Strata and Community Title in
Australia for the 21st Century

Strata and Community Titles in Australia - Issues 1

Current Challenges

Presented by:

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Current Challenges

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1. Preliminaries

Disclaimer

1.1 In fairness, I should state up front that the views expressed in this and my following paper are my own views and are not necessarily the views of Griffith University or any of its staff participating in this Conference. Of necessity, some delegates will find some of my views provocative and all delegates are invited to test and debate them as they wish throughout the various sessions of the Conference. Any positive outcomes they produce, whether conforming or otherwise, will more than justify me expressing them.

Terminology

1.2 This Conference is about both strata and community title. This means that we are dealing with all common interest subdivisions, whether vertical or horizontal in nature and whether using a single tier or multiple tiered management structure. For convenience I will categorize them generically as "strata".

1.3 In preference to technical terminology I will also use the most commonly recognized terminology, such as:

- Body corporate
- Strata manager
- Building manager
- Developer

2. Categorization of issues

I propose to examine the challenges or issues currently facing the industry by grouping them into the following categories:

- Development and re-development
- Consumer protection
- Body corporate management
- Building management
- Social issues
- Dispute resolution
- Legislative issues
- Sector specific areas
    - Tourism
    - Retirement
    - Spa/wellness
    - Timeshare

3. Development and re-development

The "drivers" of density

3.1 For many years State Governments have focused on curtailing the urban spread and encouraging more intense development that utilizes existing infrastructure rather than creating a demand for costly extensions to infrastructure. With that objective, urban re-development and in-fill projects have been encouraged. This trend has accelerated and current planning schemes are becoming more focused on achieving these outcomes.

3.2 At the same time Australians, driven by such things as demographic change, new lifestyle choices and the high cost of housing, are increasingly tending to choose to live in a medium or high density environment in preference to the conventional house with a back yard. The opportunity to live close to cities in complexes with extensive facilities and attractive locations has been a significant factor in this change of "choice".

3.3 These factors are increasing the proportion of common interest subdivisions (i.e. strata and community title) when compared to conventional land subdivisions. The trend is towards higher density living in the more sought after areas. If the experience in the United States is any indication, this trend is likely to continue. It is estimated that nearly one out of every 5 Americans lives in a community association. The following table shows the rate of increase in the United States during the period from 1970 to 1998, a rate that is commonly thought to have continued beyond 1998.[1]

Number of Community Association Housing Units - USA							
Item	**1970**	**1975**	**1980**	**1985**	**1990**	**1995**	**1998**
Total CAs	10,000	20,000	36,000	55,000	130,000	170,562	204,882
Total Units	701,000	2,031,439	3,636,000	5,225,000	11,638,921	13,644,960	16,390,560
Total Houses	69,778,000	78,821,000	87,739,000	97,333,000	102,263,678	109,457,000	111,757,000
CA's as %		2.58%	4.14%	5.37%	11.38%	12.47%	14.67%

3.4 United States statistics are particularly relevant to Australia, because Australian real estate development tends to follow United States' trends, particularly given the practice of Australian developers and consultants to study and copy from what is happening in that country. Furthermore, many of the mechanisms that have been incorporated in Australian common interest subdivision legislation have been strongly influenced by mechanisms used in the United States.

The consequences

3.5 Following this trend towards higher density living is an increase in:

- Mixed use projects
- Larger projects

[1] Based on estimates and research by the Community Associations Institute Research Foundation USA as published in *Community Associations Factbook*; 1999.

- More complex projects
- Staged projects
- The range of uses for lots (e.g. marinas to shopping centres).

Let me illustrate this by an example - *King Street Wharf* at Darling Harbour in Sydney has all of those features. This project is a mixed use staged development comprising 9 tower buildings, the majority of which are built over a common basement that houses shared parking, facilities and equipment. Most, but not all the tower buildings are strata subdivided and most, but not all, are under leasehold strata title. One large building is under freehold strata title. Part of the Sydney public road network passes over the basements and a bus interchange facility and large commercial marina facility interfaces with the complex. The uses comprise retail, commercial offices, serviced apartments, residential apartments, restaurants, entertainment venues and charter boat operations.

3.6 There are numerous other examples throughout Australia and the trend towards large and complex mixed-use projects is likely to increase. Even master planned communities are becoming larger and more complex. Almost 20 years ago the development industry and legal circles were a gasp at the prospect of *Sanctuary Cove* on the Gold Coast. Today there are numerous projects of similar size and complexity and many more in the planning stages.

The other end of the spectrum

3.7 At the other end of the spectrum we have throughout the country a large number of buildings that were built in the 1940's 50's and 60's and strata titled after 1961, some by way of conversion of existing residential flat buildings. Many have been well maintained and still have a substantial economic life ahead (e.g. many of the pre and immediate post second world war apartment buildings in the eastern suburbs of Sydney). However, there are large numbers of the older buildings that have been poorly maintained and are fast approaching the end of their economic life. Many of these have been the victim of what I call "life cycle change". The cycle occurs as follows:

- Low cost buildings were built in a down market area in poorly planned estates.
- Lower income families purchased the units, which served them well as they brought up their children and built up their equity and incomes.
- Because of the lower incomes, the buildings were poorly maintained and progressively deteriorated, as did the general neighborhood.
- When they could afford it, these owners sold their unit and purchased a better quality property in a more up market area.
- The incoming purchasers of the units were often making the move from rental accommodation and stretched themselves to make the purchase, thus having little or no capacity to start maintaining the building, let alone bring it back to standard.
- The buildings deteriorated further, as did the neighborhood.
- The cycle continued over the years until there was no prospect of addressing the degradation of the building and its neighborhood other than to completely redevelop the area.

- Sociological issues were often a by-product of this process.
- Redevelopment is difficult, if not impossible, to achieve because of the need for all owners to agree.

I am reluctant to point the finger at specific areas, but those of you who are familiar with areas of Eastlakes in Sydney's southeastern suburbs will understand what I mean.

3.8 This redevelopment problem is not confined to old, poorly maintained buildings. The same problem arises where older well-maintained buildings occupy prime locations, such as Sydney harbourfront sites that are capable of supporting a much higher density development. While it may make economic sense for everyone concerned to redevelop these sites the requirement for all owners to agree makes the task virtually impossible.

3.9 That raises the question of compulsory acquisition for redevelopment purposes – a sensitive issue for any government. Will Australia follow the lead of the United States Supreme Court? In June this year that Court upheld by a 5-4 majority decision the right of a City authority in Connecticut to resume a group of private homes so they could be demolished and the land made available to a private developer undertaking a major urban redevelopment. The decision was broadly based on the principle of "public good".

The challenges

3.10 These circumstances present the following challenges for the industry:

- How do we deal with the increasing size and complexity of developments and development processes?
- What do we do about those buildings and estates that need to be re-developed?

4. Consumer protection

Caveat emptor

4.1 The Australian contractual system, like the English system from which it is derived, still relies heavily on the legal principal of *caveat emptor* (or "let the buyer beware"). As real estate developments become larger and more complex the buyer needs better "tools" to inform themselves sufficiently to "beware". In addition, legislative protection is sometimes necessary to bridge the gap between information and consequences. Sometimes information in itself will not protect against consequences, particularly if the consequences are not easily anticipated. Consumer protection can therefore involve a component of risk allocation, based on the principal that the person best able to control or anticipate the risk of adverse consequences should bear the risk of those consequences.

4.2 This can be illustrated by an example. A buyer of a strata lot is indirectly liable to contribute to the unfounded liabilities of the body corporate at the time they acquire the lot. They can be given information about the state of affairs of the body corporate, or the opportunity to obtain

that information, but that may not be sufficient to avoid liability for a significant financial contribution to the body corporate. To protect against this, the seller (who is in the best position to know what is happening or likely to happen within the body corporate) can be required to underwrite such a contribution in certain circumstances.

Current approach to consumer protection

4.3 The current approach to consumer protection involves one or both of 2 approaches:

- Disclosure of information
- Allocation of responsibility for certain consequences.

4.4 Here are some examples:

- In New South Wales –
  - All sellers of real estate must attach a range of title related documents to the contract for sale by way of disclosure
  - Certain things cannot occur within an "initial period" after registration of a strata plan without the consent of a Tribunal, such as the long-term appointment of a caretaker or strata manager.
- In Queensland –
  - A disclosure statement must be provided to buyers
  - An *Information Sheet* must form the first page of a contract (or the second page, under a *Warning Statement* where residential property is involved)
  - For off-the-plan contracts, information is disclosed under the *Land Sales Act*
  - Sellers must give a range of statutory warranties about the affairs of the body corporate
  - The buyer is given extensive rights to cancel the contract in certain circumstances.
- In Victoria –
  - A vendor's statement and body corporate certificate are available to buyers.

Managed investments

4.5 In addition to these, if a contract relates to a building in which short term accommodation will be provided by means of a rental pool, a product disclosure statement or prospectus will need to be provided under the managed investment provisions of the Commonwealth's *Corporations Act*. These documents can be lengthy and complex, depending upon the nature of the "investment" and whether class order relief is available under that Act.

State inconsistencies

4.6 Clearly, there are inconsistencies in the various requirements. These inconsistencies exist at a time when Australians are increasing involved in purchasing inter-state real estate, particularly strata title properties. In many cases disclosure involves "information overload". In Queensland

it is not unusual for disclosure material to comprise 30 or 40 pages and sometimes this can increase to well over 100 pages. Routinely, the disclosure material is hugely voluminous when compared to the actual contract document.

Due diligence concerns

4.7 An important element of consumer protection is facing a serious, but not so obvious threat, namely the due diligence process undertaken by or on behalf of strata title buyers. I refer to the practice of inspecting the records of the body corporate to discover unfounded liabilities or other information relevant to a decision to buy or a decision to exercise a statutory or contractual right of cancellation. The threat arises from a combination of factors:

- Increasing volume and complexity of the records
- Poor filing and business processes
- Off-site storage of records and a general unwillingness to retrieve them for inspections
- Concealment of detrimental material
- Electronic storage where –
    - Document management programs are too basic
    - Cataloguing is inadequate
    - Poor quality computers are provided to persons inspecting the records.

The impact is twofold; a reduction in the ability of buyers to do their own due diligence exercise and an increase in the cost of them outsourcing that exercise. Therefore, the continuing availability of this mechanism for buyers (which mechanism is heavily relied upon by the statutory and contractual protections) is itself under threat.

Current challenges

4.8 As projects become larger and more complex the need for consumer protection will become greater. The current challenges for Government are the need to:

- Ensure disclosure is both appropriate and relevant
- Simplify and integrate disclosure material
- Make disclosure in the various States more uniform
- Consider alternatives to disclosure to protect buyers of strata properties
- Reassess the consequences of non-disclosure to ensure they are fair and not counterproductive.

5. Management

Sectors

5.1 Management of strata schemes has traditionally tended to be divided into 2 sectors:

- Body corporate management

- Building management.

Body corporate management

5.2 Body corporate management has been the domain of the strata manager, while building management has, largely, been the domain of the on-site building manager or caretaker. Furthermore, the skill levels of building managers have been more at the level of caretakers rather than at the level of "facilities managers", particularly when compared with the level of building management expertise applied to commercial real estate. The skills of strata managers have tended to center around clerical administration, accounting and record keeping.

5.3 Another feature has been, and still is, the dominance of "mum and dad" operators in both management sectors. Large numbers of operators in both sectors have no formal qualifications directly relevant to the work they perform. Where those qualifications do exist, they are at the lower end of the tertiary educational scale. Many operators, particularly in the strata management area, have been in the industry for a long time and their innovative flair, if they had any at all, has long departed them.

Recent survey

5.4 The most recent survey of the strata management industry carried out by Macquarie Bank last year, according to my interpretation, highlights a number of important points:

- The smallest operators had the lowest revenue per lot managed
- The source of revenues across all size operators was fairly common
- Size was not generally an indicator of efficiency
- The smallest operators were the most profitable
- Strategic planning and practice management is not a strength of the industry.

Strata management sector problems

5.5 In my opinion, the strata management sector generally suffers from the following:

(a) a shortage of high level skills relevant to the task at hand;
(b) poor professional standards;
(c) poor strategic and business management skills;
(d) a narrow focus that is out of line with what the market is looking for or needs;
(e) a lack of vision and innovation;
(f) low levels of credibility in the eyes of Government when it comes to law reform issues;
(g) poor technology and a general lack of resources to address the problem;
(h) the burden of over regulation that imposes un-necessary processes and procedures;
(i) inadequate remuneration;
(j) unrealistic customer expectations; and
(k) a high level of customer dissatisfaction.

Qualifications

5.6 Having said that, two further points need to be made:

- Some strata managers are making significant progress in relation to many of the above matters. But even those strata managers have a long way to go to achieve the results that I believe are achievable.
- Industry bodies have made significant inroads into a number of the above areas. However, in some respects the very issues that they need to address hamper them. Examples are –
    - In the face of a crying need for strata managers to get closer to their customers and industry colleagues we see one major Institute considering a move from an industry wide organization towards a strata manager's "trade union".
    - Industry bodies are under resourced, mainly because of the limited ability of strata mangers to properly resource them.

Challenges for strata management

5.7 The huge challenge for the strata management sector is how to address the above issues in the face of an expanding and more demanding market. More demanding, not only in the sense of customer expectations, but also in the sense of larger and more complex developments.

Building management

5.8 On the building management front, it is not so long ago that building management in a strata title context was confined to holiday letting buildings on Queensland's Gold Coast and other tourist areas. The building manager was the person who was the part-time caretaker of the building and part-time operator of the letting pool – attending to the needs of holidaymakers staying in the building. However, in recent times that profile has changed and there are other facets of building management, namely:

- On-site contract caretaking of permanent residential buildings.
- Off-site contract caretaking of permanent residential buildings.
- Full-scale facilities management of complex mixed use multi-faceted buildings.
- Permanently employed caretakers who also supervise concierge and various other owner services.

Changing profile of operators

5.9 The profile of operators has also changed. While the "mum and dad" caretakers/managers are still prevalent there are other styles of operation, namely:

- Private businesses that own and operate management rights in a number of buildings (e.g. Oak Apartments and Medina Apartments).

- Hotel chains that either own or brand various operations (e.g. Mirvac's *Sebel* and *Quay West* brands).
- The publicly listed hospitality groups, such as *Breakfree* and *S8*.
- The off-site letting managers (e.g. Accom Noosa)

5.10 A large proportion of serviced apartment complexes are still marketed as stand alone operations where goodwill attaches to the property rather than a brand. The problems confronting many of these complexes include:

- Inconsistent standards of furniture in and maintenance of apartments
- Substandard presentation and service levels generally (particularly in "tired" buildings)
- Inability to engage in central marketing and access central booking facilities
- General lack of professionalism in a hospitality sense.

5.11 An increasing proportion of complexes are being controlled by the listed professional operators (*Breakfree* and *S8*). One often hears complaints from owners that these operators are increasing their revenues at the expense of owner returns. Is this fact or fiction? Do the branding and centralized booking facilities of these professional operators improve occupancy rates and increase returns? Are they offering a better and more consistent hospitality experience?

5.12 Apart from the hospitality aspect of building management, there is the facilities management aspect. This involves:

- Arranging, supervising and keeping records of –
    - Equipment maintenance
    - Cleaning
    - General building maintenance.
- Testing of various equipment
- Basement management (which may involve such things as visitor parking, loading dock and storage areas)
- Supervision of deliveries and general movement of goods over common areas
- Rubbish removal and recycling
- Risk identification and management
- Management and of security systems
- Responsibility for fire safety
- Responsibility for workplace health and safety
- Liaising with and reporting to the strata manager and/or body corporate committee.

5.13 In smaller or simpler buildings this aspect of the building manager's role may be relatively easy and may not require a high degree of expertise. However, as larger and more complex projects increase in number (as they have been in the past decade) the need for more expertise increases. Building managers will need to be properly trained and qualified as facilities managers with a higher level of project management and clerical skills if they are to become involved in these larger and more complex projects.

Challenges facing building management

5.14 Challenges facing this sector of the management industry include:

- The competition between the "mum and dad" operators and the large publicly listed operators.
- The challenge to increase manager revenues while improving returns to investor owners and providing better service for resident owners.
- The inherent conflicts of serving diverse stakeholders, or expressed another way, balancing the expectations of owner occupiers, investment owners and guests and delivering value for money to all groups.
- Managing the relationship between the body corporate and the resident manager. (This has been a contentious relationship over the past 15 years and consumer groups have successfully convinced Government to intervene by introducing restrictive amendments to legislation that has swung the pendulum very much in favor of the body corporate and unit owners.)
- Preserving and enhancing the value of management rights in light of the highly regulated environment in which they operate and with the prospect of increasing regulation.
- The need for better skills (particularly on the facilities management side) to cope with the increasing size and complexity of real estate developments and the increase in regulation in areas of safety and risk, as well as operational regulations (such as the real estate agency legislation).

6. Sociological changes

Features of strata living

6.1 The features of strata title living are:

- Physically close living conditions
- Regular interaction among owners and residents (both casually on a daily basis and more formally via body corporate functions)
- Conforming with certain standards of conduct (stipulated in by-laws or house rules)
- Enduring a relatively confined physical environment (characterized by smaller living areas, adjoining apartments, sharing of facilities and limited insulation against vertically and horizontally transmitted noise).

Plus daily life

6.2 Overlaid on these factors are the normal features of daily life:

- General community and work stress levels
- Job insecurity
- Changes occurring in the family unit

- Disciplinary problems with young people
- Ageing population
- General changes in modern day society.

Challenges emerging

6.3 When these two sets of circumstances are combined the scene is set for a range of sociological issues arising out of home unit living, which are effectively the challenges currently facing us all. These include:

- Do building standards (from both a design and construction perspective) need to be improved?
- Is there a place for animals in home units? What constraints should be imposed?
- What are the issues associated with children in home units?
- How can the needs of people on fixed incomes be accommodated?
- What is the best way to resolve disputes?
- What changes need to be made to the way we manage these complexes?
- Should different socio-economic groups be mixed? (e.g. public and private housing mixes) What problems does this create and how should they be dealt with?
- How do you deal with differing objectives and aspirations (e.g. resident owners v. investment owners; owners v. tenants)
- Should rented units pay higher levies?
- Should we encourage particular types of "closed" communities? (e.g. adult; family; retirement; investment; gays)
- To what extent is inadequate sinking funds contributing to social degradation within buildings or particular geographic areas?
- Are social problems likely to increase as more emphasis is placed on medium and high-density development?

6.4 In a planning sense, most States are focusing on increasing densities to make more effective use of existing infrastructure. For example, a key feature of the South-East Queensland Strategic Plan released recently involved increasing densities. A comprehensive and expensive infrastructure development program also recently released by the Queensland Government supports that plan. However, the "social infrastructure" required does not appear to have received the same attention. If densities are to be increased then strata title development will increase. The administrative and communal environment created by that legislation is fundamental to the social impact of the Government's plans. However, there has been no talk about adding resources to improve the regulatory or social environments for the people of Queensland who will be required to live a higher density lifestyle.

Community building

6.5 In Australia there has been little or no emphasis on community building. The focus is on building an architecturally pleasant building in a convenient location with the minimum facilities needed to meet market expectations. These ascetically attractive complexes often

house sterile social environments where people don't know or care about their neighbors. Strata title legislation and Governments generally have not sought to address this "problem". One exception is the recent work of the Victorian Government in reviewing its strata title legislation which carried a theme and emphasis of "*building communities*".

6.6 Fortunately, recent market research is showing an increased expectation on the part of buyers to receive more for their money in the form of a pleasant and healthy living environment inside these ascetically attractive buildings. Knowing the development industry as I do I am heartened that this will drive change in this area. However, Governments and managers (both strata and building) must do their part to achieve the full potential in this regard.

6.7 I think the problem and the solution are aptly identified in the following quotation from the introduction to the US publication *Building Community*[2]-

> "I have reached the conclusion that all community associations and the people who lead them – fit pretty neatly into one of two distinct categories: administrative or aspirational. The first (and by far the largest category) comprises what I call administrative associations. They operate under the premise that a community association is essentially a neighborhood housekeeping organization. The association's purpose is to maintain common elements and enforce rules. Thus, the role of management is to furnish competent administration for the maintenance and enforcement operations of the association. The board and the manager in an administrative association tend to regard a high level of resident apathy as a compliment. Residents must be happy if they're not showing up for community meetings or casting votes for board positions. ……
>
> The second and much smaller category is made up of what I call aspirational communities. In this type of association, the role of the board and manager is as much about building the social and civic well-being of the community as it is about maintaining the physical plant or enforcing the rules. Aspirational communities tend to be managed by people who express a sense of passion and idealism about community. These managers and board members believe their role is to provide leadership and inspiration, not merely administration. They strive to engender a sense of caring, civic pride, and shared responsibility."

7. Disputes

Nature of strata disputes

7.1 By its very nature, medium and high density strata living attracts a higher incidence of neighborhood disputes than freestanding home living. Also, early resolution of these disputes is more important so as to prevent ongoing conflict fueled by the close quarter living environment and ongoing interaction between the parties to the dispute. A number of the major Australian jurisdictions have recognized this need and introduced special dispute resolution processes for strata title properties.

Dispute resolution mechanisms

7.2 These dispute resolution processes involve one or more of the following mechanisms:

[2] *Building Community – Proven strategies for turning home owners into neighbors* (Community Associations Press) 2005. Introduction by Brent E. Harrington.

- Mediation
- Conciliation
- Adjudication
- Quasi-judicial tribunals
- Limitations on normal legal remedies.

The role of information

7.3 In recent years there has also been an increased focus on the dissemination of information so that people understand their rights and obligations as strata title owners and residents. This educational component is an important factor in preventing the occurrence of disputes in the first place. While there has been an increased focus on this aspect, in my opinion, no State has yet achieved the level of support that is warranted by the size of this sector of the Australian population. More can and should be done in the form of:

- Brochures and publications
- Management aids (particularly for self-management)
- Information sessions
- Multi-media presentations
- Telephone information service
- Personal interview service
- Conflict management coaching.

The dispute resolution process

7.4 But what can be said about the dispute resolution processes themselves? Their essential features are:

- Fair
- Final
- Speedy
- Flexible
- Informal
- Inexpensive
- Enforceable remedies.

About the process

7.5 Each State jurisdiction with a formal dispute resolution system is slightly different. However, I expect that each system has been criticized (fairly or otherwise) in respect of each of the above features. However, the following should be noted:

- Each system relies upon an administrative process to adduce the relevant facts. In simplistic terms, this process usually involves –
    - A written application
    - Copying of the application to affected parties and inviting them to make submissions
    - Written submissions by affected parties who choose to respond
    - Determination of the application "on the papers".

  While there may be an inspection of the scheme the subject of the application, requests for further information and interviews of key witnesses these do not occur all that often and when they do they are more directed at finding missing material rather than testing the facts and merits of the case in any rigorous sense.
- Once a decision has been made there may or may not be an appeal as of right to a tribunal, which can determine the matter de novo. Where there is no such right (such as in Queensland), the only appeal is to a court on a question of law. Where there is such a right, the prospect of justice is better, but if it is not achieved at tribunal level then the only right of appeal is still to a court on a question of law. To this extent finality is achieved, but is justice and fairness served?

Is justice achieved?

7.6 The real issue in my mind is whether the feature of "fairness" is being sacrificed in the interest of the other features identified above. Let me use Queensland as an example. If a body corporate terminates a building manager's management agreement for breach the only remedy available to the building manager under Queensland law is an application to the Commissioner for Body Corporate and Community Management under Chapter 6 of the *Body Corporate and Community Management Act 1997*. Termination of that agreement is tantamount to termination of the manager's management rights, an asset that could easily be worth in excess of a million dollars. That application is dealt with administratively and the file, when completed, is referred to a specialist adjudicator for determination. The specialist adjudicator has few mechanisms to deal with the application. He or she may require the parties and certain other persons to attend a meeting and provide information, or they may inspect the property or relevant records, but they cannot administer an oath or conduct a hearing as such. When the determination is made the only appeal available to the parties is an appeal to the District Court on a question of law. If the manager seeks to approach the District Court or the Supreme Court as an alternative to the Chapter 6 application, neither court will have jurisdiction to determine the matter and will refer it back to for determination under that Chapter.

7.7 The concern is not so much the level of competency of the specialist adjudicator, but rather their ability to find the relevant facts and to test those facts with sufficient rigor to ensure that the decision is based on the correct facts. If the facts are not discovered and tested, then the decision may be wrong and the parties may have no redress because no question of law may be involved. It seems wrong to me that an asset of such significant value hangs in the balance of such an unreliable process.

7.8 While that example relates to specialist adjudication, the same issues arise in relation to departmental adjudication. The decision of the adjudicator is only as good as the facts on which it is based and the system is not conducive to the collection and testing of those facts.

The challenge

7.9 The real challenge is to know whether we should be trying to further improve or supplement the current systems or find and implement alternative ones. A number of questions are relevant to this, including:

- Is it possible to prevent disputes by resolving conflict before it becomes a dispute?
- What role is there within the community for conflict management?
- Are the current processes effective? In what way can they be improved?
- How important is conciliation and mediation?
- Should there be more awareness of the need for compliance?
- How can communications within strata communities be improved?
- Would better owner and resident education lead to fewer disputes?
- Should a body corporate have a right to issue fines for non-compliance?
- What other things can be done to minimise disputes?
- What options are there to fund good education programs and dispute resolution?
- Is more research needed into these matters and generally into these types of disputes?
- Should Government be directly involved in dispute resolution apart from allowing normal court remedies?
- Should Government be more involved than it presently is?

8. Legislative issues

Serious issues

8.1 Legislative issues are, to my mind, the most serious issues currently confronting strata title stakeholders. In my view, the key issues are:

- Whether we are being over regulated
- Whether the quality of our legislation is good enough
- Whether the policy making and bureaucratic processes are producing the best results.

Over regulation

8.2 In the late 1970's while a member of the standing *Strata Titles Act Review Committee* in New South Wales I advocated a general rule that "***If there are not 100 or more complaints about a matter then that matter should not be considered a problem requiring amendments***." At that time there were about 9,000 strata schemes involving some 90,000 lots. Today in New South Wales there are some 60,000 schemes with about 600,000 lots so if the same general rule were applied there would need to be 600 complaints about a matter before there is a problem

requiring amendments. This general rule recognized the theory that every amendment to resolve a problem potentially creates 3 new problems.

8.3 The point is not in the statistics. The point is that the more frequently strata title legislation is amended the more likely it will need further amendment in the future. It can be a very circulatory process.

8.4 In most jurisdictions strata title legislation is far too complex. It is too detailed and prescriptive and does not recognize the diversity of projects and people who live in them. Recent experience shows that this problem is likely to get worse as Governments struggle to address the endless list of issues raised by the various stakeholders in the strata industry, not the least being the owners themselves. This criticism is also directed at Queensland, the State with the mechanisms designed to cope with such diversity. The problem with the Queensland legislation arises because:

- The content of the various modules was compromised back in 1997 when a consensus solution was sought in preference to the "right" solution.
- This mistake was compounded with changes in the past 2 years that further alienated the original intention of the 1997 mechanisms.

8.5 Let me give a few examples of complexity:

- In Queensland, certain decisions must be taken by "secret ballot", including those that a committee or general meeting decides should be taken in that way. The secret ballot provisions in the legislation are set out in 4 sections containing 16 sub-sections taking up almost 4 pages of the regulations. Provision is also made for a "returning officer" to be appointed and this is usually a person independent of the community titles scheme. The process is lengthy, complex and time consuming, not to mention the additional costs involved. Furthermore, it is a fertile environment for technical disputes about validity of proceedings.
- In New South Wales, a developer cannot procure the owners corporation to enter into a 3 year caretaker agreement before settlement of the off-the-plan sales without the consent of the Consumer, Trader and Tenancy Tribunal even where that right is reserved in all the sale contracts. Potentially, this can have a serious impact on the operation of the project during its early weeks, particularly if the project is large and complex. It can also have an impact on the financial viability of the project itself.
- In a number of States there are restrictions on the expenditure of money by committees, subject to limited exceptions. The restriction is such that it cannot be removed or the amount increased. For example, in Queensland for a building with 20 lots the maximum amount a committee can spend is $5,000. This amount cannot be changed or the restriction removed and an expenditure of say $5,100 would require an extraordinary general meeting to be called at a cost of around $600 or $700 if there is a body corporate manager. In some buildings (not many) this restriction may make sense. In others (occupied by wealthy high powered executives or ex-executives) it is a total absurdity.

Quality of regulation

8.6 When I refer to the quality of regulation I am not referring to the standard of drafting. In most jurisdictions drafting is done in plain English and, generally speaking, is reasonably intelligible to a large proportion of the sector stakeholders. The quality issues are related to the content and its impact on the efficient operation of schemes. Probably the most significant issue in the major jurisdictions is the generic approach to this type of legislation. The reality is that one piece of legislation cannot cope with the huge range of projects that utilize strata titles legislation. Although some Governments have recognized this, they have not effectively dealt with the issue. As I have already indicated, Queensland has the mechanisms to deal with the issue but have failed to use them effectively. New South Wales has made a very poor attempt to deal with the issue by providing a selection of sets of by-laws and creating what is called a "large strata scheme". They will need to further differentiate among schemes as time progresses and the legislation will become more complex and un-workable.

8.7 Another issue is the tendency to use different pieces of legislation for different types of common interest systems. Again New South Wales is a good example. It has the following legislation:

- *Strata Schemes (Freehold Development) Act 1973*
- *Strata Schemes (Leasehold Development) Act 1986*
- *Strata Schemes Management Act 1996*
- *Community Land Development Act 1989*
- *Community Land Management act 1989.*

8.8 Together they comprise a miss-mash of inconsistent and sometimes confusing provisions. For example, in the strata development context a "body corporate" is involved in a scheme but in a management context it is an "owners corporation". In a community title context it is an "association" with potentially 3 different names. It is enough to confuse the lawyers let alone the poor lay people who have to live on a daily basis with various parts of the collection. All of this legislation could be combined into a single Act, with or without some of the titling provisions being relocated into relevant title or subdivision legislation.

8.9 Queensland is no better. Strata and community titles in Queensland are variously regulated by the following legislation:

- *Building Units and Group Titles Act 1980*
- *Registration of Plans (HSP(Nominees) Pty Limited) Enabling Act 1980*
- *Registration of Plans (Stage 2) (HSP(Nominees) Pty Limited) Enabling Act 1984*
- *Sanctuary Cove Resort Act 1985*
- *Integrated Resort Development Act 1987*
- *South Bank Corporation Act 1989*
- *Mixed Use Development Act 1993*
- *Body Corporate and Community Management Act 1997.*

8.10 Finally, there is the lack of uniformity among the various States, particularly the 3 most populous States. These days it is very common for people to own properties in more than one State or to move from State to State. Also, all of the major property developers operate in 2 or more States. This supports a case for more uniformity among the States. Clearly, there is a limit to achieving this because States will always want to preserve their independence and there are no serious commercial drivers for uniformity, as there was, for example, with the corporations law. However, more effort could be made on such things as development mechanisms and general terminology. There could also be more effort towards States working together in law reform initiatives, particularly research into what is required by way of reform.

The policy and bureaucratic process

8.11 Typically, Governments react to complaints. These complaints emanate from individuals or organizations and are usually directed at local members of Parliament who are keen to be seen to be "doing something" for their constituents. These local members refer the complaints to the relevant Minister who refers them to their policy advisers. The policy advisers and other bureaucrats work up "solutions" for Government to consider, solutions that usually involve amending the legislation. Some complaints or submissions go directly to the Minister from pressure groups, such as home unit owners associations other industry bodies. Many complaints or submissions are driven by particular "agendas" of associations or industry bodies, rather than a broader motive of the "common good". These are subjected to the same process.

8.12 This is essentially the legislative process in the case of strata titles. The consequences of this process are:

- Inexperienced (or narrowly experienced) policy advisers and bureaucrats decide on the solutions (i.e. the "required" amendments).
- In most cases there is no continuity of personnel involved in this policy making process (i.e. Ministers, policy advisers and bureaucrats change at each round of amendments so that any accumulated knowledge or experience is lost to the next process).
- Public consultation processes –
    - Feed the "noisy minority" and fail to attract the attention of the "silent majority"
    - Have a reputation of being nominal rather than serious attempts to test what is proposed
    - Do not effectively test propositions.
- Decisions are not based on any research – they are entirely reactionary.
- Changes are compromises rather than the best solutions.

8.13 These processes are leading us to what is undoubtedly the most complex and unworkable system of common interest community regulation in the world. The cycle of amendment after amendment after amendment must be broken. Governments must start to base decisions to amend legislation on solid research and the advice of independent people who know what the

implications of proposed changes are. Politicians need to find ways to placate their complaining constituents other than by fueling the process of legislative amendment.

8.14 This is by far the most serious issue confronting Government and industry stakeholders over the next decade.

9. Specific sectors

9.1 There are a few specific sectors of the industry that warrant brief mention in themselves. They are:

- Tourism
- Retirement
- Day Spas and Wellness Centers
- Timeshare

Tourism

9.2 International tourism is an important export earner for the Australian economy and serviced apartments provide a large proportion of Australia's tourist accommodation. The tourist's experience in this type of accommodation must be of a sufficiently high standard to protect the Australian tourism "brand" and promote repeat visits and recommendations.

9.3 The serviced apartment sector (excluding apartment hotels and quality branded establishments) typically suffers from:

- Low service levels
- Inconsistent standards of accommodation (both as regards properties and apartments within properties)
- Limited on-site facilities.

Apartment hotels and quality branded establishments, although providing a higher level of consistency, can also suffer from low service levels and limited on-site facilities (such as food and beverage services, a gym and other recreational facilities).

9.4 The challenges for this sector include:

- Raising service and facility levels so that the product offering is of a much higher quality.
- Managing the relationship issues (e.g. resident owner v. investment owner; manager v. body corporate).
- Convincing Government to address legislative impediments to genuine tourist structures (e.g. the difficulties presented by legislation to put in place long term "hotel management agreements" where the very purpose of the development and individual unit sales is to establish and market a hotel).

- Convincing Government to address security of tenure issues for genuine long term hotel management arrangements (e.g. the ability to terminate a management agreement for relatively minor breaches of a Code of Conduct where the breach cannot be remedied).
- Convincing Government to introduce special mechanism to accommodate genuine apartment hotel developments (e.g. the introduction of a specialist hotel module in Queensland that would be fundamentally different to all of the other modules).

Retirement

9.5 For over 25 years strata title has been used as a titling method for retirement and aged housing complexes. However, it has not been the preferred choice, mainly because of revenue and taxation implications. To sustain the development, developers have had to opt for the leasehold alternative. From the unit owners perspective, the underlying title and management structure is not as good as strata title, but economic necessity won in the end.

9.6 Where strata titles have been used there has been an unsatisfactory relationship between the complex manager and the body corporate. To address this, some Governments have attempted to "adjust" relevant provisions of the strata titles legislation to make them a better fit with the complex management and service arrangements in the complex. These adjustments are also aimed at creating a link between the strata titles legislation and somewhat detailed legislation regulating retirement and aged housing complexes (i.e. Retirement Village legislation).

9.7 The challenge for this sector of the industry is to find better ways to allow the special requirements of complexes, such as retirement villages, to operate within a strata titles environment. In Queensland, this could mean a Retirement Village Module or further attempts to facilitate the interface between the Retirement Village legislation and the community titles legislation. In the other jurisdictions, in the absence of a switch to a modular approach to legislation, an improvement to the legislative interface may be the only option.

Day Spas and wellness centers

9.8 These are facilities, usually run by a specialist operator, within a resort or hotel complex. They can be owned and/or operated in a number of ways:

- By the body corporate (where this is not prohibited by State legislation)
- By a lot owner (within their lot)
- By a third party operator under a concession or management arrangement with the body corporate (in the case of a common property facility) or lot owner (in the case of a facility within a lot).

9.9 It is difficult to mount an argument for some special legislative facility for this type of facility. However, it will be important for State legislators to recognize that these types of specialist services do exist and need to be allowed to operate. For example, restrictions imposed on resident managers (e.g. "service contractors" in Queensland) should be carefully structured to ensure that they do not have wider unintended consequences.

Timeshare

9.10 Again, over the years strata titles have been used as the title basis for various timeshare developments. Where this has occurred there is the potential for conflict between the timeshare manager and the body corporate (similar to the conflict between the building manager and the body corporate). A possible solution is to allow the body corporate to expand its role and actually be responsible for managing the timeshare scheme. This would open the way for the strata manager to undertake both roles.

9.11 To achieve satisfactory solutions for timeshare schemes, agreement needs to be reached between State governments and the Australian Securities and Investment Commission, which regulates the marketing of timeshare schemes. The real issue is the extent to which timeshare in its traditional sense will be in demand in Australia. Alternate forms of timeshare (such as the holiday points system) may prove to be the preferred vehicle, in which event the need to involve strata titles in the first place may well disappear.

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