PP 181

STRATA TITLES

EIGHTY - FIRST REPORT

OF THE

ENVIRONMENT, RESOURCES AND DEVELOPMENT COMMITTEE

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Hon Michael Atkinson, Speaker
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COMMITTEE FOREWORD

The Environment, Resources and Development Committee (Committee) commenced its Inquiry into Strata Titles in April 2015. As part of the Inquiry 22 submissions were received and five witnesses were heard. Submissions and witnesses included key players from state government and industry. The broader perspective and ideas came from the many phone calls and submissions from owners and occupiers of strata title units.

The information provided to the Committee was very often supplied by people who wanted to be heard but were fearful of reprisals. Some of these people provided their name and contact details but directly requested anonymity. Others did not understand that the normal practice would be to publish details of those making submissions. On this basis the Committee determined that it would not publish identifying details of individuals who phoned or made a submission.

I would like to thank my fellow Committee members for their efforts in considering this issue.

The Committee extends its thanks to those who prepared submissions and presented evidence to the Committee over this period. Being able to discuss issues first hand with the relevant stakeholders is most important for the Committee's understanding of the issues.

Hon Tom Kenyon MP
PRESIDING MEMBER

15 March 2018

EXECUTIVE SUMMARY

Strata titles are a form of ownership allowing individuals to own part of a property (lot) and share ownership of common property such as driveways and gardens. These titles have not been issued since 2009. New divisions of this type are now covered by the newer form of ownership; Community Titles, introduced in the *Community Titles Act 2009*. All strata corporations existing at 1 June 2009 continue to be regulated by the *Strata Titles Act 1988*.

Community concerns regarding strata titles were addressed by the Attorney-General culminating in the *Statutes Amendment (Community and Strata Titles) Act 2012* (CSTA). The Committee has concluded that the CSTA did resolve several issues prevalent at the time. The Attorney-General considers that the area is now relatively trouble free.

The CSTA targeted several areas in an attempt to make the strata title regime fairer for all. These positive changes are detailed in the report. Without overlooking these positive changes the report focuses on the issues raised by the people living, owning and managing strata titles.

The Committee realised early in its investigation that owner occupiers of strata title units contacting the Committee were vulnerable. They were often young new entrants to property ownership or elderly. They were not well resourced to engage in battles with bureaucracy or corporations. Their problem was compounded by the fact that many strata title units are owned by investors. These non-resident owners can be characterised as not wanting to be overly involved in the management of these communities. This scenario makes for an environment where those engaged to manage the strata units, body corporate managers (BCMs), can operate without the restraints imposed by a more demanding clientele.

Several of the issues were seen as comparatively easy to rectify being administrative in nature or able to be remedied with further clarification or definition or amendments to the Acts. More significant were the various allegations raised about the behaviours of BCMs. Here the Committee relied on submissions only. Companies were not required to submit examples, nor did the Committee seek them. Many examples of the BCMs operating with a conflict of interest were given. This took the form of a personal and or financial relationship with the provider of services. The documents supplied to the Committee did not point to exceptions or small operators but to the largest BCMs operating in the State. Examples were BCMs giving maintenance work to a company owned by family or to a company that is in effect the BCM itself. Assertions that BCMs were breaking the law were treated with caution. It was difficult to disagree with assertions that BCMs were not breaking their own code of conduct. The Committee could not accept this behaviour as reasonable where there is no disclosure of these relationships to the owners and therefore denying them the opportunity to make informed choices. The Committee has recommended to the Attorney General that a program be implemented to ensure greater compliance with conflict of interest requirements.

The practice of adding a fee or percentage to a service that a BCM arranges was criticised by submitters to the Inquiry. The clients remain unaware of the practice as it is not disclosed. As BCMs are paid a management fee it was considered unreasonable to add anything more than a cost based fee for arranging services. Examples provided showed that one BCM was adding a 20% brokerage fee to insurance it arranged. The BCM was not a licensed insurance broker. Adding a fee to all insurance quotes is common practice. To the Committee these costs looked like commissions. Simply re-invoicing a quote to include money for the middle man, the BCM, cannot be viewed as acting in the best interest of the client. There is a danger that BCMs will favour a service provider that gives them the

highest commission. The Committee has recommended to the Attorney General that it become compulsory for BCMs to declare all fees, bonuses and commissions.

Necessarily strata corporations have bank accounts. Several submissions complained that the BCMs have moved to products that allow BCMs to keep the interest earned in these bank accounts. Unit owners were encouraged to avoid bank imposed fund investment fees and account keeping fees by adopting a new product. This product does not charge these fees but does direct the interest earned to the account of the BCMs own company. The counter argument is that the market can decide and the legislation provides trust accounting requirements similar to other acts. The Committee is of the view that transparency is the key as only then can owners make informed decisions and take their business to a BCM that represents good value.

The Attorney-General emphasised the need to consider if the STA will hinder infill development. Strata properties consist of a lot of older developments in need of maintenance and nearing the end of their economic life. They are ripe for redevelopment especially if near the CBD. Termination of strata schemes is difficult. Prior to the 2013 changes to the Act unanimous agreement was needed and if not forthcoming then the Supreme Court had jurisdiction. This in now the Environment Resources and Development Court. The interstate trend is to make it easier by lowering the majority needed for termination of a scheme. The Committee is of the view that the pressures for this method of infill will not be as strong in South Australia. Given the need for adequate protection for the (vulnerable) demographic and its costs the Attorney-General may be satisfied with status quo in the short term.

The answer to a lot of the questions posed and issues raised was; the South Australian Civil and Administrative Tribunal (SACAT). A lot of phone calls and submissions showed the need for an accessible adjudicator in this arena. The power imbalance between the strata unit owners and the BCMs needs a counter foil. As BCMs are unlicensed someone bringing them to account would be desirable. The Committee notes that the interstate trend is for the SACAT (equivalent) to be given this jurisdiction and this is the Committee's recommendation to the Attorney-General.

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THE ENVIRONMENT, RESOURCES AND DEVELPOMENT COMMITTEE

The Environment, Resources and Development Committee (the Committee) is appointed pursuant to the *Parliamentary Committees Act 1991* (the Act). Membership for the 53rd Parliament was proclaimed on 6 May 2014. Its membership during the reporting period was:

Hon Tom Kenyon MP, Presiding Member
Mr Steven Griffiths MP to 29 March 2017
Mr Eddie Hughes MP
Hon Michelle Lensink MLC
Hon Tung Ngo MLC
Hon Mark Parnell MLC
Mr David Speirs MP from 29 March 2017.

During the reporting period the Committee staff was:

Executive Officer: Philip Frensham.

TERMS OF REFERENCE

Pursuant to section 16(1)(*c*) of the *Parliamentary Committees Act 1991* the Environment, Resources and Development Committee is to review the effectiveness of the new provisions contained in the *Community and Strata Titles Act 2012*, specifically:

1. To review the operations of the Act,
2. To determine the effectiveness of the Act in addressing those issues that it sought to remedy,
3. To recommend any further amendments to the Act that the Committee considers necessary,
4. To investigate if an increase in infill development will require changes to the Act,
5. Any other matter,
6. To report by 3rd December 2015.

Adopted 26 March 2015.

1 Introduction

1.1 This report

Strata Titles have not been created since June 2009 when all new divisions became subject of the *Community Titles Act 1996* (CTA). Strata Titles existing before 1 June 2009 continue to be regulated by the *Strata Titles Act 1988* (STA) and the *Strata Titles Regulations 2003*.

This report provides the findings and recommendations of the Environment, Resources and Development Committee's Inquiry into the operation of Strata Titles in South Australia. The terms of reference suggest a narrow consideration of the impact of the 2013 changes made to the *Strata Titles Act 1988* and the *Community Titles Act 1996* by the *Statutes Amendment (Community and Strata Titles) Act 2012* (CSTA). The response to the call for submissions has dictated that Strata Titles more generally be adopted as the main focus. Often this has involved suggestions that the older STA adopt provisions in the more recent CTA.

The Committee received 22 submissions to its Inquiry and heard three oral submissions. A list of these submissions and the witnesses is provided in Attachments A and B. Copies of the submission to the Inquiry are available on the Committee's pages on the Parliament of South Australia website.

The terms of reference for the Committee were broad and submissions covered a wide range of topics.

2 Review the operations of the Act

This Section of the report addresses Terms of Reference number 1.

2.1 2013 reforms

The 2013 reforms followed a discussion paper in 2003 and a draft Bill in 2008. A revised Bill was released for consultation in 2010 and a Bill was introduced in Parliament in April 2011. In April 2012 the Bill was passed and assented to and the changes took effect from 28 October 2013; the *Community and Strata Titles Act 2012.*

The major catalyst for the 2013 reforms was a call to license Body Corporate Managers (BCMs). The Attorney General quickly took the position that as the market was small and self-managed that this was not warranted. The changes became focused on making the BCMs more "transparent" and dispute resolution. Fact sheets were produced and a new advice service was provided by the Legal Services Commission. Materials were sent to every BCM in South Australia. Despite advertising and some media coverage it seems the changes are not well understood by all stakeholders.

The reforms targeted such things as the disclosure requirements, the fees chargeable and made a "requirement" for a leaflet to be provided. Long term BCM contracts were outlawed. A fidelity guarantee was introduced. E (electronic) meeting were allowed and proxy votes become easier to terminate and now have a time limit of 12 months. By-law and article breaches became easier to enforce. Access to documents was a key focus, attempting to make purchasers of strata title property more informed and timeframes were provided for the provision of information. The issue of the deteriation of the old stock was addressed by requiring a sinking fund (in line with CTA) and a sinking fund plan. These aspects are discussed further later in the report.

The Attorney General in his correspondence of July 2015 stated that' "As far as officers can recall there's not shown to be any provision that is causing significant problems or not working as intended" (also Hansard p5). The general tone from the responses from government is that this is an area posing few problems. The Committee is of the view that the legislation (CSTA) addressed successfully many problems inherent in the Strata Titles arena.

The call for submissions to the Inquiry generated a lot of phone calls from individual strata unit owners. These calls were from people who did not want to go on the record for fear of retribution. They covered a wide range of topics. A common theme was that the BCMs were acting against their best interest. A lot of calls related to disputes that could be described as neighbour disputes or not within the purview of this Inquiry. What became clear from these calls and the submissions from individuals is that the area does have some serious problems.

One submission said that the 2013 changes were good but many problems remained:

> …I have found the changes to the law which were made recently to be helpful and sensible. However, I find that enforcement against those managers who offend the requirements of the law to be the most difficult area (submission 1 page 1)

The general consensus from the BCMs was that the legislation was doing its job and that only some refinement to improve practical considerations was needed. In their submission Adelaide and Strata and Community Management suggest that managing in this field is not an application of legislation and rules but facilitating people to best manage themselves. Mr Forby a manager with over thirty years' experience said:

> … provides a simple, sustainable, practical and affordable method for lot owners to manage their affairs. Mandating effective collective decision making is impossible.

> Organising people to make decisions in the interest of the group is a rare skill. Legislation should always aim to provide productive outcomes which really means enabling and encouraging (sic) people and organisations that provide assistance to owners in marshalling their resources and working to achieve consensus on issues that directly affect their lifestyle and the value of their material assets. (submission 6 page 1)

2.2 List of issues

The Committee adopted the approach of identifying the issues being raised in submissions and using them as a heading for discussion. The following section of the report considers the issues raised. Each heading briefly explains the problem, the views on the problem presented to the Committee and some discussion and recommendation for a course of action. One submission was short but concisely covered the main areas raised by owners of strata titled units. Submission 10 included:

> … all managers should be required to declare any interests that they have that may compromise the advice or service that they provide to a strata corporation. (as for the finance industry etc)
>
> Funds held should be in high interest accounts and benefit the unit owners, not the managers.
>
> Re-invoicing should not be allowed unless there is transparency, indicating any benefit/commission that is received by the manager
>
> Contractor registration is pointless as it provides no more guarantee of good workmanship or compliance. An independent building supervisor would be more appropriate to check workmanship and compliance with industry standards and codes.
>
> Access to records should be available for free electronically. Optionally, payment could be applied for hard copies only.
>
> Strata plans should be provided electronically for free when units are being sold, and the original document should stay with the strata manager.
>
> Exit fees should not be payable when changing managers, especially if the change is due to lack of performance by the manager, or fee increases.
>
> SACAT would be useful as long as it is available quickly, economically, and has legally binding power, along with someone responsible to follow up that the resolution has been successfully implemented or enforced. (submission 10 page 1)

2.3 Body corporate managers (BCMs)

There is no compunction for professional management of strata complexes. The more units in the complex the greater the likelihood of a BCM being engaged. Many small and medium BCMs operators have been bought out by competitors over the last 20 years. Often expressed was the scenario of existing office holder becoming “too old” for the task and then engaging a BCM. The trend is for the percentage of strata corporations under BCMs to increase and for BCMs to become fewer and larger.

There is a clear and loud message from strata owners that they feel that BCMs are not representing their best interest. The factors that make this possible is the dominance in the market of a few BCMs with similar fees and operating practices. Many owners are investors and do not want to take an active interest in the management of the strata. Minimum “hassle” is desired. This provides an environment where practices that would not be acceptable in other businesses become prevalent. Submission 13 makes a convincing case that the owners feel they have lost control and their rights under the Act to the BCMs. (submission 13 page 2)

One submission summarises and represents the feelings of many; "…We had absolutely no idea what total turmoil we were in for when we agreed to let our Presiding Officer (who is ill and can no longer Manage our Strata Corporation) engage [company name supplied] as our Strata Manager." (submission 19 page 1)

There needs to be a level of engagement by owners in order to understand the requirements of their body corporate. It was explained that owners (and tenants) of strata units were often people not equipped to best defend their own interests. Various reasons were put forward, such as age or social economic status. The Committee agreed that the cohort includes vulnerable people and that there is a power imbalance. There is an inequitable position favouring the BCMs. (submission 20 page 2) This is supported by:

> However our ignorance of the underhanded tactics of Strata Management firms is no excuse and what we must do and all we can do is try to help improve the existing legislation, so that others do not have to experience the same all-consuming (emotional, financial and time) rollercoaster ride that we are regrettably still riding. (submission 19 page1)

2.4 Licensing of BCMs

Callers and submitters claimed that the BCMs did not know or understand their obligations. There are no minimum training standards. There was a call for a level of professionalism. One submission said:

> Strata corporation agents and unit holders' agents do not appear to be well-versed about the STA – or RTA. At a minimum they should be required to study and be examined about the STA – and RTA, comply with a code of ethics and undergo continuing professional education as part of a licensing system. (submission 20 page13)

The catalyst for the 2013 changes was the argument that BCMs should be licensed. These were discounted and not included in the Bill because of the then pending National Occupational Licensing System (NOLS). This system was abandoned leaving the question; in the absence of NOLS does the current system address the arguments originally put?

In the Attorney Generals response (23/1/215 p 4 1) he suggests that licensing is cost prohibitive because the market is too small; he argues that "over half of corporations are self-managed with no qualifications etc. required, so it might be argued no qualifications are required for managers" ; 4). He also advises that "A Regulatory Impact Assessment would be required".

The Committee agrees that on balance a licensing and an over prescriptive approach is not warranted. It would be a sledgehammer to the acorn approach. However the issues raised with the Committee demonstrate that a more effective and equitable system is needed.

2.5 Meetings

Accounts of meetings varied. The Committee was told of very amicable self-managing groups who discussed each other's proposals and resolved issues in an amicable way. Not necessarily as envisaged by the Act but everyone was happy. Those with BCMs may have a large silent majority who do not have any particular complaint of the services received from their BCM. There is evidence of meetings that are rushed, do not have complete information available and are deficient in other ways. One submission listed some of these deficiencies:

> All matters to be discussed , including nominations and proposals, should be included, in the general meeting notice, some members will exercise postal votes — these should be available and listed at the General meeting so that they cannot be manipulated." (submission 13 page 7)

2.6 Management Contracts

The BCMs suggested that 3 year management contracts for new development would be beneficial. The 2013 amendment made changes, explained by the Attorney General as follows:

> The Statutes Amendment Act brought in protections against practices whereby purchasers in new developments inherited long-term (reportedly up to 25 year) management contracts - often grossly in favour of the manager and against owners' interests - entered into by developers (who 'sold' those agreements to the highest bidder to benefit the developer. Any management contract with a term over 1 year can now be terminated after it has run for 12 months, with a notice period.
> 3 year contracts are not prohibited, but the body corporate can terminate after 12 months (see attached copy provisions).
> It is relevant to note that body corporate managers are 'agents' of the corporation; that under the CTA prior to the amendments, a corporation could revoke a delegation of functions to a manager at any time. (Attorney General 23/12/15 page 8)

2.7 Complaint handling

The handling of complaints was the issue most often raised with the Committee (certainly the most emotional). Complaints were of two types; problems between occupiers in need of resolution and disputes and complaints with the BCMs. The impression gained is that service delivery is patchy and subject to considerable complaint. Many submission do not directly relate to strata legislation or regulation but are pleas for help for disputes that do not seem to find a resolution. Other jurisdictions have a clear path towards dispute resolution. This is not proving to be the case for owners and tenants of strata titled property in South Australia.

Existing services seem to be failing the most vulnerable. People say that they raise concerns with BCMs but feel they are dismissed or outvoted. Scant notice is paid to their problem, it is ignored as not important or relevant to the business in hand. If the majority disagree the complainant is left feeling very aggrieved. There can be misunderstanding about the correct forum for a complaint. Examples provided show they may be referred to the correct agency to help them but this does not solve their problem. One submitter in frustration wrote to the Minister: The submission included: "… The Attorney-General John Rau advised that all problems with Strata Companies should be submitted to the Legal Services Commission for assistance. However, when one contacts the Legal Services Commission, the staff request the Minutes of the Meetings which, of course, do not indicate what actually occurs at any meetings". (submission 4 page 1) The frustration of some was that they could not get their issue on the agenda let alone in the minutes. The Legal Services Commission is unlikely to be the solution to problems not legal in nature or those that could and should be resolved before they become a legal dispute.

Many of the phone calls and several of the submission related tales of conflict about who can do what in the strata's common property such as carports. There are allegations of bullying and failure to resolve disputes often with the BCMs painted as part of the problem. For example: "For over two years I have been attempting to resolve issues through the Community Mediation Service [There have been repeated refusals to mediate.] the Legal Services Commission and formal letters from a Solicitor. Police have been involved, but say there is

not quite enough to warrant an Intervention Order. In the meantime, my quality of life and health are significantly impacted." (submission 18 page 1) This submission also highlighted the particular demographic that is suffering. "While I understand that my situation is at the extreme end, I know that many [particularly older] people [particularly women] are experiencing similar violations of their rights to peaceably enjoy their units". (submission 18 page 1)

2.8 Majority rules

Democracy is a demon for some unit holders. One submission told of the problem where two of the three unit holders ran the Strata Corporation and ignored the issues of the third. Submitter 7 said, "Previously a Management Committee was formed by representatives from two of the Units. Any meetings held were not recorded, nor was any information presented at the Annual Strata meetings. This meant one Unit holder had no idea what decisions were being made and was oustrasized (sic) completely". This person reports that she went to court in order to have her serious issue addressed (the presence of termites). Having to get court orders to address issues seems extreme and unnecessary and "…is time consuming and expensive. The seriousness of termites present, or other matters of a serious nature, need to be dealt with promptly without having to wait for a court date." (submission 7 page 1)

A lady owner of one of 14 units said: "…that they were repeatedly bullied by two separate resident owners who have dominated management for many years" (submission 18 page 1)

The Committee was sympathetic to the situation that these people find themselves in. The system produces winners and losers in that the majority decision can leave a disgruntled minority (often one individual). A win win situation is not going to occur. The owner of the most immediately effected unit will want some action taken whereas the others will not want the expense. Examples can be simple things such as a fence or gate in need of repair used by one person and not others and so not being a high priority for the majority. It may be the case that no universally accepted solution can be found but a system that has an umpire's decision will be more palatable.

Another submitter could not find a way to resolve disputes and called for an authority that could help: "… without having to go to court, or to the strata manager, because they are incapable of enforcing compliance, due to the current legal system." they went on to say, "…my main complaint with owning a strata property is the lack of simple, workable solutions, with a clear and concise process, to achieve a mutually satisfying solution for the majority of owners. Whilst I would've previously assumed that a strata manager has the power and authority to enforce the corporations rules, my recent experience has shown this to be far from the truth. In my opinion, there is an urgent need for a central authority to resolve issues between owners simply and efficiently". (submission 10 page 1)

Other jurisdictions are moving away from a pure legal framework for dispute handling. For example Western Australia has recently provided faster and simpler ways to resolve disputes by granting the State Administrative Tribunal (SAT) increased powers and responsibilities. (Landgate StrataTitlesActReform@landgate.wa.gov.au)

2.9 SACAT

The impression gained is that many do not know who to take their complaint to and only in the most severe circumstances seek help. Further that once the dispute has escalated to the point where people do seek help owners are told to take the matter before a magistrate. These

features combined with the power imbalance working against strata title owners in favour of BCMs leads the Committee to recommend a more accessible dispute resolution process. This was expressed in the first submission received: "…enable action to be taken more easily when a managing agent attempts to drive a coach and horses through the law to enhance their own benefit." (submission 1 page 1)

The South Australian Civil and Administrative Tribunal (SACAT) is now operational but not accessible to strata unit holders. Making SACAT the "umpire" is suggested by many of the submitters: "It strikes me whilst many of these disputes would be complicated matters of law, many of them would effectively be neighbour disputes… tribunal might be a better place". (Hansard page 5)

The author of submission 8 in his submission made the points in favour clearly:

> Currently disputes are heard in the Magistrates Court. This not only burdens an already stressed Court system but is a barrier to unit owners, many who have never dealt with a court and are very reluctant to make an application. The Magistrates Court (small claims) is not a court of public record and as such decisions are not published. One of the challenges for unit owners and BCMs is how to interpret the strata and community titles acts.
>
> SATAC is we understand going to publish its findings. This is the case with VCAT in Victoria and is a great resource for BCMs and unit owners. The President of SACAT, Mr Greg Parker, is a member of the Supreme Court. SACAT has advised us that his honour will be available for appeals at a cost of $500. This provides a simple and low cost option for the resolution of disputed rulings. (submission 8 page 26)

The role of SACAT could extend beyond dispute resolution. Body corporate managers are not licensed or regulated. The SACAT would be a useful tool for making BCMs accountable for their behaviour.

The Attorney General is not of the view that SACAT is an appropriate forum/jurisdiction:

> I confirm that community and strata disputes are not currently proposed to be transferred to SACAT as part of its staged establishment. The Alternative Dispute Resolution focus, low cost and informality of SACAT may be suited to these types of disputes. However, the Government is concerned to ensure that conferral of any particular jurisdiction on SACAT not compromise SACAT's characterisation as an administrative tribunal rather than a court. Further, any transfer would need to be subject to resource considerations. (Attorney General 23/12/15 page 1)

The Committee is of the view that disputes do need to be resolved and the current process is not working. The experience in other jurisdictions has resulted in making SACAT the jurisdiction for these disputes.

Recommendation: the Committee recommends that the Attorney General amends the Strata & Community Titles Acts to give jurisdiction to SACAT for disputes.

2.10 Incompatible or conflict of interests

Many submissions commented on what appeared to them to be a conflict of interest with a BCM having a personal or commercial arrangement with suppliers of goods and services. Documentation was supplied from multiple sources detailing these (questionable) arrangements. BCM A[1] gave an example, supplied in the capacity of a BCM, of the activities of another BCM B (BCM A). The issue is of co-ownership of companies. In this case it related

[1] From this point forward, often names though supplied, have been replaced with a generic identifier.

to BCM B being owned by a maintenance company they are co-located. The relationship is not advised to clients. Allegations of overcharging have been made (BCM A).

This example and others raise a lot of questions. Does this behaviour breach the Strata Community Australia's (SCA) Code of Conduct which is binding on its members? This BCM is a long standing member. The SCA code of ethics states that a BCM must:

> *Act ethically.*
> *Act honestly, be straightforward and sincere.*
> *Be objective, fair and not allow prejudice or bias to override that objectivity.*
> *Be and appear to be free of any interest, which might be regarded as being incompatible with integrity and objectivity.*
> *Act in a lawful manner, and comply with the law as may apply from time to time.*
> *Act at minimum in accordance with the generally accepted standards of their industry, and carry out their work in accordance with the technical and professional standards relevant to that work.*
> *Perform their duties diligently and with competence, maintain their level of competence, and only undertake work which they reasonably expect to be able to complete competently and in a timely manner.*
> *Disclose and deal with conflict of interest issues in an open and fair manner, and not pay or accept secret commissions, either directly or indirectly.*

The code also states that the manager has a fiduciary relationship with the unit owners. BCM B may have breached Section 78d of the Community Titles Act and Section 27d of the Strata Titles Act.

> Community & Strata Titles Acts - Offences
> (1) A delegate of a community corporation who has a direct or indirect pecuniary interest in a matter in relation to which he or she proposes to perform delegated functions or powers must disclose the nature of the interest, in writing, to the corporation before performing the functions or powers. Maximum penalty: $15,000.

The Committee was concerned at the number of allegations, many of which were accompanied by supporting documentations. The allegations of conflict of interest were against the larger BCMs; not a couple of very small players in the market. Another example provided demonstrated that:

> [BCM C] is one of the largest BCMs in South Australia.
> They send client maintenance work to a related firm. In this case [Maintenance B], previously sharing the BCMs name. In addition [BCM C] have other related businesses, a debt collector and a building consultancy. The address for all is the same. This is the postal address for [BCM C]. Owners do not get to sight contractor invoices. BCMs are not required at law to supply them to the body corporate committee or owners before payment. (BCM A)

Owners should be aware of these relationships at least so that owners can make informed choices. (BCM A)

Conflicts of interest range from office holders giving work or payments to family members and or providers where they have an interest to very large (largest) companies assuming control (ownership/co-ownership) of related services. Submission 13 provided pages of documents with examples of practices with a prima face conflict of interest.

Several submissions made the point that at least they could have been told of these arrangements so that an informed choice could be made. Owners may have been convinced that that they were getting good value for money or reliable service by these providers but did not get the opportunity to make that decision. In submission 10 they made the point: "It would have been extremely beneficial to have clear and transparent fee proposals from the

prospective managers, declaring any vested interests they have in relevant service providers for maintenance, insurance, finance, etc." (submission 10 page 1).

Submission 13 joins in the call for transparency: "Copies of Insurance policies with detailed information regarding coverage, valuation of property, Officers insurance who is it with; public liability, what coverage do we have. All this information should be readily available, transparency." (submission 13 page 7)

One submission posed the question; "Should BCMs be prohibited from any ownership or commissions or related party interest in suppliers of maintenance services?" (BCM A) This can be seen as a step too far. Businesses will legitimately want to expand into related fields (horizontal and vertical diversification). The business in attempting to make itself more profitable or competitive cannot be allowed to bypass legal requirements, such as disclosing interests.

The Attorney General points out that "The pamphlet is required to set out "the right to be informed of any payment that the manager receives from another trader for placing the corporation's business" (see attached provisions re commission/conflict disclosure)." The Attorney General states, "Arguably the existing conflict disclosure provisions cover what is proposed". (submission 17 page 3)

The Committee agrees with the Attorney General's position that the current laws and guides adequately cover conflict of interest disclosure requirements. Regrettably it also apparent to the Committee that these provisions are failing those the provisions are designed to protect.

Given the demographic and the spread of practices in the industry it is unrealistic to expect corporations or unit owners to police or check their BCM for compliance with state and federal laws. It is reasonable to expect that a government authority ensures compliance with the laws of the land. Self-regulation has not led to a good outcome for owners. Routine, say annual checks seems prohibitively expensive. At the least owners should be informed of any related party associations and commissions in the contract of appointment but also when any payment for service is proposed. Disclosure is required.

In considering the cases provided the Committee determined that the practices the BCMs are engaging in may or may not be legal but it is apparent that clients of BCMs do not know or appreciate that they are paying a premium to use services linked to the BCM. Transparency could possibly be a large part of the solution to the allegations arising. It may be the case that the majority of owners are just saying yes to BCMs because it is the easiest option when asked to; change the banking practice, insure with a company or accept a maintenance service. The owners more involved (usually owner occupiers) would be reassured if that the decision made or recommended by their BCM was "transparent"; had options costed and alternatives.

Action is required. Contacting all BCMs and advising of requirements in this area is not an insurmountable task. Contacting all strata tile unit owners is more difficult. Making information available is easy but not necessarily effective. Unfortunately the current situation seems to require a carrot and a stick. A motivation for BCMs to engage in behaviours more akin to the spirit of the legal requirements is needed. An education campaign alone of existing rights is not the answer. A government agency (such as SACAT), needs to have a role in routing out questionable practices and providing a forum for the reporting of abuses.

Recommendation: the Committee recommends that the Attorney General commence a program to address BCMs non-compliance with conflict of interest requirements.

2.11 Middle man

Akin to the conflict of interest issue raised in many submissions is the practice of BCMs acting as a "middle man". This is the practice of adding a fee or percentage to a service secured by the BCM. This is primarily for insurance and maintenance services. BCMs may suggest that acting as a facilitator or broker attracts a fee in other fields of endeavour. This claim is usually accompanied by a demonstration that value has been added to the transaction or that it is an administrative charge only. Others argue that the existing management fees are for the provision of just these services. The evidence suggests that adding a fee to insurance quotes renewals is common. The BCM purports to act as broker when in fact they are not a licensed insurance broker. One example invoice (BCM C), supplied via BCM A, showed the BCM C receives a 20% agent's fee from the insurer. The submission posed the question, is it: "… improper / bad faith / breach of code of conduct to reinvoice". (BCM A)

The Committee considers that for all services the original quotes for service should be supplied. BCMs should advise their clients that they re-invoice insurance premiums or when adding a further fee to any service. Further, the problem encountered in other industries where advice or selection of providers is based on the amount of commission is avoided. The practice needs to change so that the informed client can decide if the total service fee is fair.

Recommendation: the Committee recommends that the Attorney General makes it compulsory for BCMs to declare all fees, bonuses and commissions.

2.12 Access to documents

Phone calls and anecdotal evidence from owners contained the complaint that BCMs advised that the Privacy Act prevented them providing information. Mr Amber was of the opinion that the "…the treatment of Owners personal and private information is significantly at odd with Federal and State Privacy Legislation (submission 9 page 1). He called for clarification between the "conflicting" legislation requirements", namely:

> Community Titles Act Section 139 (1) (e) states that the Owners Register must be made available inspection with 5 Business days. Section 78D (7) (b) states that a copy of the record must be made available within 10 business days.
> Strata Titles Act Section 41 (1) (e) states that the Owners Register must be made available inspection with 5 Business days. Section 27D (7) (b) states that a copy of the record must be made available within 10 business days. (submission 9 page1)

Some strata managers have been charging excessive fees for allowing authorised persons access to corporation records. BCM A said that: "This inhibits a manager's transparency in their actions. He provided an example from BCM C

> Section 139 and 41 documents are for search documents for the sale of lots and units. The fees are regulated by the Parliament. A section 41 is regulated at $50+gst. An update for levies owing and financials is ½ that cost at $25+gst. The total is less than the $95 BCM C is asking for just 1 search + a later update (BCM A)

Recommendation: the Committee recommends that the Attorney General ensures that document supply fees be regulated to ensure access for all regardless of means.

Recommendation: the Committee recommends that the Attorney General ensures that (allowing for an exemption of BCMs below a certain threshold) BCMs should make all corporation records available online for all officers to access.

2.13 Access to the management contract

Some expressed difficulty in accessing the management contract. This seems adequately covered by the legislation. An owner or prospective owner can apply to view a copy of the contract (STA ss 27D(7) and 41). Under s27D a copy must be provided upon payment of a fee.

2.14 Owner details

Some submissions raised the problem that BCMs would not provide full owner details when a change of management is mooted. This seems adequately covered by the legislation. The Attorney General explained that there is a requirement to provide these details: "…requires register of owners to be made available for inspection; register is required to contain owners' contact details. This is a corporation record (and records used to compile it are also) and there is also a requirement to provide copies of corporation records to owners upon fee payment" (Attorney General 23/12/15 page 5).

There is a problem not confined to this area, a community wide problem where information is denied based on a misinterpretation or misunderstanding of the Privacy Act or Information Privacy Principles (IPP). Providing a list of owners details does not offend the IPP. (Attorney General 23/12/15 page 7)

2.15 Strata or community title plan

There was some frustration expressed from people who had difficulty accessing the plan of their complex. The Committee considered that on purchasing a unit the plan should be available and that easy access may have helped disputes. A clear understanding of property rights and the common property provided by a plan could resolve disputes before they escalate. Fights about carports (featuring highly) in particular could be lessened.

Plans are "available" but in the Committee's opinion need to be placed in prospective purchasers' hands and be readily available to owners. This was explained in the submission from the Attorney General:

> The Land and Business (Sale and Conveyancing) Act requires disclosure of certain information to buyers of community or strata titled properties. This does not refer to the strata plan though it includes the scheme description and development contract for community schemes.
>
> STA s 41. already requires the plan to be made available for inspection (per ST reg 11(1). There is no equivalent requirement under CTA s 139/ CT Regs (i.e. no equivalent to ST reg 11(1)). This oversight should be fixed.
>
> Information from the LTO indicates that the plans are now readily available electronically as part of a title search, but this is an extra option that needs to be selected when ordering a search. There might be benefit in requiring the plan to be provided, as opposed to 'made available for inspection' as in the case of Strata titles as part of strata and community property searches. This may also require amendment to the LaB(SaC) Act. (Attorney General 23/12/15 page 6)

Recommendation: the Committee recommends that the Attorney General ensures that plans of the strata and community title are included in sale documentation.

2.16 Audit of accounts

Submissions posed questions about accountability of BCMs. BCMs are accountable to their clients. Normal financial practices apply to BCMs regarding auditing. Some clients were concerned that BCMs are not complying with the legislation and "someone" needs to check on them. Some submissions suggested that OCBA audit the books or do spot checks to ensure compliance. The Attorney General was not supportive of the notion of expanding the Auditor's role to check compliance with legislation. He argued that the financial ledgers are provided to the office holders and the 2013 amendments tightened requirements for auditors of BCMs. He provided:

> Auditors' expertise unlikely to extend to detecting compliance with legislation. This would likely significantly increase costs to unit owners and there is no clear precedent for this (e.g. no equivalent requirement for land agents, etc). Recent changes to increase accountability and transparency of managers (in particular around providing information to the corporation and owners) are designed to help owners to monitor compliance are considered sufficient. (Attorney General 23/12/15 page 3)
>
> The Act contains: STA Reg 22—Certain persons may not audit accounts and records of agents
> A person must not audit the accounts and records of an agent if the person—
> (a) is, or has been within 2 years, an employee or partner of the agent; or
> (b) is an employee of another agent actually carrying on business as an agent; or
> (c) is, himself or herself, an agent carrying on business as an agent. Maximum penalty: $500.
> Auditors must be registered company auditors under (Cth) Corporations Act: STA s 36B — auditor independence is regulated under the Corporations Act. (Attorney General 23/12/15 page 5)

The Committee agrees with the Attorney General's position. The cost of establishing an audit for compliance is not justified and the provision of information to owners is sufficient so they can monitor compliance. The Committee thought that ledgers could be supplied to the Office Holders via the BCMs website.

Recommendation: the Committee recommends that the Attorney General ensures that financial ledgers be made available to the Treasurer of the strata corporation via the BCMs website.

2.17 Bank interest

Several of the submissions complained about their BCM taking actions that resulted in them getting less interest from the bank than they used to. Submissions suggested that BCMs were favouring practices that resulted in interest being paid to the BCM rather than the Corporation. For example: "…keep the sinking fund money in the account to gain interest for themselves". (submission 2 page 1)

The more frequent complaint was the arrangement made by the BCM with banks. Essentially the BCMs encouraged the adoption of a product from the bank that was fee free with less emphasis on the fact that the interest earned would now go to the BCM businesses.

The Committee had no way to determine how many unit owners were aware that they had agreed to forgo interest from their trust account in favour of a fee free account. It may have

been the intention of the BCMs to offer a simple service that was beneficial to most of its clients, or did not extraordinarily benefit the BCM. Time has shown that a substantial amount of money has flowed from the Corporation to the BCMs under these arrangements. Mr Russell in his submission and oral presentation provided some figures as to the amounts involved. In his presentation to the Law Society in 2009 he estimated some $42M in funds and some $2M held interest not going to owners. (submission 8 page 4)

An example supplied to the Committee demonstrated the extent of the financial loss to owners. One person with interest in four properties gave the interest earned on the accounts of four properties as $41,640. The bank fees totalled $1,325. The Committee is certain that owners given the choice would elect to pay the fees and receive the bank interest. (submission 8a page 2)

Whatever the motivation to move from existing banking arrangement and whoever gains the most from the arrangements made by BCMs; it is difficult to argue this is in the clients best interest. Legal requirements may have been satisfied to ensure BCMs do not breach Section 78d of the CTA and Section 27d of the STA:

> Community & Strata Titles Acts - Offences
> (1) A delegate of a community corporation who has a direct or indirect pecuniary interest in a matter in relation to which he or she proposes to perform delegated functions or powers must disclose the nature of the interest, in writing, to the corporation before performing the functions or powers. Maximum penalty: $15,000.

One submissions told of the difficulty for strata corporations to be informed of these arrangements. (submission 1 page 1)

The Attorney General is of the view that this issue should be left for the market to decide (Attorney General 23/12/15 page 3). He feels that "…extent that managers take proportion of interest earned as 'investment fees' this is considered to be the managers' cost-recovery model" The Act is considered adequate in protecting client funds as the requirement to adhere to Trust accounting requirements are the same or similar as found in other Acts. (Attorney General 23/12/15 page 3) It can be argued that transparency is the key so that owners are aware of all charges. The relevant sections are: [STA s27B(3)(e), CTA s78B(3)(e)]

One submissions called for the Committee to make a recommendation on interest in bank accounts, to the effect:

> That BCMs be required to ensure that their clients' funds are invested with an ADI to ensure the maximum return of interest. This will need to take account of day to day recurrent needs versus surplus funds that can be invested in a term deposit. (submission 8a page 2)

If bank account management fees are waived in lieu of paying interest it may not be to the detriment of the BCA's clients. It may be lawful but a policy response is needed to ensure that people are not being misled in thinking that they are gaining an advantage when in reality foregoing hundreds or thousands of dollars in interest. Certainly in a situation where the foregone interest becomes a bonus to the BCM.

2.18 Trust accounts

The Committee received several complaints of unauthorised transactions from trust accounts. It is alleged there was no approval from management committees or a general meeting of body corporates.

The 2013 changes, see s270(5)/CTA 780(5), greatly augmented transparency and accountability. The attorney General advised that:

> A delegate of a strata corporation must, on application by a unit holder, provide the applicant, on a quarterly basis, with a statement setting out details of dealings by the delegate with the corporation's money (and must continue to so provide the statements until the applicant ceases to be a unit holder or revokes the application). Also requirement for self-managed corporation to send out copy bank statements on request: STA s 41 / CTA s139. (Attorney General 23/12/15 page 4)

2.19 Quorums

The relevant Act deals with inquorate meetings in the following manner:

> If a quorum is not formed within half an hour of the time appointed for a general meeting of the corporation-
> (a) the unit holders present must appoint another day for the meeting, being a day at least seven days but not more than 14 days away; and
> (b) the meeting then stands adjourned to that day at the same place and time; and
> (c) if the quorum is not formed at the adjourned meeting within half an hour of the relevant time, the persons who are present and entitled to vote constitute a quorum. (Strata Titles Act 1988 s 33 (6))

The difficulty in achieving a quorum was strongly presented in submissions. Contained in the submission from the largest BCM was the statement that "…The current system creates avoidable costs and significant inconvenience for up to 50% of Corporations due to the need to constantly reconvene General Meetings." (submission 9 page 1) He advocated the position of many of the BCMs to call the meeting quorate with the people that do attend after 30 minutes. (submission 9 page 1)

Submission 8 gives an example with a similar reasoning. "A group of 10 units has 4 owners present in person or by proxy at its annual meeting. All owners with emails have received a reminder. The meeting waits 30 minutes then they leave as no quorum was achieved. The committed owners who took the time to turn up are rewarded with a waste of time and often a wasted evening. He suggested an alternative:

> The meeting proceeds inquorate. All decisions are made subject to the circulation of the draft minutes and the reconvened meeting. All owners then receive a copy of the draft minutes with a proxy form enabling them to agree to the minutes.
> The meeting is reconvened in accord with the current legislation. The benefit is that the owners who attended the 1st meeting are rewarded for attending and in future years will be more willing to attend as it is not a waste of time. (submission 8 page 18)

Mr Affleck also suggested that BCMs could simply declare a quorum after 30 minutes irrespective of attendance - perhaps after increased period of notice for meetings. (Hansard page 25). The Committee considered that this did not provide the appropriate rigour and would have a greater risk of reducing transparency of decision-making.

The Attorney General raises the concerns that determining the level of objection that should prevent an interim decision becoming final may be difficult. Adopting an 'interim decisions' at inquorate meetings that become final if no objection after period of days model similar to the Victorian model may be appropriate.

> VIC legislation provides interim becomes final decision after 29 days except where notice of special general meeting is given - which in turn can be given by a lot owner with support of 25% of others. Issue was not raised in consultation on Amendment Act! nor has it previously been raised as a concern as far as I am aware. However, there seems to be a level of agreement amongst managers that this is a problem therefore

there may be merit in exploring the Victorian model. (Attorney General 23/12/15 page 7)

The Committee noted that the 2013 changes allow owners to vote electronically. Attendance by telecommunication devices (phone or Skype) are desirable. (Changes to STA s 33 Holding of General Meetings (CTA s83(6a))

Recommendation: the Committee recommends that the Attorney General amend the legislation to allow for inquorate meeting subject to ratification at a reconvened meeting.

The Committee is aware that the quorum requirements for the STA and CTA are different. The Attorney General advises that he is of the opinion that "quorum is more easily achieved under STA. (Attorney General 23/12/15 page 7)

Recommendation: the Committee recommends that the Attorney General make the quorum requirements for the STA and CTA the same.

2.20 Buyer information/ Consumer awareness

Submitter 12 commented that real estate agents "…advertise that the purchase of a unit is an easy way in which young people can make a simple entry into the property market" He then cautions that these same people may not have the resources to meet the costs of pending maintenance. He also points out that many strata units are old and need maintenance. (submission 12 page 1)

Buyers need to be made aware of the obligations peculiar to strata title ownership. This has been improved in recent times by the real estate agents providing information as part of the Form 1. The Attorney General addressed this point:

1. Introduction of the Div 3 notice in the Form 1 (aka s.7 / vendor's statement) that is provided to all prospective purchasers of community or strata titled property (see attached copy). This is in addition to the existing disclosure requirements in the Form 1 re strata and community titled properties.
2. Introduction of the new Form R3 Buyers Information Notice agents must make available at open inspections and attach to the vendor's statement, which includes the following point:

• Is this property a unit on strata or community title? What could this mean for you? Is this property on strata or community title? Do you understand the restrictions of use and the financial obligations of ownership? Will you have to pay a previous owner's debt or the cost of planned improvements?

3. Funding for a free telephone Strata and Community Advice Service operated by the LSC. (Attorney General 23/12/15 page 7)

The sinking fund levies disclosure is required on the Form 1. Prospective purchasers would be better informed, not caught unawares, if they were also provided with a copy of the now mandatory sinking fund plan. Anecdotal evidence suggest a few people only learning of large planned expenditure after settlement.

Recommendation: the Committee recommends that the Attorney General require corporations to include the sinking fund plan in their (STA s41 / CTA s 139) disclosures to prospective purchasers.

For new developments developers are required to provide documents to the new corporation after it sells the first lot (CTA s. 80). The Attorney General muses that "It is not clear what

additionally should be disclosed by developers to purchasers of lots in new developments over and above the existing requirements under the LABSAC Act and CTA. … A search of interstate legislation may identify worthy options for consideration. For example, further disclosure requirements for sales of lots 'off the plan' may be beneficial". (Attorney General 23/12/15 page 7)

2.21 Fees and costs

Search Fees are set by the STA and CTA. (STA reg 11/ CTA reg 25) This fee cap has proponents for an increase (Affleck, Hansard page 28) and others saying it is excessive. (Submission 8 page 19) The Committee did not form an opinion on setting the fees other than leaving the current method of setting fees as they are. There is a need to limit extra or additional fees being charged by BCMs. For instance the practice of charging a premium for provision of documents in short time frame needs to be on a plus cost basis only.

Recommendation: the Committee recommends that the Attorney General require Body Corporate Managers provide Documents (subject of fees) on a cost only basis.

2.22 Exit Fees

The practice of discouraging or punishing people from choosing to leave and take their business elsewhere is anti-competitive. These "hooks" should be limited to those listed in the management contract. One submission said: "…it should be made unlawful/illegal for any managing agent to impose an exit fee in the event a corporate body decide to terminate their contract if the body corporate believes the managing agent is failing to carry out its duties" (submission 5 page 1)

With fees clearly scheduled it is fair to say the market can decide which BCM is offering the best management package, as long as all charges are made apparent before engagement. The market will decide whose schedule of fees is reasonable.

2.23 Contractor credential verification costs:

Added rigour in the engagement of contractors is accepted as good business practice. Some BCMs are charging unit owners for an external agency to check contractor credentials. With managers using a small pool of contractors it is reasonable to conjecture if there is a less costly method. Questionable practices include, taking a commission from contractors before paying their accounts, paying a fee for the verification service when engaging the same contractor routinely. This later practice if combined with a co-ownership arrangement is particularly dubious (see conflict of interest).

Less costly alternative include BCMs paying to check manager's contractors; undertaking the verification using OCBA's or ATOs websites and seeking current insurance details directly from contractors.

2.24 Fidelity Guarantee Insurance

Prior to the 2013 amendments there were calls for indemnity insurance. An indemnity fund that would protect the owners against the risk of the BCM stealing the funds was discounted by the Attorney General. The risk that the elected officials would run off with the funds seemed

low as the trust funds hold the cash. So fidelity guarantee insurance was seen as “a low cost (a free add on to current policy) insurance for the risk involved”. (Hansard p5)

The Attorney General provided:

> ST Reg 9—Other insurance by strata corporation (CTA Reg 16C)
> (1) For the purposes of section 31(2) of the Act, insurance cover for liability in tort must be for at least $10 000 000.
> (2) For the purposes of section 31(2a) of the Act—
> (a) a policy of fidelity guarantee insurance must insure a strata corporation in the amount of—
> (i) the maximum total balance of the corporation's bank accounts at any time in the preceding 3 years; or
> (ii) $50 000, whichever is higher;
> (a) strata corporations with no administrative or sinking funds are not required to maintain fidelity guarantee insurance. (Attorney General 23/12/15 page 6)

His comments on this section were:

> The objective is to tailor the impost to the level of risk so that groups holding large fund balances are adequately protected (if group holds $1m in a sinking fund then $100k cover would not adequately address the risk). One way to simplify the requirement, however, might be to make it clearer when the 3 years runs from e.g. 'during the 3 preceding financial years'? (Attorney General 23/12/15 page 4)

2.25 Indemnity Fund

As seen from the section regarding fidelity guarantee insurance, compulsory fidelity guarantee insurance was adopted in the Amendment Act instead as a lower cost option.

2.26 Lots

Submitter 11 provided an example of one lot or lots feeling they are bearing an unfair burden or share of the costs. In this case a group of 8 have to pay the maintenance cost for a driveway used by a much larger group due to a (historic) covenant to allow access to the larger group. They own and have to pay for the upkeep but the use and damage is from the much larger group of units. (submission 11 page 1) They have not been able to determine a solution under the current framework. The legislation provides for changes to the lots and distribution of costs but this process can be viewed as too cumbersome or expensive. The phenomena described previously where many owners want rent and no “hassles” will opt for a short term view or simply sell rather than address such issues.

2.27 Lot Insurance

Submission 8 raised the concerns he has with lot insurance:

> The CTA permits non strata community corporations to insure lot owner’s homes. Lots on a non strata community title are owned in total by the lot owner. That is, they own the land underneath and all that is built on the lot. Some insurance firms do not identify the individual lots and their value on their policies. These policies have been designed for strata titled groups where the body corporate owns the buildings and land. The big risk for the body corporate and lot owners is that a claim that relates to one lot may not have sufficient cover leaving all owners jointly and severally liable. (Submission 8 page 20)

The Attorney General suggest that the problems raised in relation to “Collective Community title lot insurance ie - insurers not recognising individual lots' coverage in policies may be remedied by informing the Insurance Council of the problem so that individual insurers can change their policies.” (Attorney General 23/12/15 page 2)

Recommendation: the Committee recommends that the Attorney General engage with the Insurance Council seeking changes to policies for the recognition of individual lots.

2.28 Insurance

The Strata Community Insurance submission warns of the need to have a level of insurance that covers the uncapped nature of the liability (submission 15 page 1). They recommend a compulsory valuation every three years. (submission 15 page 2) Here the professional role of BCMs is important as they should be able to advise owners of the requirements and appropriate levels needed. The SCA requires replacement value is insured. (Div 4 Part 3 STA)

The Strata Community Insurance (SCI) submission stated that: “…Office Bearers or Committee members, should also feel safe in knowing the Strata/Community Corporation has Office Bearers Liability insurance in place, protecting them for their acts, errors and omissions when serving in that capacity.” (submission 15 page 2) They recommended compulsory cover.

The SCI also discussed the adequacy of public liability insurance. They suggested that the current $10m was inadequate and needed to be $20m or $30m (submission 15 page 1). The Committee notices that this seems in line with contemporary insurance levels. Many insurance providers have a set $20m (max) legal liability cover for all policies. There is no choice of level. Those contacted that do offer choice of level; changing from $10m to $20m the cost was less than $30.

Recommended: the Committee recommends that the Attorney General changes the level of public liability insurance to $20m.

The Property Council as an aside mentioned: “Currently, the Strata Corporation is required to insure all buildings under the Strata Titles Act 1988, and each strata owner is also required to take out their own insurance over part of a building. To some extent there is a double-up of insurance” (submission 16 page 3). The Committee decided that this too could be the subject of discussions with the Insurance Council (see above).

Recommendation: the Committee recommends that the Attorney General engage with the Insurance Council seeking changes to policies to prevent insurance or one risk by two parties.

2.29 Sinking Fund Plan

The sinking fund plan was introduced in the 2013 amendments to ensure that maintenance of ageing stock was considered and (maintenance) action taken in a timely manner. The larger the group the larger the areas of common property and therefore the larger the impact of not planning. Future maintenance costs can become impossible to fund if they have been regularly deferred. The Attorney General explained that:

> The thresholds and exemptions in the Acts and Regulations are designed to tailor the regulatory impost to the level of risk …. There seems merit in exploring a min. 10 year plan duration rather than the present 5 and 3 years - but there should remain a

> requirement to review and update the plan before the end of 10 years. To simplify, this could be a requirement to review after 5 years for all groups, regardless of size. (Attorney General 23/12/15 page 6)

The suggestion by Mr Affleck that there should be a requirement to put money in the sinking fund in line with the sinking fund forecast/plan was considered "overly prescriptive" and "This could have significant impact on owners and cost/benefit analysis would be required" (Attorney General 23/12/15 page 9).

An anomaly was pointed out by Mr Amber; "The Act does not demand that a Sinking Fund be established despite the need for a Sinking Fund Statement" This should be corrected by an amendment to the Act, the one suggested by Mr Amber is: "27 (1) – Amend to "A Strata Corporation must establish an administrative and a Sinking Fund." (submission 9 page 1)

Recommendation: the Committee recommends that the Attorney General amend the STA to include that a Strata Corporation must establish an administrative and a Sinking Fund.

2.30 Asbestos Registers

The Committee was told that some BCMs, in relation to asbestos, are advising their clients that inspection, registers and other works are necessary. The Committee considered if this may be confusion or an over-servicing issue. The Committee was provided with an example of this practice where the BCMs own maintenance company was used. (submission 8 page 21) The Attorney General posed the question is this a systemic problem or an education problem. (Attorney General 23/12/15 page 6) The practice needs to stop. The Committee determined that whether over-servicing or misunderstanding it is wrong and an unnecessary expense to unit holders.

It is quite clear from Regulation 421 of the Work Health and Safety Regulations that the requirement of asbestos registers "does not apply to any part of residential premises that is used only for residential purposes". (Attorney General 23/12/15 page 6)

Recommendation: the Committee recommends that the Attorney General advise BCMs that Asbestos Registers are not required.

2.31 Building works and Council approval

Examples of Council approved development occurring on units without the Corporations knowledge or consent have been provided to the Committee. (Submission 8 page 24)

The Attorney General does not consider the strata legislation the appropriate vehicle but rather that discussion with the LGA/OLG is needed. (Attorney General 23/12/15 page 6)

The Committee considers that adding to the development checklist for strata and community titled property the sighting of the Corporations approval as not too onerous.

Recommendation: the Committee recommends that the Attorney General oblige all Councils to sight a certified copy of the body corporate's approval for the proposed works

2.32 Court Appointed Administrators

Submission 14 described a case of a court appointed administrator who had not consulted with the owners, refused to provide records of owners nor provided the court mandated 3 monthly progress report. The information provided suggested the administrator was lacking in several ways: "a lack of knowledge of the ST Act, reluctance to treat the owners impartially". (submission 14 page 1) The submission went on to suggest some requirements for court appointed administrators. These included:

> A person (or company) should not have the right to administer an estate without supervision from an independent authority. If one must apply to the Magistrates Court for ruling it causes not only angst but also jeopardises the future relationship with management.
>
> An owner with objections regarding interpretation of the Strata Act must have person available to clarify points of reference and have the authority over a strata managing company to comply with a ruling.
>
> Administrators must consult with owners regarding use of property, expenditure and provide indexed accounts for perusal. And again, the ability of owner to seek independent advice without having to present at the Magistrates Court.
>
> Any objections raised by an owner will be viewed without prejudice by the Administrator. (submission 14 page 1)

Evidence provided demonstrated that the current system of appointment is not optimal. Improvements could include the court ensuring that the appointee has sufficient expertise. Perhaps the appointee should put a proposal to the court before being appointed. A plan by the administrator in concert with owners and the court within 3 months of the appointment and regular review were also mooted. Should SACAT gain jurisdiction it could extend to having the power to appoint an administrator when disputes are referred to it.

The Attorney General suggests that "lack of legislative guidance as to functions" does not warrant a legislative response but "Note under administrator provisions (attached), administrator must comply with any directions of court / can delegate their functions. Would administrator in practice be a strata manager, so able to manage the corporation as per usual practice? Provisions include owners' power to apply for replacement of an administrator". (Attorney General 23/12/15 page 6)

The Committee is of the opinion that at the least the courts and potentially appointed administrators need some guidelines regarding the court appointment of an administrator.

Recommendation: the Committee recommends that the Attorney General prepare a guideline for the use of courts and administrators.

2.33 Payment of Accounts

It is the routine practice for payment of accounts to be made after checking that the goods or services are provided satisfactorily. There is a complication when the beneficiary of the services and the person paying for them are different people. One example is; units are painted the invoice is paid but the people living in the units are not satisfied the work is complete or to a satisfactory standard. There is a need for a system of checking that works have been (satisfactorily) carried out before the BCM releases the funds to contractors. Whereas submitters were concerned about circumstances where invoices should more properly be paid only after confirmation from an office holder that the service had been provided the Attorney General felt this may be "best practice versus what is required for legislation". The Committee agreed that a legislative response was a disproportionate and

potentially expensive response to the problem. BCMs should be encouraged to include a checking mechanism when engaging services. The agreement to engage for example a painter is made at the AGM that decision to engage painters could routinely include a clause that a phone call to owner /occupier before payment is made.

2.34 Abandoned cars

Cars are abandoned on strata and community property (as they are elsewhere). This does not need a legislative response. This remains a private, and or council matter.

2.35 Common Property

This has been included in earlier discussion. There were many phone calls and submissions that included queries about what is and what is not common property. Definitions are provided in the Acts as to what constitutes common property but mostly has not been judicially considered. The "big" issues is floor tiles. Tiles inside a unit or on a balcony are common property or not? There may be merit in clarifying this, in legislation if necessary, if there is broad agreement on the preferred approach. As an aside the Committee suggests the more consistent approach is that they are not common property.

2.36 Fiduciary Duties at Common Law

There was some confusion regarding fiduciary duties. The Committee considers this issue was adequately addressed in the Statutes Amendment Act. The Attorney General also considered this matter adequately addressed. (Attorney General 23/12/15 page 7)

2.37 Lodging an article or by-law

Submission 9 noted that it was cumbersome and expensive for the Corporation itself to enforce its own articles; and included the statement: "…remove costs and inconvenience to Corporations. Currently if a Corporation wants to fine a party for breach of Articles they must first hold a meeting, pass a resolution and lodge the amendment with the LTO". (submission 9 page 1) An amendment to the Act to achieve this goal was suggested, "19 (3a) – Amend to "A strata corporation may impose a penalty, not exceeding the prescribed amount, for contravention of, or failure to comply with, any articles." (submission 9 page 1)

One witness thought it was prohibitively expensive to change the articles (to enable the corporation to impose penalties) and lodge same with the LTO. (Hansard page 25)

It seems that office holders and some BCMs are not aware of the changes in this area. The Attorney General explained the process:

> Currently "Could vote for articles change at regular AGM then Strata (Fees) Regulations provide lodgement fee: 7 On lodging a certified copy of a special resolution of a $155
> strata corporation amending the articles of the corporation"
> confusion arises as ;
> "Both the STA and CTA are now consistent in providing that an article or by-law can be made to authorise the imposition of a penalty for breach of articles or by-laws. The STA was amended by the Statutes Amendment Act to bring it in line with the CTA (see copy provisions).

> The issue may in fact be that since this provision was under the CTA from the start, all by-laws tend to include this provision already, whereas, since it was not in the STA until recently, strata groups will need to amend their articles to include it."
> The problem with deeming it to be included in the articles is that it won't appear in the written articles - including those provided to prospective purchasers - so owners won't be put on notice that this particular rule applies. (Attorney General 23/12/15 page 9)

2.38 STA and CTA unaligned regarding lot entitlement value

There are two issues. Firstly the inconsistency between the STA and CTA. Secondly equal is not fair for some lots. There are inconsistencies between the STA and the CTA. There seems broad agreement that adopting one definition would be better. Mr Amber suggested amending the STA: 6(1) – Amend to "the unit entitlement of a unit is a number assigned to the unit that bears in relation to the aggregate unit entitlement of all units defined on the relevant strata plan (with a tolerance of +- 10 Per cent) the same proportion that the unimproved value of the unit bears to the aggregate unimproved value of all of the units." (submission 9 page 1)

Submissions included claims that their equal lot value (entitlement) was unfair. There were examples where one part of a group of units feel they are subsidising other parts and wanted to change "… we should have the ability retrospectively to change the ratio of strata fees" (submission 3 page 1). This was discussed earlier.

Mr Affleck raised concerns regarding the levy / benefit ratio: "Unfairness in multi-tiered community developments as to proportion of levy burden vs benefit falling to residential verses commercial lots". The Attorney General provided an answer: "Contributions are set by an ordinary resolution passed at a general meeting [s 114(1)]. The management committee may not set the contribution amount [s 114(2)]. The amount that each owner contributes to funds is normally calculated according to the 'lot entitlement' set out in the community plan [s 114(3)]. A lot entitlement is the portion, or ratio, of the capital value of a lot as against the sum of the capital values of all the lots [s 20]. The corporation may, by unanimous resolution, determine that contributions are paid on some other basis Is 114(3)]. (Attorney General 23/12/15 page 7)

It seems the mechanism is available to address the imbalance but only when the resolution at the general meeting is unanimous.

2.39 Role of Managers pamphlet

This is an important piece of information to potential owners and others. Currently the Act [STA s27B(8), CTA s78B(80] says "make available for inspection". The Attorney General wants the language to be "neutral to allow electronic provision", however, conceded that this provision "may need to be tightened to ensure it has the intended effect." (Attorney General 23/12/15 page 3)

Submission 8 points out the relevant provisions:

> Strata Titles Act Regulation 8b (4) For the purposes of section 27B(8) of the Act, the body corporate manager must ensure the **availability** of a copy of a pamphlet that sets out the role of the body corporate manager and the rights of the strata corporation and its members,
> A similar provision applies to the Community Titles Act. (submission 8 page 25)

The supply could be with AGM agenda or any time a management appointment is being considered.

Recommendation: the Committee recommends that the Attorney General amend Acts from make 'available' and 'availability' in the STA and CTA and the associated regulations to 'supply to all owners'.

3 Effectiveness of the Act in addressing those issues that it sought to remedy

This the second of the Terms of Reference has been addressed within the various heading of the report.

4 Further amendments to the Act that the Committee considers necessary

This Section of the report addresses Terms of Reference number 3.

Further changes to the Act have been suggested under the preceding headings based on the issue raised in submissions.

4.1 Inconsistencies STA and CTA

There have been several examples in the preceding pages where there are inconsistencies between the STA and CTA several changes have been suggested. Another example is "owners in arrears". The Attorney General comments that:

> "Both Acts provide that an owner has no vote if in arrears but only the STA makes exception for votes requiring a unanimous resolution. Not aware of why the CTA did not adopt that exception. Consistency would be desirable but further discussion is needed of which of the STA and CTA approaches is fairest'. (Attorney General 23/12/15 page 9)

Often it is the case that the later CTA has the preferred wording than the STA. If the Attorney General is considering some of the recommendations in this report it would be opportune to compare similar provisions in the two Acts with the view to making them consistent.

Recommendation: the Committee recommends that the Attorney General amend the ST and CT Acts to remove inconsistencies.

4.2 One all-encompassing Act

The Committee was aware of discussion of the idea of a merger or replacement Act to cover all forms of land title and ownership. No submissions put this idea forward. No argument was made to merge the STA and CTA.

There was discussion regarding "old titles". These are the titles created before the STA and CTA. Essentially those owning these Company and Moity Titles would like to see the complexity and problems associated with their rarity gone.

In Submission 21 problems with the old form of titles were discussed. The Committee suggest that the opportunity be explored to roll Company and Moity Titles into the one Act. The CTA is the most modern so probably the best choice to add provisions covering these older titles. They are problematic. Agents and conveyancers don't want to be involved as they are complex and few remaining in the state. The submission suggested:

> 1. Agents of these "titles" appear to be uneducated when selling same.
> 2. Purchasers have no idea what they are buying into, re Company Titles. Purchasers do not understand that they have the right to live within the Unit, under the Terms & Conditions of the lease & Underlease. They lease the unit, and have not "purchased same".
> 3. There are strict Rules/Conditions attached to Company Title Units, and these conditions appear not to be brought to the attention of prospective purchasers, in most cases.

4. Lenders are not keen to lend on these type of transactions, as they cannot take "The Company" as security. Instead the under-lease is taken as security, together with the Share Certificate.
5. Conveyancers don't like to handle these type of transactions, they are cumbersome and time wasting, some do not understand what has to be done.
6. A.S.I.C. requirements are also cumbersome and "deadly" if you get it wrong. Company title units that I have managed have been solely for residential purposes, yet they have to conform to "business type" requirements.

The submission described how current transitions are cumbersome and expensive for individual companies:

1. Special Meeting of Company Directors to approve the change of Title.
2. Must be a unanimous Resolution.
3. Banks must consent to the change, re mortgages held.
4. Surveyor must be engaged to draw up a new Community Plan.
5. Local Govt. requirements re firewalls must be completed.
6. Leases must be wound up
7. L.T.O. requirements must be followed.

The 2013 provisions made it easier for strata titles to be extinguished, in this instance the holders of old titles are seeking an easier path to transition from old to new titles. This would need some government involvement. The alternative is to wait until they all get demolished or decommissioned in some way. The submission described what this could include:

1 Streamline the process
2. S/Duty concessions
3. Open space planning levy exemption
4. Suggest a 12 month moratorium for existing Company Title Units to reduce their numbers
(submission 21 page 2)

Recommendation the Committee recommends that the Attorney General examine the benefits in having Company and Moity Titles provisions in the CTA.

5 Investigate if an increase in infill development will require changes to the Act

This Section of the report addresses Terms of Reference number 4.

Submissions did not directly raise this issue. However one barrier to infill development is the difficulty in ending strata schemes and replacing the units with new infill development. This is covered in the following section.

5.1 Termination of strata schemes

The impetus for the closer consideration of the termination of strata schemes is that the stock is ageing and consequently of poor design. Often not matching modern legal and social requirements. The maintenance has often been deferred but is becoming more necessary. Property that is at the end of its economic life and not had the appropriate amount of maintenance is ready for reuse or demolition. If this property is close to the CBD or other desirable feature then this is doubly so. Developers would like to access some of the near CBD property for renewal but are prevented by the current scheme termination requirements.

Prior to the 2013 changes unanimous agreement was needed. The alternative was to go to the Supreme Court with the problem. The 2013 amendment changed the jurisdiction to the ERD Court. This forum is better placed for the consideration of planning matters.

The focus interstate, especially Sydney, is to overcome the obstacles for the redevelopment of (old) Strata Title sites. The (SA) Property Council's submission said "… has long supported a reduction in the level of owner support needed to cancel a strata plan." They gave the New South Wales (NSW) example where the threshold for agreement has moved from 100 to 75%. (submission 16 page 2). They provided examples of overseas practice [NX 75%; Japan 80%; Hong Kong 90/80%; Singapore90/80% (via a sliding scale on age)]. (submission 16 page 2)

The Attorney General is keen to make "further changes to the provisions governing termination of strata schemes to make it still easier to terminate existing schemes for redevelopment. (Attorney General 23/12/15 page 1)

As in NSW, Western Australia is moving to a 75% majority for the termination of a scheme. Victoria has a review underway and the Northern Territory is drafting a review of Strata Titles. (19/1/16 Property Australia)

The Committee is in accord with the Attorney General and the call from the Property Council for an expedient process for the termination of strata schemes. However the Committee has become very aware of the demographic of the owners and occupiers of strata title units. The group must have a fair method and transition process. This consumer protection can be achieved by adopting a planned process with steps that ensure that there is notification and a consultation process (3 months). No one should be left in doubt about where they will be living should the strata be terminated. A vote can occur after these steps are complete. There is a need for independent scheme managers and valuations and a body to deal with issues should there be disputes. The Property Council's submission suggested a Strata Schemes Commissioner for orders on procedural matters and the Supreme Court of matters of law". (submission 16 page 3)

The Committee is aware that changes that ensure this protection would be costly. The Attorney General may consider the 2013 changes adequate at the moment. The impetus for this change, from developers, may not be as high as in other states.

6 Other matters

This section identifies terms of reference number 5, other matters.

Other matters have been discussed under the preceding headings based on the issues raised in submissions.

7 Abbreviations

ADI	Authorised Deposit-taking Institutions
AGM	Annual General Meeting
CEO	Chief Executive Officer
BCMs	Body Corporate Managers
CSTA	Statutes Amendment (Community and Strata Titles) Act 2012
CTA	Community Titles Act 1996
IPP	Information Privacy Principles
SACAT	South Australian Civil and Administrative Tribunal
STA	Strata Titles Act 1988

APPENDIX A: Submissions to the Inquiry

No	Submitter
01	Submitter 1 - identifying details redacted
02	Submitter 2 - identifying details redacted
03	Submitter 3 - identifying details redacted
04	Submitter 4 - identifying details redacted
05	Submitter 5 - identifying details redacted
06	Adelaide Strata & Community Management
07	Submitter 7 - identifying details redacted
08	Submitter 8 - identifying details redacted
08A	Submitter 8 - identifying details redacted
09	Submitter 9 – identifying details redacted
10	Submitter 10 - identifying details redacted
11	Submitter 11 - identifying details redacted
12	Submitter 12 - identifying details redacted
13	Submitter 13 - identifying details redacted
14	Submitter 14 - identifying details redacted
15	Strata Community Insurance
16	Property Council of Australia
17	SA Government
18	Submitter 18 - identifying details redacted
19	Submitter 19 - identifying details redacted
20	Submitter 20 - identifying details redacted
21	Submitter 21 - identifying details redacted
22	Submitter 22 - identifying details redacted

APPENDIX B: Witnesses

4 August 2015

Mr Gordon Russell, Managing Director, Unit Care Services
Bryan Forby, General Manager, Adelaide Strata and Community Management (Sub=6)
Matthew Amber, Managing Director, Whittles and President, Strata Community Australia SA (Sub=9)
Peter Affleck, Board Member, Strata Community Australia SA

19 November 2015

Ms Gillian Schach, Senior Legal Officer, Attorney-General's Department (Sub=17)