

UNIT OWNERS' & BODY CORPORATE ALLIANCE

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Introduction:

I write on behalf of the several million Australians who live in strata and Community title complexes, that is to say, unit owners. There are upwards of 400000 unit owners in Queensland. Based upon an average of 2.4 persons per unit it is possible that roughly one million Queenslanders are unit owners or dependants of unit owners. Extrapolating that to the Australia wide community and it is clear several million Australians are owners and residents in strata titled community owners complexes.

- Strata and community title complexes range from duplexes to multi story high rise developments.
- It would be wrong to assume people who live in units are wealthy. Not all units are on the beach at Surfers Paradise. Many unit owners are low income earners or welfare recipients. Each scheme includes common property of the sort found in single home dwellings on suburban blocks consisting of elements such as walls, roof, stairwells, gardens, pool and the like.
- Supply of services to maintain that common property is no different than consumption of household services under the Bill.
- Importantly, for the purpose of the Bill, under legislation in every State and Territory, the owners of residential strata lots also own their common property as "tenants in common" exactly the same as Mr and Mrs X might own their suburban home as tenants in common.

Hence once citizens elect to live in community complexes they have both private property and a share in community property, i.e. they own their unit and its contents and fixtures privately and they have a share in common property such as a community swimming pool, the gardens and grounds of the complex and so forth.

Notwithstanding they have ownership in common property they are still consumers in every sense of the word. However they cannot enter into contractual arrangements in respect of the common property as individuals. They **must act in respect of the common property in concert with other fellow owners.**

This fact however does not detract from the fact that **they are consumers contracting for services to their common property just as a husband and wife who are tenants in common are consumers.**

First Interim conclusion:

If unit owners were denied the protection of the Trade Practices Act in any of its sections millions of Australian would be placed in a special position of disadvantage.

The Original draft of the Legislation and Subsequent Change:

In the original draft of the legislation “bodies corporate” is mentioned specifically and it appears that there is every intention to include unit owners living in “bodies corporate” or strata titled homes.

In the interim the Property Council of Australia appears to have recommended that the legislation be limited to consumer to consumer contract “in the best interests of consumers”.

It may be cynical however one has to wonder why a body representing multi million dollar developers, who sell their buildings they erect to unit owners, would go out of their way to make recommendations “in the best interests of consumers”.

It is our contention that it would be unconscionable to exclude one class of citizen from the protection of the Trade Practices Act in respect of Unfair Contracts, merely to protect the interests of multi million dollar developers.

There should be only one category of citizen under the act and citizens living in strata title should not be excluded from that protection.

One might ask what possible motive could developers have for wishing to exclude unit owners from the protection of the Act if they do not intend to force unfair contracts upon unit owners? See management rights below.

Positions With Respect to Parties.

We understand that the view of the Property Council has been considered and there is now a potential position before the government that the Unfair Contracts Legislation ought to apply only when at least one of the parties is an individual.

To apply a reduction to the absurd it is clear that such a view, if it prevailed, would rule out even owners in duplexes from protection against gardeners who fail to perform to contract because both owners would have to be parties to the contract in respect of their common property. Such a position would be indefensible.

It is no less unconscionable to apply this principle to any strata title community living complex.

Second Interim Conclusion:

For this reason we submit that the definition of individual should be extended to include tenants in common, owners of residential strata common property, owners of units in strata common property whether they live in the unit full time or part time or not at all, and any agent or trustee of such persons.

Owners of Common Property Vary from State to State.

- Qld, Vic and WA: ownership of common property vests in the proprietors of the lots as tenants in common in shares proportionate to their lot entitlements.
- NSW and ACT: the common property vests in the body corporate as agent for the proprietors as tenants in common (proportionate as above).
- SA, Tas and NT: the common property is held by the body corporate in trust for the proprietors as tenants in common (proportionate as above).

(Hence, the concept of agent and trustee is important to cover all States and Territories.)

Ownership of common property vests in the proprietors of the lots as tenants in common

- Qld: Section 35 of the *Body Corporate and Community Management Act 1997*
- Vic: Section 28 of the *Subdivision Act 1998*
- WA: Section 17 of the *Strata Titles Act 1985*

Ownership of common property vests in the body corporate as agent for the proprietors as tenants in common

- NSW: Section 20 of the *Strata Schemes (Freehold Development) Act 1973* and *Strata Schemes Management Act 1996*
- ACT: Section 47 of the *Unit Titles Act 2001*

Ownership of common property is held by the body corporate in trust for the proprietors as tenants in common

- SA: Section 10 of the *Strata Titles Act 1988*
- Tas: Section 10 of the *Strata Titles Act 1988*
- NT: Section 24 of the *Unit Titles Act*

Unit Owners in Bodies Corporate (Strata & Community Living) are not a Business.

It is important to note that Unit owners acting in concert with fellow owners in a body corporate are not a business. Indeed in most if not all states, these forms of bodies corporate are specifically prevented from acting as a business.

The Property Council Agenda: The Management Rights Industry.

Typically, a strata scheme developer writes a Management Rights Agreement ('**MR contract**') on behalf of a newly formed body corporate ('**BC**') before any home units are sold in the complex.

- The MR contract period can be for up to **25** years yet the average number of years most contractors remain in a complex is **two and a half (2.5) to three (3) years** whether or not they have purchased a manager's unit with their contract.

- Developers then sell that contract to a management rights entity usually called the caretaker.
- The developer then sets about selling units in the complex to future unit owners who inherit the contract.
- Thus, under the MR contract, when the buyers become unit owners they must pay management right fees plus CPI increases to the MR entity (caretaker) for the entire contract period regardless of the true market value of the services rendered.
- In return for those fees, the MR entity performs duties being typically "supervision of maintenance" i.e. caretaking of the common property and/or actually performing all or part of the routine maintenance.
- In short, unit owners pay the income to the caretaker under a contract they did not sign but inherited when they purchased their units.
- The developer should have a duty of care to ensure he obtains the best value for performance for unit owners who will purchase his units but instead the opposite often happens.
- Typically the original caretaker moves out around the three year mark selling his contract to another who is then paid by the unit owners.
- Typically once there has been an expiration of say five years on the contract the caretaker seeks an extension to bring it back to 25 years notwithstanding he/she has no intention of remaining that time.
- A high percentage of caretakers sell within 12 months of obtaining the extension to ensure maximum price.
- Also in respect of investment units, in tourist areas the MR contract typically grants free exclusive rights to the MR entity to use an in-house reception desk for the long contract period during which time they invariably sign letting agreements . This advantage can serve to prevent owners from using better operators should they be dissatisfied with performance from time to time.
- In this process the developer who is represented before this inquiry by the Property Council of Australia, writes a contract which he himself does not have to perform.
- Some of these contracts may be fair but some are unfair either by dint of establishing an income for the caretaker well beyond the tasks to be performed or because of burdens placed upon unit owners to pay for items unrelated to caretaking such as the cost of registration of business name for the caretaker, furniture for the office which is owned by the caretaker not the unit owners and so on.
- Finally there is the question as to the fairness of a contract that extends for 25 years on terms never negotiated by one party to the contract.

A description of the Management Rights industry is included not because there is a necessary expectation that the legislation would affect existing contracts however it would strengthen the case for limiting the right of the developer to sell an MR contract beyond the formation of a body corporate by the new owners.

Ideally the new owners should have the right to appoint a caretaker on terms negotiated that are fair to both parties.

The Unfair Contracts Legislation would set a standard that state and territory governments might be persuaded to adopt in future legislation.

The application of the Unfair Contracts Legislation would **immediately** give protection to the owners in smaller complexes of which there are many in Australia from duplexes to six packs, who may have a contract with various trades people from gardeners to plumbers and other trades people.

Residents and Investors:

There are two types of owners in strata title community complexes, those who own their unit and reside in it and those who purchase a unit for investment.

We have not distinguished between the two because resident owners must, when entering into a contract, act with the consent or a majority of owners in general meeting.

This means residents and investors are not easily distinguished in respect of contracting for services whether it be caretaking services under an MR agreement or just contracting with a visiting tradesperson on a one off job.

It is clear that residents are consumers in the same sense as any other citizen is a consumer. They are living in their own home and contract for various services from a resident caretaker to visiting trades people.

The investor is different however he/she is still an individual in respect of contracting for those same services above.

Conclusion: Definitions:

In relation to Section 2 (3) “individual” should include a tenant in common, owners of residential strata common property, owners of units in strata common property and any agent or trustee of such persons.

In relation to Section 23 (3) “consumer contract” should include management and leasing rights contracts for wholly or partly a residential strata scheme and a contract for (a) goods or services or (b) a sale of grant of an interest in land to a person whose acquisition of the goods and services or interest therein is wholly or predominantly for personal domestic or household use or consumption.

If unit owners were denied the protection of the Trade Practices Act in any of its sections millions of Australian would be placed in a special position of disadvantage.

Existing State and Territory legislation does not as far as we can ascertain conflict with those proposals in which respect our proposals are meant to operate where State and Territory law is either silent or limited.

**Colin Lamont
Chairman**