

LIVING IN STRATA DEVELOPMENTS IN 2003

Some matters for discussion

- *Management*
 - *Building quality*
 - *Redevelopment*

An Issues Paper

NSW Government
May 2003

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1. THE PURPOSE OF THIS PAPER

This Paper has been prepared to stimulate public discussion on some significant strata schemes issues.

Recent events and emerging issues make it an appropriate time for the NSW Government to consider certain aspects of the strata laws and building quality issues. Of particular significance are high-rise schemes. The main events that have brought a more concentrated focus to the issues have been:

- A National Competition Policy review of the *Strata Schemes Management Act 1996 (NCP review)*
- The Joint Select Parliamentary Committee on the Quality of Buildings (*Campbell Inquiry*)
- Consumer, industry and other concerns over management arrangements and legislative provisions applying to large modern strata schemes
- Community concern over the deterioration of some older strata buildings and the difficulties associated with terminating schemes
- The emergence of other miscellaneous issues

2. MODERN TREND TOWARDS URBAN CONSOLIDATION AND MEDIUM TO HIGH DENSITY LIVING

In 2001, approximately 13% of private dwellings in Australia were flats or apartments, whereas over 75% were separate houses¹. The percentage of flats and apartments has doubled over the last 40 years. In 2000-2001, nearly 33% of all dwellings constructed were in the flat and apartment category. It seems likely that this trend will continue.

In the Report of the Campbell Inquiry, statistics were provided which estimated that the percentage of multi-unit dwellings constructed in the Sydney metropolitan area compared to detached dwellings will continue at 55:45 proportions for the foreseeable future. Some suburban areas will have a much higher proportion of multi-unit dwelling construction and, because of the obvious issue of available space, residential construction in the Sydney CBD will be 100% multi-unit. There has been an increase of 40% in people living in inner Sydney in the last 10 years.

In the last financial year banks advanced \$43 billion in loans for investors around Australia and 80% of those loans were made for apartments². One third of the 173,000 new dwellings estimated to be built up to the end of 2003 will be under strata title.³

¹ Business Review Weekly of 10-16 April 2003 from Australian Bureau of Statistics

² ³ Australian Financial Review 28 March 2003

3. BRIEF HISTORY OF NSW STRATA LAWS

The historical perspective on the NSW strata schemes laws is well documented. The strata concept, where people could have valid title to airspace in a building, came into being in NSW in the early 1960's with the *Conveyancing (Strata Titles) Act 1961*. The strata concept was later adopted in legislation throughout Australia and in a number of other countries. The legislation was substantially overhauled by the *Strata Titles Act 1973* when extensive management and disputes provisions were added. At the time the 1973 Act was introduced into Parliament, it was estimated that there were approximately 100,000 individual strata titles⁴ then in existence. This would have equated to around 12,000 schemes.

The legislation was refined several times during the 1970's and 1980's with staged developments, part strata schemes, leasehold developments and other initiatives provided for during that period. A major overhaul occurred with the commencement of the *Strata Schemes Management Act 1996* on 1 July 1997 when the management and disputes provisions were separated from the subdivision and registration provisions of the legislation and two distinct Statutes were created. The 1996 legislation lifted the significance of dispute mediation, revised adjudications of dispute processes, gave owners corporations more powers to resolve by-law contraventions internally, provided a range of by-law models and streamlined meeting procedures and administrative and financial responsibilities for owners corporations.

By 2003, the number of strata schemes in NSW has risen to over 65,000 with 700,000 or more individual strata lots in existence. An average of 10 new strata plans are now being registered every day. The average size of schemes registered has remained unchanged over the last decade at around 10 units, although there is a wide diversity ranging between 2-lot and 700-lot developments. Half of all schemes registered have 10 lots or less while only 1% or 2% can be measured as containing hundreds of lots.

Of all strata schemes registered during 2002, 61% were in Greater Sydney (1530 schemes) while 981 schemes were registered during the same period for the remainder of NSW. State-wide, ranked on a local government basis, the highest number of schemes were registered in Sutherland (182 schemes) with Gosford, Wollongong, Tweed Heads and Penrith filling the next 4 places. During 2002, 9 of the 65 strata plans registered in the City of Sydney contained more than 100 lots (14%), while in South Sydney 6 of the 70 plans registered were in the 100 lot plus category (9%). The largest scheme registered in Sydney during that period contained 279 lots while the largest in South Sydney contained 310 lots.⁵

4. NATIONAL COMPETITION POLICY REVIEW OF THE STRATA SCHEMES MANAGEMENT ACT 1996

The *Strata Schemes Management Act 1996* has been, like much other NSW legislation, the subject of a review as part of the NSW Government's commitment under National Competition Policy (NCP) to examine all its legislation that restricts, or potentially restricts,

⁴ Minister Maddison's second reading speech 26 September 1973

⁵ All statistics provided by Land and Property Information NSW 2 May 2003.

competition. The review was carried out during 2000 and 2001 and a subsequent NCP Report was released for public consultation in August 2002. The Report concluded that the Act is an appropriate mechanism for the regulation of strata schemes management and that the overall benefits of the legislation far outweigh any costs arising. However, the Report recommended a number of legislative amendments to address both existing shortcomings and emerging concerns.

An interesting result of the public consultation carried out by the then Department of Fair Trading in 2000 and 2001 was the almost unanimous community view that supported the regulation of the management of strata schemes. There was virtually no support for a totally deregulated regime, where strata owners corporations would operate their schemes as they saw fit.

4.1 RESULT OF NCP REVIEW

The Government decided to bring forward some of the recommended legislative initiatives from the NCP Report as a matter of priority. These were included in the *Strata Schemes Management Amendment Act 2002* which was passed by Parliament in November 2002 and took effect from 10 February 2003. These issues, or matters related closely to them, had also been identified in the Campbell Inquiry. The November 2002 amendments dealt primarily with:

- Contracts with caretakers
 - recognised caretakers as having a limited role in carrying out certain functions of owners corporations
 - caretaker contracts limited to a maximum period of 10 years
 - contracts not able to be transferred to another person without consent of the owners corporation
- Additional disclosure of information to prospective purchasers about caretaker contracts
 - name of any caretaker to be disclosed
 - copy of caretaker contract available for perusal
- Further dispute resolution powers for the Consumer, Trader and Tenancy Tribunal
 - able to deal with disputes over caretaker contracts
 - able to vary or terminate caretaker contracts found to be harsh or with unfair charges or where contractual obligations have not been met
 - able to award compensation on disputes arising from caretaker contracts
- The use of proxy votes by strata managing agents
 - proxy votes not able to be used to provide a financial or material benefit to the managing agent or caretaker
- The use of priority voting rights held by mortgagees
 - only permitted to be used for major issues (eg insurance, budgeting, fixing levies or spending money equal to \$200 multiplied by the number of lots)
 - mortgagees required to give lot owner 2 days notice each time the priority vote is to be exercised

The Government chose to defer other legislative amendments arising from the NCP Report until later in 2003. As this "Stage 2" of the legislative reforms is ready to proceed, it is an opportune time to examine and consult on further issues which might be considered for inclusion in a Bill to be introduced into Parliament.

4.2 REMAINING NCP REVIEW RECOMMENDATIONS

The remaining NCP Report recommendations relate mainly to:

- Streamlining the process for appointment of strata managing agents by Adjudicators or the Consumer, Trader and Tenancy Tribunal
- Allowing more flexibility in the use of mediation in settlement of disputes
- Providing a process for the ratification of mediated settlements to maximise compliance with such settlements
- Requiring owners corporations to prepare 10 year sinking fund plans to better prepare for future common property maintenance to avoid the imposition of potentially large “one-off” special levies to pay for urgent repairs or replacement of plant or equipment (see further comments below)
- Providing further exemptions for 2 lot schemes (regarding auditing of accounts)
- Vendor consent to searches of owners corporation records be able to be given verbally
- Owners corporations be given specific power to add to or alter common property or permit lot owners to do so
- Ensuring that owners corporations do not use by-laws in an attempt to extend their powers beyond that provided in the Act or under other laws
- Developers being required to disclose to prospective purchasers details of exclusive use by-laws already in place
- The responsibilities only able to be delegated to strata managing agents be limited to:
 - General financial obligations
 - Preparing budget estimates
 - Fixing levies
 - Collecting, receipting and banking monies
 - Operation of trust accounts
 - Arranging insurance
 - Conducting meetings
 - Other functions as prescribed by the Regulations
- Confirm that the owners corporation is the senior decision making body (over its executive committee)
- Make consistent the period for which all owners corporation records must be kept (5 years)
- Require owners corporations to pass a resolution that a by-law has been breached before being permitted to issue a notice to comply with a by-law to an owner or occupier
- Make some adjustments to the laws applying to strata scheme retirement villages to take account of issues relating to financial statements given to residents and information disclosed to prospective residents

4.2.1 Sinking fund reserves

During the National Competition Policy review of the *Strata Schemes Management Act*, it became apparent that some owners corporations were not planning adequately for future maintenance expenditure. While owners corporations must establish a sinking fund and estimate the necessary amounts to cater for future capital expenditure, there is no specific guidance in the legislation on how an adequate sinking fund reserve is to be achieved.

While each owners corporation is required to “turn its mind” to the issue in a general sense, there is no formula provided to point them in a particular direction. An owners corporation that has not planned diligently could find that it has to urgently impose a large one-off levy on all lot owners in the case of a sudden expensive repair or fault. There can be a significant impact on persons of limited income and it is a situation that could have been avoided or at least minimised with sensible financial planning.

The recommendation of the National Competition Policy review was that owners corporations be required to specifically plan ahead for 10 years so that some definite estimations of upcoming maintenance and replacement needs could be formulated. During the consultation that took place in association with the review, the suggested 10-year plan requirement received wide endorsement and most persons who commented on the proposal, saw that it would be of benefit and over time would improve the level of maintenance carried out on strata buildings and assist in making the purchase of a strata lot a more attractive investment.

4.3 IDEAS RAISED IN SUBMISSIONS

When the NCP Report was released, submissions were invited from interested parties on the recommendations. 78 submissions were subsequently made by individuals and organisations with development, management and ownership interests. A wide range of comments and suggestions were received, many of which related to relatively minor procedural matters or legislative fine-tuning. Some of the significant suggestions/comments made in this public consultation process (but not matters dealt with by the late 2002 amendments) included:

- A compulsory notification process to confirm to lot owners that the necessary insurance premiums have been paid by the owners corporation or managing agent
- Current minimum 5-year building valuations (for insurance purposes) continue but CPI adjustments be made each year
- Proxy restrictions imposed on strata managing agents and caretakers (re proxies not being permitted to obtain a financial or other material benefit) apply to all proxy-holders
- Proxy votes should be required to be in the hands of secretary or chairperson either 24 or 48 hours before any scheduled meeting to assist in streamlining the conduct of meetings
- Not only should the legislation stress that by-laws cannot be used to attempt to give an owners corporation more powers than the laws permit, but also make it clear that registration of such by-laws is invalid
- The owners corporation should have a specific power to dismiss its whole executive committee mid-term if appropriate
- There should be some differences in the rules applying to large and small schemes with stricter controls over large schemes
- All contracts entered into by owners corporation to be subject to competitive tendering and contractual links (eg hiring of family member, friend or business associate) to be disclosed
- Developer representation on executive committees to be specifically and proportionally limited and the value of their vote at owners corporation meetings to be further reduced
- Restrict level of representation on executive committee by strata managing agents and caretakers

- Mandatory auditing of owners corporation accounts should cut in at a specific annual budget level (eg \$75,000) or size of scheme (eg 25 lots or more)
- A requirement that a sinking fund be established within a definite time frame (eg within 12 months after scheme is registered)
- Sinking fund estimates should be required to be prepared by outside experts (eg a quantity surveyor)
- Owners corporations should be required to estimate financial needs for 15-20 year cycles with an update each 5 years and the disputes over adequacy of financial reserves be able to be subject to adjudication process
- Developers be required to establish and fund a sinking fund with an operating amount at commencement of the scheme
- There should be some flexibility in the levy-charging ability of owners corporations to take account of water use where individual meters are not installed
- Should be some mandatory by-laws for all schemes to ensure consistent standards
- The need for retaining the concept of an initial period in a strata scheme should be reviewed

ISSUE 1: Are there any further suggestions or comments on the remaining NCP recommendations such as the proposal for 10-year sinking fund plans. Are there any matters arising from the public submissions that need to be addressed?

5. BUILDING QUALITY

5.1 CAMPBELL INQUIRY BACKGROUND

In 2002, Parliament held an Inquiry into the Quality of Buildings in NSW. The Campbell Inquiry addressed the identified perception in the community that there were significant problems with new residential building construction, including strata title residential developments.

The Campbell Inquiry presented its findings in July 2002 making 55 recommendations on home building, planning and certification, dispute resolution and strata title. A small number of these recommendations related to strata title and to certification of residential building construction.

Most of the recommendations have since been acted upon by the Government and amendments to the *Home Building Act*, *Strata Schemes Management Act* and the *Environmental Planning and Assessment Act* have already been made to address a number of the major issues identified.

For the purposes of this part of the Paper, issues raised in relation to building certification and building standards as they apply to strata buildings are focused upon. This is to promote some discussion on building certification standards in regard to strata buildings.

5.2 THE BUILDING CODE OF AUSTRALIA

Industry, the Government and the community of NSW are reliant upon an efficient and effective system of building certification and control. This is necessary to ensure that the buildings we occupy or use are fit for their intended purpose and that they provide acceptable levels of safety, health and amenity. A number of essential functions are undertaken to fulfil this expectation, including setting standards for the design and construction of buildings and providing various support systems to ensure those standards are successfully implemented/met and, where necessary, maintained.

The primary vehicle responsible for setting standards for the design and construction of buildings is the Building Code of Australia (BCA) and its referenced documents.

The BCA is given legal effect in NSW through the *Environmental Planning & Assessment Act 1979 (EP&A Act)* and the *EP&A Regulation 2000*. The *EP&A Act* provides that all development consents are subject to a prescribed condition that developments involving building work must be carried out in accordance with the requirements of the BCA.

A complying development certificate and a construction certificate, which approve the detailed design plans, can only be issued for building work if the certifying authority is satisfied that the proposed building will comply with the BCA.

Before an occupation certificate for a building can be issued, the *EP&A Regulation* requires that the certifying authority be satisfied that, among other things, the building is suitable for occupation or use in accordance with its classification under the BCA.

5.2.1 A minimum acceptable standard

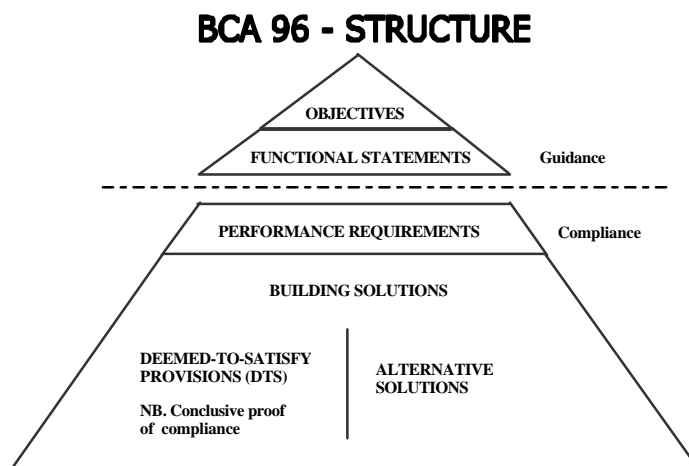
The goals of the BCA are to enable the achievement of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future. These goals are applied so that the BCA extends no further than is necessary in the public interest, is cost effective, and not needlessly onerous in its application.

The BCA therefore sets minimum acceptable standards for the design and construction of buildings.

Consent authorities in NSW, however, may require more than the BCA when circumstances warrant this. It is not possible for a consent authority to specify a lower standard than the BCA.

The BCA contains technical provisions for matters such as structural sufficiency, fire safety, access for people with disabilities, safe movement, and health and amenity. These cover subjects such as damp and weatherproofing, light and ventilation, sanitary facilities, and sound insulation.

The BCA was converted to a fully performance based code in 1996 (BCA96). For each section of the BCA there is a series of statements expressing what a building must achieve in terms of its performance (i.e. the performance requirements). These provisions are accompanied by a set of prescriptive provisions that are 'deemed-to-satisfy' the performance requirements. An owner or applicant may choose to comply with the deemed-to-satisfy (DTS) provisions or may develop an alternative building solution that satisfies the performance requirements, or a combination of both.



This structure has resulted in significant benefits and cost efficiencies for Government, industry and the community. The BCA structure provides choice and flexibility for the applicant. Certainty of compliance can be achieved through complying with the deemed-to-satisfy provisions while innovation, emerging technology and more cost effective solutions are provided for and encouraged through the alternative solution path.

It is this fact, that the BCA is a performance-based code, that raises the issue of why some buildings do not strictly comply (i.e. comply with the DTS). Building contracts under

the *Home Building Act 1989* require building work to be carried out in accordance with the BCA. Whilst most buildings meet the majority of requirements of the BCA by complying with the 'deemed to satisfy' provisions, it is common for buildings such as large strata complexes to have components which have been designed to meet the performance requirements of the BCA (i.e. an alternative solution). These buildings still comply with the BCA, however the owners may not understand how the performance provisions have been met.

The owner or applicant must nominate whether the building will meet the requirements of the BCA, via either the deemed to satisfy provisions or using a combination of deemed to satisfy and performance measures, at the time of submitting a construction certificate. Once a construction certificate has been issued, the building must be built in accordance with that approval. A construction certificate cannot be granted retrospectively, therefore an alternative solution is not open to be used after the building, or that part of the building, has been constructed. If the owner or applicant decides to use an alternative solution after the building work has commenced, they must return to the relevant consent authority and certifying authority and seek a new approval, before proceeding with construction of that part of the building.

ISSUE 2: Should the owners be provided with details of whether a building has been designed using performance based alternatives and how much information should be provided to them?

5.3 ESSENTIAL FIRE SAFETY MEASURES

To provide for an acceptable level of safety in buildings there is an accompanying suite of provisions under the *EP&A Regulation 2000* which requires that the operational performance of certain fire safety measures be continually maintained. These particular measures have an important role to play in occupant safety in the event of an emergency. The responsibility for this is imposed on the building owner, being the owners corporation. It is an ongoing responsibility at least once each year, for the owner to verify to the authorities that these fire safety measures are being maintained. This verification confirms that the owners corporation has engaged an appropriately qualified person to assess the relevant fire safety measures and that that person found them to be capable of providing the required level of performance.

The responsibility for determining whether a person is appropriately qualified rests with the building owner. The ability of building owners to determine an appropriately qualified person in all circumstances, particularly in relation to complex fire safety measures, has been questioned. This raises the issue as to whether persons performing this certification function for the building owner should be the subject of some form of accreditation or registration.

ISSUE 3: Should the persons who are being relied upon by building owners to carry out an assessment of an essential fire safety measure be required to be accredited or registered?

As indicated above, the *EP&A Regulation 2000* requires the assessment and certification of essential fire safety measures at least once a year. The owner is responsible for

arranging the inspection and certification of all fire safety measures to ensure they are operating to the required standard. Following this assessment, the owner must submit to council a fire safety statement and forward a copy to the NSW Fire Brigade.

Under this suite of regulatory provisions, councils and the NSW Fire Brigades are given a policing role and a role to keep records of the certification issued. Recent amendments to the *EP&A Regulation 2000* has given councils the power to issue a penalty of up to \$2000 a week cumulatively for the continued late submission of annual fire safety statements.

Certain fire safety measures, such as smoke detectors, are located within individual strata lots, rather than in common property. Therefore to arrange inspection of these measures, access to each lot is required. This can make the ongoing management and responsibility for the maintenance of the fire safety measures a difficult process for the owners corporation. It can also make it difficult for councils to determine who is the owner for the purposes of requiring annual certification.

ISSUE 4: Who should be responsible for arranging access to inspect the essential fire safety measures in large strata buildings?

5.4 CONFLICT OF INTEREST

The certification of essential fire safety measures is permitted to be carried out by the person who either designed or installed the measure or by an independent person. Apart from this issue, regardless of who certifies the design and installation of the measures, there is no limitation on the amount of work any one person may do for the same builder or developer.

The potential for a conflict of interest arising when a person does the majority of their work for one builder and therefore is perceived to have a dependent relationship with the builder is often raised as a significant problem in relation to private certification, as it appears that the certifier is not making an independent assessment. Section 109ZG of the *EP&A Act* does prevent an accredited certifier from having a contractual relationship with any person and from having a pecuniary interest. However this does not limit an accredited certifier having a close relationship with one builder who may be their only customer.

Several options have been considered to remove this potential conflict of interest. One may be to introduce provisions similar to those applied by the Australian Tax Office where if a sole practitioner carries out more than 80% of their work for one customer, they are considered to be an employee of that customer for the purposes of tax. Alternatively, various systems of computer based random selection processes for appointing accredited certifiers on behalf of the applicant have been considered to ensure that there is no actual or perceived dependent relationship between the certifier and the customer.

ISSUE 5: Should the person certifying the installation of the essential fire safety measures be independent of the builder? How should this independence be achieved?

6. LARGE STRATA SCHEMES – SHOULD THEY BE TREATED DIFFERENTLY?

With some relatively minor exceptions, the *Strata Schemes Management Act* applies equally to all strata schemes no matter their size, type or purpose. The variations provided for relate to:

6.1 2-LOT SCHEMES

In a 2-lot scheme there is no need to elect an executive committee and both lot owners are automatically members of the executive committee.

Where buildings are unattached in a 2-lot scheme, there is no other building on common property and the owners agree, it is not mandatory for the owners corporation to take out building insurance or to establish a sinking fund.

6.2 BY-LAWS

Optional by-laws are provided in the legislation for differing types of schemes. There is some variation in the by-laws for the six identified categories of strata complex (***residential, commercial, mixed use, industrial, retirement village and hotel***). The by-laws govern such issues as:

- *the keeping of animals*
- *garbage disposal*
- *parking of vehicles*
- *installation of safety devices on windows and doors*
- *children playing on common property*
- *behaviour of invitees*
- *drying of washing*
- *storage of flammable liquids*
- *notice boards*
- *change of use of lots which may affect insurance premiums*

When the strata management laws were drafted in the early 1970's, the common perception of a strata scheme was a red brick 2 or 3 storey building in suburban Sydney with 6 or 8 flats. It was unlikely that the drafters could have anticipated the sheer size or type of some modern developments 30 years later (with 20 or more floors, several separate towers and hundreds of individual units). Also, no-one would have envisaged commercial and industrial strata complexes nor town-house, villa or retirement village adaptation to the strata scheme concept.

Refinements to the strata management legislation over the years have attempted to keep pace with evolving strata issues such as staged development, part-strata/part-freehold buildings, and strata developments on leasehold land. However it is clear that the management of a large modern complex with multifaceted responsibilities is a far cry from the operation of many 1970's strata buildings.

Some of the newer inner Sydney strata schemes could accurately be described as small self-contained communities with permanent populations larger than many NSW towns and villages. With a mixture of resident owners, investors, tenants, business operators, strata managing agents, letting agents and caretakers all having a stake in the day to day operation of the scheme, trouble-free management can be an elusive goal. Different expectations, demands and attitudes are to be expected among such a disparate group of people and it would be unrealistic to imagine that all parties could jointly administer such a large undertaking without some tensions and disagreement.

The rationale for the existence of an effective executive committee to deal with many of the affairs of a large owners corporation would appear to be obvious. However there have been other views expressed that executive committees in large schemes wield too much power and should have limitations placed on their authority. Whatever the situation, it seems that some consideration could validly be given to providing for the special management needs of large strata schemes in the legislation.

6.3 LARGE SCHEMES – PERCEIVED PROBLEMS IN OPERATING UNDER THE CURRENT STRATA MANAGEMENT LAWS.

6.3.1 Management structure

Every strata owners corporation regardless of size must:

- have an executive committee (minimum of 2, maximum of 9 members)
- elect office bearers (chairperson, secretary and treasurer)
- conduct meetings under the same mechanism (i.e. notification of meeting times and sending out agendas, constitution of quorums, use of proxy votes etc)
- estimate budgets and fix required levy contributions from individual lot owners annually; and
- may engage a strata managing agent to carry out some or all of the owners corporation responsibilities under delegation

It is the view of some persons connected with the larger schemes that there needs to be some variation in the provisions of the legislation to allow more efficient and responsive management of large schemes. While there may be some divergent views on what constitutes a “large” scheme, it is reasonable to categorise any building or set of buildings comprising a strata scheme with over 100 or 200 lots as being larger than the majority of schemes in existence. The information provided by Land and Property Information NSW clearly supports the view that any strata development with 100 lots or more is in the top 1% or 2% by size of all the estimated 65,000 schemes in NSW.

The management structure and processes currently provided in the *Strata Schemes Management Act* could be said to be more suited to suburban residential blocks where issues are more straight forward and lack the financial and administrative complexities of a city tower building. Causing particular unease among some lot owners in large strata schemes are professional management arrangements. Concerns have been expressed that some strata managing agents may not be equipped with the necessary financial and corporate expertise to administer the affairs of large schemes. As licensed strata managing agents are the only “outside” persons (other than certified practising accountants for treasurer functions), able to undertake over any of the major administrative responsibilities of an owners corporation, consideration may need to be

given to introducing a new tier of management professionals for large schemes. Anecdotal information provided confirms that the annual operating budgets of the largest schemes exceed \$1 million.

Possible options for consideration are:

- *Administrators* with accounting and legal expertise equivalent to Receivers appointed to take over the running of a business of a large company in difficulty
- *Financial controllers* with more specific and detailed responsibilities than treasurers provided for under the Strata Schemes Management Act
- *Boards of directors* with total powers of the owners corporation but not limited to a membership of 9 as is the case for strata executive committees under the current laws

Other options to consider for the more effective management of large schemes could be:

- to make some specific variations to the Act to apply to the operation of large schemes to allow shorter time frames for notifications of meetings, smaller quorums (presently 25% of lot owners by unit entitlement), less detailed agendas etc
- to allow some choice to owners corporations to adopt different management modules as is the case in the Queensland legislation (see below)
- to provide model rules as is the case under the NSW *Associations Incorporation Act* and *Regulation* where associations can adopt their own rules which deal with specified issues or utilise the model provided in the Regulation. The model rules cover items such as:
 - *nomination and election to membership*
 - *resolution of internal disputes*
 - *committee powers*
 - *filling casual vacancies*
 - *meetings & quorums*
 - *voting & decisions*
 - *proxies*

In the strata management situation, model rules could be developed for not only these matters but also specific issues such as the procedure for commencing litigation, entering contracts, obtaining work and services quotations etc.

- schemes over a certain size could be exempted from certain parts of the legislation (eg meeting procedure and budgeting) and thus have the ability to devise their own procedures for these and other matters.
- the legislation could require that certain matters have to be addressed (e.g. the way meetings are conducted) but the actual detail could be left to each scheme to determine. This would be somewhat similar to the legislation covering community schemes where a Management Statement covering the scheme involved must address certain issues although the way in which they are addressed is flexible. The *Community Land Development Act* requires that the Management Statement must deal with the maintenance of community property, storage and collection of garbage, maintenance of water, sewerage, electricity, gas and telephone services, insurance of community property and the keeping of records.
- the Act could provide larger schemes with optional procedure models to choose from in the legislation. The legislation would only require that one of the prescribed models be chosen. Both detailed and less prescriptive models could be made available for selection. As an example, a specific set of rigid meeting procedures could be chosen

or a model could be selected which allowed the owners' corporation itself to devise its own rules about notices of meetings, quorums, proxy voting and responsibilities of office-bearers.

QUEENSLAND MODULE SYSTEM

The Queensland *Body Corporate and Community Management Act 1997*, provides for 4 separate modules for the different types of developments to adopt in some of the main management areas of their schemes. These areas include:

- ⇒ committees
- ⇒ general meetings
- ⇒ proxies
- ⇒ managers and service contractors
- ⇒ financial management
- ⇒ administrative matters

The modules are:

Standard Module – for residential apartment or town house schemes where most residents are owner/occupiers.

Accommodation Module – this is mainly for residential complexes of a services apartment, hotel or resort type. It is intended to cover mainly short-term occupancies and situations where the majority of owners are investors. It is less regulated in relation to committee powers, use of proxies and voting requirements and is meant to cater for a majority of absentee owners.

Commercial Module – This module is aimed towards developments constructed as business complexes. There is less restriction on business enterprises which are likely to all have similar interests.

Small Scheme Module – This is for the use of any scheme with 6 or less lots. It is the least regulated to allow self-management and informal administrative arrangements.

SOME OF THE MODULE DIFFERENCES

The issue of greatest recent concern in NSW regarding the different types of schemes seems to be in relation to large high-rise schemes. If the Queensland module arrangements were applied to the NSW situation, the schemes would appear to fall within the **Standard** and **Accommodation Modules**. Examples are provided of the manner in which some issues are dealt with differently in the two modules. (It should be noted that amendments to the Queensland legislation which will change some of the Module provisions are expected to take effect in mid 2003).

Issue: selection of (executive) committee

STANDARD MODULE – By secret ballot unless otherwise determined

ACCOMMODATION MODULE – No secret ballot

Issue: use of proxies

STANDARD MODULE – Body corporate (owners corporation) can restrict the use of proxies at meetings

ACCOMMODATION MODULE – No restriction of proxies possible

Issue: number of proxies able to be held

STANDARD MODULE – No more than 1 proxy where no more than 20 lots in the scheme, no more than 5% of total vote where more than 20 lots in the scheme

ACCOMMODATION MODULE – No restrictions

Issue: spending by (executive) committee

STANDARD MODULE – Limited to \$100 times the number of lots

ACCOMMODATION MODULE – May be as high as \$400 times the number of lots

Issue: election of strata managers, service contractors and letting agents to (executive) committee

STANDARD MODULE – Managing agents, service contractors and letting agents can only be elected to the committee as non-voting secretary and/or treasurer

ACCOMMODATION MODULE - Managing agent can only be elected to the committee as a non-voting secretary or treasurer. There are no restrictions on service contractors or letting agents.

ISSUE 6: Are any of the options set out in this Paper in relation to the management of large strata schemes worthy of further consideration?

6.3.2 Operation of executive committees within large schemes

There are two distinct views on this issue with one group of interested persons arguing that a large scheme would be bogged down in an administrative quagmire if the executive could not independently make decisions on behalf of the owners corporation. The opposite view is that with so much at stake from a financial point of view, executive committees attached to large schemes need to be specifically restricted in the level of decision-making able to be left in their hands.

There appears to be a level of misunderstanding over the current provisions of the strata management laws on this issue. The *Strata Schemes Management Act* already has a provision enabling the owners' corporation to place limitations on the decisions able to be made by its executive committee (section 21(2)(b)). Section 21(1) of the Act provides that decisions of the executive committee are taken to be decisions of the owners corporation **EXCEPT** if the decision is required to be by unanimous or special resolution (a vote at which no more than 25% vote against) **OR** where the owners corporation has decided that a specific matter must only be decided by the owners corporation at a general meeting.

This second circumstance is commonly known as a **restricted matter**. By virtue of these provisions any strata owners corporation in NSW can, if it so chooses, specifically restrict its executive committee from any area it believes it should not deal with. Also, Schedule 3, clause 11(2) of the Act provides that an executive committee may not make a decision where lot owners comprising one third of the total unit entitlement notify the secretary in writing that the making of the decision is opposed. In light of the above, it could be argued that there is already adequate provision in the legislation for controlling the activities of executive committees where justifiable circumstances arise.

Nevertheless, there are views that the legislation needs to be more transparent on the question of the limitation of authority of executive committees associated with large strata schemes. The following options might be considered if it is considered necessary to specifically restrict the operation of the executive committee.

- The *Strata Schemes Management Act* could be amended to specifically place limitations on the types of matters that large scheme executive committees can make

decisions about (eg spending monies on non-budget items). This would place controls on the decision-making powers of executive committees of the biggest strata schemes but leave the smaller schemes free to allow their executive committees to carry out most of the day to day business of the owners' corporation.

- The Act could be changed to make it clear that decisions of a specific nature could only be made by owners' corporations at annual or extraordinary general meetings. These would be similar provisions to those presently applying to the preparation of financial estimates for administrative and sinking funds (section 75(1) and (2)) and the levying of contributions on lot owners (section 76(2)).
- The Act could include a provision placing a monetary spending limit on executive committee decisions (eg expenditure up to \$100 per lot). There was such a provision in the original *Strata Titles Act 1973* and it applied to all schemes irrespective of their size. This restriction (at one stage \$10 per lot) was removed in 1987. A financial restriction of this type could be re-imposed on executive committees, either generally or in respect to schemes of a determined size. Such a provision would prevent executive committees from dealing with issues involving high expenditure and these matters would have to be referred to full meetings of the owners' corporation for a decision. Provisions of this nature operate under the Queensland strata schemes legislation as referred to earlier in the Paper.

ISSUE 7: Are there sufficient powers already contained in the Strata Schemes Management Act to oversee executive committees or are additional measures necessary?

7. CONCERN OVER DETERIORATION OF SOME OLDER STRATA BUILDINGS AND MECHANISM REQUIRED TO WIND UP A STRATA SCHEME TO ALLOW DEMOLITION OF BUILDING

Not all current strata buildings came into existence after the creation of the first NSW strata laws in 1961. Many buildings had been standing for decades and were already of some vintage when converted from a company title or freehold basis to strata title when the new concept became available. Consequently, it is believed that a substantial proportion of Sydney strata buildings in particular are already 70 to 100 years old. Some are quite possibly coming to the end of their useful life. Even with apartment buildings erected in the 1950s and 1960s some unit owners may be of the view that they would benefit from the demolition of the buildings and their replacement by more contemporary developments. The land on which some of these buildings are located is far beyond the value of the bricks and mortar and representations have often been made in recent years for the termination of strata schemes to be more easily facilitated.

7.1 TERMINATION OF STRATA SCHEMES - CURRENT PROVISIONS

Owners of strata lots own the cubic space within their units as well as having a proportional interest in the common property along with other owners within the scheme. An owner of a strata lot receives a certificate of title for his or her strata unit, as would any owner of land. A strata lot may be transferred, mortgaged or leased. Before a strata scheme apartment building can be demolished, the interests of all of the owners plus any

mortgagees and lessees must be properly dealt with and the strata scheme effectively wound up.

Sections 51 and 51A of the *Strata Schemes (Freehold Development) Act 1973* provide two methods by which a strata scheme can be terminated. These are:

- (1) by order of the Supreme Court following an application by a lot owner in the scheme, a mortgagee of a lot or by the owners corporation; or
- (2) by the Registrar-General following the lodgement of an application signed by each proprietor of a lot, registered lessee and registered mortgagee.

7.2 TERMINATION BY SUPREME COURT ORDER

Prior to 1993, a strata scheme could only be terminated by order of the Supreme Court. Termination of a strata scheme has the potential to extinguish valuable interests in land and as a consequence it was felt that the Supreme Court was best placed to deal with the competing interests involved. Section 51(6) of the *Strata Schemes (Freehold Development) Act 1973* gives the Supreme Court wide powers to make orders that would be just and equitable in individual circumstances.

Applications to the Supreme Court can be costly and cause delay in the redevelopment of a scheme. Many of the applications previously made to the Supreme Court for termination were uncontested matters brought where a single developer has acquired all of the lots in a strata scheme for the purpose of redevelopment. It was felt that in such circumstances, or where there was no dispute, termination could be achieved by order of the Registrar General as part of lodgement of further subdivision plans.

Though most applications for termination of a strata scheme are now made to the Registrar General, it is still possible to make an application to the Supreme Court. Such an application would be made where:

- there was a dispute between the lot owners, mortgagees or lessees regarding the termination; or
- the strata scheme formed part of a staged development; or
- the Registrar General had refused to make an order terminating the scheme.

7.3 TERMINATION BY ORDER OF THE REGISTRAR-GENERAL

This provision was added in 1993. Applications for termination of a strata scheme made to the Registrar-General will usually be cheaper and quicker than applications made to the Supreme Court.

Section 51A(8) of the *Strata Schemes (Freehold Development) Act* sets out what is to happen to the interests of lot owners, mortgagees etc when an order terminating a strata scheme is made by the Registrar-General. Usually, a certificate will be issued for the land which formed the strata parcel. Though there is some degree of discretion, the certificate of title will usually issue in the name of the former proprietors of lots in the strata scheme as tenants in common in shares proportional to their former unit entitlements. For this reason, where a strata scheme is to be demolished and redeveloped, applications for termination by the Registrar-General are usually made in instances where one developer owns all of the lots in the scheme.

An application for termination of a strata scheme by the Registrar-General can only be made where the application has been signed by each proprietor of a lot within the scheme, each registered lessees and each registered mortgagee.

7.4 CURRENT CONCERNS

A concern has been raised in recent years as to whether there should be a simpler method of achieving a termination of a strata scheme where there is obvious evidence that, because of a building's age or state of repair, it would be in the best interests of both the individual lot owners and the community at large for the building to be demolished.

It has been raised as an issue by those in favour of loosening the current 100% consent requirement that one person in a strata scheme can withhold consent to the continuing detriment of everyone else. Such a person can frustrate the plans of the majority who believe that there are obvious and overwhelming grounds to justify the demise of the building and the winding-up of the owners corporation.

The usual example provided is typified as the person who has lived in the building and in the area for many years and who has no desire to move and will thus refuse to give their consent.

However, from the perspective of the person not willing to be part of such a proposal, there may be a substantial emotive link to their present accommodation. Also the apartment is likely to be close to long-standing community and health facilities and social support networks. Some lot owners may have moved into the area when it was not regarded as an expensive area of the city and may worry that if the scheme is terminated, they would not have the financial resources to remain in the locality. Accentuating this concern may be fears that the costs of obtaining temporary accommodation while the building was demolished and the land sold would be beyond their reach. For others who had a large recent mortgage, there could be concerns that the payout from the sale of the land would be insufficient to cover the mortgage and the purchase of reasonably equivalent real estate.

The NSW provisions regarding the need for agreement by all lot owners before termination of a strata scheme may take place is not unique. All States and the ACT have similar requirements. The fact that a person could lose his/her home in an apartment block on the vote of others in the building, if the current legislative provisions were changed, is obviously an extremely serious matter.

The issue is not a simple one. There are many factors which have to be taken into account. There are questions of fundamental individual rights competing with the purported benefits to the majority. As well as the concerns of those individuals directly involved (the lot owners) there are wider aspects of the situation to be included during consideration of the matter. These include:

- Planning and local government controls
- Possible heritage value of older buildings
- Retention of residential accommodation in traditional "housing" areas of our cities

7.5 POSSIBLE OPTIONS

As the legislation currently stands, any lot owner can make an application to the Supreme Court for termination of a strata scheme. Therefore, if a situation arose where the majority of lot owners wished to terminate their strata scheme but one or two owners unreasonably objected, an application could be made to the Supreme Court by one or more of the majority owners. The Supreme Court would hear evidence from the supporters and opponents of the termination proposal and would make a decision on the merits of the case. If the Court held that termination of the scheme was appropriate despite the objection, orders could be made that would address the interests of all parties.

If it is considered that the current methods of termination are not sufficient, the following ideas are proffered:

- the Singapore model, where the required vote depends on the age of the building, be adopted or modified [under the Singapore system a 90% vote is needed for buildings less than 10 years old, 80% vote for buildings older than 10 years].
- a unanimous vote (as defined in the *Strata Schemes Management Act*) at a meeting of the owners corporation (this does not mean everyone in the building has to specifically give agreement to the decision – it just means that as long as no-one votes against it at the meeting, and the meeting has a quorum, the motion is passed).
- A special resolution be required. A special resolution (as defined in the *Strata Schemes Management Act*) means a motion where no more than 25% of lot owners comprising the total unit entitlement vote against.

Alternatively, it might be considered that the present provisions are adequate (enabling owners corporations to determine their own plans for demolition of a building when all owners and mortgagees are in agreement and leaving disputed situations to the Supreme Court).

ISSUE 8: Are the present legislative provisions regarding winding up of a strata scheme and demolition of the building appropriate or should other mechanisms be provided?

8. OTHER MISCELLANEOUS ISSUES

8.1 TRANSFER OF BUSINESS FROM ONE MANAGING AGENT TO ANOTHER

When an owners corporation appoints a managing agent for a specific period, they might not expect that the agency may at some stage decide to sell the management business to another managing agent who would take on the owners corporation in question as their own client. The legislation does not require the owners corporations' approval to the transfer and this has been the cause of some disquiet among lot owners. It would seem appropriate and logical that the owners corporation have the right to approve or object to the person taking over the management of their scheme.

Following amendments to the *Strata Schemes Management Act* in February 2002, the owners corporation's approval is now required before a caretaker contract can be transferred to another person. It would seem that it is an anomaly that this is not also the case for strata managing agents' contracts.

ISSUE 9: Should the law be changed to ensure that a strata managing agent cannot transfer responsibility for management of any particular scheme without the approval of the owners corporation concerned?

8.2 CLARIFICATION OF AREAS OF OWNERS CORPORATION RESPONSIBILITY

A constant area of dispute within strata schemes is uncertainty over the area of the building deemed to be common property and thus the responsibility of the owners corporation to maintain and repair and conversely which areas are not common property and thus the responsibility of the lot owner concerned. While common property and private property may often be determined by the specific notations on individual strata plans, it is frequently argued that there are some matters that could be specifically listed in the legislation as either being common property or private property to save the cost and time incurred where disputes arise over those issues. Some of the areas where the present uncertainty could possibly be removed to make it clear that they are not common property items include:

- ✓ “floating floors” (thin wooden floors installed over existing concrete, ceramic or particle board sheet flooring)
- ✓ any structural addition made by a lot owner without the necessary approval of the owners corporation
- ✓ fences around town-houses
- ✓ window awnings and screens
- ✓ screen doors

ISSUE 10: Would it assist owners corporations and lot owners to have the legislation specify actual examples of common property and non-common property items? Are there any specific items that should be listed?

8.3 DOCUMENTS REQUIRED TO BE PRODUCED AT FIRST ANNUAL GENERAL MEETING

Schedule 2 (Clause 4) of the *Strata Schemes Management Act* requires that certain items be handed over by the original owner (usually a developer) at the first annual general meeting of the owners corporation. These documents include plans, specifications, insurance policies and the certificate of title for the common property. It has been argued that there are additional documents that should be required to be handed over to assist the owners corporation or its managing agent in proper management of the scheme. These additional items include:

- date of warranty expiry on structural and non-structural defects
- copies of all warranties from manufacturers of equipment and goods installed
- copy of the valuation of the lots at the time of registration of the strata plan
- wiring, sewerage and drainage diagrams

ISSUE 11: Is there any additional documentation or information that developers should be required to hand over to the owners corporation at the first annual general meeting?

8.4 BY-LAW CHANGES

While owners corporations are free to select the by-laws of their choice, there are many by-laws in use that are relatively constant. For example, there is a by-law allowing lot owners to place safety and security devices on doors and windows, which are usually common property, to protect against intruders without seeking specific consent from the owners corporation. It has been suggested that this automatic right to install security devices should have to be in accordance with fire safety and other issues applying under local government and the *Environmental Planning and Assessment Act*. There are concerns that some installations may not comply with fire rating requirements and lives could be at risk through inadequate or inappropriate modifications which take place without owners corporation supervision. The legal liability of owners corporations in the event of death or injury in such situations has been raised.

Other by-law changes may be necessary to reflect changes in local government concerns and requirements in other areas such as car parking and garbage collection since the current model by-laws were drafted in 1996.

ISSUE 12: Do changes need to be made to the model by-laws relating to the installation of safety and security devices, car parking, garbage collection or any of the other issues dealt with by the by-laws?

ISSUE 13: Are there any other issues relating to this Paper that need to be raised?

9. SUMMARY OF ISSUES RAISED FOR COMMENT

NATIONAL COMPETITION POLICY REVIEW AND PREVIOUS PUBLIC COMMENT

ISSUE 1: Are there any further suggestions or comments on the remaining NCP recommendations such as the proposal for 10-year sinking fund plans. Are there any matters arising from the public submissions that need to be addressed?

BUILDING QUALITY ISSUES

ISSUE 2: Should the owners be provided with details of whether a building has been designed using performance based alternatives and how much information should be provided to them?

ISSUE 3: Should the persons who are being relied upon by building owners to carry out an assessment of an essential fire safety measure be required to be accredited or registered?

ISSUE 4: Who should be responsible for arranging access to inspect the essential fire safety measures in large strata buildings?

ISSUE 5: Should the person certifying the installation of the essential fire safety measures be independent of the builder? How should this independence be achieved?

LARGE STRATA SCHEMES

ISSUE 6: Are any of the options set out in this Paper in relation to the management of large strata schemes worthy of further consideration?

EXECUTIVE COMMITTEES

ISSUE 7: Are there sufficient powers already contained in the Strata Schemes Management Act to oversee executive committees or are additional measures necessary?

TERMINATION OF STRATA SCHEMES

ISSUE 8: Are the present legislative provisions regarding winding up of a strata scheme and demolition of the building appropriate or should other mechanisms be provided?

TRANSFER OF MANAGING AGENTS

ISSUE 9: Should the law be changed to ensure that a strata managing agent cannot transfer responsibility for management of any particular scheme without the approval of the owners corporation concerned?

COMMON PROPERTY

ISSUE 10: Would it assist owners corporations and lot owners to have the legislation specify actual examples of common property and non-common property items? Are there any specific items that should be listed?

HANDING OVER OF DOCUMENTS BY DEVELOPERS

ISSUE 11: Is there any additional documentation or information that developers should be required to hand over to the owners corporation at the first annual general meeting?

BY-LAWS

ISSUE 12: Do changes need to be made to the model by-laws relating to the installation of safety and security devices, car parking, garbage collection or any of the other issues dealt with by the by-laws?

ANY OTHER ISSUES

ISSUE 13: Are there any other issues relating to this Paper that need to be raised?

10. HOW TO HAVE YOUR SAY ON THE IDEAS RAISED IN THIS ISSUES PAPER

If you have any comments or suggestions that you would like to make on any of the matters raised in this Paper, particularly in relation to the options outlined, you are welcome to send them to:

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COMMENTS MUST BE RECEIVED BY FRIDAY 1 August 2003

