One Size Does Not Fit All

By Gary Bugden*

When it comes to making or reviewing strata and community title laws it is becoming increasingly clear that one size does not fit all and that the laws must look to the needs of different projects.

My topic for this issue of *Inside Strata* was inspired by two recent events. The first was an article in the *Australian Financial Review* in January about expensive management contracts put in place by developers in favour of related companies and the efforts of those companies to deflect issues, such as building defects, away from the developer.

The second was a democratic decision by owners in a building to grant an on-site manager a 5 year extension of its management rights without taking advantage of the opportunity to address serious legal and financial issues associated with those management rights. In the second case the anecdotal evidence is that the legal and commercial interests of the body corporate were discarded by the investment owners to the detriment of the resident owners, so as to favour the on-site managers' interests.

While these events point to the ongoing issues associated with long term management contracts around Australia and the failure, despite huge efforts on the part of some Governments, to stem the ongoing problems posed by these types of contracts, they also serve to remind us of the diversity and complexity of the strata and community tile sector in this country.

This arises from the diversity and complexity of the projects themselves. At the lower end of the scale of size we have 2 unit duplexes and 6 unit "walk-ups", while on the other end of that scale we have massive high rise buildings containing many hundreds of units.

We also have community title properties ranging from small townhouse complexes to massive master planned communities with 1,000 to 2,000 lots. Further complexity is added by multiple (tiered) bodies corporate, mixes of uses and airspace ("stratum") subdivisions regulated by statutory sanctioned contracts, known in some jurisdictions as "building management statements". And then we have concept developments, such as retirement villages and timeshare resorts.

As Governments around the country embark upon reviews of their strata and community title laws there needs to be a renewed understanding that "one law" will not effectively regulate all of the existing common interest properties, or the innovative ones that are certain to follow in the immediate future. The sooner this understanding occurs and is reflected in new "flexible" laws, the sooner will we start to see some relief in the myriad of problems that confront common interest property owners.

The options are reasonably clear:

1. The North American approach where project developers impose their own "customised" governance and management arrangements, subject to legislative safeguards. The disadvantage of this approach is that it requires a high level of Government oversight and results in lack of uniformity, as every project potentially ends up with its own set of rules.
2. The Queensland "white shoe brigade" approach, where there is a generic piece of legislation that regulates "ordinary" projects and project specific legislation for each of the more complex or unusual projects (e.g. *Sanctuary Cove* and *Paradise Centre*). In modern day Australia, this is not an option that would be embraced by politicians of any persuasion.
3. A modular approach where the Act is restricted to empowering and substantive provisions and the governance and management arrangements are set in a number of different regulations, each tailored to a particular type of project (based on use, size or some other criteria). This approach is similar to the "use" approach taken in Queensland in 1997 which, for a number of reasons, has not been very successful.

While the North American approach would be far too radical for Australian jurisdictions, the concept of allowing some flexibility to tailor governance and management arrangements for some projects in "governing" documents (such as a Community Management Statement) does have merit. The concept could incorporate "model rules" in a way similar to the way in which they operate under the *Corporations Act 2001* (C'wlth).

The modular approach allows government to make adjustments to the various regulatory regimes with the skills of a micro surgeon; removing or repairing what is required without unnecessarily impacting on the health of the rest of the regime. This minimizes the risk of resolving one problem in respect of a particular type of project while creating another problem for another type of project.

The NSW approach of having a generic piece of legislation with a number of by-law options to accommodate different types of projects does not go far enough. This is because the problems of communal living extend beyond the day to day use of common areas. They extend to the fundamentals of governance and management which in the case of NSW are set out in the generic legislation.

The Queensland experience has demonstrated that merely having a special module for long term management contracts does not relieve the tensions that arise in relation to such contracts. This is because the tension is caused by a number of issues, including –

- The differing interests and aspirations of investment and resident owners.
- An underlying "dislike" by owners of long term contracts imposed by third parties (such as a developer) – a dislike that appears to be universal around the world!
- The content of the long term contracts (which is usually controlled by the developer and designed to accommodate the developer's commercial interests).

I personally believe that there are circumstances where long term management contracts are warranted, but those circumstances are unusual. They certainly do not include the need, for project feasibility purposes, for the developer to be able to sell the management rights. However, they may include certain types of branded hotel or resort projects. For the average serviced apartment operation the long term contract is not essential, even if it can be said to be desirable. Serviced

apartments can operate on shorter term contracts or even using permanent employees (assuming that the law was flexible enough to allow that).

Where there are long term contracts there may be an argument that they should be confined to situations where all unit owners are investment owners, thus eliminating permanent owner occupation of units. This approach, which was the original concept for Queensland's *Accommodation Module*, would effectively ensure commonality of interest of the unit owners and thus allow for a less volatile governance and management environment.

Whatever the answer, to those charged with managing complex projects it should be clearer than it has ever been that in jurisdictions which promote innovative property development a single piece of generic legislation to regulate the full range of projects is no longer a viable option.

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