Review of the Strata Titles Act 1998 – May 2020

RESPONSE BY AUSTRALIAN INSTITUTE OF CONVEYANCERS (TASMANIAN DIVISION)

Comments by Debbie Hutton

Note: I have looked at this review based on feedback from my clients over the years with dealing with Strata legislation issues and my previous experiences owning Strata in NSW.

Area One – Planning and development of Strata Schemes

I have not looked closely at the Act to determine whether the planning and development requirements of the Act are effective, however believe that all planning and development aspects of strata should be dealt with in one piece of legislation. This would reduce the risk of missing important parts of the Act and confusing Strata with other development legislation.

Having the planning and development aspects of strata contained in the same legislation as planning and development requirements for a subdivision, has the potential to expose a development to additional costs through cross referencing the incorrect part of the legislation.

Area Two – Requirements for a Strata Plan

There is room for improvement in the legislation to bring clarity to the consumer in respect to Strata Plans.

Any Schedule of Easements covenants and/or easements that may apply to the Strata Plan are not noted on title.

Dimensions for the lot being purchased by the consumer are not noted on the Strata Plan.

Both the Schedule of Easement notation and the dimensions for to the lot provide clarity to a prospective purchaser of exactly what they are purchasing, particularly in villa or townhouse style developments where there are “backyards” associated with the lot. It is noted that instances have arisen where lot owners have fenced off some common property or part of another lot owners property. Without measurements for a lot owner to be guided by, these may be missed on inspection, or unknown.

Area Three – Different Regulatory frameworks depending on the number of lots, use of those lots and/or configuration of the development (conjoined, high-rise or villas)

Consumer confusion arises when there are a two or more lot Strata where there is no common property save for the boundary fences. Most other jurisdictions make an exception in different ways for the two lot strata.

As Tasmanian two lot developments (and some 3 lot developments) that have each driveway with direct access from the lot to the street, often have a different street address, eg, 1 Blog Street, 3 Blog Street etc and the only shared infrastructure being the boundary fence between each lot and any other neighbour, consumers are often confused as to why there is a requirement for them to have their building insured in conjunction with their

neighbour when a normal house next door contains the same type of infrastructure is not required to do so.

The NSW model appears to be the easiest for a consumer to understand in that “Building Insurance is NOT compulsory where the two buildings in the scheme are physically detached and there are no additional buildings on common property in the Scheme. Each owner may independently insure their own lot”

If the Tasmanian legislation is amended to include a requirement for Body Corporate Meetings or Management Plans, compulsory administration and/or sinking funds, these requirements would add the complexity of owning a two lot strata, in particular where there is a requirement for a majority vote for a resolution.

It is noted that NSW also has “NO requirements for two lot schemes to have any audit of accounts and financial statements UNLESS the annual budget exceeds $250,000.” This type of budget is highly unlikely in Tasmania, however going forward if this component were to be added to the Tasmanian legalisation, perhaps a percentage of the Scheme’s land value could be used, thereby making an even playing field for all two lot schemes.

Affordable and social housing considerations:-

It is my understanding that the majority of the “Affordable & Social Housing” properties are owned by or bulk rented by, community housing providers eg. Anglicare, Housing Tasmania etc. A consideration may be given to reduce the overheads for any Strata Schemes which are wholly or majority owned by the community housing providers, such as limiting the number of meetings required, suspending the requirement for an administration fund until such time as the majority of the Scheme is no longer owned by the community housing provider. It is my opinion that the requirement for insurance should remain however, particularly where there is common property within the Scheme.

This would provide flexibility for the community housing providers to channel resources to the predominant focus of providing the affordable and social housing.

Area Four – Management or Disclosure Statements

The current Disclosure Statement does not reveal information relating to the ongoing “day to day” of the Strata Scheme, but rather discloses information only relating to the Scheme whilst the Staged Development is in place. Any Staged Development is noted on title and removed once the development is complete.

A Management statement would be useful in the situation where you have a mixed used development, eg commercial and residential mix. Although these could, in some instances, be useful to be noted in the By-Laws.

Any rules applying to a residential Strata Scheme should be contained within the By-Laws. Once again this provides just one place for the consumer to obtain information on the Scheme. The issue with motions passed by a Body Corporate (eg for exclusive use areas etc) is that often that information is not readily available to a consumer until after they have purchased a property and is often difficult to obtain due to poor record keeping by Body Corporates (eg change of secretaries with different record keeping methods).

If By-Laws are to be changed, they should be registered on the title for clarity for all lot owners.

Area Five – Unit Entitlements

My questions on this one are:-

Is it fair and equitable that a lot with more area than another have the same entitlement?

Does is equate generally that area and market value go hand in hand?

If value of the lot is a factor is that land value or improved value?

Who determines the value, particularly over time when one lot owner keeps their lot well maintained, but another lot owner does not?

It is noted that the majority of unit entitlements in Tasmania are distributed equally among the lots. Is this due to the general ignorance of lot owners regarding the significance of unit entitlements, or is it due to the general practice (especially in regional areas) that the Body Corporates are “dormant” or “inactive” and therefore the value of unit entitlements are inconsequential?

Area Six – Common Property

Issues of properties that have no common property save a boundary fence would benefit from the option of having no common property. This is most common in 2 lot strata schemes, however could also apply to other larger schemes.

Consumers appear to automatically believe that all fences fall under the Boundary Fences Act and a notation of such should be available for the consumer.

As for how this could be implemented, new developments should comply with the legislation at the time of the development. Strata Schemes in existence at the time of the introduction to legislation could receive a retrospective exemption.

New developments could have a notation on the plan or title to the effect that there is no common property. Would this also provide that no common property title would issue.

Allowing for common property definitions to be included in either Management or Disclosure Statements would benefit the consumer in providing clear information on common property. However, from a consumer perspective, one document with all information would be far more beneficial for referencing than a number of documents with cross-over references.

Without definitions, there is the potential that there would be many variants of definitions for common property and thereby create more confusion in the industry.

Should there be a set of standard definitions (similar to definitions for a Schedule of Easements) that developers should abide by for their developments with any exceptions to these being included in By-Laws?

Area Seven – Activation of a Body Corporate

The current process is Tasmania is adequate, however where the problem lies is with enforcement. Developers who do not wish to "do the right thing" are often not pursued. The feedback I have received is that the process is very difficult for a consumer, particularly if the matter has been left for quite some time and other lot owners have been led to believe "there is no Body Corporate" when they purchased or they have a developer with majority vote.

In order to activate a Body Corporate in existing schemes, a regulatory body, Tribunal or some other specialist committee should be tasked with bringing all schemes into activation.

On the purchase of a strata property, a consumer is often not aware they are purchasing into a strata scheme or if they are, unsure of the details of such a scheme. Many instances have arisen where a consumer believes Strata means smaller and nothing more.

There are currently provisions under the *Neighbourhood Disputes About Plants Act* 2017 that provide disclosure requirements on a Vendor. Perhaps a similar disclosure provision could be included in the Strata legislation.

The disclosure documents could be:-

- By-Laws of the Scheme, whether these be the Model By-laws and/or Additional or amended By-Laws of the Scheme;
- Details of the Strata Insurance coverage in place (many consumers have purchased insurance coverage as noted in the contract, as no information has been available from the Vendor regarding insurance coverage).
- Body Corporate details, eg Secretary details or Strata Manager details, last meeting held;
- Current levies may also be critical in some instances, such as purchasers on a tight budget or limited ongoing income.

Currently there are many purchasers, who being unaware of the legislation until after they have executed a contract, are forced into breach situation that they are often unable to rectify (depending on attitude of developer or other lot owners), and cannot terminate the contract, which can cause undue stress etc for the consumer for longer than just the purchase process.

By legislating what items must be on the first meeting agenda and what documents must be made available as part of that meeting, may assist to prevent some developers from "railroading" a non-active status or other non-compliance measures for a body corporate.

Area Eight – Meeting Procedures

A Body Corporate is likely to have more success if there are more participants in the meetings. By permitting the use of technology this provides a broader view of a larger portion of the lot owners than otherwise may have been achieved, particularly when many investors are not located in the same area as their investment property.

There is the option of allowing proxies, but in some instances, this may grant a Chairman or some other person within the meeting a majority vote, thereby controlling the meeting and the future of the Scheme, particularly where robust discussion is in session. The opinion of the person providing the proxy (to enable the meeting to proceed), may change their mind following such discussion.

The use of technology is likely to assist in obtaining a quorum at the first meeting negating the additional costs of arranging a subsequent meeting.

Area Nine – Quorum

Should the decision to fix quorum numbers at a percentage for all strata schemes, details of a quorum should be set by the Act to provide clarity across the Tasmanian Strata Community.

However, this presents its own problems particularly if the legislation dictates a 50% majority of those entitled to vote and there are an even number of entitled voters. For the purposes of reducing the risk of stalemate, quorum numbers in the Model By-Laws can be amended by the Body Corporate to fix a majority at some other number or percentage.

All lot owners should have the opportunity to have their say at a meeting. If a quorum is reduced too far for a subsequent meeting or the notice for the subsequent meeting is short (eg 1 week), this may preclude a lot owner with an intent to be part of a meeting to do so. Allowing meetings to include participants through the use of technology may also reduce this scenario.

Reducing the quorum at a subsequent meeting may also provide for an avenue for decisions to be made to favour the few.

Area Ten – Access to and disclosure of body corporate records/information

Information is not always available to a consumer in accordance with s.83(5). There is no continuity on where the information can be obtained in such circumstances.

This is not necessarily a “fault” of the legislation, but rather the practice of “inactive” or “dormant” Body Corporates.

Another issue that arises when requesting information, particularly when acting on behalf of a purchaser, the information to be provided under s.83(5) is often delivered in many formats, particularly when dealing with Body Corporates run by lot owners rather than Strata Managers. An inclusion should also be a copy of the current insurance policy (including the premium paid for such insurance) particularly for those “inactive” or “dormant” schemes.

Information should be provided within a timely manner and a timeframe should be set.

If there is no incentive to comply with the legislation by way of penalties applied, it condones an attitude of “it doesn’t matter anyway”.

The Act should not preclude any method of provision of information, particularly for lot owners or purchasers.

A Body Corporate is an entity that performs a service and should be able to be rewarded for provision of such service.

Area Eleven – Roll or Register for the Body Corporate

A Body Corporate should be compelled to maintain a roll or register for clarity of current lot owners. With so many ‘inactive’ or ‘dormant’ Bodies Corporate there may need to be consideration given to the timing of implantation of such a measure. New developments must comply immediately with a timeframe set for all Bodies Corporate to comply. It is likely that any Strata Manager appointed by a Body Corporate has and “unofficial” roll or register in place already.

The roll should contain information as per NSW legislation especially current By-Laws. Access can be granted to Strata Manager (who are likely to maintain the roll on behalf of a Body Corporate), lot owners, Mortgagees with noted interest in a lot.

Area Twelve – Insurance

With the exception of strata schemes if certain conditions are met (eg a scheme with no common property and no active Body Corporate), insurance should be maintained by the Body Corporate.

The risk associated with leaving the insurance in the hands of a consumer, especially where the scheme is a villa type setup with no common walls but there is common property such as amenities or driveway is that the consumer may arrange insurance that does not adequately cover the common property.

Insurance should cover all improvements and common property. A requirement for a valuation to be conducted periodically (eg. every 3 years) will also ensure adequate insurance for the scheme. Without these measures there is potential for a lot owner to hold inadequate insurance to the determent of others within the scheme.

Should there be an insurable event on common property, and Lot 1 has inadequate insurance, it has the potential to cause issues for all lot owners.

If all lot owners have separate insurance, there is the potential of insurance companies in dispute over value of loss, reinstatement requirements etc, creating a long drawn out process for lot owners.

For example Lot 1 holds inadequate insurance coverage (or no insurance) and an insurable event occurs, eg fire on Lot 1, there is likelihood the reinstatement will not be to a similar standard to others within the lot, or no reinstatement due to financial constraints, which in turn has the potential to de-value other lot owners properties.

Area Thirteen – Dispute Resolution

Does the Land Titles Office have the resources to receive initial applications for relief?

With an external dispute resolution provider, is it likely the consumer (who are potentially mum and dad owners) likely to be too far out of pocket to consider pursuing a dispute?

Is RMPAT resourced sufficiently to handle all disputes from the initial application, bearing in mind that the popularity of Strata Development is increasing in Tasmania?

Concern:- If the dispute resolution process is too arduous for the consumer, the developer (initially) may refuse to comply with legislation by not forming an active Body Corporate or obtaining strata insurance leaving consumers who purchase unable to terminate contracts and bear the brunt of the developer's non-compliance.

Is it a possible alternative to create a mechanism that a Developer must provide evidence of Body Corporate meeting or at least insurance before consumers locked into purchase?

By targeting the developer to comply with legislation, ongoing issues by active or inactive Body Corporates to comply with legislation, particularly with respect to insurance may be limited.

Whilst it is possible that some of these issues could be dealt with by a Contract for Sale, there is not legislative requirement for the use of a “standard” contract within Tasmania.

Perhaps the legislative requirement could be contained withing the Strata Titles Act, similarly to the Neighbourhood Disputes About Plants Act 2017.

Area Fourteen – Strata Managers

Whilst at present in Tasmania there is no regulation of Strata Managers, in time are we opening our State up to abuse by Strata Managers against the Body Corporate without anywhere for the consumer to turn to?

If Strata Managers are to hold funds in Trust Accounts for consumers (Bodies Corporate), then some sort of regulation should be in place to ensure accountability.

Area Fifteen – Keeping of Animals

Changing Model By-Law 7 to permit the keeping of animals brings with it other problems such as type and size of animals.

The keeping of animals on a lot should be maintained as a flexible item for each Scheme to determine. Some schemes are not suited to animals or particular types of animals, whereas other schemes are.

Without disclosure legislation in place, removing reference to the keeping of animals from the By-Laws, provides further confusion for a potential purchaser unable to obtain information prior to signing a contract. If a position is not stated, then a default position needs to be in place.

Area Sixteen – Future Maintenance Schedules

Maintenance plans for 5 years provides lots owners and prospective lots owners with clarity on likely future expenditure. The plan should be reviewed at annually.

Plans should be prepared by independent specialists to reduce the risk on under valuing the maintenance schedule.

This however does not take into account the common practice in Tasmania of an ‘inactive’ or ‘dormant’ Body Corporate.

If it is not likely that the legislation will require all Bodies Corporate to be active, then making of a maintenance plan as a legislative requirement is likely to fail.

Areas Seventeen – funds established for various purposes

Strata schemes with no common property except for boundary fences should be excluded for practical purposes, of running accounts. Maintenance in these schemes is likely to be undertaken by the individual lot owners in any event, particularly if the insurance requirement is waived for such schemes. There should be an option to ‘opt in’.

If establishment of funds for other schemes is left unmandated there is the possibility that if sufficient lot owners do not agree with the 'maintenance' fund in principal, they could vote for minimal funds to be retained leaving future lot owners to bear the brunt of expenses by way of special levy, particularly for a lot owner who does not maintain their property. Without disclosure legislation this has the potential to leave some consumers in an untenable position.

Area Eighteen – Compliance and Enforcement

Any non-compliance should be dealt with by the Body Corporate initially. The issue then arises if the Body Corporate is 'inactive' or 'dormant' and one member of the Body Corporate attempts to have the issue resolved. There should be a mechanism for a single lot owner to report non-compliance without the burden of following up on the non-compliance.

Current system appears sufficient where a Body Corporate is active.

Feedback has been received from consumers frustrated by the process when there is no active Body Corporate in place or the developer still part of the Body Corporate and assuming a position of power and dictating because they are the developer.

COMMENT FROM HELEN KENT

My only input is in relation to Dispute Resolutions – refer 2.13 on page 65. It mentions that Tasmania is the only State that relies on the Land Titles Office for dispute resolutions. Every other State has a governing body to which disputes can be referred for external dispute resolution.

I firmly believe that we should be doing the same. We need a strong governing body that also has the power to impose and collect fines so that Bodies Corporate and their members will stand up and take notice and not be so dismissive of the process.

COMMENT FROM GRAHAM WOODHOUSE

A Bond should be paid by the developer on lodgement of the strata plan, such bond to be refunded if the developer can prove they have complied with legislation with respect to holding the first meeting, setting up a Body Corporate correctly and has strata insurance in place.