Community Schemes Reforms Explanatory Paper

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Explanatory paper — community lands law reforms

Community schemes in NSW

Community schemes are an important form of land title in NSW. Community schemes are governed by two Acts:

- the *Community Land Development Act 1989,* which facilitates the subdivision and development of land with shared property, setting the requirements for registration of plans, changes to the subdivision and dealing with lots.

- the *Community Land Management Act 1989*, which provides for the management of community schemes and their subsidiary schemes, including management of funds and accounts, association and committee meetings, maintenance of common property, insurance, the management statement (including by-laws) and dispute resolution.

The two Acts provide for subdivisions where a lot owner owns and maintains any buildings constructed on their lot and also shares the use and maintenance costs of other facilities. The schemes range from rural settings where they can be used for sustainable eco-developments, with shared dams and communal farmland, to large residential communities with private roads, high security and extensive recreational facilities such as swimming pools, park lands, marinas and golf courses.

There are many similarities between strata and community schemes. However, community schemes have an added level of flexibility, with a tiered management structure based on three main types of schemes enabled by the legislation:

- community scheme
- precinct scheme
- neighbourhood scheme.

Strata schemes are also often developed as subsidiary schemes within community lands, where the *Strata Schemes Development Act 2015* and the *Strata Schemes Management Act 2015* apply alongside the community schemes laws.

In NSW, there were 937 community schemes, 63 precinct schemes and 1,754 neighbourhood schemes as at June 2019.

Proposed changes to community schemes laws

Existing community scheme laws (originally modelled on strata schemes laws) are over thirty years old and in need of significant changes – to modernise them and to ensure they best deliver on consumers' needs. New community schemes laws have been developed to provide residents and commercial interests with modern, flexible and more democratic governance arrangements, similar to those introduced for strata schemes in 2015.

The Department of Customer Service is seeking feedback on reforms to community land legislation and has released drafts of the proposed new laws. The proposed legislation rewrites community schemes laws and largely reflects the proposals outlined in the Community Schemes Law Reform Position Paper (the Position Paper) that was released in 2014.

However, there are some changes to earlier proposals that incorporate feedback and concerns identified during implementation of the strata laws.

Alongside exposure drafts of the *Community Land Development Bill 2019* and *Community Land Management Bill 2019*, a separate 'Table of Reforms' document for each Bill is being published alongside this explanatory paper that identifies where reform proposals appear in the draft legislation.

This explanatory paper is intended to highlight some of the key changes and the rationale for the change and should be read in conjunction with the draft legislation and 'Table of Reforms' documents.

The Position Paper has also been republished to give context to the reform proposals.

The project to reform community scheme laws started in 2011 and was originally taking place as part of the strata schemes law reform project. Research and extensive stakeholder consultation led to the release of the Position Paper, which outlined 58 proposed reforms.

However, implementation of these reforms was delayed so that focus could be given to the strata scheme reforms, which would provide the basis for the community scheme amendments.

Consistency in strata and community scheme law reforms

In 2016, the NSW Government delivered major reforms to modernise and streamline the strata schemes laws with the commencement of the *Strata Schemes Development Act* 2015 and the *Schemes Management Act 2015*. This comprehensive reform sought to bring strata laws into the 21st century and created a modern framework for people living and working in strata schemes.

With the changes to the strata laws now established and in use, it is time to align community schemes law. This is a primary aim of the draft community schemes legislation. Consistency will reduce unnecessary duplication and make it easier for owners and industry professionals to understand their rights and obligations.

However, the sizes of many community schemes and the tiered management structure mean that consistency will not always be possible. Some of the strata schemes law reforms — for example secret ballots and proxy vote limits — will be most relevant to neighbourhood associations but may not be necessary or practical for the operation of precinct and community associations. For this reason, some differences between the strata and community legislation are necessary.

Consultation process

When does the consultation close?

Feedback on the new laws can be provided the Department of Customer Service until Friday, 28 February 2020.

Submissions can be made by:

- completing the online form on the NSW Fair Trading website
- sending an email to communityscheme@customerservice.nsw.gov.au, or
- posting a written submission to:

  Community Schemes Law Reform
  Better Regulation Division, Department of Customer Service
  Level 5, McKell Building, 2-24 Rawson Place
  SYDNEY NSW 2000

What happens after this consultation?

After feedback from the consultation is reviewed, some re-drafting and further targeted consultation may be needed before the Bills are introduced into the NSW Parliament.

Supporting regulations will also need to be developed after the Bills are passed by the NSW Parliament. A separate consultation process will be undertaken to finalise the regulations.

Once these regulations are complete, it is anticipated that the new laws will commence in 2021.

Summary of key reforms included in the draft laws

The draft laws include proposed reforms that reflect the Position Paper published in 2014 as well as new, previously unpublished reforms that have been developed since the Position Paper was released. The 'Table of Reforms' documents published along with the draft bills provide a full list of all the reforms being pursued.

The following sections provide a summary of the key reforms, including the basis for new reforms.

Reforms from the Position Paper

The proposals published in the Position Paper are the basis for the redrafted community scheme legislation and make up a majority of the reforms.

For the Community Land Management Act, these include:

- alternative methods of attendance at meetings including social media, video and teleconferencing
- postal or electronic voting and secret ballots
- electronic storage and distribution of documents
- limiting the number of proxies able to be held by any person, and limiting the matters for which a priority vote can be used
- prohibiting non-owners with a financial interest in the scheme (for example, managing agents and letting agents) from being a member of the strata, neighbourhood, precinct or community committee
- more flexibility regarding AGMs and quorums
- restricting developers' rights to vote on matters relating to building defects
- expanding the range of disputes that can be dealt with by NCAT
- requiring developers to set realistic levies during the initial period and for the first year after the initial period ends
- better ways to control parking within schemes
- increasing penalties and streamlined enforcement for by-laws
- allowing penalties to be paid directly to scheme associations.

For the Community Land Development Act, the changes will:

- make development contracts more transparent and flexible by remodeling the staged development provision so they align with the strata legislation. This will:
    - allow land to be added to a community or precinct scheme, providing it has been disclosed in the development contract
    - allow a schedule of contributions to be included in a development contract which will itemise expenses and identify who is responsible for payment
    - allow additional association property to be created by a community or precinct plan of subdivision, providing it has been disclosed in the development contract
    - require meetings to be called to authorise certain matters identified in a development contract as "development concerns".
- only require a neighbourhood development contract for staged development of a neighbourhood scheme
- allow land to be added as association property or as a lot in the scheme by special resolution
- allow associations to lease additional property
- allow subsidiary neighbourhood schemes to be wound up and the property to be vested in the parent community scheme
- enable a community plan of subdivision to subdivide or create association property by special resolution

- allow a neighbourhood scheme or strata scheme within a community scheme to approve the subdivision of property by special resolution
- enable associations to take the benefit of a statutory easement, and
- allow subsidiary schemes to lodge a revised schedule of unit entitlements when development of the relevant scheme is complete.

A more detailed explanation of these proposals is provided in the Position Paper. A small number of reforms have changed slightly from those outlined in the Position Paper as a result of further consultation undertaken during the drafting of the strata schemes reforms.

Key new reforms since the Position Paper in the Management Bill

As outlined above, some further enhancements and updates to the reform proposals have been developed since the Position Paper was published.

An explanation of some of the key further changes is set out below.

Redefine the "initial period" for community and precinct schemes to ensure it expires at an appropriate time rather than potentially continuing indefinitely

Currently, the initial period for neighbourhood schemes ends in the same way as for strata schemes — when the original owner (developer) has sold lots having a total unit entitlement of at least one third of the unit entitlements of the scheme.

For precinct and community schemes, the method is more complex. The initial period ends when at least one-third of the total unit entitlements are sub-divided by neighbourhood or strata schemes that are out of their initial periods.

However, not all lots in a community and precinct scheme will necessarily be subdivided by a subsidiary scheme. This means that for many community and precinct schemes the initial period can never expire unless they apply to the NSW Civil and Administrative Tribunal (NCAT) for an order to end the initial period.

This reform will amend the definition so that if there is no subsidiary scheme in a community or precinct scheme, the initial period will expire on the issue of an occupation certificate under the *Environmental Planning and Assessment Act 1979*, which is issued when development is completed on land as required by a development consent.

This reform will allow a more effective trigger to expire the initial period for community and precinct schemes where there is no subsidiary scheme, without the need to apply to NCAT for a resolution.

New restrictions on owners who are appointed as managing agents to better deal with potential conflicts of interest

An owner who is seeking to be appointed as a managing agent for their scheme will not be entitled to vote, or cast a proxy vote, related to their appointment. This reform ensures that the appointment of a managing agent is conducted in a fair and transparent manner, reducing the risk of potential conflicts of interest. This reform has also been implemented for strata schemes.

Prevent developers from locking in neighbourhood associations into long-term contracts for the supply of utilities

Agreements for the supply of utilities to neighbourhood schemes will automatically expire at either the first annual general meeting (AGM) of the association, if the agreement was executed before the meeting, or in any other case three years after the date on which it commenced. Utilities agreements are to be included as an agenda item at AGMs. This does not extend to electrical embedded network agreements that apply to residents.

The intention of this reform is to prevent developers from neighbourhood schemes becoming "locked in" to long term supply contracts for neighbourhood association property. This reform will help to ensure that neighbourhood associations are able to fully consider utility contracts and ensure the contract is in the association's interests before adopting it. This reform has also been implemented for strata schemes.

Managing agent may obtain fewer than three insurance quotations if written reasons for not providing three quotes are submitted to the association

Anecdotal evidence shows that some agents can find it difficult to find three quotes for buildings or schemes because it has unique features, exceptional claims history, or for other reasons. This reform has been implemented for strata schemes.

Associations will have a new option to seek orders to recover unpaid levy contributions and interest via NCAT. Associations will also still be able to pursue recovery through the Courts.

Previously, it has only been possible for an association to acquire and enforce a debt order via the courts, even though the reason for the debt could be a matter more suited to NCAT. This change provides NCAT with the power to make a debt order. However, any order would need to be enforced in the court, as it is not possible for NCAT to do this. Depending on the circumstances of an unpaid contribution, associations are likely to be more comfortable seeking orders via NCAT. This reform has been implemented for strata schemes.

Key new reforms since the Position Paper in the Development Bill

Updating the definition of "consent authority"

Update the definition of "consent authority" and the consent approval process in line with the *Environmental Planning and Assessment Act 1979* to ensure plans and instruments are assessed under the approval regime of that Act.

Amend the definition of "developer" in a community or precinct scheme to be the original owner, or the owner of a development lot that is bound to perform a development contract

The amendment will make sure that restrictions placed on the developer, and any powers and obligations of the development contract, will apply to the original owner and also to any subsequent developer who buys a lot in the scheme with the intention of carrying out development identified in a registered development contract.

Remove the requirement to obtain a Supreme Court Order where land is resumed below the surface of land within a community, precinct or neighbourhood scheme

This proposal will complement section 62(2) of the *Land Acquisition (Just Terms Compensation) Act 1991*, which provides that where land is resumed for a tunnel and there will be no disturbance to the surface, no compensation is payable. The requirement for a Supreme Court Order will only be dispensed with where the resumption falls within section 62(2).

Reform proposals not being pursued

Following further consultation, the Government has decided not to pursue two proposals that were in the Position Paper.

The first proposal no longer being pursued relates to enabling community schemes to hold a trademark. A community association is a body corporate with a 'legal personality' and can therefore own personal property. The *Trademarks Act 1995* (Cth) allows for entities that have legal personality to apply for and hold trademarks. Therefore, this reform is not required.

The second relates to abandoned goods. The reform proposal for establishing processes for abandoned goods in community schemes, similar to those that exist under residential tenancies laws, will instead be prescribed in the *Uncollected Goods Act 1995*. All provisions relating to the disposal of abandoned and uncollected goods in NSW will be streamlined and contained in that Act.