

Strata & Community Titles Proposal to Amend Bills



*Submission to the Attorney General in regard to draft
legislative changes proposed in December 2008*

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This paper is a response to the Attorney General's draft Bill to amend the Strata & Community Titles Acts.

Our Background

UnitCare Services has 300+ body corporate clients here in South Australia. We commenced business in 1994. We are winners of the 2008 REISA Excellence Award.

Its managing director, Gordon Russell, has been in the industry since 1986. He has been a trainer with the Real Estate Institute of SA since 1991.

More details of our team and services are available on our website www.unitcare.com.au

In 2003 the Attorney General (AG) released a Discussion Paper (see appendix).

The paper canvassed the regulation of body corporate managers (BCMs), proxy votes, dispute settling, fidelity fund, information to unit owners and more.

There were some 44 submissions. Amongst them a submission from the Hon John Rau.

In December 2008 the AG released for discussion draft bills to amend the Strata & Community Titles Acts.



Current View & Industry Issues

- Small number of body corporate managers (BCMs)
- Many small and medium BCMs operators bought out by competitors over the last decade.
- No minimum training standards
- Service delivery is patchy and subject to considerable complaint
- Many BCMs have interests in building maintenance firms either through direct ownership or commissions. One BCM is owned by a building firm, another owns a maintenance firm and others receive a commission from contractors.
- Audits of client accounts – honour system, no enforcement or spot checks.
- Re-invoicing of insurance renewals to earn more fees
- Monies raised and paid from Trust accounts without approval of management committees or general meeting of body corporates (BC)
- Funds held by managers estimated at \$42 million
- Interest on funds estimated at \$1.5 million
- Little or no reporting to BC committees or owners between AGMs
- Refusal by some BCMs to supply owners with information on their BC including owner list & ledgers
- A culture built on having the owner's money and drawing fees regardless of service delivery and contract requirements.
- Sacking BCMs made difficult as group decision and nowhere to turn for help except Magistrates Court. Some managers impose 3 month penalties.
- Contracts (where they exist) are often not fair to both parties and force the BC to pay out or wait many months to make a change even when the BCM has clearly breached trust.
- BCM drawing unspecified fees before handing over funds and records.

The regulation of body corporates and their managers varies from state to state in Australia. The following tables are summaries of the current situation.

Table 1 Number of Units & Managers in Australia, is based on information from the 2006 Census, Lands Titles Office and Yellow Pages information.

<i>Region/State</i>	<i>Dwelling Type</i>	<i>Number Units</i>	<i>% of all dwellings</i>	<i>No firms</i>	<i>No units per firm (yellow pages listings)</i> <i>High no indicates smaller choice</i>	<i>No body corp's if known</i>
SA	Flat, unit or apartment	56,167	9.2%	18	3120 units /firm	17,098 (LTO) at 12/2008
Adelaide Metro	“” “”	49,327	11.0%	-		
NSW	“” “”	470,496	19.0%	417	1127 units /firm	
VIC	“” “”	251,246	13.4%	274	917 units /firm	
QLD	“” “”	196,584	13.0%	269	730 units /firm	
WA	“” “”	61,246	8.1%	126	486 units /firm	
TAS	“” “”	16,308	8.6%	4	4077 units /firm	
NT	“” “”	10,279	15.3%	13	856 units /firm	
ACT	“” “”	13,829	11.3%	10	1728 units /firm	
	Total	1,076,315	14.2%	Total Firms	1137	

Table 2 State of Regulation in Australia, is based on information from official government websites and The Stamford report (WA June 2007) - see appendix.

<http://stiwa.com.au/upload/documents/StrataManagerRegulationReview.pdf>

<i>Region/State</i>	<i>Managers</i>	<i>Education</i>	<i>Funds</i>	<i>Disputes</i>	<i>Information Services</i>
South Australia	No licensing or registration	No educational requirements	Annual audit of Trust Fund – not enforced by OCBA or other agency. No spot checks.	Magistrates Court only	Only from non government sources – LSC, REISA.
NSW	Licensed agents under the Property, Stock and Business Agents Act	Required & continuing	Trust accounts & compensation under the Property, Stock and Business Agents Act. Regular reports to owners.	Strata Schemes Adjudicator	Strata Schemes Adjudicator
Victoria	Must register with Business Licensing Authority	No educational requirements	Manager required to have \$1.5 million PI cover	Government tribunals – Consumer Affairs and VCAT.	Consumer Affairs Victoria
QLD	Subject to Code of Conduct – see appendix	Spelt out in Code of Conduct	Annual audit required. Regular reports to officers/owners.	Commissioner for Body Corporate and Community Management	Commissioner for Body Corporate and Community Management
WA	No – under review see Stamford report attached http://stiwa.com.au/upload/documents/StrataManagerRegulationReview.pdf	STIWA Accreditation Program.	Trust accounts allowed. PI cover under consideration.	Determined by State Administrative Tribunal	State Govt' Landgate
Tasmania	No regulation of managers	No educational requirements	No audits or reporting required.	Recorder of Titles	Some publications on govt' website
NT	Managers must be licensed under the Agents Licensing Act 2001. New Act in process. Code of Conduct	Unknown	Required to have PI cover	Magistrates Court	Not known
ACT	No regulation of managers	No educational requirements	Not known	Magistrates Court	Some publications on govt' website

Table 3 lists BCMs in South Australia, in order of size of portfolio. The figures are based on information from BCM & CTISA* websites and extrapolation based on industry intelligence.

<i>Body Corporate Manager by est' size</i>	<i>No groups est'</i>	<i>Funds in trust est'</i>	<i>No Managers est'</i>	<i>Interest/mon th (Dec 08)</i>	
Whittles	2000	\$15m +	18 (website)	\$46,000	
Strata Data	1350	\$11.5 +	11 (website)	\$31,500	
Adelaide Strata & Community Title Management	640	\$4.9m	6	\$15,000	
UnitCare Services	300	\$2m+	4	\$7,000	
Horner Management	300	\$2m +	4	\$7,000	
Willsmore Paterson	100	\$600k +	1	\$2,300	
Lin Andrews	100	\$600k +	1	\$2,300	
Ace	100	\$600k +	2	\$2,300	
Others	600	\$4.6m +	15	\$14,000	
				\$127,400 per month	
Totals	5490	\$42 million	62+	\$1.528m per annum	31% of total groups are prof' managed

* CTISA is the Community Titles institute of SA.

Major concerns with proposed Bill. (in order of impact on body corporate managers)

Legislative Area

Body corporate managers - licensing

“The Government is against the imposition of unnecessary red tape on business and especially small business. The Government believes that adequate protections for owners can be delivered without licensing and so the draft Bill does not propose to require body-corporate managers to hold licences” Left to unit owners to “choose a body-corporate manager who is competent and can be relied on to manage the body corporate in accordance with the law”

Notes/Comments/recommendations

We are extremely disappointed that this has been omitted from the draft legislation.

- This assumes unit owners know their rights and that the BCM has provided proper and timely advice.
- Relies on unit owners bringing legal action if OCBA declines as is commonly the case. No evidence of OCBA currently enforces statutory audit requirements in relation to BC Managers.
- AG acknowledged the many complaints to government agencies in his 2003 discussion paper - Possible Regulation of Body Corporate Managers.
- NSW, Victoria, Queensland and the NT all have some form of licensing or registration of managers. Victoria and the NT have only recently introduced their new legislation.
- The AG does not address the education of managers. This is critical as many complaints to OCBA and other government agencies including the Courts centre on poor or misleading advice and assertions from BC Managers. Interstate education is commonly part of the licensing or registration requirements. There is now a nationally accredited TAFE course for BCMs.
- Funding – use the Land Agent & Property Managers model, that is direct the \$1 million + interest earned on BCMs trust accounts to OCBA to provide resources. Charge managers and firms an annual registration fee.
- Who will check that the BCMs have professional indemnity insurance?
- Who will ensure that the accounts they manage are in order?

Establishing a low cost Tribunal

The draft legislation makes no proposal to take BC disputes away from the Magistrates Court.

We are extremely disappointed that this has been omitted from the draft legislation.

Notes/Comments/Recommendations

Tribunals are used extensively interstate (NSW, Victoria, Queensland, Tasmania) see table 2.

Currently the SA Government provides no publications, information unit or education for South Australia’s unit owners or BCMs.

A Tribunal would have value

- In reducing time to hear matters, some strata related court cases take 18 months to settle.
- Providing accurate information to unit owners, prospective owners and managers.
- Reduce the cost to the public purse – remove from Magistrates Court
- In establishing a set of public rulings on BC matters – example of Queensland rulings in 2008 is attached.

Publications & Training examples of Qld etc ... attached.

Funding – use the Land Agent & Property Managers model, that is direct the \$1 million + interest earned on BCMs trust accounts to OCBA to provide services and publications.

A quick, easy, inexpensive and user-friendly dispute resolution mechanism needs to be developed. (The Victorian V. C.A.T. model seems to work well in other fields but it may not suit local South Australian conditions). In South Australia, the Residential Tenancies Tribunal could be modified to serve this function.



Original attached

Proposal 22 Body corporate managers should not be able to operate Trust Accounts:

The Bill proposes that body-corporate managers should not be able to operate trust accounts. Rather, the funds of the body corporate should be held by the body corporate. If the body corporate wishes, it can permit the manager to become a signatory or co-signatory to the account of the body corporate. This proposal is intended to minimise the risk of a large default. The Bill would require managers to dismantle existing trust accounts within four months after the Bill becomes law. Comment is invited.

At present, if a body corporate manager holds funds for a corporation, the funds must be paid into a trust account that must be annually audited. It is lawful to use the one trust account for all the bodies corporate under management, resulting in substantial trust balances. This creates the risk of a large fiduciary default.

A body-corporate manager does not need to have had any special training in the management of trust accounts and is not liable to have administration of the trust account taken over by an outside authority in case of mismanagement. Apart from an annual audit by an auditor of the agent's choice, the account is not subject to independent inspections. Other traders who are, by law, authorised to operate trust accounts, for example, land agents, conveyancers and lawyers, have to have formal qualifications and are liable to official trust-account inspections and to having the account taken over by the authorities in case of mismanagement.

Notes/Comments/recommendations

Oppose: This will have a dramatic and costly effect on BCMs. The reasoning by the Attorney General that "Other traders who are, by law, authorised to operate trust accounts, for example, land agents, conveyancers and lawyers, have to have formal qualifications and are liable to official trust-account" suggests that BCMs should be subject to the similar trust account training and licensing requirements as land agents, property managers et al..

The draft legislation background paper states that "*The Government is against the imposition of unnecessary red tape on business and especially small business.*"

The proposal will impose extraordinary costs on BCMs as they will have to arrange and hold in some cases many hundreds or thousands of bank accounts in place of their existing single Trust Accounts. This will see millions of dollars leave local bank accounts as managers seek BPay and Credit Card facilities for each of the bank accounts many of which will contain less than \$2,000. Currently Maquarie Bank (Sydney) is one of the few offering such facilities.

The paper provides no evidence that individual accounts will provide improved security for owner's funds. We have been informed by our bank that they do not check signatures or the number of signatories in their clearing houses except where the amounts exceeds \$10,000.

This major and serious change was not canvassed in original 2003 discussion paper and we are unclear as to the objective of this change.

Alternative: Enable BCs to determine their own end of year as is currently the case. Information to all BCs on their responsibilities.

Proposal 1 - Contracts in writing and specified terms

The draft Bill provides that, in future, contracts for the management of a body corporate must be in writing. The contract is to be available for the inspection of all members in advance and must specify:

- 1. that either party can end it at any time;*
- 2. which functions are delegated to the manager;*
- 3. that the delegation of any function can be revoked at any time;*
- 4. what payment the manager will be entitled to or how the manager's payment will be calculated*
- 5. whether the manager is to be authorised to operate any and which of the accounts of the body corporate and whether as sole signatory or with which co-signatories, or whether the body corporate will remain the signatory to the accounts*
- 6. that the manager will not be entitled to sell or otherwise transfer the appointment to another manager (that is, further delegate his or her powers) without the permission of the body corporate*

Notes/Comments/recommendations

Support with amendments:

We support written contracts.

The termination "at any time" may need some work to explain how this may come about. In the case of BCs terminating, this should require a general meeting rather than just the management committee's decision. The termination "at any time" will we believe reduce the value of BCMs portfolios and make it difficult to sell a portfolio or raise funds against a portfolio. We suggest a mandated maximum term for Management agreements.

We strongly suggest that all contract proformas created by BCMs should be vetted by OCBA or similar to ensure fairness.

We note that provisions of the British Columbia Strata Act state that BCM must hand over all documents and funds within 4 weeks of the termination of the contract or refund the BC \$1000.

Proposal 3 - Body corporate managers - Indemnity insurance:

The draft Bill also proposes that body-corporate managers should have to carry professional-indemnity insurance. This insurance protects clients in case of negligence in carrying out the delegated functions, for example, if the manager failed to renew the insurance on the common property, causing loss to the body corporate. That is already the law in Victoria, which requires cover of at least \$1.5 million per claim.

Notes/Comments/recommendations

Support. This is a sensible measure. Prudent managers will have this in place. Required for REISA corporate members.

How will this be enforced?

Proposal 7 - Managers permitted to chair meetings:

The Bill therefore provides that a body-corporate manager may preside at a meeting either at the request of the presiding member or by consent of the majority of those present, but that the regulations can set procedures in that case. It is intended that where the manager is permitted to chair the meeting, the regulations will require that the manager must tell the meeting at the outset:

- (a) that he or she is chairing the meeting at the members' request but that if a majority of members do not want that they can appoint another chair*
- (b) that he or she has no right to vote, except when exercising a proxy for a member*
- (c) whether he or she holds any and what proxies for this meeting, and that they are available for inspection and*
- (d) that he or she has no right to prevent any member from moving or voting on any motion.*

Notes/Comments/Recommendations

Support with amendment: We strongly believe that the manager as chair should always be put to a vote of the meeting and that the manager should not be permitted to use proxies in their name unless the proxy explicitly is in favour of the manager chairing the meeting. Having the Presiding Officer decide the matter could see owners pitted against the PO in what could be seen as a vote of no confidence. This would be unfortunate. All those present should vote on manager as chair.

Matters where a conflict of interest may occur should see the manager vacate the chair and if requested vacate the room. Examples are a vote on management services or any other pecuniary matter pertinent to the manager or their firm or related businesses.

Proposal 11 Proxy-holders to declare interests

The interests of holders of proxy votes may sometimes conflict with the interests of the owners they represent. A body-corporate manager may, for example, hold a proxy vote for a meeting at which there is a motion to appoint a new manager. To prevent the abuse of proxy votes, holders of proxies should not be able to vote on any motion in which they have an interest, unless they first declare the interest. The proxy should be available for inspection of other members at the meeting.

Notes/Comments/Recommendations

Support with Amendment: A BCM should only be able use a proxy to vote on any motion in which they do not have an interest. We are aware of cases where the BCM has used proxies sent to their firm to retain their management despite the wishes of the owners present at the meeting and without any such explicit instruction from the unit owner giving the proxy. In NSW the Act specifically prohibits use of proxy vote. The following is an extract from fair trading fact sheet titled Managing Agents & Caretakers (see attached).

Neither a strata managing agent nor a caretaker can use a proxy vote to obtain a financial or material benefit.

For example:

- *for the purpose of extending the term of their appointment, or*
- *increasing their remuneration or in a decision about legal proceedings involving the proxy.*



Original attached

Proposal 4 Bodies corporate to carry compulsory fidelity-guarantee insurance

The Bill also proposes that bodies corporate themselves should have to carry fidelity-guarantee insurance. This is insurance against the risk of theft or fraud of the corporation's funds by an office-bearer, manager or other person authorised to handle the funds. Such insurance is sometimes sold as an addition to the building-insurance policy. The amount of the cover would be set by regulation. One possibility is that it should be at least the maximum total balance of the corporation's bank accounts at any time in the last three years or \$50,000, whichever is higher, but comment is invited.

Notes/Comments/Recommendations

Support. Provides peace of mind to unit owners. Problems – one UnitCare client has \$350,000, some have been \$250,000. We understand that some insurance companies may not provide fidelity cover or such large amounts. The standard FID cover is between \$40,000 & \$100,000. This is more than adequate for most BCs. How will this be enforced?

How will officers know that they need to do this?

What if any officer training programmes are proposed?

Proposal 5 Register of owners' contact details to be open to other owners

The Bill proposes that the body corporate should have to keep a list of the names, contact addresses and telephone numbers of the unit owners and make these available to other unit owners and prospective owners on request. At present, the body corporate keeps a list of owners' names and addresses but is not obliged to make these available to any other owner. It may be helpful to require this, so that owners can then communicate about the affairs of the body corporate. For example, it will help an owner who is trying to convene a general meeting. It will also help a prospective buyer of a unit or lot to find out whether this body corporate is well run. The Bill does not oblige an owner to disclose to the body corporate his or her home address. What is required is an address at which the owner can be contacted for purposes connected with the strata or community group. This could be a business address, the address of someone who will pass on correspondence or even a post-office box.

Notes/Comments/Recommendations

Support. Some BCMs have claimed that they cannot supply a list of owners details to their co-owners as they falsely claim the Privacy Act forbids it. The proposed amendment will help stamp out this practice.

Proposal 6 Taking part in meetings from a remote location

One difficulty for some bodies corporate is to get enough members to a meeting to make up a quorum. In many cases, the owner does not live in the group and does not trouble to attend the meetings. It might be that attendance rates would improve if it were possible to attend a meeting by telephone, internet, video-link or other technology. Neither the Community Titles Act 1996 nor the Strata Titles Act 1988 provides for owners to participate in meetings by such means. The Bill proposes to permit owners to attend by these means, without imposing any duty on the body corporate to provide the means.

Notes/Comments/Recommendations

Support. The High Court has ruled that 'boards' may meet by the suggested means and we have from time to time had owners phone into a meeting. Owners can already lodge an absentee vote and a proxy. Some of our clients who suffer from inquorate meetings have applied a 'non attendance levy' following a years warning to owners. This has proved a useful incentive. Both Acts provide for the reconvening of meetings lacking a quorum.

Proposal 8 Annual general meetings of secondary and tertiary corporations

At present, under section 82 of the Community Titles Act, a primary corporation must hold its annual general meeting within three months after the end of each financial year. A secondary corporation must then hold its annual general meeting within one month after the meeting of the primary corporation. By section 86, however, any secondary corporation that is a member of the primary corporation is entitled to vote at a meeting of the primary corporation, if authorised to do so by its members. Further, if a proposed resolution of the primary corporation is a special or unanimous resolution, then the vote of the secondary corporation on that matter will, in turn, require a special or unanimous vote of the secondary corporation. Notice of such resolutions will only be given within the weeks before the proposed meeting.

In practice, therefore, there will need to be a meeting of the secondary corporation before the meeting of the primary corporation, but after the distribution of the agenda for that meeting, so that the representative of the secondary corporation knows how he or she must vote at the meeting of the primary corporation. The minimum notice period for an annual general meeting is 14 days. The result is that a secondary corporation may have to meet within 14 days before the annual meeting of the primary corporation and again within one month thereafter. Otherwise, the secondary corporation will not be able to take part in the running of the primary corporation. The tertiary corporation, if there is one, faces similar difficulties.

The Bill proposes to remove the requirement that the secondary and tertiary corporations must meet within one month after the annual general meeting of the primary corporation. It should be enough to require these corporations to hold an annual general meeting for a financial year by 31 December of the next year. Corporations should be free to hold the meeting either before or after the meeting of the primary or secondary corporation.

Notes/Comments/Recommendations

Support

Proposal 9 Strata owners should be able to revoke proxies at any time

Purchasers of new lots off the plan are sometimes asked to assign their right to vote to the developer. The assignment is sometimes expressed to be irrevocable. The Community Titles Act 1996 gives owners an express right to revoke a proxy at any time but the Strata Titles Act 1988 is silent about this. The Bill proposes to amend the Strata Titles Act to make clear that that the appointment of a proxy can be revoked at any time. Also, having appointed a proxy is not to prevent an owner from attending the meeting and exercising his or her vote in person.

Notes/Comments/Recommendations

Support

Proposal 10 A proxy cannot last more than 12 months

The Bill also proposes that proxies should have a limited life of no more than 12 months or such lesser term as is specified in the appointment. This will compel the owner to take a decision at least every year about whether to take part in meetings in person or by proxy and, if the latter, whom to appoint. Further, a proxy appointing the body-corporate manager will lapse automatically if the appointment of the body-corporate manager ends.

Notes/Comments/Recommendations

Support

Proposal 12 All persons entitled to vote are to declare conflicts of interest

Other people who vote at meetings may also have conflicts of interest. Later discovery of a conflict can cause disputes among members. The Bill proposes that all members of the body corporate and any proxies who attend the meeting on their behalf should have to disclose any interest that they or their principals have in matters being considered by the corporation. If an undisclosed conflict is later discovered, the body corporate should be able to end the contract and the person who failed to disclose the conflict of interest would be liable to account for any profits he or she has made from the contract.

Notes/Comments/Recommendations

Support Forces owners to engage with process at least annually

BCMs should not be permitted to have an interest in a maintenance firm nor receive commissions from maintenance contractors.

Proposal 13 Make it easier to achieve a special resolution under Strata Titles Act

Under the Strata Titles Act, a special resolution is passed if two-thirds of all lot holders vote for it at a validly-convened meeting. Thus, in a group of 15 units, at least ten owners must vote in favour for the resolution to pass. If nine or fewer owners attend the meeting, the resolution cannot pass, even though the members not attending might have no strong views on the resolution. The Community Titles Act takes a different approach. Under that Act, a special resolution is passed if no more than 25% of all lot holders vote against it at a validly-convened meeting. Thus, for example, in a group of 16 units, if 9 owners attend the meeting and four of them vote against the resolution, it will pass even though it has the active support of only five of the sixteen members. The result is that a special resolution is more easily achieved under the Community Titles Act, because it is not defeated by those who are indifferent but can only be defeated by those who are actively opposed.

A meeting is only validly convened if 14 days' notice has been given to all owners, including notice of the text of the proposed special resolution. That means that anyone concerned about the resolution has his chance to vote, whether in person, by remote attendance or by proxy.

The Bill would amend the Strata Titles Act to match the Community Titles Act on this point. A common problem in managing these bodies corporate is that owners do not trouble to exercise their votes. Where special resolutions are required, that can frustrate those owners who do take a proper interest in the running of the corporation.

Notes/Comments/Recommendations

Support

Proposal 14 Permit strata articles to apply penalties for breaches

The Community Titles Act 1996, by section 34, provides that the by-laws may impose a penalty of up to \$500 for breach of a by-law. The Strata Titles Act 1988, however, does not provide for such penalties. The Bill proposes that the Strata Titles Act should also permit the body corporate to impose a similar penalty for breach of the articles.

Notes/Comments/Recommendations

Support

Proposal 15 Permit bodies corporate to collect penalties by notice

The Bill further proposes that, in both cases, a penalty can be imposed by notice. The notice must specify the breach and the fine. It is then up to the recipient, if he or she wishes to contest the notice, to apply within 60 days to the Magistrates Court to have the notice revoked. Unless the Magistrates Court otherwise orders, the penalty would be recoverable as a debt to the body corporate. The Bill also provides for a higher maximum fine of \$2 000 where the scheme includes non-residential lots.

Notes/Comments/Recommendations

Support with amendment Consider 60 days may well exacerbate an existing conflict such as illegal parking. We strongly suggest 30 days to apply to Court.

Proposal 16 Future owners to be able to challenge certain by-laws

The Community Titles Act permits an owner to apply to the Magistrates Court for a remedy if a by-law is made that reduces the value of the unit or unfairly discriminates against the owner. The application must be made within three months of the date this happens or of the date on which the owner should reasonably have found it out. An application can only be made by a person who is an owner at the time the by-law is amended. That is because a person should not be able to complain of a by-law that already existed when he or she bought the unit.

It will sometimes happen, however, that the owner at the time is unconcerned by the change because he or she is selling the lot. Thus, the Bill proposes that the application can also be made by a person who has made a contract to buy the lot.

The draft Bill would also amend the Strata Titles Act to match the Community Titles Act on this point.

Notes/Comments/Recommendations

Support

Proposal 17 Owners should be able to appoint the community corporation to insure their properties

Under the Strata Titles Act, the buildings in a strata scheme are common property and so are insured by the body corporate. Under the Community Titles Act, however, buildings (other than those divided by a strata plan) are the property of individual lot owners and the responsibility to insure lies with them. The Act compels insurance only where one building provides an easement of shelter or support to another, for instance, where they have a party wall. The draft Bill provides that the by-laws of a community group can provide for the body corporate to be authorised or required to insure property on behalf of the owners.

Notes/Comments/Recommendations

Support Provides peace of mind that cover is in place across the Corporation. Acting collectively in our experience provides unit owners with considerable savings on building insurance.

Proposal 19 Owners should be entitled to inspect records**Notes/Comments/Recommendations**

Support

Proposal 20 Owners should be entitled to request regular bank statements

The body corporate already has a statutory right to require anyone holding its property, including records, to return the property in response to a notice. In addition, the draft Bill proposes, first, that all owners should be entitled on request to inspect any records of the body corporate in the possession or control of the body-corporate manager. Second, it proposes that the body corporate should send copies of the bank statements of the corporation each quarter to any owner who asks.

Notes/Comments/Recommendations

Support: Our firm currently posts a monthly ledger and log to the Treasurer of every client group. We would have some difficulty posting a recurring quarterly statement to any owner who requests one. We currently supply financials to any owner upon request. We oppose the abolition of Trust Accounts and as such can only support the provision of financial statements and ledgers. We support owners access to all their BC's records.

Proposal 21 Bodies corporate should have to prepare budgets for large future expenses

The draft Bill does not propose to dictate to bodies corporate how much money they should collect against large future expenses. To improve planning, however, and to encourage such funds, the draft Bill proposes that both strata and community corporations would have to prepare a 10-year budget for non-recurrent costs, such as major maintenance of the common property. They would also have to revise that budget each year. It will still be a matter for the body corporate whether contributions are levied in advance as a way of saving up for the planned expenditure or whether the whole amount will be collected from those persons who are owners at the time the work is done. These budgets would form part of the minutes of the annual general meeting and thus would be available to prospective owners, so that they could see what future expenses are in contemplation.

Notes/Comments/Recommendations

Support with amendments. We support this proposal for larger groups. Too much red tape for little or no value for regular groups. They may need to bear additional costs for a professional to undertake the work. We see greatest value for larger groups with lots of common property.

- How will this be enforced?
- How will officers know that they need to do this?
- What if any officer training programmes are proposed?
- Alternative: Only applies where depreciated value of common property is greater than \$2 million and as by regulation.

We wonder why the concern for maintenance of common property does not extend to compulsory 5 year insurance valuations.

Proposal 23 Increase the threshold for compulsory audit of community corporations' accounts

In the case of community corporations, it is intended to retain the requirement but to increase the threshold. The regulations should exempt corporations that collect no more than \$10,000 per year, hold no more than \$10,000 in either fund, as well as those with no more than six lots or those that are owned wholly by one person. It is not proposed to bring in similar requirements for strata corporations. That is, it will be left to the body corporate itself to decide whether to hold an audit. In New South Wales, audits are not required for corporations of fewer than 100 lots. In the case of small schemes, the sums handled are not likely to be large and the accounts will often be quite simple. Many owners will be able to follow these accounts for themselves and the extra cost of an audit would be an unnecessary burden.

Notes/Comments/Recommendations

Support

Proposal 24 Permit any owner to apply for an audit

In both cases, however, the draft Bill provides that any owner can apply to the Magistrates Court for an order requiring an audit. The Court could order that the body corporate must pay for the audit. Alternatively, any member could obtain copies of the financial records from the body corporate and arrange an audit at his or her own expense and then apply to the Court for reimbursement of the cost from the body corporate. This is a safeguard so that if a member has suspicions about the accounts, he or she will be able to have them independently checked, even if the majority of owners are unconcerned.

Notes/Comments/Recommendations

Support

Proposal 25 Discount for early payment

At present, neither Act contemplates that bodies corporate can offer a discount to members who pay their contributions early or on time. Instead, the Acts seek to discourage late payment by allowing the corporation to require interest and to pursue the contribution as a debt. The draft Bill permits bodies corporate to encourage early payment by offering discounts.

Notes/Comments/Recommendations

Amend. Creates budgeting difficulties for groups – do they collect more than need to allow for a % paying early. We and other BCMs would need to replace or amend software. If to proceed we would suggest the NSW approach...

NSW STRATA SCHEMES MANAGEMENT ACT 1996 - SECT 79

Interest and discounts on contributions

79 Interest and discounts on contributions

- (4) An owners corporation may, by special resolution, determine (either generally or in a particular case) that a person may pay 10 per cent less of a contribution levied if the person pays the contribution before the date on which it becomes due and payable.

Proposal 26 Entitle prospective owners to see the contract with body corporate manager and the sinking-fund budget

Under both Acts, owners and prospective owners are legally entitled to information from the body corporate about its financial position. The draft Bill proposes to add an obligation to disclose any contract with a body-corporate manager and the contact details of the current owners. It also proposes to fix a time limit of five days for the body corporate to provide the information.

Notes/Comments/Recommendations

Support

Proposal 27 Provide for the court to rule on validity of votes and by-laws

It may sometimes happen that there is a dispute within the body corporate about whether a vote was validly taken on a particular decision or about whether a particular article or by-law is valid. The draft Bill proposes that any owner should be able to have the Court rule on these questions.

Thus, the draft Bill provides that the court can also:

- declare that a vote has been validly or invalidly taken and
- declare that a by-law or article is valid or invalid.

Notes/Comments/Recommendations


Oppose: Court system presently overtaxed, and the process is a potential deterrent to parties pursuing change.

Alternative: Establish an arm of OCBA (similar to the RTT) to hear such matters.

See QLD precedents at

<http://www.austlii.edu.au/au/cases/qld/QBCCMCmr/2008>

2008 Queensland Body Corporate and Community Management Cases. [http://www.austlii.edu.au/other/qld/qbcccmmr/](http://www.austlii.edu.au/au/other/qld/qbcccmmr/)



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<http://www.austlii.edu.au/au/cases/qld/QBCCMCmr/2008>

Proposal 28 Provide a remedy for strata owners for prejudicial decisions

The Community Titles Act provides, by s. 142, for an owner to apply to the Magistrates Court for a remedy if prejudiced by the wrongful act of a delegate of the body corporate, including a manager, or if he claims that the delegate's decision is unreasonable, oppressive or unjust. There is no corresponding provision in the Strata Titles Act and the draft Bill proposes to add one.

Notes/Comments/Recommendations

Support, however Court system presently overtaxed and costly to public purse.

Alternative: Establish an arm of OCBA (similar to the RTT) to hear such matters.

Proposal 29 Permit the court to avoid or end some contracts

The draft Bill also proposes that an owner or the body corporate should be able to apply to the Magistrates Court for an order avoiding or ending certain contracts. These are contracts that the body corporate has made with the developer (in the case of a community corporation) or the body-corporate manager (in both cases) or their associates. Needless to say, the Court would not do so lightly and would only make such an order when persuaded that the interests of justice so required. For example, the body corporate might have made the contract with a manager at a time when the body corporate was controlled by the developer but the Court might be persuaded that the contract is not fair from the point of view of the body corporate and that it would be just to end it.

Notes/Comments/Recommendations

Support

Proposal 30 Make clear that a developer owes fiduciary duties to the body corporate *The draft Bill proposes to state, for the avoidance of doubt, that a developer stands in a fiduciary relationship with the community corporation or proposed community corporation of the development. That adopts the decision of the New South Wales Supreme Court in the case of Community Association D. P. No. 270180 v Arrow Asset Management Pty Ltd, handed down on 30 May, 2007. That case confirmed, applying the reasoning in the earlier case of Re Steel (1968), that a developer owes a fiduciary duty to a community corporation by analogy with the duty owed by a promoter to a company. Thus, the developer will be in breach of duty if he or she acts in conflict of interest or makes secret profits.*

A fiduciary relationship also exists, under the present law, between a body corporate and the body-corporate manager, who is its agent.

Purchase of units or lots

Information for buyers

Some people buy strata- and community-titled units without fully understanding the rights and duties that go with ownership. They may not know, for example, that they will have to obey the by-laws, which can restrict the use of the property, nor that they will become liable for any contributions owed by the vendor to the body corporate and for the debts of the body corporate if it does not pay.

Better information will now reach prospective purchasers under the amendments to the Land and Business (Sale and Conveyancing) Act, in the form of information statements to be given out at open inspections and disclosure of the scheme description and by-laws on the sale of a community-titled unit. The Regulations under that Act will also now require that the buyers of community-titled properties receive copies of the development contract, the scheme description (if any) and by-laws as part of the Form 1 disclosure.

A special problem, however, confronts those who contract to buy a unit before it is built. It may be that, when the contract is made, the plan has not yet been deposited and so no scheme description or by-laws have been lodged. The plan shown to the purchaser may be only a draft plan subject to change. The rules of the scheme may be yet to be decided. Development approval might not have been granted.

That means that, at the time of deciding whether to buy, the buyer lacks much of the information that is available when buying an established unit and the information he or she does have could well change. Such things as the appearance of the buildings, content of the by-laws or the use of other parts of the property, could change. A person might, for example, sign the contract on the understanding that the by-laws will prevent the use of any of the apartments as short-term holiday rentals but, before settlement occurs, the by-laws might be changed to permit this. That will make an important difference to the amenity and the value of the unit.

Also, many people buying apartments in multi-use developments where there is more than one governing corporation fail to understand how voting rights work. Although all the apartment owners might have equal votes in matters that solely concern the apartments, they will usually not be able to outvote the owners of other parts of the development on larger matters. For example, a community scheme might include three primary lots: one

lot a hotel, one a group of shops and one a group of apartments. Even if there are many apartment holders, they will not be able to outvote the owners of the other two primary lots. Hence, aspects of the commercial development that might be important to the residents, like its car parking or hours of trading, are beyond their control. Buyers of the residential lots might not realize this.

Accordingly, it is planned that, as part of the Form 1 disclosure, sellers should have to give buyers a prescribed information notice about these matters, alerting buyers to these matters. That is proposed to be done in the Regulations to the Land and Business (Sale and Conveyancing) Act and thus does not appear in the draft Bill.

Notes/Comments/Recommendations

Support

Proposal 31 Developers not entitled to deposit monies before plan deposited

The draft Bill proposes a similar provision for South Australia. To protect consumers who pay deposits, the draft Bill provides that, if a contract of sale is made before the plan is deposited, then the buyer's deposit must be held in trust by a land agent, solicitor or conveyancer, until that occurs. If this is not done, the buyer can avoid the contract at any time. Also, if the plan is not deposited within six months of the contract or such later date as the parties may have agreed, the buyer can avoid the sale and retrieve the deposit.

Developer control

Section 87 of the Community Titles Act prevents a developer from retaining control of a community corporation after it begins selling the community lots. This is achieved by a rule that, once one or more lots are owned by persons other than the developer, the developer cannot outvote the other owners (section 87(3)). Even if they have given proxies, they can revoke these by written notice at any time (section 84 (5)).

Proposal 32 Extend the s. 87(3) rule to related companies

The provision does not, however, address the possibility that the developer might sell some lots to a related company. By that mechanism, the developer might be able to continue to outvote the other owners. That is not desirable and the draft Bill proposes amendments to prevent this.

Notes/Comments/Recommendations

Support

Housing Improvement Act

The draft Bill also clarifies the relationship between these Acts and the Housing Improvement Act, under which a council can require an owner to rectify or demolish a building. The council's powers should apply to buildings that form part of a strata or community titled development, without the need for approval of the works by the body corporate.

Notes/Comments/Recommendations

Support

Attachments: (in print and on cd supplied)

Bill Longworth – Advertiser coverage 2001

NSW, Victoria & Queensland various publications/Web Site information

Queensland Body Corporate Commissioner Adjudicators Orders

WA Government Landgate publication 'A Guide to Strata Titles'

The Stamford report – WA reform 2007

UnitCare Summer 2008/9 newsletter

Team sheet – UnitCare Staff profiles

Strata & Community Titles Proposal to Amend Bills

Attachments