REINSW
REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

Submission

Strata & Community Title Law Reform Discussion Paper

To:

The Hon. Anthony Roberts MP
Minister for Fair Trading
Level 36 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Introduction

The Real Estate Institute of New South Wales (**REINSW** or the **Institute**) submission is in response to the Strata & Community Title Law Reform Issues Paper (**Issues Paper**) published by NSW Fair Trading.

The REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. The REINSW seeks to promote the interest of members and the property sector on property related issues, and in doing so the REINSW believes it has a substantial role in the formation of regulatory policy in New South Wales.

The REINSW appreciates the opportunity to lodge this submission and welcomes discussion of the issues raised by this submission with the Minister and/or policy officers from NSW Fair Trading.

General

The REINSW welcomes the reform and modernisation of the NSW strata and community schemes legislation.

The legislators' challenge will be to create a balanced system that is fair to the interests of the various stakeholders and at the same time straightforward, easy to understand and not overly prescriptive. Consumers of the strata and community schemes regime include the owners corporations and executive committees, individual lot owners, tenants and strata managing agents. Other stakeholders include the original developer, mortgagees and covenant charges and prospective future owners.

Underpinning the review of the legislation should be the following guiding principles:

- clear plain language;
- consolidation and harmonisation of duplicated similar provisions in the strata and community schemes legislation;
- consistency throughout the various pieces of legislation;
- simple democratic governance processes;
- balancing of personal freedoms in the context of communal living/occupation;
- fostering a culture of community and cooperation; and
- future focus.

As the number of people living in strata and community schemes and the sizes of schemes increase it becomes ever more important to ensure the legislation is drafted in the language of the users for whom it is intended. Many owners enter the strata environment not by choice but by default as living in free-standing homes progressively becomes less affordable and population growth drives denser development styles. Others downsize after having lived in a house for many years. An up-front understanding for owners of their rights and responsibilities and encouraging a cooperative community culture are at the core of promoting attractive and harmonious environments in strata and community schemes.

The existing duplication in the various pieces of legislation should be removed and the strata and community schemes laws consolidated and harmonised to the maximum extent possible. Clear consistent definitions of terms and simple straightforward processes in the legislation will promote certainty and assist consumers to better understand their rights and responsibilities.

The new legislation should provide as much flexibility as possible to allow schemes to govern themselves. Prescription should be limited to the essential governance framework and fundamental administrative and financial matters. Some of the existing constraints, such as the requirements for timing of annual general meetings and the requirement to pay special levies into the administrative fund, should be removed. By giving schemes more power to govern themselves owners will be encouraged to take responsibility for the issues concerning their scheme.

There should be more clarity around the concept of common property. The obligations of owners as regard common property and fixtures servicing only their lot should be expanded. Internal fixtures such as kitchen cabinets, tiling and flooring should be the lot owners' responsibility to repair, maintain, insure and replace. Water leaks and plumbing blockages originating from within a lot should be that lot owner's responsibility, with powers for the owners corporation to step in in the event of non-compliance by the owner.

As a fundamental measure to addressing building defects in newly constructed schemes, building laws and the certification processes under those laws need to be strengthened to promote the construction of good quality buildings with good quality materials. The balance between the need to construct multiple dwellings in a short period of time and the quality, safety and longevity of the construction needs to be addressed by government on a policy level.

Construction laws should set an adequate minimum noise transmission specifications for building materials used in schemes. Developers and builders should be held accountable for defects within the statutory framework, including by requiring developers to hand over to the owners corporation an independent building report and a 10-year sinking fund forecast prepared by an appropriately qualified professional.

Schemes should be encouraged to be proactive with defect rectification and repairs and maintenance, including by strengthening the 10-year sinking fund provisions and ensuring schemes comply with them.

Dispute resolution processes should be simple, expedient and accessible. Schemes should be able to develop and implement internal dispute resolution mechanisms and to make provision for the imposition of fines for breaches of their by-laws.

The strata and community schemes division of the Tribunal should be staffed by specialists in strata and community schemes law. There should be procedures for dealing with and penalising chronic and vexatious claimants who waste the resources of strata schemes and the Tribunal.

A lot of the disputes occurring within schemes, as well as owner apathy, can be alleviated by encouraging a spirit of community and cooperation. A fundamental cultural shift is required to achieve this.

Government should support schemes and the consumers of the strata and community laws by providing clear, consistent and concise information and education readily accessible by all stakeholders.

The new legislation should be future focused by promoting sustainable quality building practices so as to ensure longevity within strata schemes and by providing fair processes to facilitate urban renewal.

The Institute's responses to the specific questions raised in the Issues Paper are set out below.

Answers to Questions in the Issues Paper

Abbreviations used: "CLMA" – *Community Land Management Act 1989*
"PSBA Act" – *Property, Stock and Business Agents Act 2002*
"SSMA" – *Strata Schemes Management Act 1996*

1.	***Should the law distinguish more between different schemes based on size, usage, type of construction or other reasons? If so, how?*** The REINSW is of the view that the laws relating to scheme governance should be consistent irrespective of the size or construction of a scheme. All schemes require regular and active governance and maintenance regardless of size, with the difference being in the types of matters requiring maintenance in schemes depending on the size and construction of the scheme. The laws should prescribe the general obligations with which each scheme needs to comply depending on its particular circumstances. For example if there is a general prescription in the law that a scheme must repair and maintain its common property (as per section 62 of the SSMA) this would apply equally to the common property of a 2-lot strata scheme, which may comprise only of the building itself and common entry ways as to the common property of a multi-storey development, which may include lifts, a swimming pool and common ventilation systems.
2.	***Should the current laws be combined and if so, how?*** It is noted there is currently significant duplication where the strata and community legislation contain separate but similar provisions e.g. provisions regarding the initial period, meeting procedures, insurances, and dispute resolution. In addition there are some provisions which should be in both the SSMA and the CLMA but are not – for example there is no provision in the CLMA equivalent to section 80 of the SSMA regarding the recovery of unpaid contributions and interest. The Institute would support combining the current laws and creating a harmonised and streamlined regime in respect of all matters which are common to or similar within the strata and community developments. There could be 2 acts – one governing development and one governing management. To the extent that the laws governing development, maintenance, insurances and day to day operations are similar for strata and community schemes, they should be consolidated within the relevant act. Separate divisions within the same act would be included dealing with the matters which are specific to the different types of schemes.
3.	***What examples of unnecessary red tape do you believe should be removed?*** Several areas where the REINSW believes red tape should be reduced are as follows:

	• There should be greater flexibility within the legislation to allow owners to change the timing of the annual general meeting by general resolution. The Tribunal should not be involved in the administration of schemes – schemes should be able to make such decisions on their own. • The prescription to pay special levies into the administrative fund should be removed and the owners should be able to direct special levies to be paid into the relevant fund depending on the purpose for which they are raised. • There seems to be confusion as to from which fund the costs of repairs and maintenance should be paid – there should be a clarification that such costs are to be paid out of the sinking fund. • The only prescription as to purpose for which funds may be applied should be that the costs of repairs and maintenance are to be paid out of the sinking fund. • There should be no requirement to fill vacancies on the executive committee before the next annual general meeting. • Creating easements during the initial period where they benefit the scheme should be permitted. • The notice periods between strata schemes and community schemes should be harmonised. • The process for enforcing compliance with by-laws should be simplified as it is currently excessively complex and lengthy. • The requirement for compulsory mediation before an application to the Tribunal can be made should be removed. Areas in which regulation should remain include the following: • The consideration of auditing and office bearer liability insurance should remain as compulsory items on the agenda for each AGM. • Insurance policies should be required to be taken out with approved insurance companies. This is a necessary layer of protection for strata schemes. • The requirement for a general resolution before an owners corporation can change its postal address should remain. There should also be a provision requiring the registration of the address so it is accessible to parties wishing to effect service. • Only owners or their immediate family should be permitted to hold a position on the executive committee. • The requirements for the preparation of the 10-year sinking fund plan should be actively enforced. There should be a requirement that the plan be prepared by an appropriately qualified professional and there should be penalties for non-compliance.
4.	***To what extent should the Government prescribe rules for all schemes?*** Prescription of rules should be limited to financial, administration and governance matters only. There is merit in having generic model by-laws in the legislation, which can become the default position in the event a scheme does not have its own by-laws or a by-law dealing with a particular matter, however schemes should have the ability to make their own by-laws. There should be a prohibition on proxy farming.

5.	***Should broad principles apply to the making of by-laws?*** Generic models for by-laws should be contained in the legislation and prescribed as default positions unless and until a scheme passes its own by-laws, however there should not be a prescription that by-laws be reasonable or consistently enforced as this would create uncertainty and the potential for disputes.
6.	***Is there merit in the mission statement idea?*** The Institute does not support the mission statement concept.
7.	***Should the law give more recognition to the personal freedoms of owners?*** The Institute is of the view that owners' personal freedoms are sufficiently recognised in the legislation, including by having the ability to pass by-laws by special resolution. In a communal living environment it is important that the exercise of personal freedoms of one person do not interfere with the rights and personal freedoms of another. In this regard the Institute supports a provision to the effect of the existing section 117 of the SSMA.
8.	***Are reforms needed to address the competing interests of stakeholders? If so, what should they be?*** All owners within a scheme should have the same rights, subject only to their unit entitlements. There should be no discrimination in the rights of owner-occupiers versus investors. The tensions between owner-occupies and investors as regards maintenance can be addressed by stricter enforcement of the requirements for 10-year sinking funds to be prepared, and by introducing requirements that the plans be prepared by appropriately qualified professionals and that the owners' corporation must levy sufficient contributions to ensure that the 10-year plan is executed. All current owners need to be providing for the future of the scheme to ensure the overall health and longevity of the scheme. Developers should be prevented from voting at the first annual general meeting and the requirements for developers to hand over plans, building contracts and other documentation pertaining to the building and development should be more strictly and actively enforced. The developer should be required to disclose to the owners corporation any interest the developer has in any contract entered into by the developer and all contracts entered into by the developer should be subject to review at the first annual general meeting.
9.	***What terms or provisions in the current law do you believe should be rewritten in plain English?*** The current review of the legislation is an opportune time to ensure that all the newly drafted laws are written in plain English. Terminology for similar concepts used in different acts should be harmonised and consistent. Terms which are well-understood and accepted in their meanings in the sector should not be changed, as this would create confusion.
10.	***Which of the following would help to improve awareness and in what ways?*** *(i) more information resources (e.g. factsheets, targeted brochures, template forms, sample documents and an email newsletter);* *(ii) compulsory training for executive committee members of all schemes or just large schemes;* *(iii) having new committee members signing a statement setting out their obligations and responsibilities;* *(iv) requiring managing agents/secretaries to supply new owners and tenants with an up to date set of by-laws within a specified timeframe (e.g. 14 days);* *(v) making it a requirement that schemes review their by-laws at regular intervals (e.g. every 5 years);*

	(vi) expanding the section 109 certificate to disclose more matters likely to be of material interest to prospective buyers; *(vii) clarifying and simplifying the law dealing with the inspection of records.* The Institute supports the concepts in paragraphs (i), (ii), (iv), (v) and (vii) above but does not support the concepts in paragraphs (iii) and (vi). To require new committee members to sign a statement setting out their obligations and responsibilities is not practical and would deter people from serving on committees. It should be the owner's responsibility to provide a new tenant with a set of the by-laws. Frequently owners do not notify the owners corporation of a new tenancy – this needs to be addressed. The prescribed information in the 109 certificate should not be expanded – the information in relation to the levies and insurances is mainly relevant at the time of settlement of a purchase, not at the time when the decision to purchase is initially made. Disclosure information of other types should not be included in 109 certificates. Buyers have available to them the procedure for inspection of the books and records of the owners corporation and should rely on that and other due diligence processes in determining whether to purchase a lot in a particular scheme. A set of minimum specifications could be prescribed where records are kept electronically and the records for the past 5 years should be kept at the strata manager's office.
11.	***Do you have any other suggestions for how awareness of rights and responsibilities could be improved?*** A resource kit for executive committees could be created and a helpline providing practical advice could be established. The Strata Living booklet should be made a mandatory document to be provided to all purchasers.
12.	***Which of the following would help to improve participation and in what ways?*** *(i) limiting the numbers or restricting the use of proxies;* *(ii) introducing a system of pre-meeting postal voting for those who cannot attend a meeting;* *(iii) mandating that all owners must vote, with fines imposed if they do not;* *(iv) providing the option of secret ballots on certain issues;* *(v) reducing the restrictions on quorum requirements or removing the need for quorums altogether;* *(vi) enabling some form of tenant representation in schemes;* *(vii) calling for committee nominations in advance of AGMs;* *(viii) allowing payments to be made to committee members for attending meetings;* *(ix) clarifying the legal liability of executive committee members* The REINSW supports the measures in (i), (ii), (vii) and (ix). The measures in (iii), (iv), (vi), and (viii) are not supported. It is submitted that making voting compulsory and imposing fines would not be effective in improving participation and would not be conducive of good governance. Secret ballots should not be permitted as the records of the owners corporation should be publicly available. Committee members should not receive payment for attending meetings as this will encourage people to sit on committees for the possibility of receiving payments rather than for the purpose of serving the owners corporation.

	A quorum should be deemed if there is no quorum half an hour after commencement of the meeting. Absent owners should be able to vote by postal vote or by proxy. The proxy form should include a complete voting instruction for each motion and should be valid for one meeting only – this will help alleviate some of the problems with proxy farming. There should be a limitation on the amounts that can be recovered against the executive committee members and there should be insurance in place for those amounts. Other laws may also need to be amended to ensure the limitation is effective.
13.	***Do you have any other suggestions for how participation in schemes could be improved or owner apathy addressed?*** Changing owner apathy would require an investment in education and a cultural shift for many strata owners towards a more community-oriented mind set and taking ownership of the issues facing their scheme. Owners should be educated on the consequences that their apathy can lead to, such as the building falling into disrepair and reduction in the value of units in the building.
14.	***Which of the following would help to improve communication and in what ways?*** *(i) recognising various technological options for distributing information to those involved with individual schemes;* *(ii) enabling teleconferencing, videoconferencing or other means of holding meetings;* *(iii) providing more certainty as to how correspondence to schemes should be handled;* *(iv) reducing the documents required to be sent to owners ahead of meetings;* *(v) giving schemes the flexibility to make documents available on their website or on request from owners;* *(vi) requiring minutes of meetings to be made available within a specified time after the meeting (e.g. 14 days);* *(vii) making it clear when contact details can be given to executive committees and owners/residents.* The concepts above are generally supported, except for (iii). It is problematic to prescribe the method for handling of correspondence, as this would depend on the number and complexity of issues raised in the correspondence. In practice, managing agents circulate the minutes of the annual general meeting to the owners together with the next levy notice shortly after the annual general meeting is held. Clarity as to the circumstances when contact details can be released and the type of contact details that can be provided to executive committees and owners or residents would assist managing agents, as agents are reluctant to provide any information that is not on the strata roll and therefore publicly accessible.
15.	***Do you have any other suggestions for how communication in schemes could be improved?*** Fostering a community-oriented environment of cooperation and responsibility is a precursor to the improvement of communications within schemes.
16.	***Which of the following would help to improve transparency and in what ways?*** *(i) requiring any person with a conflict of interest to declare that interest and not participate in any discussion or voting on the matter;* *(ii) restricting the ability of certain persons (e.g. non-owners or more than one co-owner) from being*

elected to executive committees;

(iii) making the managing agent automatically a non-voting committee member;

(iv) requiring office bearers be elected at each annual general meeting;

(v) imposing a minimum number of committee members (e.g. three);

(vi) limiting the period of time any individual can continually hold the same office (i.e. Chairperson, Secretary or Treasurer);

(vii) requiring motions to be accompanied by an explanatory note and to identify the person who submitted the motion

(viii) prohibiting or requiring the disclosure of commissions;

(ix) imposing further restrictions on the length of contracts associated with schemes;

(x) streamlining the levels of consent required to make decisions;

(xi) providing greater clarity over who can make what decisions in schemes;

(xii) requiring all or some schemes to have accounts audited;

(xiii) giving owners a right to request and receive copies of any documents relating to expenditure.

Persons with a conflict of interest should be required to disclose the conflict and abstain from voting on the matter. Provisions similar to those applying to Australian company directors should be considered.

Only owners or their immediate family should be permitted to be elected to executive committees.

There is no utility in making the managing agent automatically a non-voting committee member as the managing agent already has delegated authority from the owners corporation. It is concerning however that a number of people are offering what practically amounts to strata management services in return for payment who are neither owners nor licensed real estate agents and are effectively managing a strata scheme without a license – this practice should be discouraged and appropriate provisions should be put in place to ensure it does not occur.

In practice, in schemes managed by an agent, the executive committee meeting is frequently convened immediately after the annual general meeting. This could be made a requirement.

Prescribing a minimum number of committee members could be problematic if there are insufficient nominations. A default position should be provided for in these circumstances.

Limiting the number of consecutive years that a person can hold a position could cause problems for schemes where members are happy to have the same person in the position for multiple years.

Requiring motions to be accompanied by an explanatory note is supported as this will assist persons who wish to vote by postal vote and will save time at meetings.

A requirement for disclosure of commissions is supported – it is noted that the PSBA Act already requires agents to disclose commissions and benefits. Prohibition on receiving commissions is not supported, including because it is likely to lead to a significant increase in the cost of strata management services.

It would make good sense to streamline the levels of consent required for the same types of decisions in strata and community schemes.

Clarifying who can make what decisions in schemes is supported.

Self-managed schemes should choose if they wish the records to be audited. The PSBA Act makes provision for the auditing of strata managing agents' accounts in any event.

Owners already have the ability to inspect the records of the owners corporation – if an owner wishes to access the records of have copies, they should meet the cost.

17.	***Do you have any other suggestions for improving transparency within strata and community schemes?*** It is submitted that there is already sufficient transparency as there is the ability to inspect the records of the owners corporation.
18.	***Which of the following would help to improve accountability and in what ways?*** *(i) more clearly defining the role of managing agents, executive committees and office bearers;* *(ii) holding agents directly accountable for their actions;* *(iii) providing an easier process for schemes to terminate the services of agent;* *(iv) making professional management mandatory for large schemes;* *(v) introducing a Code of Conduct for executive committees or requiring them to act with due care, skill, honesty and for the benefit of all owners;* *(vi) giving the CTTT more options before appointing a compulsory agent;* *(vii) requiring executive committees to prepare brief annual reports* A clearer definition of the roles of the strata managing agent, executive committees and office bearers would be supported. Managing agents are accountable under the terms of their contract with the owners corporation. Agents are licensed and regulated under the PSBA Act. It is submitted that this is the appropriate legislation for regulation of strata managing agents rather than the strata legislation. The process for termination of the services of a managing agent should be the same as that for appointment – via an annual general meeting, which is the forum representative of all owners. If the executive committee makes a recommendation to terminate the services of the managing agent, it should provide written reasons for its recommendation. Making professional management mandatory for all schemes (rather than large schemes only) would be supported. It is noted that some of the most problematic schemes are 2-lot strata schemes. A statutory duty for executive committees to act with due care, skill and diligence and for the benefit of all owners would be preferable to a code of conduct. Suitable education should also be made available to assist executive committee members in understanding and meeting their obligations and in enabling them to make good decisions. Giving the CTTT more options before appointing a compulsory agent may create confusion as it is frequently the case that CTTT members are not sufficiently familiar with the complexities strata legislation and there is no consistency in the manner in which cases are decided. For some time now the REINSW has been calling for members sitting on strata matters to have specialist knowledge of the strata legislation. Whilst the potential benefit of an annual report is acknowledged, the additional workload and compliance burden on executive committees may act as a deterrent for people to volunteer.
19.	***Do you have any other suggestions for how to improve accountability?*** It is submitted that the present regime provides adequately for accountability.
20.	***Do you support the introduction of an alternative process for terminating strata schemes? If so, how many lot owners would need to agree to initiate the process?*** It is recognised that it will be necessary to put in place an alternative process for terminating strata schemes. A 75% majority vote to initiate the termination process once the building has reached the stage when it can no longer be properly maintained at a reasonable cost would be supported. However the

	termination of strata schemes is a complex issue requiring the balancing and consideration of many factors, including: • having a fair and objective process in place to determine the condition of the building; • how a fair valuation and compensation to owners can be achieved; • the position of mortgagees; • the position of existing tenants; • dispute resolution procedures; • sufficient information, advice and representation being provided to all parties to achieve a fair outcome; • making provisions for an independent review and appeals process.
21.	***Should any alternative process accommodate only collective sale or should the process be more flexible, to enable co-operative redevelopment of the scheme?*** Collective sale should be only by unanimous resolution. A co-operative development of the scheme would be a commercial matter to be negotiated and designed between the owners and the developer. The cost of legal representation and expert advice to owners can be an impediment for owners to negotiated co-operative development as legal fees in negotiating, documenting and implementing development arrangements can run into the tens of thousands of dollars.
22.	***Should the meaning of common property be changed? If so, which approach do you favour?*** It is submitted that common property should comprise of the base building elements only and within a lot should exclude tiling, waterproofing membranes, floor coverings and the space between the ceiling and the concrete slab (such as in a situation where there are down lights).
23.	***Should owners be responsible for all internal repairs within their lot and/or work which only benefits or affects them?*** Fixtures and fittings located within a lot which are attached to the common property and which only service one lot should be the responsibility of the lot owner. Works that benefit only one lot should also be the responsibility of the lot owner. If a plumbing blockage originates within a lot, then that lot owner should be responsible for the repairs, even if they involve works to another lot or to common property. The owners corporation should not be responsible for internal water penetration between lots where it originates from one lot and not from the common property. There should be procedure to compel owners to carry out repairs. If a lot owner does not carry out the repairs, then the owners corporation should have the ability to enter a lot and to carry out the repairs (particularly where the damage could affect other lots or the common property) and subsequently recover the cost of the repairs as a debt from the lot owner. Fixtures attached to a lot which only service that lot should be excluded from the owners corporation insurances – the individual lot owners should insure those fixtures. In addition insurers should be required to provide coverage for a prescribed minimum of items in their policies – too much confusion arises as to what is and what is not covered by the owners corporation insurances.
24.	***Should the absolute obligation to maintain common property be changed to take account of the age and life of the scheme and the funds available?*** The available funds should not be a factor to be taken into account in relation to the obligation to

	maintain – it should be the responsibility of the owners corporation to ensure that sufficient funds are available. The provisions regarding 10-year sinking funds should be adhered to and enforced. The requirements for schemes where the building is older should be stricter given that they would be likely to require more repairs. The exception to this could be where there is a concluded and binding termination arrangement and vacation of the building by all residents and occupants is imminent.
25.	***Should owners or occupants be responsible for any damage to common property they cause?*** Owners and occupiers should be responsible for damage they cause to common property. Schemes should have the ability to require the owner to rectify the damage in a proper and workmanlike manner. If the owner refuses or if required in order to prevent further damage from occurring, the owners corporation should have the ability to carry out the work and recover all costs (including strata managing agents costs, legal costs and the costs of enforcement or recovery proceedings) as a debt from the owner.
26.	***Should the law about common property for pre 1974 strata schemes be changed?*** The law for all strata schemes should be consistent throughout and the present law reform should be forward-looking. If it is likely that a significant number of owners in pre-1974 schemes will be disadvantaged by a harmonised definition coming into force, then such schemes could be given the ability to revert back to the pre-1974 position by special resolution.
27.	***Should the process for owners wanting to renovate or make changes to their lot be simplified and/or clarified?*** Firstly, a clear definition of what constitutes common property is needed. Then, a simple, clear process should be contained in the legislation. A process for policing and enforcement should also be legislated. Works involving or affecting common property as part of an owners renovation should be at the complete cost and responsibility of the lot owner. The owners corporation should have the right to inspect the work and rectify defective work done to common property and recover the costs of doing so from the lot owner.
28.	***Could easy-to-read guidelines be produced giving information to owners on what they can and cannot alter/renovate? What would the content of these guidelines be?*** Easy-to-read guidelines should be produced and more awareness raised of the requirements for renovations in strata schemes. The Strata Living Booklet should be updated to include this information. It should be compulsory to provide a copy of the Strata Living booklet to all new owners.
29.	***Which of the following would help address overcrowding and short-term rentals in schemes and in what ways?*** *(i) enabling schemes to make and enforce by-laws to deal with the issue;* *(ii) giving the CTTT power to prohibit certain letting arrangements for a lot where there is a proven pattern of anti social behavior;* *(iii) introducing a law setting the maximum number of persons per bedroom;* *(iv) giving local councils more power to deal with such matters.* It may be necessary to employ a combination of the above measures. It is submitted that councils and police should have the powers to deal with overcrowding matters.

30.	***Do you have any other suggestions for how the issues surrounding overcrowding and short-term rentals could be addressed?*** For new schemes Councils could impose a maximum number of occupants as a condition of the development consent and require that a covenant to that effect be registered on title, however none of the measures proposed address the fundamental problem of the shortage of affordable accommodation, which will need to be addressed by government on a policy level.
31.	***Do you think that a maintenance schedule prepared by the developer would be useful?*** A maintenance schedule would a valuable document for the owners corporation, provided that the schedule is prepared by the builder or an appropriately qualified independent building professional rather than the developer. An independent building report on the structure of the building should be one of the prescribed documents to be handed over by the developer to the owners corporation.
32.	***Should defects be a compulsory agenda item for discussion at the first AGM?*** Defects should be a compulsory agenda item for the first AGM. Any defects identified by that time should be notified to the developer. Another compulsory agenda item for the first AGM should be whether the scheme should be registered for GST. A 10-year sinking fund plan should be prepared by an independent quantity surveyor or other appropriately qualified building professional and handed over by the developer to the owners corporation to be adopted at the first AGM.
33.	***Should the law set clear rules for voting on action regarding defects?*** Rules for voting on action regarding defects should not be set. The owners corporation should have the ability to evaluate its options and resolve how to proceed.
34.	***Should any other changes be made to the strata laws to more adequately deal with defects?*** The primary issue of the quality of the construction work and materials used needs to be addressed in the building legislation. It is submitted that buildings built in recent years will not have the same longevity as buildings built in the first three-quarters of 20th century. This will result in an urban renewal crisis if the building quality issues are not urgently addressed. Prescribed materials should be used within the construction to inhibit the transmission of noise – this will avoid a substantial number of complaints. There should be stricter certification and compliance requirements with regard to the installation of waterproofing and structural and safety matters. Schemes should be able to act on an ordinary resolution under section 62 of the SSMA or an equivalent provision in the new legislation and should be able to change materials or resolve to bring the building up to current standards if required.
35.	***Should land be able to be added to a community scheme, precinct scheme and a subsidiary neighbourhood or strata scheme? If so, should land be able to be added only as association or common property or should land also be able to be added as a separate lot?*** There should be the ability to add land to any scheme property or to an individual lot by special resolution.

36.	***Should a mechanism be introduced to enable amalgamation of subsidiary neighbourhood schemes with a community scheme? If so, what kind of resolution should be required?*** A mechanism to enable the amalgamation of subsidiary neighbourhood schemes with a community scheme should be put in place. This should require a special resolution.
37.	***Should initial unit entitlements for strata schemes be based upon a valuation from a qualified valuer as it is for community and staged strata schemes?*** Initial unit entitlements for strata schemes should be based on a valuation from a qualified valuer and the valuation should be one of the documents to be handed over by the developer to the owners corporation.
38.	***Should more flexibility be given to schemes to determine levies other than on the basis of unit entitlements?*** Levies should continue to be determined based on unit entitlements as using any other method is likely to create uncertainty and disputes. There is already flexibility to charge additional levies under exclusive use by-laws or where the usage of a lot affects the insurance premiums – these provisions should remain.
39.	***How could the process of reallocating unit entitlements be improved? Would you support the ACT model being adopted in NSW? Should the procedure for revising unit entitlements in community schemes be expanded to precinct scheme, standalone neighbourhood schemes and strata schemes?*** Requiring developers to register the initial valuation (see reply to question 37 above) may assist in the future valuations for the purpose of re-calculating the unit entitlements and would be an incentive for developers to make a fair allocation in the first place.
40.	***Should notices for AGMs contain more details about proposed levy increases? If yes, what additional information do you suggest?*** The provision of information to owners as to the amount of levies to be payable by them is supported. In practice strata managing agents already include these details in notices of AGM.
41.	***Should the law require periodic levy notices to be issued?*** An annual levy notice providing for immediate payment or quarterly installments should be sufficient. Reminders can be issued if a scheme so chooses but should not affect the liability to pay the levy.
42.	***Is more regulation over the initial setting of levies by developers required?*** A 10-year sinking fund plan should be prepared by a quantity surveyor or other appropriately qualified building professional and handed over by the developer to the owners corporation as part of the prescribed documents to be provided by the developer, to be subsequently adopted at the first AGM. The person preparing the 10-year sinking fund should be directly accountable to the owner corporation in order to ensure the report is impartial.
43.	***Should developers be liable for budget shortfalls in the initial period?*** The developer should be required to disclose budget and expenses information annually during the initial period.

44.	***Should the law allowing discounts for early payment of levies be removed?*** It is submitted that the law allowing discounts for early payment should be removed. It creates administration problems and can distort budgeting due to the need to allow for the possibility that everyone will pay early. The law is currently based on amounts being 'paid' rather than received – this creates disputes and costs associated with rectification.
45.	***Should a strata management statement be required to disclose the method of allocating the shared expenses and/or be certified by a quantity surveyor?*** It is sufficient if the method for allocating the shared expenses is disclosed in the strata management statement– in practice this already occurs in many schemes. The method of calculation should be subject to a review process if it is later perceived to be unfair.
46.	***Should the penalty interest rate on outstanding levies be raised? If so, what should the figure be?*** The interest rate for late payment should be high enough to act as a deterrent for late payments - 20% after 1 month delay is suggested. This will be a better incentive for on-time payments and will save on administration costs. There should be no discounts for early payment of levies.
47.	***Should schemes be required to take recovery action within a certain time? If so, what should the timeframe be?*** It should be up to the scheme to decide when to take recovery action.
48.	***Should the CTTT be given jurisdiction to deal with outstanding levies?*** The CTTT should be given non-exclusive jurisdiction to deal with outstanding levies. Owners corporations should be able to choose whether to go to the CTTT or directly to the Local Court. There should not be an additional layer or complexity added to the process.
49.	***What hardship provisions (if any) should be introduced?*** Hardship provisions should not be introduced as they can be problematic and operate unfairly towards other owners who are on time with payment and who may be faced with being unable to meet scheme expenses or having to cover the shortfall.
50.	***Should the recovery of expenses for outstanding levies be limited to reasonable expenses or built into the penalty interest rate?*** The owners corporation should be able to recover all its actual costs plus interest. The owners corporation should not be out of pocket because of an owner's delay in payment of an amount that they ought know to be due and payable and for which the owner has been served with a levy notice.
51.	***Should owners who owe levies continue to not have voting rights? Do you support any other practical punishments or deterrents and if so what?*** Lot owners who owe levies should not have voting rights. Other deterrents would include a higher interest rate on overdue payments and being banned from participation on the executive committee. Any sanction against an owner should not unfairly affect other owners or tenants.

52.	***Should a minimum period of arrears (e.g. two levy payments) be required before loss of voting rights or other punishments are imposed?*** Loss of voting rights should be immediate.
53.	***Should schemes be able to seek orders that tenants pay rent to them to cover debts owed by investor owners?*** The ability to garnishee rent already exists via the Local Court.
54.	***Should sinking funds remain compulsory? Should schemes be able to carry forward budget surpluses instead?*** Sinking funds are essential for the funding of the cost of capital works and should remain compulsory. Surpluses should not be permitted. The raising of special levies should be discouraged by active enforcement of the 10-year sinking fund provisions. Borrowing funds to cover capital costs should not be permitted, including because future owners can end up having to pay debts incurred by past owners.
55.	***Should the law dictate contributions to sinking funds? If so, how?*** The 10-year sinking fund plan should be prepared by an appropriately qualified expert. There should be a requirement that schemes actually carry out the 10-year sinking fund plan.
56.	***Have the 10 year sinking fund plan reforms been successful? Should they be retained and expanded to the community scheme sector? Are any refinements needed to make them more effective?*** The Institute is not able to comment on the effectiveness of 10-year sinking fund plans so far. However it is submitted that compliance with the requirement to have the 10-year sinking fund plans should be monitored and enforced. There should also be a requirement that schemes actually levy the amounts required to carry out the 10-year plans. The process for preparing 10-year sinking fund forecasts should include a comprehensive building inspection and an inspection of the records of the owners corporation. The 10-year sinking fund requirements should also apply to community schemes.
57.	***Should the requirement for valuations every 5 years be kept or changed?*** A requirement for valuations to be carried out every 2 years would be supported. There is concern that the values insured for are not keeping up with the rising costs of construction and accordingly this leads to underinsurance. Relying on annual indexation may not be an adequate measure – it is submitted that building and other costs increase at a greater rate than CPI.
58.	***Should insurance and valuation details be on the notices for each AGM?*** Yes - in practice a lot of strata managers already include this information on notices of AGM.

59.	***What items should the law require to be covered by scheme insurance policies?*** Only common property should be covered by scheme insurance policies with owners fixtures left for the owners to insure by the owners' contents insurance. There is concern that insurers are sending mixed messages by advising owners that items are insured by the owners corporation insurances, which originally were thought not to be insured. This leads to lot owners requiring the owners corporation to make claims for items it did not believe it was insured for and pay the resulting excess. Sometimes the bill for the item claimed is lower than the excess and there are disputes as to who is liable for payment in those circumstances. There should be a uniform prescribed list of items to be covered by the owners corporation insurance (with owners corporations choosing to insure additional property if they wish) and there needs to be clear communication as to what is covered and what is not.
60.	***Should schemes be encouraged or required to have a higher insurance excess?*** No. It should be up to the scheme whether to accept a higher excess or not.
61.	***How could the law give schemes more flexibility over their insurance requirements?*** It is submitted that basic insurances should be compulsory. There may be exemptions from building insurance for 2-lot strata schemes where the buildings re detached as per the existing regime or for schemes where value of the common property does not exceed a prescribed amount.
62.	***Should the cost of insurance be shared only on the basis of unit entitlements?*** The ability for schemes to pass on the cost of increases in insurances as per the existing section 77 of the SSMA should be retained.
63.	***Is there a need to increase the minimum public liability cover for schemes? If so, what should be the amount?*** It is submitted that the coverage should be at least $30 million, however an insurance expert would be in a better position to comment on this issue.
64.	***How do the laws around accounting records need to be modernised (if at all)?*** The increased use of technology should be recognised in the law.
65.	***Do you support a simplified set of financial statements?*** It is submitted that financial statements are already not unduly complex, however a simplified statement in addition to the detailed statement could be provided to owners on request.
66.	***Are annual financial statements sufficient? Should the law require or recognise the ability of schemes to request statements on a more regular basis?*** In practice a lot of strata managing agents provide quarterly reports. Self-managed schemes should also prepare 6 monthly or quarterly accounts.

67.	***Should internal dispute resolution mechanisms be recognised in the law?*** Internal dispute resolution processes should be recognised in the law and encouraged, however they should not be made mandatory.
68.	***Should attendance at mediation be made compulsory?*** No – mediation could be encouraged as an alternative dispute resolution process, however it should be voluntary – it should be up the parties to choose which mechanism to use.
69.	***If mediation is unsuccessful should parties be able to apply for a CTTT hearing without needing to go through the Adjudication step?*** The adjudication step should be retained as it gives the parties owners the opportunity to make a written submission.
70.	***Should legal representation be limited to where a proven need is shown or the dispute is over a specific amount (e.g. $10,000)?*** No – it should be left up to the parties as to how they wish to pursue the matter and what representation to have.
71.	***Is there merit in establishing a 'duty advocate' like information service at mediation sessions and CTTT hearings?*** No.
72.	***Should mediation for strata and community schemes be a free service? If so, how should dispute resolution services be funded?*** No – the fees for mediation should be increased. There should be no discounts as this encourages vexatious litigants.
73.	***Should the jurisdiction of mediation and the CTTT be broadened to cover the majority of disputes which arise in strata and community schemes? If so, should such jurisdiction be exclusive? What types of matters would be inappropriate for mediation and the CTTT to handle?*** The CTTT does not currently handle strata disputes well. There is a need for a specialist strata division staffed by strata law specialists. It is submitted that if matters were dealt with by specialists the efficiency of the CTTT in dealing with strata disputes would be greatly improved. Jurisdiction should not be exclusive to the CTTT as parties should be able to pursue other avenues as well.
74.	***Should the procedure around cost orders and interim orders be clarified?*** There would be merit in clarifying the procedure, however it is also important that the provisions be consistently followed and enforced.
75.	***Should there be a process to reject applications about trivial matters or where the same matter has been contested before?*** Yes. Rules similar to those of the Supreme Court regarding vexatious litigants could be adopted.

76.	***Which of the following would improve the level of compliance?*** *(i) streamlining the number of offences;* *(ii) increasing the penalties that can be imposed;* *(iii) enabling penalty notices to be issued;* *(iv) requiring or encouraging schemes to appoint a committee member as a 'compliance officer';* The level of compliance could be improved by increasing the penalties that can be imposed and by enabling penalty notices to be issued. Requiring a compliance officer to be appointed is not supported as it would discourage people from volunteering to serve on committees and has the potential to alienate the person carrying out that role from other owners.
77.	***Should schemes be able to issue their own fines for by-law breaches?*** Yes. It is submitted that a lot of breaches are currently tolerated because schemes are unable to issue fines. Provisions for fines should be included in the by-laws and the fines should be included on the offending owner's levy notice.
78.	***Should it be mandatory for a scheme to enforce its by-laws?*** It should be up to the scheme to decide how to govern itself and whether it will enforce its by-laws, so long as the choice to enforce or not to enforce is applied consistently throughout the scheme, i.e. not disadvantaging some owners.
79.	***What other changes to the system of enforcing by-laws would you like to see?*** There is a need for greater consistency in the decisions handed down by the CTTT and in the way the law as to enforcement is applied.
80.	***What do you think should be done, if anything, about parking in schemes?*** Wheel clamping should be allowed, with the cost to be recovered from the offending car owner.
81.	***What do you think should be done, if anything, about pets in schemes?*** The default position should be that pets are permitted, subject to owners complying with a set of reasonable conditions prescribed in the legislation or the model by-laws. It should then be up to the individual scheme, if it so resolves, to adopt and document within its by-laws a differing policy on pets within the scheme.
82.	***What do you think should be done, if anything, about noise in schemes?*** There should be a requirement that building materials used meet a prescribed level of noise resistance. Schemes can be empowered to issue "cease and desist" notices and fines for repeated breaches of the noise by-laws. Also, awareness should be raised about the nature of living in strata schemes and the effect that noise can have on other occupants. Owners need to be educated on the one hand to be considerate of others and on the other hand to have a level of tolerance for noise occurring in the normal course of living.

83.	***What do you think should be done, if anything, about smoking in schemes?*** Smoking can be dealt with by aggrieved owners seeking orders under section 117 of the SSMA. Schemes could also pass by-laws dealing with smoking – introducing a smoking-related model by-law would be a good starting point for schemes wishing to adopt such a by-law.
84.	***What do you think should be done, if anything, about flooring in schemes?*** Building materials with prescribed minimum noise insulation standards should be used in the first instance when new buildings are constructed. Where flooring is being replaced, minimum noise insulation standards for underlays and flooring materials should be mandated and enforced. It is not practical to make the use of carpet compulsory.
85.	***What do you think should be done, if anything, about washing in schemes?*** It should be up to individual schemes to set by-laws in relation to the drying of washing, subject to any local government rules. If the local council has specific rules about the visual street scape then it should be left to the council to enforce such rules.
86.	***Do you agree with any of the above reform proposals?*** The following reform proposals would be supported: • The list of documents which must be handed over by the developer at the first AGM should be expanded to include an independent building report and the 10-year sinking fund forecast prepared by an appropriately qualified professional. There should be more rigorous enforcement of the requirements regarding the handing over of documents by developers. • The provisions dealing with development contracts should be updated and harmonised across the various types of schemes and the terminology used should be consistent throughout. • The requirement for registration of neighbourhood development contracts should remain. • Owners corporations or community associations should have the ability to lease additional common property or association property from its own scheme or a subsidiary scheme. • Schemes should be given the power to deal with abandoned goods. • Schemes should be authorised to enter lots to trim trees which pose a risk or are damaging common property. • The cap on the number of executive committee members should be reduced to 5. • Clarifying who is the "controlling officer" for WHS purposes is supported, however this should not be the managing agent – it should be a member of the executive committee. • The information on the strata roll should remain at a level where private or sensitive details are not publicly disclosed without the consent of the owner concerned. • Service of legal notices should be on the owners corporations address for service as notified to the LPI. • Clarifying the circumstances when a scheme can restrict access to common property – e.g. where

	there is a danger or damage. Such restrictions should be by special resolution.
87.	***Do you have any other suggestions for how the existing law regulating strata and community schemes could be improved?*** Please note the introductory comments to this submission.

The REINSW appreciates the opportunity to comment on the strata and community titles law reform and would welcome the opportunity to discuss it further.

21 November 2012

Tim McKibbin
Chief Executive Officer
Real Estate Institute of New South Wales

Eva Sklavos
Legal & Policy Manager
Real Estate Institute of New South Wales