Kay M Rodda

16 June 2020

Craig Pursell
Review of the Strata Titles Act 1998
Land Tasmania
Department of Primary Industries, Parks, Water and Environment
GPO Box 44
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Dear Sir

I would like to submit comments in relation to strata schemes against nine areas identified in your latest discussion paper for the review of the *Strata Titles Act 1998*.

The areas on which I wish to make submissions are:

1. Meeting Procedures (area eight)
2. Quorum (area nine)
3. Access to and disclosure of body corporate information (area ten)
4. Roll or register for the body corporate (area eleven)
5. Dispute resolution (area thirteen)
6. Strata managers (area fourteen)
7. Keeping of animals (area fifteen)
8. Future maintenance schedules (area sixteen)
9. Funds established for various purposes (area seventeen)

I also wish to make suggestions about retention of body corporate records, and about the information about the strata law publicly available for a body corporate and for its committee of management.

1. <u>Meeting Procedures (area eight)</u>

Electronic communication

Provision for electronic communication and participation is essential as it reflects the main means of current social and business communication. The *Electronic Transactions Act* 2000 requires a recipient to have the capacity to receive information in the form it is sent. Such protections should be extended to electronic communications within strata title law. This arrangement would permit, but not require, a body corporate to utilise various forms of electronic communication.

I support the inclusion of notices of general meetings, service of other notices, proxy nominations, and proxy voting at general meetings in any provision for electronic communication.

I do have a concern about the retention of electronic records. Where a body corporate has a domain email address, there is capacity to retain past and current

records, regardless of the strata manager (if any) or committee of management office holder. However, in most cases, the email address used is that of the person or of the strata manager engaged in the electronic communication at a particular time in the existence of the body corporate. The storage of these records, and future access to these records, becomes problematic as body corporate strata managers and committee members change over time, and as computer systems are superseded.

Unanimous resolutions

I am strongly in favour of retaining unanimous resolution as the threshold for disposal of common property as this protect the interests in, of all members of the body corporate. I have no other comment about unanimous resolutions.

Ordinary resolutions

Current strata law allows matters that would be subject to ordinary resolution of the body corporate to be exercised by a committee of management, and the committee of management, exercising the powers available to the body corporate, can appoint and delegate functions to the manager. Although current strata law allows a body corporate to limit the functions the committee of management can exercise. I expect this would be rarely done in practice, with the result there can be an estrangement of the body corporate from business transacted in its name. See also comments under strata manager, area 14.

I suggest there is a case for additional protections to be provided to the body corporate where decisions impose obligations or responsibilities (by making by-laws), or are capable of alienating access to common property (exclusive rights), or delegate specific or general powers for the management of the strata scheme to a third party. I have no particular preference for how the body corporate retains that that control.

2 <u>Quorum (area 9)</u>

What constitutes a quorum

I support retention of a quorum of 50% of the total body corporate for a general meeting and 50% of the committee of management for a meeting of that committee. Fifty per cent is a generally accepted threshold, and it is clear and unambiguous. In addition, I propose that the quorum be included in the body of the Act, not by-laws.

The current placement of the description of a quorum for the purposes of the Act, in the Model By-laws, gives a body corporate the flexibility to tailor the description to suit its particular needs. This flexibility also enables a person/committee exercising delegated body corporate powers to change the quantum for a quorum without body corporate agreement, unless the body corporate has retained the power to make by-laws to itself. Section 91 of the *Strata Titles Act 1998* may provide protection against the action, but placement in the primary legislation is preferred.

Constitution of a quorum

I suggest that the provisions relating to proxy voting be specified as relating to general meetings of the body corporate only (that is, not to committee of management meetings).

Many factors can contribute to a member of the body corporate not attending a general meeting of the body corporate. The proposition that a member of the body corporate be deemed, for the purposes of establishing a quorum, to be in attendance at a meeting through the lodgement of a proxy vote has considerable merit. Such a provision, combined with the capacity to lodge a proxy vote electronically, offers significant advantage to members wanting to, but unable to attend a general meeting of the body corporate in person.

There is also a need for protection against proxy harvesting. This would be particularly important should the proxy be included in a count for a quorum: but the need exists regardless. A limit is required on the number of proxies that can be held by a person for a general meeting. I suggest that a person be able to hold no more than two votes – if the person is a member of the body corporate, then only one more proxy vote be held. A limit should not apply where the proxy is given to the chairperson of the general meeting.

On a failure to obtain a quorum at a meeting

I do not support resolutions being regarded as interim resolutions in the absence of a quorum at the general meeting: it complicates the process and delays finalisation of actions beyond the date that would come from an adjournment. The adjournment of the meeting for a week, will afford the body corporate a second opportunity to participate, and prompt notice of the adjournment is reasonable with the predominant use of electronic communication. The New South Wales and Queensland arrangements for when a quorum is not present within half an hour of the time fixed for the adjourned meeting appear reasonable and appropriate.

3 <u>Access to and disclosure of body corporate (area 10)</u>

A member of a body corporate [as a part owner of the stratum scheme] should have free and unfettered access to the records of the body corporate, subject to the provisions for the protection of personal information. The outline of the New South Wales provisions covers key associated elements, but should also extend to disclosure of current by-laws.

The range of documents available to a person other than a member of the body corporate [WA legislation describes a person *who has a proper interest in information about strata titles scheme*] should not extend to matters beyond those reasonably required to assess the financial and management health of the strata scheme and any encumbrances or debts associated with the particular lot of interest. Other records or documents in the control of the scheme and details of the names of the members of the body corporate should not be made available to a third party.

The body corporate should be able to impose a fee to access the information by a person who is not a member of the body corporate. This fee could be one determined by each body corporate, but preferably one determined by reference to a scale of fees prescribed in other legislation for document access. To cater for a

situation where access can be immediate and not resource intensive, there could be provision for the body corporate of the chairperson of the committee of management to waive the fee in special circumstances.

The timeliness of access is a factor: the quantity and location of the records requested, and the availability of the custodian of the records will impact on the time taken to service the request, however access should be required to be provided within a reasonable period. I do not favour a penalty being attached, primarily because the body corporate itself cannot recover penalties, and also because the processing time will depend on the facts in each case. An applicant should have the right to seek resolution of disputed [however provided] reasonableness of the time being taken, or expected to be taken, to service the request. This line of action should obviate the need to obtain authority to pursue a financial penalty.

4 Roll or register of the body corporate (area 11)

Many body corporates maintain a de facto roll for the purposes of, at least, issuing notices, such as contributions levy and notices of general meetings. The formality of such an arrangement in a small, say two-unit, scheme is likely to be capable of being managed otherwise. It may be appropriate to apply separate provisions to smaller schemes.

For larger schemes, the creation/maintenance of a roll or register is desirable. Looking at the data required in different states, the details specified in Western Australian legislation appears to be the most focussed and likely to have the greatest value to day-to-day administration. However, there are two additional features would be of beneficial use, they are the total lot entitlements of the scheme and the lot entitlement of each lot, and, in the case of a lease or tenancy, details of the managing agent.

The collection of this information does not appear to conflict with the protection of personal information principles, provided it is used only for the purpose for which it is obtained. Release of details to a third party would contravene those privacy principles {see comments under area 10). These constraints may not apply to access to the roll by other members of the body corporate as they are, essentially, co-owners in the scheme, although this assumption should be confirmed.

I do propose that a member of the body corporate have the right to apply to have their contact details suppressed from being accessed by other members of the body corporate (for particular reasons such as those that apply for silent electoral roll enrolment), and that the chair of the committee of management have the sole authority to approve any such application.

5 Dispute resolution (area 13)

There is considerable value in providing for a cheap, quick resolution of disputes that arise from decisions made, or failed to have been made, by the body corporate management (committee or a strata manager if exercising delegated power).

A desirable preliminary step would be a voluntary dispute resolution process as provided in New South Wales legislation. That approach provides the flexibility to establish an ad hoc mechanism that can be adjusted to fit particular circumstances.

However, certain protections should be included, these include the mediator being acceptable to both/all parties to the matter (to exclude any apprehension of bias), that there be a record of agreement signed by all parties and the mediator or, in the event there was no agreement, a record signed by all parties and the mediator as to the facts agreed.

In the event of non-agreement on the matter, or of failure to agree to a mediator, a further formal review needs be available. The involvement of the Recorder of Titles in resolving disputes has merit in that it is a specialist in strata law and has a primary responsibility for the integrity of strata schemes. The Recorder will generally be able to approach a matter with 'clean hands', one exception would be if the matter followed a body corporate's successful application under section 133 to impose a penalty.

Mediation can be expected to winnow out many disputes, but there will be matters to be taken further.

In 2015 a recommendation was made for various disparate Tasmanian tribunals and boards to be amalgamated in a single civil and administrative tribunal. The recommendations extended to cover decisions by the Recorder of Titles under the *Strata Titles Act 1998*. This structure, if adopted, would be consistent with the models in place in other states. A single external review authority for strata title disputes is the more efficient both administratively and from an applicant perspective, than the current two-step process.

The establishment of a Tasmanian Civil and Administrative Tribunal, and the incorporation of strata law disputes within its jurisdiction, is the preferred external dispute resolution mechanism.

6 <u>Strata managers (area 14)</u>

The existing Tasmanian strata provisions for the appointment of a strata manager is inadequate for proper accountability and actions. There is provision in the Act for strata manager to be subject to control and direction of the committee of management or body corporate, however there are uncertainties of actions and roles where there is both a strata manager and a committee of management.

There are many valuable provisions in Part 9 of the WA legislation relating to strata managers, and these would translate well to Tasmanian strata management. One of the most important is that the body corporate authorises the strata manager to perform a specified function – rather than the blanket delegation allowed in current Tasmanian strata law. Other beneficial provisions in the WA Act are specific provisions for volunteer strata managers, prescription of minimum requirements for strata management contracts; and the prior disclosure of any conflict of interest and expectation of other benefits from performance of the contract. Further desirable provisions come from regulations to the WA Act in relation to matters such as criminal record checks, and the qualifications of both the strata manager and certain designated employees of the business of the strata manager. Tasmanian law does not provide for qualifications such as those cited in the WA regs, but the basic principle, that the professional strata manager and persons with key roles in the

strata manager's business have appropriate knowledge and qualifications to perform the work entrusted by the body corporate, is sound.

The WA Act also provides a committee of management is not prevented from performing a scheme function that is within the authority of the strata manager (ss144(7)(8)) – thus removing an area of ambiguity. It also leaves open the option for a body corporate to minimise expenses by utilising a contracted strata manager for certain functions, and one or more volunteer strata managers for other specified functions.

One of the matters in the discussion paper sought input to the potential licencing of strata managers. I submit that there is considerable merit in requiring a professional strata manager (as opposed a volunteer manager) to be licensed. The objective being to establish a code of conduct that is enforceable. The suggested licencing standard is one based on the Tasmanian Real Estate licence, this would provide comparable standards of behaviour for those working in similar property management occupations.

7 Keeping of animals (area 15)

It is open to a body corporate to resolve to delete the Tasmanian model by-law relating to animals and replace it with a by-law setting out its own requirements (or decide against regulating any constraint), and it can be assumed the changes so made would reflect the preferences of that particular body corporate.

The Tasmanian model by-law has the flexibility for the body corporate to grant conditional approval for keeping an animal on the premises, and make clear to intending applicants any conditions that are required to be met for approval to be granted. These arrangements appear to remain appropriate.

8 Future maintenance schedules (area 16)

Many extant strata schemes may not have a costed maintenance plan. There is considerable cost to a body corporate to obtain a ten-year plan that reflects the specific state of repair and project maintenance costs of an established strata scheme.

Forward planning is necessary to make appropriate provision, for capital costs and maintenance. However, the cost of preparation of a proper maintenance plan may be expensive. A generic maintenance plan, one based on the standard replacement periods and costs, is a cheaper option but this approach will cause an imbalance in the amounts of funds set aside to meet future replacements, renovations and upgrades because it does not reflect the actual needs of the scheme. If the introduction of a provision for a ten-year (or other period) maintenance plan is mandated for prescribed larger schemes, the complexities involved in developing a specific maintenance plan for such a scheme will be expensive and time-consuming. A body corporate for which a maintenance scheme is to be mandated should be afforded a reasonable transition period during which it can set aside funds and organise the plan survey before the requirement comes into effect.

The maintenance plan and costings should be available to all members of the body corporate to explain the apportionment of as incorporated into the contributions

levy, and to assure the adequacy of provision to maintain the property in which they share an interest.

9 Funds established for various purposes (area 17)

Section 82 of the Strata Titles Act 1998 sets out, succinctly, the basic requirement for receiving and expending funds, and appropriately leaves open to the body corporate to determine the structures most appropriate for it to manage its funds.

It is counter-productive to mandate any distribution of funds across accounts as this must reflect the needs of the individual body corporate with the members of the body corporate having access to details of the investments, at least annually at annual general meeting with the concomitant right to demand other arrangements be made.

In setting the contributions levy, future capital expenditure is not limited to the maintenance plan as the projected costs of renovations and other improvements also need to be factored in. Members of the body corporate should have ready access to any maintenance plan that impacts on the amount of the contributions levy.

Comments outside the matters raised in the discussion paper.

Documents

Tasmanian strata law is silent on the matter of records and correspondence to be retained, yet these are invaluable to learning and understanding the many strands leading to the body corporate's current position. There is some guidance in other areas about what records should be retained and for how long (such as for taxation purposes), otherwise it is left to the administrative bent of those managing the strata scheme from time to time.

Both Victorian and Western Australian strata law and regulations address these matters in some detail. I urge consideration be given to including provisions for the retention of specific documents and correspondence within Tasmanian strata law. The corporate knowledge within a body corporate is unreliable without contemporaneous records, and changes in body corporate membership and in scheme management over the years erodes reliable memory.

I have mentioned, under area 8, the complicating factors associated with the retention of electronic body corporate records.

Guidance for body corporates and committees of management

Tasmania offers limited assistance for the guidance of members of a body corporate and its committee of management. In the main, I suggest members of the body corporate and elected management committees have limited knowledge of strata law and, as the Lands Titles Office is unable to give what it regards as legal advice, most committees muddle through, doing the best they can do, often without regard to their statutory obligations. The risks inherent in that situation are compounded when a committee has contracted a strata manager and is unable to effectively manage the contract.

State governments of other states provide detailed information about the strata law requirements, obligations and responsibilities. Although the provision of information offers no guarantee that it will be accessed or applied: it does offer a strong base for any party who wishes to understand and properly discharge their duties. I strongly urge that similar detailed information be made available when the revised Strata Titles Act comes into operation.

Thanking you

Kay M Rodda