



Report into Strata and Community Titles in South Australia

February 2004

By
John Rau MP
Member for Enfield

Presented to
The Hon. Michael Atkinson MP
Minister for Consumer Affairs

1. INTRODUCTION

This paper on Strata Titles emerged as a by-product of my earlier investigations into problems in the Real Estate industry in South Australia. Those investigations began in the middle of 2002, and culminated in my December 2002 report to the Attorney-General and Minister for Consumer Affairs, the Hon Michael Atkinson MP.

As I collected information and sought opinions in relation to the Real Estate industry, I was made aware of particular concerns in many quarters about Strata and/or Community Titles. As this was well and truly a topic all of its own, I chose not to devote any time to it in my December 2002 paper, but rather to put it aside for later consideration. This report represents that later consideration.

On the 16th of August 2003, I placed an advertisement in *The Advertiser* calling for public submissions to my Inquiry. In my advertisement, I sought information regarding the following:

1. Effectiveness of Strata Management
2. Problems with Strata Management
3. Oppression of minority Strata holders
4. Fees charged by Strata Management
5. Any other matters of interest

I have received over 50 written representations from members of the public. A number of these individuals also met with me to personally underscore problems identified in their written materials. In keeping with my established practice, I have not identified any of the individuals who have made representations to this Inquiry.

Quite independently of my interest in this subject, the Attorney-General issued a discussion paper on the possible regulation of Body Corporate Managers in mid-2003. This paper covers similar ground to my Inquiry, and I wish to acknowledge the

assistance that this paper has provided to me. I would also like to thank Dr Coral Baines from the Parliamentary Library for her invaluable assistance.

2. RANGE OF ISSUES

This Inquiry into Strata and Community Titles has considered a wide range of issues. It is important to understand that these issues vary greatly between the **various types of Real Estate** that have their Management vested in Strata or Community Corporations. At one end of the spectrum, there is the simple, small suburban unit, which may be one of only two. These buildings are often single storey, have a common driveway and off-street parking, perhaps discreet areas of outdoor space, a shared roof and perhaps a common wall. These are often managed by a volunteer resident, with varying degrees of success.

The other end of the spectrum can now be seen increasingly in Adelaide. These complex developments, known elsewhere as “vertical villages”, combine mixed functions with buildings of considerable size. They may have a great mix of owners. Some may be owner/occupiers, some may be investors. They may incorporate commercial activities on one or more of their floors. They may also include functions such as that of an hotel. Clearly, the complexity of these much larger buildings, and the nature of the commercial activities conducted within them, necessitate more complex Management skills and generate far more complex problems.

I have found it useful therefore to divide further discussion of this topic by reference to “**simple**” and “**complex**” developments. Whilst no clear demarcation line is possible, some broad generalisations in these terms can usefully be employed to illustrate the problems that emerge in different types of Strata Corporations.

The legislative framework in South Australia is to be found in the Strata Titles Act (1988) and subsequent amendments together with the Community Titles Act (1996).

BRIEF HISTORY OF SA STRATA LAWS

The Strata Titles Act was enacted in 1988 to provide for the division of land by Strata Plan. Until that time Strata Title was covered by s. XIXB of the Real Property Act (1886) which had been responsible for 8000 Schemes providing 48,800 units for 61,000 residents.

The new Act attempted to resolve some of the problems with s. XIXB which included confusing wording and, amongst other things, an absence of any avenues for resolving the following:

- disputes
- administration of Strata Corporations
- amendment of the Scheme where some physical change had taken place
- inability to deal with unit subsidiaries independently
- staged development
- misuse of unit entitlements¹

In 1990 the Act was fine-tuned. Amendments were aimed mainly at clarifying technical provisions related to the division of land by Strata plan, especially for easements, encumbrances and encroachments. The Act was also amended to provide commercial flexibility for non-residential premises and to allow unit holders to carry out structural work with two-thirds rather than unanimous agreement of the unit holders. Other amendments clarify the responsibilities of the members of the Strata Corporation.

In 1991 the Act was further amended to include provisions for resolution of disputes by appeal to the Magistrates Court, rather than the Supreme Court as set out in the original Act. The amendments left intact the jurisdiction of the Supreme Court to appoint an administrator of a Corporation's affairs under s.37 and to grant relief when an unanimous resolution is required under s.46.²

Since the enactment of the Community Titles Act (1996) there have been no new Strata Plans. However the Strata Titles Act (1988) has not been repealed and remains

¹ Ian Hales, *Strata Titles – Explained*, p. 1.

² Parliament of South Australia House of Assembly debates 24 October 1991, p.1433

active for the administration, amendment, amalgamation and cancellation of plans deposited pursuant to that Act.

3. DIFFERENCES BETWEEN STRATA AND COMMUNITY SCHEMES

Information available from the Legal Services Commission³ suggests the following differences between the Schemes:

3.1 Strata

A Strata Title is created by the division of a structure into separate units. The boundaries of a unit are defined by reference to the structural divisions in a building, not by reference to the land. There must be an area of common property, for which everybody is responsible. A Strata development must have a Strata Corporation, the role of which is to administer and maintain the property for the benefit of all unit holders and to enforce the articles of the Strata Corporation. All unit owners are automatically members of the Corporation, but tenants are not. A Strata Corporation can delegate some or all of its functions to a Management committee and may appoint a Strata Manager to assist with the Management of the Corporation.

Under Strata Title, the question of what is and what is not common property is a difficult issue, and can cause many disputes. In general terms, common property is any land or space that is not within the internal walls, floors and ceilings, but another boundary may be specified on the Strata Plan. A unit may also include a 'unit subsidiary' which is an area for the exclusive use of that unit – for example a garden or carport. Pipes or wiring which service a number of units but are located within a particular unit can complicate strict definitions of common property.

3.2 Community

There are **two** types of Community Titles available depending on the nature of the Scheme: **Community Schemes** and **Community Strata Schemes**. Regardless of the type of Community Title, both divide land to create lots and common property in a similar manner to Strata Titles. Each plan must divide the land to create at least two

lots and common property. Unlike a Strata Title, a Community Scheme may include a development lot, retained by the developer, for later division into further lots within the Scheme.

3.2.1 Community Schemes

In a Community Scheme, lot boundaries generally do not relate to a structure, but are determined by surveyed land measurements and are unlimited in height and depth, unless otherwise specified on the plan. Unlike a Strata Scheme the owner is therefore responsible for the maintenance and insurance of any structures on that lot, and has no obligation for maintenance of other lot owner's buildings.

3.2.2 Community Strata Schemes

In a Community Strata Scheme there must be at least one lot that exists above another, and the lot boundaries must be defined by reference to parts of the building, similar to a Strata Title. The structure itself is common property and it is therefore the responsibility of the Corporation to maintain and insure it.

3.2.3 The Community Titles Act

The Community Titles Act (1996) was designed to enable common property to be created within conventional subdivisions. In addition to extending the concept of shared use of common facilities to subdivisions which may consist of no more than vacant blocks of land, the Act provides for the development of planned communities of any type where some of the land is shared. The types of projects which could be developed under a Community Titles Scheme include:

- business parks
- university and research parks
- resorts
- urban developments
- rural cooperative developments (eg. wineries)
- industrial developments

³ Strata & Community Titles. Information Pamphlet produced by the Legal Services Commission with assistance from the Lands Titles Office

- mobile homes and parks

The Community Titles Act (1996) allows for projects ranging in size from small groups of houses clustered around a common area of open space or sharing no more than a common driveway, to large communities with shared roadways and facilities based on commercial, sporting, recreational, or agricultural features. As is the case with Strata Title development, the common areas within a Community Title development are owned and managed by a Body Corporate comprising all lot owners.

As a means of overcoming the limitations of Strata Titles legislation which does not facilitate the promotion of mixed developments containing separate areas for residential, commercial and recreational uses, Community Titles legislation provides machinery for flexibility in Management and administrative arrangements operating in the Scheme. This necessary degree of flexibility is achieved by providing for multi-tiered Management and by permitting an individually tailored set of bylaws to be prepared for each Scheme, setting out the rules and procedures relating to the administration of and participation in the Scheme.

4. HOW BIG IS THIS ISSUE IN SA?

According to the Australian Bureau of Statistics (ABS) at the time of the implementation of the Strata Titles Act (1988), 16% of all new residential buildings in South Australia were units. This amounted to 1,045 units.⁴ At the time of the 2001 Census there were 74,083 persons living in 51,140 flats, units or apartments.⁵ According to information from the Lands Titles Office, the majority of flats, units or apartments were on land subject to either the Community Titles Act (1996) or Strata Titles Act (1988). However, some older buildings would be subject to an older form of land holding, a Company Title, in which unit owners hold shares in a company, whereby the company owns the land and building. At the end of June 2003 there have

⁴ ABS 8752.4

⁵ Additional information provided by the author of 'Possible Regulation of Body Corporate Managers: A Discussion Paper', issued by the Attorney General, the Hon. Michael Atkinson, M.P. <http://www.justice.sa.gov.au/> (follow the link to 'News')

been a total of 14,098 Strata and Community Plans lodged with the Lands Titles Office for a total of 70,776 units or lots.⁶

There has been a sharp growth in this area in the past five years as the following table illustrates:

Growth in Strata/Community Title Development in S.A. 1997- 2003⁷

<i>Year</i>	<i>New Strata plans under the STA</i>	<i>New Strata units under the STA</i>	<i>New Strata/Community plans under the CTA</i>	<i>New Strata/Community lots under the CTA</i>	<i>Total new units/lots created each year</i>
1997	169	798	33	143	941
1998	103	530	132	778	1308
1999	69	372	234	1173	1545
2000	64	287	304	1446	1733
2001	49	250	338	1755	2005
2002	11	161	420	2385	2546
2003 to 30 June ⁸	2	19	208	939	958
Totals 1997-2003	467	2417	1669	8619	11,036
Averages		5.17 per plan		5.16 per plan	

Although Strata (now Community) developments are growing in South Australia, the magnitude is not of the same order as it is in the eastern states which are experiencing growth in this area of 'boom' proportions. In NSW the number of Strata Schemes has risen to over 65,000 with 700,000 individual Strata lots in existence. Of the 153 Strata Schemes registered during 2002, 61% were in Greater Sydney.⁹ In Adelaide there have been only 38 Strata Plan and 191 Community Plan applications lodged since 1998 (this figure includes those approved, withdrawn or refused).¹⁰

⁶ 'Possible Regulation of Body Corporate Managers', p. 4.

⁷ Additional information provided by author of 'Possible Regulation of Body Corporate Managers'

⁸ The 11 plans deposited under the STA in 2002 and the 2 in 2003 were the subject of applications made in 2001. No new applications for strata plans under the STA have been accepted since 1 January 2002, pursuant to a proclamation made under STA s8(1a). See *Government Gazette* 29 November 2001, at p.5190. New strata plans are now accepted only under the CTA.

⁹ 'Living in Strata Developments in 2003', p. 4.

¹⁰ Information provided by the Lands Titles Office

BIS-Schrapnel have tracked fluctuations in South Australia's dwelling building cycles over the past decade and say that the historical picture for "private other [than house] development" is relatively weak. In 1996/97 the 'private other dwelling segment' bottomed at 650 dwellings – the lowest level in over 30 years. There was an increase of 11% in 1997, then 44% in 1998/99 and 33% in 1999/2000. The increases were boosted by low interest rates and improving economic conditions. There was then a decline in building commencements for this segment of 21% in 2000/01 due to significant excess stock amid weak underlying demand and economic growth slowdown, but was expected to recover by 32% in 2001/02. BIS-Schrapnel say that "dwelling commencement activity [for all dwellings] is forecast to fall 25% in 2002/03 due to a correction from the extra activity brought forward due to the First Home Owners Scheme grant and low interest rates in 2001/02, but commencements are still well above underlying demand further adding to the stock excess in an already over supplied market, particularly in Adelaide."¹¹

5. PROBLEMS

5.1 One of the major problems with both Strata and Community Title properties is the lack of regulation of professional Body Corporate Managers (BCM). This issue has been recognised by the Attorney-General's Department in the discussion paper on the topic.¹² This and the associated issues of governance and dispute resolution were by far the most commonly raised issues in submissions to my Inquiry.

There is concern that the complexity of the law has influenced many Corporations to seek professional assistance with Body Corporate Management. The reliance upon professional BCMs has given rise to a number of complaints including:

- a BCM controlling a Corporation's meeting, rather than assisting;
- reluctance of a BCM to provide minutes of meetings and trust account records;

¹¹ BIS Schrapnel 'Building in Australia 2002-2017, 22nd Edition. Section 11 Detailed Building Activity Forecasts: South Australia

¹² 'Possible Regulation of Body Corporate Managers: A Discussion Paper'.

- difficulties obtaining information from a BCM about activities undertaken on behalf of the Corporation
- when the appointment of a BCM comes to an end, a refusal by the BCM to deliver up the Corporation's records promptly
- Corporation members having no information about the basis on which a BCM proposed to charge the Corporation for services
- a BCM not fully disclosing any commissions obtained for arranging services (such as insurance) with a particular provider
- a BCM advising the Corporation members that it cannot legally be replaced;
- a BCM not doing its jobs properly
- Poor communication by a BCM

The Attorney-General's paper discusses compulsory licensing or registration and the introduction of a mandatory code of conduct as options for addressing these problems.

5.2 'Honorary' Body Corporate committees, made up of unqualified volunteer unit owners are managing increasingly complex laws and expensive Strata Corporation activities. Many Strata and Community plans are now large, elaborate apartment complexes with pools, gyms, lifts and other facilities that need to be managed in accordance with the rules of corporate governance. Honorary or volunteer managers also tend to see their task as keeping costs down rather than maintaining a valuable asset.

5.3 There are issues arising from the process of resolving disputes. The Body Corporate has limited ability to deal with the destructive behaviour of other tenants. It can intervene where a dispute between neighbours involves a breach of the Articles or in an attempt to sort out other disputes. If no resolution can easily be worked out, then application can be made to the Magistrates Court to decide the matter or to stop the offensive behaviour. Any person who fails to comply with an order of the Court is guilty of an offence and heavy fines or a jail penalty can be imposed. In the case of complicated matters which involve large amounts of money, the matter may be transferred to the District or Supreme Courts for resolution.

Community mediation services are available at the request of at least one of the parties to a dispute. Attendance is voluntary and any party may withdraw from the resolution process at any time.

In 1987 a discussion paper was circulated canvassing a proposal to establish a Strata Title Commission to resolve Strata Title disputes, suggesting that the Commissioner be funded by a levy on new Strata developments and on the transfer of Titles. However, the proposed method of funding was not supported and this led to other options being considered. The result was the 1991 amendment to the Strata Titles Act (1988), referred to above.

In 1998 Victoria amalgamated 15 boards and tribunals to form the Victorian Civil and Administrative Tribunal (VCAT).¹³ However VCAT does not cover disputes arising in Strata and Community developments (except for s.107 of the Fair Trading Act (1987) which covers the supply of goods to a Body Corporate).¹⁴

There was an attempt in 2001 in NSW to incorporate dispute resolution over Strata and Community Titles into an amalgamated Fair Trading and Residential Tenancies Tribunal. The *Consumer Trader and Tenancy Tribunal Bill* proposed that the new amalgamated Tribunal be composed of eight divisions:

- Commercial - for credit and travel agents' matters
- Review of property agents' commissions
- Home building
- Motor vehicles
- Residential parks
- Retirement villages
- Strata and Community Schemes
- Tenancy—for residential tenancy and rental bond matters

¹³ For a profile of VCAT see <http://www.vcat.vic.gov.au/annual-report-2001-2002/03-profile.pdf>

¹⁴ Advised by spokesperson from VCAT's Civil Disputes and Domestic Buildings Lists.

The aim of the Bill was to ensure that the Tribunal would be a respected dispute resolution forum where decisions would be fair, consistent and prompt. Whereby the procedures adopted in proceedings would be transparent, balanced and efficient. The Bill was not passed. Although it sought to streamline and amalgamate two separate bodies to cut costs and improve efficiencies, there were concerns about the Tribunal's ability to manage such an enormous amount of work fairly and speedily.¹⁵

The failure elsewhere to solve this problem should not prevent South Australia leading the way. It may be feasible to amalgamate a Strata and Community jurisdiction with the current Tenancy jurisdiction in the South Australian Residential Tenancies Tribunal. This needs to be explored.

- 5.4 With large unit developments and many Body Corporate members, it is difficult to obtain agreement over issues, especially when unanimous or even two-thirds agreement is required. This causes impasses that can be hard to resolve.
- 5.5 Real Estate agents applying pressure for prospective purchasers to 'sign up or miss out' often leads people to buy a unit without proper consideration of their responsibilities as members of a Body Corporate. Also, they may not have included Body Corporate fees into their calculations of a unit's affordability. The facts of life need to be clearly drawn to the attention of any prospective purchaser **before** they sign on the line.
- 5.6 Unpaid Body Corporate fees at the time of purchase are passed on to the new owner, as is the unit's share of any planned upgrade or maintenance expenditure. This may not be understood by intending purchasers. Again, this needs to be clearly disclosed on the contract documentation.
- 5.7 The unit entitlement is calculated in accordance with s.6 of the Strata Titles Act (1988). It relates to the value of a unit as a proportion of the total value of all units and is based on a certificate from a licensed valuer when the Strata Plan is created. Unit

¹⁵ Parliament of NSW House of Assembly Debates. Debate on second reading of the *Consumer Trader and Tenancy Tribunal Bill*, 9 September 2001.
<http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/hansard>

entitlement is used to calculate a unit owner's share of fees paid to the Body Corporate for maintenance, insurance, communal lighting, upkeep etc. An unfair unit entitlement can occur as a result of improvements or modifications to an individual unit resulting in increased insurance premiums for all unit owners. Some Strata Schemes lodged prior to 1988 have unfair schedules and some mixed residential and commercial Strata Schemes are unfair because residential unit holders are contributing towards commercial maintenance and capital works. Unit entitlement can only be changed by unanimous resolution by the Body Corporate. It is fairly obvious that a person benefiting from an unfair unit entitlement is unlikely to vote in favour of changing it. Although s.46 allows for a special resolution (two-thirds of all unit holders) to be taken to the Supreme Court, to alter an unfair unit entitlement, it may be a more accessible option if an appeal could be made to the Magistrates Court (or Tribunal) instead.

5.8 There is no regulatory requirement to establish a sinking fund to pay for upkeep in Strata Title developments. When expensive repairs or maintenance are required, if a sinking fund has not been established, unit owners are often unprepared or unwilling to meet the sudden expense. Although there is a requirement under the Community Titles Act (1996) to establish a sinking fund, there is no requirement for it to be resourced at an appropriate level. The result of inadequate provision for upkeep can be a dilapidated building, reduced asset value and the eventual creation of slums. An insurance product option may in part resolve this issue. Discussions with insurers should be undertaken to explore this.

5.9 Under Insurance is a potentially serious problem in Strata Titles. This has two aspects. The first is a failure by Strata Managers to keep abreast of contemporary building valuations and reconstruction costs. This can be remedied by a requirement for periodic professional valuations. The second issue relates to individual unit holders arranging their own insurance, which may or may not be adequate and complimentary to insurance held by other unit holders. For example, in the case of an earthquake, different unit holders with different insurance policies would have different entitlements which may leave the some of the common property not completely

repaired. This is clearly unsatisfactory and should be addressed by common insurance.

6. TERMINATION OF PROFESSIONAL BODY CORPORATE MANAGERS

6.1 This is an issue that is only touched upon in the Attorney-General's discussion paper, it is however, most important.

Often the members of a Strata Corporation will appoint a manager to handle the affairs of the Body Corporate. The engagement of a manager is a written agreement (contract) between themselves and the person they engage. However, in the case of Community developments where there may be commercial interests which outweigh the voting rights of residents, a BCM may be contracted to manage the affairs of the Body Corporate in a way which favours those commercial interests. Because the appointment of the BCM is a contractual matter it cannot be terminated. As the legislation stands at present, appeal can be made to the Magistrates Court, which may change the terms of contract if it finds them to be onerous.

Queensland's Body Corporate and Community Management Act (1997) specifies the terms of engagement of a BCM and limits the term of the contract.¹⁶ The terms of engagement must:

- be in writing
- state when the term of the engagement begins and ends
- state the functions that the Body Corporate Manager is authorised to carry out
- state the basis on which the Body Corporate Manager is to be paid

There are four regulation modules which cater for the different types of Schemes that can be established under the Queensland's Body Corporate and Community Management Act (1997). The modules are the *Standard Module*, *Accommodation Module*, *Commercial Module* and *Small Schemes Module*.

Body Corporates may decide for themselves which regulation module best suits their individual circumstances. Provided a Body Corporate meets the required entry criteria set out in the module, it can pass a special resolution to change its Community Management Statement (CMS) to adopt an alternative regulation module at any time.

The length of the term that a BCM may be appointed is limited by the regulation module as follows:

REGULATION MODULE	DESCRIPTION	MAXIMUM TERM
Standard	Highly regulated, suitable for predominantly resident owners	3 years
Accommodation	Less regulated, suitable for predominately investment owners who let their lots	1 year
Commercial	Some regulation, suitable for business premises	3 years
Small Schemes	Little regulation, available to Schemes of six lots or less	3 years

The adoption of limited terms of contract would eliminate concerns about being locked into Schemes where long term Management rights can be bought and sold.

6.2 TERMINATION OF COMMUNITY TITLE SCHEMES

When Strata or Community Title Schemes have reached the end of their lifespan, they need to be demolished and replaced. However, this can only occur with the unanimous agreement of all owners. The Property Council of Australia has produced a discussion paper “Renewing our Strata Titled City: A discussion paper on reforming Strata Title law” (July 2003).¹⁷ The paper discusses the problems in NSW of deteriorating buildings and the need for compulsory maintenance plans. It also

¹⁶ Queensland Government, Tourism, Racing and Fair Trading. ‘Body Corporate and Community Management’. http://www.dtrft.qld.gov.au/disputeres/bccm/bc_managers.asp

¹⁷ www.propertyoz.com.au/nsw/advoc/subs/0307Renewing%20our%20Strata%20Titled%20City.pdf

addresses the termination of Schemes on fair terms. It recommends replacing the requirement for a unanimous resolution to approve the termination of a Strata Scheme, with a requirement that no more than 25% of owners vote against the termination.

The following paragraphs draw heavily on this paper:

6.3 Fixed Terms for Strata Schemes – Not the Answer

Introducing fixed terms for freehold Strata Schemes would avoid the need for prescribing a process for deciding under what conditions and on what terms a Scheme will be terminated. It would provide certainty as to when the Strata Scheme comes to an end, or needs to be renewed, as is the case now with leasehold Schemes.

The benefit of a fixed term for freehold Strata Title buildings is that owners must face the inevitability of renewal or termination of the Scheme.

Overseas, there appears to be a high degree of acceptance of preordained terminations where they apply, and the courts have strictly enforced such provisions. For example, some early Strata arrangements in the United States contain automatic termination dates, providing for the renewal of the Scheme. However, under these Schemes, each unit owner still has to consent to the renewal, unless otherwise provided for in the original declaration of the association. These provisions are strictly enforced. In one Court case where the association was formed in 1925 with a fixed expiry in 1965, a renewal of the Strata arrangement was held ineffective despite the concurrence of 62 out of 73 owners to termination.

There are also a number of difficulties with setting preordained termination dates. With rapidly advancing technology it is often difficult to predict with any reasonable certainty the life expectancy of a particular building. What might make sense today might be a complete nonsense in ten years time. Fixed terms or preordained terminations are also by their nature inflexible and would stifle creative responses to changing market circumstances. They could also run into problems if a building was heritage listed at some point.

Fixed terms could also be counterproductive if the aim is to improve the amenity of Strata buildings. As the termination date approaches, owners may lose any incentive to fund repairs and maintenance on a progressive basis. Fixed terms may also adversely affect the value of a Strata building as it nears termination, thereby affecting the compensation to be paid to owners and any distributions on winding up.

6.4 The Solution - A fairer threshold for approving termination

A fairer and more sensible approach, one that balances all interests, would be to require a majority decision, rather than a unanimous one, for the termination of a Strata Scheme. This is the approach taken in many countries overseas. But what level of majority decision is appropriate? If the level is set too high it may not be an improvement on the existing arrangements. And if it is set too low, it may inadequately protect owners' rights.

Overseas, a threshold of 80% of owners to terminate a Scheme is common. This is sometimes known as a super majority. In Singapore, the threshold is 80% for older buildings (10+years) and 90% for buildings less than ten years old. However, according to Teys McMahon, experience in the United States suggests that an 80% threshold may be too high. I propose that the threshold currently required under the Strata laws for "special resolutions" on capital expenditure also be required for termination proposals. This threshold is that no more than 25% of owners vote against a proposal.

Current arrangements for the holding of a meeting, the eligibility rules for using the value of unit holdings to achieve the threshold would continue to apply. Such a change would, however, have to include measures to protect the interests of those owners who did not support termination, and to deal with them on fair terms.

There are various overseas models, but a good process is in use in Ohio, USA. The Owners' Corporation undertakes the purchase or sale of the property of the non-participating owners, and an independent valuation of the Strata building is used to

establish individual owners' entitlements. Non-participating owners may elect to receive the fair market value for their share, selling the lot to the Owner's Corporation. This sale would be a common expense for all other participating owners if the parties cannot agree on the fair market value of the lot, then such determination shall be made by the majority vote of a board of three appraisers. The owner appoints one appraiser, one is appointed by the Owner's Corporation and then these two appointees decided on the third appraiser. A similar process could be adopted in Australia.

7. OTHER FINDINGS

As would be clear from the earlier discussion, there are a considerable range of Strata properties in South Australia. At one end of scale these are small developments of perhaps two, or three individual units. At the other end of scale we see the beginnings of what is referred to in eastern states as the "vertical village". These developments are characterised by both size and complexity.

Particular concerns arise from the current trend towards purchasing "off the plan". Purchasers in these cases often sign large and complex commercial contracts as part and parcel of their agreement to purchase. These documents regulate the rights and responsibilities of the purchaser vis-a-vis the developer. Many of these documents are skewed heavily in favour of the developer. For example, consider the implications of a term such as the one reproduced below:

“AGREEMENTS RELATING TO COMMON PROPERTY AND COMMON AREAS

The purchaser expressly acknowledges and agrees with the Vendor (the developer) that:

1. It is intended the Vendor shall have the sole right (on its own behalf and as agent of the Community Corporation of which the Purchaser will become a member) to:-

1.1 Enter into arrangements with a third party to assist the Community Corporation to administer and maintain the Common Property and other

public areas within the boundaries of the Site (the Public Areas) with such arrangements to be on such terms and conditions as the Vendor shall in its absolute discretion require;...”

This also raises the interesting issue of the relationship between developers and Body Corporate Managers. These are frequently the subject of complex formal Management agreements. Management agreements are entered into between the developer and the manager in circumstances where a purchaser has delegated authority to the developer for the purposes of appointing a manager. Reproduced below is an example of the type of Exit clause that may appear in such an agreement.

1. “The Manager is appointed to assist the Corporation for a term commencing on the ... day of.... 200... and concluding on the ... day of... 200... and shall continue after the expiration of the term for a further two terms of five years and shall continue after the expiration of the final term from month to month (unless otherwise terminated) at a monthly management fee equivalent to a monthly proportion of the total management fee payable until the holding of the ensuing General Meeting.

2. Should either the Manager or the Corporation intend to terminate this Agreement at the end of the term then they must give written notice to the other party of such intention at least one (1) month prior to the expiration of the term.

3. Should the Manager continue on a monthly basis after the expiration of the term then either party may terminate the appointment by giving at least one (1) month’s written notice to the other party.

4. Upon the termination of its appointment, the Manager shall pay the amount standing to the credit of the Corporation in the Trust Account, to the Corporation or its nominee.”

It is clear that many purchasers of Strata Title properties do not fully appreciate the complex legal relationship into which they are entering. Many people do not realise

that the traditional rights and privileges of homeownership are modified, regulated or absent when property of this type is held. Many purchasers are clearly unaware of the extent to which their rights are subservient to decisions made by the Strata Manager and Strata Corporation.

Of particular concern are mixed use buildings which may include shops, restaurants, hotels, or other commercial activities in proximity to owner occupied residential apartments. These arrangements have serious implications for dispute resolution, decision-making, the burden of Management fees and other associated costs, as well as general equity considerations.

RECOMMENDATIONS

- 8.1 Professional Strata Managers should be registered and licensed so as to enable their activities to be scrutinised and regulated.
- 8.2 A code of conduct and range of specific legislative requirements, including appropriate criminal sanctions, should be imposed upon professional Strata Managers modelled on those soon to apply to Real Estate Agents.
- 8.3 Conflicts of interest can and do arise between Strata Managers, Strata Unit holders, third party suppliers and developers. These conflicts need to be the subject of legislation requiring full disclosure of any such conflicts and providing penalties for breaches.
- 8.4 Strata Managers should not be permitted to chair Corporation meetings. The actual or potential conflict of interest associated with this behaviour makes it highly undesirable. This may mean that an independent chair person is required from time to time in some Corporations.
- 8.5 Certain core obligations imposed on Strata Managers are so important, as to require strict observance with appropriate formalities. This is the case irrespective of whether

the Corporation is professionally managed or not. These functions include trust account auditing, obtaining and maintenance of appropriate insurance and the maintenance of an appropriate sinking fund.

- 8.6 In order to insure that adequate insurance is held and maintained, Strata Managers should be obliged to:
- a) Obtain a professional valuation as to the replacement cost of buildings at least every five (5) years.
 - b) Arrange common insurance on behalf of Unit holders for each Unit (not including personal effects, furniture or chattels).
- 8.7 Irrevocable proxies should be outlawed.
- 8.8 A maximum term for Management agreements, or at very least a clear power to dispense with the services of a Strata Manager at any time, should be mandated by law.
- 8.9 Aside from certain specific obligations imposed on all Strata Managers at all levels of sophistication, a practical and legal distinction should be drawn between the simple Strata Corporation and a professionally managed Strata Corporation.
- 8.10 Professional Managers should be required to hold professional indemnity insurance as against a major default on their part, for example failure to provide adequate insurance cover for the Corporation.
- 8.11 Mandatory “sinking fund” arrangements should be introduced, with preference being for an insurance based product rather than by direct contribution to a fund (if possible).
- 8.12 Funding for the Regulatory Scheme may be in part secured from interest on funds held by Managers (currently estimated at \$13 million).
- 8.13 Strata Managers should only be able to exercise powers specifically delegated to them by the Corporation. Such delegation should be in writing to eliminate ambiguity.

- 8.14 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 perhaps be modified to serve this function.
- 8.15 Replace the requirement for a unanimous resolution to approve the termination of a freehold Strata Scheme to a requirement that no more than 25% of owners vote against the termination (as currently applies for 'special resolutions').
- 8.16 Include provisions for dealing on fair terms with the interests of any owners not supporting termination.
- 8.17 The current segmented approach to legislative schemes governing Real Estate Agents, Strata Managers and other associated professional callings should be abandoned in favour of an holistic approach focusing on the common themes of accountability, transparency, avoidance of conflicts of interest and regulation through a licensing regime capable of imposing standards and regulating conduct in the industry.
- 8.18 A property vendor's Section 7 statement should be required to include a copy of the Corporation's most recent accounts. A concise explanation of the difference between Strata Title and Torrens Title should also be provided. Unpaid Strata fees should also be clearly and explicitly disclosed.