



## AUSTRALIAN COLLEGE OF COMMUNITY ASSOCIATION LAWYERS INC.

# LEGISLATIVE ISSUES PAPER

## 1 Context

- 1.1 One of the objects of the College is *'to work with State and Federal Governments to ensure that legislation related to the Discipline or having the potential to impact on Associated Persons is relevant, effective and of the highest quality so as to ensure the best possible outcomes for such persons'*. 'Associated Persons' means persons who live in, work in or have a legal or equitable interest in all or part of a Common Interest Subdivision development.
- 1.2 As the College is a national body, it will be important to ensure that commentary on proposed legislation is uniform on a national basis. This is particularly so given that commentary is likely to occur on a state by state basis. The best way to achieve uniformity would be to have a national policy dealing with strata and community title legislation.
- 1.3 The purpose of this issues paper is to facilitate discussion and possible formulation of a national legislative policy.
- 1.4 The issues identified in this paper are not exhaustive. There will no doubt be many other issues and this paper is intended merely as a starting point. During the course of coming meetings of College members, additional issues can be identified and added to the list of issues for consideration for a proposed policy.

## 2 Language

- 2.1 Given that strata and community title legislation is used by laypeople on a daily basis, it is suggested that there be a fundamental requirement that the language of all legislation in this area be on a genuine, plain English basis and that it be drafted in a way so as to maximise comprehension and understanding on the part of non-legal readers.
- 2.2 It is also suggested that legislation be structured so as to ensure that it is most easily followed and understood. The use of charts, tables, graphics, explanatory notes and footnotes is encouraged for this purpose.

- 2.3 Finally, it is suggested that terminology and fundamental concepts used in strata and community title legislation should wherever possible be uniform throughout Australia. For example, the use of mixed terms such as ‘body corporate’, ‘owners corporation’, ‘strata company’ and ‘strata corporation’ should be avoided and a single national term should be used.

### **3 Legislative Instruments**

- 3.1 Strata and community title legislation can be housed in separate Acts or the various components of such legislation can be separated and housed in a number of Acts. Separate Acts for discrete components are preferred but there should be ample footnotes, cross-references and other aids to improve the interface to the various pieces of legislation and assist understanding by lay readers. For example, the title provisions may be in generic land titling legislation, while the management and dispute provisions may be in separate legislation.
- 3.2 Like Acts, such as the NSW Leasehold and Freehold Development Acts, should be consolidated.
- 3.3 It is common for all of the detail of strata and community title law to be housed in an Act. Alternatively, the Act can be restricted to empowering provisions and the detail can be housed in regulations. The College prefers a sensible balance involving the Act, Regulations and Administrative Guidelines.

### **4 Legislative Philosophy**

- 4.1 Strata and community title legislation can, from a philosophical point of view, follow one of the following two approaches:
- (a) it can be prescriptive in that it contains very detailed provisions about procedures that have to be followed (e.g. secret ballot provisions that run to two or three pages in an Act); or
  - (b) it may contain minimal detail and leave individual schemes with the option of deciding how things should be implemented, subject to certain basic principles (spelt out in the legislation) being followed.

Where the approach in (b) is adopted, it is necessary to have an effective dispute resolution process to deal with any ‘problems’ arising out of the loose regulatory requirements. This is commonly referred to as the ‘safety net’ approach to regulation. The College favours the approach in (b) and recommends the production of model provisions for key processes that can be adopted in whole or in part by a body corporate.

- 4.2 Legislation is often prescriptive as to the exercise of certain powers by bodies corporate. For example, a body corporate, or its committee, may be restricted from spending money beyond a specified amount multiplied by the number of lots in the scheme. The College favours bodies corporate having the right to ‘opt in’ or ‘opt out’ of various regulatory provisions? Also, the College favours bodies corporate

having the right to increase or decrease prescribed amounts of money or to vary certain prescriptive provisions in the legislation?

## **5 Development**

- 5.1 These days, developments come in a wide range of sizes, configurations and uses. Projects have become larger and more complex. The application of strata and community titles has extended far beyond the suburban residential home unit. The College maintains that the point has been reached, where generic strata and community title legislation (i.e. 'one size fits all') is impracticable.
- 5.2 The College favours some form of separate regulation of different categories of schemes, either by multiple instruments or "compartments" within a single instrument.
- 5.3 All strata and community title legislation should contain special provisions to facilitate staged development and the creation of layered schemes.
- 5.4 The College advocates a body corporate being subrogated to the rights of the developer as regards previous contracts (such as construction contracts) when it acquires common property upon a subdivision or re-subdivision.

## **6 Legislative Reviews**

- 6.1 Changes to strata and community titles legislation to resolve problems can often result in new problems being created. This is particularly so where the changes are not properly thought through. Also, regular changes to legislation impose burdens on strata and community title lawyers, managers and unit owners – all of whom have to adjust to the changes for their day to day activities.
- 6.2 In relation to the frequency of legislative amendments, it is the College's views that amendments should:
  - (a) only occur if there is a demonstrated need for them;
  - (b) be accumulated so that they only occur as part of a comprehensive review;
  - (c) be supported by appropriate research demonstrating the need for those amendments; and
  - (d) be the subject of a 'whole of industry impact assessment'.

## **7 Consumer Protection**

- 7.1 The College is totally supportive of consumer protection provisions in strata and community title legislation. However, every effort should be made to ensure that they are necessary and that particular provisions are sensible and balanced.
- 7.2 Extreme consequences (e.g. failure to use or follow a prescribed form giving rise to the right for a buyer to cancel an 'off the plan' contract) should be avoided and damages should be the first remedy, reserving cancellation for more substantial matters.

- 7.3 The College has a preference for disclosure rather than prohibition. For example, rather than prohibit certain long term contracts, they should they be permitted subject to appropriate disclosure being made to buyers. However, prohibition (outright or by restricting the term) may be justified in circumstances where it is simply not appropriate for long term contracts to be applied to a particular type of development.

## **8 Lot Entitlements**

- 8.1 Lot entitlements may be allocated according to lot area, respective values of lots, equally or on the basis of what is just and equitable (i.e. the extent to which individual lots draw on the expenses and resources of the body corporate).
- 8.2 Some jurisdictions have a single lot entitlement to determine both the interest in common property and liability to contribute to maintenance contributions. Queensland has two types of lot entitlements – one determining contribution to maintenance and voting entitlements with the other determining the interest in common property.
- 8.3 Some jurisdictions provide for a change of lot entitlements during the course of the life of the scheme. Others have very restricted opportunities to change lot entitlements. Sometimes it is possible to change lot entitlements by agreement among the owners and in other cases, they can be changed with reference to an adjudicator or Tribunal.
- 8.4 The College favours the use of 2 lot entitlement schedules, as well as cost effective mechanisms for review being made available.

## **9 Amalgamation**

- 9.1 Some jurisdictions allow for two or more schemes to be amalgamated into a single scheme. This overcomes problems caused as a result of the approach adopted by some developers to staging projects. The College encourages the inclusion of such provisions but recognizes the need for a review process to protect minority interests.
- 9.2 Outstanding assets and liabilities of a scheme being discontinued on amalgamation should remain with the owners of that scheme unless the owners of the other scheme agree otherwise.

## **10 Small Schemes**

- 10.1 Small schemes are generally regarded as those with six units or less. Typically, these schemes do not adhere to the normal regulatory environment. For example, they will rarely (if ever) comply with detailed requirements for the holding of meetings and the making of decisions. Decisions are normally made relatively informally and management is often based on convenience rather than process. For example, if the insurance premium needs to be paid in a two lot scheme, rather than impose a levy it is common for the two lots owners to each write out a cheque for their share of the premium and send both cheques off to the insurer.

- 10.2 The College favours small schemes being allowed to be self regulatory within parameters set out in their governing legislation. This will effectively require them to be relieved of virtually all of the prescriptive management provisions usually found in strata and community title legislation.

## **11 Management Issues**

- 11.1 The College does not support prohibition of voting by proxy unless an owner is able to cast a written vote on motions to be considered at a meeting.
- 11.2 In relation to the numerous types of agreements that can be put in place in relation to schemes (e.g. strata managing agents, building managers and long term contractors such as lift maintenance contracts), the College maintains that they should be permitted, subject to:
- (a) disclosure to buyers;
  - (b) reasonable limitations on terms; and
  - (c) essential provisions (e.g. default, transfer) being implied by the statute.
- 11.3 A body corporate should not be permitted to carry on a business unless that business is related to its core functions. One exception may be an activity servicing its owners (e.g. black water recycling) while being offered to adjoining landowners to help off-set costs to the body corporate. Generating electricity for the scheme and selling surplus requirements into the national market may be another example.
- 11.4 The College favours compulsory long term sinking fund budgeting and longer term maintenance planning.
- 11.5 The College supports the concept of a body corporate committee being given a full range of powers, including a power to delegate, subject only to:
- (a) a minute of the decision to delegate being recorded;
  - (b) an instrument of delegation being executed; and
  - (c) minutes being recorded by the delegate whenever a delegated power is exercised.
- 11.6 The College is supportive of bodies corporate being required to submit a brief annual return setting out information relevant to Government monitoring of the sector.

## **12 Conveyancing**

- 12.1 In most jurisdictions, standard contracts for sale of strata and community title properties contain a range of warranties designed to protect the purchaser in relation to body corporate liabilities and defects in common property. Because these provisions are only contained in standard form contracts, they can be modified or deleted. Where this occurs, the interests of the purchaser may be seriously affected. In Queensland, warranties of this type are embodied in the legislation and cannot be varied or modified.

- 12.2 The College favours these types of warranties being implied in contracts by the legislation in preference to leaving them as a voluntary inclusion in contracts.
- 12.3 When it comes to protecting purchases of lots, the body corporate should be quarantined from risk as far as possible? The onus should be on the seller to provide information rather than the body corporate providing the information in certificate form. The logical exception would be information relating to levy arrears and other money owing to the body corporate. Where the body corporate provides such information it should be liable for any mistakes, subject to any claim it may have on a third party, such as a body corporate manager.

### **13 Dispute Resolution**

- 13.1 In relation to dispute resolution in schemes, the College favours the inclusion of dispute resolution processes in strata and community title legislation. The College also favours the inclusion of alternate dispute resolution practices (particularly mediation) as part of those processes. Where mediation is undertaken the person representing the body corporate must be able to agree to an outcome on behalf of the body corporate.
- 13.2 The College does not support dispute resolution processes that preclude parties being represented by a lawyer.
- 13.3 The Colleges supports the inclusion of provisions allowing for the discretionary awarding of costs arising out of dispute resolution processes.
- 13.4 The College supports rights of appeal to the Supreme Court (or specialist Tribunals in appropriate cases), but only on questions of law.
- 13.5 The College supports specialist adjudication of disputes, similar to that used in Queensland, in appropriate cases.

### **14 Body Corporate Liability**

- 14.1 In all jurisdictions, bodies corporate are generally at risk of normal contractual, tortious and criminal liability. Such liability can only be discharged by raising funds from lot owners. In all Australian jurisdictions, the extent to which lot owners must contribute to discharge the liabilities of a body corporate is unrestricted. In other words, the status of a body corporate is essentially that of an unlimited liability company.
- 14.2 The alternative to this approach is to provide protection to lot owners against unfunded liabilities of a body corporate. While this would be beneficial to lot owners, it would be detrimental to any creditor (including a claimant for damages for personal injuries) of the body corporate.
- 14.3 The College supports the current position and is opposed to relief against liability where the interests of innocent third parties would be adversely impacted.

## **15 Redevelopment**

- 15.1 There is an increasing number of strata schemes throughout Australia that are reaching the end of their economic life, either because they have not been properly maintained or because they occupy such prime positions that redevelopment is economically preferable to refurbishment. In most jurisdictions it is necessary to have unanimous agreement for redevelopment of these types of schemes. Unanimous agreement is very difficult, in most cases impossible, to obtain.
- 15.2 Pressure is mounting on governments throughout Australia to come up with a provision that enables redevelopment of older schemes. Any such provision is likely to have an adverse impact on persons who resist redevelopment because of a desire to continue to live in the particular property. These people are often elderly and have been living in the property for a substantial period of time.
- 15.3 The College supports the inclusion of provisions in legislation allowing for an appropriate majority of owners to decide to proceed with a redevelopment of the scheme, provided provision is also made for a merits review of that decision.