

Strata and Community Title in
Australia for the 21st Century

**Strata and Community Titles in Australia
- Issues 2**

Future Directions and Challenges

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1. Introduction

Objectives

- 1.1 In my earlier paper I identified the issues and challenges that, in my view, confront the various sectors of the strata and community titles industry at the present time. In this paper I give my views on -
 - (a) the likely direction in which the various sectors will head over the next 5-10 years (which I broadly define as “the future”); and/or
 - (b) what response is required by the various stakeholders, particularly Government.
- 1.2 I single out “Government” in that way because the ultimate direction and challenges for the future will heavily depend on how Governments respond to the challenges that I have already identified.

Qualifications

- 1.3 As in my previous paper, I will use generic terminology and a reference to “strata” includes community titles and other forms of common interest subdivision. Also, I repeat my disclaimer so it is clear that the views I express are my own and not necessarily those of the Conference organizer or others associated with the Conference.

2. Development and re-development

The future

- 2.1 In the future I believe we can expect to see:
 - Further increases in medium and high density development
 - Further increases in mixed use projects
 - Further increases in larger and more complex projects
 - Greater pressure for redevelopment of older schemes, particularly in inner-city and near city areas
 - A wider range of lifestyle facilities being incorporated in new schemes (such as home theatres, Clubs, business centers, retail servicing facilities, child minding, spas, concierge services, etc.)
 - Greater emphasis on security
 - Greater emphasis on technology facilities within schemes (e.g. broadband internet will be a “given” and units will be networked with a range of technology and other services, including “on line” services being available)
 - More market demand for a sense of community to compliment good design and use of space
 - A wider range of real estate based investment products (such as unitized rental housing and tourist projects)
 - Growth of the latest timeshare models (such as the “points” system).

The Challenges

- 2.2 These changes will present a range of challenges for all sectors of the industry. For Government, the challenge will be to adjust development provisions in legislation to facilitate the changes, but to balance this against an obvious need for more effective consumer protection. While one or two jurisdictions are reasonably well equipped to accommodate many of these changes, all jurisdictions will need to adjust their legislation. Some will need to make substantial adjustments. This will be very difficult for Government because there is no expertise within the bureaucracy to ensure that this balance can be achieved. Governments will therefore have no option but to rely on outside advisers, many of whom will be driven by private agendas rather than the public good. Later in this paper I will discuss ways in which Governments may approach this task.

Development industry needs

- 2.3 The development industry will need effective mechanisms to facilitate:
- Staged development (which will need to be much more flexible than the current New South Wales mechanisms for example)
 - Tailored management arrangements, with less restriction on what and when you can do things and more emphasis on disclosure and obligations to act in the best interests of the future operation of the scheme
 - Flexibility for the developer to meet fluctuations in the market, the economy and consumer demands, which in turn will require a greater element of “developer control” during the earlier stages of a project
 - The compulsory acquisition of say the last 2 units or last 5% of the total units (whichever is the greater) in a scheme designated for re-development by say local government
 - Rationalization and coordination of consumer protection measures, particularly for investment products.

Challenges for consultants

- 2.4 These changes will put substantial pressure on industry consultants, all of whom show signs of inadequate knowledge and training in the more complex types of development. While acknowledging that there are some very competent and talented consultants across all sectors of the industry, the fact is that, in a broad sense, the knowledge and skill levels within the legal, development management, strata management and project marketing sectors are far below the levels they will need to be at to cope with what the future will bring. Industry professionals will need to lift their game if they are to succeed in the future environment. Specialization will become even more important.

3. Consumer protection

Greater need

- 3.1 It is clear that as projects become more complex and developers are given the mechanisms to cope with that complexity the need for more effective consumer protection becomes greater. Even without the changes that I predict, there is a need for existing consumer

protection provisions to be rationalized and coordinated. These mechanisms are not as effective as they should be and they have the potential to operate unfairly against developers and financiers. For example, why should a buyer have a right to cancel an off-the-plan contract simply because a real estate agent or lawyer has inadvertently attached an out-of-date form to the top of the contract where there is no material difference between the current form and the one used? The next market “collapse” will graphically demonstrate how unfair some of the existing consumer protection provisions are.

Government response

- 3.2 Government response needs to be balanced and coordinated, otherwise consumer protection will be less effective and legitimate and desirable development trends could be impeded. While the bureaucracy may be confident that it can cope with this challenge, the risks are that policy advisers and bureaucrats:
- Do not sufficiently understand the development and financial processes to come up with the optimum mechanisms
 - Will become too zealous in their desire to protect the consumer (i.e. will opt for the proverbial sledge hammer to crack a nut).

Coordination

- 3.3 Coordination also presents a challenge. Co-ordination between different pieces of State legislation is difficult enough because of the need to cope with different Departments and different Ministers. However, coordination between State and Federal legislation is extremely difficult. For example, I once tried unsuccessfully to convince the Australian Securities and Investment Commission at the highest level to coordinate its disclosure provisions for serviced strata schemes with the Queensland Government’s comprehensive disclosure provisions for off-the-plan contracts. As a result we now have 2 separate disclosure statements, often containing the same information. Incidentally, the reason I was given for this not being possible was that the Commission wanted to maintain a uniform approach across the entire country and did not want to have a different rule for Queensland or any other State. This highlights the challenge that lies ahead on this particular issue.

Challenges for Government

- 3.4 In my view, Governments need to:
- Commence a complete review of the consumer protection provisions that apply to strata title sales
 - Consider strata title transactions independently of other transactions, such as buildings on the older conventional type subdivisions
 - Reassess risk allocation in consumer transactions so that it is more fairly allocated according to who has the best chance of controlling that risk
 - Adjust the balance between disclosure and risk allocation
 - Reassess the consequences of non compliance with particular provisions with a view to making better use of compensatory provisions.

- 3.5 That leaves one important question. How do Governments bridge the “knowledge and skills gap” among policy advisers and bureaucrats while avoiding outside advisers who have a private agenda to push? A simple solution is to engage paid outside advisers who are under a contractual and professional obligation to safeguard the public interest. The problem with this solution is the choice of advisers. They are often chosen based on how “safe” the decision is (e.g. choosing an academic is much safer for the bureaucrat than choosing an industry figure). The problem is that the academic, while having different skills, may not be any better equipped to deliver a better outcome than the bureaucrats. Even where they can produce a better outcome, some policy advisers and bureaucrats remain tempted to impose their own preferences on the process or to opt for a compromise position (that will be less controversial) rather than the “best” solution.
- 3.6 So what is the solution? In my view, the best solution to resolving consumer protection issues is the same solution as that needed for legislative issues generally. I will deal with that solution later, when I deal with the legislative issues.

Protection of funds

- 3.7 Before moving on from consumer protection, there is another aspect that needs to be mentioned. It concerns the protection of strata owner’s funds in the hands of strata managers. As legislative provisions increasingly focus on the need for sinking funds and adequate budgeting to those funds, the amount of funds under management by strata managers will increase substantially. In all jurisdictions, other than New South Wales and the Northern Territory, those funds are substantially unprotected. While the odd misappropriation occurs, in recent times there has not been a large defalcation. However, the potential for such a defalcation will increase and Governments will come under more pressure to introduce strata manager licensing or some other mechanism to protect body corporate funds.

4. Management

Drivers for change

- 4.1 The drivers for change in the development and consumer sectors will also be drivers for change in the strata and building management sectors. However, in the strata management industry the principal driver of change will be the push towards consolidation of the industry. The consolidation will be driven by companies with:

- (a) a strong capital base;
- (b) good management skills;
- (c) the latest technology and equipment; and
- (d) strategic commercial connections.

Consolidation of the sector

- 4.2 This trend could completely change the way strata managers operate – it has the potential to revolutionize this sector of the industry. To be clear, I am not suggesting that these types of companies will take over the strata management sector. Rather, I am saying that their impact could be the main driver of change through the strata management sector so as to

completely change the way it operates. I can see this sector emerging as a 3 tier structure, much the same as the accounting and legal professions:

- 3 or 4 well resourced corporates (possibly listed) in the premium market segment
- 6 or 8 large second tier corporates (privately owned and operated)
- Smaller boutique firms.

Drivers of consolidation

4.3 Other drivers of consolidation will be:

- Pressure of market demand
- Need for substantial investment in technology
- Need to ensure scalability of businesses
- Potential for efficiency and productivity gains
- Complexity of strata title legislation and costs of compliance.

4.4 You may well ask what happens to the current “mum and dad” operations under that scenario. The answer is, in my view, they will virtually disappear. They will either lift their game to compete as a boutique operation or they will close or sell out.

Necessary changes

4.5 So, what type of change will be necessary in the strata management sector? In my view it will be:

- A change of approach from process focused businesses to service focused businesses with the primary objectives of preserving and enhancing asset value and facilitating a desirable communal lifestyle.
- A professional services sector approach. In other words, strata managers will move from relatively basic secretarial services to full scale professional services operating in much the same way as legal and accounting firms.
- A substantial investment in technology to support the sector. By substantial, I am talking in terms of many tens of millions of dollars. However, I am not suggesting that a manager, or a group of managers, will need to undertake that investment. I am saying that the combined investment of a range of stakeholders will need to be of that order.¹
- Providing a broader range of services (e.g. it will become increasingly more difficult for strata managers to avoid involvement in building maintenance issues).
- A fee structure more appropriate to the services provided and the value being added, leading to more profitable outcomes for the sector.
- A substantial raising of strata manager skill levels, driven by new educational standards and emerging career paths.

¹ I might add that this is already happening. Managers and their commercial partners have already spent many millions of dollars gearing up for this change and a range of stakeholders are already planning large spends on technology to service the sector and interface with what some strata managers are doing.

Outcomes

4.6 The outcomes from all of this are potentially:

- Better service levels to bodies corporate
- Enhanced value of unit owner's asset (i.e. their unit)
- More pleasant living environment (with fewer disputes)
- Higher fee levels for strata management
- More professional and efficient strata management sector
- More profitable strata management sector.

Building management

4.7 In the building management sector, in my view, what we are likely to see is:

- Further growth in the large hospitality companies and “brand” companies (e.g. BreakFree and S8) – the drivers for this being:
 - Improvement of owner returns
 - Potential for these companies to vertically integrate and/or cross market to the sector
 - Market demands for consistent standards of accommodation
 - New entrants to the market.
- Emergence of branded “chains” (similar to multiple listing real estate operations, the old motel chains and the IGA grocery concept)
- Enhancement of facilities management capability (initially through specialized divisions of the larger companies)
- Increase in stand alone caretaking operations, where the sole focus is on asset management
- Improvement in skills and qualifications of on-site managers
- An overall positive contribution to Australia's tourism industry
- Greater strength for this sector in its dealings with bodies corporate, Government and consumer groups.

5. Sociological change

Need for research

5.1 To understand and respond to the changes that are occurring in our society, Government needs to devote more resources to research. If necessary it needs to find ways to fund an appropriate response. One approach to funding adopted overseas involves the imposition of an annual levy on the owners of strata lots (similar to the fire levy and ambulance levy in Queensland). In New South Wales for example an annual \$2.00 levy (collected by local government) could raise some \$1.2 million to fund research and other strata related Government services.

Building standards

5.2 There is antidotal evidence to suggest that improvements in the design and construction standards for residential apartment buildings can have a positive impact on living conditions (e.g. designs to accommodate the needs of young families and quality construction to eliminate conflict arising from noise). Pressure for such improvement is likely to continue, driven mainly by:

- Changing demographics
- Further improvements to Government regulation (particularly the National Building Code)
- Market demand.

Community building

5.3 The marketplace is also likely to focus the attention of developers and strata managers on “community building” within schemes. This involves the creation of a pleasant livable environment within strata communities. Techniques include encouraging communications and social interaction within the community.

6. Disputes

Likely pressure points

6.1 States without statutory dispute resolution processes will come under increasing pressure to introduce those processes, particularly the larger States. States with statutory dispute resolution processes will be under pressure to keep those processes under review and constantly adjust and improve them. This will effectively be a continuation of the progressive improvement processes that have been underway for years in New South Wales, Queensland and Western Australia.

Areas requiring attention

6.2 The areas that will require particular attention are likely to be:

- Evidence gathering and the “testing” of that evidence
- The time taken to deal with applications relating to disputes
- The quality of the decisions of adjudicators and tribunals
- The way in which remedies are enforced.

Things to be encouraged

6.3 In my view, there are 4 things that Governments need to encourage in the future:

- Research into conflict issues and the feeding of the results of such research into policy making and solutions
- Community building as a means of minimizing disputes (as discussed above)
- Increasing awareness of and encouraging conflict management within schemes

- More focus on education as a means of improving management standards and heading off disputes.

Conflict management

- 6.4 Government has not been keen to embrace conflict management as a means of minimizing disputes. This appears to be because of a lack of understanding of what it really is. Typically, I hear the response that it is not appropriate to involve the strata community in “resolving” its own “disputes”. There is a failure to understand that “conflict” and “conflict situations” are not “disputes”. They are nothing more than situations that can lead to a dispute. Conflict management is simply the application of techniques to prevent a conflict situation from turning into a dispute. For example; communicating the by-laws to tenants is a means of facilitating compliance with them and avoiding future conflict. How can a tenant be expected to know that he or she cannot use the swimming pool after 10.00 pm if someone does not tell them that this is the rule?

Education

- 6.5 Education is another area that assists in preventing conflict. The means of education should include:
- Brochures and publications
 - Management aids (particularly for self-management)
 - Information sessions
 - Multi-media presentations
 - Telephone information service
 - Personal interview service
 - Conflict management coaching.

7. Legislative issues

Imperatives for legislators

- 7.1 In my view, imperatives for the future for legislators will be:
- Serious investigation of the possibility of more uniformity of strata legislation across the various Australian jurisdictions.
 - Comprehensive review of the legislation in all major jurisdictions to ensure that it can cope with the challenges that I have alluded to in this paper.
 - Deregulation of all management provisions. (Although this will require real political commitment on the part of Government there is a huge range of regulatory provisions that need to be “weeded out” to ensure the efficient and economic functioning of bodies corporate.)
 - Consolidation of strata related legislation in New South Wales and Queensland and, to a lesser extent, in South Australia.
 - Facilitating the tailored management structuring of new projects rather than trying to push them into a restrictive generic model or set of models.

- Change the public consultation process to ensure that it is meaningful and restricts the influence of minority groups that are not “really” representative of their constituents.
- As a means of achieving the last point, commission and rely upon quality research before deciding to make changes to legislation (which also involves a commitment to avoid “reactive change” for short-term political gains).
- To tap the wealth of knowledge that resides in a range of industry experts, but to do this in a way that avoids outcomes driven by “private agendas”.

Recommended approach

7.2 The real challenge for Government is how to achieve all this in the most efficient and cost effective way. In my view, the best approach would involve the setting up of a standing “Strata Reform Commission”, probably within the office of the Commissioner in those States where there is a Commissioner or similar office. Such a Commission would say:

- Comprise 3 to 4 “members”, with no more than one from Government
- Have a range of appropriate skills
- Be under a statutory duty to act in the public interest
- Be responsible for commissioning and interpreting relevant research
- Be the designated body to receive and assess submissions from members of the public
- Make recommendations to Government on required changes to the law.

Funding a Commission

7.3 Such a Commission would need to be properly funded and given adequate secretarial support. Again, an option for funding may be an annual levy on unit owners. The communication process for such a levy may itself be an opportunity for research and general feed-back from the strata community. In my view, this would be a very effective way to overcome the flaws in the current policy making and public consultation processes. Given the large percentage of the community that lives in strata properties the costs can be easily justified. Politically, this could be seen as a serious attempt on the part of Government to address the needs of persons living in a strata environment.

8. Conclusion

My contribution to this Conference has been the raising of issues, many of which are controversial, for debate during the course of the Conference. I believe that I have demonstrated that:

- We are entering a period of rapid and fundamental change within the broader strata industry
- All sectors of the industry will be challenged by these changes
- Government needs to provide the legislative and social infrastructure to cope with those changes
- The industry itself needs to respond positively and decisively

- There is the prospect of substantial improvements for most of us at the end of the process.

I commend my comments and predictions for your debate and look forward to the outcome, whatever that may be.

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