Law Commission
Reforming the law

Commonhold
Comparative research

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Chapter 1: Introduction

1.1 Many jurisdictions outside of England and Wales have frameworks similar to commonhold which enable the freehold ownership of flats. These frameworks have achieved a level of success, and widespread use, that has not yet been seen with commonhold.

1.2 As part of our work preparing the Consultation Paper on commonhold, we have carried out comparative research to provide us with ideas for reform and inform us of what has and has not worked well in other jurisdictions.

1.3 Our comparative research covers both common law jurisdictions, such as Australia, Canada, New Zealand and the United States of America, as well as civil law jurisdictions such as Scotland, Germany, France and Italy. Each jurisdiction is set out in a separate chapter, where key elements of the commonhold-equivalent framework are considered. The separate headings within each chapter pick up the areas covered by a part of parts of our Consultation Paper. Appendices 1 to 4 contain summaries of the law in each common law jurisdiction, and a comparison table of the common law jurisdictions is provided in Appendix 5.

1.4 We have focussed our research on those jurisdictions most frequently referred to by academics commenting on commonhold, and those most often discussed by stakeholders. Our research on common law jurisdictions has been more in-depth than that on civil law jurisdictions, as there are more parallels which can be drawn between England and Wales and other common law systems.

1.5 We are extremely grateful to the overseas academics and experts who have assisted with our comparative research. In particular, we would like to thank: Dr Cathy Sherry (Associate Professor at the University of New South Wales, Sydney), Dr Hazel Easthope (Associate Professor at the University of New South Wales, Sydney), Chris Baker (Special Counsel at Hickey Lawyers, Australia), Rhys Bollen (Executive Director at NSW State Insurance Regulatory Authority), Professor Douglas Harris (Professor at the University of British Columbia, Peter A Allard School of Law), Thomas Gibbons (Director at McCaw Lewis Lawyers, New Zealand), Rod Thomas (Associate Professor at Auckland University of Technology, New Zealand), Professor Graham Paddock (Senior Partner at Paddocks Sectional Title Specialists, South Africa), Carl Lisman, William Breetz and Benjamin Orzeske from the Uniform Law Commission and Wayne Hyatt (Attorney with Hyatt & Stubblefield, P.C, USA).

1.6 This paper sets out our comparative research, and is published for reference alongside the Consultation Paper, which is available at https://www.lawcom.gov.uk/project/commonhold/.

Chapter 2: Australia

INTRODUCTION

2.1 "Strata title" is the Australian equivalent of commonhold. It was developed in New South Wales ("NSW") and was one of the first forms of this title to be introduced in the world. Since then, strata title (or an equivalent system) has been adopted in other Australian states and across the globe, from New Zealand, to Singapore, to Canada.

2.2 Australia operates a federal system with legislative power[1] split between the Federal Government, and the states and territories. Each state and territory is its own jurisdiction, with its own Parliament and court system. Strata law in Australia therefore varies from state to state, depending on the legislation in force in that state. Cathy Sherry explains that NSW, being the first state to enact strata legislation, was used as a model for other states, and consequently represents a middle-ground between some of the positions adopted in other states. Queensland's legislation is the most detailed and frequently amended, and is comparatively accommodating of developers. In contrast, Victoria's legislation is comparatively minimalist and restrictive. Western Australia is very similar to NSW's current model, whereas South Australia and Tasmania are more similar to older versions of the NSW acts.[2]

2.3 The examination below focusses predominantly on the law of strata in NSW, but also considers other Australian states in key areas. First, the history and background to the original strata legislation is set out, followed by an outline of the basic framework. Key policy areas will then be considered in more detail.

LEGISLATIVE HISTORY

2.4 After the Second World War there was a high demand for residential properties in NSW and across Australia.[3] The resulting increase in housing development risked outstripping the infrastructure for water supplies, sewerage and other services.[4] Consequently, developers turned to building multi-occupied residential blocks which would satisfy the need for housing whilst placing less pressure on the infrastructure. However, this did not change the Australian preference to own property outright, rather

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1 The power to make law.

2 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017) p 4.

3 A Bradbrook et al, *Australian Real Property Law* (5th ed 2011) p 609; *Hansard* (NSW Assembly), 17 Nov 1960 p 2114.

4 Between 1945 and 1948, over 62,000 houses were built in Australia to address the post war housing shortage. This shortage also led to the shift from building houses to building flats, and between 1962 and 1965, the number of flats in NSW almost trebled. G Powell and S Macintyre, *Land of Opportunity: Australia's post-war reconstruction* (2015) ch 14, http://guides.naa.gov.au/land-of-opportunity/chapter14/; J Watson and P Grimes, "The Strata Titles of New South Wales, Australia" (1965) 30(4) *Saskatchewan Bar Review* 265. G Davidson argues that immigrants in Australia looked back to their experience of living as tenants in their homeland, and "longed to be free of the fear of the landlord and the bailiff": "The Past and Future of the Australian Suburb" (1993) 31(2) *Australian Planner* 63, 65.

than rent.[5] This lead to demand for a system by which people could own defined parts ("lots") of multi-occupied buildings.

2.5 Australian lawyers devised three solutions to enable lot ownership.

(1) Long leasehold: This operated the same way as long leasehold in England, but it never gained popularity. This was in part due to the Australian desire to own property outright, and partly because so few Australians wanted to be landlords. It seems that the tight constraints imposed by landlord and tenant legislation in NSW at the time would also have included long leaseholds.[6]

(2) Tenants in common: The lot owners could own the whole building jointly, as tenants in common.[7] However, this was only feasible in small buildings due to the requirement for decisions to be made unanimously. There were also problems with enforcing obligations on future owners, as positive obligations generally do not run with the land.[8] Consequently, very few buildings were set up in this way.

(3) Company title: Under this scheme, a company was incorporated which owned the building. People bought shares in the company which entitled them to exclusive occupation of a unit. This was the most frequently used scheme of the three. However, the shareholders did not acquire a property interest in land, and consequently lenders were reluctant to give mortgage finance.[9] In addition, lenders did not like the fact that the company directors' power to veto sales could interfere with a mortgagee's power of sale.[10]

2.6 Each solution had problems in practice and all fell "short of the Australian expectation of ownership of a fee simple in land".[11] Consequently, the NSW Government

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5 J Watson and P Grimes, "The Strata Titles of New South Wales, Australia" (1965) 30(4) *Saskatchewan Bar Review* 265, 273.

6 At this time, policies were centred on the protection of tenants. For example, the Landlord and Tenant Act 1948 imposed strict restrictions on eviction of tenants to provide security of tenure to all tenants. See further NSW Parliamentary Research Service, *Protected tenancies: history and proposals for reform* (March 2013), https://www.parliament.nsw.gov.au/researchpapers/Documents/protected-tenancies--history-and-proposals-for-r/Protected%20Tenants.pdf.

7 There seems to be a difference with English land law here. In England, the legal ownership of property must be as joint tenants, and is limited to four registered owners. The beneficial ownership of the land, however, can be shared between an unlimited number of owners, who can be either joint tenants or tenants in common. On the other hand, in NSW the legal co-owners of property can be either joint tenants or tenants in common, and there is no limit on the number of legal owners.

8 *Austerberry v Oldham Corp* (1885) 29 Ch 750, approved by the Australian Federal Court in *Forestview Nominees Pty Ltd v Perpetual Trustees* (1996) 141 ALR 687. However, there are now a few statutory exceptions to this, for example the Conveyancing Act 1919, ss 88D and 88E.
See also A Bradbrook et al, *Australian Real Property Law* (5th ed 2011) p 610; J H Watson and P J Grimes, "The Strata Titles of New South Wales, Australia" (1965) 30(4) *Saskatchewan Bar Review* 265, 266.

9 J Watson and P Grimes, "The Strata Titles of New South Wales, Australia" (1965) 30(4) *Saskatchewan Bar Review* 265, 265 to 266.

10 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017) p 19.

11 C Sherry, "Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property" (2013) 36(1) *University of New South Wales Law Journal* 280.

commissioned a drafting committee, which designed strata title. This was enacted in the New South Wales Conveyancing (Strata Titles) Act 1961 ("the 1961 Act"). Strata title allowed absolute ownership over defined parts of buildings and set out a code to govern living in close community.

2.7 Under the 1961 Act, a strata plan would be registered which specified the perimeters of the scheme and the boundaries of each "lot"[12] within the scheme.[13] Each lot would be owned on a freehold basis by the "lot owner". The strata plan would be accompanied by a schedule setting out the entitlement of each lot, which determined the proportion of the scheme's costs to be paid by that lot owner, along with his or her voting rights and proprietary share of the common parts.[14] The statute created certain easements in respect of each lot without any need for formal agreement between neighbours, such as rights to support, shelter and the benefit of water and other services.[15]

2.8 A "body corporate" (now renamed the "owners' corporation") was incorporated on registration of the scheme, with all the lot owners in the scheme as members. The body corporate had rights and duties relating to the management and administration of the common property, but it was the lot owners who were registered as owners of the common property, as tenants in common. The body corporate had the power to make and enforce by-laws. The only restriction on this power was that by-laws were prohibited from restricting the transfer, lease or mortgage of units.[16]

2.9 An aggrieved lot owner could apply to the court for the appointment of an administrator, should the body corporate fail in any respect. The administrator would take on the powers of the body corporate for the duration of the appointment. If the building was destroyed, the lot owners would become entitled to the land as tenants in common, in shares proportional to their lot entitlement.[17]

2.10 By September 1965, almost 25,000 strata lot titles had been issued in NSW.[18] This increased to 70,591 residential strata schemes by December 2015, which amounts to 710,885 residential lots.[19] The popularity of the new scheme was not due to compulsion[20] or financial incentives such as tax breaks, but voluntary acceptance by

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12 "Unit" is usually used to refer to a flat in a multi-occupied building and "lot" is usually used to refer to a defined part of a larger parcel of land, which may or may not be a unit. However, the legislation uses them interchangeably. Given that lots in strata schemes are not always units, "lot" will be used for the rest of this section.

13 NSW Conveyancing (Strata Titles) Act 1961, ss 3 and 4.

14 NSW Conveyancing (Strata Titles) Act 1961, s 18.

15 NSW Conveyancing (Strata Titles) Act 1961, ss 5 to 7.

16 NSW Conveyancing (Strata Titles) Act 1961, ss 9, 13 and 14; C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017) p 21.

17 NSW Conveyancing (Strata Titles) Act 1961, ss 11 and 23.

18 J Watson and P Grimes, "The Strata Titles of New South Wales, Australia" (1965) 30(4) *Saskatchewan Bar Review* 265, 273.

19 University of New South Wales City Futures Research Centre, *Strata Data 2015*, https://nsw.strata.community/wp-content/uploads/2015/08/strata_data_report_2015.pdf.

20 *Hansard* (NSW Assembly), 7 Mar 1961 p 2963.

purchasers, legal practitioners, building developers and lenders.[21] As there was previously no effective, workable system that satisfied the Australian desire to own, rather than lease lots, it is understandable that no incentive was needed. Additionally, all Australian states have Torrens systems of land registration. Torrens is a system of *title by registration*, not registration of title. This does not simply apply to the transfer of existing interests in land, but to the creation of new titles to land. If a land owner wants to subdivide his or her land, creating multiple new *freehold* titles, the only way he or she can do this is by lodging a plan of subdivision with the state. The state registration of the plan brings the multiple new titles into existence. If a landowner wants to subdivide the land horizontally, creating freehold titles to a "slice" of a horizontally-divided building or to airspace, they can only do this by registering a strata plan under the strata legislation. In short, the only way a developer can create freehold, and thus marketable, titles, is by using the strata title system.

2.11 A similar increase in the construction of apartment blocks and the consequent demand for ownership of lots was seen across Australia. This led Queensland to introduce a similar scheme in 1965 (Building Units Titles Act 1965) and Western Australia to introduce strata title in 1966 (Strata Titles Act 1966). All the other states in Australia have now adopted strata title, and it has spread to other territories such as New Zealand, Singapore and Canada. The Law Reform Commission of Western Australia has found that the introduction of strata title was so popular that the other methods of dealing with ownership of lots (long leases, joint tenancy and company title) almost entirely fell into disuse.[22] The original legislation was revised to take account of experience, and to accommodate more complex developments. By 2017, most states in Australia were on their third generation of strata and community title legislation, with NSW and Queensland on to a fourth.[23]

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21 J Watson and P Grimes, "The Strata Titles of New South Wales, Australia" (1965) 30(4) *Saskatchewan Bar Review* 265, 273.

22 The Strata Titles Act 1966-1978 (1982), Law Reform Commission of Western Australia No 56, para 2.7, http://www.lrc.justice.wa.gov.au/_files/P56-R.pdf.

23 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017), p 29.

2.12 Since the 1961 Act, NSW has had several more statutes relating to strata schemes:

Figure 1:

Provision	**Purpose**
Repealed measures	
Strata Titles Act 1973	This Act replaced the 1961 Act. The main reforms introduced were:[24] (1) enabling the acquisition of adjoining land; (2) ability of developers to develop schemes in stages; (3) requiring both lot owners and their tenants to comply with by-laws; (4) introducing dispute resolution mechanisms outside of applications to the court; (5) regulation and facilitation of professional managing agents to assist with the duties of the body corporate; and (6) moving significant amounts of the first schedule alterable by-laws into the main body of the Act so that they could not be altered by individual schemes (for instance, repair of common property and meeting procedures).[25]
Strata Schemes (Leasehold Development) Act 1986	This Act introduced a framework for leasehold strata schemes (see paragraph 2.13 below).
Strata Schemes (Freehold Development) Act 1996	Land titles and management were split into two Acts, with this Act retaining the provisions relating to land titles from the 1973 Act.
Strata Schemes Management Act 1996	The management parts of the 1973 Act were put in this Act (for instance,

[24] *Hansard* (NSW Assembly), 12 Sep 1973 p 787.

[25] C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017), p 26.

	meeting procedures, by-law making powers, insurance, finances). It aimed to balance the rights of individual lot owners with the freedom of the body corporate to manage without interference.[26]
Current measures	
Property, Stock and Business Agents Act 2002	As part of this Act, provisions were introduced to regulate the actions and certification of strata managing agents.
Strata Schemes Development Act 2015 ("the Development Act")	These re-enacted, with amendments, the Strata Schemes (Freehold Development) Act 1973 and Strata Schemes (Leasehold Development) Act 1986. The main reforms included: (1) changes to the permitted content of by-laws;[27] and (2) a new process for the collective sale and renewal of developments without unanimous consent.[28]
Strata Schemes Development Regulation 2016 ("the Development Regulations")	
Strata Schemes Management Act 2015 ("the Management Act")	These re-enacted, with amendments, the Strata Schemes Management Act 1996. The main reforms include: (1) greater accountability of strata managers; (2) allowing electronic voting, and other digital technologies, within the framework of the owners' corporation; (3) simplifying the dispute resolution process;[29] and
Strata Schemes Management Regulations 2016 ("the Management Regulations")	

[26] K Everton-Moore et al, "The law of strata title in Australia: a jurisdictional stocktake", (2006) 13 *Australian Property Journal* 1.

[27] See para 2.51, below.

[28] See paras 2.102 to 2.105, below.

[29] See paras 2.89 to 2.92, below.

	(4) a clearer, three-tiered structure for regulating renovations.[30]

2.13 Leasehold strata schemes were introduced in 1986 by the Strata Schemes (Leasehold Development) Act, which has now been replaced by the Development Act. A leasehold strata scheme is defined as one "in which all lots and common property in the scheme are subject to a lease or leases".[31] This is distinct from leases within a freehold strata scheme, where the lot owners hold the freehold in their units, but a proportion of these may lease the lot to a tenant. Leasehold strata was introduced to allow Government to retain control of the Sydney harbour area, although it has since been expanded to other property owners.

2.14 In a leasehold strata scheme, the tenants are considered the "lot owners",[32] and the structures and requirements of the owners' corporation still apply. This is a key difference to long leasehold blocks of flats in England and Wales. Whilst leasehold strata schemes mostly operate in the same way as freehold strata schemes, there are some specific provisions discussed at key points below and more fully at paragraphs 2.76 to 2.84.

2.15 NSW has also introduced a parallel system of "community schemes",[33] which allow for a number of individual strata schemes to part of a larger scheme. These are discussed briefly at paragraph 2.35, below.

PARTS II & III: CONVERTING TO STRATA AND CREATING A NEW STRATA DEVELOPMENT

Setting up a new development

2.16 An application to register a freehold strata plan must be signed by the registered proprietor of the land (be it an individual or a company) and all registered mortgagees.[34] For leasehold strata schemes,[35] there is an additional requirement that the plan must be signed by each lessee under a registered lease of whole, or part, of the land and each registered mortgagee affecting such a lease.[36]

2.17 The Registrar-General may also, if appropriate in the circumstances, require written consent from any judgment creditor, registered interest holder, or registered lessee (in

30 See para 2.60 below.

31 Strata Schemes Development Act 2015, s 4.

32 Strata Schemes Development Act 2015, s 4.

33 Community Land Development Act 1989 and Community Land Management Act 1989.

34 Strata Schemes Development Act 2015, s 22(1).

35 See paras 2.76 to 2.84 below.

36 Strata Schemes Development Act 2015, s 22(1).

the case of freehold strata schemes, where registered lessees are not required to sign the plan).[37]

2.18 However, the Registrar-General has discretion to waive the requirement for one or more of these signatures,[38] and is not required to give notice to any person when exercising this discretion.[39]

2.19 The Registrar-General can only register strata plans which are in accordance with strata legislation, and so the Registrar-General must check every plan to ensure that they are in the right form. At the point the plan is registered, the property is divided up into individual titles for each lot and the common parts.[40]

Converting an existing development

2.20 The conversion of buildings to strata from an alternative tenure is a rare occurrence in NSW, as most apartment buildings, with the exception of a small number of older company title buildings, are already strata. In part, this is because land was plentiful enough that relatively few apartment blocks were constructed before the 1960s. Strata legislation was specifically introduced at the time widespread apartment construction became necessary, and so most buildings were developed as strata schemes from the very beginning. Conversion has, therefore, rarely been necessary.

2.21 In order to convert, the same consents are needed, as discussed at paragraph 2.162.17 above. If there are lessees in the building, their leases are not automatically terminated by the process of converting. However, given that residential leases are usually of very short duration in NSW, the landlord will be able to terminate them with very little difficulty, and in practice would usually terminate all the leases before proceeding with conversion.

2.22 Due to the nature of tenancy in common, in any cases of conversion from tenancy in common to strata, all the owners would need to consent. However, it is conceivable that in the case of conversion from company title there may be some dissenting owners. The company would be the registered proprietor of the land, and so it will be the company which has to consent to the subdivision of the land by a strata plan and the winding-up of the company. Due to the voting procedures of a company, the company may act to give its consent based on a majority vote, allowing conversion to go ahead despite a minority of owners dissenting. The NSW Law Reform Commission has stated that “in the Commission’s view, residents of company title units would reasonably expect that disputes relating to a loss of shares in, or to the winding-up of, the company would be resolved in a superior court such as the Supreme Court”.[41]

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37 Strata Schemes Development Act 2015, s 22(3).

38 Although it seems very unlikely that the Registrar-General would dispense with the signature of the land owner.

39 Strata Schemes Development Act 2015, s 22(4).

40 This is due to the nature of Torrens title as a system of title-by-registration.

41 NSW Law Reform Commission Report 115: Disputes in company title home units http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-115.pdf at para 6.8. (It

Development rights

2.23 Part 5 of the Development Act is designed to "facilitate the development in stages" of land subject to a strata scheme. The strata plan must indicate the existing lots alongside "development lots", which relate to future parts of the scheme.[42]

2.24 There is no requirement for a development to have reached a certain level of completion before lots can be sold. Many purchasers will buy "off-plan", and the contracts will be drafted to provide the developer with flexibility. The strata plan is not registered at this stage, and the by-laws will be in a draft format, if not blank. This means purchasers have relatively little security over what they are buying into. Although NSW legislation contains a lot of disclosure provisions to help protect off-plan purchasers, in practice, so little is finalised at the time of contract that the disclosure requirements give purchasers very little information.

2.25 If the scheme is a strata or community title development, the developer must produce a "strata development contract" and submit it for registration along with the strata plan. It must detail the proposed development for the development lot and set out certain rights and obligations of the developer and lot owners.[43] This will include "warranted development" that the developer is obliged to complete, and "authorised proposals" which the developer may complete. Detailed provisions relating to the content of a development contract are set out in the Development Regulations.[44] However, in practice many developers bypass the requirement for a strata development contract by choosing to use "stratum" subdivision for their developments instead of strata or community title.[45] Stratum is much less tightly regulated, and does not require a development contract to be produced.

2.26 A number of covenants are also implied by statute into strata development contracts[46] covering areas such as:

(1) permission to carry out development;

(2) expenses incurred by the owners' corporation caused by the developer (such as the costs of water and electricity used by the developer);

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should be noted that the "Supreme Court" in NSW is the approximate equivalent of the High Court in England and Wales).

42 Strata Schemes Development Act 2015, ss 71 and 73(2). A development lot may be situated wholly or partly above, below or alongside the building to which the strata scheme initially relates, but it must be identified in the strata plan for the scheme when the plan is registered.

43 Strata Schemes Development Act 2015, s 73(3).

44 Strata Schemes Development Regulations 2016, reg 12. There is a slightly different system in Western Australia. Staged development is permitted, and the Management Statement setting out the by-laws for the scheme may set out the proposed development as part of the by-laws. This allows developers to disclose the proposed stages for development, and allows developers' rights and obligations to be built in to the framework of the scheme. See further Landgate, *Strata Titles Practice Manual* (2016), https://www0.landgate.wa.gov.au/?a=2336.

45 See paras 2.34 to 2.40 below.

46 Strata Schemes Development Act 2015, sch 3.

(3) standard of development expected of the developer;

(4) restoration of damage caused by the developer.

2.27 There are provisions giving developers flexibility to carry out the necessary work needed to continue development:

(1) a development contract may confer a right on the developer to occupy and use common property to the extent necessary to carry out the development. This can extend to exclusive use;[47]

(2) the development contract may be amended by the developer, albeit with the necessary consents; [48]

(3) the developer may pass, or defeat, a motion of the owners' corporation, or strata committee, if that motion has the effect of making a decision about a specified development concern.[49]

2.28 In reality, developers retain control of developments in a number of ways, such as retaining a proportion of the apartments to give them voting rights in the owners' corporation, or structuring large phased developments so as to ensure completed phases cannot interfere with their ability to complete the rest of the development.

2.29 In commonhold, a developer may reserve rights through the commonhold community statement to enable it to build in stages. However, there are more limited provisions to protect unit owners who purchase before schemes are complete. In commonhold, the developer may not exercise development rights in such a way as to interfere unreasonably with unit owners' enjoyment of their freeholds or the exercise of their rights under the commonhold community statement. The developer must also put right any damage to common property or units. However, there is nothing to compel developers to carry out certain works.

2.30 In Australia there are also provisions giving protection to people who buy lots before the whole scheme is complete:

(1) the contract must predict a time of 10 years or less in which the development scheme will be concluded;[50]

(2) the developer may only exercise its right to occupy and use common property in a way that does not cause unreasonable inconvenience to any lot occupier;[51]

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47 Strata Schemes Development Act 2015, s 82.

48 Strata Schemes Development Act 2015, s 84(1). Depending on the amendment being made, consent may be needed from the owners' corporation and the planning authority.

49 Strata Schemes Development Act 2015, ss 74 and 87(1). Specified development concerns relate to actions which are essential for carrying out the works detailed in the strata development contract, such as erecting structures, providing and using means of access to a development lot, or adding land to the parcel.

50 Strata Schemes Development Act 2015, s 76(3) and 89(1)(c).

51 Strata Schemes Development Act 2015, s 82(4).

(3) any proposed amendments to the development contract will not take effect if they are inconsistent with a registered strata management statement. Amendments requiring changes to planning approval must be supported by a resolution of the owners' corporation, and if they involve a change in the basic design they must be approved by unanimous resolution of the owners' corporation;[52]

(4) On conclusion of the development, the owners' corporation may lodge a revised schedule of lot entitlement if it considers it necessary to reflect accurately the market value of each lot.[53]

2.31 Additionally, there are limitations on what owners' corporations may do during the "initial period",[54] unless authorised by the Tribunal.[55] This serves to protect future owners. Owners' corporations cannot:

(1) alter common property or erect any structure on common property, other than as specified in a development contract;

(2) incur a debt greater than the amount then available from the administrative or capital works fund; or

(3) appoint a strata managing agent or building manager for a term extending beyond the first annual general meeting ("AGM").

2.32 An owners' corporation can recover from the original owner (usually the developer) any amount for which the owners' corporation is liable, or damages for breach of statutory duty, due to any breach of these limitations.[56] Recent changes in NSW legislation now require developers to pay a bond that is 2% of the construction price of the building to cover any building defects which will later be discovered. This was introduced to address frequent problems faced by unit owners when defects were discovered, but it was very difficult for the unit owners to act collectively to sue the developer, who would, more often than not, pass on liability to sub-contractors. However, some NSW lawyers argue that 2% is nowhere near enough to cover the costs of the defects that arise.

2.33 Further, developers and persons connected to the developer are not eligible, at any time, to be elected to the strata committee, unless they own a lot in the scheme and disclose that connection before the election is held. If a strata managing agent or building manager has been appointed by the developer before the first AGM, the appointment terminates at that first meeting. Before appointment, at any time, a strata

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52 Strata Schemes Development Act 2015, s 84.

53 Strata Schemes Development Act 2015, s 90.

54 Strata Schemes Management Act 2015, s 4: the period commencing on the day the owners' corporation is constituted, and ending on the day there are owners of lots in the strata scheme the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement. It is in effect the period in which a developer can still control a special majority vote, which is required for more significant decisions of an owners' corporation.

55 Strata Schemes Management Act 2015, s 26(1).

56 Strata Schemes Management Act 2015, ss 26(2) and (3).

managing agent or building manager must disclose if it is connected with, or providing services on behalf of, the developer.[57]

Mixed-use/complex developments

2.34 Most states in Australia have some provision for layered schemes. In NSW, there are two ways of layering a scheme: community title,[58] and stratum subdivision.

Community title

2.35 Community title allows for a number of smaller schemes to exist within a larger scheme.[59]

2.36 Community schemes might have an overarching community association, which can then be sub-divided into "precinct", "neighbourhood" and strata schemes. There are subtle differences between each one, but in effect they allow developers to provide facilities to a specific section of a development, and to allocate the cost to that section. They also allow developers of large sites to build in stages, selling one section before they begin the next.

2.37 *For example: a scheme may be created for a new development with three detached houses (A, B and C) and two blocks of five flats (D and E). A, B and C share a common garden, and share a swimming pool with block D. Block D also has its own garden. Block E has its own swimming pool and gardens. All the buildings share a common driveway and waterfront walkway (see figure 2 below).*[60]

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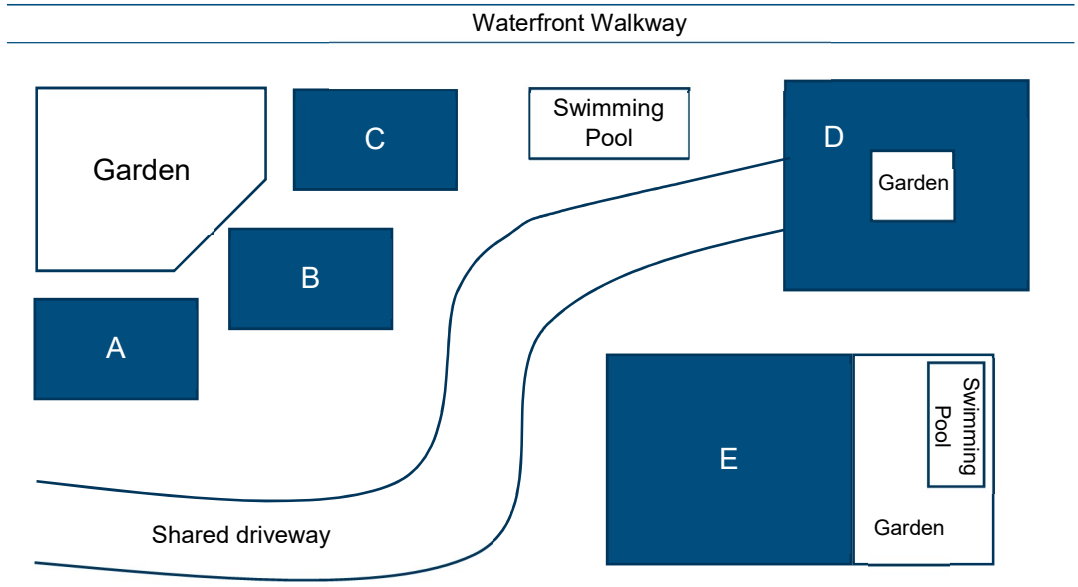
57 Strata Schemes Management Act 2015, ss 26(1)(c), 32 and 71.

58 Community Land Development Act 1989, Community Land Management Act 1989 and Community Land Development Regulation 2007.

59 Other states also allow for layered schemes, including Queensland.

60 In practice, most community schemes will be much larger than this example.

Figure 2:



In England and Wales this would have to be organised and managed through leases and/or deeds of covenant or estate rentcharges. Under the NSW community scheme legislation, this could be organised in the following way:

(1) *a neighbourhood scheme comprising houses A, B and C. The neighbourhood association would own and manage the shared garden;*

(2) *a strata scheme comprising block D. The owners' association would own and manage the common parts, including external walls, staircases and the garden;*

(3) *a precinct scheme comprising the neighbourhood scheme and the strata scheme of block D. The precinct association is made up of one representative from each scheme, and owns and manages the shared swimming pool;*

(4) *a strata scheme comprising block E. The owners' association would own and manage the common parts, including external walls, staircases, the garden and its swimming pool;*

(5) *a community scheme comprising the precinct scheme and the strata scheme of block E. The community association would own and manage the shared driveway and waterfront walkway, and would be made up of a representative from the precinct scheme and the strata scheme of block E. Each subsidiary body corporate will have one representative on the community association, with each representative having one vote.*[61]

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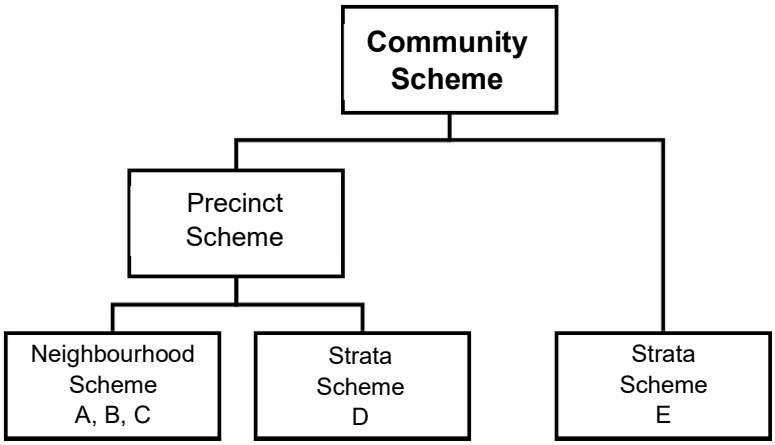
61 Typically, each sub-association is about the same size, and so the one-representative-one-vote system has not caused problems.

Figure 3:



Stratum sub-division

2.38 Stratum sub-division is completely separate from strata title, despite the similar terms. Stratum sub-division allows a building to be divided horizontally into separate, independent freehold lots.[62] These lots can then be dealt with separately, and can be sold or leased, or further subdivided into a strata scheme.

2.39 Despite the legal independence of these lots in comparison to a strata scheme which includes collectively owned land, as stratum lots exist in the same building they are structurally interdependent, and therefore something is needed to regulate the relationship between the lots. All Australian states retain a prohibition[63] on positive freehold covenants, instead, the Registrar General is able to register a developer-drafted Building Management Statement[64] which sets out provisions relating to the management and maintenance of the building as a whole. Building Management Statements typically contain complex schedules which attempt to allocate costs logically and fairly to each stratum lot. As the statement is registered, it binds all subsequent owners of lots, overcoming the prohibition on positive freehold covenants. This is accompanied by a building management committee, which is comprised of one representative from each lot. The legislation also provides that mutual easements for support and shelter between the lots in a stratum sub-division automatically come into effect upon the registration of the stratum plan.

2.40 Stratum sub-division seems, in effect, to be a method for allowing positive covenants to be binding and run with the land when registered between structurally interdependent

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62 Conveyancing Act 1919, ss 196B to 196L, as inserted by the Conveyancing Amendment (Building Management Statements) Act 2001.

63 Known as the *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 (CA) prohibition.

64 Conveyancing Act 1919 (NSW), s 196D. Or a Strata Management Statement if a strata scheme will be created over one or more of the stratum lots.

lots.[65] Stratum is much less tightly regulated than strata, and the Building Management Statement is subject to very few restrictions. For this reason, Cathy Sherry explains that developers prefer to use stratum, particularly for large mixed-use developments, as it gives greater freedom to design the scheme as the developer wishes, and it frees commercial owners from being inside the same strata scheme as residential owners. However, she argues that the lack of regulation is problematic as it allows binding obligations to be put in place with minimal outside review of whether they are appropriate. This is particularly problematic given that all the stratum lot owners have to agree in order to change the Building Management Statement, or get a court order to that effect.[66]

PART IV: THE OWNERS' ASSOCIATION

2.41 The lot owners are automatically part of a body corporate known as the owners' corporation, with the official name "The Owners—Strata Plan No X" (X being the registered number of the strata plan to which that strata scheme relates).[67]

2.42 This is a bespoke corporate body, and owners' corporations are excluded from the application of the Corporations Legislation,[68] as provided for by section 5F of the Corporations Act 2001.[69] This is different from commonhold in England and Wales, where the commonhold association is a company limited by guarantee, and is consequently governed by the Companies Act 2006.

2.43 The owners' corporation has principal responsibility for the management of the strata scheme,[70] and ownership of the common parts.[71] This involves responsibility for:[72]

(1) managing the scheme's finances;

(2) keeping accounts and necessary records;

(3) maintaining the common property;

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65 This seems to be akin to the flying commonhold method that was discussed in the run-up to the enactment of the CLRA 2002, which contemplated allowing positive covenants to run with land in the case of commonhold units.

66 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017).

67 Strata Schemes Management Act 2015, s 8. In the case of a leasehold strata scheme, the tenants are considered to be the owners for the purposes of the Management Act (s 4).

68 Management Act, s 8(2).

69 Strata Companies in Western Australia are also bespoke corporate entities excluded from the provisions of the Corporations Act 2001 (Strata Titles Act 1985, s 32(4)).

70 Strata Schemes Management Act 2015, s 9(1).

71 Strata Schemes Management Act 2015, s 24(2)(a). This is different to Strata Title as originally enacted, under which the lot owners would be the registered owners of the common property as tenants in common: see n 92, below.

72 Strata Schemes Management Act 2015, s 9(3).

(4) insuring the strata scheme – this includes insuring the whole building and taking out public liability insurance.[73]

2.44 There must be an AGM of the owners' corporation once each financial year and general meetings may be convened at any other point. One or more owners can request a general meeting. If their total lot entitlement is at least a quarter of the scheme, this amounts to a qualified request and the meeting must be convened within 14 days.[74] Detailed procedures for meetings and voting are set out. Included in these provisions is a requirement that the owners' corporation must prepare accounting records and financial statements, and circulate the statement of key financial information to the members ahead of the AGM. Owners may also request a copy of the latest financial statement ahead of the AGM.[75] Owners may request to inspect the financial statements at other times, but this may incur a fee.[76]

2.45 The owners' corporation must also appoint a strata committee which must be elected at an AGM of the owners' corporation.[77] Agents who lease one or more lots to tenants, and persons connected to the developer are not eligible to be appointed to the committee unless they own a lot in the scheme and disclose their connection before the election is held.[78] Additionally, owners who have outstanding unpaid contributions are ineligible. There are specific provisions setting out different requirements for who makes up the committee in the case of large schemes and schemes comprising two lots. Committee members have a duty to carry out their functions for the benefit, so far as practicable, of the owners' corporation and with due care and diligence.[79] In Queensland there is a code of conduct to help committee members understand how to exercise their powers appropriately.

2.46 In a freehold scheme, tenants of unit owners are entitled to attend meetings of the owners' corporation but are not entitled to vote.[80] Where there are tenants occupying over half of the lots in a scheme, they can nominate one non-voting tenant representative to the committee, but the committee may decide they are not entitled to be present for the discussion of certain financial issues.[81]

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73 Strata Schemes Management Act 2015, ss 160 and 164.

74 Strata Schemes Management Act 2015, ss 18 and 19.

75 Strata Schemes Management Act 2015, sch 1.

76 Strata Schemes Management Act 2015, s 182. In commonhold, the preparation and provision of financial information is governed by the Companies Act 2006, and the requirements of Companies House. This includes sending copies of annual accounts, which must be audited, to members, and sending a copy to Companies House. Failing to do so may incur a penalty and amount to a criminal offence.

77 Strata Schemes Management Act 2015, s 29.

78 See para 2.33 below. In commonhold, the CCS can confer a right on developers to appoint directors of the CA. During the transitional period, where there are no unit owners, the developer may appoint two directors. Once the transitional period ends, the developer may appoint up to one-quarter of the directors, so long as the developer remains the unit owner of over a quarter of the total number of units.

79 Strata Schemes Management Act 2015, ss 30, 32 and 37.

80 Strata Schemes Management Act 2015, sch 1(21).

81 Strata Schemes Management Act 2015, s 33.

Insolvency

2.47 Owners' corporations are exempt from the provisions of the Corporations Act 2001.[82] Consequently, they cannot be compulsorily wound-up due to insolvency under that Act. There is no reference to the insolvency of an owners' corporation in either the Development Act, or the Management Act. This flows from the fact that owners are ultimately jointly and severally liable for the debts of the owners' corporation. This is different from a commonhold association, which can be wound-up for insolvency by a creditor under normal insolvency rules.

2.48 Ahead of each AGM, the owners' corporation must estimate how much money it will need for both the administrative and capital works funds in order to fund actual and expected expenditure. As part of this, the owners' corporation must take into account its current financial situation.[83] Consequently, any debts incurred by the owners' corporation should end up being shared out between lot owners as part of the ordinary contributions, in proportions dictated by their lot entitlement. This makes the lot owners liable for the debts of the owners' corporation in proportion to their lot entitlement:[84]

(1) in the case of a contractor who has not been paid by the owners' corporation, privity of contract would mean he or she could only enforce the debt against the owners' corporation;

(2) if the owners' corporation does not have sufficient funds to pay the debt, it will need to raise a special levy to cover the debt; this will extract further funds from individual owners;

(3) in the case of a catastrophic injury claim, if the proper insurance was not in place then it seems likely that the claimant could bring an action against the owners' corporation and join the individual lot owners as defendants, to sue them together.

2.49 If an owners' corporation fails to pay a debt when it becomes due and a judgment debt is lodged against it in court proceedings, the NSW Civil and Administrative Tribunal may make an order appointing a strata managing agent. The order can specify the length of the appointment, but it must not exceed two years.[85] The managing agent then takes responsibility for administering the affairs of the owners' corporation for that period.

PART V: THE COMMUNITY

2.50 In a strata scheme, a building is subdivided into lots. Lot owners generally own anything within the "airspace" in their lot (such as carpets, internal walls and fixtures), and anything else is common property (for example, external walls, staircases and

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82 Strata Schemes Management Act 2015, s 8(2).

83 Strata Schemes Management Act 2015, s 79.

84 Cathy Sherry explains that most unit owners are unaware of this liability.

85 Strata Schemes Management Act 2015, s 237.

driveways). Owners automatically become part of the owners' corporation,[86] which has ownership of and responsibility for the common property.[87]

By-laws

2.51 In addition to the rights and obligations set out by statute, the strata scheme is internally governed by by-laws, which may impose rights and duties on owners, the owners' corporation, lessees, occupiers and mortgagees.[88] These may relate to activities on the common property, or within owners' lots. By-laws can be amended during the life of the strata scheme, by a resolution of the owners' corporation where 75% or more of those turning up to vote, vote in favour of doing so.[89]

2.52 Model by-laws exist. Developers are free to either adopt the models in their entirety, adopt them with alterations, or create a bespoke scheme from scratch. This allows by-laws to be designed that suit the needs of the particular scheme. However, by-laws cannot be harsh, unconscionable or oppressive, restrict children from the scheme or restrict dealings in a lot.[90] The matters which are left to the owners' corporation to prescribe through by-laws are also relatively limited and generally cover activities which may affect other owners' enjoyment of their property. This includes issues such as parking, keeping pets, behaviour of owners and their guests, and noise. The more significant rights and obligations of the owners and owners' corporation are set out in statute and cannot be derogated from. Despite this, Cathy Sherry argues that the power to create by-laws is, in fact, relatively expansive; particularly given that by-laws can regulate private lots, as well as common property. She explains that very few by-laws would fail to meet the requirement of dealing with "the administration, use or enjoyment of lots or common property".[91]

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86 This differs from commonhold, where membership of the commonhold association is mandatory for unit owners, but technically they are not automatically members. Automatic membership occurs in other states in Australia, including Queensland, Western Australia and Southern Australia.

87 The owners' corporation holds the land as agents for the lot owners, as tenants in common: Strata Schemes Development Act 2015, s 28(1). This differs from the original scheme in the 1961 Act for administrative reasons, and the position in all other Australian states. NSW Fair Trading, *Strata Living: Get Involved* (November 2016, revised July 2017) p 5, http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Publications/ft045.pdf.

88 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017), p 31.

89 Enough people must turn up to vote that a "quorum" is present at the meeting. This means that one-quarter of all the people entitled to vote must turn up. The result is that very few people can turn up and as long as only a small number of people vote against something, it will be passed. Apathy is the biggest problem in strata management. Getting 75% of all the owners in the corporation to vote in favour of something would be very difficult.

90 Strata Schemes Management Act 2015, s 139. This was a new provision introduced in the 2015 Act. To date there seem to be no court decisions on what amounts to being harsh, unconscionable or oppressive.

91 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017), pp 1 and 32. Most states prohibit by-laws from restricting assistance animals, and some states prevent "discriminatory" by-laws. NSW additionally prohibits by-laws banning children. Victoria is perhaps the only state to have set out an exhaustive list of what by-laws can regulate in relation to private lots. However, the legislation is ambiguous, and the scope of the by-law making power may in fact be broader than this. See further C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017) pp 31 to 32. In England and Wales, general equality law will regulate discrimination within commonhold.

2.53 This is different from England and Wales, where such rights and obligations are largely provided by the commonhold community statement ("CCS"). A prescribed form must be adopted for the CCS, as set out in statute and regulations, but there is some scope given for local rules to be created.

Management and maintenance

2.54 When the strata scheme is created, the common property vests in the owners' corporation[92] and is freed from any mortgage or charge.[93] If the common property is part of a freehold strata scheme, it is also freed from any lease affecting the land immediately before registration of the plan or notice.[94] This is presumably why consent from these parties may be required by the Registrar for the creation of the strata scheme.

2.55 The owners' corporation holds the common property as agent for the owners as tenants in common in shares proportional to their lot entitlement.[95] An owner's interest in the common property cannot be severed from, or dealt with separately from, his or her lot. Therefore, a dealing in relation to an owner's lot affects their interest in the common property even if the common property is not expressly referred to.[96]

2.56 By special resolution (75% majority), the owners' corporation may transfer or lease common property or create or vary easements, restrictions of use and positive

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92 This differs from the approach under the 1961 Act, where the common property vested in the lot owners as tenants in common. This was changed to the current system in the Strata Scheme (Freehold Developments) Act 1973 for administrative ease: whenever there is a dealing with the common property, an entry needs to be recorded against the title for the common property. Under the 1961 Act, this meant the Registrar General had to make an entry on the strata plan itself as there was no separate title certificate issued for the common property. At this time, there was a "modern policy, in the interests of space-saving, of reducing records by techniques such as micro-filming, the use of computers, and so on". This meant that every time a new entry was made on the strata plan, the whole plan, which usually had multiple pages, had to be re-photographed. Under the new system, a certificate of title would be issued for the common property in the name of the owners' corporation. The Registrar General could then record any dealings on the certificate alone, saving time and effort (*Hansard* (NSW Assembly), 26 Sep 1973, pp 1314 to 1315.

93 Strata Schemes Development Act 2015, s 24(2).

94 Other than a lease that is necessary for the purpose of providing a service to the scheme: Strata Schemes Development Act 2015, s 24(2)(c).

95 Strata Schemes Development Act 2015, s 28(1). This is different in Queensland, Victoria, Southern Australia and Western Australia, where the common property vests in the lot owners as tenants in common (Subdivision Act 1988, s 30; Strata Titles Act 1985, s 17). It is unclear why the position in Australia differs from the position in England and Wales, where the Commonhold Association owns outright the common parts. Cathy Sherry explained some of the consequences of the lot owners owning the common parts as tenants in common: firstly, they are entitled to occupy the whole, which makes it difficult to exclude owners from certain areas, for instance the gym if they have not paid the required fees. Additionally, it has made it harder for unit owners to pursue legal action against a developer for building defects, as they have to act unanimously, rather than the owners' corporation being able to act on their behalf, with a majority vote. Courts have now accepted that an owners' corporation can bring a case on behalf of all lot owners.

96 Strata Schemes Development Act 2015, ss 28(2) and (3).

covenants.[97] It would seem, however, that the owners' corporation cannot mortgage the common property.[98]

2.57 To acquire additional common property, the owners' corporation may accept a lease, sublease or transfer of land that is adjacent to the land already in the scheme. The land must not be subject to a mortgage and the transaction must be approved by a special resolution of the owners' corporation (75% majority).[99] If the scheme is a leasehold strata scheme, the lease of the new common property must not terminate after the lease of the existing common property.[100]

2.58 There are specific statutory provisions setting out obligations and rights of the owners' corporation in relation to:

(1) abandoned goods and vehicles on common property;[101]

(2) smoking on common property;[102]

(3) the installation of window safety devices;[103]

(4) provision of a letterbox;[104] and

(5) access to lots in order to carry out maintenance on common property.[105]

2.59 Common property can be designated for exclusive use by a specific lot owner. Where this is the case, that lot owner will be financially responsible for the upkeep of their allocated area of common property.

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97 Strata Schemes Development Act 2015, ss 33 and 34.

98 In Western Australia, a mortgage over the common parts is permitted but will only be effective if it has been approved in writing by the Planning Commission and local government (Strata Titles Act 1985, s 19(10)). The ability to mortgage common property in commonhold is much debated, but currently a legal mortgage may be created with unanimous consent of the commonhold association.

99 This is different to commonhold, where unanimous consent is required to add common property.

100 Strata Schemes Development Act 2015, s 25.

101 Strata Schemes Management Regulations 2016, regs 32 and 34.

102 Strata Schemes Management Regulations 2016, sch 3(9). This forms part of the model by-laws which do not have to be adopted. However, under the Strata Schemes Management Act 2015, s 153(1)(c), smoke from smoking may constitute a nuisance and, if it is taken to Tribunal, could carry with it a penalty.

103 Strata Schemes Management Act 2015, s 118. External windows will be situated in external walls of units, and therefore amount to common property. This provision had to be introduced as there were cases of owners' corporations preventing lot owners with children in high rise buildings from installing safety locks on their windows.

104 Strata Schemes Management Act 2015, s 121. The letterbox will be shared and consequently is common property.

105 Strata Schemes Management Act 2015, s 122.

2.60 There are also detailed provisions relating to any renovation and work that lot owners may wish to carry out on the common property surrounding their lot (for example, the outer walls of their flat). This is subdivided into three categories.[106]

(1) Cosmetic: this includes things such as installing a hook or painting. This does not require permission from the owners' corporation.

(2) Minor: for example, renovating a kitchen or installing hard flooring. This needs the approval of the owners' corporation by a general resolution.[107]

(3) Other renovations: this encompasses structural changes, changes to the external appearance of the lot and anything which might seriously affect the common property. Permission by a special resolution of the owners' corporation is needed for work in this category.

2.61 The owners' corporation is responsible for the overall management of the scheme. It should elect a strata committee to make day-to-day decisions, and may also appoint professional managing agents and/or a building manager to share the workload.

2.62 There are two types of professional agent that strata schemes can appoint: strata managers, who deal with all the functions of the owners' corporation, including financial matters; and, building managers, who deal with the day-to-day maintenance and running of the building (for instance, sweeping driveways and changing lightbulbs) but have no involvement with the finances of the scheme.

2.63 The owners' corporation may appoint, by general resolution (over 50% majority), a managing agent and/or a building manager to assist with carrying out certain functions. If a managing agent, or building manager, has been appointed by the developer before the first AGM, its appointment will end at that first AGM. If an appointment is made at the first AGM, the appointment will be for 12 months. If an appointment is made at any other AGM, the appointment will be for three years.[108]

2.64 When appointing managing agents, owners' corporations can negotiate the contract of appointment on terms that suit the specific scheme, including determining which areas of responsibility are delegated from the owners' corporation and strata committee to the manager. However, there are certain safeguards in place:[109]

(1) managing agents must be licenced;

(2) the manager cannot delegate its powers, authorities or duties to another;

(3) the manager cannot set the contributions to be paid; and

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106 Strata Schemes Management Act 2015, ss 108 to 110.

107 The owners' corporation can delegate the giving of approval for minor works to the strata committee using by-laws.

108 Strata Schemes Management Act 2015, ss 12, 26(1)(c) and 50(1).

109 Strata Schemes Management Act 2015, s 52(2).

(4) the manager cannot make a decision on a restricted matter that needs a special or unanimous resolution.

2.65 Building managers help specifically with the running of the building. This can include managing common property, controlling use of common property and maintenance.[110] Building managers are not eligible for appointment to the strata committee, and must declare, before their appointment, if they are either connected with the developer or have any financial interest in the scheme.

2.66 The use of managing agents across Australia is so common that in every state there is an active scheme manager industry, but regulation of agents varies widely. For example, the Northern Territory also requires managing agents to be licensed, in Victoria they only have to be registered, and in Queensland there is no requirement of licensing or registration. Victoria and NSW are the only states to require managing agents to have professional indemnity insurance. Building managers are less common, with only NSW, Victoria and Queensland having an active industry for such on-site managers, typically within serviced apartment or tourist strata schemes.[111] In Queensland the developer is specifically authorised to appoint a service contractor or letting agent for the scheme. Developers routinely do so, particularly for tourist schemes, and are paid for those contracts by the service provider or letting agent. There is an entire industry based around "management rights" in Queensland, and to a lesser extent in NSW. Developer-appointed managers have been the source of considerable litigation.[112]

Requirements varying by scheme size

2.67 The law regulating strata schemes differentiates, to a certain extent, between different sizes of scheme, requiring large schemes over 100 lots to fulfil extra requirements, and setting out specific rules to address the challenges faced by two-lot schemes. For example:

(1) in two-lot schemes, both owners are automatically on the strata committee which removes the election requirement;[113]

(2) in two-lot schemes where the buildings are not physically connected, the owners can unanimously decide that building insurance does not have to be provided by the owners' corporation, and instead the owners each get building insurance for their own lot;[114]

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110 Strata Schemes Management Act 2015, s 66.

111 National Community Titles Institute, "How different are we?" (July 2008), http://chambersfranklyn.com.au/upload/documents/Owners/ReferenceMaterial/NCTI-HowDifferentAreWe.pdf.

112 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017), pp 132 to 136.

113 Strata Schemes Management Act 2015, s 30(3).

114 Strata Schemes Management Act 2015, s 160(4).

(3) in schemes over 100 lots, it is mandatory that financial accounts are audited every year. In smaller schemes this is merely optional, unless the annual budget exceeds $250,000;[115] and

(4) in schemes over 100 lots, the owners' corporation must obtain at least two quotes for any expenditure exceeding $30,000 unless it is an emergency.[116]

Contributions to shared costs

2.68 The owners' corporation must establish an administrative fund for day-to-day expenses, and a capital works fund for major, or one-off, expenditure.[117] Owners contribute to this in proportion to their "lot entitlement", which is set out in the strata plan. The lot entitlement determines the share to be paid by that unit of any shared cost – there is no option for one unit to pay different proportions towards different costs. Although this is one aspect of the current commonhold legislation which has been widely criticised, it seems that this approach has not led to issues in NSW.

2.69 Across Australia, lot entitlement is usually based on the market value of the unit. However, this has caused issues in Queensland where the owners of penthouses with water views have a much higher market value than other lots in the same scheme, but argue that they do not use the common areas any more than other owners. In contrast, in the US lot entitlement is usually linked to floor space.

2.70 While voting is usually done on a one lot, one vote basis (when a vote is taken by a show of hands), voting can be done on a poll, which will mean that lot entitlement will determine voting entitlement. However, as lot entitlement is also linked to levies, abuses are not common. For instance, if a developer wanted to increase the voting share of some lots, then the contribution of those lots to the shared costs will also increase. If the developer wanted to decrease the contribution the units were paying to the shared costs, the voting entitlement of those units would also decrease if voting was conducted on a poll.

Special services

2.71 The Management Act enables an owners' corporation to enter an agreement with one or more lot owners to provide particular amenities, or services, to the lot, or lots.[118] This may have been introduced to accommodate different lot owners who may require

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115 Strata Schemes Management Act 2015, s 95(1).

116 Strata Schemes Management Act 2015, s102; Strata Schemes Management Regulations 2016, reg 25.

117 It is mandatory to establish this sinking fund, and to have a major works plan in place. However, it is not mandatory for the major works plan to be created by a professional. Owners' corporations can borrow money to pay for major works where it does not have sufficient funds in its sinking funds, but it may not mortgage the common parts. Lenders, such as Lannock Finance, are willing to lend to owners' corporations unsecured, seemingly on the basis that the majority of loans are repaid.

118 Strata Schemes Management Act 2015, s 117.

different services – for example, where there are both commercial and residential lots in the same scheme.[119] However, it seems that this provision is not used in practice.

Leases within strata

Lot owners in a freehold strata scheme leasing their lots

2.72 From the outset, the strata legislation has prohibited by-laws that restrict transfer or leasing.[120] Consequently, owners are free to create both short-term leases, for a periodic rent, and long leases, for a premium, over their lots. The Management Regulations contain a model by-law which, if adopted, would require owners to notify the owners' corporation of any change in use including any lease. This does not prevent lot owners from creating such leases, it simply requires notice to be given to the owners' corporation, which can help the owners' corporation monitor behaviour and maintain security.[121] Where 50%, or more, of the lots in a strata scheme are leased, the tenants are entitled to have an elected non-voting representative at the owners' corporation meetings.

2.73 The prohibition on by-laws restricting leasing has caused controversy in relation to short-term holiday leases. In a report published on the adequacy of the regulation of these leases in NSW, it was highlighted that some stakeholders want to prevent or restrict the creation of holiday leases because of the impact they have on security, increased wear and tear of common facilities, and more incidences of by-laws being breached.[122]

2.74 A NSW government submission to a NSW Legislative Assembly Committee report has stated that owners' corporations can:

> only seek to control short-term accommodation through the use of "conduct" by-laws, or development approvals that have been issued by the local council in respect of the scheme.[123]

2.75 Despite this, the committee received several submissions from owners' corporations stating that they currently have by-laws preventing short-term holiday letting in their

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119 In Western Australia, the by-laws for a scheme may allow contributions to be based on factors other than lot entitlement. This may relate to all the expenses of the Strata Company, or just particular kinds of expenses. This is another method of achieving flexibility in contributing to the provision of services (Strata Titles Act, s 42B).

120 See n 16, above.

121 NSW Fair Trading, *Strata Living: Get Involved* (November 2016, revised July 2017) p 28, http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Publications/ft045.pdf.

122 NSW Legislative Assembly Committee on Environment and Planning, *Adequacy of the regulation of short-term holiday letting in NSW Report 1/56* (Oct 2016), p 39, https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6080/Final%20Report%20-%20Adequacy%20of%20the%20Regulation%20of%20Short-Term%20Holiday%20Letting%20in%20New%20South%20Wales.pdf.

123 NSW Legislative Assembly Committee on Environment and Planning, *Adequacy of the regulation of short-term holiday letting in NSW Report 1/56* (Oct 2016), para 3.102, https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6080/Final%20Report%20-%20Adequacy%20of%20the%20Regulation%20of%20Short-Term%20Holiday%20Letting%20in%20New%20South%20Wales.pdf.

building.[124] However, a recent decision of the NSW Civil and Administrative Tribunal[125] declared invalid a by-law purporting to prevent owners creating short-term holiday leases. Cathy Sherry argues that this is more a question of public planning law than private property law: short-term letting is frequently prohibited by planning law, which in NSW can be enforced by owners' corporations, or even individual lot owners, without recourse to by-laws.[126]

Leasehold strata schemes

2.76 Leasehold strata schemes are a particular type of strata scheme, introduced in NSW by the Strata Schemes (Leasehold Developments) Act 1986 (the "1986 Act"). The explanatory note says:

> The purpose of this Act is to allow land to be subdivided by means of a strata scheme in cases where the owner of the land does not wish, or is not able, to part with ownership of the land. Under a leasehold strata scheme, the owner of the land that is the subject of the scheme retains an estate in fee simple in the land. The purchaser of each lot that is created under the subdivision obtains a leasehold interest, rather than a freehold interest, in the lot.

2.77 This has now been replaced by the Development Act, which defines a leasehold strata scheme as one "in which all lots and common property in the scheme are subject to a lease or leases".[127] It should be noted that leasehold strata schemes are very rare. Initially, only the state government could create leasehold strata, allowing it to retain control of the Sydney harbour area. This has since been expanded to other property owners, but in practice it is only really used by large institutions like the Catholic church who have property that is not currently being used, but they do not wish to (or cannot) sell.

2.78 In order to create a leasehold strata scheme, the plan submitted for registration must be accompanied by leases for each of the lots and common parts.[128] The separate leases must be registered (or lodged for registration) and must expire at the same time.

2.79 If leases of parts of the land already exist which correspond directly to lots shown in the strata plan, those leases will continue after the conversion to strata, so long as they all

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124 NSW Legislative Assembly Committee on Environment and Planning, *Adequacy of the regulation of short-term holiday letting in NSW Report 1/56* (Oct 2016), para 3.107, https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6080/Final%20Report%20-%20Adequacy%20of%20the%20Regulation%20of%20Short-Term%20Holiday%20Letting%20in%20New%20South%20Wales.pdf.

125 *Estens v Owners' Corporation SP 11825* [2017] NSWCATCD 63.

126 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017).

127 Strata Schemes Development Act 2015, s 4.

128 Strata Schemes Development Act 2015, s 11(1)(a). The freeholder of the scheme seems to usually be one person (often the developer), who retains ownership of the whole parcel of land, including the lots and the common parts.

expire on the same day.[129] This usually occurs when the leases have been created by a single freeholder with the intention of later forming a leasehold strata scheme.

2.80 There may be existing leases which do not correspond directly to lots shown in the plan, but are intended to be replaced with leases of lots. These will be terminated on conversion and replaced with new leases for the same tenants, over areas which now constitute lots. The replacement leases must be expressed to be in substitution for the terminated leases, to commence upon registration of the plan and to all expire on the same date. Any option to renew must be the same.[130]

2.81 If there are no existing leases, new leases can be created so long as they are expressed to commence upon registration of the plan and all expire on the same date, with the same option for renewal.

2.82 In each of the above situations there must also be a lease lodged for registration for the common property to the owners' corporation, executed by the developer.[131]

2.83 Upon expiry of the leases, the strata scheme would be terminated and the owners' corporation dissolved. Compensation may be payable to the tenants for the value of improvements to their lot if the leases, or any other agreements, so provide. The rights and liabilities of the owners' corporation vest in the tenants and the property reverts to the freeholder(s).[132] However, in practice, the legislation gives an almost guaranteed right that the leases will be regranted for another 99 years. Despite this, it is unlikely that the lot owners would want a regranted lease, as the building will almost certainly need redevelopment at that point.

2.84 Leasehold strata schemes constitute a tiny proportion of strata schemes, the vast majority of which are freehold. NSW and Queensland are currently the only states to have this type of strata scheme. Western Australia is in the process of introducing reforms to permit leasehold strata schemes, because they perceive leasehold strata to have the following benefits.[133]

(1) It gives freeholders an opportunity to develop land which they otherwise would not – for example, churches and universities who must retain ownership of their land, but also want to make it available for development.

(2) Private landowners can grant a lease to a developer to enable it to construct a strata scheme, without the landowner being actively involved him or herself in the development or maintenance of the building.

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129 Any terms for renewal must also be the same: Strata Schemes Development Act 2015, ss 11, 12(3) and (4).

130 Strata Schemes Development Act 2015, ss 12(1) and (2).

131 Registrar General's Guidelines, *Leasehold strata plan*, http://rgdirections.lpi.nsw.gov.au/strata_schemes/leasehold_strata_plan.

132 The proposed system of leasehold strata in Western Australia would have the property revert to the freeholder on termination of the scheme: Landgate, *Leasehold strata schemes* (April 2016), https://www0.landgate.wa.gov.au/__data/assets/pdf_file/0013/13135/Leasehold-strata-schemes.pdf.

133 Landgate, *Leasehold strata schemes* (April 2016), https://www0.landgate.wa.gov.au/__data/assets/pdf_file/0013/13135/Leasehold-strata-schemes.pdf.

(3) It offers an alternative form of tenure for retirement villages where purchasers are looking for a cheaper, shorter term interest.

(4) The expiration of the leasehold strata scheme is a more streamlined way of terminating strata schemes.

Affordable housing

2.85 The Department of Housing is starting to buy units in strata schemes, in order to mix public housing into existing schemes. However, a very small percentage of strata lots are social housing. Those who qualify for affordable housing rent directly from the Department. The Department would have the lot's vote, as only lot owners (rather than tenants) can vote.

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

2.86 The main causes of dispute in NSW are:

(1) building defects: in the past, it was hard for individual owners to act collectively to sue a developer, but case law now permits this. However, developers employ contractors to do much of the building work, and owners do not have any direct contractual relationship with those contractors. As a result, if work is defective, they cannot sue independent contractors. The person with whom they do have a contractual relationship – the developer – technically did not do the defective work. Defect problems have been seriously exacerbated by the use of private – as opposed to state - building certifiers, who are engaged by developers to certify that building work is compliant with the necessary regulations. The widespread existence of defective building work in the apartment market indicates that the current system is not working properly, and owners are often left with very large defect bills having purchased brand new apartments;

(2) complex developments: the more complex a development, the harder it is for purchasers to understand. Cathy Sherry explains that it is impossible for ordinary people to understand some of the complex titles and physical properties they are buying, in particular the contractual obligations that the developer may have caused the owners' corporation to enter prior to the completion of the development. This often leads to disputes;[134] and

(3) by-laws: owners' corporations sometimes become over-zealous in the enactment and enforcement of by-laws which can cause disputes amongst lot owners. The interaction of discrimination law and by-laws is also unclear, which leads to further disputes.

2.87 NSW legislation sets out a number of ways for resolving disputes, depending on the subject of the dispute. These are discussed in turn, below.

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[134] C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017).

Unpaid contributions

2.88 If a contribution is not paid, it attracts interest at an annual rate of 10% unless it is paid within one month of becoming due.[135] Owners' corporations may also decide to offer a 10% discount for contributions paid before the due date.[136] If an action is already pending before the Tribunal, for example, for breach of a by-law, then the Tribunal can order the owner to pay any unpaid contributions.[137] If there is no pending action, the owners' corporation must instead apply to the local court to recover any contributions left unpaid for more than one month.[138] This position differs from that in certain US States, and Canada, where the owners' association is entitled to a lien over the unit owner's lot for the payment of contributions even without applying to Court.

Breach of by-laws

2.89 If by-laws are breached, there is a three-stage process for the owners' corporation to achieve compliance:[139]

(1) first, they could contact the owner in question to advise them of the breach and ask them to comply (this is encouraged, but not mandatory);[140]

(2) if this is not successful, the owners' corporation then issue a notice to comply; and

(3) if the breach continues after a notice has been served then the owners' corporation may, if agreed at a committee meeting, apply to the Tribunal to impose a fine, payable to the owners' corporation. The maximum fine is currently $2,100.

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135 Strata Schemes Management Act 2015, s 85(1). In commonhold, interest is payable on late payments, at a rate decided by the commonhold association in the local rules, set out in the commonhold community statement.

136 Strata Schemes Management Act 2015, s 85(4).

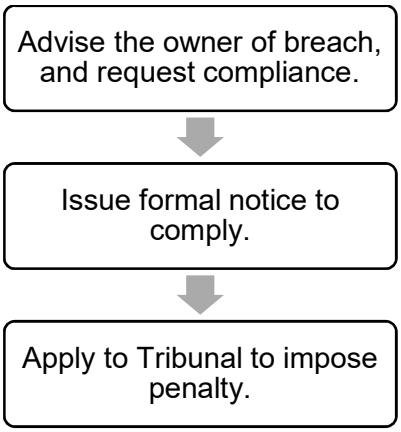
137 Strata Schemes Management Act 2015, ss 86(1) and (2).

138 Strata Schemes Management Act 2015, s 86(2A). There doesn't seem to be any additional enforcement powers, such as a charging order or power of sale. In commonhold, a court may award a charging order over a unit for unpaid commonhold assessments.

139 Strata Schemes Management Act 2015, ss 146 and 147.

140 NSW Fair Trading, *Strata Living: Get Involved* (November 2016, revised July 2017) p 39, http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Publications/ft045.pdf.

Figure 4:



2.90 If a penalty has already been issued to the same person for the same breach in the last 12 months, a second notice to comply does not need to be issued and the maximum fine the Tribunal can impose doubles. South Australia is the only state where the owners' corporation can directly fine lot owners.

Other disputes

2.91 Other disputes may occur, such as dissatisfaction with a managing agent, or disputes over damage caused to a lot. Strata schemes are designed to be internally self-governing. Many have their own process for resolving disputes and owners are encouraged to talk about issues.[141] Owners can also request disputed matters to be put on the agenda for the owners' corporation. If it cannot be settled through these channels, the Management Act provides for free mediation.[142] This service is provided by the NSW Fair Trading Agency. If the issue still remains unresolved, an application can be made to the Tribunal.[143]

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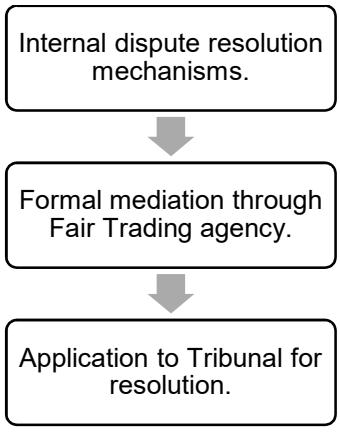
141 Strata Schemes Management Act 2015, s 216; NSW Fair Trading, *Strata Living: Get Involved* (November 2016, revised July 2017) p 39, http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Publications/ft045.pdf.

In Western Australia, an application to the Tribunal to resolve a dispute must certify that there are either no by-laws setting out internal dispute resolution mechanisms, or if there are such by-laws, that the internal procedures have been followed (Strata Titles Act 1985, s 77B).

142 Strata Schemes Management Act 2015, s 218.

143 In most cases mediation must first have been attempted: Strata Schemes Management Act 2015, s 227.

Figure 5:



2.92 In all Australian states, apart from South Australia, where there are relatively few strata schemes, there is a government-funded tribunal specifically responsible for resolving strata disputes.

PART VII: TERMINATION

2.93 Given that an owners' corporation cannot be wound-up on the petition of a creditor for insolvency, which would lead to the termination of the strata scheme, the main reason a strata scheme will be terminated is when it has become too expensive to maintain and needs redeveloping. There are three ways to terminate a freehold strata scheme (the first two of which also apply to leasehold strata schemes): (1) by application to the Register General; (2) by application to the Court; and (3) by following a special procedure in the event of sale or redevelopment.

Termination of Freehold Schemes

(1) Termination by Registrar General

2.94 Where there is unanimous agreement, the scheme can be terminated by the Registrar General.[144] An application for termination can be made to the Registrar General by a lot owner, a mortgagee of a lot, or the owners' corporation.[145] In order for the application to be accepted, the following conditions must be satisfied.

(1) The scheme must not be subject to a strata development contract.[146]

(2) The intention to make an application must be advertised at least 14 days prior to the application being made, in both:[147]

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144 Strata Schemes Development Act 2015, s 142(1).

145 NSW Land and Property Information, *Fact Sheet: Termination of a Strata Scheme by Registrar General* (December 2016), p 2, http://rgdirections.lpi.nsw.gov.au/__data/assets/pdf_file/0009/25965/Termination_of_a_strata_scheme_by_RG.pdf.

146 Strata Schemes Development Act 2015, s 142(1).

147 Strata Schemes Development Act 2015, s 142(2).

(a) a daily newspaper generally available in the state; and

(b) a local newspaper circulating in the area where the scheme is located.

(3) Any outstanding debts of the owners' corporation must be settled, as the Registrar General cannot appoint a person to oversee the winding-up of the owners' corporation.[148]

(4) The application must be signed by:[149]

(a) all lot owners;

(b) all registered lessees of a lot within the scheme;

(c) all registered mortgagees; and

(d) in the case of leasehold strata schemes, the freeholder.

(5) Applicants must obtain the consent of the local council, and must provide evidence that the land tax and water rates have been paid.[150]

2.95 If an application for termination is rejected by the Registrar General, the applicant may still apply to the Supreme Court for a termination order.[151]

2.96 A termination order for a freehold strata scheme made by the Registrar General has the following effects.[152]

(1) The owners' corporation is dissolved and the strata scheme is terminated.

(2) The land that was subject to the scheme, along with the assets of the owners' corporation, vest in the lot owners as tenants in common. Each owner's share is determined by his or her lot entitlement. Presumably, in order to reach unanimous consent to the termination, the lot owners must have agreed beforehand how to

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148 NSW Land and Property Information, *Fact Sheet: Termination of a Strata Scheme by Registrar General* (December 2016), p 2, http://rgdirections.lpi.nsw.gov.au/__data/assets/pdf_file/0009/25965/Termination_of_a_strata_scheme_by_RG.pdf.

149 Strata Schemes Development Act 2015, s 142(3). The Registrar General may dispense with the requirement for one or more of these signatures. However, this will only be done if it can be shown that the non-signing party will not be disadvantaged, there is other evidence of their consent, and obtaining their signature was not possible without considerable expense or difficulty. (NSW Land and Property Information, *Fact Sheet: Termination of a Strata Scheme by Registrar General* (December 2016), p 2, http://rgdirections.lpi.nsw.gov.au/__data/assets/pdf_file/0009/25965/Termination_of_a_strata_scheme_by_RG.pdf).

150 NSW Land and Property Information, *Fact Sheet: Termination of a Strata Scheme by Registrar General* (December 2016), p 2, http://rgdirections.lpi.nsw.gov.au/__data/assets/pdf_file/0009/25965/Termination_of_a_strata_scheme_by_RG.pdf.

151 Strata Schemes Development Act 2015, s 143(2). See para 2.97 below.

152 Strata Schemes Development Act 2015, s 146.

progress at this stage, otherwise this could create a deadlock where the unanimous decisions required for dealing cannot be reached.[153]

(3) Any interests registered over the land prior to termination continue to bind the lot owners, now as tenants in common, to the same extent as they did before termination.

(4) The lot owners are liable for the liabilities of the owners' corporation in shares determined by their lot entitlements.

(5) Any legal proceedings begun by the owners' corporation can be continued by or against the lot owners.

(2) Termination by Court

2.97 An application for the termination of a strata scheme may also be made to the Supreme Court.[154] The applicant must be a lot owner, mortgagee of a lot, the owners' corporation, or, in the case of a leasehold strata scheme, the freeholder.[155]

2.98 Notice of the application must be given to all lot owners, mortgagees, the owners' corporation, the freeholder (if it is a leasehold strata scheme), the local council and the Registrar General. The Court may also direct that notice should be given to some other person. Each of these parties may appear and be heard at the application hearing.[156]

2.99 The Court may then make a termination order. This can include any specific directions the court finds just and equitable, including directions relating to:[157]

(1) the property and assets of the owners' corporation;

(2) the discharge of any liabilities of the owners' corporation, and who is liable to contribute; and

(3) the termination of any development scheme or contract relating to the land.

2.100 There is no specific requirement that all parties must consent. In cases where the Court decides not to issue a termination order, it may instead issue a variation order.[158] In practice, this provision has almost never been used due to uncertainty over what the court would do.

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153 However, in reality, almost all of the terminations that occur this way will happen when a developer has bought all of the lots, and is terminating to redevelop. There is, therefore, no one else that the developer has to get to agree.

154 See n 41 above.

155 Strata Schemes Development Act 2015, s 135(1).

156 Strata Schemes Development Act 2015, ss 135(2) and (3).

157 Strata Schemes Development Act 2015, s 136.

158 Strata Schemes Development Act 2015, s 140. The court may include any specific directions it considers just and equitable, including amending a strata management statement and the substitution of lot entitlements (Strata Schemes Development Act 2015, s 131).

2.101 A termination order issued by the Court has the following effects.

(1) The common property, which was vested in the owners' corporation as agent for the lot owners, now vests in the owners' corporation as principal. It will, it appears, continue to be subject to any registered interest. Given that the owners' corporation cannot mortgage common property, the registered interests are likely to be leases or easements.[159]

(2) The rest of the land also vests in the owners' corporation as principal, subject to any registered interest.

(3) The lot owners cease to be owners.

(4) Instead, each lot owner has the rights and liabilities conferred upon them by the provisions of the termination order.

(3) Sale and Renewal

2.102 In addition to the two methods of terminations set out above, the 2015 legislation introduced a new way to achieve termination for the sale or redevelopment of a freehold strata scheme. This reform was a response to criticism that the requirement for unanimity made it difficult for schemes to terminate. Under the new provisions, only a 75% majority is needed.[160]

2.103 The new provisions require the following process to be followed.

(1) A proposal to sell or redevelop must be put before the strata committee for consideration, and must then go to a general meeting of the owners' corporation. At least 50% of the owners must agree to pursue the proposal. [161]

(2) A strata renewal committee will then be formed to investigate and develop the proposal. This committee can also get the assistance of professionals, such as lawyers and valuers. [162]

(3) A collective sale, or renewal plan, must be developed. There are strict requirements as to what this must include;[163] for example, the amount that each lot owner will receive, proposed settlement dates and moving out arrangements. If it is a redevelopment plan, there must be a statement from the purchaser, or developer of its intended future plans. The plan must go to the owners' corporation for consideration. The owners' corporation may amend the plan by

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159 See para 2.56.

160 Queensland, Western Australia and Southern Australia have no mechanism for terminating strata schemes without unanimous consent, other than by application to the court which may order termination if it appears just and equitable to do so (however, it is unclear when this will be the case). In Victoria, termination can be achieved only by application to the court.

161 Strata Schemes Development Act 2015, ss 157, 158 and 160(1).

162 Strata Schemes Development Act 2015, ss 160 to 167.

163 Strata Schemes Development Act 2015, s 170.

general resolution (over 50% majority), and decide by special resolution (75% majority) to give the plan to all the owners for consideration. [164]

(4) All the owners will then be given at least 60 days to consider the proposal and seek independent advice.[165] If the plan receives support from 75% or more of the owners, within 12 months, then it will proceed. If this is not attained then the plan lapses. [166]

(5) Plans that receive at least 75% consent will then be referred to the Land and Environment Court for consideration and approval.[167] The Court will consider, amongst other things, whether the process has been properly followed and whether it has been developed in good faith. It may mediate any disputes and ensure that the terms are just and equitable, as well as examining the amount to be received by each owner.[168] Where the plan is for a sale, or where there are dissenting owners, the amount paid to each owner must not be less than the value of his or her lot. [169]

(6) An order given by the Court giving effect to a collective sale or renewal plan attaches to the land in question and is binding on the owners' corporation, owners, mortgagees and purchasers or developers under the plan.[170]

2.104 In England and Wales, commonhold may be terminated by an 80% majority vote, and, where there are dissenting unit owners, it is left to the court to determine the terms of the termination. The process for sale and renewal in NSW seems to set out a more detailed and involved framework to achieve a similar end point. The main difference is that the terms of termination should have been set out by the owners' corporation before it gets to the court, rather than the court deciding the terms. Whether this is just a case of adding complexity, or a helpful process by which lot owners have the opportunity to be involved in making the decisions, remains to be seen.

2.105 Cathy Sherry argues that, whilst some form of termination provision is needed, this scheme has insufficient protection for lot owners. Her view is that the sale and renewal provisions effectively amount to compulsory acquisition of private property for financial

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164 Strata Schemes Development Act 2015, s 172. This means that the plan will be distributed to all owners, even if they were not present at the meeting of the owners' corporation where it was decided to distribute the plan. Importantly, the 75% majority vote to distribute the plan to owners does not mean that the plan has 75% approval. It merely means that the process of distributing the plan has support, and it then remains to be seen at the next stage whether the owners actually approve of the plan. For example, one owner could vote to distribute the plan at the meeting of the owners' corporation, but then object to the plan itself at the next stage.

165 Strata Schemes Development Act 2015, s 174.

166 Strata Schemes Development Act 2015, ss 154 and 177. The consent of mortgagees does not seem to be required.

167 Strata Schemes Development Act 2015, ss 178 and 179.

168 Strata Schemes Development Act 2015, ss 181 and 182.

169 Strata Schemes Development Act 2015, s 171. The compensation value is determined under the Land Acquisition (Just Terms Compensation) Act 1991, s 55.

170 Strata Schemes Development Act 2015, s 187.

gain. She suggests that there should be some requirement that the cost of repairs are so great that renewal is the best course or that there is some public benefit to justify termination where there is a dissenting minority.[171]

Termination of a leasehold strata scheme

(1) Termination by Registrar General

2.106 A termination order for a leasehold strata scheme made by the Registrar General has the following effects.[172]

(1) The owners' corporation is dissolved and the strata scheme is terminated.

(2) The leases of each lot and the common property are terminated.

(3) The lot owners[173] are liable for the liabilities of the owners' corporation in shares determined by their lot entitlements.

(4) Any legal proceedings begun by the owners' corporation can be continued by or against the lot owners.

(5) The assets of the owners' corporation vest in the freeholder, unless the application provides that they should vest in the former owners as tenants in common. In this case, each owner's share is determined by his or her lot entitlement.

(6) The land that was subject to the scheme vests in the freeholder and is freed from any mortgage over the lease of a lot or over common property that was registered prior to termination.

(2) Termination by the Court

2.107 In addition to the provisions set out above, in relation to the termination of a freehold strata scheme, leasehold strata schemes can be terminated by application to the Court. The effects of termination will be the same, but additionally, if the leases or other agreements provided for the payment of compensation, the freeholder of the scheme is liable to pay such compensation.[174]

(3) Effluxion of Time

2.108 In addition, a leasehold strata scheme will terminate on expiry of all the leases. On termination of the scheme, the owners' corporation is dissolved.[175] All rights of the owners' corporation vest in the lot owners[176] and they become jointly and severally liable

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171 C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (2017).

172 Strata Schemes Development Act 2015, s 147.

173 For the purposes of a leasehold strata scheme, the tenants are considered lot owners: Strata Schemes Development Act 2015, s 4.

174 For the value of improvements to the lot (Strata Schemes Development Act 2015, sch 6).

175 Strata Schemes Development Act 2015, s 148.

176 For the purposes of a leasehold strata scheme, the tenants are considered lot owners.

for any liabilities of the owners' corporation. Any legal proceedings that have already begun may be continued by, or against, the lot owners.[177]

2.109 The leases, or other agreements, may provide that compensation is payable in respect of any improvements the tenant has carried out on his or her lot. On termination of the scheme, this becomes payable.[178] If there is a dispute as to the value of such improvements, either party may apply to the court for an order to resolve the dispute.[179]

[177] Strata Schemes Development Act 2015, ss 148(1)(d) to (f).

[178] Strata Schemes Development Act 2015, s 148(2), sch 6.

[179] Strata Schemes Development Act 2015, s 149.

Chapter 3: Canada

INTRODUCTION

3.1 The Canadian equivalent of commonhold has different names in different places. In British Columbia it is called "strata title" and in Quebec it is known as "divided co-property" (or "copropriété divisée" in French). All the other Canadian provinces and territories refer to it as "condominium".

3.2 Canada has a common law legal system[180] with legislative power[181] split between the federal and provincial governments. Property law falls within the jurisdiction of the provinces. Consequently, the law relating to condominium/strata/divided co-property varies between provinces.

3.3 In this document, we have focussed on the province of British Columbia for two main reasons. First, the four cities with the highest proportion of homeowners owning strata properties in Canada (Vancouver, Abbotsford, Victoria and Kelowna) are in British Columbia.[182] Secondly, the British Columbia Law Institute is currently undertaking a long-term law reform project on strata title.[183] However, at key points, the approach of other Canadian states will also be considered.

LEGISLATIVE HISTORY

3.4 During the mid-twentieth century, Canadian society became progressively urbanised. This put more pressure on land in cities and forced land prices up. Consequently, multi-unit buildings became increasingly common.[184] Title to these units could be dealt with through leasehold or housing co-operatives,[185] but lenders were reluctant to give mortgage finance on either of these types of title. Strata title was therefore introduced to encourage acceptance of units among lenders, and to encourage involvement from property investors.[186]

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180 With the exception of Quebec, which operates a hybrid system of common law and civil law.

181 The power to make law.

182 Statistics Canada, *Changing Patterns in Canadian Homeownership and Shelter Costs, 2006 Census* (2006), Table 4, http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-554/table/t4-eng.cfm.

183 See further, https://www.bcli.org/project/strata-property-law-phase-two.

184 Report on Strata Property Law: Phase One, British Columbia Law Institute, p 3, http://www.bcli.org/sites/default/files/2012-11-30_BCLI_Report_on_Strata_Property_Law--Phase_One.pdf.

185 Housing co-operatives are similar to company title in Australia, and to "housing co-operatives" in certain of the United States. A company is created, and the occupiers buy shares in the company. These shares entitle the occupiers to exclusive occupation of part of the land through a lease which is attached to the share. However, the shares do not necessarily amount to an interest in land, which consequently meant lenders were often unwilling to accept such rights as security for a loan.

186 Report on Strata Property Law: Phase One, British Columbia Law Institute, p 9, http://www.bcli.org/sites/default/files/2012-11-30_BCLI_Report_on_Strata_Property_Law--Phase_One.pdf.

3.5 The first strata legislation in British Columbia was the Strata Titles Act 1966 ("the 1966 Act"). It sought to popularise residential multi-unit buildings by providing stability for unit owners, certainty for lenders and simplicity for conveyancers through the use of a standardised template for freehold ownership in such buildings. It appears that there was no compulsion or financial incentives provided to encourage the adoption of strata, but as it provided a secure and full title in a way that no previous solution had, there may have been no need for such measures.[187]

3.6 The 1966 Act, with a total of only 25 sections, created a relatively basic framework for the operation of strata title. The Act provided that strata schemes would be created by the registration of a strata plan, which divided the scheme into strata lots (to be owned by individuals as freeholders) and common property (to be owned collectively by all the lot owners). Access, support and the provision of services were provided for through statutory easements.[188]

3.7 The 1966 Act also contained provisions relating to the governance of strata schemes. A strata corporation would be created on registration of the strata plan, with all the lot owners automatically becoming members. Although it was the lot owners who jointly owned the common property, the strata corporation had responsibility for the management and administration of the common property. The 1966 Act required the corporation to obtain building insurance, and provided for the creation of an administrative fund. The Act also required the scheme to have by-laws, governing the relationships between lot owners, and between the lot owners and the corporation.[189]

3.8 Although the 1966 Act made it possible to create strata "councils" to exercise the day-to-day functions of the corporation, this was left up to the scheme's by-laws to implement and regulate. Additionally, the only provisions relating to termination focussed on defining when a building would be considered "destroyed", and how property interests were to be disposed of following destruction.

3.9 Since the 1966 Act, there have been several statutes repealing and replacing previous strata legislation, as well as a number of amending statutes and regulations supplementing the statutory provisions. Some of these are set out in Table 2, below.

Figure 6:

Provision	Purpose
Strata Titles Act 1974	This repealed the 1966 Act, replacing it with many provisions that were very similar (albeit more sophisticated), but also added in a range of new provisions. Key reforms included:[190]

187 Report on Strata Property Law: Phase One, British Columbia Law Institute, p 9, http://www.bcli.org/sites/default/files/2012-11-30_BCLI_Report_on_Strata_Property_Law--Phase_One.pdf.

188 Report on Strata Property Law: Phase One, above, p 10.

189 Report on Strata Property Law: Phase One, above, p 10.

190 Report on Strata Property Law: Phase One, above, pp 11 to 12.

	(1) provision for phased strata schemes;[191] (2) provision for leasehold strata schemes (which can only be created by public bodies);[192] (3) an arbitration procedure for dispute resolution; (4) more specific direction regarding strata councils; (5) a requirement that a contingency reserve fund be established; and (6) scope for sections to be created within strata schemes.
Strata Property Act 1998	This repealed and replaced the 1974 Act. It addressed all the areas covered in the 1974 Act, but expanded some provisions and introduced new ones to address issues that had emerged. The three main purposes of the 1998 Act were:[193] (1) to redraft strata law in plain language; (2) to balance fairly the interests of developers, strata corporations, and lot owners; and (3) to provide increased flexibility for strata schemes. One of the main additions was a detailed consumer protection regime, which covered record-keeping and access to information, the conduct and obligations of developers, disclosure requirements and more detailed provisions on maintenance obligations.
Strata Property Amendment Act 2009	This amended the 1998 Act, in particular, in relation to the consumer protection provisions. It reduced the threshold for lot owners to call meetings and provided for audits. It also amended the rules on leasing strata lots and gave the provincial court a bigger role in resolving strata disputes.[194]
Civil Resolution Tribunal Act 2012	This introduced an online tribunal to help resolve disputes in strata schemes. It was originally used for strata disputes only, but its jurisdiction has since been expanded to cover small-claims disputes.

191 See paras 3.20 to 3.24 below.

192 See paras 3.68 to 3.71 below.

193 *Hansard* (British Columbia Legislative Assembly), 23 July 1998, 36th Parliament, 3rd Session, vol 12(4), p 10379.

194 Report on Strata Property Law: Phase One, British Columbia Law Institute, pp 13 to 14, http://www.bcli.org/sites/default/files/2012-11-30_BCLI_Report_on_Strata_Property_Law--Phase_One.pdf.

PARTS II & III: CONVERTING TO STRATA AND CREATING A NEW STRATA DEVELOPMENT

Setting up a new development, or converting an existing development

3.10 In order to create a strata scheme, a strata plan must be filed with the Land Title Office.[195] The person applying to deposit the strata plan must be the registered owner of all the land in the plan,[196] and the plan must show the strata lots, common property and limited common property.[197] There are further, detailed requirements in the Strata Property Regulation setting out how the strata plan is to be prepared, what it must show, and how it must identify the different types of property in the plan.[198]

3.11 If the strata plan relates to a new development, that has not been previously occupied, a land surveyor must endorse the plan, specifically certifying that the building has not been previously occupied.[199] If the plan relates to a building which has been previously occupied (that is, converting an existing ownership structure to strata), the plan must first be submitted to an approving authority[200] who will either approve or reject the plan. This decision is final and may not be appealed.[201] The strata plan must comply with building regulations and any applicable by-laws in the region, otherwise the approving authority will not approve the plan.[202] The approving authority may approve the plan as it is, or may approve it subject to terms and conditions. The approving authority must take into consideration:

(1) the priority of rental accommodation in the area;

(2) any proposals for the relocation of people currently occupying a residential building;

(3) the life expectancy of the building and any corresponding increases in maintenance costs; and

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195 Strata Property Act 1998, s 239.

196 Strata Property Act 1998, s 240.

197 See para 3.51 below. Similarly to British Columbia, in Alberta the condominium plan, along with the by-laws, are the main documents governing a condominium. The system operates differently in Ontario where a declaration must be created for each scheme, setting out that the land in question is to be subject to the condominium legislation, setting out the unit entitlement, what common property is to be available, and other central matters. This forms the constitution of the condominium, and all other by-laws and actions of the corporation must comply with this constitution. B Ziff, *Principles of Property Law* (5th ed 2010).

198 Strata Property Regulation, regs 14.3 and 14.4.

199 Strata Property Act 1998, s 241.

200 This includes the municipal council of the municipality; the regional board of the regional district; and the Village Government or other governing body of indigenous groups. Strata Property Act 1998, s 242(1).

201 Strata Property Act 1998, s 242(4).

202 Strata Property Act 1998, s 242(5).

(4) any other matter they deem to be relevant.[203]

3.12 In order to be accepted by the Registrar, the strata plan must be signed by every freehold owner of the land[204] and each holder of a registered charge over any part of the land included within the strata plan.[205] However, this requirement may be waived if the Registrar deems that the deposit of the strata plan will not adversely affect the interests of those who have not signed.

3.13 Regarding conversion from an existing scheme, the city of Vancouver, for instance, will only approve strata plans where at least two thirds (67%) of the households occupying the building have consented to the conversion and the interests of all tenants have been adequately respected in the conversion process.[206]

3.14 This is significantly different from the conversion process for commonhold. The Commonhold and Leasehold Reform Act 2002 and the Commonhold Regulations 2004 provide that 100% consent must be obtained from all owners, tenants and chargees of the land that is to be converted. This has attracted criticism that it makes it effectively impossible to convert an existing building from leasehold to commonhold.[207] Given that British Columbia has had strata title for such a long period, it might have been thought that there would be little demand for conversion, as strata seems to have been widely accepted since the 1960s. This seems to be the case in New South Wales ("NSW"), where there is seemingly no acknowledgement that conversion may occur. In British Columbia, there is statutory recognition that a previously occupied building may be the subject of a strata plan., Unlike in England and Wales, however, it seems to be intended to facilitate the conversion of rented, rather than leasehold, residential units.

Impact of conversion on leases

3.15 Landlords may terminate tenancies of residential units if they intend, in good faith, to convert that residential property to freehold strata lots. This appears to provide landlords with a specific, additional ground to terminate tenancies. Landlords must give at least two months' notice of such a termination.[208] Tenants who receive notice of termination due to conversion are entitled to receive compensation, which must amount to one month's rent. However, if the landlord has not made steps to accomplish the stated purpose within a reasonable period after termination, the landlord must compensate the ex-tenant for a sum equivalent to two months' rent.[209]

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203 Strata Property Act 1998, s 242(6). The approving authority's role involves more than vetting the accuracy of the plans, although it is unclear how each of these considerations is applied in practice.

204 Strata Property Act 1998, s 240; Land Title Act 1996, s 97.

205 Strata Property Act 1998, s 244(1)(g).

206 City of Vancouver Planning and Development Services, *Land Use and Development Policies and Guidelines: Strata Title and Cooperative Conversion Guidelines* (2013), http://vancouver.ca/docs/bylaws/subdiv/Strata-title-and-cooperative-conversion-guidelines.pdf.

207 See, for instance, responses to question 1 of our Call for Evidence.

208 Residential Tenancy Act 2002, s 49.

209 Strata Property Act 1998, s 51.

Development rights

3.16 The developer[210] is taken to be the person who registers the strata plan. A person who acquires more than 50% of the strata lots from this developer is also considered to be a developer.[211] This might lead to there being two different developers within the same strata scheme.

3.17 The developer has different rights and obligations at different stages in a strata development. From the point when the strata plan is registered, and the strata corporation is consequently incorporated, the developer must act as the strata corporation. This includes a duty to pay the expenses of the strata corporation up until the first lot is sold. Up to this point, the developer may also pass any resolution of the strata corporation without holding a general meeting, including resolutions to amend by-laws.[212]

3.18 In the period between the first lot being sold and the first AGM, the developer, acting as the strata corporation, must set an interim budget and consequently collect fees from lot owners.[213] This includes fees from itself in respect of any lots it still owns. The developer must also establish a contingency reserve fund, by depositing a sum which is at least 5% of the estimated annual running costs of the scheme.[214] There are restrictions on what resolutions may be passed by the strata corporation during this period, protecting current occupiers from unilateral decisions by the developer, and also protecting future purchasers.

(1) Any resolution normally requiring a 75% majority vote will require unanimous consent before the first AGM.[215]

(2) Any amendment to the by-laws after the first lot is sold, but before the second AGM, requires a unanimous resolution of the strata corporation.[216]

(3) No contract or transaction may be entered into before the first AGM with either the developer or a person connected to the developer, unless this is given unanimous approval by the strata corporation.[217]

3.19 These duties and restrictions will end at the first AGM (with the exception of the restriction on by-law amendments, which ends at the second AGM). The first AGM must be prepared for and held by the developer. It must be held within six weeks of the date on which over 50% of the lots have been sold, or within nine months and six weeks of the first lot being sold, whichever is earlier. The developer must prepare an annual

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210 Referred to in the Strata Property Act 1998 as an "owner-developer".

211 Strata Property Act 1998, s 1.

212 Strata Property Act 1998, ss 7 and 8.

213 Strata Property Act 1998, s 13.

214 Strata Property Act 1998, s 12.

215 Strata Property Act 1998, s 11(c).

216 Strata Property Act 1998, s 127(1). After the second AGM a 75% majority will be sufficient.

217 Strata Property Act 1998, s 10.

budget and financial information statement for this AGM, and must provide access to its financial records. A strata council must be elected at this AGM which will take over the duties of the strata corporation from the developer.[218]

3.20 In addition to setting out the rights and obligations of developers in ordinary strata schemes, the law in British Columbia also makes provision for phased strata schemes. This is where strata lots are constructed in two or more phases, on one or more separate parcels of land. This gives flexibility to developers to sell one phase in order to finance the development of the next. Commonhold makes no reference to phased development, other than allowing developers to reserve any development rights they need to permit them to continue developing. This seems to allow flexibility to developers to build and sell lots as they wish, but can be criticised for not providing any structure or protection for pre-completion purchasers.

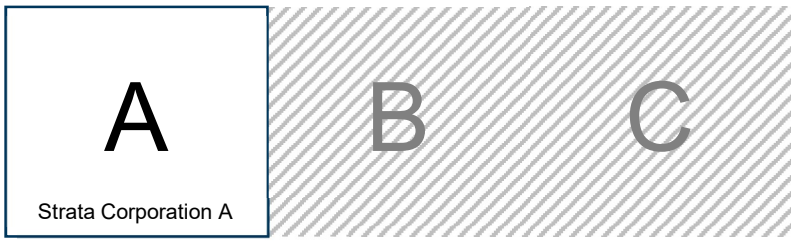
3.21 A separate strata plan must be registered for each phase. Each new phase is automatically joined to the previous phase(s) on registration of the plan for that phase.[219]

For example: Strata Scheme X is to be built in three phases: A, B and C.

Figure 7:

Once phase A is complete, a strata plan for that phase is registered. This creates strata scheme A, and incorporates strata corporation A.

Figure 8:

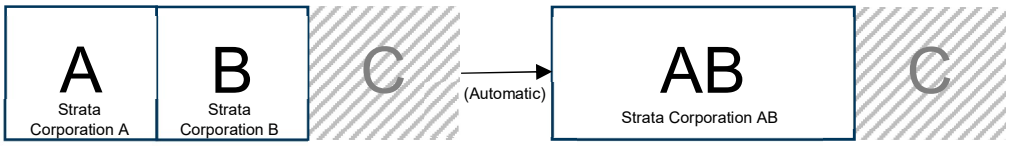


[218] Strata Property Act 1998, ss 16, 20, 21 and 23.

[219] Strata Property Act 1998, s 228.

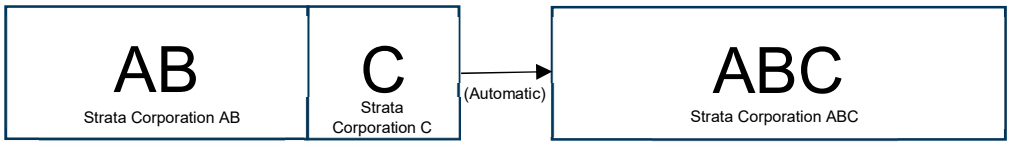
Once phase B is complete and a strata plan for that phase is registered, strata scheme B and strata corporation B is created. This is automatically amalgamated with strata scheme A and strata corporation A to create strata scheme AB which is governed by strata corporation AB.

Figure 9:



Phase C is then completed and a strata plan registered. This creates strata scheme C and strata corporation C, which is amalgamated with strata scheme AB to create strata scheme ABC, governed by strata corporation ABC.

Figure 10:



3.22 A "Phased Strata Plan Declaration" setting out the intentions of the developer must be filed with the first phase strata plan. To gain approval for registration of strata plans for later phases, the phase must substantially comply with the plan set out in the declaration.[220] In order to amend the declaration, a developer must apply to an approving officer[221] for approval of the amendment, and must notify the strata corporation. The strata corporation may make written representations to the approving officer, or apply to the Supreme Court of British Columbia[222] for a declaration that an amendment alters the common facilities in a way which is unfair. If an amendment is found to be unfair, the Supreme Court may order that the developer completes whatever common facilities are deemed to be equitable.[223]

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220 Strata Property Act 1998, s 224.

221 As appointed under the Land Title Act. Each municipal council must appoint an approving officer, such as the chief planning officer or municipal engineer.

222 It should be noted that the "Supreme Court" in British Columbia is the approximate equivalent of the High Court in England and Wales.

223 Strata Property Act 1998, ss 233 and 234.

3.23 A developer may also elect not to proceed with a phase. If so, it must give written notice of this decision to the strata corporation.[224] The Supreme Court may determine that this election is unfair, and order the developer to complete whatever common facilities the court considers equitable.

3.24 This is different from the protection provided for purchasers of lots before completion in NSW. In NSW a development contract must be registered along with the strata plan. This sets out certain work which the developer *must* undertake, as well as work which the developer *may* undertake. This sets up contractual obligations which bind developers and can be enforced as a matter of contract. Whilst the system of development declarations in British Columbia does provide some protection to pre-completion purchasers, in particular through the jurisdiction of the Supreme Court, this seems to be a lower level of protection than the contractual expectations protected in NSW.

Mixed-use/complex developments

3.25 There are two methods of dividing up a strata scheme into separate parts: sections and types. Sections operate effectively as mini strata schemes within the overall scheme, whereas types are a way of differentiating different types of lot for the purpose of allocating expenses. Air space parcels, which are then subdivided by a strata scheme, may also be used as an alternative way of separating title, ownership and management of residential and non-residential portions in the same building.

Sections

3.26 Sections may be created under the Strata Property Act for the purpose of representing the different interests of lot owners in schemes where:[225]

(1) there are residential and non-residential lots;

(2) there are a number of non-residential lots, which use their lots for significantly different purposes;[226] or

(3) there are different types of residential lots.[227]

3.27 A section is created through the by-laws of a strata corporation. On registration of by-laws, or amendment of previously registered by-laws, a section is created. This includes the incorporation of a company with the name “Section [number of section] of [name of strata corporation]". The strata corporation remains responsible for matters of common interest to all the owners in the strata scheme. The section becomes responsible for matters that relate solely to owners in the section, and as part of this, takes on the same duties and powers as a strata corporation in relation to the section. This includes holding AGMs, and setting and collecting fees from the owners to fund the day-to-day expenses

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224 Strata Property Act 1998, s 235.

225 Strata Property Act 1998, s 191.

226 For example, a supermarket and a hotel.

227 The different types of residential strata lot are apartment-style lots, townhouse-style lots and detached houses: Strata Property Regulation, reg 11.1.

of the section and a contingency reserve fund. However, the section cannot enter contracts in the name of the strata corporation (and so must enter into contracts in its own name), and the strata corporation has no liability for debts of, or contracts entered into by, the section.[228]

3.28 A section must elect an "executive" which is the equivalent of the strata council for that section.[229] One member of the executive will be elected to the strata council, to represent the section. The by-laws of the strata scheme will apply to the section, unless they have been amended by the section.[230] The only by-laws a section may amend are those relating solely to that section, and amendments must be passed by a 75% majority of section owners.[231]

Types

3.29 Types can be created by a strata corporation, or a section, by adding a by-law to that effect. Types are more limited in scope than sections, as they do not have their own corporation or executive and cannot create their own by-laws. The strata corporation (or section, if the types are within a section) remains responsible for the management of the lots and common property within the different types.

3.30 Types are focussed on allowing expenditure from the operating fund to be allocated to a subsection of the lots.[232] This gives the flexibility to recognise that different services may be required by different lots, and consequently to allow only those owners using a particular service to contribute to the costs. The by-law must state the different types of lot, and the expenses allocated to a certain type must relate to, and benefit only, that type of lot. The Strata Property Act 1998 does not set out what constitutes a different type of lot for these purposes, which leaves it open to strata corporations to define different types as they wish. This gives a wide scope for types to be adapted to suit the needs of the particular scheme.

For example: there is a new multi-use block being developed. There is a small supermarket, hair dresser and preschool on the ground floor. There are then three floors of office space, each of which is a separate strata lot, so as to accommodate three different businesses. The other three floors are residential lots, with three flats on each floor, except for the top floor which is a penthouse apartment with a private roof terrace. The basement is a swimming pool for use by the residential lots only. Next to the swimming pool is a gym, which all the residential lots have the choice to subscribe to. Currently, flats 2, 4 and 6 are subscribers. There is a carpark with spaces allocated specifically to each residential lot, 5 spaces allocated to each office lot, and 10 spaces which are unallocated and may be used by anyone. There is also a shared satellite dish used for TV services by flats 1, 3, 5 and 7, the hairdresser and preschool.

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228 Strata Property Act 1998, ss 193 and 194.

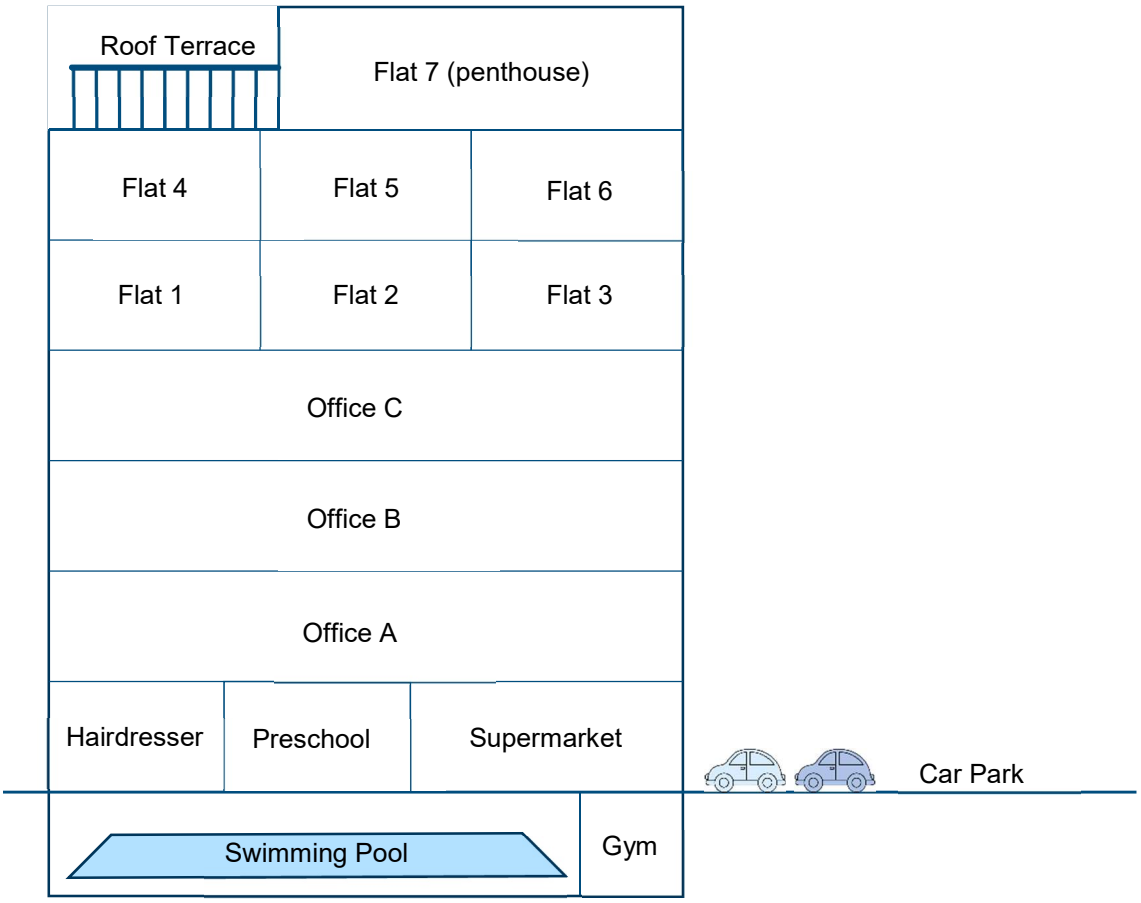
229 Strata Property Act 1998, s 196(2).

230 Strata Property Act 1998, s 197.

231 Unless it is before the second AGM of the strata corporation, in which case a unanimous vote is needed.

232 A key difference between sections and types is that sections allow for any cost to be apportioned between different strata owners within the same strata development, whereas types only allow the separation out of operating fund expenses.

Figure 11:



In England this would have to be organised through a system of leases, (or flying freeholds with numerous positive covenants, but this is very unlikely as positive covenants do not currently run with land). [233] *However, in British Columbia this could be organised in the following way.*

(1) *There would be an overall strata scheme created for the building. This would involve the incorporation of a strata corporation, which would elect a strata committee.*

(2) *Sections could then be created to separate the residential lots, and the non-residential lots. The non-residential lots are used by owners carrying out significantly different activities on their lots. The divide might look like:*

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[233] See Making Land Work (2011) Law Com No 327, paras 1.9, 1.10, 5.17, 5.18, 5.90 and 5.91.

(a) a section with all the residential lots; and

(b) a section with the three office lots, hairdresser, preschool and supermarket, as commercial units.

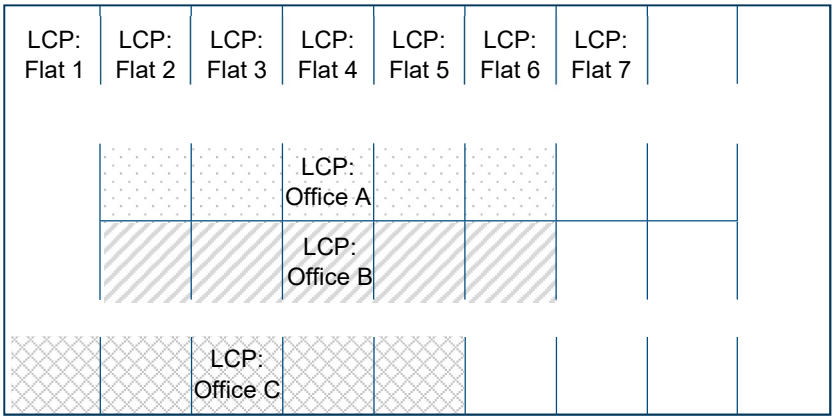
(3) *The roof terrace would be designated as limited common property ("LCP") for the exclusive use of Flat 7. The by-laws of the strata scheme could provide that the owner of Flat 7 is responsible for the upkeep and maintenance of the roof terrace.*

(4) *The swimming pool and gym would be designated as LCP for the exclusive use of all lots in the residential section. The maintenance and running costs of the swimming pool are therefore expenses paid by the section, and not by the strata corporation.*

(5) *Within the commercial/retail section, a type may be created for the three office units, which have a different type of commercial use to the preschool, hairdresser and supermarket. Consequently, expenses such as high-speed broadband which are used only by the offices could be allocated to just the offices, rather than the whole commercial section.*

(6) *The car park would be allocated as follows:*

Figure 12:

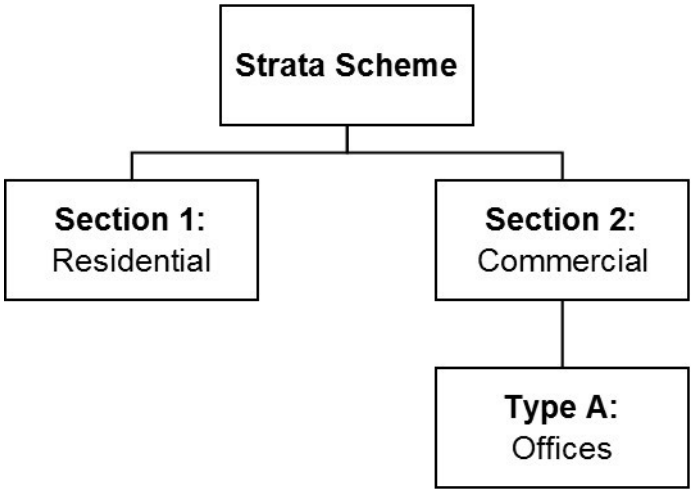


(7) *The remaining, unmarked spaces would be common property, available for the use of all lot owners within the building.*

(8) *However, splitting the costs of maintaining the car park might be a source of dispute. The by-laws could dictate that those spaces which are LCP are maintained by the owners of the lot to which they are allocated. However, this is unlikely to be an efficient way of maintaining the car park, as maintenance is likely to involve resurfacing the whole area. A better set up might be for by-laws to dictate that the costs of maintaining the car park are paid entirely by the strata corporation, and therefore are shared between lot owners in proportions based on their lot entitlement. This may not lead to a wholly satisfactory result, and this highlights the potential for unfair distribution of costs. However, in reality, it is likely that the lot entitlement would more or less correlate to that lot's usage of the car park.*

This arrangement creates an overall scheme hierarchy like the one set out in figure 13.

Figure 13:



PART IV: THE OWNERS' ASSOCIATION

3.31 The lot owners are automatically members[234] of a corporate body known as the "strata corporation", with the official name "The Owners, Strata Plan, (the registration number of the strata plan)".[235] The strata corporation is incorporated at the time the strata plan is registered with the Land Title Office. The corporation is a bespoke corporate entity which is responsible for the management and administration of the common property.

3.32 The strata corporation is automatically established at the point the strata plan is registered. The Strata Property Act 1998 does not explicitly state that the strata corporation is exempt from company law. However, because they are incorporated under the Strata Property Act and not under the Business Corporations Act 2002, strata corporations are not regulated by the Registrar of Companies.[236] The rights, responsibilities and relationships of a strata corporation are governed by the Strata Property Act, and any by-laws created under that Act. This makes strata corporations bespoke corporate entities, unlike commonhold associations in England and Wales, which are companies limited by guarantee and regulated by the Companies Act 2006.

3.33 The strata corporation is responsible for managing and maintaining the common property and common assets for the benefit of the owners.[237] This includes:

(1) holding general meetings to make decisions;

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234 This is different to commonhold, where the lot owners are entitled to membership of the commonhold association, but do not automatically become members.

235 Strata Property Act 1998, s 2(1)(b).

236 Government of BC, *Strata Housing: Operating a Strata – Finances and Insurance (2016),* https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/operating-a-strata/roles-and-responsibilities/strata-corporations.

237 Strata Property Act 1998, s 3.

(2) managing the scheme's finances, including maintaining a contingency reserve fund;

(3) maintaining and repairing the common property; and

(4) obtaining insurance – this includes building insurance for full replacement value and liability insurance.[238]

3.34 Whilst the strata corporation is responsible for obtaining some insurance, the lot owners may, but are not required to, obtain contents insurance for their lot. They may also take out building insurance up to the value of the strata corporation's insurance excess, as the strata corporation may sue a lot owner for the value of that excess if damage caused originated on their lot.[239] The lot owner will be liable whether or not he or she was at fault.[240]

For example: a strata corporation (X) gets building insurance, which has an excess of $20,000. A dishwasher in owner A's lot malfunctions and leaks, causing a flood. The cost of repairing water damage caused to the building is $150,000. X must pay the $20,000 excess, and X's insurance will contribute the additional $130,000. Under the Act, X may sue A for the $20,000, even if A was not negligent or at fault. It may therefore be preferable if A has obtained building insurance up to the value of $20,000, so A's insurance, rather than A personally, foots the bill.

3.35 The strata corporation must hold an AGM every year, and special general meetings may be called at other times throughout the year. A lot owner may request a general meeting or add items to a meeting agenda if he or she has the support of 20% of the owners in a scheme.[241] There are detailed provisions relating to meeting and voting procedures set out in Part 4 of the Act.

3.36 These provisions include a requirement to give advance notice of the AGM,[242] and the preparation and circulation, in advance, of financial statements detailing the current position of the corporation, along with a proposed budget for the following year.[243] Lot owners may also inspect, or request copies of, the strata records, including financial statements, at any other point in time. This must be provided at no cost to the requesting owner, within one week (if it is a request to see the by-laws) or two weeks (for any other document) of the request being received.[244]

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238 Strata Property Act 1998, ss 149 and 150.

239 Strata Property Act 1998, s 158.

240 *Strata Plan LMS 2835 v Mari* [2007] BCSC 740.

241 Strata Property Act 1998, ss 40, 42, 43 and 46(2).

242 Strata Property Act 1998, s 45.

243 Strata Property Act 1998, s 103(2) and Strata Property Regulation, reg 6.7.

244 Strata Property Act 1998, s 36.

3.37 However, the requirement for an AGM may be waived. This would seem to be particularly useful for small schemes, and can be done if all eligible voters, in writing:[245]

(1) waive the requirement for the AGM;

(2) pass a resolution approving next year's budget;

(3) elect the strata council on an uncontested basis; and

(4) deal with any other business necessary.

3.38 The strata corporation must also elect a strata council which will be responsible for the day-to-day management of the strata scheme.[246] This includes performing the duties of the strata corporation; in particular, calling meetings and preparing information for those meetings, as well as the enforcement of by-laws and rules.[247]

3.39 The number of people on the strata council is determined by the by-laws of a particular scheme. Under the standard by-laws (which may be amended), there should be between three and seven members of the council.[248] If there are fewer than four lot owners, all the owners are required to sit on the council.[249] The following people are eligible for election to the council:[250]

(1) lot owners (unless they owe money to the strata corporation);

(2) representatives of corporate lot owners;

(3) tenants who have been assigned the owner's right to vote;[251] and

(4) any other class of person specified by the by-laws.

3.40 This does not necessarily prevent developers, or persons connected to the developer, being elected to the strata council, or setting the by-laws to allow such a person to be elected to the council. This differs from the NSW strata laws, which prevent such persons from being elected to the strata committee. There are concerns in England and Wales that developers may be able to exert too much influence over a commonhold scheme through influencing the appointment of directors. The protections in the NSW scheme may be more suited to addressing these concerns than the approach in British Columbia.

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245 Strata Property Act 1998, s 41.

246 Strata Property Act 1998, ss 25 and 26.

247 Rules specifically relate to common property. By-laws can apply to lots, common property, and the relationship between owners, the strata corporation and strata council, see further para 3.45 onwards below.

248 Strata Property Act 1998, Schedule of Standard Bylaws, para 9.

249 The main benefit of this is that it removes the requirement for election.

250 Strata Property Act 1998 s 28.

251 See further para 3.65 below.

3.41 If there are not enough eligible people willing to act as members of the strata council, an application can be made to the Supreme Court of British Columbia which will then appoint an administrator.[252] The administrator will carry out the powers and duties of the strata council, at the expense of the strata corporation.

3.42 In exercising the powers of the strata council, each council member must act honestly and in good faith, in the best interests of the strata corporation. The standard of care expected of them is the care, diligence and skill of a reasonably prudent person in comparable circumstances.[253] The standard by-laws (which may be amended) provide that council members are not personally liable for actions done in the course of their role as a council member, so long as they comply with this standard of care.[254]

Insolvency

3.43 Although creditors can apply for court ordered winding-up of a strata corporation, this is rarely used as a way to resolve insolvency issues. Instead, insolvency of strata corporations is dealt with through other methods. First, the Strata Property Act 1998 provides that a deficit resulting from operating expenses exceeding contributions must be eliminated during the following financial year.[255] This is reinforced by the power of the Supreme Court to appoint an administrator on application of a strata corporation, owner, tenant or chargee.[256] Additionally, the Act provides that lot owners are liable for any judgment against a strata corporation.[257] The share of the judgment allocated to each owner is determined by the lot entitlement. This would seem to encompass liability for any judgement debt. Consequently, lot owners bear full liability for the debts of the strata corporation. There is no shield of limited liability, as there is in commonhold.

3.44 The liquidator holds the land for the purposes of selling the land and assets, and distributing the proceeds as set out in the interest schedule. In carrying out liquidation, the liquidator must obtain a 75% majority vote of the strata corporation approving any disposition of land or other property. Once this has been completed, the final accounts can be approved by a 75% majority and an application for dissolution of the strata corporation can be registered.

PART V: THE COMMUNITY

By-laws and Rules

3.45 By-laws and rules govern the internal workings of a strata scheme. Rules can only relate to common property, whereas by-laws can affect lots, common property, and the

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252 Strata Property Act 1998, s 174.

253 Strata Property Act 1998, s 31. This fiduciary duty and the standard of care is drawn directly from company law. The language is from the Business Corporations Act.

254 Strata Property Act 1998, Schedule of Standard Bylaws, para 22.

255 Strata Property Act 1998, s 105(2).

256 Strata Property Act 1998, s 174.

257 Strata Property Act 1998, s 166.

relationship between owners and the strata corporation and council. The breach of a by-law is considered more serious than the breach of a rule.[258]

3.46 The rights and obligations set out in by-laws and rules cover a slightly broader range of issues than in NSW,[259] but are still more limited in scope than a commonhold community statement. Statute sets out the non-negotiable duties and rights of both lot owners and the strata corporation. By-laws in British Columbia deal with issues such as:[260]

(1) the payment of strata fees, and any interest accruing on late payments;

(2) repair and maintenance;

(3) restriction on activities of owners which may affect the interests and enjoyment of others' use of their property or common property;

(4) the strata corporation's permission to enter a strata lot for emergencies or repairs;

(5) procedures of the strata council, and council members' liability;

(6) fines for breach of by-laws and rules;

(7) some procedures for meetings of the strata corporation, including voting procedures; and

(8) provision for a voluntary dispute resolution committee.

3.47 Strata schemes will be governed by the standard by-laws unless other by-laws have been registered.[261] This creates a presumption that certain rules will be adopted, but still gives strata schemes significant freedom to make different by-laws as they wish. This provides significant scope for strata schemes to alter the way their particular scheme runs.

3.48 However, the power to amend and add bespoke by-laws is not unlimited. The Act provides that by-laws which contravene the Act, destroy or modify easements, or prohibit or restrict owners' rights to dispose of their lots are unenforceable.[262] Pet restriction by-laws are also prevented from applying to service dogs, and age restriction by-laws are permitted, but cannot apply to persons residing in a strata lot at the time the by-law is passed.[263] In addition, voluntary dispute procedures cannot be made

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258 The maximum fine that may be set for the breach of a rule is lower than the maximum fine for the breach of a by-law.

259 In NSW, by-laws deal only with activities of owners and the owners' corporation which have potential to affect others' use and enjoyment of their property and the common property.

260 Strata Property Act 1998, Schedule of Standard By-laws.

261 Strata Property Act 1998, s 120.

262 Strata Property Act 1998, s 121. Except for rental restriction by-laws which comply with the narrow statutory limits, as discussed at paras 3.60 to 3.62.

263 Strata Property Act 1998, s 123.

mandatory, nor can they confer the power to make binding decisions on any person.[264] The Strata Property Regulation also dictates maximum fines and rates of interest[265] that may be prescribed in by-laws.

3.49 Rules are used to govern the use, safety and condition of common property, but cannot make provisions relating to owners' use of their own lots. Strata schemes are free to make what rules they wish,[266] but they will be unenforceable to the same extent by-laws will be unenforceable.[267]

Management and maintenance

3.50 Anything within a strata scheme which does not constitute a lot is common property. Typically, the strata lot usually ends at the centre of walls, floors and ceilings, although different boundaries may be indicated by the strata plan.

3.51 The common property is owned collectively by the lot owners as tenants in common, in shares determined by each owner's lot entitlement. Owners may use common property so long as they act within limits set by statute, by-laws or rules.

3.52 Common property may be designated as "limited common property" ("LCP"). This is common property which is allocated for the exclusive use of one or more particular strata lots, for example parking spaces or balconies. There are two ways of making common property LCP.

(1) The common property may be designated as LCP on the strata plan,[268] which will indicate the lot(s) entitled to use the LCP. Rights to use LCP attach to strata lots, so will pass with the lot if it is sold. A unanimous resolution of the strata corporation is needed to turn LCP into ordinary common property, and an updated strata plan must be registered.[269]

(2) A short-term exclusive use ("STEU") arrangement may be agreed with specific owners.[270] STEU arrangements may not be for a term longer than one year, but may be renewed. Conditions may be attached to the use agreed under a STEU arrangement, and an arrangement can be terminated without reason, so long as notice is given. STEU arrangements do not attach to the strata lot itself, so will terminate automatically if the owner sells his or her lot.

3.53 It is possible for a strata corporation to transfer a freehold estate in the common property or to grant a lease for a term longer than three years over common property.[271]

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264 Strata Property Act 1998, s 124.

265 Strata Property Regulation, regs 6.8 and reg 7.1.

266 Strata Property Act 1998, s 125.

267 Strata Property Act 1998, ss 121 and 125(2).

268 Strata Property Act 1998, s 73.

269 LCP may be created and removed with a 75% majority if the amendments are done using a sketch plan.

270 Strata Property Act 1998, s 76.

271 Strata Property Act 1998, ss 80 and 253.

However, these transfers or grants are considered to be subdivisions and so the procedure for creating a new strata scheme must be complied with.[272] Strata corporations are not permitted to mortgage common property.[273] Any other interest, such as easements, can be created over common property. Common property can be acquired[274] if supported by a 75% majority vote, if any holders of charges over the relevant land consent[275] and if the disposition is registered.

3.54 Under the standard by-laws (which may be amended), the strata corporation must maintain and repair ordinary common property. The duty to repair also extends to the structure and exterior of strata lots and LCP and, in the case of LCP, maintenance that occurs less than once a year in the normal course of events.[276] The standard of repair and maintenance does not seem to be specified, an omission also made in commonhold legislation (and criticised). The strata corporation must not make significant changes to the appearance or use of common property unless it is approved by a 75% majority, or it is an emergency.[277] Maintenance of the common property is funded through strata fees paid by the lot owners, determined in proportion to his or her lot entitlement and collected by the strata corporation.

3.55 Strata property managers may be appointed through a strata management contract, to assist the strata council with the administration of the strata scheme.[278] Under the Real Estate Services Act, strata managers must be licensed.[279] The strata council can decide the extent of the managing agent's powers; however, the Strata Property Act provides that managing agents cannot do the following:

(1) act as an arbitrator in a dispute without the consent of all the parties;[280] or

(2) act as a proxy voter for any strata corporation voter.[281]

3.56 The standard by-laws (which may be amended) additionally prevent a strata property manager from determining whether a person should be fined by the strata council, preventing an owner from using recreational common property, and spending strata corporation funds without a specifically delegated power.[282]

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272 See further paras 3.10 to 3.13, above.

273 Strata Property Act 1998, s 81.

274 Strata Property Act 1998, s 78(1).

275 Unless the registrar deems that their interests will not be adversely affected.

276 Strata Property Act 1998, Schedule of Standard Bylaws, para 8. This is because the standard by-laws allocate responsibility for other LCP maintenance to the lots entitled to use the LCP. However, a strata corporation could choose to assign maintenance responsibilities differently.

277 Strata Property Act 1998, s 71.

278 Strata Property Act 1998, s 38.

279 Real Estate Services Act, ss 1 and 3.

280 Strata Property Act 1998, s 179(8).

281 Strata Property Act 1998, s 56(3).

282 Strata Property Act 1998, Schedule of Standard Bylaws, para 20.

3.57 Strata management contracts may be entered into by the developer before the transfer of the first strata lot to a lot owner, or before the first AGM if the manager is unconnected to the developer. Management contracts entered into by the developer will terminate either four weeks after the second AGM or on the cancellation date in the contract, whichever is earlier.[283]

3.58 In commonhold, in England and Wales, developers may be given the right to appoint directors of the commonhold association. During the transitional period, where there are no unit owners, the developer may appoint two directors. Once the transitional period ends, the developer may appoint up to one-quarter of the directors, so long as the developer remains the unit owner of over a quarter of the total number of units. Directors are then responsible for the appointment of managing agents, which provides a potential avenue for the developer to exercise a large degree of control over who is appointed as manager. This is very different from British Columbia and NSW, where the focus is on preventing developers having an ongoing degree of control.

Different size schemes

3.59 Unlike NSW, there is little recognition of different sizes of strata schemes in British Columbia strata law. The only provision that varies by scheme size, is in the standard by-laws (which may be amended). It states that the council must have between three and seven members, unless the scheme only has four lots, in which case all the owners are on the council.[284] In part, the lack of recognition in statute for different size schemes may be due to the broader scope of the by-laws in British Columbia as opposed to NSW, which allows strata schemes to make necessary changes to the standard system in order to suit their size of scheme. Commonhold has been criticised for the lack of recognition for different size schemes. The NSW approach may be better suited to meeting these criticisms than the approach in British Columbia.

Leases within strata

Lot freeholders leasing their lots

3.60 Strata corporations can restrict strata lots from being rented out, but such a by-law must be worded within the narrow limits set out by the Strata Property Act 1998.[285]

3.61 There are statutory limits on what rental restriction by-laws a strata corporation may create.[286]

(1) The strata corporation cannot establish screening criteria for tenants.

(2) They may prohibit the rental only of residential strata lots.[287]

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283 Strata Property Act 1998, s 24.

284 Strata Property Act 1998, Schedule of Standard By-Laws, para 9.

285 Strata Property Act 1998, s 121(2). In Ontario, blanket prohibitions of rentals are not permitted. However, both Ontario and British Columbia permit strata developments to prohibit short-term holiday rentals.

286 Strata Property Act 1998, ss 141 and 142.

287 By implication this suggests that they may not prohibit the renting of commercial strata lots.

(3) They may limit the number, or percentage, of residential strata lots which may be rented.

(4) The strata corporation may restrict the period of time for which residential strata lots may be rented.

(5) By-laws cannot prevent the rental of a strata lot to a family member of the lot owner. If a lot is rented to a family member, this is not counted for the purposes of any by-law restricting the number, or percentage, of strata lots which may be rented.

3.62 If a rental restriction by-law is introduced, owners will have time to adjust. The Strata Property Act 1998 provides that the by-law does not apply to lot owners renting out their strata lot until the later of one year after the by-law is passed, or one year after the tenant occupying the lot, at the time the by-law was passed, has moved out.[288] An owner may also apply to the strata corporation for an exemption to the rental restriction by-law on the basis that the by-law causes him or her hardship.[289] The strata corporation must not unreasonably refuse to grant an exemption, but is allowed to grant an exemption for a limited time.

3.63 If a rental agreement is entered into in contravention of a rental restriction by-law, the tenant is not considered personally to be contravening the by-law. The tenant may terminate the tenancy agreement, without penalty, by giving notice to the landlord within 90 days of learning of the landlord's contravention.[290]

3.64 A tenant of a strata lot must be notified by his or her landlord of the current by-laws and rules, and given a notice of tenant's responsibilities. This must be signed and returned to the strata corporation within two weeks of entering into the rental agreement. If the landlord fails to notify the tenant of the by-laws, the tenant is still bound by them, but may terminate the tenancy without penalty by giving notice to the landlord within 90 days of learning of the landlord's failure.[291]

3.65 A landlord may choose to assign to his or her tenant some or all of the powers and duties the landlord has as a lot owner, with the exception of liability for fines due to the landlord's contravention of a by-law. Such an assignment must be notified to the strata corporation in writing. If a lease is for a term of three years or more, this assignment is automatic. In this case, the tenant must notify the strata corporation of the assignment, including details of the time period of the lease. Automatic assignment also occurs where a strata lot is leased to a family member of the lot owner, regardless of the duration of the lease.[292]

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288 Strata Property Act 1998, s 143(1).

289 Strata Property Act 1998, s 144.

290 Strata Property Act 1998, s 145.

291 Strata Property Act 1998, s 146.

292 Strata Property Act 1998, ss 147, 148 and 142.

3.66 Landlords are prohibited from dealing with their interests in strata lots or common property in such a way that unreasonably interferes with the rights of their tenants, including rights gained through assignment.[293]

3.67 If developers intend to rent one or more strata lots, rather than grant outright ownership, they must disclose this to the Superintendent of Real Estate[294] before the first residential strata lot in a development is offered for sale or conveyed to a purchaser. This disclosure must also be provided to any prospective purchaser before he or she enters into an agreement to purchase. If the developer fails to satisfy these disclosure requirements, the purchaser of a strata lot may cancel the agreement to purchase without incurring any penalty.[295]

Leasehold strata schemes

3.68 Leasehold strata schemes operate slightly differently in British Columbia from in NSW. In NSW, any person can develop his or her freehold land into a leasehold strata scheme, retaining a freehold interest over the entire scheme. In British Columbia, "leasehold landlords" are only ever public bodies – the government of either Canada, British Columbia, a regional district, municipality or indigenous village.[296]

3.69 The leasehold landlord grants a registered "ground lease" to a developer over the land which is to be subject to the leasehold strata scheme. The landlord must also provide a model strata lot lease which will eventually apply to the individual lot owners. Once the developer has built the scheme, a strata plan will then be registered.[297] On registration, the ground lease is automatically converted into individual leases for each strata lot, which includes each lot's share in the common property.[298]

3.70 The freeholder will now have individual freehold interests in each strata lot. The terms of the model lease will form the terms of each individual strata lot lease. At this point the public authority is still the landlord, and the developer is the tenant of every individual lot. The developer will then assign the lease of each lot to different "leasehold tenants". The developer will then drop out of the picture and every tenant will have the same public authority landlord. The assignment of leases by the developer does not require the signature of the leasehold landlord. Other than this, the leasehold landlord may impose conditions on any lease or assignment of a leasehold strata lot.[299]

3.71 The strata corporation in a leasehold strata scheme, on request of the leasehold landlord, performs the same duties as a strata corporation of an ordinary strata

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293 Strata Property Act 1998, s 148(7).

294 This is the regulatory body of the government of British Columbia which deals with consumer protection in the real estate market.

295 Strata Property Act 1998, ss 139 and 140.

296 Strata Property Act 1998, s 199.

297 As with ordinary strata plans, the plan will detail the individual lots and common property.

298 Strata Property Act 1998, s 203.

299 Strata Property Act 1998, ss 204 and 206. Any restrictions must be set out in a schedule of restrictions, which is registered at the same time as the strata plan is registered.

scheme.[300] Leasehold strata lot tenants are considered "owners" in a leasehold strata scheme,[301] and so automatically become members of the strata corporation, and are bound by the Act, and by any by-laws which govern that particular strata scheme. In practice therefore, the leasehold strata scheme operates in a similar way to where long leaseholders have exercised the Right to Manage in England and Wales.

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

Unpaid strata fees

3.72 If an owner fails to make a strata fee payment, the strata corporation must issue the owner with a written notice demanding payment within two weeks, and indicating that action may be taken if the notice is not complied with.[302] If payment is not made, the strata corporation may register a lien against the owner's lot for the amount owed. Like the position in the US, it is not necessary to obtain a court order for the sum prior to registering the lien. The strata corporation may then apply to the Supreme Court for an order to recover the sum owed through the sale of the lot. Any reasonable legal fees and land registry costs incurred in the registration and enforcement of a lien may be added to the sum owed to the strata corporation. Additionally, unpaid fees may attract interest if so provided by the by-laws of the specific strata scheme.[303]

Breach of by-laws

3.73 In order to enforce by-laws and rules in the event of a breach, the following steps must be followed.

(1) The strata corporation must first receive a complaint about the contravention. Enforcement mechanisms are not available to the strata corporation without an initial complaint being made.[304]

(2) The strata corporation must then issue a written notice to the owner breaching the by-law, notifying him or her of the complaint. If the person in breach is a tenant, both the tenant and the landlord (the lot owner) must be issued with a written notice. The notice may give a warning, or give time for compliance.[305]

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300 Strata Property Act 1998, s 208.

301 Strata Property Act 1998, s 1.

302 Strata Property Act 1998, s 112. If the strata corporation intends to register a lien over the owner's lot, following a failure to make the payment, the notice must specifically indicate that a lien will be registered if the notice is not complied with.

303 Strata Property Act 1998, ss 107, 116 and 117. The rate of interest may vary from scheme to scheme, but may not exceed 10% per annum: Strata Property Regulations, reg 6.8.

304 Strata Property Act 1998, s 135 (1)(d). The downside of this seems to be the lack of protection against frivolous neighbour complaints. Case law does enable a strata corporation to inform itself of a breach of the by-laws.

305 Strata Property Act 1998, ss 129(2) and 135(1)(e).

(3) If the strata corporation wishes to proceed with enforcement beyond a written warning, it must give the lot owner a reasonable opportunity to answer the complaint, including a hearing if requested.[306]

(4) Next, the strata corporation must decide if a by-law, or rule, has been breached, and if so, how it will enforce this. The strata corporation has the following enforcement options:

(a) impose a fine. This can be imposed for the breach of a by-law or rule. The by-laws must set out the maximum fine that the strata corporation may impose,[307] however this is subject to the maximum limit of $200 for each contravention of a by-law and $50 for each contravention of a rule.[308] For ongoing breaches, the strata corporation may impose a fine once every seven days, unless the by-laws provide for a longer maximum frequency;[309]

(b) remedy the contravention. This allows the strata corporation to do whatever is reasonably necessary to remedy the contravention in question, including doing work on a strata lot or common property, and removing objects from common property;[310] or

(c) deny access to a recreational facility. The strata corporation may prevent access to recreational facilities that are common property where the contravention relates to that particular recreation facility. The denial of access may only be for a reasonable length of time.[311]

(5) Once the decision has been made, the strata corporation must give written notice to the owner of how it intends to enforce the by-law or rule.[312]

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306 Strata Property Act 1998, s 135(1)(e). A hearing is defined as an opportunity to be heard in person at a council meeting: Strata Property Regulations, reg 7.2.

307 Strata Property Act 1998, s 132.

308 Strata Property Regulations, reg 7.1. Breaches of rental restriction by-laws may incur a fine of up to $500.

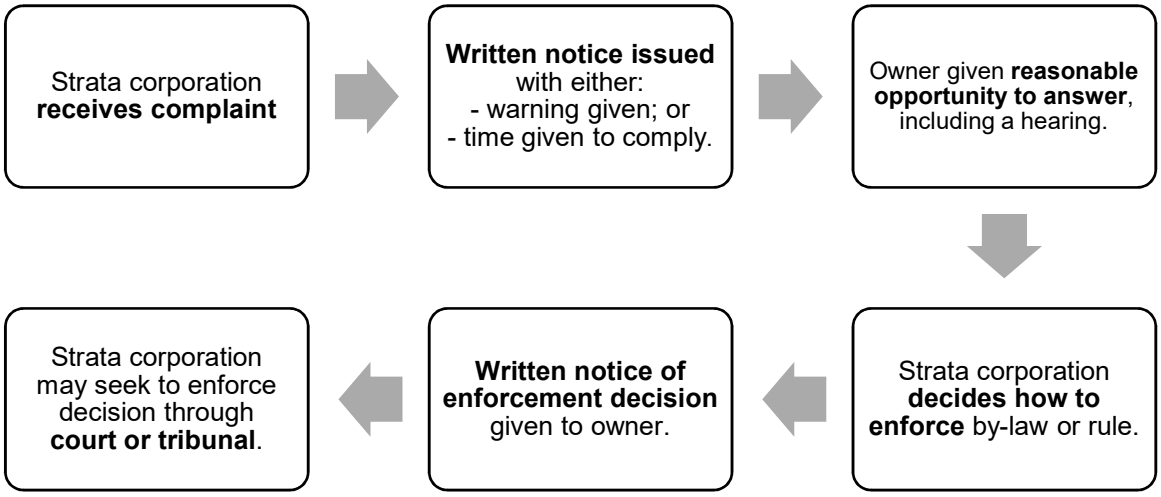
309 Strata Property Regulations , reg 7.1(3).

310 Strata Property Act 1998, s 133.

311 Strata Property Act 1998, s 134.

312 Strata Property Act 1998, s 135(2).

Figure 14:



3.74 If the complaint is made against a member of the strata council, he or she must excuse him or herself from the complaint and enforcement procedure, unless all the lot owners are members of the council.[313]

3.75 In some situations, eviction of a lot owner's tenant might be an available enforcement tool where a reasonable and significant by-law is repeatedly or continually breached.[314] The breach must be committed by a tenant of a lot owner, and must seriously interfere with another owner's use and enjoyment of their strata lot or the common property. If these conditions are satisfied, the strata corporation may give the tenant a notice terminating the tenancy agreement.[315]

3.76 Fines and other costs incurred in the process of enforcement, including the costs of remedying a breach, can be recovered by the strata corporation in one of four ways. However, each of these four methods of recovery is subject to a two year limitation period:[316]

(1) applying to the Civil Resolution Tribunal;[317]

(2) suing the owner in court;[318]

(3) through arbitration;[319] or

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313 Strata Property Act 1998, s 136.

314 Strata Property Act 1998, s 138. This type of breach will also allow the landlord to give a notice terminating the tenancy agreement: Strata Property Act 1998, s 137.

315 Under the Residential Tenancy Act 2002, s 47.

316 Limitation Act 2012, s 6.

317 Strata Property Act 1998, s 189.1; Civil Resolution Tribunal Act, s 3.6.

318 Strata Property Act 1998, s 170.

319 Strata Property Act 1998, s 177.

(4) refusing to produce the certificate stating that the owner does not owe the strata corporation any money when the owner is trying to sell his or her lot.[320]

Other disputes

3.77 Other disputes may arise in the life of a strata scheme, such as disagreement over a decision of the strata corporation, or disputes over damage caused to a lot or common property. There are a number of mechanisms available to help resolve these disputes, which are set out below.

Court proceedings

3.78 The strata corporation may be sued by an owner, or may be sued by a third-party as a representative of the owners. Owners and tenants may also be sued by the strata corporation.[321]

3.79 The Supreme Court of British Columbia may make a number of orders in strata dispute proceedings, including any order deemed necessary to prevent or remedy unfair actions of the strata corporation or any person who holds more than 50% of the voting rights. The Court can also order strata corporations, owners or tenants to perform their duties under the Strata Corporation Act.[322]

Arbitration

3.80 Most disputes that would arise in the course of strata scheme life can be referred to arbitration. However, the arbitration option is very rarely used in practice, and does not apply once court or tribunal proceedings have been commenced in relation to the same dispute.[323] The Act sets out detailed procedures, specific to strata, for how arbitration is to be commenced and carried out, and the range of orders the arbitrator may make.[324] The parties must be advised of the possibility of a mediated settlement, but there does not appear to be a free system of mediation provided as there is in NSW.

Civil Resolution Tribunal

3.81 The Civil Resolution Tribunal ("CRT") is an online tribunal, introduced in British Columbia by the Civil Resolution Act 2012, which came into force in July 2016. The tribunal has jurisdiction over claims involving: [325]

(1) the interpretation of strata legislation;

(2) common property;

(3) the use and enjoyment of strata lots;

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320 Strata Property Act 1998, s 59.

321 Strata Property Act 1998, ss 163, 170 and 173.

322 Strata Property Act 1998, ss 164, 165 and 173.

323 Strata Property Act 1998, ss 177 and 178.

324 Strata Property Act 1998, ss 179, 182, 184, 185 and 187.

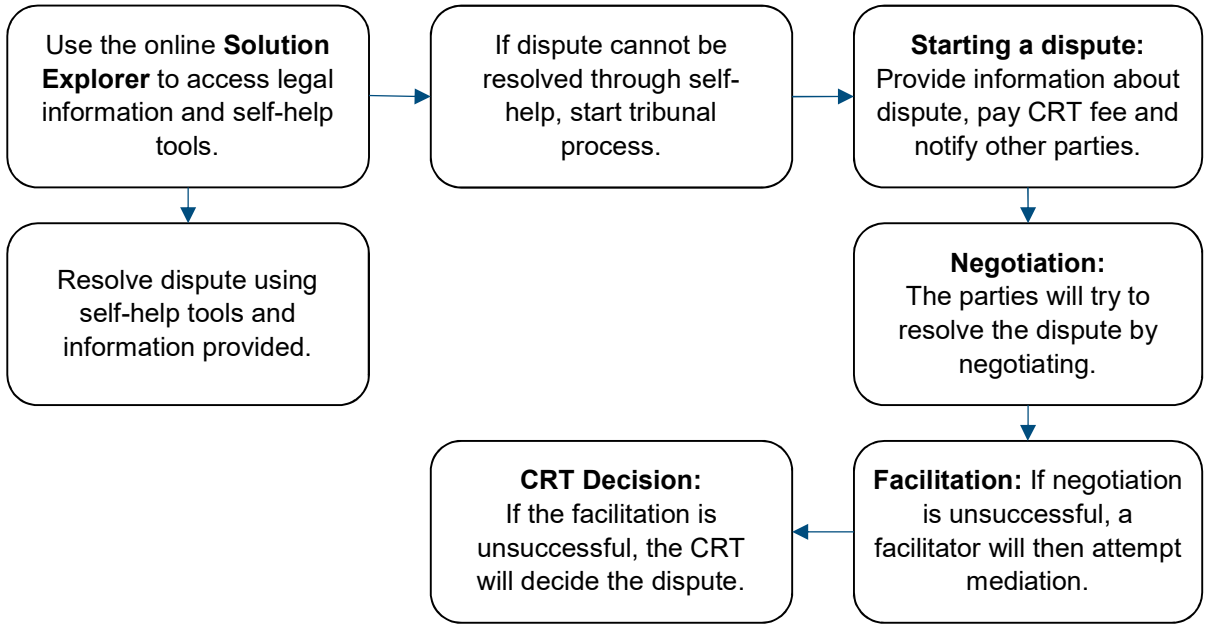
325 Civil Resolution Tribunal Act 2012, s 3.6. Its jurisdiction was initially restricted to strata scheme disputes, but was expanded in February 2017 to include small-claims disputes.

(4) money owed under the Strata Property Act; and

(5) actions and decisions of the strata corporation and persons holding more than 50% of the votes in a scheme.

3.82 The CRT claim process works as follows:

Figure 15:



PART VII: TERMINATION

3.83 Termination is rarely, if ever, used in situations where the strata scheme is insolvent, but desires to keep operating. Unlike in commonhold, the Strata Property Act 1998 in British Columbia sets out numerous ways to avoid the insolvency of a strata scheme.[326] Termination is mainly used in British Columbia when a strata scheme has reached the end of its life, maintenance and repair costs are increasing or redevelopment is needed (or a developer offers a substantial premium for a collective sale). Insolvency is dealt with through other methods, and, because owners are personally liable for the debts of the strata corporation, it will rarely arise. There are three procedures which may be used to terminate a strata scheme.

Voluntary winding-up without a liquidator

3.84 If a resolution is passed with an 80% majority, and the strata corporation has no debts, other than those secured over the land, the strata corporation may apply to the registrar to cancel the strata plan. The application to the registrar must be accompanied by:[327]

(1) the termination resolution passed by the strata corporation;

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326 See further paras 3.43 to 3.44.

327 Strata Property Act 1998, s 274.

(2) an order from the Supreme Court confirming the termination resolution;[328]

(3) a conversion schedule setting out the share of land owned by each lot owner, calculated in proportion to the market value of his or her lot;[329] and

(4) a certificate stating that the strata corporation has no debts other than registered charges secured against land in the scheme.

3.85 The effects of a successful application to the registrar to cancel the strata plan are as follows:

(1) all the land that was shown on the strata plan, including the strata lots, as well as any assets of the strata corporation, vest in the lot owners as tenants in common, in shares set out by the conversion schedule;[330]

(2) the strata corporation is dissolved;[331]

(3) any charges over the land become claims against the interest of each owner in the land, having the same priority they did before termination;[332] and

(4) owners are jointly and individually liable for any debts of the strata corporation to creditors who do not have a security over the land.[333]

Voluntary winding-up with a liquidator

3.86 Where the strata corporation has debts other than those secured over the land in the strata scheme, it can terminate the scheme by passing a resolution to cancel the strata plan and appoint a liquidator.[334] This resolution must be passed by an 80% majority. The resolution must include:[335]

(1) the name and address of the liquidator[336] to be appointed;

(2) an estimate of the costs of winding-up; and

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328 Unless the scheme has fewer than five lots, as the 80% threshold effectively requires unanimous agreement for schemes of this size. If the scheme has fewer than five lots, the written consent of all the lot owners will suffice in place of the court order. Strata Property Act 1998, s 273.1.

329 Strata Property Act 1998, s 273.

330 Strata Property Act 1998, s 275(1). The registrar may alter any interests in land necessary to give effect to the termination order.

331 Strata Property Act 1998, s 274(4)(a).

332 Strata Property Act 1998, s 274(4)(c).

333 Strata Property Act 1998, s 274(4)(e).

334 Strata Property Act 1998, s 277.

335 Strata Property Act 1998, s 277(3).

336 The liquidator must be qualified in accordance with the requirements set out in the Business Corporations Act.

(3) an interest schedule, setting out each owner's share of the proceeds of distribution, calculated in proportion to the market value of his or her lot.[337]

3.87 Strata schemes with five or more lots must also apply to the Supreme Court for an order confirming the resolution.[338]

3.88 The appointed liquidator then has 30 days to apply to the Supreme Court for an order confirming his or her appointment and vesting in the liquidator all the land shown on the strata plan, including strata lots, and any assets of the strata corporation.[339] The liquidator must then register the order along with the interest schedule. The effects of registering this order are:

(1) the strata plan is cancelled; and

(2) title to the land is registered in the name of the liquidator.

Court-ordered winding-up

3.89 Where the voluntary consent of the owners cannot be obtained, an application may be made to the Supreme Court for the winding-up of the strata corporation. This application may be made by a lot owner, a mortgagee of a strata lot, or any other person considered to be appropriate by the Supreme Court.[340]

3.90 In deciding whether to make a winding-up order, the court will consider the best interests of the owners and the probability of significant unfairness to owners, registered charge holders and other creditors. The court will also consider whether an order would cause, or solve, any significant confusion or uncertainty in the affairs of the strata corporation or owners.

3.91 If the court decides to make an order, the procedure will follow that set out above, at paragraphs 3.86 to 3.88, for voluntary termination with a liquidator. This does not appear to be a frequently used method of termination.[341]

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337 Strata Property Act 1998, s 278.

338 Strata Property Act 1998, s 278.1.

339 Strata Property Act 1998, s 279.

340 Strata Property Act 1998, s 284. Despite the ability of a creditor to apply for termination, the court seems to strive to keep the corporation operational in cases of insolvency, and will instead appoint an administrator to resolve the issue, instead of winding-up the corporation as would occur in commonhold.

341 Report on Terminating a Strata (2015), British Columbia Law Institute, p 31, http://www.bcli.org/wordpress/wp-content/uploads/2015/02/2015-02-20_BCLI-SPL-Ph2-Report-on-Terminating-a-Strata-FINAL.pdf.

Chapter 4: New Zealand

INTRODUCTION

4.1 New Zealand has a common law legal system, with legislative power[342] residing exclusively with the New Zealand Parliament. The equivalent of commonhold is "unit title". Given that unlike in Australia and Canada, no lower tier of government has legislative power, the same law applies to unit title developments across New Zealand. We therefore consider the New Zealand approach as a whole, rather than focussing on practice in a specific area.

LEGISLATIVE HISTORY

4.2 Prior to the introduction of unit title, buildings with multiple units in New Zealand were dealt with through tenancy in common, company title,[343] or cross lease title. In cross lease title, the owners own the whole land as tenants in common. They then create leases over the individual units, one to each owner, giving that owner exclusive occupation of a unit. The rules of the development are contained in a "Memorandum of Lease", which sets out the rights and obligations of each owner, and governs how decisions are made. Cross lease titles are still fairly common in New Zealand.

4.3 Similar to the situation in New South Wales, discussed at paragraph 2.5(3) above, lenders were unwilling to give mortgage finance on company titles as the shares owned by each owner did not amount to an interest in land. Cross lease was complicated and, from the start, was considered to be an unsatisfactory form of land tenure. A New Zealand Law Commission Report, from 1999, referred to this form of land tenure as being "irremediably flawed," suggesting it should be abolished.[344] The basic flaw in the title is that each owner's lease is of the building only (and not the land the building is situated on).[345] The associated rights of use and occupation of the surrounding area are then an issue for those owners as tenants in common to resolve based on their separate title shares.

4.4 Cross lease was created by developers to bypass the (then) sub-divisional constraints affecting land tenure and has since led to problems concerning management, redevelopment and density issues. Although many cross lease properties still exist today, the difficult legal issues that have since emerged have not been resolved and are becoming exacerbated over the passage of time.[346] Cross lease remains however,

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342 The power to make law.

343 This operates in the same way as company title in NSW.

344 New Zealand Law Commission, *Report 59: Shared Ownership of Land* (1999), para 6.

345 Cross leases were originally used to accommodate more than one house on the same plot by circumventing provisions which prevented a plot from being subdivided. The provisions preventing sub-division were the reason why cross leases only related to buildings, and the land on which the buildings stood was owned jointly. Cross leases were later extended to accommodate flats.

346 E Toomey (ed) *New Zealand Land Law* (3rd ed, Brookers, Wellington, 2017), para 11.1.01.

a significant form of land tenure, given the extended period it was used as a major form of land ownership. However, there still seems to be a willingness amongst purchasers to buy cross lease properties.[347]

4.5 The Unit Titles Act 1972 was introduced to address the issues associated with company title and cross lease, and provide a way of creating titles for units that would be acceptable to mortgage lenders and more practically workable than cross lease. Unit title has been widely adopted in New Zealand, but still on a smaller scale than the uptake of strata title in either British Columbia or New South Wales ("NSW"). There are currently around 184,000 unit titles in New Zealand, making up 8.5% of the total land titles in New Zealand.[348]

PARTS II & III: CONVERTING TO UNIT TITLE AND CREATING A NEW UNIT TITLE DEVELOPMENT

4.6 On registration of a "unit plan", a plot of land is divided into principal units,[349] accessory units[350] and common property.[351] A principal unit is one which is designed for use as a place of residence or a business. It must contain a building or part of a building, or be contained "in a building". An accessory unit is anything which is designed to be used in connection with a principal unit, such as a garden, swimming pool, or parking space.

Setting up a new development

4.7 To create a new unit title development, a unit plan must be registered by the freeholder of the land, or a lessee of the land. The plan must show which areas will become principal units and accessory units, with everything else being common property. Where the application is made by a long leaseholder, they will need the consent of the freeholder,[352] but conversion does not extinguish the freeholder's interest in the land. In these cases, each unit will then be held on a leasehold basis, with the original freeholder holding the reversionary interest.[353] This seems to be the New Zealand method of creating leasehold "strata schemes". However, this is unlikely to provide assistance in the reform of commonhold, if retaining long leasehold in commonhold is considered undesirable.

Converting an existing development

4.8 To convert an existing company title or cross lease development into a unit title arrangement, a 75% majority of the tenants in common or company members is

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347 This might also be due to cross lease properties having a lower purchase price, cross lease properties still being widely available, or purchasers no necessarily understanding the complexities involved.

348 http://stratacommunity.co.nz/understanding-strata/what-is-strata/.

349 Unit Titles Act 2010, s 7(1).

350 Unit Titles Act 2010, s 5.

351 Unit Titles Act 2010, s 16(2).

352 Unit Titles Act 2010, s 32(1)(b).

353 Unit Titles Act 2010, s 159. The units seem to become "locked in" to the underlying lease, and whilst unit owners are free to dispose of their unit as they wish, they cannot surrender it to the lessor, and the lessor cannot release any unit from the lease: Unit Titles Act 2010, s 162.

required. If the majority cannot be obtained, an application may be made to the High Court.[354] The High Court may then grant an order to convert the land to a unit title development. Any person with an interest in the land has a right to be heard before the High Court in the proceedings of the application. There is no provision for compensation to be paid to dissenting residents. This appears to be because the legislature may not have considered the owners to have suffered a loss which should be compensated.

4.9 On registration of a unit plan converting a pre-existing development, the freehold of each unit vests in the person who was previously entitled to occupation of that unit. Any existing mortgages over more than a single unit must be discharged before conversion can take place.[355] If the mortgage affects only a single unit, it will be unaffected by the conversion, and will simply continue to attach to the unit.

Impact of conversion on leases

4.10 There is nothing to indicate that leases will be extinguished by conversion to a unit title development. Where a strata development is created on land which is held on a leasehold basis, then the lease will continue (see paragraph 4.40 below). In the case of leases of individual units, a unit owner in a unit title development can lease his or her unit, and there is no requirement to obtain consent from individual lessees before conversion. This points to the conclusion that leases over individual units will remain in existence after conversion. Where cross leases are converted to unit titles, the cross leases themselves will be extinguished, but any sub-leases should be unaffected.

Development rights

4.11 The Unit Titles Act 2010 sets out the specific duties of the developer at different points in time. The "control period" is defined as the period between registration of the unit plan, and the point at which the developer holds less than 75% of the votes in the body corporate.[356] During the control period, the developer has a duty to exercise reasonable skill, care and diligence when entering into any service contracts. They must act in the best interests of the body corporate (as it will be constituted after the control period has ended). If they fail in this duty, the body corporate may seek compensation for any loss suffered as a result.[357]

4.12 When the control period comes to an end, the developer must present the body corporate with a disclosure statement setting out the assets and liabilities of the body corporate at that time, and the details of any existing and proposed maintenance or service contracts.[358] The developer must also give a statement setting out any interest it has in any current contracts.[359]

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354 Unit Titles Act 2010, ss 192 to 194.

355 Unit Titles Act 2010, ss 198 to 199.

356 Unit Titles Act 2010, s 6.

357 Unit Titles Act 2010, ss 139 to 140.

358 Unit Titles Regulations 2011, reg 36.

359 Unit Titles Act 2010, s 156(1)(b).

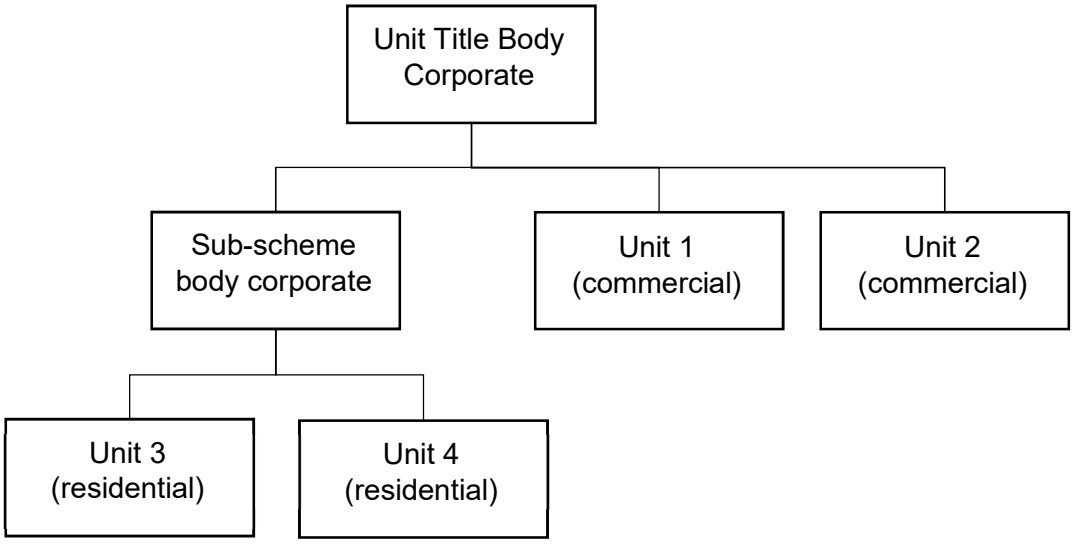
4.13 There is provision for developments to be created in stages, giving flexibility to developers in how they create and sell a development. A proposed plan must be registered, detailing all the units and common property which it is proposed will make up the completed development. This is followed by stage unit plans, registered as each stage is completed. In order to be accepted for registration, the stage unit plans must be consistent with the relevant part of the proposed plan. Amendments can be made to the proposed plan, if supported by a 75% majority of the body corporate.[360] However, there does not seem to be any specific provision allowing pre-completion unit purchasers to enforce the completion of certain works by the developer.

Mixed-use/complex developments

4.14 Layered unit title developments can be created. The body corporate for the overall development must agree to the creation of a sub-scheme by a 75% majority.[361] On registration of the sub-scheme, a subsidiary body corporate will be incorporated.[362] It must hold its own general meetings, including meetings in advance of any general meeting of the overall body corporate. There must be a representative of the subsidiary body corporate at any meeting of the overall body corporate or committee.[363] This position differs from the US where the association may delegate powers to a master association rather than a sub-scheme (discussed at paragraph 5.37 below).

4.15 For example, as set out in figure 16, below, a scheme could be created with four units: two residential and two commercial. The two residential ones could be part of a separate sub-scheme allowing them to address their different needs.

Figure 16:



360 Unit Titles Act 2010, ss 23 to 30.

361 Unit Titles Act 2010, ss 19 to 20.

362 Unit Titles Act 2010, s 75(2).

363 Unit Titles Act 2010, s 92.

PART IV: THE OWNERS' ASSOCIATION

4.16 A body corporate is created on registration of the unit plan, with the official name "Body Corporate Number…" and the registered number of the unit plan. All unit owners are automatically members of the body corporate.[364] Although there is no explicit statement that the body corporate is a bespoke corporate entity, the Companies Act 1993 only applies to companies incorporated under that Act.[365] A unit title body corporate is incorporated under the Unit Titles Act, does not follow the incorporation process set out in the Companies Act,[366] and so is a bespoke corporate entity.

4.17 The body corporate is responsible for the management of the development. It must establish a long-term maintenance plan, set up operating and long-term maintenance funds,[367] collect levies from unit owners to contribute to those funds[368] and insure the building to its full value.[369] It may also establish additional contingency or improvement funds as it wishes.[370] Financial records must be accurately kept and submitted for independent auditing, unless the body corporate passes a resolution with a 75% majority to waive the auditing requirement.[371]

4.18 An AGM must be held every year,[372] for which notice must be given and documents, including the current financial statements, distributed in advance.[373] Extraordinary general meetings may be called at any time, including by a unit owner with the support of 25% of the owners.[374]

4.19 If a unit title development has more than nine units, the body corporate must elect a committee.[375] Smaller developments may elect a committee, but this is optional.[376] The body corporate can delegate powers to the committee,[377] and the committee must

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364 Unit Titles Act 2010, ss 75 to 76. The exception is owners for the time being of future development units in a phased development.

365 Companies Act 1993, s 2 and Pt 2.

366 Unit Titles Act 2010, s 12.

367 Unit Titles Act 2010, ss 115 to 117, though a body corporate may resolve by 75% majority not to have a long-term maintenance fund.

368 Unit Titles Act 2010, s 121.

369 Unit Titles Act 2010, s 135.

370 Unit Titles Act 2010, ss 118 and 119.

371 Unit Titles Act 2010, s 132.

372 Unit Titles Act 2010, s 90(1).

373 Unit Titles Regulations 2011, reg 6.

374 Unit Titles Act 2010, s 89A.

375 Unit Titles Act 2010, s 112(2), unless a resolution to the contrary is passed with a 75% majority.

376 Unit Titles Act 2010, s 112(1). This approach is different to NSW and British Columbia, where smaller developments must still have a committee, but the election requirement is merely removed.

377 Unit Titles Act 2010, s 108.

report back on how it has exercised those powers.[378] Committee members must be unit owners (or in the case of businesses which own units, a director of the business).[379]

4.20 The body corporate must also elect a chairperson every year.[380] They will usually, but not always, sit on the committee.[381] In addition, the committee must also have a chairperson,[382] who need not be the same person as the chairperson of the body corporate. The duties of the chairperson of the body corporate are set out in the Regulations,[383] but some (or all of these) may be delegated to the committee.

Insolvency

4.21 The New Zealand scheme barely acknowledges the possibility of a body corporate becoming insolvent. There is no reference to the liability of owners for any debts of the body corporate, and no provisions requiring levies to be used to make up any deficit in the funds of the body corporate.

4.22 However, there is provision for the appointment of an administrator and also for cancellation of the scheme.

4.23 Application for appointment of an administrator to a body corporate can be made by a creditor of the body corporate, or any person with a registered interest in a unit. The applicant may apply to the High Court for the appointment to be made. The administrator exclusively will then exercise the powers and duties of the body corporate for the duration of its appointment.[384] It was possibly deemed that this was sufficient to deal practically with any cases of the apparent threat of insolvency, but this is a much less comprehensive approach to that taken in NSW and British Columbia.

PART V: THE COMMUNITY

Operational Rules

4.24 Every body corporate must have operational rules to govern the development.[385] The default rules, which are set out in the Unit Titles Regulations 2011,[386] will apply unless and until the body corporate creates its own bespoke rules.[387] The body corporate has

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378 Unit Titles Act 2010, s 114.

379 Unit Titles Regulations 2011, reg 24(6). This does not seem to prevent developers being elected to the committee whilst they still own units. This perhaps gives rise to opportunities for developers to exert unfair levels of control, as has been criticised in commonhold.

380 Unit Titles Regulations 2011, reg 10.

381 Ministry of Business, Innovation and Employment, *Short guide to unit titles – what you need to know* (October 2017), p 4, https://www.tenancy.govt.nz/assets/Uploads/Tenancy/short-guide-to-unit-titles.pdf.

382 Unit Titles Regulations 2011, reg 26(1).

383 Unit Titles Act 2010, reg 11. These include things like maintaining records, preparing meeting agendas, and other administrative duties.

384 Unit Titles Act 2010, s 141.

385 Unit Titles Act 2010, s 105(1).

386 Unit Titles Regulations 2011, sch 1.

387 Unit Titles Act 2010, ss 105(2) and (3).

freedom to create operational rules as it wishes, so long as they relate to the control, management, administration, use or enjoyment of the principal units or common property[388] and are not inconsistent with any provisions of the Unit Titles Act.[389]

4.25 The default operational rules are short and relate entirely to activities which may affect others' use and enjoyment of their units and common property. The statute sets out the other rights and responsibilities of the owners, body corporate and the committee. This approach is similar to NSW, where statute is used to set out the non-negotiable rights and duties, and by-laws fill in the areas where flexibility is permitted.

Management and maintenance

4.26 The common property is owned by the body corporate, but the unit owners are beneficially entitled to the common property as tenants in common, [390] in shares determined by their ownership interest.[391]

4.27 The body corporate may sell, lease or licence any part of the common property, if this is supported by a resolution of unit owners passed by a 75% majority vote. It may also acquire additional land (outside the base land of the development) as common property with a 75% majority vote, so long as the land is not subject to a mortgage.[392] The body corporate is prohibited from mortgaging common property at any time.[393] This is different from the position in commonhold and the US.

4.28 There seems to be nothing preventing a body corporate leasing or licensing common property to a unit owner in order to facilitate exclusive use. However, there are no specific provisions allowing for exclusive use of common property, such as there are in British Columbia.

4.29 The body corporate has a duty to maintain and repair all common property and assets owned by the body corporate, as well as any elements of the building that relate to, or serve, more than one unit. To fulfil this duty it must keep it in a good state of repair, and renew where necessary. The body corporate has the right to access, at all reasonable hours, any unit, where necessary, to carry out these maintenance obligations.[394]

4.30 Unit owners have a duty to repair and maintain their units to keep them in good order, in order to ensure that no damage or harm is caused to common property or other units. Any additions or structural alterations that an owner wishes to make must be notified to

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388 Unit Titles Act 2010, s 106(1).

389 Unit Titles Act 2010, s 106(4). There is however an extensive body of case law relating to body corporate rules being found *ultra vires* and unenforceable.

390 Unit Titles Act 2010, s 54.

391 For definitions of ownership and utility interest, see paragraph 4.36 below.

392 Unit Titles Act 2010, ss 56 and 58.

393 Unit Titles Act 2010, s 130(2).

394 Unit Titles Act 2010, s 138 and s 80(1)(a)(iii).

the body corporate, and if they will materially affect the common property or another unit, the body corporate must consent.[395]

4.31 The body corporate may enter into contracts, where authorised to do so by a resolution of unit owners.[396] The most common types of contract include contracting a professional manager to take over the administrative functions of the body corporate or contracting a building manager to take care of the maintenance of common property.[397] There are no licensing requirements for managers, unlike in NSW and British Columbia. However, given the financial responsibility such a manager may have (with the body corporate members being correspondingly vulnerable to potential financial irregularities by such managers), such a regime is presently being considered by way of statutory amendment to the legislation.[398]

4.32 The New Zealand model has a number of built-in consumer protection provisions, but of particular note are the strict disclosure requirements.[399] A seller of a unit, along with the body corporate, must inform a prospective purchaser of things which may affect their decision to purchase, including: [400]

(1) the value of the levy (equivalent to the commonhold contributions) paid by that unit;

(2) the balance of each of the body corporate funds, as at the last AGM;

(3) the ownership and utility interest of the unit;[401] and

(4) any maintenance planned for the next year, and whether the property has been subject to any weather-tightness claim.

Requirements varying by scheme size

4.33 There does not seem to be much acknowledgement of developments of different sizes, apart from in relation to the need to elect a committee of the body corporate. Developments with nine units or fewer do not have to have a committee (see paragraph 4.19 above). This differs from British Columbia and NSW where small developments still have to have a committee, but the election requirement is just removed as all the owners are automatically members. The New Zealand approach seems to recognise the different needs of a smaller development, and that having a committee may put undue pressure on owners in smaller developments.

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395 Unit Titles Act 2010, s 80.

396 Unit Titles Act 2010, s 86, Unit Titles Regulations 2011, reg 17.

397 https://www.tenancy.govt.nz/uta/governance/service-contracts/.

398 http://www.mbie.govt.nz/info-services/housing-property/unit-titles/review-of-the-unit-titles-act-2010/documents-and-images/048%20-%20Unit%20Titles%20Act%20Working%20Group.pdf.

399 Unit Titles Act 2010, ss 144 to 153.

400 Unit Titles Regulations, regs 33 to 35.

401 See para 4.36 below.

Contributions to shared costs

4.34 The body corporate can choose to recover repair, maintenance, and renewal costs from a subset of owners, where:

(1) the maintenance affects the subset of owners substantially more than others;

(2) is carried out on property contained within the subset of owners' units; or

(3) if the subset of owners caused the damage.[402]

4.35 Expenses for any amenities or services supplied can also be metered, so that each owner only pays for what he or she has actually used, rather than having to divide costs.[403]

4.36 Additionally, in New Zealand, there are two types of owner entitlement or interest: the ownership interest and the utility interest. The ownership interest (set by a registered valuer) relates to the share of common property attached to each unit, and the utility interest (set by a valuer, or by the body corporate) determines what proportion of the shared running costs will be paid by each unit. These two interests are usually the same, but may on occasion may be different. For example, in a development where all of the units are the same size, the ownership interest would probably be equal. However, if one unit was owned by a supermarket, which used the communal car park for customers, the unit owners might want the supermarket to contribute a higher percentage of the body corporate expenses. The utility interest of the supermarket unit may therefore be higher than its ownership interest. Another example may be a lift in a building, with the owners on the upper floors taking a correspondingly greater responsibility for maintenance and refurbishment of the lift, in shares proportional to their usage.

4.37 These provisions, together, give flexibility for different owners to make different contributions to the body corporate's expenses, depending on their needs. Commonhold does not have such flexibility, and has been criticised for this.[404]

Leases in unit title

Lot owners in an ordinary unit title development leasing their lots:

4.38 Lot owners can lease their units under the Unit Titles Act.[405] There does not seem to be anything directly discussing whether operational rules may restrict this. On the one hand, a rental restriction rule would relate to the use/enjoyment of principal units, and thus fall within the remit given to a body corporate to create operational rules.[406] However, the Act states that on creation of an individual unit title, that unit may be

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402 Unit Titles Act 2010, ss 126 and 127.

403 Unit Titles Act 2010, s 125.

404 See, for instance, responses to question 3 of our Call for Evidence.

405 Unit Titles Act 2010, s 50(a).

406 Unit Titles Act 2010, s 106(1)(a).

leased.[407] Therefore, operational rules restricting the lease of units could be interpreted as contradicting the Unit Titles Act, and consequently be deemed invalid.

4.39 Where units have been leased, the tenants are bound by the development's operational rules, but are not entitled to vote at meetings of the body corporate (unless the lease allows for this).[408] This is different from the position in US condominium developments where certain votes may be delegated to tenants of the unit owners (see paragraph 5.47 below).

Leasehold unit title developments:

4.40 There is no specifically defined category of "leasehold development", as there is in NSW and British Columbia. However, as has been discussed at paragraph 4.7 above, a long leaseholder may apply to register a unit plan, so long as the freeholder consents.[409] This creates a development where unit owners become liable (jointly and severally) as guarantors for breaches of the lease,[410] and the freeholder retains his or her reversionary interest post-conversion.

4.41 Any common property acquired at a later date must become subject to the same long lease as the rest of the development, no lots may be surrendered to the freeholder, and the freeholder may not release an individual lot from the lease.[411] The effect of this seems to be the creation of a leasehold development similar in operation to the leasehold strata developments of NSW. This also appears to operate in practice in a similar way to blocks of flats in England and Wales where the leaseholders have exercised the Right to Manage.

4.42 The whole underlying lease may be varied by a 75% majority vote of the body corporate. On expiry of the underlying lease, the freeholder applies to the Registrar to have the unit plan cancelled. If the terms of the lease provided that lessees are entitled to compensation equal to the value of the buildings, fixtures or any other improvements on the base land, the lessees become entitled to this sum on cancellation of the unit plan.[412]

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

4.43 There are three different levels of jurisdiction in the dispute resolution scheme set out by the Unit Titles Act 2010: the Tenancy Tribunal; the District Court; and the High Court. Which jurisdiction may be used to resolve a dispute is dependent on the value of the case, rather than the type of breach in question.

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407 Unit Titles Act 2010, s 50(a).

408 Unit Titles Act 2010, ss 96 and 105.

409 Unit Titles Act 2010, ss 16 and 32.

410 Unit Titles Act 2010, s 163.

411 Unit Titles Act 2010, ss 58 and 162.

412 Unit Titles Act 2010, ss 166 to 168.

Tenancy Tribunal – claims under $50,000

4.44 Any claims seeking an order of any value under $50,000 may be decided by the Tenancy Tribunal.[413] This will include most claims arising from:

(1) an owner failing to pay contributions to the body corporate; [414]

(2) disputes over repair and maintenance;

(3) the governance of the body corporate;

(4) breaches of operational rules; and

(5) most other disputes that arise in the course of a Unit Title development.

4.45 A cause of action cannot be split into two claims in order to bring it within the jurisdiction of the Tribunal.[415]

4.46 Where possible, the Tenancy Tribunal will resolve applications through its mediation service.[416] Where this is not possible, the Tribunal will adjudicate, giving a legally binding decision on the matter.

District Court – claims between $50,000 and $350,000

4.47 Where the disputing parties seek to claim more than $50,000, the dispute must be heard by the District Court. [417] The District Court will also hear any appeals against decisions of the Tenancy Tribunal.[418]

High Court – claims over $350,000

4.48 The High Court will deal with any disputes with a value over $350,000. It also has exclusive jurisdiction to resolve any disputes over land title.[419]

PART VII: TERMINATION

4.49 In order to terminate a unit title development, the unit plan must be cancelled. This must be done by the Registrar. If a sufficient majority of the body corporate support the cancellation, an application can be made directly to the Registrar. If there is no consensus, an application may be made to the High Court for an order requiring cancellation, which can be made on terms protecting the interests of the parties.

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413 Unit Titles Act 2010, s 171.

414 The claim will include interest on any unpaid contributions, at a rate set by the body corporate, but which must not exceed 10% per annum: Unit Titles Act 2010, s 128 (2).

415 Unit Titles Act 2010, s 171(9).

416 Residential Tenancies Act 1986, s 76(5).

417 Unit Titles Act 2010, s 172.

418 Residential Tenancies Act 1986, s 117.

419 Unit Titles Act 2010, s 173.

Cancellation by Registrar

4.50 If the body corporate passes a resolution to cancel the unit plan, with the support of 75% of the owners, it can apply directly to the Registrar for the cancellation of the plan. Before an overall unit title plan can be cancelled, any subsidiary unit plans must first have been cancelled.[420]

4.51 The effects of cancellation are as follows.[421]

(1) The body corporate is dissolved.

(2) All land in the development, whether it was a unit or common property, vests in the unit owners as tenants in common. Their shares will be determined by their ownership interest prior to cancellation.

(3) Anything remaining in the funds of the body corporate is distributed amongst the unit owners in the same shares they contributed to the funds in the first place. This effectively distributes all non-land assets of the body corporate amongst the unit owners.

(4) Despite the body corporate being dissolved, it is deemed to continue in existence in respect of any debt still owed by it after cancellation.

Cancellation by order of the High Court

4.52 Without the requisite 75% majority of the body corporate, an application for cancellation can instead by made to the High Court. Applications can be made by the body corporate, a unit owner, or a creditor of the body corporate. Everyone who has an interest in the land in the development has the right to be heard by the High Court during the application. The High Court will have regard to the interests of creditors as well as everyone who has an interest in the land, and will only make an order where it deems it just and equitable to do so.[422]

4.53 The order will require the Registrar to cancel the unit plan, and can set out any terms or conditions it deems necessary, including the making of any payment by the body corporate and the distribution of the body corporate's assets in a particular way.[423]

4.54 The power to apply to court may be desirable in cases where a minority of unit owners unreasonably refuse to agree to terminate the development, particularly where the development is no longer able to pay its debts.

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420 Unit Titles Act 2010, ss 177 and 178.

421 Unit Titles Act 2010, ss 180 and 185.

422 Unit Titles Act 2010, ss 187 and 188.

423 Unit Titles Act 2010, s 188(3).

Chapter 5: United States of America

INTRODUCTION

5.1 The United States of America has a common law federal legal system under which the Constitution reserves certain powers to the federal government, leaving the individual states to exercise the remaining powers. Condominium law is a matter dealt with at state level and each of the 50 states have adopted their own rules. However, in an effort to promote uniformity, model laws have been produced by the Uniform Law Commission[424] which individual states may choose to adopt. Although the uniform laws have been criticised, in order to gain an overview of the general approach to common ownership in the United States of America, the research in this chapter mainly focusses on the uniform laws of condominium.

LEGISLATIVE HISTORY

5.2 Puerto Rico was the first North American jurisdiction to introduce legislation on condominium ownership in 1958, drawing on experience from Latin America and Europe.[425] Condominium was introduced in Puerto Rico following a major housing shortage and as a result of the high cost of land. The same housing shortage and high land costs faced by Puerto Rico was experienced across America, especially following World War Two. This led to a need for:

> more efficient use of land through high rise multi-family dwellings located in those areas where facilities for employment, education, recreation, and public services already exist.[426]

5.3 Cooperatives were the first answer to the housing shortage, especially in major metropolitan areas. In a cooperative structure, a company owns the whole of the building, including both the apartments and the common areas. Individuals are then granted exclusive possession of apartments and also become stakeholders in the company. Cooperatives, unlike condominiums, do not give individuals a property interest in their apartments. The possibility for outright ownership of apartments was seen as a major advantage of condominium ownership. Additionally, condominium was also particularly attractive to retired homeowners who wanted the physical security of having neighbours above and below their property.[427]

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424 The National Conference of Commissioners on Uniform State Laws.

425 D S Bennett, "Condominium Homeownership in the United States: A selected Annotated Bibliography of Legal Sources" [2011-16] Vol 103:2 *Law Library Journal* 254. The 1958 Act, called the "Horizontal Property Act", is frequently cited as the first piece of legislation covering condominium law in America, although it appears that Puerto Rico had already introduced a less detailed condominium Act in 1951.

426 D S Bennett, above, p 254 citing Louis Pohoryles, "The FHA Condominium: A basic comparison with the FHA Cooperative" (1963) *The George Washington Law Review* 1014.

427 M G Lasner, "No Lawn to Mow: Co-ops, Condominiums, and the Revolution in Collective Homeownership in Metropolitan America, 1881-1973" unpublished (2007), p 91.

5.4 A number of states, such as California, began to develop condominium schemes using existing principles of property law on a case-by-case basis, in the absence of specific legislation. From the 1960s, it became increasingly desirable for states to adopt legislation to enable and regulate condominium ownership.[428] Despite the popularity of condominiums, mortgage lenders did not offer very attractive terms, leaving this form of ownership "out of reach for the average person".[429] Following pressure from Puerto Rican delegates, in 1961 the Federal Government enacted the National Housing Act which legally recognised condominium as a form of ownership. This Act also authorised the Federal Housing Administration ("FHA") to insure mortgages on condominiums.[430] The FHA is a government agency which provides lenders with protection against homeowners (traditionally of low to medium income) defaulting on their mortgage.[431] This policy allowed purchasers to avoid having to make large down payments when buying condominium units.

5.5 The National Housing Act contained a requirement that "condominium homeownership must be established under the laws of the state where the property is located".[432] In 1962, the FHA published a model statute with terms designed to ensure that condominiums would be compatible with the FHA's standards.[433] States were quick to adopt their own legislation, following either the approach taken in Puerto Rico, or the FHA model statute.[434] It was hoped that adopting state legislation would simplify and standardise the operation of condominiums, clarifying a number of grey areas left by the case-by-case approach which had previously been taken. It was also hoped that state legislation would make condominium developments more readily insurable.

5.6 By 1966, condominiums were more prevalent than cooperatives everywhere in the United States, except for New York. By 1969, all 50 states had enacted legislation to govern condominium ownership.[435] The initial statutes were fairly basic in form and it soon became necessary to adopt more sophisticated legislation to govern this fast-growing form of ownership. In particular, many states perceived a need for additional consumer protection within condominium, as well as greater flexibility in the creation and use of condominiums.[436] States therefore began to develop their own more detailed provisions. However, this led to significant variation in the practices of different states. It became difficult for agencies at a federal level, such as the FHA, and homeowners purchasing in a different state, to assess the suitability of a condominium. Additionally,

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428 C G van der Merwe, "A Comparative Study of the Distribution of Ownership Rights in Property in an Apartment or Condominium Scheme in Common Law, Civil Law and Mixed Law Systems" (2002) *Georgia Journal of International and Comparative Law* 101, 103.

429 D S Bennett, "Condominium Homeownership in the United States: A selected Annotated Bibliography of Legal Sources" [2011-16] Vol 103:2 *Law Library Journal* 254.

430 D S Bennett, above, p 262.

431 More information about the FHA can be found at https://www.hud.gov/program_offices/housing/fhahistory.

432 D S Bennett, above, p 264.

433 C G van der Merwe, above, p 103.

434 *Uniform Laws Annotated: Business and Financial Laws, Master Edition, Vol 7 Part II* (1997) ("Annotated Uniform Laws (1997)") p 201.

435 D S Bennett, above, p 255; C G van der Merwe, above, p 103.

436 Annotated Uniform Laws (1997), p 201.

many problematic areas such as termination and insurance remained unaddressed in the individual states.[437]

Introduction of Model Statutes

5.7 In an attempt to promote consistency between states, in 1977 the National Conference of Commissioners for Uniform State Law introduced the Uniform Condominium Act. The Uniform Condominium Act has been adopted in 14 states.[438]

5.8 In 1982, the Uniform Condominium Act was consolidated with two pieces of legislation which governed other types of multi-owned property[439] to produce the Uniform Common Interest Ownership Act ("UCIOA").[440] Six states have adopted the 1982 version of the UCIOA.[441] The UCOIA "closely paralleled" the Uniform Condominium Act in relation to condominium law but extended the benefits of consumer protection and a regulatory structure to unit owners in other types of multi-owner developments.[442]

5.9 The UCIOA was significantly amended in 1994. These amendments reflected the experiences of the states adopting the UCIOA 1982, and responded to academic criticism. The main amendments were to:

(1) increase developer responsibility;

(2) allow for the subdivision and expansion of developments;

(3) improve procedures for addressing use and occupancy restrictions in units;

(4) empower the managing association to deal with tenants in rented units; and

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437 C G van der Merwe, "A Comparative Study of the Distribution of Ownership Rights in Property in an Apartment or Condominium Scheme in Common Law, Civil Law and Mixed Law Systems" (2002) *Georgia Journal of International and Comparative Law* 101, pp 103-104.

438 The Community Associations Institute ("CAI") website www.caionline.org states that the following States have adopted the UCA: Alabama, Arizona, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Mexico, Pennsylvania, Rhode Island, Texas, Virginia, Washington and West Virginia (although it would seem that West Virginia subsequently replaced sections of the UCA with the UCIOA). CAI is an international institute providing information on homeownership.

439 The Model Real Estate Cooperative Act (1981) which governed cooperatives and the Uniform Planned Community Act (1980) which governed planned developments. Cooperatives and planned developments are explained further at paras 5.35 to 5.39 below.

440 The UCIOA represents the culmination of the conference's nine-year project to offer comprehensive legislation to the states which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership.

441 Alaska, Colorado, Connecticut, Minnesota, Nevada and West Virginia (CAI website, above), although it would seem that Connecticut has now adopted the 2008 version.

442 *Uniform Laws Annotated: Business and Financial Laws, Master Edition, Vol 7 Part II* (September 2002) ("Annotated Uniform Laws (2002)") p 5.

(5) clarify the standard of care that applied to the directors of the managing association.[443]

The 1994 version of the UCIOA was adopted by two states.[444]

5.10 The UCIOA was again amended in 2008. There had been growing dissatisfaction with the UCIOA which, it was argued, created tensions between unit owners and the scheme's managing association. The introductory note to the 2008 amended Act explains:

> it had become increasingly clear … that major tensions remained … . Those tensions principally involved the perception that individual unit owners were often unduly disadvantaged in their dealings with elected directors and employee/managers of unit owner associations … . There has been growing focus, both in the media and in professional conferences, on the intensity of owner/association disputes. Even the federal government became involved, enacting a federal statute to ensure that associations of every form of common interest community must permit the display of the American flag on units, and another one that enabled individual unit owners to purchase individual cable television systems, notwithstanding widespread prohibitions on such purchases by unit owner associations.

5.11 To address these complaints, a number of amendments were introduced to improve the protection of unit owners' rights and to prevent abuses by managing associations, including:

(1) clearer and more open rules on the adoption of budgets, subject to unit owner approval;

(2) requirements to notify unit owners of a variety of additional events;

(3) improved access to records for unit owners;

(4) a straight-forward means of removing directors;

(5) requirements for meetings to be open; and

(6) restrictions on the use of the forfeiture process.

5.12 In 2014, there were further amendments made to the operation of "liens" under the UCIOA. If a unit owner fails to pay his or her contribution to the shared expenses of the condominium, the managing association can obtain a "lien" over that unit owners flat. In this context, a lien is similar to a mortgage, giving the association the right eventually to sell the unit owner's property to recover the money owed, if the unit owner fails to pay the debt.

5.13 In the 2008 version of the Act, associations' liens were given priority over mortgages to the extent of six months' unpaid common expense assessments. As a result, when the

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443 UCIOA Summary, Appendix H.

444 Connecticut and Vermont, although it seems that both of these states have now adopted the 2008 version (CAI website, above).

relevant property was sold, the association would be repaid first, up to six months of unpaid contributions. The mortgage lender would only then be repaid. Any remaining value would be used to pay any further expenses owed to the association, with the remainder going to the unit owner. It was anticipated that, if the association instigated the sale of a unit to recover unpaid expenses, the mortgage lender would in fact step in to pay what was due the association (up to six months' expenses). The mortgage lender would then be able to sell the unit to a purchaser free from the association lien. It was assumed that the proceeds of this sale would be sufficient for the mortgage lender to recover both the unpaid mortgage balance and the amount it had paid to the association.

5.14 However, the economic climate changed markedly from that in which the 2008 version of the UCIOA was drafted. Lenders often delayed taking forfeiture action to sell units, fearing that they would be unable to sell the units and would become liable to repay the association in the meantime. The 2014 amendments sought to strike a fairer balance between the association and the mortgage lender by clarifying the situations in which the association itself could take forfeiture proceedings. Examples of how these amendments operate in practice can be found at paragraph 5.89 below.

PARTS II & III: CONVERTING TO CONDOMINIUM AND CREATING A NEW CONDOMINIUM

Setting up a new development

5.15 A condominium is created by the registration of a declaration which must contain certain prescribed information. Whilst the UCIOA does not specify, presumably it will be necessary for the developer to own the land to be developed, or have obtained the necessary consents from other freeholders. Guidance included within the original 1982 UCIOA states that mortgage lenders are not required to sign the declaration. However, the developer must pay off any mortgages over a particular unit before selling them, unless the purchaser expressly agrees to take the unit subject to the mortgage.[445]

5.16 The declaration setting out the rights and duties of the owners, including both the original owners and future owners".[446] The declaration must contain, for instance:

(1) the name of the scheme;

(2) a description of the land included;

(3) a description of the boundaries of each unit;

(4) a statement of the maximum number of units that can be created;

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445 See also UCIOA (2014) s 4-111.

446 D S Bennett, "Condominium Homeownership in the United States: A selected Annotated Bibliography of Legal Sources" [2011-16] Vol 103:2 *Law Library Journal* 254, 267. In the decision of *Clampit v Cambridge Phase II Corp*., Mo App E D 1994, 884 s w 2d 340 it was held that the declaration and its amendments should be strictly construed to reassure investors that what "the buyer sees [the] buyer gets". Annotated Uniform Laws (1997), p 243.

(5) a description of any limited common parts;

(6) a description of development rights (see further at paragraph 5.24 below);

(7) the allocation of unit owners' interests in the common parts, and their share of votes;[447] and

(8) any restrictions on selling or letting units.[448]

5.17 The declaration must also be accompanied by plans meeting prescribed requirements.[449] A declaration cannot be registered unless all the structural components and mechanical systems[450] of the buildings containing the units have been substantially completed in accordance with the plans.[451] An independent engineer, surveyor or architect must provide evidence of this.[452] This requirement is intended to ensure the expectations of purchasers are met; for instance, making sure that the facilities described in the declaration are in fact provided.

Converting an existing development

5.18 It is possible for an existing building to be converted to condominium. Prior to marketing any of the units in the converted scheme, the developer must obtain a report from an independent architect or engineer describing the condition of the structural components and any significant mechanical and electrical installations. This information needs to be included within the statement provided to prospective purchasers.[453]

5.19 There is no provision in the UCOIA which deals specifically with converting an existing building from a cooperative to a condominium. It appears, therefore, that either all the existing owners would need to consent to the conversion, or all of the individual interests would need to be terminated. It appears that if the units in the scheme are currently let on leases or tenancies and the developer does not want the condominium units to be subject to these interests, the developer must terminate the tenancies or leases (in

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447 The declaration may provide that votes may be allocated differently on particular matters: UCIOA (2014) s 2-107.

448 UCIOA (2014) s 2-105.

449 UCIOA (2014) s 2-109.

450 For example, those parts which are necessary to keep any part of a building from collapsing and to maintain the building in a weathertight condition such as foundations, walls, roof, floors plumbing heating and air conditioning units. See Annotated Uniform Laws (1997), p 237.

451 This does not mean that the developer must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units may ultimately be located have been structurally completed, the declaration may create a condominium which reserves particular development rights, such as adding additional land and units, by creating new units on common parts or by subdividing existing units. See Annotated Uniform Laws (1997), p 238.

452 UCIOA (2014) s 2-101.

453 See further n 468 below.

accordance with the terms of the tenancy agreement or lease).[454] Alternatively, the existing occupier could purchase the new condominium unit.

5.20 Before offering the units for sale to the public, the developer must first provide the current tenants and sub-tenants with a statement setting out the details of the new condominium scheme at least 120 days before they are required to vacate.[455] This rule does nothing to amend the eviction procedure in place in the particular state. If the tenant refuses to vacate following the 120-day notice, the usual provisions of the state's eviction process statutes would apply and any defence available to the tenant would also be available.[456]

5.21 Tenants and sub-tenants are then given 60 days in which to decide whether they wish to purchase the flat they are currently occupying from the developer. If the offer is not accepted, the developer may offer the unit to the public, but may not sell the unit on more favourable terms within the following 180 days. This rule aims to discourage developers making unreasonable offers to existing tenants. If the developer sells the unit in breach of this requirement the transaction is not void but the tenant would have the right to claim damages.[457]

5.22 The conversion of rental buildings to condominium has been one of the most contentious issues with condominium.[458] Some commentators argue that the result of the conversion is to displace low and moderate income tenants in order to provide homes for more affluent persons able to afford the higher price. Supporters of the conversion process argue, however, that it results in the stabilisation of buildings and the preservation of neighbourhoods. The provisions of the Act dealing with conversion try to balance these competing interests. Additionally, it has been noted that an advantage of the FHA mortgage insurance is to enable tenants on a low to moderate income to purchase a condominium unit upon conversion.[459]

Compulsion of condominium

5.23 Whilst there does not appear to have been any legislative provision compelling the establishment of or conversion to condominium, the Act does include provision which aims to prevent condominium being less favourable than other forms of ownership. The Act requires that there should be nothing in a building code or in planning legislation which places more restrictions on condominium construction than would be applicable to other forms of ownership.[460]

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454 UCIOA (2014) s 4-112(e) states that "nothing in this section permits termination of a lease by a [developer] in violation of its terms".

455 Some states such as Alabama and New Mexico have shortened this to 60 days. Annotated Uniform Laws (1997), p 352.

456 Annotated Uniform Laws (1997), p 354.

457 UCIOA (2014) s 4-112.

458 Annotated Uniform Laws (1997), p 353.

459 D S Bennett, "Condominium Homeownership in the United States: A selected Annotated Bibliography of Legal Sources" [2011-16] Vol 103:2 *Law Library Journal* 254, 263.

460 UCIOA (2014) s 1-106.

Development rights

5.24 The developer can reserve development rights in the declaration, allowing them to: add property to the scheme; create units, common parts or limited common parts; and withdraw property from the scheme.[461] The declaration must provide a clear description of the land to which each of the rights apply and a time limit within which each of the rights can be exercised. The declaration must also clarify whether the rights may be exercised over different parcels of land at different times. The declaration should be amended once the rights have been exercised (for instance, the creation of new units will require interests to be reallocated and plans to be amended).[462]

5.25 If a development right has been reserved to enable a developer to withdraw a portion of land, this right ends as soon as a lot within that portion has been sold to another purchaser.[463]

5.26 The developer may reserve the right to have sales and management offices in the common parts, but these rights will end when all of the units have been sold.[464]

5.27 The developer can also reserve rights:

(1) to complete improvements indicated on the plans lodged with the declaration;

(2) to make the scheme subject to a master association (see further at paragraph 5.37 below)

(3) to merge a development with another development in the same form of ownership;

(4) to appoint or remove any officer of the association or master association or an executive board member;

(5) to control any construction and design review;

(6) to attend meetings of the unit owners (except certain executive board meetings); and

(7) to have the same access to records as a unit owner.[465]

5.28 The developer will also have an easement through the common parts in order to enable him or her to exercise the development rights and comply with any obligations.[466]

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461 UCIOA (2014) s 1-103.

462 UCIOA (2014) ss 2-105(8) and 2-110.

463 UCIOA (2014) s 2-110(d)(2).

464 UCIOA (2014) s 2-115.

465 UCIOA (2014) s 1-103(33).

466 UCIOA (2014) s 2-116.

Consumer Protection

5.29 If the court considers a contract or a term of the contract to have been unconscionable at the time the contract was entered into, it can declare the contract (or a particular term) to be unenforceable. It would seem that this applies to contracts for the sale of a condominium unit. The court can take into account a number of factors when considering whether a contract or term is unenforceable, including if there is a "gross disparity" between the amount charged for the property and its value.[467]

5.30 The developer must provide prospective purchasers with a "public offering statement" containing certain prescribed information, including:

(1) the name and address of the developer;

(2) a general description of the scheme;

(3) a schedule of commencement and completion;

(4) a description of services;

(5) the development rights reserved;

(6) the costs and fees payable; and

(7) any restrictions on selling or letting units.

5.31 If a purchaser is not given this statement more than 15 days before executing the contact to purchase the unit, the purchaser is able to cancel the contract within 15 days of receiving the statement.[468] The purchaser must be refunded all payments made and will be entitled to damages including an additional amount equal to 10% of the sale price of the unit. The developer will also be liable for any false or misleading statements made or for any omission of a material fact.[469]

5.32 The developer is required to complete all improvements depicted on any site plan provided with the declaration, the public offering statement or any promotional material unless they are labelled "need not be built".[470]

5.33 The Act implies various warranties as to the condition of the unit. During the period of developer control, the association can establish an independent committee to evaluate

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467 UCIOA (2014) s 1-112. Certain states such as Alabama and North Carolina omit this section (Annotated Uniform Laws (1997), p 233).

468 There are similar requirements for the unit owner to provide a prospective purchaser with information at the point of re-sale. A unit owner will request the relevant information from the association, which must provide this information within 10 days of a unit owner's request. A unit owner is not liable for any erroneous information provided by the association or for any delay caused. An association cannot recover from the new owner any outstanding unpaid assessment or fee greater than the amount set out in the information provided. UCIOA (2014) s 4-108.

469 UCIOA (2014) ss 4-102 to 4-108.

470 UCIOA (2014) s 4-119.

and enforce any warranty claims involving the common parts. The unit owners will be responsible for all costs reasonably incurred by the committee in doing so.[471]

5.34 The model Act also sets out further optional provisions which can be adopted by states where a regulatory agency is desired, or deleted in states where the Act is to be enforced through private action. In the states adopting the provisions for a regulator, the developer cannot offer a unit for sale until the scheme has been registered with an administrative agency.[472] The developer has to provide certain information to the agency, including evidence of sufficient funds to complete all buildings on the scheme and copies of the construction contracts required to complete the scheme. The regulator can issue cease and desist notices to registered schemes and can issue orders revoking registration in a number of circumstances, for instance if the developer has provided misleading information, or has concealed or diverted funds. The developer is also required to file annual reports to the agency, until the developer holds less than 25% of the voting rights within the scheme.

Mixed-use/complex developments

5.35 In the United States of America, developers have significant flexibility to set up mixed-use developments as they see fit. In particular, this is facilitated through three different forms of common ownership in the United States of America. We outline below how master associations and master planned communities, the other forms of common ownership apart from condominium, operate.

Master Associations

5.36 It is common in large or multi-phased developments for the developer to create a "master association" to provide management services or decision-making functions for a series of smaller developments.[473]

5.37 A condominium's declaration can delegate any of the condominium association's powers to a master association, or give the executive board the power to make the delegation at a later point. Once a delegation has been made, the executive members are no longer liable in respect of those powers which have been transferred.

5.38 There are different mechanisms available to elect the members of the master association executive. For instance, the members may be appointed by all the unit owners of the schemes subject to the master association. Alternatively, the executive board members of each individual condominium may elect the board members of the master association.[474]

Master Planned Communities

5.39 A developer may state that a development is a master planned community where it has reserved a development right to create at least 500 units and owns or controls more

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471 UCIOA (2014) s 4-116.

472 Unless the scheme has fewer than 12 units and no development rights are reserved.

473 Annotated Uniform Laws (2002) p 88.

474 UCIOA (2014) s 2-121.

than 500 acres on which the units are to be built. In this case, the declaration does not need to include details of the maximum number of units that will be built and can omit the majority of other information that would otherwise need to be provided in a condominium declaration. However, information will need to be added to the declaration at the time the units are conveyed. There is no restriction on a developer adding land to a master planned community.[475]

Flexibility for different sized condominiums

5.40 Condominiums can be a "high-rise apartment building, a garden type housing development, an office building, a shopping centre or an industrial complex, where each apartment, attached or semi-detached unit, or office space unit is individually owned".[476]

5.41 Different rules will apply depending on the size and use of the development. Some examples of the variations are discussed below.

5.42 Only limited provisions of the Act apply to:

(1) small cooperatives of less than 12 units with no reserved development rights; and

(2) small and limited expense developments, of less than 12 units, with no reserved development rights, and less than $300 annual contribution towards common expenses. The declaration can however provide that the entire Act is applicable instead.[477]

5.43 The Act does not apply to entirely non-residential common interest communities unless:

(1) the declaration provides that the entire Act applies, and in which case, the Act indicates which specific provisions may be altered for non-residential schemes;[478] or

(2) the declaration provides that only articles 1 (which contains general rules of interpretation and applicability) and 2 (which governs the creation, alteration, division of property, exercise of development rights and termination) apply. Therefore, the provisions relating to the management of the scheme would not apply as a matter of course.[479]

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475 UCIOA (2014) s 2-123.

476 D S Bennett, "Condominium Homeownership in the United States: A selected Annotated Bibliography of Legal Sources" [2011-16] Vol 103:2 *Law Library Journal* 254, 266, citing E H Breuer, *Condominium: A Selected Bibliography of the Historical, Common Law, Federal and State Legislation Aspects of Unit Ownership, Horizontal Property and Air Space Ownership in Real Property* (1962) p 101.

477 UCIOA (2014) ss 1-202 to 1-203.

478 For example, the Act provides that a declaration in a purely non-residential scheme may provide that less than 80% of votes would be needed to consent to the sale of common parts of the scheme (s 3-112) or to terminate the scheme (s 2-118).

479 UCIOA (2014) s 1-207.

PART IV: THE OWNERS' ASSOCIATION

5.44 A unit owners' association must be created by the time the first unit in the development is sold.[480] Only the unit owners will be the members of the association. The association may be a profit or non-profit organisation and can take any form permitted in the particular state, including a limited liability company, a partnership (which will be unincorporated) or trust.[481] The Act sets out bespoke rules which govern the operation of the association.[482] The association has numerous powers including the ability:

(1) to adopt and amend by-laws and rules;

(2) to adopt and amend budgets;

(3) to hire and fire managing agents and other employees;

(4) to institute and defend legal proceedings on behalf of itself or two or more unit owners in matters relating to the condominium;

(5) to enter into contracts;

(6) to regulate the use and maintenance of common parts; and

(7) to require unit owners to make contributions to the shared expenses of the condominium.[483]

5.45 The declaration may add to these powers, but certain powers cannot be removed by the declaration (for instance, the provisions giving the association power to deal with the developer).[484]

5.46 A unit owners' meeting must be held annually at a time fixed by the by-laws. An additional special meeting may be held to address any matter affecting the condominium if its president, a majority of the executive board, or unit owners having at least 20% of the votes of the association (or a lower percentage if specified in the

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480 Annotated Uniform Laws (1997), p 96. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and the other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium, even during the period of developer control. The Act includes the words "'unincorporated" in brackets. Most states give developers flexibility to decide whether the association should be a profit or not-for-profit organisation. However, some states such as Georgia and Alabama require the organisation to be a corporate body.

481 UCIOA (2014) s 3-101. Members of our advisory group explained that the "non-stock corporation" is the most common form taken by owners' associations, which is relatively similar to a company limited by guarantee in England and Wales.

482 UCIOA (2014) s 1-108 provides that the "law of corporations and any other form of organisation authorised by the law of this state [and unincorporated associations]… supplement the provisions of this Act except to the extent inconsistent".

483 UCIOA (2014) s 2-102.

484 UCIOA (2014) s 3-102.

declaration) request the meeting. Unit owners must be given a reasonable opportunity to comment during the meeting.[485]

5.47 In order for decisions of the owners' association to be valid, unit owners holding at least 20% of the votes must be present in person, by proxy or have cast absentee votes (if this is permitted in the by-laws).[486] Where votes are cast in person, this can be done by voice vote, show of hands, standing or any other method designated by the person presiding at the meeting. If only one of several owners of a particular unit is present at a vote, that person may cast all the votes allocated to that unit. Otherwise, if more than one of the owners are present, the votes may be cast in accordance with the agreement of the majority (in which case, an owner's failure to protest against the vote will be taken as agreement).[487] It is also possible for voting to be carried out by paper or electronic voting (unless prevented in the declaration or by-laws) and in this case, the vote will count if the necessary quorum of unit owners return their ballot. The declaration can also require votes on specified matters to be cast by leaseholders rather than unit owners.[488]

5.48 The association must keep records of several matters, including receipts of expenditures, minutes of meetings, records of votes taken and copies of contracts.[489]

Executive board

5.49 The association must have an executive board which will act on behalf of the association.[490] The executive board is responsible for adopting budgets and decides whether enforcement action should be taken against unit owners or a developer for any construction defects.

5.50 The developer may appoint and remove members of the executive and other officers during the "period of control". This period ends at the time set out in the declaration or on the occurrence of certain earlier events set out in the Act.[491] During this period of control, the developer will still be restricted in the number of executive members it may appoint.

(1) After one-quarter of the units have been sold to owners other than the developer, at least one of the executive members (making up at least 25% of the members of the executive board) must be elected by unit owners.

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485 UCIOA (2014) s 3-108.

486 UCIOA (2014) s 3-109(a).

487 UCIOA (2014) s 3-110(2).

488 UCIOA (2014) s 3-110.

489 UCIOA (2014) ss 3-118 and 3-120.

490 UCIOA (2014) s 3-101.

491 UCIOA (2014) s 3-103(d). The period of control will terminate at the earliest of: 60 days after three-quarters of the units have been sold to owners other than the developer; two years after the developer has stopped offering units for sale; two years after any right to add new units was last exercised; or the day the developer surrenders all rights to control.

(2) After half of the units have been sold to owners other than the developer, not less than one third of the members of the executive board must be elected by unit owners.[492]

5.51 When the period of control ends, the developer can no longer appoint members of the executive board. The unit owners must elect an executive board of at least three members. A majority of the members of the executive board should be unit owners.[493]

5.52 The gradual handover of control from the developer to an executive appointed by the unit owners has two key functions:

(1) to avoid abuses by developers retaining control indefinitely over a certain percentage of units; and

(2) to allow for the "gradual training and involvement of unit owners". According to the authors of an American text on real property:

> the role of developer in turning over the project to new unit owners has been likened to that of a businessperson turning over an established business to new people with no business experience.[494]

5.53 During the period of developer control, the executive board is required to meet four times each year. After this period ends, unit owners can amend the by-laws to vary the procedures for executive meetings. An action of the executive board which does not comply with the provisions of the Act is still valid unless set aside by a court.

5.54 The board meetings should be open to unit owners, except during "executive sessions" which can be used to consult with lawyers, discuss potential litigation, personnel, contracts or other commercial transactions which may be prejudiced if discussions were open to all. Unit owners need to be given reasonable opportunity to comment during the board meeting.[495]

5.55 In order for a decision taken by the board to be valid, officers entitled to cast a majority of the votes must be present. The agreement of the majority of those present is then sufficient to pass an act.[496]

5.56 Executive members and officers are required to exercise the degree of care and loyalty required of any board members in a non-profit corporation under the particular state's law.[497]

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492 UCIOA (2014) s 3-3-103(3). The member(s) must be elected within 60 days of the sale which causes the requisite percentage to be met.

493 UCIOA (2014) s 3-103(f).

494 D A Thomas, *Thompson on Real Property* (2nd ed 2004) p 262.

495 UCIOA (2014) s 3-108.

496 UCIOA (2014) s 3-109(b).

497 UCIOA (2014) s 3-103(a). This appears to be a change from the original Act, which only required executive board members to exercise ordinary and reasonable care. The standard is lower than that required of

Removal of board members and officers

5.57 Where a quorum is present at a meeting of unit owners, the majority of members may decide to remove a board member with or without cause. The board member must be given a reasonable opportunity to speak before the vote. Members appointed by a developer cannot, however, be removed by the unit owners during the period of developer control. The declaration or the by-laws cannot amend the ability of the association to remove a board member.[498]

Liability and Insurance

5.58 A unit owner will not be personally liable for any injury or damage arising out of the condition or use of the common parts. Any action arising out of the condition or use of the common parts must be brought against the association. If the damage occurred during the period of developer control then the developer is liable to the association for losses not covered by insurance, and all resulting legal costs. The association must give the developer reasonable notice of the claim, and an opportunity to defend itself against the action.[499]

5.59 From the sale of the first unit, the owners' association is responsible for taking out:

(1) property insurance on the common parts against physical loss at no less than 80% of the property's actual cash value;

(2) commercial general liability insurance in an amount determined by the executive board against bodily injury and property damage arising out of or in connection with the use, ownership or maintenance of the common parts;[500] and

(3) fidelity insurance.[501]

5.60 In addition, unit owners are not prevented from taking out their own insurance.[502]

5.61 An insurer may not cancel or refuse to renew the insurance unless 30 days' notice has been provided.[503]

5.62 If the cost of repair or replacement of any damaged parts exceeds the insurance proceeds it will be a common expense to be shared between the unit owners.[504]

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executives appointed by the developer in order to "increase the willingness of unit owners to serve as officers and members of the board".

498 UCIOA (2014) s 3-122.

499 UCIOA (2014) s 3-111.

500 Commercial general liability insurance appears to be the equivalent of personal liability insurance.

501 UCIOA (2014) s 3-113. Fidelity insurance appears to cover the loyalty and honesty of employees and agents of the association.

502 UCIOA (2014) s 3-113.

503 UCIOA (2014) s 3-113.

504 UCIOA (2014) s 3-113.

Insolvency

5.63 Forfeiture or enforcement of a charge against the entire condominium does not by itself terminate the condominium. Similarly, forfeiture or enforcement of a charge against a portion of the condominium does not withdraw that portion from the wider scheme.[505] Generally, it seems that an association may enter into bankruptcy proceedings to reorganise the debt, but this would not lead to the termination of the association itself.[506]

PART V: THE COMMUNITY

5.64 Unless amended in the declaration, the unit owner will own everything within his or her apartment, up to and including the surface finishings of the walls, floor and ceiling (for instance, the plaster, wallpaper, paint, wooden flooring). Everything else will form part of the common parts, including the structural elements of the boundary walls and floors as common parts.[507] C G van der Merwe in his comparative review of condominium law notes that, as a consequence:

> an owner is not in principle entitled to construct a niche or even to hammer in a nail into any boundary feature without the co-operation of the other owners.[508]

5.65 An amendment was made to the Act in 1994 to clarify that common parts may also include easements or other forms of property right which benefit either the association or the unit owners: for instance, easements for shared parking. This amendment allowed land to be added to the condominium without having formally to amend the section of the declaration which describes the boundary of the scheme.[509]

5.66 The declaration sets out the fraction or percentage of the common parts owned by each unit owner, his or her contribution to common expenses and portion of votes in the association. The declaration must set out the formula used to establish these allocations, which must not discriminate in favour of units owned by the developer or an affiliate. The declaration must also prescribe how the shares are to be reallocated in the event that units are added or withdrawn from the scheme.[510] A unit owner cannot sell

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505 UCIOA (2014) s 2-118(k). It appears that in certain cases, secured creditors can negotiate an interest superior to the declaration so that upon the termination of the development, the lender would have the right to exclude the land subject to the charge from the project. This has the effect that the association would not be able to secure a release of the lien until the lender is paid in full from the proceeds of sale: Annotated Uniform Laws (2002) p 80.

506 Although this will depend on the form of the association.

507 This is the position in both the model Uniform Condominium Act and the Uniform Common Interest Ownership Act. Other older Statutes based on the Model Statute of the FHA adopted a list of parts of the building which would constitute a common element unless varied in the declaration as explained in C G van der Merwe, "A Comparative Study of the Distribution of Ownership Rights in Property in an Apartment or Condominium Scheme in Common Law, Civil Law and Mixed Law Systems" (2002) *Georgia Journal of International and Comparative Law* 101, p 106.

508 C G van der Merwe, above, p 106.

509 UCIOA (2014) s1-103(6)(B); C G van der Merwe, above, p 108.

510 UCIOA (2014) s 2-107.

his or her interest in the common parts separately from the unit; any attempt to do so will be void.[511]

5.67 Certain parts of the scheme may be designated as limited common property ("LCP"). LCP can include those parts of the scheme which are outside of the boundaries of a unit but are designed to serve one or more, but not all, units, such as shutters, doorsteps, window boxes, parking spaces, patios and balconies. Additionally, elements such as where wires, chutes, flues, ducts, wires and conducts are partially within and partially outside the boundary of a unit, any portion which exclusively serves one unit will be LCP. Any portion which serves more than one unit, or any common part, will simply be classed as common property.[512] LCP may be reallocated between owners with their agreement (unless the declaration provides otherwise). The declaration must be amended to reflect the reallocation.

5.68 The unit owners have an easement over the common parts in order to access their units.[513]

By-laws and rules

5.69 The association must implement by-laws which govern how the affairs of the association are to be conducted.[514] The by-laws will set out how many members of the executive are required and how they are to be appointed. The by-laws can also require a specific number of officers to be appointed, which may include a president, treasurer or secretary. The by-laws can also specify: the powers of the executive board; how unit owners may amend the by-laws; and any other matter necessary in relation to meetings, voting, quora and other activities of the association.[515] Where a by-law is inconsistent with the declaration, the declaration will prevail (unless it is inconsistent with the terms of the Act).[516]

5.70 The association can also adopt rules which include policies, guidelines and restrictions (not otherwise included within the declaration or by-laws and so long as they are not inconsistent with them or the Act) which govern the conduct of persons, or use and appearance of the property.[517] The rules may include, for instance, "provision for pets, parking, trash, noise, fencing, decks, patios, landscaping, exterior decorating and lighting, windows, doors and skylights and the use of common parts."[518] The rules may also establish and enforce construction and design criteria and aesthetic standards if the declaration allows.[519] Generally, it is not necessary to obtain the support of unit

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511 UCIOA (2014) s 2-107(g).

512 UCIOA (2014) s 1-102.

513 UCIOA (2014) s 2-116.

514 UCIOA (2014) s 1-103(5).

515 UCIOA (2014) s 3-106.

516 UCIOA (2014) s 2-103.

517 UCIOA (2014) s 1-103(31).

518 D S Bennett, "Condominium Homeownership in the United States: A selected Annotated Bibliography of Legal Sources" [2011-16] Vol 103:2 *Law Library Journal* 254, p 268.

519 UCIOA (2014) s 3-120.

owners in order to implement a rule.[520] However, before adopting, amending or repealing any rule, the executive board must give the owners notice and invite comments.[521]

Amendments to declaration

5.71 Most amendments to the declaration require the agreement of unit owners holding at least 67% of the votes, unless the declaration specifies a different percentage.

5.72 Certain amendments require the support of unit owners holding at least 80% of the votes. Such amendments include creating new development rights or extending the time limit to exercise these rights. The declaration may require a higher percentage for these amendments, but may not lower the majority required.

5.73 Other amendments to the declaration require unanimity: for instance, amendments to increase the number of units, change the boundaries of units or change the allocated interests of the units.[522]

5.74 The declaration may provide that all or a certain number of mortgage lenders are required to approve certain actions of the association (provided this does not impede on the general administrative affairs of the association).[523] If the association has written to a lender to seek its consent, and no response has been received within 60 days, then that lender is deemed to consent.[524]

Management and maintenance

5.75 Unit owners are able to make alterations or improvements to their units so long as they do not affect the structural integrity of the building or any mechanical systems (such as heating or air conditioning units). Where a unit owner acquires an adjacent unit, he or she may remove the partition wall so long as doing so does not affect the structural integrity of the building or lessen support for another unit or common part. Unit owners must obtain the permission of the owners' association before making any changes to the external appearance of the unit or to the appearance of the common parts.[525]

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520 D S Bennett, above, p 268.

521 UCIOA (2014) s 3-120.

522 UCIOA (2014) s 2-117. It appears that an amendment was made to the original 1982 Act also to provide that if the declaration specifies that certain amendments can only be made with at least 80% support, then the amendment will only be approved if no unit owner votes against the amendment or, if they do, the association obtains a court order that the amendment can proceed.

523 UCIOA (2014) s 2-119. Guidance at page 76 of the Annotated Uniform Laws (2002) explains that lenders may for instance require a larger percentage than 80% for the voluntary termination of the scheme, or, more typically, require that lender consent is required for the termination to proceed.

524 UCIOA (2014) s 2-117(i).

525 UCIOA (2014) s 2-111.

5.76 Adjoining owners can agree to alter the boundaries between their units. Any such alteration must be registered by the association, although the association may reject the application within 30 days on the grounds of unreasonableness.[526]

5.77 If a unit owner wants to alter the boundary between his or her unit and any common part, the association must approve the alteration. Such approval will require 67% of the votes to be cast in favour (not including votes allocated to units owned by the developer). The unit owner may be required to pay for the common part and any costs associated with the boundary relocation.[527]

Sales of, and charges over, the units and common parts

5.78 The association may sell a portion of the common parts or grant a charge (such as a mortgage) over them only with the support of unit owners holding at least 80% of the votes. If the sale includes LCP, then the owners to whom these parts were allocated must consent, and they will be allocated 100% of the proceeds of sale of these parts.[528]

5.79 Where a charge other than a mortgage (for instance, a legal charge imposed by a court to secure a debt) exists over two or more units, one unit owner is able to pay the creditor the percentage attributable to his or her unit to discharge the portion of the charge over his or her unit.[529]

Contributions to shared costs

5.80 The executive board members will set a budget each year which must be approved by the association. Within 30 days of adopting the budget, the executive board must provide the unit owners with a summary of the budget and call a meeting of the association within the following 60 days. The budget will be approved unless rejected by a majority. It is not necessary for there to be a quorum present when the decision is taken. If the proposed budget is rejected, the budget that was last approved by the association will continue in operation.

5.81 Unit owners will be required to contribute to the budget in accordance with the allocations set out in the declaration. Unless the declaration provides otherwise the following default provisions will apply:

(1) costs associated with the maintenance, repair or replacement of LCP (explained at paragraph 5.67 above) must be assessed against the units to which that LCP is assigned (equally or in any other proportion the declaration provides);

(2) common expenses which do not benefit all the units may be assessed exclusively against the units that benefit;

(3) the costs of insurance must be assessed in proportion to risk;

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526 UCIOA (2014) s 2-112.

527 UCIOA (2014) s 2-112.

528 UCIOA (2014) s 3-112.

529 UCIOA (2014) s 3-117.

(4) the costs of utilities must be assessed in proportion to usage;

(5) costs of satisfying a judgment must be assessed against the owners at the time the judgment was entered; and

(6) costs to remedy damage wilfully caused by a unit owner or as a result of gross misconduct may be assessed entirely against that owner (even if the association maintains insurance with respect to that damage).[530]

5.82 If provided for in the declaration, the association can assign the right to future income and receive assessments, for instance to secure a charge.[531]

5.83 The executive members may also determine by a two-thirds majority to introduce a special assessment in an emergency. In such a case the assessment becomes effective immediately, without the need for approval by the association.[532]

Leases within condominium

Leasehold Common Interest Communities

5.84 It is possible to create a common-ownership community (including condominium) where some of the land is held on a leasehold rather than freehold basis. Any lease which might expire during the life of the development must be registered together with other prescribed information (such as the date of expiry and whether the unit owners have any right to renew the lease or buy the freehold).

5.85 Each landlord must sign the declaration when the condominium is created. Once the declaration has been registered, the landlords will be unable to bring the lease to an end unless the leaseholder breaches the terms of the lease, or the term of the lease expires. If the owners' association holds the common parts on a leasehold basis, and certain unit owners fail to pay their rent, the landlord is not permitted to prevent the continued use of the common areas by those unit owners who had been paying their share of rent.[533] If the expiry or termination of a lease decreases the number of units in the scheme, the interests of the unit owners will need to be reallocated and the declaration amended.[534]

Restrictions on leasing units

5.86 The rules adopted by the association may restrict the leasing of residential units. However, it appears that such a restriction may only be adopted where it is necessary to meet the requirements of institutional lenders.[535]

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530 UCIOA (2014) s 3-115.

531 UCIOA (2014) s 3-102(a)(14).

532 UCIOA (2014) s 3-123.

533 Annotated Uniform Laws (2002) p 57.

533 Annotated Uniform Laws (2002) p 354.

534 UCIOA (2014) s 2-106.

535 UCIOA (2014) s 3-120(f)(3).

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

Unpaid contributions

5.87 The association is able to charge up to 18% interest per annum on overdue contributions to shared costs.[536] The association will also have an automatic statutory lien over a unit for any unpaid contributions or any fines imposed against that unit owner.[537] Other liens, such as those created before the declaration and liens for taxes will take priority over the association's lien.

5.88 However, the association's lien can take priority over other secured interests such as a unit owner's mortgage up to the value of six-months' assessment per year. If the association takes action to enforce the lien by selling the unit and the mortgage lender does not pay the outstanding assessment, the lender's lien would be extinguished and the associations' 6 month assessment would be paid first out of the proceeds of sale. If however the lender does pay off the association's priority lien, the sale by the association will not extinguish the mortgage lender's lien and the lender must then be paid first out of the proceeds of sale. Figure 17 below illustrates how these priorities might operate in practice.

Figure 17

Example 1 – A unit owner (A) owns a unit, subject to a mortgage held by a lender (B). A fails to pay any contributions during either 2016 or 2017. In December 2017, the association conducts a foreclosure sale (having given notice of the sale to both A and B). The contributions owed were $100/month for 2016 and $125/month for 2017. The unpaid balance of A's contributions was $2,700, and the association incurred an additional $1,000 in reasonable legal fees and costs in enforcing its lien. The association's lien would be entitled to priority over B's mortgage to the extent of $2,350, which represents (1) six months of unpaid 2016 contributions (a total of $600), (2) six months of unpaid 2017 contributions (a total of $750) and (3) $1,000 in attorney fees and costs. The association's foreclosure sale extinguishes B's mortgage. The association receives the first $2,350 in sale proceeds. The sale proceeds would next be used to pay off the remainder of B's mortgage. If there remained any surplus sale proceeds after this, those proceeds would be used to pay off the remaining balance of A's unpaid contributions.

Example 2 – A unit owner (X) owns a unit, subject to a mortgage held by a lender (Y). X fails to pay any contributions during 2017. In December 2017, the association conducts a foreclosure sale (having given notice of the sale to both X and Y). Based on the association's annual budgets, contributions were $100/month for 2017. The unpaid balance of X's contributions was thus $1,200, and the association incurred $1,000 in reasonable attorney fees and costs in enforcing its lien. Just prior to the scheduled foreclosure sale, however, Y paid the association a total of $1,600, which represented (1) six months of unpaid 2017 contributions (a total of $600), and (2)

536 UCIOA (2014) s 3-115.

537 As explained at para 5.12 above, a "lien" in this context is similar to a mortgage, giving the association the right eventually to sell the unit owner's property to recover the money owed, if the unit owner fails to pay the debt.

$1,000 in the association's attorney fees and costs. Y's payment extinguishes the priority that the association's lien would otherwise have had; therefore if the association proceeds with its foreclosure sale, the sale will not extinguish Y's mortgage, and the buyer at the sale will take the unit subject to the mortgage.[538]

5.89 The association must commence proceedings to enforce the lien (in the same way a mortgage lender exercises a power of sale) within three years of the amount becoming due. The association can only commence an action to foreclose a lien where the unit owner owes at least three months' contributions and the executive board has voted to commence the action.[539] If the only sums owed are fines, a foreclosure action cannot be commenced unless the association has obtained a court order.[540]

5.90 The court may appoint a receiver to collect the sums due before allowing the association to recover possession of the particular unit.

5.91 The association may suspend any right or privilege of a unit owner who fails to pay an contribution, but must not:

(1) deny access to a unit;

(2) suspend an owner's right to vote;

(3) prevent an owner from seeking to be elected as a director or officer of the association; or

(4) withhold services if this could endanger health and safety or any property.[541]

5.92 The association may exercise other rights short of foreclosure such as bringing a breach of contract claim.[542]

5.93 The association may also obtain possession of the unit and lease the unit to a tenant, using the rent to reduce the balance of unpaid contributions. This remedy is particularly helpful in states which otherwise only allow foreclosure following a court procedure, which can take a significant amount of time. Once the assessments have been paid off, the unit owner may then obtain an order ending the possession, which will usually be granted to take effect when the tenancy ends.[543]

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538 These examples are based on those in the prefatory note and comments to the UCIOA 2014 amendments, prepared by the National Conference of Commissioners on Uniform State Laws.

539 In the United States of America, foreclosure is a process used by lenders to recover a debt owed to them. This process seems to reflect the repossession and sale process used by lenders in England and Wales.

540 UCIOA (2014) s 3-116.

541 UCIOA (2014) s 3-101(19).

542 UCIOA (2014) s 3-116(g).

543 UCIOA (2014) s 3-116(j).

Breach of by-laws and other disputes

5.94 The association may impose reasonable fines for violations of the declaration, by-laws and rules of the association, after giving notice to the unit owner and an opportunity for the unit owner to be heard.[544]

5.95 The association may require that disputes should first attempt to use alternative dispute resolution before commencing legal proceedings.[545]

5.96 If a tenant of any unit owner violates the declaration or any of the by-laws or rules, the association can impose a fine directly against the tenant. If, after serving a notice, the violation has not been remedied within 10 days, the association may enforce any powers the landlord would have under the terms of the lease in respect of the violation.[546]

PART VII: TERMINATION

5.97 A decision to terminate the condominium requires the support of unit owners holding at least 80% of the votes, or a larger percentage if the declaration provides. The declaration may also specify that other consents are required.[547] A termination agreement must be registered in order to be effective. The agreement will set out whether any common parts or units will be sold following the termination. What an agreement can include will vary depending on whether or not the condominium contains only units with horizontal boundaries (for instance, high rise blocks of flats).

(1) Blocks of flats only – the termination agreement may state that the common parts and units must be sold following the termination and the minimum sale price. Consequently, the wishes of a minority of unit owners who may not wish to sell their units can be overridden on termination.

(2) Houses (or schemes not exclusively made up of blocks of flats) – the termination agreement may provide that the common parts will be sold, but can only specify that the units will be sold if all the owners agree (or if the declaration permits it). This position allows the owners of single family homes to sell the common parts

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544 UCIOA (2014) s 3-101(11). As an example of how this operates in individual states, North Carolina includes a provision that the by-laws of the association may require a hearing before an adjudicatory panel to determine if a unit owner should be fined an amount not exceeding $150 for a violation of the declaration, by-laws or rules and regulations. The unit owner must be given an opportunity to be heard and present evidence, and be given notice of the decision. The Rhode Island legislation contains detailed provisions for setting daily (not to exceed $100 per day) and other fines (not to exceed $500 in residential premises and $1000 in commercial premises) by the executive board following a hearing (Annotated Uniform Laws (1997) p 203).

545 UCIOA (2014) s 3-103(18).

546 UCIOA (2014) s 3-101(19)(c).

547 UCIOA (2014) s 2-118. The declaration can only specify a smaller percentage in respect of non-residential schemes. The result of this provision is that developers who still have 80% of the votes would be able to terminate against the wishes of the existing unit owners, the unit owners then having to rely on rights under the law of the state, such as in equity or contract: see Annotated Uniform Laws (2002).

for which they have to pay common charges, but continue to own the homes they occupy.[548]

5.98 Any property which is to be sold vests in the association following termination as trustee for the unit owners. The association then has the necessary power to sell the land and must distribute the proceeds between the unit owners. An independent valuer must determine the fair market value of the units to be sold.

5.99 If the common parts are not being sold following termination, they will transfer to the unit owners as tenants in common, in proportion to their respective interests. Any creditors holding liens of the units (such as mortgage lenders) may continue to enforce these liens in the same way they would have previously.[549]

Termination following catastrophe

5.100 If substantially all of the units in the condominium have been destroyed, meaning it is unlikely a meeting could be arranged to consider termination, the executive board or any interested person may apply to the court to terminate the condominium. The court may make any order it considers appropriate, including the appointment of a receiver. The court may decide to terminate the scheme, reduce its size or make any other order which it considers to be in the best interest of the unit owners or anyone else with an interest in the condominium.[550]

548 Annotated Uniform Laws (2002) p 77.

549 UCIOA (2014) s 2-118.

550 UCIOA (2014) s 2-124.

Chapter 6: Scotland

INTRODUCTION

6.1 Tenement buildings have a long history in Scotland and can be traced back to medieval times, when they were especially popular in Edinburgh. By the end of the 20th Century, tenements comprised more than a quarter of the occupied housing stock in Scotland.[551] From the 1790s onwards, in Scotland it has been possible to create "real burdens" which can contain both restrictive and positive obligations and which can be passed to successive owners. The leasehold device was therefore unnecessary in Scotland for positive obligations, such as repairing obligations, or an obligation to pay certain costs, to run in blocks of flats.

6.2 Conveyancers became familiar with drafting burdens into the title deeds of properties to cover the repair and renewal of the building and shared areas. Until 2004, there was no legislation which governed the operation of tenements. The common law of tenement operated as a default, but was almost always substantially displaced in the title deeds. Consequently, the title deed provisions varied widely between tenements, especially between old and modern titles, the latter being much more prescriptive. There was therefore a lack of clarity in the law applying to tenements. There was also a lack of an appropriate mechanism for the management of the building and decisions about maintenance usually had to be made unanimously.[552]

6.3 The Tenement Management Scheme and Development Management Scheme have since been introduced to address this issue.

LEGISLATIVE HISTORY

The Tenement Management Scheme

6.4 In 1998, the Scottish Law Commission proposed introducing legislative rules to govern decision making, management and the apportionment of costs in tenement buildings.[553] These model provisions, named the "Tenement Management Scheme" ("TMS") were enacted in the Tenements (Scotland) Act 2004. The rules apply automatically to existing and new tenement buildings in default of any (or defective) title provisions to the contrary.

6.5 On the recommendation of the Commission, this Act also did the following.

(1) The Act re-stated and clarified the common law rules on ownership, which again, could be amended by the title deeds.[554] Unlike blocks of flats in England where

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551 Scottish Law Commission, *Report on the Law of the Tenement* (No 162, 1998) para 2.1.

552 Scottish Law Commission, *Report on the Law of the Tenement* (No 162, 1998), paras 2.1, 2.3 to 2.4, 2.12 to 2.13, and 3.2.

553 Scottish Law Commission, *Report on the Law of the Tenement* (No 162, 1998), para 3.15.

554 Tenements (Scotland) Act 2004, ss 1 to 3.

the landlord normally retains ownership of the structure and exterior of the building and communal areas, ownership of tenement buildings in Scotland is divided between the tenement owners. In default of anything to the contrary in the title documents, the top floor flat owner also owns the roof; the ground floor flat owner owns the foundations; and any cellars, gardens, air space, and external walls are owned by the adjoining tenement owners. The shared passageways and stairways are the common property of the flats that can access them.[555] The Scottish Law Commission did consider recommending varying the rules so that major structural parts of the building such as the roof and the external walls would become common property. However, the Commission was concerned that such a redistribution of property might constitute a breach of European Human Rights with no workable compensation rules. It also raised the question of "whether the aspirations of home ownership are properly served by a rule which makes external and structural walls common property." It was decided that it would be more straightforward to leave the rules on ownership as they were, but introduce rules to govern the maintenance of key structural parts.[556] In Scotland, therefore, there is often a disconnect between who owns and who is responsible for maintaining tenement property.

(2) The Act re-stated and clarified the common law rule of "common interest".[557] This rule requires owners to carry out repairs to their property necessary for the shelter and support of the building as a whole.

6.6 The TMS has been criticised for lacking any central management body, which for many other jurisdictions, including England and Wales, has been seen as essential element in communal ownership. Rather, any tenement owner can propose a decision which can generally only be accepted with a majority vote. Repairs to tenement buildings therefore depend on the motivation and commitment of the owners. Even where the title documents provide for the appointment of a manager, or where this is done informally, the management body will not, unlike the commonhold association, be a separate corporate entity. The lack of corporate identity prevents common parts being owned by the management body,[558] causes difficulties in dealings with third-parties, and exposes owners to personal liability.[559]

6.7 Additionally, the TMS does not place a duty on any owner to maintain or manage any part of the tenement building, other than where the support or shelter of the building is

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555 Scottish Law Commission, *Report on the Law of the Tenement* (No 162, 1998) paras 2.6 to 2.10.

556 Scottish Law Commission, *Report on the Law of the Tenement* (No 162, 1998), paras 3.1 to 3.5.

557 Tenements (Scotland) Act 2004, s 8. Whilst this rule may have been sufficient to ensure a fair distribution of maintenance costs in the past, experience has shown that roofs require more maintenance than walls: Scottish Law Commission, *Report on the Law of the Tenement* (No 162, 1998) para 2.7.

558 Although it appears the corporate body created by the Development Management Scheme ("DMS") still does not own any property: the common parts are owned by the owners, either individually (in the case of external walls) or jointly (in the case of halls and stairways).

559 Lu Xu, "Managing and Maintaining Flatted Buildings: Some Anglo-Scottish Comparisons" (2010) 14(2) *Edinburgh Law Review* 236, 241 to 244.

at risk.[560] The view of the Scottish Law Commission was that maintenance "is a right but it is not a duty ... the building is theirs and what they do with it is a matter for their collective decision".[561] An owner only has an obligation to contribute towards the cost of repair once a decision has been made. Therefore, even where repairs are needed, there is no power to enforce works to be carried out without the support of the majority of owners. In this scenario, the lack of positive duty to repair also means the court has no power to direct that works should be carried out, however reasonable they may be.[562] As academic Lu Xu summarises in his review of management provisions in flatted buildings:

> the key functionality of the statute is dependent on the majority of owners in a building holding a reasonable or sensible view on maintenance and repairs.[563]

6.8 Unfortunately, statistics show that the necessary repairs are not being agreed upon. Data from 2011 to 2013 indicates that 65.8% of tenement dwellings had disrepair to critical elements, and 39.2% of tenement dwellings were in need of urgent repair.[564]

6.9 It is easy to appreciate how owners might find themselves in a situation of deadlock, especially given the relatively small size of Scottish tenement buildings. Owners are likely to have different agendas and opinions on what would benefit themselves and/or the property. If an owner is planning to sell the property in the future, for instance, he or she may be less inclined to invest substantial sums into the property. In one case, it was necessary for an owner to buy the interest of another in order to break the deadlock in relation to works to communal stairs.[565] Lu Xu points out that it would have been easier and preferable for this owner to be able to apply to court for an order sanctioning the necessary works, rather than having to acquire a majority. Where personal injury is caused as a result of certain works not being carried out, it is unclear whether only those who voted against the works would be liable under occupiers' liability.[566]

Development management schemes

6.10 The creation of the Development Management Scheme ("DMS") was envisaged by the Scottish Law Commission in its 1998 report on the law of tenements. This report proposed an alternative management scheme known as "Management Scheme B" to be used to manage tenement buildings. This scheme was intended to be particularly

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560 Lu Xu, "Managing and Maintaining Flatted Buildings: Some Anglo-Scottish Comparisons" (2010) 14(2) *Edinburgh Law Review* 236, 245. This obligation will not help in situations where for instance, the common passageways and stairs are in disrepair.

561 Scottish Law Commission, *Report on the Law of the Tenement* (No 162, 1998) para 5.45. Lu Xu points out at p 246 of his article that this reasoning resembles English law's rejection of positive covenants, namely that the law cannot force an owner to "put his hand in his pocket" just because he or she happens to be the owner of a building.

562 Lu Xu, above, p 249.

563 Lu Xu, above, p 245.

564 Scottish Government, *Scottish House Conditions Survey 2011-2013 Public Data*, https://www.gov.scot/Topics/Statistics/SHCS/DataAccess.

565 *PS Properties (2) Ltd v Callaway Homes Ltd* [2007] CSOH 162, [2007] GWD 31.

566 Lu Xu, above, pp 246 to 249 and 252 to 253.

useful in situations where the development contained shared facilities such as a garden, parking area or recreational facilities. Whilst these facilities could be regulated through the use of real burdens, the Management Scheme B set out a best practice template which could be adopted and enabled an owners' association to be formed as a body corporate.[567]

6.11 A subsequent discussion paper on real burdens[568] produced by the Scottish Law Commission asked whether the proposed management scheme should be extended to developments other than tenements. According to the 2000 Scottish Law Commission Report on real burdens ("the 2000 Report"), almost all consultees expressed support for this idea. The report proposed the creation of an optional Development Management Scheme which largely replicates the provisions of Management Scheme B but can be applied to all developments.[569]

6.12 The DMS was provided for in the Title Conditions (Scotland) Act 2003; however, the provisions did not come into force until much later. This delay occurred because the DMS required the creation of a "business association", which fell within the UK's reserved powers. Following an Order of the UK Government, the DMS finally came into effect on 1 June 2009 in the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 ("the Order"). The creation of a DMS is optional and replaces the TMS when established.[570]

6.13 The DMS sets out to resolve many of the same problems as commonhold, namely to ensure the effective management of communal areas within multi-occupancy buildings. The Scottish Law Commission favoured keeping the DMS relatively short and drafted in a simple style. This decision was to reflect existing practice when drafting title deeds. It was felt that conveyancers would not use the DMS if it was considered to be a long and complex model. Additionally, it was thought that a "secure set of general principles" was "better than intricate elaboration", with common sense filling in any gaps.[571] It has been observed that "the DMS is much easier to read, and much more succinct, than the average deed of conditions."[572] We understand, however, that the DMS has been used very little in practice.

PARTS II & III: CONVERTING TO DMS AND CREATING A NEW DMS DEVELOPMENT

Setting up a new development

6.14 The DMS scheme can be applied to any development by registering a "deed of application" against the land. There is no prescribed form for this deed.[573] The application must be made by, or on behalf of, the owner of the land. The registration will

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567 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.1.

568 Scottish Law Commission, *Real burdens – discussion paper* (No 106, 1998).

569 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.2.

570 Lu Xu, "Managing and Maintaining Flatted Buildings: Some Anglo-Scottish Comparisons" (2010) 14(2) *Edinburgh Law Review* 236, 239.

571 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.5.

572 K Reid and G Gretton, *Conveyancing 2009* (2009), p 147.

573 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.7.

apply a scheme of rules to the land, as set out by schedule 1 of the Order, unless that scheme is varied in the deed of application.[574]

6.15 The rules will apply automatically on registration unless the deed of application fixes a different date.

Converting an existing development

6.16 The 2000 Report provides that whilst in theory it would be possible for the DMS to be applied to existing developments. "the deed would then need to be signed by the owner of each unit". The scheme is therefore likely to be used only for new developments.[575]

Development rights

6.17 The deed of application may specify that the rules will take effect at different times for different parts of the scheme. This structure could perhaps be used by developers for phasing developments. However, the Commission stated in the 2000 Report that, although "perhaps undesirable", the result of this provision would be to allow some unsold units to be later sold free of the DMS.[576] This result raises concerns regarding consumer protection, and the legitimate expectations of purchasers when buying a property which is part of a DMS.

6.18 The deed of application must nominate the first manager, who would hold office until the first general meeting could be held.[577] The Commission suggested in the 2000 report that the developer might be permitted to vary the DMS at the outset to reserve the power to appoint a manager. However, it was suggested that this power should only last for 10 years and would terminate earlier if the developer had disposed of all the units.[578] This recommendation does not appear to have been enacted. The manager is entitled to reasonable remuneration, unless otherwise agreed.

PART IV: THE OWNERS' ASSOCIATION

6.19 The DMS is managed by an owners' association which is a *sui generis* body corporate. The members of the association are the owners of the units.[579] The intention is that

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574 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 3.

575 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.7.

576 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.10.

577 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.17; Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 7.1. See further, para 6.22 below.

578 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.16.

579 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 4 and sch 1 r 2.3.

owners become members automatically on purchase.[580] Where two or more persons own a unit, both (or all) of them are members.[581]

6.20 According to the 2000 Report, at the point the DMS was introduced, owners' associations were already being found in the more sophisticated deeds of condition. However, these associations were always unincorporated. The DMS allows developers to opt for an incorporated body to manage the shared facilities which carries a number of benefits.[582] It was decided not to make the company subject to the Companies Acts. This was because "the degree of formality and regulation involved are out of scale with the relatively humble functions which the association performs."[583]

6.21 The 2000 Report explains that the association accounts do not need to be audited or made available for public inspection.[584]

General meetings

6.22 The manager must call an AGM every year. Other meetings may be called to approve a revised draft budget, or where a general meeting is requested by members holding at least 25% of the allocated votes, or by a majority of the advisory committee. The manager is also able to call a meeting at any time. The manager must attend these meetings and take a record.[585]

6.23 In order to be quorate, members holding at least 50% of the votes must be present at the meeting where there are 30 or fewer units within the development. Where there are more than 30 units, members holding at least 35% of the total number of votes must be present.[586] The 2000 Report explains that the South African model was used as a basis for this rule. The policy reason given for this is that "in larger developments individual owners may feel that their vote counts for little and may feel inclined to stay away, with the result that a quorum is not easily attained."[587]

6.24 The members present at the general meeting must nominate one of them, or the manager, to chair the meeting. This person is referred to in the DMS rules as "the convener".[588]

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580 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.12.

581 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 2.3

582 As a corporation is a separate legal person it can enter into contracts, sue in its own name, and so on. The DMS does not, however, have limited liability: see paras 6.58 and 6.73 below.

583 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.13.

584 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.77.

585 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 rr 9 and 12.3.

586 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 10.

587 Scottish Law Commission, *Report on real burdens* (No 181, 2000), para 8.35.

588 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 12.

6.25 The default rules allocates one vote per unit, although the developer may vary this allocation. Joint owners must agree how to cast their vote (and if they disagree, no vote can be counted for that unit). It is possible for unit owners to nominate a proxy. Voting will be by show of hands unless the convener determines that the proposal should be decided by ballot (which would only affect the outcome where the unit owners have a different vote allocation, or if proxies have to be taken into account). Decisions of the association are taken by majority, unless the DMS rules provide otherwise.[589]

PART V: THE COMMUNITY

By-Laws

6.26 The developer has a great deal of flexibility to vary the rules of the DMS at the outset to suit the particular development. In fact, the 2000 Report acknowledges that "it will be unusual for the management scheme to be applied in the precise form in which it is enacted."[590]

6.27 Once registered, however, certain rules cannot be amended. The rules that cannot be amended are set out in Part 2 of schedule 1 to the Order. The report describes these rules as "quasi statutory."[591] The rules which cannot be changed relate to:

(1) the creation of the association;

(2) the association's functions and powers;

(3) the duties and powers of the manager; and

(4) the winding-up of the association.

6.28 Rules other than those contained in schedule 1, Part 2 can be varied in certain circumstances, discussed below.

Variation by association

6.29 It would appear that there are two routes which can be taken where the association wishes to vary or discharge a rule in relation to a particular unit.[592]

(1) Rules can be varied with the consent of the affected unit owner and the owner of at least one adjacent unit. The manager may decide to grant a deed of variation, after having consulted the advisory committee (if any).[593]

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589 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 rr 11.1 and 11.3.

590 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.85.

591 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.94.

592 These methods of variation refer to varying the provisions as they relate to a particular unit, rather than the DMS rules as a whole.

593 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 16.1.

(2) Rules can be varied following approval, by a majority of votes allocated[594] at a general meeting.[595] If the members approve the grant of a deed of variation, the association must send a copy of the proposed deed of variation to the members before it can be registered. Members have eight weeks within which to apply to the Lands Tribunal for the preservation of the existing rule. Before the variation can take effect, a member of the Lands Tribunal must endorse the deed of variation to confirm that no application had been made to the Tribunal within the eight-week period.[596]

Variation by members

6.30 A member may also apply to the Lands Tribunal to vary a rule of the DMS (other than a rule in Part 2) in relation to a unit owned by that member. Additionally, an application may be made by the owners of at least a quarter of the units for the variation or discharge of a rule which affects all or some of the units in the development.[597]

Factors considered by the Lands Tribunal

6.31 A case can therefore end up before the Tribunal where:

(1) a deed of variation made by the association is challenged by an individual member (or members); or

(2) an individual member (or members) applies directly to vary or discharge a rule.

6.32 The Tribunal must consider a number of factors when deciding whether to grant the application.

(1) Where the variation would mean that a new obligation would be imposed on a unit owner, that unit owner must consent.[598]

(2) The Tribunal will consider:

(a) the reasonableness of the application;

(b) whether the application is in the best interest of all the members; and

(c) whether it is unfairly prejudicial to one or more members.

(3) The Tribunal may also consider:

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[594] Above, sch 1 r 16.2.

[595] This is a higher standard than requiring a majority of just the members attending a meeting.

[596] Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 9.

[597] Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, arts 22 and 23.

[598] Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 22(4). Although, it seems this consent is not required where the application is being made by one-quarter of the unit owners.

(a) any change in circumstances since the rule was created;

(b) how practicable and costly it is to comply with the rule;

(c) whether the owner of the burdened unit is willing to pay compensation;

(d) the length of time elapsed since the rule was created; and

(e) the purpose of the rule.

6.33 When making an order to vary the rules, the Tribunal can direct those applying to pay compensation to persons affected.[599]

Regulations

6.34 It is also possible for the association to enact regulations in relation to recreational facilities forming part of the scheme. These regulations only take effect once they have been sent to each member.[600] The 2000 Report provides examples of regulations governing matters such as opening hours, type of use and use by guests.

Management and maintenance

6.35 As with the TMS, the tenement building will be entirely divided between the unit owners. Certain owners may jointly own certain parts of the tenement, referred to as "common property". The association may exercise powers in respect of "scheme property", which includes the common property and other structural elements of the building, whose ownership will be divided amongst the unit owners rather than being owned by the association. These structural elements include the foundations, external and load-bearing walls and the roof of the building. However, doors and windows do not form part of the common property.[601]

6.36 The association is required to manage the development for the benefit of the members. The association has any powers necessary to carry out this function, including the power to enter into a contract of insurance (however, this power does not create a mandatory requirement), carrying out maintenance works and requiring owners to pay service charge. The association may also invest and borrow money. However, the association is not permitted to acquire land outside of the development.[602] This restriction would seem to exist because the owners' association does not own the common parts; rather it is the owners themselves who own these areas. It is unclear whether, and if so, how, land from outside could be added to the DMS at a later date.

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599 However, the Tribunal will only direct the applicant to pay compensation where the applicant agrees to such a direction being made: Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 22(7).

600 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 3.6.

601 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 20.

602 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 rr 3.1 to 3.3.

6.37 The association is required to appoint a manager, who may or may not be a member. A "first manager", as appointed in the deed of application, will act until a manager is appointed at the general meeting. This manager is entitled to reasonable remuneration and may be reappointed at the general meeting. Subsequent managers may be appointed at the general meeting on such terms and conditions as the association may decide.[603] The manager's appointment is evidenced by a formal certificate, which assists the manager in dealings with third-parties.

6.38 The manager may be removed by the association at a general meeting. It does not appear that any fault needs to be demonstrated or any particular criterion needs to be satisfied.[604]

6.39 The policy reason behind the requirement to appoint a manager is set out in paragraph 8.16 of the 2000 Report.

> Experience shows that owners are often reluctant to attend meetings or otherwise play an active part in the management of a development. Such reluctance is understandable; but it suggests that the owners as a body should not be given a day to day role in the running of the development. In our view the Development Management Scheme is unlikely to work efficiently unless one person – and one person alone – is charged with executive responsibility for management.

6.40 The manager can exercise all the powers of the association, subject to certain decisions that are required to be taken at a general meeting. For example, the annual budget must be approved by the association, as must a decision to vary the DMS rules and a decision to incur expenditure for improvements.

6.41 The 2000 Report envisages that it will generally be the manager who carries out the executive functions of the association.

6.42 The manager is required to manage the development for the benefit of the owners. He or she owes fiduciary duties to the association to exercise his or her powers in good faith, not make a secret profit, and not favour one contractor over another. Damages would be payable to the association for breach of these fiduciary duties.[605]

6.43 The manager's duties include:

(1) carrying out inspections of the scheme property (the 2000 Report suggests it is advisable to set out the frequency with which the manager should carry out these inspections);[606]

(2) arranging for the carrying out of maintenance to scheme property;

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603 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 7.

604 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 4.2.

605 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.18.

606 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.55.

(3) keeping financial records;

(4) implementing decisions made at the general meeting; and

(5) enforcing, if reasonable,[607] any obligation owned by any person to the association.[608]

6.44 The 2000 Report recommends that the manager's duties should be owed to the members individually as well as the association.[609]

6.45 The manager must, so far as reasonably practicable, comply with any direction given by the association at a general meeting regarding his or her exercise of powers or duties.[610] For example, the members acting by majority decision may require the manager to carry out certain works.

6.46 The manager may be assisted by an advisory committee appointed by the association. Where such a committee is formed, the manager must from time to time seek the advice of the committee. This committee is intended to be an informal arrangement whereby the manager would be bound to listen to the advice of the committee but would not be bound to follow it.[611]

6.47 The manager is responsible for arranging the maintenance of the scheme property. "Maintenance" is defined as "including repairs or replacement, cleaning, painting and other routine works, gardening and the day to day running of property; but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance."

6.48 The association may only use money held by the association to carry out improvements, alterations or demolition of scheme property (which are not incidental to maintenance) with the support of members holding a majority of the allocated votes.[612] A decision to make a payment out of the reserve fund requires the same majority. The 2000 Report indicates that a similar restriction operates in a number of other countries.[613]

6.49 Additionally, where the decision to carry out the improvement, alteration or demolition affects property which is not "common property" (for example, where the property is

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607 As with commonhold, this rule does not amount to a mandatory requirement to enforce.

608 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 8. The Scottish Law Commission, *Report on real burdens* (No 181, 2000) from para 8.14 onwards considers possible provisions regarding consequences of a manager acting ultra vires.

609 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1, r 4.6.

610 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 4.7.

611 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 15; Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.22.

612 Rather than simply requiring a majority of members attending the meeting.

613 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 13.1; Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.57.

solely owned by one unit owner, such as an exterior wall attached to his or her property), the owner of that property must also consent in writing.[614]

6.50 Any owner may instruct or carry out "emergency work". Emergency work is defined as work which is required to be carried out to scheme property:

(1) to prevent damage to any part of that or other property; or

(2) in the interests of health or safety,

where it is not practicable to consult the manager before carrying out the work.

6.51 The association must reimburse any member who pays for emergency work.[615]

Contributions to shared costs

6.52 Before each AGM, the manager must prepare a draft budget for consideration at the meeting. This budget will set out the service charge which will be payable in the next financial year and the amount to be set aside in a reserve fund. The association may approve or reject the budget at the AGM. If the association rejects the budget, the manager must submit a revised budget for consideration at a meeting held within two months. The previous budget will continue to apply in the interim. The 2000 Report suggests that any surplus at the end of one year will be available for the following year.[616]

6.53 The 2000 Report points out that annual budgeting has the advantage of making provision for longer term repairs, rather than developments operating on a "hand-to-mouth" basis. As a unit with a healthy reserve fund is likely to command a higher premium, the Scottish Law Commission suggests that, hopefully, the use of reserve funds would become more common.[617]

6.54 No differentiation is made between expenditure of different kinds. The default rule is that all unit owners will pay an equal share of the service charge contribution. However, the developer may change the shares at the outset. Further, the association may decide at a general meeting that a particular owner should pay nothing, or less than his or her share, in respect of a particular charge.[618]

6.55 The manager may decide to demand an additional service charge where the expenses cannot be paid for otherwise than out of the reserve fund. However, if the additional

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614 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 13.2.

615 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 14.

616 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 18; Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.47

617 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.49.

618 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 19.

service charge (excluding costs of emergency works) exceeds 25% of the total service charge for the year, the manager must submit a supplementary budget for approval.[619]

6.56 The manager must ensure that the funds are deposited in an interest-bearing account (or invested in a way determined at a general meeting). The reserve fund (if any) must be kept separately from other funds.[620]

6.57 Where the service charge cannot be recovered from a particular owner (for instance, where the owner cannot be found), that owner's charge is to be shared equally amongst the other owners, or, if the association decides, paid from the reserve fund.[621]

6.58 Where a creditor is unable to recover the full amount of a debt from the association[622] after executing diligence,[623] or where the association is being wound-up, a creditor can seek contribution from the unit owners. An owner will be liable to the creditor in accordance with proportion of their service charge contribution. If part of the debt that cannot be recovered is attributable to a "non-paying unit" (such as where the owner of that unit cannot be found), the contribution required from the other owners will be increased proportionately. These owners would then be given a right to recover the additional amount from the non-paying unit owner.[624]

6.59 The 2000 Report on real burdens recommends that the creditor should have direct recourse to levy a service charge as if he or she were the manager. The report suggests that "there is no reason to suppose a greater reluctance to pay a share of a repair bill directly to the creditor, than to pay the same share indirectly to the manager".[625]

6.60 A prospective purchaser may ask the scheme's manager to provide a certificate setting out the amount of service charge outstanding. The purchaser is not liable to pay any additional sum which was outstanding at that date.[626]

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619 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 20.

620 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 21.

621 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 19.

622 Although certain restrictions apply as to which debts can be enforced directly against the unit owners (see sch 1 r 13).

623 "Executing diligence" is the term used in Scottish Law for the process which would be described in England and Wales as "taking action to enforce a judgment debt".

624 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 12.

625 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.66.

626 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 16.

Leases within DMS

6.61 Since 1974, it has not been possible to grant new leases of over 20 years. However, unit owners may grant shorter tenancies. Rules which require owners to refrain from certain activities will also be binding on any tenants.[627]

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

6.62 The manager is able to enforce any obligation owed to the association, "in so far as it is reasonable to do so". [628]

6.63 With regards to service charges which remain outstanding for at least 28 days, the manager may require a unit owner to pay interest at a "reasonable rate".[629]

6.64 The rules of the DMS may confer power on certain, or all, of the members to enforce the DMS. A member is, however, only entitled to enforce the rule if another's failure to comply with the rule would result in "material detriment to the value or enjoyment of the member's ownership of the unit".[630] However, the 2000 Report suggests that:

> the absence of enforcement rights seems a positive advantage. No one wants to sue a neighbour. It is easier, and more efficient, to telephone the manager.[631]

6.65 A unit owner has the power to challenge a decision made by the association, provided that they did not vote in favour of that decision. A summary application may be made to the sheriff[632] seeking to annul the decision. This application must be made within 28 days of the decision being taken (or within 28 days of the notification of the decision if the owner was not present). No decision can take effect until the 28-day period for challenging the decision has expired, or, where an application has been made to the sheriff, until the application has been disposed of or abandoned. This applies unless the decision is required to be carried out urgently.[633]

6.66 The sheriff may make an order annulling the decision in whole or in part, where he or she is satisfied that the decision is not in the best interests of all the members, or is unfairly prejudicial to one or more of the members. The sheriff can also make such a consequential order as he or she thinks fit. The stated policy reason behind this

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627 Land Tenure Reforms (Scotland) Act 1974, sch 6 para 1; Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 3.4.

628 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 8(f).

629 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 19.5.

630 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 10.

631 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.27.

632 A Scottish judge, with a status and jurisdiction broadly similar to that of a circuit judge sitting in the county court.

633 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 14.

approach is that "majorities are not infallibly wise. Nor are they always fair to minority interests."[634]

6.67 Where the decision which is sought to be annulled relates to maintenance, improvement or alterations, the sheriff must have regard to:

(1) the age of the property;

(2) the condition of the property;

(3) the likely cost of the works; and

(4) the reasonableness of the cost.

6.68 A successful application will restore the previous status quo. Therefore, if a member challenges a decision not to carry out works, the sheriff cannot then authorise the works.[635] Additionally the power only relates to decisions of the association and not the manager.

6.69 An owner has 14 days to appeal the sheriff's decision to the Sheriff Appeal Court, whose decision is then final.

6.70 Additionally, any member may apply to the sheriff for an order relating to the operation of the DMS and the 2009 Order.[636] The sheriff's decision may be appealed to the Sheriff Appeal Court within 14 days.

PART VII: TERMINATION

6.71 The association may vote (presumably by the default majority rule) for the DMS rules to be disapplied to the development. If the association votes in favour, the association must notify every member of the association of its intention to register a deed of disapplication to disapply the DMS rules. The notice must explain the effects of deregistering the DMS. The notice must also advise owners of their rights to apply to the Lands Tribunal to avoid the DMS being disapplied. Such an application may be made by any member who has not voted in favour of the decision and must be made within eight weeks. The DMS may not be disapplied unless the deed has been endorsed or accompanied by a certificate from the Lands Tribunal that no application has been received within the eight-week period.[637]

6.72 The disapplication will take effect on the date of registration of the deed or such later date specified in the deed.[638] The association will then be wound-up (and presumably the TMS will apply to the scheme). The manager will pay the debts of the association

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634 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.40

635 Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.41.

636 Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, art 15.

637 Title Conditions (Scotland) Act 2003, s 74.

638 Title Conditions (Scotland) Act 2003 s 73.

out of the association's funds and then distribute remaining funds between the owners. The manager must prepare final accounts showing how the winding-up was carried out and send them to the unit owners.[639]

6.73 The 2000 Report suggests that the association will not usually become insolvent as, if the association cannot meet its debts, the manager can raise money by means of an additional service charge. If he or she fails to do so, the creditor can act in the manager's place. The 2000 Report did not propose that insolvency should be a ground for winding-up the association, but did propose that the association should be subject to sequestration under the Bankruptcy (Scotland) Act 1985.[640] This proposal does not appear to have been addressed by the Order, but it may be an issue which is covered by general Scottish law.

[639] Title Conditions (Scotland) Act 2003 s 73; Title Conditions (Scotland) Act 2002 (Development Management Scheme) Order 2009, SI 2009 No 729, sch 1 r 6.

[640] Scottish Law Commission, *Report on real burdens* (No 181, 2000) para 8.102.

Chapter 7: Germany

INTRODUCTION

7.1 Although a form of condominium ownership existed in medieval Germany, the current form of condominium ownership in Germany is called "wohnungseigentumgesetz" ("WEG"). The WEG was introduced in 1951, and was later amended in 2007. As Germany is a civil law jurisdiction, the WEG is based on civil law property concepts, and operates alongside the German Civil Code.

LEGISLATIVE HISTORY

7.2 Apartment ownership in Germany dates back to the medieval period.[641] However, during the medieval period, the structure in place to regulate apartment ownership was far from satisfactory.[642] Residential owners would generally own the whole storey of the apartment block, with the roof being owned by the top floor flat and the owner of the bottom storey owning the land on which the building stood. There was no body established to ensure the building as a whole was adequately maintained and there were no procedures in place to regulate disputes.[643]

7.3 As a result of the number of disputes generated, apartment buildings became known as "streithauser" which translates as "houses of dissent". Consequently, apartment ownership was expressly prohibited in the 1900 German Civil Code.[644] The owner, or owners, of the land were required by the 1900 Civil Code to own the entire building as "co-owners". Presumably, individual apartments could then be let by the co-owners to themselves individually on short tenancies or under a licence.

7.4 The devastation and housing shortage resulting from the two world wars brought apartment ownership back onto the agenda. Many buildings had been destroyed, and millions of refugees had fled to West Germany and needed accommodation.[645] Apartment blocks were considered a solution to the housing crisis due to their ability to house a greater number of individuals, usually at a lower cost to separate dwellings.[646]

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641 C G van der Merwe, "A comparative study of the distribution of ownership rights in property in an apartment or condominium scheme in common law, civil law and mixed law systems" (2002) 31 *Georgia Journal of International and Comparative Law* 101, p 110.

642 This structure was known as the "stockwerkseigentum".

643 C G van der Merwe, above, p 111.

644 C G van der Merwe, above, p 111. The Code included the maxim "superficies solo credit" which meant that a building is not capable of being separated from the soil and the owner of the whole building must therefore belong to the owner of the soil.

645 C G van der Merwe, *European Condominium Law* (1st ed 2015), p 32.

646 P F Smith, "Apartment ownership – German style" [2007] *Conveyancer and Property Lawyer* 203, pp 203 to 204.

According to van der Merwe, it was believed that home ownership would bring "not only social and economic stability, but also political stability".[647]

7.5 In 1951, legislation was introduced in West Germany to regulate apartment ownership in the form of the "Wohnungseigentumgesetz", translated as the "Act on the Ownership of Apartments and the Right of Permanent Residency".

7.6 The 1951 Act was amended in 2007, when there were reported to be some 5 million residential condominium units in Germany.[648]

(1) Previously, in order to uphold the principle of owners' "security in their title", any changes to "important matters" could only be made by way of unanimous vote. The priority was to ensure purchasers could be "confident that the registered scheme rules are accurate with regard to such matters, and they need to look no further, as into minute books or meetings of the owners' assembly".[649] However, the unanimity requirement began to be criticised as too rigid and heavy-handed and courts started to relax it.[650] The 2007 amendments made it easier for condominiums to be modified by replacing the unanimity requirement with a requirement for the support of a simple majority.

(2) The informal dispute resolution procedure under the 1951 Act was replaced with a power to refer disputes to the court, by the 2007 amendments.

(3) Additionally, in 2007 the community of apartment owners was recognised as having its own legal identity.

PARTS II & III: CONVERTING TO CONDOMINIUM AND CREATING A NEW CONDOMINIUM

Setting up a new development, or converting an existing development

7.7 A German condominium may be created by way of "contractual grant" or by "partition".[651] It would seem that, under the WEG, either option may be used to create a new condominium development, or convert an existing building to condominium.[652]

7.8 It appears that the distinction between the two options for creating or converting is whether the work is being carried out by two or more existing owners or a developer.

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647 C G van der Merwe, "A comparative study of the distribution of ownership rights in property in an apartment or condominium scheme in common law, civil law and mixed law systems" (2002) 31 *Georgia Journal of International and Comparative Law* 101, p 111.

648 P F Smith, "Apartment ownership – German style" [2007] *Conveyancer and Property Lawyer* 203.

649 BGH, 18.05.2000 - VII ZR 178/99.

650 P F Smith, above, p 214.

651 Wohnungseigentumgesetz ("WEG"), s 2.

652 According to P F Smith, "the German regime applies to existing, as well as new, schemes which has helped boost numbers of units held within its remit": P F Smith, above, p 203.

7.9 Where there is more than one existing owner, the "contractual" grant will be used. The Act refers to co-owners forming a contractual agreement in which they divide land into separate self-contained apartments.[653]

7.10 Where there is only one owner, the "partition" method can be used. This is most likely to be in the scenario where a developer is constructing a new condominium. The developer will prepare a declaration, to be registered at the Land Registry, under which the land will be divided up into individual apartments and common areas.[654] The partition method is more frequently used, particularly as there are fewer formalities, making it cheaper.[655]

7.11 In both scenarios, a "partition plan" must be submitted to the Land Registry, showing the location and size of the separate apartments and the common parts. The plan must be sealed or stamped by a building authority. The building authority must also provide a certificate confirming that each separate apartment is self-contained.[656] The Land Registry will check the plan submitted for any obvious errors.[657]

Development rights

7.12 According to P F Smith, purchasers of apartments in Germany who buy before the development is complete are offered greater security than purchasers of commonhold units in the same position. This is because, in Germany, the building must be constructed or converted exactly in accordance with the detailed plans submitted to the Land Registry. Once the developer's declaration has been registered at the Land Registry, "neither it nor the constitution of the scheme can be altered by the developer without the consent of all unit purchasers".[658]

PART IV: THE OWNERS' ASSOCIATION

7.13 Unlike in many jurisdictions, the common areas are not owned and managed by a company made up of the unit owners. Instead, the common areas are jointly owned by the apartment owners who then form a community of apartment owners. The community is considered as having a limited legal capacity.

7.14 In the original version of the WEG, it appears that the apartment owners were jointly and severally liable for the debts of the scheme and had to be named individually in court proceedings. This position was subsequently amended by case law. In a decision of the Bundesgerichtshof (the federal court) in 2005, it was held that the community of apartment owners collectively could have a legal personality and could commence and

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653 WEG s 3(1). The contract must be recorded by a licenced person, and the subsequent apartments registered at the Land Registry: German Civil Code s 311b.

654 WEG s 8(1).

655 P F Smith, "Apartment ownership – German style" [2007] *Conveyancer and Property Lawyer* 203, p 207.

656 WEG s7(4). One test which is applied is whether an apartment has a separate entrance: "these rules aim to avoid the boundary demarcation disputes which used to plague [strife houses]", where imprecise physical boundaries were a source of dispute (P F Smith, above, pp 206 to 207).

657 P F Smith, above, p 208.

658 P F Smith, above, pp 208 to 209.

respond to legal proceedings in its own right. Apartment owners could only be jointly and severally liable if they had clearly committed themselves personally in respect of a particular debt.[659]

7.15 The legal capacity of the community of owners is expressly recognised in the current version of the WEG. The Act provides that the community can itself acquire and exercise collective rights, as well as be subject to and fulfil collective obligations against third-parties. This appears to make the owners' association a separate legal person, but not to give it limited liability.[660]

Owners' resolutions

7.16 A resolution may be passed either in a meeting, or if all owners provide their written consent to the resolution.[661]

7.17 A meeting will only be able to make binding decisions if the apartment owners present and eligible to vote make up more than a half of the co-ownership shares. If this criterion is not met at a meeting, a further meeting must be held on the same subject. This second meeting will be able to make binding decisions regardless of the size of shares represented.[662]

Administrator

7.18 The apartment owners must appoint an administrator. This obligation cannot be excluded by agreement.[663] The Act is silent on whether the administrator can be one of the apartment owners. However, given that a separate administrative committee made up of apartment owners may be created (see below), the implication would seem to be that it is likely that the administrator will be a professional manager.

7.19 The administrator may be appointed and dismissed by a majority vote of the owners. It appears that the first appointment following the creation of the scheme can only be for a maximum of three years. Subsequent appointments can last for up to five years. An administrator can only be dismissed for an "important cause".[664]

7.20 The administrator's responsibilities include implementing resolutions of the owners, taking measures for the proper maintenance and repair of the shared parts and to levy and pay contributions towards the costs of the scheme.[665] The administrator must keep these funds separately from his or her own assets. The administrator will also be

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659 BGH 2.6.05 – V ZB 32/05; IWW Institut, "Eigentümergemeinschaft ist teilrechtsfähig: Das sind die Konsequenzen für Gläubiger" [2005] (09) *VE Vollstreckung effective* 147.

660 See further para 7.24 below.

661 WEG s 23.

662 WEG s 25(4).

663 WEG s 20.

664 WEG s 26(1).

665 WEG s 27.

responsible for undertaking legal action on behalf of the owners, following an agreement or resolution of the owners.

7.21 The administrator must convene a meeting of the owners at least once a year. The administrator must also convene a meeting where this is requested in writing by more than one-quarter of the apartment owners. If the administrator fails to call the meeting, a meeting may instead by called by the chair of the administrative committee where one has been appointed.[666]

7.22 The administrator will set a financial plan each calendar year which sets out the anticipated income and expenditure required in respect of the shared property. The financial plan will confirm each owner's pro rata share and also any contributions required towards the reserve fund. The owners must approve the financial plan by majority resolution. The administrator must produce a statement of account at the end of the calendar year.[667]

Administrative committee

7.23 The appointment of an administrative committee is optional. The owners may vote to appoint a committee by a majority resolution. The committee will be made up of one apartment owner as chair and two further apartment owners as advisory members. The committee assists the administrator in carrying out his or her functions. In particular, the committee reviews the financial plan, statement of accounts and cost estimates and will provide an opinion before the owners decide to approve the financial plan.[668]

Insolvency

7.24 The assets of the condominium scheme, such as any money received from the operation of the common parts, belong to the community. Each apartment owner is only liable to creditors in the ratio of their "co-ownership share". For instance, if one apartment owner owns 20% of the shared areas, they will be directly responsible to creditors of the association for 20% of the community's debts. Presumably this position will apply where there is a shortfall in the sum paid by the community to the third-party, resembling the proposals for restricted liability in commonhold, set out in the Aldridge Report.[669]

PART V: THE COMMUNITY

By-laws

7.25 The main provisions governing the relationship between the apartment owners are set out in the Act. In the absence of specific provision in the Act, the rules of the German Civil Code ("the Code") as they relate to co-ownership will apply. Unless expressly provided otherwise in the Act or Code, the apartment owners can deviate from the standard provisions of the Act or Code by agreement.

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666 WEG s 24.

667 WEG s 28.

668 WEG s 29.

669 WEG s 10. See further, Commonhold: Legislative History.

7.26 An apartment owner has the right to demand that the standard rules of the Act or Code be departed from where, for "serious reasons", it would be inequitable to maintain the original provision. Regard must be given to all the circumstances and the interests of the other owners.

7.27 Any deviation from the Act or Code must be registered at the Land Registry to bind future owners in that condominium. Resolutions passed by majority and court decisions in respect of the management of the condominium do not need to be registered in order to bind future owners.[670]

7.28 Certain provisions of the Act cannot be derogated from, as will be seen below. Examples of such provisions include the right of owners to vote to change how shared costs are allocated between the owners, and the requirement to appoint an administrator to manage the scheme.

7.29 The day to day "house rules" of the condominium are essentially left to the developer to create. For example, house rules could include rules which regulate an owner's use of their property. Additionally, apartment owners may, by agreement, set rules to regulate the use of the separately and jointly owned property. In the absence of an agreement, the owners can regulate the use of these areas by majority vote.[671] The unit owners must also ensure that the common parts are only used in such a way as not to inconvenience other owners.

Management and maintenance

7.30 Each owner has individual exclusive ownership of his or her apartment or unit. The common parts are jointly owned by the apartment or unit owners. The owners will each have a "co-ownership share" of the jointly owned property. The share allocated to each unit should be set out in the plan registered at the Land Registry. This share will also determine how much an apartment owner must contribute towards the costs of the scheme, and his or her voting rights. The developer or joint owners are free to decide on the allocation of these shares when setting up the condominium.[672]

7.31 There are different terms used to refer to ownership of residential and non-residential areas of the condominium. A person may own a residential apartment ("Wohnungseigentum") or a non-residential unit ("Teileigentum"). Despite the different terms used for unit and apartment ownership, the law governing both is substantially the same.[673]

7.32 The common parts of the German condominium will be made up of any area of land, facility or installation which has not been designated as individually owned property.[674] As CG van de Merwe explains, if there is any doubt as to whether part of a building is

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670 WEG s 10.

671 WEG s 15.

672 P F Smith, "Apartment ownership – German style" [2007] *Conveyancer and Property Lawyer* 203, p 210.

673 WEG s 1(6).

674 WEG s 1(5).

individually owned or a common area, the presumption will be that it forms part of the shared parts.[675]

7.33 Individually owned property in a condominium cannot include any element which:

(1) cannot be altered, removed or added to without adversely affecting the common parts, the external appearance of the building or the rights of any other apartment owner;[676]

(2) are necessary for the building's "continued existence or safety"; and

(3) facilities and installations which are for the common use of the apartment owners.[677]

7.34 C G van de Merwe explains that as a result of these provisions, only the inside surfaces of the particular apartment, including walls, ceilings and floors, will be owned by the individual owner. External features of the buildings such as outside walls, windows and doors will be included within the shared parts, as will shared staircases, entrances corridors and common facilities such as heating installations and pipes which serve more than one individual owner.

7.35 Individually owned property must be self-contained, although exclusive ownership can also be granted of garages and car parking spaces, provided that these areas are sufficiently demarcated with permanent markings.[678] Additionally, the Federal Court has recognised that owners may agree to give certain owners exclusive use of specific areas of the shared parts.[679]

7.36 The owners must provide for the proper administration of the condominium. This includes:

(1) establishing house rules and regulations (for instance, provisions regulating noise disturbance or the keeping of pets). These rules will be established by the developer or the owners;[680]

(2) making provision for maintaining and repairing the jointly owned property;

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675 C G van der Merwe, "A comparative study of the distribution of ownership rights in property in an apartment or condominium scheme in common law, civil law and mixed law systems" (2002) 31 *Georgia Journal of International and Comparative Law* 101, p 114.

676 WEG s 5(1). It appears that the previous version of the Act did not include this provision and the rule was initially created by the German courts: P F Smith, "Apartment ownership – German style" [2007] *Conveyancer and Property Lawyer* 203, p 211.

677 WEG s 5(2).

678 WEG s 3(2).

679 C G van der Merwe, "A comparative study of the distribution of ownership rights in property in an apartment or condominium scheme in common law, civil law and mixed law systems" (2002) 31 *Georgia Journal of International and Comparative Law* 101, pp 114 to 115.

680 P F Smith, above, p 213. See further para 7.29 above.

(3) making provision for insuring the jointly owned property at its replacement value against fire and obtaining an appropriate level of third-party liability insurance;

(4) making provision for building up a reasonable maintenance reserve fund;[681] and

(5) setting out the manner and means of making contributions to the cost of the association (such as the time payments are due and the consequences of late payment).[682]

7.37 The court has the power to implement any of the above provisions if the owners have failed to do so.[683]

7.38 Where any matters relating to the administration are not already covered by an agreement of the owners, the owners can make decisions by majority vote. Decisions relating to the administration of the scheme should be "appropriate to the condition of the jointly owned property".[684]

Repair

7.39 Apartment owners must maintain their individually owned property in such a way that no other apartment owner suffers an inconvenience. The owner must also ensure that any person permitted to use his or her property complies with this obligation. The apartment owners must allow access their property to the extent necessary to maintain and repair and maintain the shared parts.[685]

7.40 Particular rules apply where the community want to make structural changes and incur expenditure beyond the "maintenance and repair" of shared parts.[686] These works may not be carried out without the consent of any owner who is likely to suffer a particular disadvantage as a result of these works.[687]

7.41 If there is an imminent threat of damage to the shared parts, an apartment owner can take any measures necessary to protect the shared parts, without the consent of the other apartment owners.[688]

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681 This requirement appears to be omitted from the previous version of the Act: P F Smith, above, p 217.

682 WEG s 21(5).

683 WEG s 21(8).

684 WEG s 21(3).

685 WEG s 14.

686 This provision would seem to include any improvement or modernisation works.

687 WEG s 22. The Act is not especially clear on this point; however, it appears that if any owner does not vote in favour of these works, they are not required to contribute towards the cost. However, such a member would not be entitled to any share of profit resulting from these works. This rule can be displaced where the owners vote to share costs in a manner other than in accordance with the co-ownership share, which must reflect actual usage or the ability to use.

688 WEG s 21(2).

Contributions to shared costs

7.42 Each apartment owner is required to pay towards the costs associated with the shared parts, including maintenance, repair and administrative costs (which expressly includes the cost of litigation).

7.43 The default rule is that the costs are shared proportionately to the owners' co-ownership shares of the shared parts. However, the owners may vote to change how the costs are allocated. Where the costs relate to costs of repair and maintenance, more than 75% of the apartment owners must vote in favour and these owners must make up more than half of the co-ownership shares. The new allocation must however reflect the apartment owners' usage or ability to use the property being maintained or repaired. The ability to vary the allocation by vote cannot be amended by vote of the apartment owners.[689]

7.44 Each apartment owner is entitled to a share in any profits deriving from the jointly owned property in accordance with their co-ownership share.[690]

Disposal of, and interests over, apartments

7.45 The owners may reach an agreement that the sale of individual apartments will require the consent of the other apartment owners or a third-party. However, consent may only be refused for an "important reason". These reasons should be set out in the house rules. The owners may vote to remove such a restriction by majority.[691]

7.46 It appears, however that case law has determined that the sale of an apartment can only be prevented "on the grounds of financial risks which would almost certainly materialise if the sale is registered". Additionally, damages may be awarded to an apartment owner prevented from selling his or her unit due to an unimportant ground. Therefore, this provision cannot be used, for instance, to require the current owner to pay off any arrears as a condition of consent. However, a purchaser will not be liable for any arrears owed by the seller.[692]

7.47 The separately owned property cannot be sold independently of the co-ownership share attached to that unit.[693] Otherwise, the apartment owners are free to use their apartments as they wish (in the absence of any conflicting laws or third-party rights). The owners may, in particular, rent or lease out their units.[694]

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689 WEG s 16.

690 WEG s 16(1).

691 P F Smith, "Apartment ownership – German style" [2007] *Conveyancer and Property Lawyer* 203, n 149; WEG s 12.

692 P F Smith, above, pp 217, 220 to 221. Apparently, when revising the WEG in 2007, drafters did consider including a rule similar to that which applies in commonhold, which would make the purchaser liable, but this was rejected for fear of deterring potential purchasers.

693 WEG s 6.

694 WEG s 13.

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

7.48 If an apartment owner remains, despite warnings, in "gross breach" of his or obligations as an apartment owner, or if the owner has not paid costs and expenses for over three months, the other owners, by majority vote, can require that owner to sell his or her apartment. The owner is able to avoid the sale, up to the moment a bid is accepted, by fulfilling the obligations of which he or she is in breach, or by paying the sums due.[695]

7.49 This power, according to P F Smith, is only available if all other means, including legal proceedings, fines and penalties have been tried.[696] The power was found to be compliant with human rights legislation because it operates as a forced sale as opposed to confiscation.[697]

7.50 The owners may also, by majority resolution, pass rules which set out the consequences of late payment of contributions.[698]

PART VII: TERMINATION

7.51 It appears that the condominium can only be ended, and the Land Registry entry in relation to the condominium closed, in two situations:

(1) on the application of all separate apartment owners if the building has been destroyed. This must be supported by evidence from a building authority;[699] or

(2) if the all the separate apartments fall into the ownership of one person, that person can apply to terminate the condominium.[700]

7.52 Section 11(1) of the Act is expressly headed "Indissolubility of the Community of Apartment Owners". The Act clarifies that it is not possible for any apartment owner to demand the dissolution of the community except where the building has been wholly or partially destroyed. No agreement may be made by the owners to the contrary. Additionally, no creditor may apply to dissolve the community and no insolvency proceedings can be brought.[701]

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695 WEG, ss 18 and 19.

696 P F Smith, "Apartment ownership – German style" [2007] Conveyancer and Property Lawyer 203, p 218.

697 BVerfG, 14.07.1993 - 1 BvR 1523/92.

698 WEG s 21(7).

699 WEG s 9(1)2. Additionally, it seems that a mortgagee's consent may also be required.

700 WEG s 9(2)(3).

701 WEG s 11.

Chapter 8: Italy

INTRODUCTION

8.1 In Italy, the commonhold-equivalent framework for property ownership is called "condominio negli edifice". Italy is another civil law jurisdiction, and so the law of condominium is based on the Italian Civil Code, and is influenced by civil law theories of property ownership.

LEGISLATIVE HISTORY

8.2 The Italian Civil Code of 1865 provided some brief provisions to regulate condominium ownership, but these proved to be too sparse adequately to regulate the condominiums which then existed.[702] More comprehensive provisions were introduced in the Royal Decree 54 of 14 January 1934 (which was converted into Law 8 of 10 January 1935) and then, for the most part, incorporated in articles 1117 to 1139 of the current Civil Code.

8.3 A number of subsequent reform projects have been undertaken to ensure that the Italian condominium law remains relevant to modern social conditions. In particular, the issue of how the management body of a condominium should be structured has been a key topic of discussion for these reforms.[703]

PARTS II & III: CONVERTING TO CONDOMINIUM AND CREATING A NEW CONDOMINIUM

Converting existing buildings

8.4 Italian condominium developments have always been built as condominiums. Therefore, provision for the conversion of existing buildings to condominium from another type of ownership is not necessary.

Selling units before completion

8.5 Italian law permits the sale of units based on building plans, before construction has been completed. The developer must give the purchaser a bank guarantee which would entitle the purchaser to be repaid the purchase price, plus interest, in the event that the developer or building contractor becomes insolvent.[704]

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702 C G van der Merwe, *European Condominium Law* (1st ed 2015), p 27.

703 C G van der Merwe, above, p 27.

704 Legislative Decree on the Protection of Purchasers 2005, arts 2 and 3; C G van der Merwe, above, p 105. The guarantee must be issued by a registered bank or insurance company; a default on the payment of the insurance premium cannot be raised against the purchaser; and the guarantee must include a waiver of the benefit enjoyed by the guarantor under the Italian Civil Code, art 1944 para 2, which would otherwise provide that the parties can agree that the guarantor will not have to pay before remedies against the developer are exhausted.

8.6 There are a number of other requirements for the contract of sale, which must include a detailed description of the unit sold, the municipal building approval and details of mortgages or charges affecting the unit. A failure to comply with these requirements or to provide the guarantee described above will allow the purchaser to void the contract.[705]

Mixed-use/complex developments

8.7 There are no prohibitions in general Italian law on the use of a condominium unit as commercial premises. Consequently, one condominium may contain a mix of residential and commercial units. However, the by-laws of a specific condominium could prohibit certain or all commercial activities. The Italian Civil Code provides no specific structure for mixed-use developments, and there are no provisions relating specifically to such developments.

PART IV: THE OWNERS' ASSOCIATION

8.8 In an Italian condominium, the common parts are not owned by a company. Instead, each of the unit owners will own a share of the common parts proportionate to the value of his or her unit, or units. The common parts will be governed in the same way as generic common ownership[706] in Italy, which means that all participants have a right to share in the administration of the common property.[707]

The membership meeting

8.9 Article 1136 sets out the provisions relating to a membership meeting. A membership meeting will be able to make binding decisions if enough members are present to represent two-thirds of the value of the entire building, and also two-thirds of the members of the condominium.[708] For binding decisions to be passed, a majority of participants (who represent at least half the value of the building, calculated according to the value of their shares) must vote in favour.[709]

8.10 In the event that there are not enough members present to meet these requirements, a second meeting must meet within the next ten days. In this second meeting, a decision will be valid if one third of the members (who represent at least one third of the value of the building) vote in favour.[710]

8.11 A larger majority is required for alterations or decisions which aim to improve, make more convenient use of, or lead to greater income from, commonly owned parts. For

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705 Italian Civil Code art 1421.

706 Generic common ownership arises in any non-condominium situation where "the ownership … belongs in common to several persons" (Italian Civil Code, art 1100).

707 Italian Civil Code, art 1105.

708 Italian Civil Code, art 1136 para 1. It would seem that both of these conditions must be met for a meeting to be able to make binding decisions.

709 Italian Civil Code, art 1136 para 2.

710 Italian Civil Code, art 1136 para 3. It would seem that if a condominium has particularly varied unit sizes, so that one or two units represent a large proportion of the overall value, these voting conditions could potentially allow one or two owners to block decisions easily.

such decisions, a majority of the members who represent at least two-thirds of the building's value must vote in favour.[711]

8.12 Article 1138 requires that when the number of members in a building is greater than 10, by-laws will be adopted, which shall contain the rules concerning use of common property and the division of expenses.

The administrator

8.13 Article 1129 provides that where there are more than four members in a condominium, the membership meeting must appoint an administrator. The court may appoint an administrator if the members fail to do so.[712] The amended implementing provisions of the Italian Civil Code contain a list of necessary qualifications for this appointment.

8.14 The administrator's responsibilities include the following:

(1) carrying out the decisions of the membership meeting and ensuring the by-laws are complied with;

(2) controlling the use of the common parts and the performance of services in the common interest, so that the members obtain the greatest enjoyment of them; and

(3) collecting the financial contributions from members, and paying the expenses required for the ordinary maintenance of the common parts of the building and for the operation of common facilities.[713]

8.15 The administrator is required to provide an account of his or her management of the condominium.[714] Additionally, the administrator is required to take out a professional liability insurance policy to cover the risk of any damage incurred in the performance of his or her role.[715] The costs of this policy are charged to the members of the condominium.

8.16 The administrator will be appointed for a term of one year and can be discharged at any time by the membership meeting.[716] He or she can also be discharged by the court on the application of a member if the administrator has failed to account for his or her management for two years, or if there are well-founded suspicions of serious irregularities.[717]

8.17 No standard of care is explicitly stated for the administrator. It might be expected that the administrator would be in a position similar to that of a fiduciary (for instance, a director or agent) where a duty of loyalty is required, but the grounds for discharge in

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711 Italian Civil Code, arts 1120(1) and 1136(5).

712 Italian Civil Code, art 1129 para 1.

713 Italian Civil Code, art 1130.

714 Italian Civil Code, art 1130 para 2.

715 Italian Civil Code, art 1129 para 3.

716 Italian Civil Code, art 1129 para 2.

717 Italian Civil Code, art 1129 para 3.

article 1129 paragraph 3 indicate that only very serious wrongdoing will result in a breach of obligation. On the other hand, the duty to provide an account – one hallmark of fiduciary obligations in the common law context – is strict and is also a ground for discharge.

Insolvency

8.18 There are no provisions for the insolvency of a condominium in the Civil Code. It would seem to be the case that the members are liable for all of the debts of the condominium. In any case where the condominium has failed to pay its debts, this means that the members will jointly be responsible for paying those debts. If one member is unable to repay his or her share of the debts fully, the other members must make up the shortfall.

PART V: THE COMMUNITY

By-laws

8.19 Every member is entitled to take the initiative for the formation of the by-laws of the condominium, and for the revision of those in existence.[718] Where there are 10 or more members in a condominium, by-laws must be adopted.[719] The by-laws must be approved by the membership meeting, by a majority of those present at the meeting who must also represent at least half of the value of the building.[720] A dissenting participant can challenge the by-laws before the court within 30 days of the decision which approved them.[721]

Management and maintenance

8.20 Article 1117 makes the distinction between units and common parts by way of demonstration. It lists the different parts that are to be considered as common property. These are:

(1) the land on which the building stands, the foundations, the bearing walls, the roofs and solariums, the stairways, the entrance doors, the vestibules, the corridors, the porches, the courtyards and in general all parts of the building necessary for common use;

(2) the premises for the porter's working and living quarters, for the laundry, for the central heating, for clothes-drying and for other similar common services; and

(3) works, installations and manufactures of any kind that serve common use and enjoyment, such as elevators, wells, cisterns, aqueducts, drains and drainage channels, and the systems for water, gas, electricity, heating and the like, up to the point where they branch off to the areas owned exclusively by individual members.

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718 Italian Civil Code, art 1138 para 2.

719 Italian Civil Code, art 1138.

720 Italian Civil Code, art 1136 para 2.

721 Italian Civil Code, art 1107 para 2.

8.21 The owners of the different floors or apartments are collectively the owners of the common parts, in shares proportionate to the value of their respective floor or apartment.[722] The relationship between the value of each member's unit and the value of the entire building is expressed in *millesimi* (one-thousandths). Tables of *millesimi* are also used for the allocation of expenses and for determining voting rights at meetings.

8.22 It is possible within general co-ownership in civil law to divide the collectively owned property, so that some parts are reserved for the exclusive use of certain owners. In contrast, a central feature of condominium is the permanent, common use of the collectively owned property.[723] The commonly owned parts cannot, therefore, be designated for the exclusive use of certain owners, unless this can be done without making the use of the common parts less convenient for any member.

Contributions to shared costs

8.23 The expenses incurred in the maintenance of the common property are shared between the condominium owners, in proportions relative to the value of each owner's unit (or otherwise, if the by-laws make alternative provisions).[724] Costs relating to the performance of services in the common interest and alterations or improvements to the common parts will be shared in the same way, unless otherwise provided by the by-laws.

8.24 Where common parts only benefit a particular group of owners, those owners alone must contribute to their maintenance and repair.[725] Similarly, where common parts benefit some owners more than others, their respective contributions may be different to reflect this.[726] For instance, a top-floor owner might contribute more to the maintenance of a lift than would a ground floor resident.

Leases within condominium

8.25 In principle, an owner of a unit is entitled to sell or lease out his or her unit.[727] As a result, title conditions, restrictions in by-laws, or decisions at general meetings aimed at preventing apartments being sold or leased are generally considered to be invalid.[728] However, contractual by-laws (agreements approved with the unanimous consent of the owners)[729] may limit the exclusive property rights of an owner.[730] But there are limits on the content of contractual by-laws. In particular, a clause in the by-laws of a

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722 Italian Civil Code, arts 1117 and 1118.

723 G Alpa and V Zeno-Zencovich, *Italian Private Law* (2007), para 6.9.2.

724 Italian Civil Code, art 1123 para 2.

725 Italian Civil Code, art 1123 para 2.

726 Italian Civil Code, art 1123 para 3.

727 Italian Civil Code, art 832.

728 C G van der Merwe, *European Condominium Law* (1st ed 2015), p 156.

729 "Regolamenti contrattuali o convenzionali" in Italian.

730 C G van der Merwe, above, p 157. These are contrasted with the model by-laws (*regolamenti assembleari o non contrattuali*) which are those approved by a majority vote of the members at the meeting, who must represent at least half of the total value of the building.

condominium that prohibits letting out a unit would likely be considered invalid on the basis that it contradicts the civilian understanding of what an owner may do with his or her property.[731]

8.26 It is not clear – and not stated in the Civil Code – whether the lessee of a unit in a condominium has voting rights at general meetings and may participate in the same ways as the owner might.

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

Unpaid contributions

8.27 The condominium administrator has the power to obtain an immediately enforceable court order for the recovery of unpaid contributions.[732] If the unpaid contributions are not received within ten days of the order being made, the unit can be sold to recover the unpaid sums. In addition, the administrator can suspend the defaulting owner from using certain common services if that owner has been in arrears for a period of six months.[733]

Breach of by-law

8.28 A member who dissents from a decision taken at a meeting can complain to the court that the decision is contrary to law or to the by-laws of the condominium.[734] The general rules on common ownership also entitle a member to apply to the court if measures necessary for administration of the common property are not taken, if a majority is not formed or if decisions are not put into effect.[735] This provision would seem to include cases where the administrator has failed to enforce the by-laws of the condominium.

8.29 If an owner breaches a by-law through his or her conduct, it is most likely that the other owners would rely on the law of nuisance to address the concern, rather than any provisions dealing particularly with condominium.[736]

PART VII: TERMINATION

8.30 The condominium rules do not seem to provide for the termination of a condominium.

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731 C G van der Merwe, above, p 157.

732 Italian Civil Code, art 63 para 1.

733 Italian Civil Code, art 63.

734 Italian Civil Code, art 1137 para 2.

735 Italian Civil Code, art 1105 para 4.

736 C G van der Merwe, *European Condominium Law* (1st ed 2015), p 388.

Chapter 9: France

INTRODUCTION

9.1 In France, the commonhold-equivalent framework for property ownership is called "copropriété". France is a civil law jurisdiction, and so the law of condominium is based on the French Civil Code, and is influenced by civil law theories of property ownership.

LEGISLATIVE HISTORY

9.2 In the original 1804 Civil Code, only one article – article 664 – was devoted to condominium. It was, unsurprisingly, insufficient to regulate the complexity of the relationships involved in condominium ownership. As a result, the rules of co-ownership arose over time, through practice. The first law dealing with condominium comprehensively – the Law on Joint Ownership of Buildings – was introduced on 28 June 1938. The law did not impose mandatory rules on condominiums, and it was open to condominium owners either to modify the statutory provisions in their individual by-laws or to ignore the provisions altogether. The 1938 law made all owners members of a management association ("syndicat") to manage the common parts. The association had its own legal personality, meaning it could enter into contracts or legal proceedings in its own name. Decisions about the management of the condominium would be as directed by majority resolutions of a members meeting. A manager ("syndic") could be appointed by the association, and duties could be delegated to the manager.

9.3 However, the 1938 law had a number of shortcomings: the management provisions were overly simplistic; the powers of the manager and association were ill-defined; and the by-laws could be modified only by unanimous consent.[737] In 1965, the Law on Apartment Ownership of Buildings[738] replaced the 1938 law.

9.4 The 1965 law provides precise definitions of the key features of a condominium, including the individual units, common parts and accessories to common parts. The function of each part of the management structure is also specified. It also cured one of the key weaknesses of the 1938 law, by implementing the ability for majority decision-making, rather than requiring unanimity for all changes (although unanimity was retained for certain matters).[739] Subsequent amendments to the 1965 law have included:

(1) the registration of ownership rights of individual units;[740]

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737 C G van Der Merwe, *European Condominium Law* (1st ed 2015), p 28.

738 Loi n° 65-557 du 10 juillet 1965.

739 Namely, resolutions to change the intended purpose, or to restrict the use of individual units, and a resolution to sell common parts necessary for the preservation of the original characteristics of the scheme.

740 Loi n° 66-1006 du 28 décembre 1966 and Loi n° 79-2 du 2 janvier 1979.

(2) wider application of majority decision-making;[741]

(3) ability to use proxy votes in members meetings;[742]

(4) the introduction of a charge on an owner's unit to secure the claims of the association against an owner who has failed to pay his or her contributions;[743]

(5) provisions for the temporary administration of a condominium that experiences serious financial difficulties;[744]

(6) reduction of the majority required for works required to preserve the building;[745]

(7) provision for the termination of the condominium in exceptional circumstances;[746]

(8) establishing an owner's right to information from the association;[747]

(9) entitling purchasers to request a technical report on the building before buying into a condominium that is older than 15 years;[748] and

(10) authorising the termination of the condominium if the management fails to manage the condominium properly, or the owners are in physical danger from the building collapsing.[749]

PARTS II & III: CONVERTING TO CONDOMINIUM AND CREATING A NEW CONDOMINIUM

Converting an existing development

9.5 There do not appear to be any provisions for conversion of existing buildings to condominium in the French laws. It is likely that there has been no need for such provisions, as the ability to create condominiums has existed for a sufficiently long time that apartment buildings will have been built as condominiums in the first place.

Selling units before completion

9.6 French law governs the sale of units from building plans, where construction has not been completed, via a special contract: a sale of a building to be constructed (*vente d'immeuble à construire*).[750] There are two varieties of such contracts: the sale on credit

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741 Loi n° 85-1470 du 31 décembre 1985.

742 Loi n° 85-1470 du 31 décembre 1985.

743 Loi organique n° 96-624 du 15 juillet 1996.

744 Loi organique n° 96-624 du 15 juillet 1996.

745 Loi n° 96-987 du 14 novembre 1996.

746 Loi n° 96-987 du 14 novembre 1996.

747 Loi n° 96-987 du 14 novembre 1996.

748 Loi n° 2000-1208 du 13 décembre 2000.

749 Loi n° 2003-710 du 1 août 2003.

750 C G van der Merwe, *European Condominium Law* (1st ed 2015), p 98.

(*vente à terme*) is very rare; and the sale on the state of future progress (*vente en l'état future d'achèvement*), which is more common.[751]

9.7 There are complex provisions governing a sale on the state of future progress, in order to help protect consumers. The purchaser will pay an initial sum, followed by successive sums based on the building progress of the building. It does not appear that the building needs to be at any particular stage of completion or progress before a contract for sale on the state of future progress can be entered into. If the building is never completed, the purchaser is protected by law. If the developer becomes insolvent before the unit is completed, the purchaser can rely on a completion guarantee (*garantie d'achèvement*) which may have been issued alongside the contract to recover sufficient money from the developer to complete construction. Alternatively, the developer can give the purchaser a repayment guarantee (*garantie de remboursement*), entitling the purchaser to demand that the bank repay all advances made to the developer if the contract is cancelled because the building was never completed.[752]

Mixed-use/complex developments

9.8 French law on condominiums seems to deal solely with residential apartments. Consequently, mixed-use developments are not provided for.

PART IV: THE OWNERS' ASSOCIATION

9.9 Decisions are taken at general meetings by the owners. Different types of decision require different voting majorities: some just require a 50% majority, others require a two-thirds majority or unanimity. For instance, to alter the by-laws requires a two-thirds majority.[753]

PART V: THE COMMUNITY

By-laws

9.10 The condominium is internally governed by by-laws (règlement de copropriété), which regulate the relationships between the owners in relation to the common parts. To add to or modify by-laws requires a members' meeting to vote in favour by a two-thirds majority. If a by-law is going to restrict the rights of owners in the condominium, then it must do so in line with the intended purpose of the building.[754]

Management and maintenance

9.11 Individual owners are not allowed to demarcate portions of the common parts for their own use.[755] If an owner wants to acquire a portion of the common parts for his or her private use, he or she must acquire a right of exclusive use of that portion. A resolution

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751 C G van der Merwe, above, p 98.

752 C G van der Merwe, above, p 99.

753 Loi n° 65-557 du 10 juillet 1965, art 26(b).

754 C G van der Merwe, above, p 412.

755 C G van der Merwe, *European Condominium Law* (1st ed 2015), p 272.

with a two-thirds majority is required to designate an area of the common parts for the exclusive use of an owner.

9.12 The management body is responsible for paying for all repairs. All owners must allow representatives from the management body to enter their units to perform necessary repairs or other prescribed work.[756]

Leases within condominium

9.13 The Law on Apartment Ownership of 1965, article 8, prohibits any restriction on an owner's right to use his or her property, or to sell or lease the property, except for a restriction in line with the stated purpose of the condominium as residential, professional or commercial. Consequently, a by-law prohibiting the letting of apartments would be invalid as well. However, French case law suggests that by-laws can prohibit the sale of a "chambre de services" (separate room serving a particular apartment, usually located on the top of old buildings and linked with a specific apartment), without the consent of a members' meeting, where such a sale would go against the intended purpose of that building.[757]

9.14 Only owners may vote at general meetings. Tenants have no right to attend or to vote at the general meeting.[758] There are two key exceptions to this.

(1) Where a contract of location-accession is agreed, the tenant will gradually become the owner of the rented apartment. In this case, the original owner still votes on some important matters[759] but the future owner (the tenant) is invited to general meetings and can participate in the debates.

(2) The tenants of the building or a group of buildings can form an association. If that association represents at least 10% of the tenants and complies with the conditions imposed by law,[760] up to three representatives of the tenants' association are entitled to attend general meetings and participate in the debates, but they are not entitled to vote.

PART VI: ENFORCEMENT AND DISPUTE RESOLUTION

Unpaid contributions

9.15 If an owner has failed to pay his or her financial contribution, the management body will send the owner a formal letter of demand by registered post. If the contributions are not paid within 30 days, an application can then be made to the President of the High Court

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[756] Loi n° 65-557 du 10 juillet 1965, art 9 para 2.

[757] C G van der Merwe, above, p 146. Cass. Civ. 3ème 10 March 1981 No. 79-12950; 4 June 1998 No. 96-16452; 28 Feb 2006 No. 05-11409. In these cases, the prohibition on such a sale was considered to be consistent with the intended purpose of on family residing on each floor.

[758] Loi n° 65-557 du 10 juillet 1965, art 22.

[759] These matters include maintenance and repairs, sale of common parts and vertical extension of the building.

[760] Loi n° 86-1290 du 23 décembre 1986, art 44.

who will order the owner to pay his or her debt.[761] If the debt is still left unpaid, the manager of the condominium can obtain an order from the court to charge the owner's assets, including his or her salary and the furniture in the apartment if it is let as a furnished apartment.[762] The management body may then have the property sold at a public sale to recover the debts.

PART VII: TERMINATION

9.16 A condominium can be terminated in the event of destruction of or damage to the building by natural disaster.[763] The owners must, at a meeting to be held within two months after the disaster, decide by a 50% majority if the building is to be reconstructed or not. If it is not, the condominium must be liquidated and the assets divided among the owners in proportion to their co-ownership shares.

761 Loi n° 65-557 du 10 juillet 1965, art 19 para 2.

762 Décret n°67-223 du 17 mars 1967, art 55.

763 Loi n° 65-557 du 10 juillet 1965, arts 38 to 41.

Appendix 1: Summary of New South Wales (Australia) strata policies

Area	Policy Summary
Conversion	• Must be signed by the registered proprietor and all mortgagees. • Consent of registered lessees also required in the case of leasehold strata schemes, and may be required for freehold schemes. • Registrar General has discretion to waive requirement for signatures or require additional signatures to be provided.
Corporate structure	• Owners' corporation (OC) is bespoke corporate body, not subject to usual company law. • Must appoint committee for day-to-day decisions. • Committee members must act for the benefit, so far as practicable, of the OC with due care and diligence. • Owners are automatically members, but tenants are not. • May appoint (licenced) managing agent and on-site building manager.
Common property	• Held by the OC as agents for the lot owners as tenants in common. • Units typically defined as "airspace" within boundaries. Everything else is common property. • Owner's interest in the common property cannot be severed from their interest in their lot. • OC cannot mortgage common property. • Owners can carry out certain cosmetic renovations on common property without needing approval. More major renovations require consent of the OC.
Leases	• Conversion does not appear to extinguish leases. • No restriction on lot owners creating leases of their units. • Can create leasehold strata schemes, where all lots and common property are subject to leases of the same duration.

Development	• Can create staged developments, with existing lots and development lots shown on plan. • Strata development contract needed, setting out proposed development and creating obligation on developer to complete certain work. • Necessary rights and covenants for developer to carry out development are implied into the contract, but must not cause unreasonable inconvenience to current lot owners. • Restrictions on what developers can do during initial period (until one-third of units sold).
Dispute resolution / enforcement of obligations	• Unpaid contributions: OC may apply to court for an order to recover, (or Tribunal, if case already before the Tribunal). OC can charge interest on late payments, and can offer deduction for prompt payment. • Breach of by-law: OC must issue notice, and can then apply to Tribunal to impose a penalty. • Other disputes: free mediation service provided. Can apply to Tribunal if that fails.
Flexibility	• Can create layered schemes using different forms of community schemes (community, precinct and neighbourhood schemes). • Large schemes over 100 lots and two-lot schemes have special provisions. • Possible to create bespoke funds for services provided to only some lot owners. • Can create entirely bespoke by-laws, regulating activities which may affect others in the scheme.
Insolvency	• OC cannot be wound-up for insolvency. • Lot owners effectively liable for the debts of the OC through payment of contributions. • If OC fails to pay judgment debt, Tribunal can appoint a managing agent to administer affairs of the OC for a prescribed period.
Termination	• If unanimous consent, can apply to Registrar General • Without consent, possible to apply to court for termination order. • If not unanimous consent, a plan for collective sale and renewal can be approved by the court if 75% of owners consent, and the terms have been approved by the Court.

Appendix 2: Summary of British Columbia (Canada) strata policies

Area	Policy Summary
Conversion	• Strata plan must be signed by every freeholder and owners of registered charges. • If building previously occupied, must get authority approval. • Approving authorities may prescribe the level of consent required for a conversion: eg 67% of occupiers must consent in Vancouver, but note this is not prescribed by statute. • Consents may be waived by Registrar. • It is unclear whether leases and tenancies have to be cancelled prior to conversion.
Corporate structure	• Strata Corporation is bespoke corporate entity, not subject to company law. • Must appoint council for day-to-day decisions. • Default is between three and seven members of the Council in schemes of more than four lots. • Council members must exercise standard of care expected of a reasonably prudent person in comparable circumstances. • Owners are automatically members of the corporation. • May appoint licensed managing agents.
Common property	• Owned by the lot owners as tenants in common. • Units typically defined as including up to middle line of boundaries. Remaining land forms common property. • Corporation cannot mortgage common property. All other dispositions permitted. • No standard of maintenance set out by statute. • Common property can be allocated for exclusive use through “limited common property” or short-term exclusive use arrangements.
Leases	• Leases and tenancies probably have to be terminated prior to conversion (although this is not clear).

	• Renting lots is permitted, but rental restriction by-laws are permitted within narrow limits. • Landlords can assign rights as lot owners to their tenants. Automatic assignment for leases over three years. • Leasehold strata schemes are only created with public bodies as landlords.
Development	• Can create phased developments. • Phased strata declaration must set out plans. Court has jurisdiction to enforce provisions in plan if developer's decision to deviate is unfair. • Developer has a range of statutory duties and restrictions on resolutions that can be passed up to the point of the first annual general meeting. These protect current and future lot owners.
Dispute resolution / enforcement of obligations	• Unpaid fees: corporation may register a lien (following a notice), and can charge interest. Corporation can apply to Court to enforce lien. • Breach of by-law: corporation can fine owners, remedy the contravention or deny access to recreational facilities. • Other disputes: court proceedings, arbitration and an online tribunal can be used to resolve other disputes.
Flexibility	• Can create complex layered schemes using "sections" and "types". • Very limited recognition of different size schemes. • Types allow for allocation of fees to a subsection of lots. • Can create entirely bespoke by-laws on a wide range of issues, including strata corporation and council procedures. Some obligations set out in statute.
Insolvency	• Corporation will not be wound-up for insolvency. • Lot owners are fully liable for the debts of the corporation. • Administrators can be appointed for a period on application of a creditor.
Termination	• Voluntary termination can occur with an 80% majority. Court approval is also needed. • Court may order winding-up without necessary consent, but this is rare. • A liquidator must be appointed, unless the corporation has no debts other than those secured by a charge over the land.

Appendix 3: Summary of New Zealand unit title policies

Area	Policy Summary
Conversion	• If it is a new scheme, freeholder (or long leaseholder and freeholder) must consent to creation. • If converting from an existing multi-owned scheme, 75% of the previous owners must consent. • If 75% agreement not reached, the Court may order conversion. • Any mortgages over more than one unit must be discharged prior to conversion.
Corporate structure	• Body corporate is bespoke corporate entity, not subject to company law. • Schemes with over nine units must appoint a committee. This is optional for smaller schemes. All schemes must appoint a chairperson. • Statute contains no provisions setting out standard of care expected of committee members. • Owners are automatically members of body corporate. • May appoint managing agents and building managers. No licensing requirements.
Common property	• Owned by body corporate, but unit owners are beneficially entitled as tenants in common. • Cannot mortgage common property. All other dispositions permitted. • Standards of maintenance set out in statute, for both body corporate and unit owners.
Leases	• Leases seemingly unaffected by conversion. • Renting out units is permitted. Appears operational rules cannot restrict this. • Tenants are not entitled to vote at body corporate meetings. • “Leasehold” schemes can be created where all the units and common property are subject to a long lease, established over the base land before conversion.

Development	• Can create staged developments. • Proposed plan must set out intentions of developer. To register completed stages, they must match the plan. • No compulsion mechanism if developer does not complete. • Developer has duties to consider best interests of body corporate until end of “control period”. This includes strict disclosure requirements. Body corporate may seek compensation in default.
Dispute resolution / enforcement of obligations	• In all types of dispute, must apply to Tribunal or courts for resolution. • Tenancy Tribunal: claims up to value of $50,000. Tenancy Tribunal includes a mediation service. • District Court: claims between $50,000 and $350,000 • High Court: claims over $350,000 and disputes over land title.
Flexibility	• Can create layered schemes with “sub-sections”. • Schemes with nine or fewer units do not need a committee - only difference for small schemes. • Metered charges allow different units to make contributions based on usage. Not complete freedom to create funds. • Can create entirely bespoke by-laws, relating to activities affecting others in the scheme.
Insolvency	• Almost no recognition of insolvency in statute. • Unit owners appear to be jointly and severally liable for the debts of the body corporate. • Can appoint administrator on application of creditors, or others.
Termination	• With 75% majority, can apply to Registrar for termination. • Without 75% majority, can apply to High Court for termination if it is deemed just and equitable.

Appendix 4: Summary of United States of America condominium policies

Area	Policy Summary
Conversion	• Condominium created on registration of declaration containing prescribed information. • All structural components and mechanical systems of unit buildings must be substantially completed. • Consent required from any leaseholders whose leases will expire during the lifetime of the scheme. • Mortgagee consent not required. • Prior to conversion, developer must offer to sell units to existing tenants. • To convert existing residential building, report needed on structural soundness.
Corporate structure	• Association can be any kind of body authorised by the State. • Act sets out bespoke rules which govern operation of the association. • Association must have an executive board of at least three members. • Executive members and officers required to exercise degree of care required by the State law governing the type of body created.
Common property	• Owned by the lot owners as an undivided interest. • Units defined as including surface finishings inside lot. Everything else is common property. • Unit owners can make alterations that do not affect the structural integrity of the scheme. • Interest in common property cannot be severed from lot. • Association can sell or charge common elements with 80% support. • Common property can be allocated for exclusive use through “limited common property”.
Leases	• Condominium can be granted out of leasehold land if owners of these leases agree.

	• Developer must terminate existing leases/tenancies and sell lots free of these interests after conversion. Developer must offer tenants opportunity to purchase condominium lots. • Restrictions on lot owners granting leases only to the extent necessary to meet lender requirements. Certain votes can be allocated to leaseholders.
Development	• Declaration sets out development rights, the land to which they apply and the time limit in which they can be exercised. • All structural components and mechanical systems of unit buildings must be substantially completed before registration. However, developer can reserve rights to create more buildings. • Developer must provide "public offering statement" setting out development rights. If not provided, purchaser can cancel contract. Developer required to complete all improvements set out on plan. Warranties implied into unit sale. • In certain States, developer cannot market units until registered with administrative agency, requiring evidence of developer's means to complete scheme.
Dispute resolution / enforcement of obligations	• Unpaid fees: association has lien over units for unpaid assessments. Lien takes priority over mortgages to a certain amount. Some states require court order to enforce lien. • Can charge interest on late payments, suspend privileges and services provided. Can also bring a court money claim and/or seek possession temporarily and then rent unit to recover sums. • Breach of by-law: can impose fines, require alternative dispute resolution or take direct action against tenant.
Flexibility	• Can create three different types of community interest scheme (co-operatives, condominiums and planned communities) • Can delegate powers of one or more schemes to a master association. • Concept of limited common property allows expenses to be allocated by benefit. • Different rules for small schemes of less than 12 units, and for non-residential schemes.
Insolvency	• Condominium cannot be terminated by a creditor. However, certain charges taking priority over the declaration can be excluded from the scheme.
Termination	• 80% consent required to terminate scheme voluntarily. Termination agreement must set out which land is to be sold and how much each unit owner will receive. • Following a catastrophe, the executive board or any interested person may bring a court action to terminate the scheme.

Appendix 5: Policy comparison table

Area	England and Wales (commonhold)	Australia: Strata (New South Wales)	Canada: Strata (British Columbia)	New Zealand	United States of America
Creation/Conversion	• 100% consent required from registered and unregistered: freeholders; leaseholders; and mortgagees.	• Must be signed by the registered proprietor and all mortgagees. • Consent of registered lessees also required in the case of leasehold strata schemes, and may be required for freehold schemes.	• Strata plan must be signed by every freeholder and owners of registered charges. • If building previously occupied, must get authority approval.	• If it is a new scheme, freeholder (or long leaseholder and freeholder) must consent to creation. • If converting from an existing multi-owned scheme, 75% of the previous owners must consent.	• Consent required from any leaseholders whose leases will expire during the lifetime of the scheme. • Prior to conversion, developer must offer to sell units to existing tenants.
	• Consent can be dispensed with by court where person cannot be identified or traced, or has not responded, after all reasonable efforts.	• Registrar General has discretion to waive requirement for signatures or require additional signatures to be provided.	• Approving authorities may prescribe the level of consent required for a conversion. Eg 67% of occupiers must consent in Vancouver, but not this is not prescribed by statute. • Consents may be waived by Registrar.	• If 75% agreement not reached, the Court may order conversion.	• Mortgagee consent not required.

			• It is unclear whether leases and tenancies have to be cancelled prior to conversion.	• Any mortgages over more than one unit must be discharged prior to conversion.	• All structural components and mechanical systems of unit buildings must be substantially completed. • To convert existing residential building, report needed on structural soundness.

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
Corporate Structure	• CA is company limited by guarantee, subject to normal company law.	• OC is bespoke corporate body, not subject to usual company law.	• Strata Corporation is bespoke corporate entity, not subject to company law.	• Body corporate is bespoke corporate entity, not subject to company law.	• Association can be any kind of body authorised by the State. • Act sets out bespoke rules which govern operation of the association.
	• Must appoint two directors. They can be professional, but no licensing requirement.	• Must appoint committee for day-to-day decisions.	• Must appoint council for day-to-day decisions. • Default is between three and seven members of the council in schemes of more than four lots.	• Schemes with over nine units must appoint a committee. This is optional for smaller schemes. All schemes must appoint a chairperson.	• Association must have an executive board of at least three members.
	• Directors must exercise degree of care, skill and diligence that would be expected of the skill set and experience of the particular director.	• Committee members must act for the benefit, so far as practicable, of the owners' corporation with due care and diligence.	• Council members must exercise standard of care expected of a reasonably prudent person in comparable circumstances.	• Statute contains no provisions setting out standard of care expected of committee members.	• Executive members and officers required to exercise degree of care required by the State law governing the type of body created.

	• Unit owners are not automatically members of the CA, but are entitled to membership.	• Owners are automatically members, but tenants are not.	• Owners are automatically members of the corporation.	• Owners are automatically members of body corporate.	
	• No specific licensing requirements for any appointed managing agents	• May appoint (licensed) managing agent and on-site building manager.	• May appoint licensed managing agents.	• May appoint managing agents and building managers. No licensing requirements.	

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
Common Property	• Owned absolutely by CA.	• Held by the OC as agents for the lot owners as tenants in common.	• Owned by the lot owners as tenants in common.	• Owned by body corporate, but unit owners are beneficially entitled as tenants in common.	• Owned by the lot owners as an undivided interest.
		• Units typically defined as “airspace” within boundaries. Everything else is common property.	• Units typically defined as including up to middle line of boundaries. Remaining land forms common property.		• Units defined as including surface finishings inside lot. Everything else is common property.
		• Owner’s interest in the common property cannot be severed from their interest in their lot.			• Interest in common property cannot be severed from lot.
	• CA may dispose of interests in the common parts, so long as it has the required support. This includes legal mortgages with unanimous consent.	• OC cannot mortgage common property.	• Corporation cannot mortgage common property. All other dispositions permitted.	• Cannot mortgage common property. All other dispositions permitted.	• Association can sell or charge common elements with 80% support.
	• Standard of maintenance of common property not set out in detail. No provisions governing maintenance of lots.	• Owners can carry out certain cosmetic renovations on common property without needing approval. More major renovations require consent of the OC.	• No standard of maintenance set out by statute.	• Standards of maintenance set out in statute, for both body corporate and unit owners.	• Unit owners can make alterations that do not affect the structural integrity of the scheme.

	• Common property can be designated for exclusive use through “limited areas”.		• Common property can be allocated for exclusive use through “limited common property” or short-term exclusive use arrangements.		• Common property can be allocated for exclusive use through “limited common property”.

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
Leases	• Leases extinguished on conversion. Leaseholders/tenants entitled to compensation from most proximate party consenting to conversion.	• Conversion does not appear to extinguish leases.	• Leases and tenancies probably have to be terminated prior to conversion (although this is not clear).	• Leases seemingly unaffected by conversion.	• Developer must terminate existing leases/tenancies and sell lots free of these interests after conversion. Developer must offer tenants opportunity to purchase condominium lots.
	• Can only create a lease over commonhold property if it is for less than seven years, and is not for a premium.	• No restriction on lot owners creating leases of their units.	• Renting lots is permitted, but rental restriction by-laws are permitted within narrow limits. • Landlords can assign rights as lot owners to their tenants. Automatic assignment for leases over three years.	• Renting out units is permitted. Appears operational rules cannot restrict this. • Tenants are not entitled to vote at body corporate meetings.	• Restrictions on lot owners granting leases only to the extent necessary to meet lender requirements. • Certain votes can be allocated to leaseholders.
		• Can create leasehold strata schemes, where all lots and common property are subject to leases of the same duration.	• Leasehold strata schemes are only created with public bodies as landlords.	• “Leasehold” schemes can be created where all the units and common property are subject to a long lease, established over the base land before conversion.	• Condominium can be granted out of leasehold land if owners of these leases agree.

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
Development	• Nothing to prevent staged developments.	• Can create staged developments, with existing lots and development lots shown on plan.	• Can create phased developments.	• Can create staged developments.	• All structural components and mechanical systems of unit buildings must be substantially completed before registration. However, developer can reserve rights to create more buildings.
	• Nothing to require developer to set out planned work. • During transitional period (where no unit owners), developer free to make changes to development. • After transitional period, developer may reserve rights to allow development to be completed.	• Strata development contract needed, setting out proposed development and creating obligation on developer to complete certain work. • Necessary rights and covenants for developer to carry out development are implied into the contract, but must not cause unreasonable inconvenience to current lot owners.	• Phased strata declaration must set out plans. Court has jurisdiction to enforce provisions in plan if developer's decision to deviate is unfair.	• Proposed plan must set out intentions of developer. To register completed stages, they must match the plan. • No compulsion mechanism if developer does not complete.	• Declaration sets out development rights, the land to which they apply and the time limit in which they can be exercised. • Developer must provide "public offering statement" setting out development rights. If not provided, purchaser can cancel contract. • Developer required to complete all improvements set out on plan. Warranties implied into unit sale.
	• Developers must not interfere unreasonably with unit owners' rights, but no obligation to complete works, and no specific contract detailing rights and obligations.	• Restrictions on what developers can do during initial period (until one-third of units sold).	• Developer has a range of statutory duties and restrictions on resolutions that can be passed up to the point of the first annual general meeting. These protect current and future lot owners.	• Developer has duties to consider best interests of body corporate until end of "control period". This includes strict disclosure requirements. Body corporate may seek compensation in default.	• In certain States, developer cannot market units until registered with administrative agency, requiring evidence of developer's means to complete scheme.

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
Dispute resolution/enforcement of obligations	• Unpaid contributions: CA may apply to court for a money judgment which may be charged on the unit. Forfeiture not available. • Directors have discretion whether or not to take action.	• Unpaid contributions: OC may apply to court for an order to recover, (or Tribunal, if case already before the Tribunal). OC can charge interest on late payments, and can offer deduction for prompt payment.	• Unpaid fees: corporation may register a lien (following a notice), and can charge interest. Corporation can apply to Court to enforce lien.	• In all types of dispute, must apply to Tribunal or courts for resolution. • Tenancy Tribunal: claims up to value of $50,000. Tenancy Tribunal includes a mediation service. • District Court: claims between $50,000 and $350,000 • High Court: claims over $350,000 and disputes over land title.	• Unpaid fees: association has lien over units for unpaid assessments. Lien takes priority over mortgages to a certain amount. Some states require court order to enforce lien. • Can charge interest on late payments, suspend privileges and services provided. Can also bring a court money claim and/or seek possession temporarily and then rent unit to recover sums.
		• Breach of by-law: OC must issue notice, and can then apply to Tribunal to impose a penalty.	• Breach of by-law: corporation can fine owners, remedy the contravention or deny access to recreational facilities.		• Breach of by-law: can impose fines, require alternative dispute resolution or take direct action against tenant.
	• Other disputes and breaches: must follow ADR/apply to court for enforcement. Act provides power for ombudsman service to be established.	• Other disputes: free mediation service provided. Can apply to Tribunal if that fails.	• Other disputes: court proceedings, arbitration and an online tribunal can be used to resolve other disputes.		

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
Flexibility	• Cannot create layered schemes.	• Can create layered schemes using different forms of community schemes (community, precinct and neighbourhood schemes).	• Can create complex layered schemes using “sections” and “types”.	• Can create layered schemes with “sub-sections”.	• Can delegate powers of one or more schemes to a master association. • Can create three different types of community interest scheme (co-operatives, condominiums and planned communities)
	• No flexibility for differently sized schemes.	• Large schemes over 100 lots and two-lot schemes have special provisions.	• Very limited recognition of differently sized schemes.	• Schemes with nine or fewer units do not need a committee - only difference for small schemes.	• Different rules for small schemes of less than 12 units, and for non-residential schemes.
	• No flexibility for different funds to reflect different use of services.	• Possible to create bespoke funds for services provided to only some lot owners.	• Types allow for allocation of fees to a subsection of lots.	• Metred charges allow different units to make contributions based on usage. Not complete freedom to create funds.	• Concept of limited common property allows expenses to be allocated by benefit.
	• CCS must take prescribed form, but can create local rules.	• Can create entirely bespoke by-laws, regulating activities which may affect others in the scheme.	• Can create entirely bespoke by-laws on a wide range of issues, including strata corporation and council procedures. Some obligations set out in statute.	• Can create entirely bespoke by-laws, relating to activities affecting others in the scheme.	

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
	• CA may be wound-up for insolvency.	• OC cannot be wound-up for insolvency.	• Corporation will not be wound-up for insolvency.	• Almost no recognition of insolvency in statute.	• Condominium cannot be terminated by a creditor. However, certain charges taking priority over the declaration can be excluded from the scheme.
	• Liability of unit owners technically limited to £1, but this has been described as a "façade" as the CA can pass on debts to the unit owners through the commonhold assessment.	• Lot owners effectively liable for the debts of the OC through payment of contributions.	• Lot owners are fully liable for the debts of the corporation.		
Insolvency	• Successor CA may be created by the court, but unclear whether liabilities of prior CA will transfer to new CA.	• If OC fails to pay judgment debt, Tribunal can appoint a managing agent to administer affairs of the OC for a prescribed period.	• Administrators can be appointed for a period on application of a creditor.	• Can appoint administrator on application of creditors, or others.	

	England and Wales	New South Wales	British Columbia	New Zealand	United States of America
Termination	• Voluntary termination can occur unanimously.	• If unanimous consent, can apply to Registrar General	• Voluntary termination can occur with an 80% majority. Court approval is also needed.	• With 75% majority, can apply to Registrar for termination.	• 80% consent required to terminate scheme voluntarily.
	• Voluntary termination with 80% support is possible, but the court must give an order as to the terms of termination.	• Without consent, possible to apply to court for termination order. • If not unanimous consent, a plan for collective sale and renewal can be approved by the court if 75% of owners consent, and the terms have been approved by the court.	• Court may order winding-up without necessary consent, but this is rare.	• Without 75% majority, can apply to High Court for termination if it is deemed just and equitable.	• Following a catastrophe, the executive board or any interested person may bring a court action to terminate the scheme.
	• Involuntary termination will occur on insolvency.		• A liquidator must be appointed, unless the corporation has no debts other than those secured by a charge over the land.		• Termination agreement must set out which land is to be sold and how much each unit owner will receive.