inadequate in scope, and often either completely ignored or insufficiently complied with.

Remembering that lot owners, by and large, are individual home owners or small scale property investors this is very much a consumer protection issue. Strengthening this obligation and providing penalties in the breach represents another modest but essential piece in establishing much needed, much stronger consumer protection for apartment owners.

The owners corporation needs information about the building that would enable it to:

1. Identify building defects in a timely fashion during building warranty periods,
2. Have building defects addressed under warranty in a timely fashion,
3. Develop accurate and meaningful asset registers covering every element of the building construction and operation,
4. Develop and implement maintenance plans for the building based on those asset registers to ensure the economic life of all assets is achieved and to maintain the building in a safe state including, in particular, meeting fire safety requirements,
5. Develop and implement asset replacement plans for all elements in the asset register based on the asset life expectancies provided by suppliers and builders,
6. Develop long term capital spending forecasts based on asset replacement plans to set capital fund levies sufficient to meet asset replacement needs over time, and

7. Be able to undertake major repairs to restore the building to a proper standard of construction following major events affecting the building's integrity e.g. fires, earthquakes, subsidence caused by third parties among other matters.

The OCN has information from a new build in the Sydney CBD approaching occupation where the developer and builder have sophisticated systems for data recording, however the prospective Facilities Manager is still working to ensure that all of the detailed information has been provided.

This is a situation where a developer has taken steps to employ an arm's length Facilities Manager who has experience and sophisticated knowledge of the documentation required to address the issues in subparagraphs 1-7 above. For many smaller, less exclusive developments developers do not have the incentive to take even this step, leaving the nascent owners corporation either completely in the dark or having to employ another specialist to go through any material provided to ensure accuracy and sufficiency.

OCN proposes that there should be a penalty for the failure to provide the initial maintenance schedule (as certified as complete) of at least $10,000.00.

The Building Confidence Report (BCR)[6], published in April 2018, made 24 recommendations to Building Ministers to address systemic issues in the Australian building industry. Building Ministers supported the recommendations and established the BCR Implementation Team within the Office of the Australian Building Codes Board (ABCB) to respond to the recommendations.

BCR recommendation 20 is "that each jurisdiction requires that there be a comprehensive building manual for commercial buildings that should be lodged with the building owners and made available to successive purchasers of the buildings".

The BCR defined commercial buildings as Class 2 – 9 buildings. Class 2 buildings are apartment buildings, recognised as presenting new risks and challenges for regulators.[7]

ABCB intends to produce a guideline for the structure and contents of a building manual; however, the requirement for a building manual must be legislated and specify its structure and content and consequences for not providing the complete and accurate building manual to a building owner. Without legislation, it is unlikely that developers of Class 2 – 9 buildings will provide complete information, in a usable format, to building owners.

A solution has been proposed to either withhold a proportion of the project cost until the building manual is certified as complete, and or to withhold the Occupation Certificate until the building manual is certified as complete.

Until the national standards are finalised and the home building legislation is amended it is necessary for the Management Act to include a substantial penalty for breach of the developer's duty to provide all of the information about the building which the owners require for the execution of their duty to maintain and repair common property.

The specific requirements for the hand-over documentation should be in the Strata Schemes Development Act 2015.

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[6] Available at: https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf.

[7] Queensland Audit Office, Licensing builders and building trades Report 16: 2019–20, available at: https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T978.pdf.

119. There is still anecdotal evidence that levies set by the original owner/developer are unrealistically low. There are obvious reasons for this.

OCN is aware of a scheme where the original unit entitlements and thus levies favoured employees of the developer. That was over 20 years ago and that favourable treatment is maintained and those employees are still benefiting. It is almost impossible to change unit entitlements, particularly over time, once owners are used to the existing set-up and the majority of owners benefit from the original unrealistic set up. Having independent valuations and safeguards in place from the establishment of the scheme is preferable.

OCN submits that this issue could be addressed by education of prospective purchasers of strata as described in the introduction to this submission.

121. OCN submits that the Management Act should mandate that the 10-year Capital Works Fund plan should be prepared by a specialist and should be reviewed every AGM to allow owners to ask whether the plan has been followed and, if not, the reasons for the failure to do so and the plan to get back on track. It may be necessary to apply penalties as part of the Management Act if an owners corporation wilfully ignores its own plan.

Sustainability Infrastructure

122. **OCN is strongly of the view that NABERS should be mandated by the Act for all Strata schemes, along with supporting funding to allow its smooth introduction.**

OCN has established simple user guides to assist in the introduction of EV Charging. Similar user guides could be established for solar, batteries, hot water etc, supported by strata laws and Government funding as appropriate.

Insurance

123. The ongoing issue which owners report to OCN is excessive insurance commissions obtained by strata managing agents. This issue has been discussed above in relation to strata management.

There should be no commissions paid to either strata managers or facilities managers who should tender for the true cost of their services and not seek to increase their remuneration by opaque means.

Utility Supply Contracts

125. OCN considers embedded networks as another way that developers can defer costs to unsuspecting new strata owners via inflated long term contracts for services that previously were included in the cost of the apartment. As such, OCN is on record of not supporting embedded networks.

Amendments to the SSMA in s132A have limited utility contracts to 3-year terms, but the Supply of Electricity for Residential purposes falls outside this limit, meaning that it is easy for embedded electricity networks to continue in place without owners corporation scrutiny or the realistic possibility of change.

> ***132A(4)*** *This section does not affect any agreement to supply electricity to residents in a strata scheme through an embedded network.*

There is a strong case for the existence of the embedded network "liability" to be disclosed in purchase contracts. This takes on even greater significance where an embedded network provider owns plant and equipment in the building (eg the hot water plant, that would under

other circumstances be an owners corporation asset) and any termination of their contract would involve the owners corporation in substantial "buy out" payments.

At the very least any utility contracts should be considered in the same way as other contracts, like strata management agent contracts, ie at least 3 competitive quotes provided to the owners corporation at the first AGM with a maximum term of 12/15 months initially and 3 years thereafter.

Building Managers

Division 4 of the Management Act defines the role of a building manager in a manner which conflates the layman's understanding of the difference between a facilities manager and a caretaker.

OCN submits that the role of a caretaker is very different to that of a facilities manager and the difference should be identified in the Management Act.

Section 66 subsection 3 states that a building manager can be an on-site residential property manager, or in other words a caretaker.

An on-site manager who also manages properties for rental purposes and often lives in a lot on the property is in a very different position to a facilities manager who has a different type of management agreement.

OCN knows of cases where the on-site manager sought to transfer his functions to another person or entity and the owner corporation was in a very difficult position in relation to authorisation. If they did not vote in favour of the transfer they would be faced with a hostile manager, however, if they approved the transfer they would be left with a new manager whose credentials or capabilities were not known.

Often the on-site manager has voting rights and is in a position to influence the management of the owners corporation in a very significant way.

OCN is of the view that building managers who are in fact caretakers or on-site managers should be restricted to a three-term contract in the same way as facility managers. A manager of this type should not be permitted to monetarise the owners corporation.

126. OCN is of the view that building managers should not be the same as managing agents as while some of the functions seem similar (eg assigning work orders) many functions are very different (eg security, managing detailed renovations and building equipment). Bringing the function closer would likely result in a further blurring of accountabilities and ultimately the 'one stop shop' approach including a likely reduction in service levels and more issues of conflicting duties.

128. OCN in principle supports strengthening of duty of care across the strata industry. Assigning a duty of care for building managers to act in the best interests of the owners corporation is consistent with our views.

129. As stated in 126, OCN believes there are significant differences between building managers and managing agents. It follows that their licencing (eg security licencing) also needs to be different and appropriate to their function.

130. OCN believes it is a good philosophy to test and question relationships with suppliers on a regular basis. Aligning the period of appointment across the board makes sense.

The terms for Building Management contracts should be restricted in the same way as those of strata managing agents - choice of 3 at First AGM for an initial 12-15 month term and thereafter 3 year term limitation.

The nomination of the Building Manager by the developer plays a key role in the 2 year statutory warranty period in identifying and negotiating defects with the builder and communicating with affected owners & residents. Independence from the developer /builder is paramount. The possibility of 10 year terms under the current legislation - s68 (1) b acts entirely as a "transactional" asset to the building manager and is prima facie a conflict of interest.

131. As stated in 128, OCN supports the concept of duty of care.

Resolution of Disputes

132. OCN believes that strata disputes require specialist attention. Disputes between owners and owners corporations are by their nature emotional and the processes are already complicated by the fact that the parties are in close residential contact and animosity is sometimes very high. The difficulty of then waiting months for adjudication of any complaint exacerbates the animosity and the issues continue.

    OCN submits that a dispute resolution system for minor complaints, such as parking, noise, pets on common property should be able to be managed by the owners corporation using a process set out in a schedule to the Management Act (including number of warnings, evidence etc) which process can be conducted on paper thereby minimising costs and appearance time. Any penalty attached to the breach or complaint should be automatically registered to the lot record for debt recovery. **This system would fit into the office of the Strata Commissioner.**

133. The Mediation process conducted by Fair Trading, while well meaning, is rarely effective in strata disputes. OCN reiterates its submission that the Management Act should be amended to remove the necessity to attempt mediation before moving to the Tribunal, particularly when it is not in the power of the OC to grant the relief being sought by the lot owners.

    Mediation assumes that the members of strata committees are people who can take a day off work and attend a mediation. This is usually impractical. There ought to be a statutory right to appoint a representative including a legal representative to appear at a mediation.

    The suggestion that the absence of legal representation makes the process quicker and more economical is wrong and in many cases the disputes are too complex for lay people.

    Often the complications arise from vexatious complaints which require the skill and discipline of a lawyer, which ultimately saves time.

Jurisdiction and powers of the Tribunal

135. The Management Act should provide a clear process for privilege in litigation. In other types of civil litigation both parties have the benefit of privacy and privilege attaching to their strategies and documents. As the owner/litigant has a right of access to all strata documents it is impossible for the owners corporation to conduct litigation with an owner with the ordinary protections, while the owner does not have to reveal any information to the owners corporation.

    This issue also arises in disputes with developers where the developer or its associates holds ownership of lots and is entitled to the information obtained by the owners corporation.

OCN's primary submission regarding **the need for a Strata Commissioner** sits with a submission that strata disputes should be adjudicated by a lawyer with strata experience.

Approval of legal services

s103(1) of the Management Act should be amended to clarify the requirement for approval for obtaining legal services. The section refers to "…legal services for which any payment may be required...". This has been misunderstood to mean that the right to proceed is proscribed by a fixed amount identified at or even before the obtaining of legal services.

Clearly this is illogical as no owners corporation or their legal adviser can predict with certainty the costs of litigation. Furthermore, should an amount be estimated at the beginning of litigation and this amount is exceeded by even $1000.00, the subsection as presently drafted would result in a requirement for a general meeting costing substantially more than $1000 to re-approve the additional cost. This might happen every month during litigation.

The amendment should read "An owners corporation or the strata committee of an owners corporation must not obtain legal services other than those described in subsections 2 and 3 below, unless a resolution approving the obtaining of those legal services is passed at a general meeting of the owners corporation".

Amendment to s150 Management Act

OCN also recommends an amendment to s.150 Management Act to provide that if a portion of a by-law is determined by NCAT to be invalid or unfair, that portion should be able to be removed, where practicable, without invalidating the entire by-law.

Power to award damages for breach of statutory duty

136. It is ironic that the Tribunal has a general jurisdiction to adjudicate disputes for a very high value yet the combined effect of the terms of the Management Act and the Civil and Administrative Tribunal Act (**NCAT Act**) and the recent decisions in *Pullicin* and *Vickery* have made it expensive and difficult for an owner to obtain efficient and economical redress for breaches of statutory duty. As noted in the Discussion Paper under the heading "Overview of the Dispute Resolution Process", the most common matters before resolution are repair and damage to common property, damage/alteration to common property and general damage to a lot.

In *Pullicin* the damages sought were over $70,000.00 and in *Vickery* over $90,000.00, yet the parties were put to extraordinary expense (and still are) to achieve redress when liability has been determined.

OCN believes that for any claim for breach of statutory duty in which a judgment of over $30,000.00 is sought, the Tribunal should have the power to award damages and costs.

OCN believes that the Tribunal should also have the power to award damages, compensation or other monetary amounts in other types of disputes.

Monetary limits on damages or compensation or other monetary orders

138. OCN submits that the monetary limit on damages or compensation should be the same as the Local Court - $100,000, where there are no rules of evidence.

For any higher claim, there should be no upper limit; however, the rules of evidence should apply. This should be reflected in s106 NCAT Act.

Power to award costs

Although the power to order costs in proceedings before the Tribunal is contained in the NCAT Act, it should be a question posed in the review.

OCN believes that, prima facie, the unsuccessful party should pay the costs of the successful party, unless the Tribunal orders otherwise.

Often a disgruntled owner takes the owners corporation to the Tribunal knowing that unless special circumstances arise, he/she will not be required to pay the costs incurred by the owners corporation.

There should be a greater disincentive against wasting the Tribunal's time and the owners corporation's costs.

Enforcement of Tribunal Orders

139. The penalties for breaches of orders are unwieldy to enforce and inadequate to address recalcitrant by-law offenders.

After the breach is found, the system requires a further attendance at the Tribunal to obtain the orders for the civil penalty and then further costs and work to enforce the penalty.

Furthermore the penalty point system operates unfairly in that the penalty is a one off amount so a breach of by law which continues for 300 days attracts the same amount as a breach of a by law which continues for 30 days.

The amendment to the Act in 2015 removed the penalties for ongoing breaches and these should be reinstated.

The value of the penalty point should be increased from $110.00 to $220.00 so a five penalty point breach would attract a penalty of $1,100.00 for each day it continues.

If the Tribunal finds a breach, it should make orders for the remedying of the breach and an automatic penalty if the breach is not remedied within a reasonable time. The penalty, if not paid at the end of one month from the date on which it is due, should bear simple interest at the same rate as unpaid levy contributions under the Management Act until paid and the interest should form part of that debt. If an owner is liable for the costs and expenses, the owners corporation should be able to record the costs and expenses on the ledger for that lot.

This would result in a much faster and cheaper process for the successful party.

NSW Fair Trading's role and functions generally

OCN repeats its submissions regarding the need for a Strata Commissioner to oversee strata related matters.

The scope of issues affecting strata owners, which range from minor complaints to complicated defects issues, or disputes with developers and builders to the management of funds by owners corporations, contractual disputes with service providers and even breaches of by-laws require specialist knowledge.

The Management Act itself is very complex legislation which seeks to regulate the lives and investments of many owners who do not have the expertise to understand the nuances of the legislation or what relief they might have.

OCN repeats its concerns voiced in the introduction to this submission. Strata owners deserve:

1. Government focus of resources on the strata sector, which could be achieved by the establishment of a Commissioner for Strata Living and the allocation of strata matters to a senior ministerial portfolio.
2. Education of owners as to their rights and obligations as strata owners, and education of strata committees as to their duties and obligations. Many of the questions and issues addressed by OCN on a daily basis would be resolved if prospective owners understood the difference between owning a house and owing a lot in a strata community. Although there are guides issued by Fair Trading these are not often read by potential buyers. A simple one-page document outlining these differences could be attached to every contract for the sale of a strata lot.

OCN is frequently asked by government agencies to canvas the views of its members and advocate on their behalf on issues as important as defect rectification and short-term letting, but without any funding to assist in the management of these tasks

The provision of funding would greatly enhance the ability of OCN to provide the comments and submissions regularly requested and to support owners with high value guides and more resources for individual problem solving.

Appendix 1 - DEVELOPMENTS STRUCTURED WITH A BMC

The above structure can create many problems for small single building developments.

My development consists of 32 residential lots and 5 retail lots in ONE building.

The structure has been set up as 2 stratums, Residential and Retail, with a Building Management Committee.

The structure was put in place by the developer and Registered with Land & Property Services before settlements took place.

The Developer and his representative attended the Inaugural AGM of the development and became the 2 members of the BMC. The Developer's preferred Strata Management Company also attended and conducted the meeting.

At that meeting the BMC members (Developer and his assistant) appointed the Strata Management Company, which was conducting the meeting, to a contract of 5 years, and the Building Management Company, associated with the Strata Manager, to a contract of 3 years.

The Developer chose to manage and hold the Retail Stratum himself and that situation exists as at today's date, February 2021, 3.5 years after settlements.

From that Inaugural annual general meeting the appointed BMC Strata Manager arranged the AGM for the Residential Strata Plan and acted as Chair. At that meeting the Strata Committee was formed and the Residential Member of the BMC elected, to replace the Developer's Assistant.

It was recommended to the Owners Corporation that the Residential Strata Manager and the Building Manager be given contracts for 1 year.

By the time the above Inaugural Meeting and Residential Strata AGM had taken place, and Management contracts signed for their respective periods we had the following 4 contracts all with varying start and end dates in place:

BMC – **Strata Manager, 5 years**, contrary to SMS that said 3 years maximum, and contrary to the Strata Schemes Management Act which restricts Strata Management contracts to 1 year at the 1st AGM and 3 years thereafter). That was discovered and corrected to end date 2020.

17/10/2017 – 17/10/2022

BMC – **Building Manager**, 3 years

17/10/2017 – 17/10/2020

Residential Strata Plan – Strata Manager, 1 year

21/2/2018 – 21/2/2019

Residential Strata Plan – Building Manager, 1 year

21/2/2018 – 21/2/2019

The Registered structure of 2 stratums with a BMC resulted in 4 Management Contracts in place for 32 apartments, (Developer doing his own) each contract being charged at the high end of full market rates. Residential was responsible for about 80% of BMC fees. Plus the contracts had different starting and finishing dates.

Within a matter of months after settlements, the financial disadvantage of the structure became quite obvious and the contract dates were preventing mobility in order to go to market for better management fees.

To overcome the situation we have been awarding 12 month Strata Manager contracts since 2018 to bring the end date of those, February 2021, to line up as closely as possible to the end date of the BMC contract which was in October 2020. The BMC contracts, Strata and Building Manager have now expired and are rolling month to month to meet the Residential Strata contract end date in February 2021, which means that the contract dates issue is now resolved, as all contracts have expired.

Three and a half years have now passed and the opportunity has arisen to improve on the financial deal on the management fees and future contract dates.

We have gone to market and received a number of proposals. All of them potentially reduce the fees of our current Strata and Building Manager and therefore the levies. It also provides the opportunity to elect contract start and end dates.

The problem remains though, that because of the BMC structure, there are 4 contracts involved (2 Strata Manager and 2 Building Manager). Strata and Building Managers are legally able to treat them as separate contracts and charge fees accordingly.

The Strata Manager and Building Manager are able to do both the BMC and Strata Plan work concurrently, saving them time and money. For example, when the building manager comes to the site he does both the BMC and Residential work. The jobs are clearly SP or BMC but the location is the same geographically and administratively. If the work was done at different geographical locations or for common property concerning many buildings, separate contracts would make more sense but not when it is in the same building.

The volume of work to manage our development is the same no matter how the management is structured and the most cost effective way for owners is one Strata Manager and one Building Manager. There are developments with similar numbers of retail and residential apartments to ours **without** a BMC, that have a Strata Manager only, resulting in very fair management fees and levies.

Because of the management structure we are paying about 30% plus of operating expenses in management fees, when it could be half that in a fair structure.

Those fees are a crippling impost on the owners. It reduces the building's ability to spend funds on repairs and maintenance, particularly for emergencies.

Whist Strata and Building Managers have the right to have 2 contracts each because of the structure, it is very difficult to get them to halve their costs to be fair to owners. I know of one company that comes close to a 2 for 1 pricing model with a very low base fee on the BMC contract and they use an activity based cost system for work done.

In a small single building complex the only party that is disadvantaged is the Owners Corporation and owners.

Another issue with the BMC structure is the potential for disagreements that are difficult and may be expensive to resolve if there is a dispute between BMC members, and there is no clarification under the Strata Management Statement as to how one party may prevail. All owners do not have an equal vote.

WAYS OF OVERCOMING THE PROBLEMS FOR SMALL DEVELOPMENTS.

PREFERRED:

1. **Legislate** to prohibit BMC structures for small developments that consist of one building.

   Calculations could be made to gauge at which point it is financially fair or administratively advisable, before creating a BMC structure. Maybe not until there are multiple buildings on site.

A small single building does not need a BMC to look after its common property and, besides, many mistakes are made finding the dividing line for accounting purposes.

"Small" needs to be defined.

Such legislation would eliminate multiple contracts, contract date start/end problems, excessive management fees, and reduce the chances of expensive conflicts.

2. **Legislate** to allow small developments caught up in unfair BMC arrangements to retrospectively simplify their structures easily and at low cost. The way it is now, it is virtually impossible and, if attempted, legal fees are prohibitive. All lawyers advise against trying to rectify.

ALTERNATIVE:

In the absence of preventing the setting up of BMC structures for small buildings through legislation, or retrospectively changing them through legislation:

An avenue left for action is maybe to legislate what Strata Managers and Building Managers can do on the current structure.

1. **Legislate** against Strata Managers and Building Managers being able to have 2 contracts each in place on a single building small development. If they have BMC contracts, they cannot have Strata Plan contracts too. They must add the Strata Plan work in some way to the BMC contract, benchmarked to a simple single plan cost structure, because that is what it is. (That could have implications for the SMS and that would need to be looked at.) If the Strata and Building Managers also manage the Retail Strata Plan, they have 3 contracts each in place.

   The SSMA 2015 does not require either a Strata Manager or Building Manager so it might be that a manager with a BMC contract, without legislation to include the Strata Plan if needed/wanted, would refuse to do it at the loss of a management fee.

   The argument might be that "you can always do it yourself ". "We do not have to do it." The Strata Managers know that buildings are caught into something that they cannot get out of and what they do is legal, although morally corrupt.

   Strata Managers and Building Managers are pretty much free to structure their contracts the way that they want to so long as they comply with legislation. They are making full use of the BMC situation to their own benefit but to the detriment of owners.

   The only avenues open to try and get a better deal for owners right now, are to review shared costs and CWF provisions but even those steps are costly and may produce nothing.

Treasurer/BMC Representative SP95514

Appendix 2 - CASE STUDY - Inflated contracts at the first AGM

John purchased a unit as a first home property off the plan in 2017. This was a 169 lot high rise in Liverpool. He settled and moved into the property in 2019, and within a few weeks of the occupancy certificate for the plan being issued, the first annual general meeting for the plan was held.

Less than a dozen lot owners attended the first AGM, many not having sufficient time to review the schedule of contracts proposed. The developer of the scheme still owned the majority of the lots, and the developer-appointed strata manager was appointed.

At this AGM, the strata manager asked the attendees to sign a 10 year contract for treatment of the stormwater system with Stormwater 360, the company that installed the system for the developer of the scheme. Lot owners were advised that they "had to" sign a 10 year contract as there was "no other company in Australia" that provided that service. This was not true.

The committee would find out from the strata manager of the scheme many months after the first AGM, that the developer had not paid for the stormwater system, and instead had tried to pass the cost on to the owners corporation. The strata manager that was appointed by the developer was apparently instructed to do this. Issues of this nature have been reported in the news as well, particularly on Domain. A link has been attached below.

Fortunately, John managed to convince the owners corporation at the first AGM to vote against signing a 10 year contract with the supplier of the stormwater system. This was despite high pressure tactics employed by the strata manager at the first AGM indicating that if any another service provider was appointed to service the stormwater system the warranty on the unit might be rendered "void".

Less than a week after the first AGM, John was able to find a competitor to the service provider offered, that was prepared to match the contract and service level of that provider, as well as provide a contract for 1 year at a cost that was almost 10 times less than what was proposed at the first AGM by the developer appointed strata manager.

To elaborate, the contract put forward to the owners corporation at the first AGM was a 15 year contract for a total amount of $96,000. The contract that the owners corporation ended up signing with an independent service provider, for the same service, was a 1 year contract at $1,500 per annum.