CONSUMER AFFAIRS VICTORIA
Education and Communications Branch

Building communities –
An insight into governing bodies corporate

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A formula for harmonious living
in a strata title community

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1. Introduction

1.1 Of course, there is no formula that ensures a harmonious living environment within a strata title community. Unfortunately, human behaviour in a close living environment is not that calculator able. Nevertheless, it is convenient, for illustrative purposes, to borrow from the title of today's topic and compose a formula that embodies all of the things that I want to talk about. So I will impose upon your mathematical imaginations to that extent.

1.2 The formula that I would choose is as follows:

$$HL = \frac{WL}{CR + QM + DR} + GC + CS + CM$$

Where –

HL = the objective, **Harmonious Living**

WL = a framework of **Workable Legislation**

CR = the existence of **Clear Rules**

QM = the presence of **Quality Management**

DR = the availability of effective **Dispute Resolution**

GL = the presence of **Good Communications**

CS = a sense of **Community Spirit**

CM = a focus on **Conflict Management**

1.3 The components of this formula identify the topics that I will deal with in this paper. As I deal with each topic you will be able to test my views against the content of the Victorian Government's *Future Directions Paper*. At the time I prepared my paper I had not had the benefit of reading the *Future Directions Paper*, but from what I have heard about it there may not be too much conflict between the two.

1.4 At the outset let me say that the 3 components below the Workable Legislation line depend heavily upon Workable Legislation – and they are essentially the responsibility of State Government. The 3 components standing to the right of the Workable Legislation line are essentially the responsibility of the particular strata title community, although Government can facilitate their achievement. Given the objectives of this Conference and the Government sessions planned for tomorrow, I have made a special point of highlighting the relevance of strata title legislation in achieving the various components of my formula. Also, it is no accident that, in my formula, the higher the figure (or score) for "WL", the higher the figure (or score) for "HL". That simply reinforces the fact that the better the legislation, the better the potential for harmonious living conditions in strata communities.

2. Workable Legislation

2.1 Historically in the United States of America condominium and planned communities governing documents were written by the developer. Every project had its own governance and management structure, with rules designed specifically for that project. The legislation that existed was facilitative rather than prescriptive. In a perfect world, this is **almost** the perfect solution.

2.2 In retrospect, the results of that approach were predictable:

- The standard of the documents deteriorated (particularly as lawyers began to mindlessly copy from other projects).
- Developers took unfair liberties (or, in other words, they abused the system).

Government responded by requiring greater disclosure to purchasers and, eventually in some jurisdictions, formal approval of the disclosure documentation by a Government agency. As the disclosure became more complex and less effective in certain key jurisdictions, Government opted for legislative solutions to problems. Now in the United States, legislative intervention is becoming more common, aimed mainly at:

- Regulating the content of the governing documents prepared by the developer.
- Consumer protection.
- Overcoming what I call some of the "people problems".

2.3 The United States comparison is an important one for Australia. Traditionally, when Australian developers have planned their projects they have looked to that country for ideas. And that has not changed. Today, when a developer is planning a major project they first undertake the mandatory trip to the United States to get ideas about how they can get an "edge" on their competitors.

2.4 The approach to structuring common interest communities in Australia has been fundamentally different. The first legislation in New South Wales in 1961[1] set up a very simple set of rules that applied to every project. Flexibility was restricted to the by-laws or "house rules". That legislation was aimed at the post-war 3 storey walk-up residential buildings that were proliferating in the suburbs of Sydney. Not surprisingly, it was soon outgrown by the size, complexity and variety of projects that began to appear. Within 10 years something more sophisticated was required.

2.5 That came in New South Wales in the form of the *Strata Titles Act 1973*. Again, a single "mould" for every project irrespective of whether it was:

- Vertical or horizontal
- High or low
- Large or small
- Residential, retail, commercial, industrial or a mixture
- Residential disguised as serviced apartments or a hotel
- House, apartment, townhouse or villa home
- With no common facilities or extensive common facilities.
- New or recycled.

2.6 Developers continued to search the United States, and other countries, for ideas. Consumer demands became more sophisticated and the developers responded. Projects became larger and more complex. Pressure increased for more flexibility. During the early 1980's the 1973 legislation came under pressure. Lawyers (myself included) pressured by the demands of developers began to stretch the legislation beyond its limits (e.g. the use of "strata titles" to subdivide a master planned community by using bus shelters scattered throughout the subdivision as the mandatory "buildings").

2.7 At the same time Queensland was marching to the tune of the white shoe brigade. New innovations were being introduced almost daily – the *Paradise Centre* in Surfers Paradise, *Sanctuary Cove* on Hope Island, *Dockside* in Brisbane and many others that stretched the building units and group titles legislation past its limits.[2] The marketing of real estate "off-the-plan" was well established, as were the serviced apartments or holiday letting concept. Investor buyers were everywhere. That created a new range of **different** problems for Government to address, problems that would eventually spread to the other major Australian jurisdictions. Queensland's second generation legislation[3] was intended to address some of these problems but was struggling under a number of pressures, including sharp practices and conflict between investor and resident owners.

[1] The *Conveyancing (Strata Titles) Act 1961* (NSW).

[2] Theese projects were so complex that the Government introduced a range of legislation just to cope with them. It included the *Registration of Plans (HSP(Nominees) Pty Ltd) Enabling Act 1980* (Qld), the *Registration of Plans (Stage 2) (HSP(Nominees) Pty Ltd) Enabling Act 1984* (Qld), the *Sanctuary Cove Resort Act 1985* (Qld), the *Integrated Resort Development Act 1987* (Qld) and the *Mixed Use Development act 1993* (Qld).

[3] The *Building Units and Group Titles Act 1980* (Qld).

2.8 By the early 1980's New South Wales was under immense pressure to accommodate the larger and more complex developments. It introduced a range of legislation[4] in an attempt to find a solution, but again the approach was prescriptive and inflexible. The result was also very complex with a range of legislative provisions that lacked uniformity. This complexity was partly addressed in 1996 when the freehold and leasehold strata title systems were partly consolidated.[5] New South Wales then began to experience the early stages of the off-the-plan and serviced apartment problems that emerged earlier in Queensland, as well as the consequences of having one "mould" for all developments. New South Wales has just made a further attempt to address these problems.[6]

2.9 Meanwhile Western Australia and South Australia did not escape unscathed. Pressure for better legislation resulted in action. South Australia replaced its first generation legislation in 1988 with a comprehensive piece of strata titles legislation.[7] Subsequently in 1996 it introduced comprehensive community titles legislation.[8] Both pieces of legislation eventually introduced special jurisdictions within the Magistrates Court and the District Court for resolution of disputes. Western Australia's first generation legislation[9] was replaced in 1985 by legislation based on a 1994 Queensland Act[10] that was passed by the Parliament but was repealed without being proclaimed.[11] The 1985 Western Australian legislation has since been amended on a number of occasions.[12]

2.10 Victoria was different to the other jurisdictions. For some reason it escaped many of the pressures that confronted Queensland and New South Wales. It started its strata titles journey with a collection of legislation.[13] Then in 1988 it broke new ground when it introduced the *Subdivision Act 1988* (Vic). That Act was renowned for its comprehensiveness and the fact that it removed the detailed rules for body corporate management from the Act and placed them in regulations. It was my opinion at the time that the Victorian legislation was then the most advanced of its kind in Australia. However, it too followed the well entrenched approach in Australia of regulating the extensive range of projects under the one inflexible set of rules.

2.11 The stories were much the same in other Australian jurisdictions, although the smaller jurisdictions did not experience the full extent of the problems encountered by the other states.

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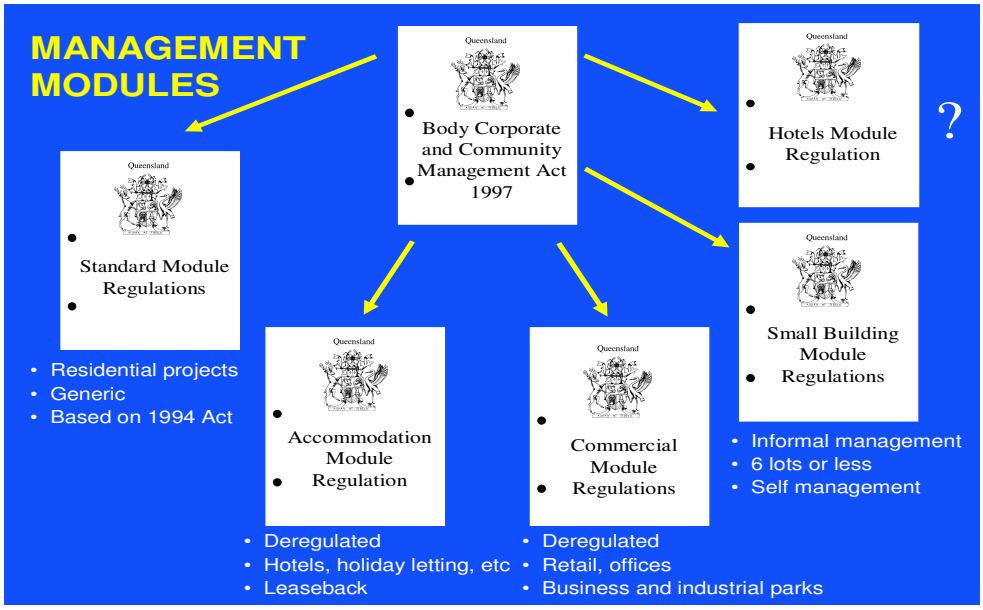
[4] *Strata Titles (Leasehold) Act 1986* (NSW), *Community Land Development Act 1989* (NSW) and *Community Land Management Act 1989* (NSW).
[5] This occurred with the passing of the *Strata Schemes Management Act 1996* (NSW) and the re-naming of the *Strata Titles Act 1973* (NSW) as the *Strata Titles (Freehold Development) Act 1973* (NSW) and the *Strata Titles (Leasehold) Act 1986* (NSW) as the *Strata Titles (Leasehold Development) Act 1986* (NSW).
[6] In 2003 the Parliament passed the *Strata Schemes Management Amendment Act 2002* (NSW) and the *Strata Schemes Management Act 2004* (NSW) was passed by the Parliament at the time this paper was being written.
[7] The *Strata Titles Act 1988* (SA).
[8] The *Community Titles Act 1996* (SA).
[9] The *Strata Titles Act 1966* (WA).
[10] The *Strata Titles Act 1985* (WA).
[11] The *Building Units and Group Titles Act 1994* (Qld).
[12] Substantive amendments were made by *Strata Titles Amendment Act 1986* (WA), *Strata Titles Amendment Act 1995* (WA) and *Strata Titles Amendment Act 1996* (WA).
[13] The *Transfer of Land (Stratum Estates) Act 1960* (Vic), the *Strata Titles Act 1967* (Vic) and the *Cluster Titles Act 1974* (Vic).

2.12 Queensland broke new ground in 1995 when it decided to depart from the single mould approach. This decision was taken by the Goss Labour Government following its disastrous attempt to reform building units and group titles law in 1994.[14] New legislation was nearing completion when the Goss Government lost power. At the time, having been the architect of the schematic design of this legislation, I was privileged to be the Government's external advisor on the legislation. After the conservative Government took control the Department convinced the new minister, the Hon Howard Hobbs, to continue with the project. Following a change of name and the obligatory adjustments to make it look like the new Government's initiative, the project was back on track. It culminated in the passing and commencement of the *Building Units and Group Titles Act 1997* (Qld).

2.13 The scheme of this 1997 Act is illustrated in the diagram on the following page. This diagram shows how the substantive law is contained in the Act while the detailed management rules are contained in regulation "modules". Different modules are used for different types of projects and their contents are tailored to the needs of those projects, even to the extent of modifying the role of the body corporate to suit the project (e.g. in the case of hotels or retirement villages). This legislation also introduced the most flexible and comprehensive land subdivision mechanisms in Australia that have served the development industry in Queensland very well. Those mechanisms make a substantial contribution to the liveability of communities because they allow the management structuring of projects to be undertaken in a way that best suits a particular project. It is this ability to structure a project to enhance its management and choose a regulation module most appropriate to the structure that sets the Queensland model apart from the other Australian states.



2.14 The rationale behind this approach to management is that it makes it easier for Government to fix specific problems in particular sectors of the industry without impacting adversely on

[14] That Government passed the *Building Units and Group Titles Act 1994* (Qld) but before it was proclaimed it was universally condemned as being inappropriate to address the myriad of complex problems that confronted the industry in that state. The highly unusual decision was made to repeal the Act before it even commenced and start again.

other sectors of the industry. For example, if there are problems in residential schemes the Standard Module can be simply amended by regulation without impacting on serviced apartments or commercial offices. Furthermore, the Small Schemes Module was intended to set up very informal management procedures reflecting what happens in practice (i.e. decisions are made without meetings or formalities).

2.15 Unfortunately everything did not go as planned. In particular:

- The Standard Module and the Accommodation Module ended up too similar.
- Minority pressure groups drove too much detail into the Small Schemes Module.
- The Hotel Module and a Retirement Villages Module (as well as a possible Time Share Module) did not eventuate.

The concept was further watered down by the amendments to the Act last year and the amendments to two of the Modules this year.[15] The end result is, in my (not surprising) view, is that Queensland has the right structure for that State, but it is not being used effectively. Despite its many shortcomings, I think most industry people would agree that it is still an appropriate piece of legislation for its times.

2.16 So what have we learnt so far from this journey through legislative wonderland? I believe that the key lessons we have learnt are these -

- Well structured projects function better. This in turn contributes to more economical living and a better lifestyle for residents. Therefore, first and foremost, legislation must facilitate the best title, subdivision and management structuring for projects.
- Highly prescriptive management procedures inhibit the efficient management of bodies corporate and distracts them from their key role – asset protection and enhancement. Such procedures are also very expensive for bodies corporate as they are forced into professional management and rising costs.
- There needs to be a safety net in the form of a structured dispute resolution system to help people deal with the inevitable problems that occur in higher density living.
- There needs to be more focus on the part of Government (and bodies corporate) on enhancing the lifestyle of residents of strata communities.
- You cannot solve "people problems" by legislation alone. Governments generally are too keen to be seen to be addressing problems by "amending the Act". The reality is that for every strata title problem solved by legislative amendment, a further 3 are created. I call it "***the three for one rule***".

3. Clear Rules

3.1 Rules fall within 2 categories:

- Legislative rules (i.e. those made by Government)
- Body corporate rules, or by-laws.

[15] Introduced by the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld) and the consequential changes to the Standard Module and Accommodation Module.

In both cases the rules need to be clear. This requires plain English expression and logical presentation. They must be easily understood by the whole community, not just those with a university education.

3.2 It is also important that the rules are appropriate to the particular community. How many times have you seen rules for a high rise building requiring residents to put out their garbage bins for collection each week when, in practice, the garbage is placed in a communal garbage chute? With inappropriate rules like that can you blame the residents for not taking **any** of the rules seriously?

3.3 The rules established by legislation should not only be clear themselves, they should also ensure that any rules made by the community are clear, appropriate and communicated to residents. The rules should also be readily enforceable.

4. Good Communications

4.1 There is no point having clear rules if they are not communicated to the residents (i.e. owners **and tenants**). Therefore, legislation needs to encourage communication of rules and bodies corporate need to pay special attention to communications.

4.2 The need for good communications is not confined to rules. It applies to the whole range of body corporate activities, as well as residents themselves. Too often, problems within strata communities are caused by poor or non existent communications. The common examples are:

- Body corporate committees make decisions and then fail to communicate the reasons for those decisions to unit owners. Potentially, this leads to non-acceptance of the decision by some owners.
- A resident has a concern about the conduct of another resident but fails to bring the matter to the attention of the other resident who is completely unaware of the concern.

4.3 When communicating one should not loose sight of the "**good**" aspect. Communications need to be "good communications". For example; an owner applies to the committee for permission to install an air conditioner. The committee declines the application and then writes a letter to the owner in the following terms:

"I refer to your application to install an air conditioner in unit 4.

The application was dealt with by the committee at its meeting on 11 March 2004 and it declined the application because of concerns about noise and appearance.

Yours faithfully"

4.4 No doubt that qualifies as a communication, but, in the context of a collegial and caring strata community it is not "**good**" communications. It would be preferable for the decision to be conveyed to the unit owner personally by the Chairperson and then followed up by a letter, a friendlier letter even. Better still; the committee might defer the application pending discussions with the unit owner on how the concerns about noise and appearance might be

addressed. Even if the application is eventually refused, the unit owner feels that the matter has been carefully considered and is more likely to accept the decision. More importantly, the previous good relationship between the unit owner and the committee is more likely to be preserved.

4.5 The way a problem is dealt with will often determine whether it is resolved or inflamed. It is always best to speak to people rather than make demands or write letters. The approach I suggest is what I call the "Asian approach" - always appreciate the need for the other side to "save face". This starts with giving them the benefit of the doubt. For example, when you first approach them it is best done by saying; "*I am sure you are unaware, but our by-laws require wet garbage to be securely wrapped before being put in the shute. Our cleaner would really appreciate it if you could do that in future.*" That approach **invites** the response; "*I wasn't aware, but that's no problem. Thank you for letting me know.*" The owner or tenant is able to comply without loosing face.

4.6 If the friendly approach does not work, then one moves to the next level - a firmer requirement. However, even this should be done in a way that invites compliance rather than provoking defiance. Only when these approaches fail should recourse be had to nasty letters of demand and applications to statutory dispute resolution services. The prospect of internal mediation should also be considered. I will say more about this later in this paper.

5. Quality Management

5.1 Quality management is a very important component of the formula for harmonious living. In my view a quality manager needs to be:

- Honest
- Competent
- Efficient
- Open
- Receptive
- Sensitive

5.2 From my experience, if a manager has those qualities, then the likelihood of disputes within the strata community is substantially reduced. This is because disputes often manifest themselves in arguments about technical, management related issues. For example; a meeting resolves to replace the carpet in the foyer with tiles. An owner, knowing that the decision cannot be reversed, commences proceedings to declare the meeting invalid. The dispute focuses on a management issue while it is really about carpet –v- tiles. If the matter had been carefully handled and it was clear that the meeting had been properly convened there may not have been a dispute.

5.3 Management needs to be "solution oriented" rather than "problem oriented". This requires a proactive approach to resolving issues along the lines of a "peacemaker". Where management itself is involved in an issue, then one of the office bearers of the body corporate should be available to step in and broker a solution. The manager has an important role in promoting and preserving harmony within a strata scheme and must accept responsibility for such a role.

5.4 There is yet another dimension to good management, namely, effective property management. After all, the principal function of the body corporate is to maintain the common property and management plays a critical role in determining the effectiveness of this function. It is an important function for owners in that it is the key to preserving and enhancing the value of their asset. But it is also an important function from a Government perspective because a breakdown in the maintenance of the physical structures within strata title communities is usually accompanied by social degradation. If this becomes systematic, it will eventually be a serious problem for Government and one that will be difficult to resolve.

5.5 Unfortunately, you cannot legislate for good management. But Government can encourage good management if it:

- Keeps legislation as simple as possible.
- Spells out the management procedures clearly.
- Provides approved forms (using the "in or to the effect" approach).
- Provides a comprehensive information service.
- Imposes competency and ethical standards on professional managers.
- Requires professional managers to undertake continuing education.
- Emphasises the role of the body corporate in maintaining **and upgrading** the building.
- Requires the build-up of adequate reserve funds for future renewals and replacements (i.e. a serious sinking fund).
- Enforces management requirements.

6. Community Spirit

6.1 Community spirit is the "essence" of the formula. It is a cultural thing that has to be developed over time, starting from the day the original residents move into the building or community. It is developed by strong leadership that encourages social cohesion and interaction among the residents – owners and tenants alike. In some communities it will be easy to build while in others it will be difficult. Unfortunately, there will also be those communities in which it will not be possible to instil any real sense of community.

6.2 Despite the prospects for success, the leaders within the building or community must ensure that there are many and varied opportunities for residents to meet and communicate with each other. These opportunities can take the form of meetings, discussion groups, social or sporting functions. Meetings alone are not sufficient, mainly because of their formality and the likelihood that they will at times discuss contentious issues.

6.3 Examples of activities that are effective in fostering community spirit are:

- Monthly BYO drinks in the barbecue area (as a recurring function on a designated day each month – such as the last Friday of the month).
- Annual Christmas party.
- Quarterly or half yearly cocktail functions rotating among residents' units.
- Charity functions.

- Family barbecues.
- Theatre parties or movie nights.
- Sporting functions (such as a golf day, tennis afternoon or swimming carnival).

6.4 Another good facilitator is a contacts list that is distributed to all residents. Such a list typically provides:

- Unit number.
- Names of all occupants (including children).
- Telephone number.
- E-mail address.

6.5 Yet another one is a web page. It can be an important tool for communications, but it can also facilitate social interaction and help build a good sense of community. Apart from being a good source of information about the scheme, it can include such things as:

- Opinion polling.
- Electronic newsletter.
- Bulletin Board.
- Chat Room.
- Photo gallery (for the photographs taken at the various social functions).

6.6 As people get to know each other and form neighbourly friendships the community spirit starts to build and a positive, caring attitude based on mutual respect tends to develop. You then have the foundations for good community spirit.

6.7 This is an area where legislation can also play its part. In particular it can:

- Recognise that the body corporate of a residential complex has a role in developing a sense of community and fostering a pleasant lifestyle for residents.
- Allow budgeting for and expenditure of money on body corporate activities associated with that role, subject to certain limits (e.g. $50 per lot per annum).

7. Conflict Management

7.1 At the outset we need to distinguish between conflict and dispute. To my mind **conflict** occurs where there is a disagreement between residents over a particular issue and this disagreement causes tension between them. A **dispute** is the next stage of conflict. It occurs where this tension develops into a situation where the parties are themselves unable to resolve the issues between them and any prior relationship they had is breaking down or has broken down.

7.2 Conflict within a strata title community is, unfortunately, inevitable. In some cases it is also inevitable that conflict will lead to a dispute. This is a product of normal human behaviour and close quarter living. From a communal harmony point of view, the important thing is to have mechanisms in place within the community to manage conflict when it occurs. The mechanisms that I advocate are:

(a) a ***positive attitude*** to deal with conflict; and
(b) a ***community relations person***.

Positive attitude

7.3 As part of the sense of communal spirit, everyone should have a desire to avoid serious conflict. The communal "culture" should be one of harmony and compromise. There should be a generally accepted expectation that conflict will be resolved within the community before it develops into a dispute. This will assist with motivating people to find their own solutions to problems. It will also compliment the whole concept of mediation.

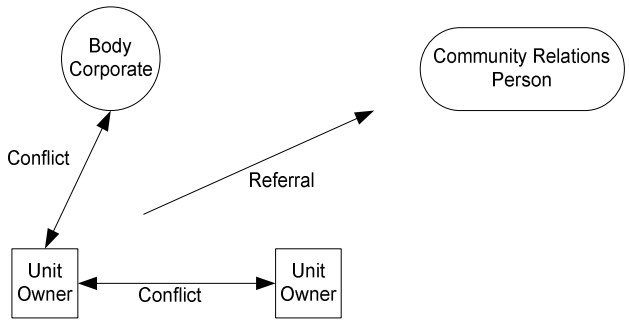
7.4 I realise that this sounds like utopia, but remember, what I am advocating is an environment that will not always work, but will, if properly promoted, assist in either:

(a) finding the best solution to conflict; or
(b) minimizing the impact of conflict on the community.

Community relations person

7.5 The community relations person will be a key player in the conflict management process. They must be carefully chosen for their "people skills". While the body corporate manager could undertake this role, my preference would be for a member of the community who is known and respected by the community. However, in the case of body corporate managers with large businesses, they may wish to consider engaging a person to specialize in community relations services.

7.6 At the first sign of serious conflict, the community relations person (whether internal or external) should visit both of the parties to see if there is anything they can do to assist in resolving the issues between them. They should operate according to strict rules of impartiality and confidentiality and these rules should be known to everyone in the community. They effectively act as mediators.



The Conflict Referral Process

8. Dispute Resolution

8.1 When conflict becomes a dispute, the community relations person may still have a role to play, particularly where they were not involved in trying to manage the earlier conflict. The important thing is to ensure that the dispute is resolved. If it is not resolved it will lead to

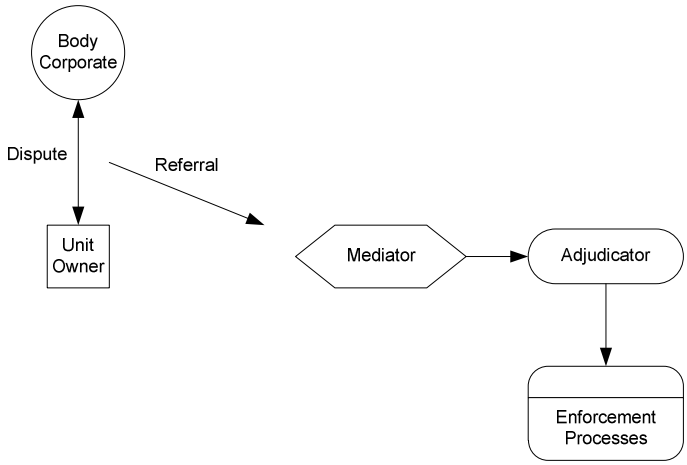
ongoing problems between the parties and, possibly within the community. It can eventually lead to a polarization of views and a break down of the communal spirit.

8.2 Disputes within strata title communities can be resolved in one of three ways:

- By private mediation (e.g. by the community relations person).
- By Government sponsored mediation services.
- By Government sponsored dispute resolution services (such as those that exist in New South Wales, Queensland and Western Australia).

8.3 I firmly believe that mediation produces the best results. It is also the most economical mechanism. It provides a fair environment to facilitate mutual, respectful problem solving efforts by the parties. The mediator assists those involved in the dispute to communicate clearly with each other, identify their own needs and then work together to develop a solution that meets those needs.[16] The important thing is that the parties to the dispute "own" the solution.

8.4 Where mediation does not work, or where it cannot be attempted because of the attitude of one or both of the parties, then the dispute must be the subject of adjudication. The adjudication system should be informal and inexpensive. It should also be timely, because delayed resolution usually leads to more entrenched positions and more collateral damage to the community. These are the essential qualities for any Government sponsored dispute resolution system.



The Dispute Resolution Process

8.5 The other essentials for any Government sponsored dispute resolution system are:

- The absence of jurisdictional boundaries (e.g. different sections under which relief is sought).
- Exclusivity of jurisdiction for most types of disputes.
- The ability to grant urgent interim relief.
- The ability to impose costs in limited circumstances.

[16] *From Hatred and Blame to Compassion and Resolution*, Jack A. Hamilton PhD, "The California Therapist" (Jan/Feb 1997).

- An effective means to enforce decisions.
- A specialist panel of adjudicators (i.e. adjudicators whether from the private or public sector who specialise in these types of disputes, rather than having a wide range of consumer disputes coming before them).

9. Summary

9.1 From what I have said it will be appreciated that the content of strata title legislation has a critical role to play in promoting harmonious living within strata communities. Indeed, every item that comprises the so called formula for harmonious living either requires or can be enhanced by good legislative provisions. In particular -

- Legislation needs to set out **clear rules** and ensure that rules made by the community are also clear and readily enforceable.
- Legislation should ensure that the rules, particularly by-laws, are **communicated** to residents so they know what is required of them.
- **Quality management** cannot be mandated but it can be encouraged and facilitated by the content of legislation and programs to support the legislation.
- The essence of the formula is **community spirit** and although it is a cultural thing that the community needs to develop, legislation can focus attention on the need for it and empower the body corporate to invest in its development.
- There needs to be a distinction between conflict and disputes and legislation needs to encourage the strata community to **manage conflict** so as to minimise disputes within the community.
- Legislation needs to set up both **mediation** and **dispute resolution** mechanisms that are informal and inexpensive to deal with any disputes that may develop.

9.2 I conclude by commending the Victorian Government for its focus on promoting a harmonious lifestyle within strata title communities and I encourage it to carefully consider the relationship between achieving that objective and the content of the legislation it is about to shape for the people of Victoria.

Gary F Bugden
22 March 2004