Strata Titles Act 1998 Review

Response from the Property & Commercial Law Committee of the Law Society of Tasmania

Introduction

The Property & Commercial Law Committee supports a review of the *Strata Titles Act* and strata practice and subdivision laws.

The special features of strata titles were designed to enable development and land titling of separately owned portions of buildings and in particular multi-storey buildings. All of the special features of a strata title are likely to be needed to manage separate owners of portions of a community of titles included in a multi owner building.

The control of development by reference to lot size needs to be more sophisticated than simply rely on a minimum lot size. Strata titles should not be applied just to access an exception for minimum lot sizes.

The planning system is now better responding to density and lot sizes, but the old sub-division legislation remains and calls out for reform.

Smaller lots and greater lot density calls for greater sophistication and, to that extent, sometimes a greater need for the solutions available in strata titles. They are sometimes applied where they are not needed and where their inclusion merely creates unnecessary burden.

The Strata Title legislation often works poorly in those cases where its sophistication is a poor match for the needs of parties.

The Committee's view is that any review of the Act should be part of a much broader review of the subdivision of land, as has been discussed in past meetings. Notwithstanding that, we certainly welcome your review and hope that our responses are of assistance. We would welcome the opportunity to discuss these matters in further detail as the review process unfolds.

Area One - Planning and development of strata schemes

Q1. Are the planning and development requirements in the Act effective?

A. No – we consider they should be separate. We have provided further comments below regarding planning aspects and suitability of strata schemes for certain developments.

Q2. What additional requirements, if any, should be included?

A. None but they should be included elsewhere as indicated above.

Q3. Are the current provisions in relation to community development schemes and staged development schemes easy to understand? If you find they are not, how do you suggest they be amended to provide further clarity?

A. We make no comment

Q4. Should the planning and development aspects of strata be dealt with in legislation separate from legislation dealing with strata scheme management?

A. Emphatically Yes

Q5. Should the planning and development aspects of strata be contained in the same legislation as the planning and development requirements for a subdivision?

A. Yes

Q6. Should a review of the planning and development aspects of the Act form part of a more comprehensive review of all legislation dealing with land development?

A. Emphatically Yes.

Area Two – Requirements for a strata plan

Q1. Are the current requirements for a strata plan adequate?

A. We believe this is really a question for Surveyors to answer, but from a conveyancing and lay persons viewpoint perhaps notations could be better explained and set out, perhaps even using a schedule or some other proper explanatory notes.

Q2. Do they provide for proper boundary definition?

A. Yes – but why don't they always include measurements?

Q3. What additional requirements should be introduced?

A. Perhaps a separate sheet showing common property & underlying easement

Q4. Should a location plan and floor plan be added to the requirements?

A. There is some sense to this suggestion. Anything which could show a lot as two or three dimensional would be beneficial

Q5. What role does the Council play in relation to the approval of strata plans and what role should it play if you believe it should be different?

A. They issue permits and sign Plans. We are not sure what more say they could have, unless planning laws are changed which allow an alternative to strata titles where a relaxation of minimum lot size and more effective use of easements, caveats and Part 5 Agreements could be used (i.e. relax minimum lot size requirements).

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

Q1. Should different rules apply to strata developments, based on the number of residential lots in the strata development, the use of the lots, or the configuration of the development?

A. Yes

Q2. If you agree that different rules should apply based on size, use or configuration of the development, which rules should lots be exempted from and how is that exemption applied?

A. Perhaps exemptions based on use, complexity, whether conjoined buildings or number of units. Some consideration should be given to allowing separate insurance for small residential developments.

Q3. Should Tasmania adopt a similar model to that in Queensland were regulatory modules have been developed for different types of strata developments?

A. We should consider a model similar to Queensland to reflect mixed use etc.

Q4. Given the increased need for affordable and social housing, moves towards increased density, inclusionary zoning, use of density bonus and the like (in Tasmania and in other jurisdictions), are there any

considerations or specific provisions relating to social and affordable housing that should be considered?

A. Do we need to differentiate between "social" and "non-social" housing? Government generally effectively outsources this to the private sector. By creating a distinction, do we risk creating ghettos?

Q5. Should different rules apply to strata developments that are in part or whole designed to encourage and deliver social and affordable housing?

A. No

Area Four – Management or Disclosure Statements

Q1. Should a management statement or disclosure statement be required for all strata developments, and if so, what should that statement cover?

A. The purpose of Disclosure Statements and Management Statements is for Council and therefore more a question for Town Planners.

Q2. What additional requirements would you suggest being included in a disclosure statement or management statement for a staged development scheme and community development scheme respectively?

A. No response

Q3. Should a statement be used to establish what is common property, service infrastructure and respective maintenance responsibilities?

A. For common property, no if the definition is in the legislation is sufficient to begin with. We query whether it is. Service infrastructure and maintenance should be obvious and are frequently covered by General Law.

Q4. Should a penalty apply for non-compliance?

A. Yes, but only if it will be enforced.

Area Five – Unit Entitlements

Q1. What do you think should be used as the basis for determining unit entitlements?

A. Other jurisdictions recognise there are a number of relevant issues for unit entitlements and unit obligations. So should Tasmania.

The specifications of unit entitlements and unit obligations needs to be flexible. To a large extent the current provisions achieve this outcome.

The legislation should recognise as separate categories:

1. Governance entitlements, the right to vote with:
a. differential weighting; and
b. rights of veto, which often but not always will be expressed as a requirement for unanimous resolution.
2. Ownership entitlement, what is the interest of the lot owner in the event of a sale of some portion of the common property.
3. Contribution liability, what is the proportionate obligation to contribute to costs of some sort of infrastructure or some particular activity.

In simple cases, all lots will have the same proportionate responsibility for each of these potentially different aspects.

If all lots are the same for the purpose of, governance, contribution, and ownership, then there will be single unit for all these aspects and each lot owner will have the same obligation and entitlement. With that default, the legislation should enable the parties to make differential arrangements for different lots and different aspects of the community ownership and activity as the development demands.

Q2. For what additional circumstances, if any, could a special unit entitlement be established?

A. The circumstances requiring special definition of unit entitlements and obligations are so diverse that they are not usefully limited or classified.

The current purposes for special unit entitlements in section 16 are broad but do not properly recognise the current practice of using these entitlements to levy discrete charges on certain lot owners and not others. This occurs where there are parts of common property or assets

on common property (eg lifts) that are not used by or available to some lot owners.

Area Six – Common Property

Q1. Should the option of having no common property be introduced in Tasmania, and if so, how would this be implemented?

A. If not required, and if the definition of Common Property is sufficient adequate, then no, if the development does not need one. However, there is a problem sometimes with the definition of Common Property, for instance the middle of a fence. However, for large scaled developments there typically will be a requirement for common property.

Q2. Should the strata plan and associated management or disclosure statements include further definition and/or information regarding common property (i.e. describing further what it includes and excludes)?

A. Yes, but the definition in the legislation needs to be reviewed and sufficiently certain as well as the definition of Service Infrastructure.

Q3. Is a single comprehensive definition of common property required? If so, what should it include?

A. Yes, see notes above

Q4. Are the current provisions clear as to when service infrastructure is common property? If it is unclear, what changes need to be made?

A. Yes, but the practical application is potentially difficult

Area Seven – Activation of a Body Corporate

Q1. Who should be responsible for activation of a body corporate in existence prior to the current provisions requiring the original owner/developer to hold the first Annual General meeting, and who should be notified of its activation?

A. The initial developer or owners from time to time. There is a practical consideration in that titles often issue and settle in rapid succession. There needs to be a fall-back position in case they have not met. Perhaps a deeming provision if certain things have happened (save and except insurance)

Q2. Should the Act provide what items should be included on the Agenda for the first Annual General Meeting?

A. Yes, but only a minimum. Perhaps there could be a model agenda which would also assist time poor developers as referred to above.

Q3. What documents should be required to be presented by the original owner/developer at the first Annual General Meeting?

A. Insurance policy

Q4. Are the current sanctions for non-compliance with a legislative provision adequate and appropriate?

A. Yes, if enforced

Q5. Should there be certain disclosures or requirements in relation to the strata scheme on a sale of property within that scheme? If so, how should this be mandated and effected?

A. Yes, but should be regulated by the profession within their contract. The Government has been happy in the past for self-regulation in this respect and could be reviewed by industry/profession as they are the parties that deal with practical difficulties.

Area Eight – Meeting Procedures

Q1. Should the Act specifically permit the use of technology to facilitate meetings?

A. Yes

Q2. What limits, if any, should be imposed on the use of technology?

A. Only that it should be readily available and usable for all

Q3. In respect of what specified subject matters should the Act require ordinary resolutions?

A. The Act already specifies those resolutions that are required to be ordinary or unanimous resolutions. The by-laws can be used as required for any other decision making requirements.

Q4. In respect of what specified subject matters should the Act require special resolutions (noting that special resolution needs to be defined)?

A. The current provisions requiring unanimous resolution are open to abuse by a disgruntled owner. The use of special resolutions (with an appropriate definition) would be more beneficial and cause less potential disruption. Special resolutions could be applied to all current resolutions under the Act required to be unanimous, other than those that may impose a liability on an owner.

Q5. In respect of what specified subject matters should the Act require unanimous resolutions?

A. Only matters that may impose an obligation on an owner should be unanimous. Others that do not impose obligations would be better suited to special resolutions.

Area Nine – Quorum

Q1. Should the quorum requirement be contained in the body of the Act rather than in the Model by-laws?

A. There is an opportunity for abuse of rights by the manipulation of a quorum specifications. To that extent the body of the Act might usefully make some specifications on a quorum.

The broad relief powers under the existing Act gives some relevant protection and if the dispute resolution forum for disputes under the Act were enhanced, that relief protection would be more practical.

Q2. Should the Act include alternatives for when a quorum is not present at the commencement of a meeting as other jurisdictions have? If so, what should that alternative be?

A. Yes. The provisions adopted in Victoria should offer guidance, with appropriate amendments for our purposes.

Q3. Is 50% an appropriate requirement for a quorum in model by-law 10?

A. No, although it is difficult to be too prescriptive about a quroum as there are so many variations as to what is appropriate.

The Act should be consistent or carefully define *"member"* and *"Owner"*. There are instances where member refers to unit entitlements and owners as to number of owners which obviously can lead to confusion and unintended and possibly unjust consequences. We contend that there should be some consistency.

The 50% rule set out in Model By-Law 10 is suitable on the face of it, but it should be contained in the body of the Act or, in the alternative, retained in the Model By-Laws **BUT** the Act should provide some machinery to regulate when that may occur. This would provide an initial basis but still allow for flexibility to be adopted.

Q4. Should the percentage be different depending on the number of strata lots in a strata scheme?

A. The mechanism for determining a quorum must be sufficient to be fair but also reflect some reality that larger bodies corporate may have difficulty in reaching a quorum requirements for a number of reasons. The proposal to allow bodies corporate to determine a quorum should be allowed, subject to some regulation within the Act.

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

Q1. Are the current requirements for the provision of information adequate?

A. Yes, but perhaps incorporate aspects from other jurisdictions

Q2. Should the Act specifically provide for the electronic provision of information?

A. Yes

Q3. Should a body corporate be able to charge a fee for the provision of information?

A. Yes, but a limit and it will depend on the information required and whether a third party charge needs to be passed on.

Q4. Should a specific timeframe be included by which the information sought should be provided?

A. Yes

Q5. Should a penalty be included for non-compliance?

A. Yes but through the Recorder of Titles

Area Eleven – Roll or register for the body corporate

Q1. Should a body corporate be required to create and maintain a roll or register?

A. No but it is perhaps preferable for communications. Most information is available by public search and is perhaps more up to date.

Q2. If so, what information should be included in the roll or register?

A. Contact details.

Q3. Who should have access to the roll or register, and what fee should be payable?

A. NA

Q4. Should a penalty be included for non-compliance?

A. NA

Q5. Should smaller developments be excluded from having to maintain a roll or register?

A. Yes

Q6. How does this proposal to create or maintain a roll or register relate to principles and legislation regulating privacy and personal safety?

A. It is problematic. If a role or register is required, then the lot owner should have the option of opting out due to privacy and safety considerations and the like. Contact in those cases could be made through a secure third party such as the Land Titles Office.

Area Twelve – Insurance

Q1. Should smaller strata schemes (eg two-lot strata schemes) be exempt from the requirement for the body corporate to take out insurance (bearing in mind that where there is common property, they will be personally responsible for any damage arising out of the use of that common property)?

A. Yes. Insurance in common where parties prefer to self-insure is perhaps the biggest frustration with the current legislation. The legislation is largely ignored by many bodies corporate in this respect.

The legislation should at least restore the option for a lot owner to self-insure and opt out of common insurance where there is no common building. Any such self-insurance should require public liability cover that extends to the common property.

Some polices are issued over strata lots, containing an exclusion clause for liability of the insurance company if the title is held under the Strata Title legislation. It would be a useful reform to make any such exclusion clause invalid.

Q2. If so, should this exemption be limited to certain circumstances, including where a unanimous resolution of the body corporate has been obtained?

A. Yes, see above.

Q3. What should be insured (e.g. improvements on the lots and on the common property, only improvements on the common property, etc)?

A. The current requirement suits many developments and in particular multi-storey developments. In this setting insurance should cover all aspects including buildings and common property and public liability. If certain schemes are able to be exempt they should be fully exempt to avoid a partial compliance regime which would be worse than a full compliance regime.

Q4. Should a monetary penalty apply for non-compliance?

A. Yes

Area Thirteen – Dispute Resolution

Q1. Should each body corporate be required to establish an internal dispute resolution process?

A. Perhaps mediation run by a suitable third party – otherwise no

Q2. What is the most appropriate external dispute resolution mechanism for dealing with strata-related disputes?

A. The existing dispute resolution process and practice is capable of dramatic improvement.

Disputes with reference to strata titles are generally matters of community living.

The Recorder of Titles should not be expected to mediate or arbitrate neighbour disputes.

There needs to be a quick cost-effective dispute resolution forum which compels the parties to initially engage in a mediation conference and then quickly moves onto arbitrated result.

The Resource Management and Planning Appeals Tribunal is the logical body.

All of the dispute resolution provisions in the legislation should be referred to The Resource Management and Planning Appeals Tribunal.

The provisions in one of the other states where there is an automatic reference by the registrar to a mediation conference is worthy. That is a typical process and works well in the Magistrates Court.

It is unrealistic to expect each Body Corporate to have its own internal dispute resolution process.

It is possible that the appointed forum for dispute resolution may outsource some of the mediation. Some element of compulsion is often needed for parties to engage in mediation. Mediation as the first response to an application for arbitration process is often required where the parties are not able to resolve their dispute without intervention by a third party.

Area Fourteen – Strata Managers

Q1. Should strata managers be regulated and/or licenced in Tasmania and if so how and in what way?

A. Yes. Given strata managers are in control of money the establishment of a regulatory framework similar to other professions having control of monies (Lawyers, Real Estate Agents, Conveyancers) would seem appropriate.

Q2. If you have a preferred model of regulation, what matters should be regulated, for example qualifications, operation of a trust account, and sanctions for non-compliance?

A. The work of a strata manager is perhaps closest to the work of an estate agent. If it is necessary for there to be Statutory Regulation and Licensing integration with the Property Agents and Land Transactions Act may be worthy of consideration. The Tasmanian branch of Strata Communities of Australia is well established and would be able to give sound advice.

General oversight could be through a code of conduct with regulation focussed primarily on control and auditing of funds under their control.

Area Fifteen – Keeping of Animals

Q1. Should the reference to keeping animals be removed from the model by-laws thereby allowing individual bodies corporate to determine whether they are allowed or not?

A. Yes

Q2. Should Model by-law 7 be changed to permit the keeping of animals?

A. No.

Q3. Should the provision regarding animals be in the body of the Act rather than the Model bylaws which can be changed?

A. No

Q4. If it is moved to the body of the Act, what should the provision be?

A. NA

Area Sixteen - Future Maintenance Schedules

Q1. Should a requirement be introduced that all or some strata schemes have a future maintenance plan or schedule, and if so, what time period should that plan cover?

A. No. The variation between strata schemes is too broad to mandate future maintenance plans or schedules. The less regulation the better.

Q2. What reporting, if any, should be required in relation to the maintenance plan or schedule and for what time period?

A. NA

Area Seventeen – Funds established for various purposes

Q1. What funds, if any, should be mandated and if they are mandated should there be minimum and maximum amounts set either in legislation or bylaws?

A. No, this is a matter for owners. The less regulation the better

Q2. Should the funds established reflect the required costs identified in a maintenance schedule, management statement or disclosure statement?

A. NA

Q3. Should smaller strata schemes (e.g. two-lot strata schemes) be exempt from the requirement to establish a fund to meet anticipated and actual costs, and have the choice of opting in?

A. Yes

Q4. Are the current sanctions for non-compliance with a legislative provision adequate and appropriate? If the strata scheme does not have a strata manager and the scheme has established a fund, should an independent

government agency similar to the Tasmanian Government Bond Authority be responsible for regulating the use of that money?

A. The first question, no. To the second question, yes, as a guard against misappropriation or where parties are in dispute.

Area Eighteen – Compliance and Enforcement

Q1. How should non- compliance with legislative, orders by-laws and provisions be dealt?

A. Fine by appropriate authority

Q2. What are the legislative requirements in respect of which there should be an enforcement regime, and how should that enforcement regime operate?

A. We have no fixed view.

Q3. What level of responsibility should a body corporate assume in relation to compliance and enforcement, and what should this involve?

A. We have no fixed view.

Q4. Which external body should be responsible for enforcement if a body corporate is unsuccessful in dealing with non-compliance?

A. Land Titles Office, RMPAT or a suitable Administrative Tribunal (such as the Tasmanian Civil and Administrative Tribunal).

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