

16 January 2023

Building Regulation Division
Department of Customer Service
4 Parramatta Square
12 Darcy Street
PARRAMATTA NSW 2150

By email: StrataReview@customerservice.nsw.gov.au

Dear Melissa and team

STATUTORY REVIEW OF THE STRATA SCHEMES DEVELOPMENT AND MANAGEMENT ACTS 2015

OCN is privileged to be able to contribute to the ongoing review of the Strata Schemes legislation to ensure that amendments and new provisions are effective to identify issues which concern owners of strata properties and that there are no adverse consequences or ambiguities which could make it difficult to achieve the outcomes which the review seeks to address.

OCN provides a response to each of the recommendations by directly answering the questions as requested in the consultation paper.

OCN's primary position is that, as much as possible, owners corporations should be allowed to manage and organise their own environment and living conditions as is appropriate for the size, age and constituency of the occupants/owners. Past amendments to the legislation have often brought in changes which have an unnecessarily wide ranging application.

OCN has long been an exponent of education as the primary tool to engage owners and encourage good management, and, if necessary, reform, rather than blunt legislative changes.

Sincerely



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Statutory Review of the Strata Schemes Development Act 2015 and the Strata Schemes Management Act 2015

OCN Response to Phase 2 of implementing the Review as invited by the Consultation paper issued 25 November 2022

Recommendation 76: Further consideration be given to whether the fee charged in Roden necessitates an amendment to the Management Act.

OCN Feedback:

There needs to be a clear definition in the Act of the difference between a fee and a bond. OCN supports a definition that a fee is a non-refundable impost while a bond is a refundable one. Furthermore, because there are so many different types of fees and bonds OCN does not support the open-ended Option 1 without details of what might be prohibited, for example the inclusion of bonds for moving in and out would be disadvantageous in large schemes, or option 2 which would unnecessarily stifle an owners corporation from imposing fees for instances such as described at the response to option 3 below.

OCN supports Option 3 and submits that owners should decide how to manage their schemes, OCN does not support legislative changes which lack detail and might be used to address an issue which does not have widespread application. On the other hand, the right of an owners corporation to charge fees via its by-laws should be affirmed in the legislation. This is because there is doubt in some sections of the strata community, with some resorting to constructs such as... “a non-refundable bond”, evidencing doubt about the legal standing of fees.

1. OCN supports option 3.
2. Owners Corporations should not be obliged to pay for costs which are unfair to the community as a whole, when these costs are caused by the requirements, or wrongful or unreasonable actions of or by individuals.
3. Some examples include:
 - A contribution to costs of EV Charging infrastructure and/or energy usage by users of EVs.
 - Cleaning costs by owners of pets, whose pets soil common property
 - Costs associated with issue and replacement of access devices including security fobs and keys
 - Recovery of Fire Brigade costs due to misuse of fire alarms and fire safety equipment.
 - Excessive requests for records inspections.

Recommendation 108: Introduce further specific requirements regarding the content of the initial maintenance schedule, with consideration given to the development of a standard form in the Management Act and Regulation.

OCN Feedback:

4. Generally yes. However, it is difficult to see how the maintenance schedule associated with EV charging stations (which are often user provided) and associated infrastructure would

work as it is largely an extension of the building electrical infrastructure, which is not specifically included.

5. Windows should be added to the first point “exterior walls ...etc. as well as solar panels as these have a definite life span. Hot Water Plant, Plumbing and Tempering Valves also be included as these should be subject to regular testing and upgrading.

OCN supports the development of a **Model/Standard Form of Maintenance Schedule** as standard form documents to make life much easier for owners corporations.

A complication arises with embedded networks where the network provider owns the plant. The responsibility for plant maintenance may rest with either the owners corporation or provider. The schedule must make this clear because costs may flow through to Capital Works Fund levies, if maintained by the owners corporation, or Administration Fund levies if maintained by provider and costs recovered through utility rates.

Recommendation 109: Require that an independent review and certification of initial maintenance schedules and levy estimates set by developers is undertaken and provided to owners corporations at the first AGM, with the qualifications of expert reviewers to be set following further sector consultation

OCN Feedback:

OCN is concerned that this potential regulation does not result in the same problem as we have with independent certifiers for building construction. There should certainly be some oversight of the maintenance schedule, including the manner in which it is delivered, and if s89(2) of the SSMA is tightened to remove the prohibition on the imposition of a penalty for under-valuing contributions when a developer has used “due care and diligence” this may give buyers protection from less careful certification.

6. Quantity Surveyors are a profession with the appropriate skill set as they deal with a range of buildings, materials and financial aspects.
7. Skills include strong maths knowledge, attention to detail, analytical thinking, understanding of engineering science and technology and knowledge of building and construction.

Recommendation 111: Prescribe greater detail on minimum requirements for capital works fund plans and consider mandating an approved form of plan.

OCN Feedback:

8. Yes. Checklists are always useful in helping to develop a detailed document such as the capital works plan. See Recommendation 110, which this discussion paper says does not need further stakeholder consultation; however, if an Owners Corporation has the initial maintenance schedule it is difficult to see why that cannot form the basis for the Capital Works fund plan.
9. Additional items for consideration to complete the list with common items:
 - External: Landscaping refurbishment, Waterproofing (roofs, flashings, gardens), painting, carpark shutters/motors, ventilation fans
 - Internal: Access systems. Painting, Gyms and gym equipment, lobby fit-out
 - Plumbing works – Water pressure/ reticulation pumps, Hot water systems and circulation pumps

- Fire services (Dampers, Pressurisation systems, Diesel motors and pumps, sprinklers, signage), electrical infrastructure such as switchboards
- Sustainability - EV Charging infrastructure, electrification of buildings/ gas replacement, lighting upgrades, pool heating
- Office equipment, such as printers in the building manager's office, terminals or display screens
- Internet and TV infrastructure (including aerials, common are wi-fi etc)
- Letter boxes
- Garbage and Recycling Handling equipment
- Airconditioning systems must also include ventilation (in buildings without air-conditioning but with bathroom ventilation)
- Contingency.

Financial records are typically maintained by Function, not Area eg "Waterproofing", "Plumbing", "Electrical" etc

Capital Works Projections typically focus on the Area : for example – Bldg1 roof, Balconies, Carpark etc

An accessible Capital Works Projections that is to be a useful tool for the owners corporation must be able to be cross referenced to appropriate financial accounts. Its layout has to be more than just a "walk through" of the site and its facilities.

[Recommendation 115](#): Prohibit by-laws that block sustainability infrastructure due to appearance and examine any necessary exemptions to this requirement.

OCN Feedback:

10. OCN supports all opportunities to increase sustainability in strata infrastructure; however, the path to sustainability covers a wide range of views held within owners corporations and it is a difficult and complicated path. The process for sustainability upgrades is already facilitated by changes to infrastructure concerning sustainability needing only the support of 50% of owners present at a meeting to succeed. This is the "carrot" for change – we do not need a "stick" in the form of by-law prohibitions. By-law prohibitions should be reserved for conduct that would be harsh, oppressive or unconscionable, not for achieving policy objectives.
11. No. Exceptions will over complicate the issue. The City of Sydney is a great example of using solar panels on the Town Hall, one of our most significant buildings. Once again, the carrot for change is the examples set by public bodies. There is no need for a provision which would likely be subject to litigation about what constitutes acceptable "appearance".

[Recommendation 119](#): Redraft section 132A of the Management Act to provide greater clarity and certainty regarding its use.

OCN Feedback:

12. OCN agrees with the proposal to redefine "utility" contracts to include as many services as possible particularly by including embedded networks in the definition.
13. Yes. Any changes to s. 132A should embrace the future needs for sustainability related utilities. OCN agrees that there needs to be more discussion regarding making owners aware

of the processes for negotiating contracts for utilities and the processes to get out of unfair contracts.

In the experience of OCN, the difficulties for owners restricted by embedded network agreements put in place by developers are poorly understood at policy level. To the extent that the cost shifting for infrastructure from the developer to the owners no longer occurs, this will be beneficial.

The Paper proposes that the NSW Government website provide information on how to change contracts and the effect of changes on contracts with indefinite periods. It will be very important to see how this is explained.

Recommendation 121: Explore the feasibility of allowing certain longer initial contracts in cases where they are required to deliver sustainability measures. Such sustainability measures would need to ensure a minimum building rating of NABERS 5 star and be demonstrated as delivering positive benefits for the owners corporation over the duration of the contract.

OCN Feedback:

OCN's concern here is the word "**initial**".

Developers **should** deliver 5 star NABERS rated buildings and the system allows them to obtain such a rating through advance commitment.

Developers **should** pay for the sustainability components required for a newly constructed and marketed building. This is what they are marketing.

Cost shifting from developer to owners is unacceptable whether it relates to Sustainability Infrastructure or any other type of infrastructure. Ownership in a new building should come "free of encumbrances" eg levy burdens to pay off infrastructure cost.

Should an Owners Corporation **after the first AGM** wish to finance Sustainability improvements by means of a contract with a provider, that is a different situation. It is more akin to borrowing to pay for the infrastructure and consideration could be given to a longer period for contracts that provide such financing.

14. A conditional - Yes. In reference to answer 13, it is possible that these contracts would need to be longer term, because they are greater than just electricity supply, they may include the capital cost of asset replacement; however, OCN repeats its submission that such contracts should only be those entered into with the owners after the first AGM.
15. Yes, some reference to asset upgrades or replacement for the purposes of electrification of old assets, delivered by renewables.
16. The NABERS 5-star rating could be difficult for some older buildings to achieve, even with upgrades to assets to achieve sustainability. There might be a broader definition in terms of the second part of the recommendation – that is, to demonstrate that the contract will deliver positive benefits for the owners corporation over the duration of the contract.
17. This is a difficult question. It will depend on the value of the assets replaced and reductions in the cost of delivery of renewable energy. 5 years may be achievable, but it would depend on the respective business cases.

18. Delivery of energy savings and Co2 reductions must be maintained.

In considering a path to the next phases of sustainability, specifically electrification of buildings, the issues OCN members are encountering with electric vehicle charging are instructive, eg:

- misinformation causing concerns with cost and requirements for building electrical supply infrastructure upgrades
- funding of building infrastructure upgrades
- cost recovery of owners corporation's funds.

One option to mitigate against these issues is to employ, with the owners corporation's agreement, organisations that will take on this risk, and plan for and facilitate this necessary change. These organisations should be differentiated from the tarnished "embedded network" operator label.

This new function is evolving with some start-ups. They would:

- advise on sustainability/ electrification upgrade paths
- advise on sustainable asset replacements
- advise on building energy/supply upgrades, including the alternate use of solar
- assist with owners corporations approvals
- arrange installation and own the upgrades/ replacement assets
- charge a cost recovery fee, based on the saving achieved by moving to renewables.

The business case to do so is currently evolving, but it is important to encourage this and other new approaches to the ultimate end of achieving net zero by 2050.

Recommendation 122: Introduce a requirement that, as part of any sale of strata scheme units, including off the plan sales, there is plain English disclosure of which services are provided as an embedded network, their ownership structure and what this will mean for residents, including in relation to access to alternative providers and ongoing capital costs

OCN Feedback:

OCN is often called on to assist owners with issues arising from embedded networks. As implied in the preamble to this topic, most purchasers of off the plan properties have little or no understanding of the locked in nature of these networks.

OCN welcomes the results of the inquiry by the Legislative Assembly Committee on Law and Safety in relation to embedded networks¹ and the finding that there is a need for regulatory change.

OCN notes Recommendation 9 of the report that there must be disclosure of an embedded network service to a potential owner or tenant before they purchase or lease a property.

19. OCN's preference is Option 5. As it is pointed out, as each option as developed, no single option will cover the full need for disclosure, so a combination of all the options is needed to ensure there is sufficient disclosure.

¹ Committee on Law and Safety – Embedded Networks in New South Wales Report 3/57 – November 2022 <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2873#tab-reportsandgovernmentresponses>

Recommendation 126: Consult further with the strata sector to determine the appropriate limitation on contract terms for building managers.

OCN Feedback:

20. First and foremost there needs to be a clear distinction drawn between building managers and caretakers. The unfairness arises when an entity has a contract for “management” of a building which includes exclusive rights such as to manage rental properties, enter into services agreements without consultation with the owners corporation, and even ownership of a lot. These are contracts which these entities enter into with a view to selling off the rights at a profit at a later stage, usually with no recourse available to the owners corporation to stop the sale. The new entity then takes on an even longer terms, with the cycle continuing.

A maximum 3 year term with no automatic option to renew would solve the problem of entities entering into these contracts with a view to making a profit and require them to concentrate on providing service to the owners who employ them.

Building Managers’ contract should be subject to exactly the same term limits as those of Strata Managers.

21. The contract should include a disclosure of any interest with or connection to the developer. Further terms could outline the circumstances which would constitute a breach; however, if the maximum term is 3 years from the first AGM, then the owners corporation would be able to act swiftly to replace an unsatisfactory manager and any conflicts with the developer’s interest would be resolved.

The classic problem is the owners corporation requiring the assistance of the building manager in prosecuting claims for building defects against the developer / builder and the building manager not wanting to “bite the hand that feeds it” by over zealously pursuing defect claims.

That said, a developer appointed building manager may have a closer knowledge of the construction issues around a building than a new incoming manager. They have the potential to be of great assistance with their local knowledge and contacts.

The conflict issue could be addressed by including in a building manager’s contract a mandatory and explicit term that they will at all times act in the best interests of the owners corporation in their dealings with the developer / builder and disclose to the owners corporation any situation where a conflict of interest arises.

22. It is difficult to legislate mechanisms such as those suggested, as the contract terms should be clear as to what constitutes a breach such as incompetency or failure to undertake the work outlined in the contract.

Much as non-performance by building managers is an issue it appears that this is best dealt with within the Management contracts rather than in the legislation.

OCN believes that there would be merit in having a Model/Standard Form of Building Management contract. As it is, every Building Management Company has its own form of contract and its own sets of terms and conditions – only large schemes typically have their own form of contract that they tender, or the ability to negotiate terms.

Owners corporations typically are not in a position to compare the contracts offered and all the different performance and termination criteria. Providing a Model/Standard Form of contract as the basis for any mutually agreed amendments would provide owners corporations with a level playing field and with the protection they need against poor performance and the legal obstacles they face in termination (for example KPI's that are next to impossible to measure).

Recommendation 127

Redefine other contractors who undertake work assisting the owners corporation to manage the common property as common property contractors and consult further with the strata sector on what the appropriate limitations on contract terms for these contractors should include

OCN Feedback:

23. Yes, there should be a limitation on the terms for common property contractors similar to those proposed for building managers, that is a maximum 3 year term. For example: certain lift maintenance contracts contain terms whereby the contract rolls over for a further full term if appropriate notice (requirements may require strict adherence) is not given by the owners corporation. The default situation leads to contracts with de facto terms in excess of 3 years and the owners corporation in practice not having the opportunity to review the contract.
24. See above.
25. In an environment where the quality of supervision and understanding by owners corporations and their representative strata committees may vary greatly from year to year some protection would be afforded to owners if the following were included as common property contractors (even though many might in practice only offer short term contracts):
 - Fire Inspections
 - Safety & pest inspections
 - Contracts for routine maintenance (incl lifts, sump cleaning etc)
 - Cleaning
 - Landscaping maintenance

A suitable definition might be “any contractor engaged to assist the owners corporation in discharge of its duties under s 106 of the SSMA or in assisting in the compliance with statutory obligations”.