



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 56

The Strata Titles Act 1966-1978

REPORT

DECEMBER 1982

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on the *Strata Titles Act*.

C W Ogilvie
Chairman

29 December 1982

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PART I: INTRODUCTION

CHAPTER 1

TERMS OF REFERENCE AND THE WORKING PAPER

1. TERMS OF REFERENCE

1.1 The Commission was asked to review the *Strata Titles Act 1966-1978*.¹

2. WORKING PAPER

1.2 The Commission issued a working paper² in February 1977 after calling for preliminary submissions from the public. Many of the issues dealt with in the working paper were raised by the preliminary submissions which came in response to that public invitation.³ The working paper was distributed not only to associations having a professional or commercial interest in the strata titles system and to relevant government departments and instrumentalities, but also to developers, surveyors, solicitors, accountants, estate agents, managing agents, councils of strata companies, strata lot proprietors and those members of the public who had indicated their interest in the project. About one thousand copies of the working paper were distributed.

1.3 Seventy submissions were received in response to the working paper,⁴ including many from persons and bodies referred to in the previous paragraph. These submissions, together with a number of others received independently of the working paper, have enabled the Commission to take into account the views of a wide range of organisations and people closely involved with the strata title system. The Commission is indebted to all those who

¹ The Commission has interpreted its terms of reference as including an examination of the concept of cluster titles: chapter 21 below.

² Referred to in this report as the “working paper”.

³ Eighty-three such submissions were received.

⁴ The names of the commentators are listed in Appendix I. In this report, the names of some of the commentators have been abbreviated. The Real Estate Institute of Western Australia Inc is referred to as “REIWA”, the Royal Australian Institute of Architects (Western Australian Chapter) as “the Institute of Architects”, the Institution of Surveyors, Australia Western Australian Division as “the Institution of Surveyors”, West Australian Trustees Limited as “WA Trustees”, the Urban Development Institute of Australia Western Australian Division Inc as “the Urban Development Institute”, the Local Government Association of Western Australia (Inc) as “the Local Government Association”, the Law Society of Western Australia Inc as “the Law Society” and the Western Australian Division of the Australian Institute of Valuers (Inc) as “the Institute of Valuers”.

submitted comments and to the many others, including State Government officials, who provided information or discussed problems.

1.4 In the course of the project, a member of the Commission visited Sydney and Melbourne to discuss issues with Government officials, solicitors and agents.⁵ The Commission also corresponded with officials in Queensland. The Commission wishes to express its gratitude for the ready assistance it received from all those persons.

3. RECENT REFORMS IN NEW SOUTH WALES AND QUEENSLAND

1.5 Subsequent to the issue of the working paper, substantial amendments were made to the New South Wales *Strata Titles Act 1973*.⁶ The Queensland strata titles legislation was completely revised in 1980.⁷ In a matter of such complexity as strata titles, the Commission considered that it should study these provisions and obtain information about their practical working before submitting its report.

⁵ The visit took place in July 1981. Another member of the Commission who was in Sydney on other business in July 1982 also held discussions on the New South Wales legislation.

⁶ The New South Wales *Strata Titles (Management) Amendment Act 1979* and the *Strata Titles (Real Property Computer Register) Amendment Act 1979*. Further amendments were also made in 1980.

⁷ The *Building Units and Group Titles Act 1980-1981*.

CHAPTER 2

STRATA TITLES: A POPULAR INNOVATION

1. THE RISE IN DEMAND FOR INDIVIDUALLY OWNED UNITS

2.1 As Western Australia entered the 1960's the demand for home units¹ was increasing.² Many of the purchasers had owned traditional style houses but wished to reduce the time and money necessarily expended in maintaining a home. Often they were people whose children had grown up and left home. Others were unmarried people who either did not have the same need for outdoor areas as parents with young children or did not wish to care for a large garden. The cost of a home unit as compared to a house property was also generally lower.

2.2 Prior to the enactment of the *Strata Titles Act 1966*, two methods were commonly used to create home unit ownership. The first was by means of tenancy in common.³ By this means a person acquired an undivided interest in the whole of the land the subject of the unit scheme but executed an agreement with his co-owners giving him the right to exclusive possession of a particular unit and surrendering his occupational rights in the other units in the building. Such agreements also set out obligations in regard to such matters as rates, insurance and repairs and permitted enjoyment by all owners of certain portions of the land and buildings in common with the other co-owners. However, the difficulty of enforcing obligations, particularly against subsequent purchasers with whom there might be no privity of contract, rendered the interest of a tenant in common unattractive as security for a mortgage. This limited the availability of funds for those who could not finance the acquisition of a unit from their own resources.

2.3 The other method was the home unit company system⁴ under which the land and building were owned by a company. Ownership of particular shares in the company carried with it the right to exclusive occupation of a particular unit together with the right to enjoy other parts of the development in common with other occupiers. However, since the shareholder's right to his unit was contractual and not proprietary, he might have difficulty in

¹ "Home unit" is used here in the sense in which it is used in Western Australia, namely to include not only units in high rise buildings, but also "town houses", "villa units", "duplexes", "triplexes" and so on. In New South Wales, the term "home unit" usually refers to a unit in a high rise building.

² Western Australian *Parliamentary Debates* (1966) Vol 174, 1298 and 1390.

³ A F Rath, P J Grimes and J E Moore, *Strata Titles* (1966), xiii (hereinafter cited as "Rath, Grimes and Moore").

⁴ Rath, Grimes and Moore, xii.

enforcing his claim to possession in some circumstances.⁵ The company, subject to any "modification of rights" provision in its articles of association, was able to alter those articles to the detriment of a minority shareholder unless fraud or oppression could be established.⁶ The articles of many home unit companies vested in the directors a power to veto any transfer or transmission of shares. There was as well the psychological drawback of not being able to offer the prospective purchaser a "title" to his unit. Many lending institutions would not advance money on the security of the shares.

2.4 The disadvantages associated with the existing methods led to a demand for a system under which a separate title could be granted for each unit in a development. In theory it has always been possible to obtain a freehold title to horizontal strata in land,⁷ although elaborate agreements between the proprietors would be required to make such a scheme operate satisfactorily. The difficulty which confronted those who wished to have a freehold title to a unit in a building was a planning, rather than a legal, problem. The Town Planning Board was not prepared to approve a subdivision by conventional means which would result in the permanent fragmentation of land into relatively tiny parcels, whether vertical or horizontal.⁸

2. INTRODUCTION OF STRATA TITLES LEGISLATION

2.5 In 1961, New South Wales enacted its *Conveyancing (Strata Titles) Act* which established a system which overcame the objections of town planners. The legislation provided for the subdivision of land on which there were one or more buildings into horizontal strata. Each strata could be divided into two or more lots. The Act provided for a registered title for each lot in the building so that the lot could be owned and dealt with as an estate in fee simple registered under the *Real Property Act 1900*.⁹ So much of the land as was not comprised within the lots was owned by all the proprietors as tenants in common and was known as common property. The proprietors together constituted a body corporate which controlled and managed the common property. The proprietors, by passing a unanimous

⁵ See *Tittman v Trailla* (1957) 74 WN (NSW) 284; *H H Halls Ltd v Lepouris* [1964-5]NSWR 1535.

⁶ See the paper entitled, *High Living – The Strata Titles Act 1966*, delivered by Mr J L Toohey (now Mr Justice Toohey of the Federal Court) at the Law Summer School held at the University of Western Australia in 1968.

⁷ *Bursill Enterprises Pty. Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73, 91.

⁸ In Western Australia it is not permissible to subdivide land without the approval of the Town Planning Board: *Town Planning and Development Act 1928-1981*, s 20(1).

⁹ The comparable enactment in New South Wales to Western Australia's *Transfer of Land Act 1893-1982*.

resolution, or the Supreme Court by a declaration, could "destroy"¹⁰ the building but if this occurred the whole of the land (including the building) reverted to the proprietors as tenants in common. Fragmentation of the title was therefore permitted for the life of the scheme only and objections on town planning grounds to permanent fragmentation did not apply. The Act broke new ground within Australia.

2.6 In 1965, the Western Australian Government having appreciated the growing demand in this State for occupation of units on an ownership basis and the generally unsatisfactory nature of the existing methods of dealing with the demand, introduced a Strata Titles Bill into Parliament. The Bill, which was based on the New South Wales legislation, was enacted in the following year and came into operation on 1 November 1967. In 1969, the Western Australian Act was amended¹¹ to provide for strata titles to be issued in respect of a scheme where there was no lot superimposed horizontally on another, for example, duplexes. The Western Australian *Strata Titles Act 1966* as amended is usually referred to in the text of this report as "the Act". In the footnotes to this report, it is referred to as "WA".

2.7 After the Act came into operation, the methods which had previously been utilised to create unit ownership virtually fell into disuse.¹² Undoubtedly, the popularity of the strata title system stems from the fact that under it a separate title is issued for each unit. This is not only attractive to most purchasers but means that a strata lot is an acceptable security to lending bodies. The consequence is that there is greater demand for units having strata titles than those with other forms of ownership. This in turn reflects in their value.

2.8 Other Australian States also followed the New South Wales lead. In 1973 the New South Wales legislation itself was revised when the 1961 Act was repealed and replaced by the *Strata Titles Act 1973*.¹³ This Act introduced many important changes. In 1980, Queensland also revised its strata titles legislation by enacting the *Building Units and Group Titles Act 1980*¹⁴ which in many respects is based on the New South Wales revision.

¹⁰ See paras 8.19 and 25.1 of the working paper. See also para 20.5 below.

¹¹ Act No 34 of 1969. The other amendments made to the Act since it was passed were by Act No 31 of 1970 and Act No 76 of 1978.

¹² However, a number of tenancy in common and home unit company schemes still exist.

¹³ The 1973 Act was amended in 1974, 1975, 1976, 1977, 1979, 1980 and 1981. The New South Wales *Strata Titles Act 1973-1981* is hereafter referred to in the footnotes to this report as "NSW".

¹⁴ The *Building Units and Group Titles Act 1980-1981* is hereafter referred to in the footnotes to this report as "Qld".

2.9 In addition to legislation providing for strata titles, Victoria and Queensland have legislation providing for what are commonly known as "cluster titles".¹⁵ Although in many ways comparable to strata titles, a cluster title lot is not defined by reference to a building but by survey in the ordinary way. There is common property and the legislation provides for a body corporate consisting of the owners of all the lots to manage it. As with strata titles, the scheme can be wound up and the title to each lot cancelled. This legislation is discussed in chapter 21 below.

3. OUTLINE OF THE ACT

2.10 The system of strata titles established in Western Australia by the Act has as its basis the registration of a strata plan at the Office of Titles.¹⁶ The strata plan consists of a location plan showing the allotment of land (or "parcel" as it is referred to in the Act) on which the building is constructed and the relationship of the building to the boundaries of the parcel. The strata plan must also include a drawing which illustrates each lot in the building and defines the boundaries of each lot by reference to floors, walls and ceilings.¹⁷ Land in the strata plan other than lots is "common property".¹⁸ A surveyor's certificate, the approval of the Town Planning Board and the certificate of the local authority must be endorsed on the strata plan before it can be registered.¹⁹

2.11 Upon registration of a strata plan the Registrar of Titles issues a certificate of title for each lot together with the share of the common property relating to that lot.²⁰ Such titles can be transferred, leased, mortgaged or otherwise dealt with in the same manner as land which is registered under the *Transfer of Land Act 1893-1982*.²¹ Dealings with the titles follow the *Transfer of Land Act* pattern: the same forms are used and the same Titles Office fees apply.

2.12 On registration of the strata plan, there comes into existence a body corporate known by the name of "The Owners of [the name of the building] " and the number of the strata plan

¹⁵ See the *Cluster Titles Act 1974-1981*(Vic) and *Building Units and Group Titles Act 1980-1981*(Qld). In Queensland cluster titles are known as "group titles".

¹⁶ The Office of Titles is commonly known, and is hereinafter referred to, as the "Titles Office".

¹⁷ WA, s 5(1).

¹⁸ Id, s 3.

¹⁹ Para 3.2 below.

²⁰ WA, s 4(4).

²¹ Id, s 4(6).

allocated to it by the Registrar of Titles.²² The body corporate is referred to in this report as "the strata company". Every proprietor is a member of the strata company. The main functions of the strata company are to enforce the by-laws, control, manage and repair the common property and insure the building.²³ Its functions, subject to any restrictions imposed at a general meeting of proprietors or by the Act, are exercised by the council of the strata company.²⁴ The council is elected at the annual general meeting of the proprietors.²⁵

2.13 The strata company may make by-laws for the control, management, use and enjoyment of the lots and the common property.²⁶ The by-laws set out in parts I and II of the schedule are deemed to be by-laws of the company but may be amended, repealed or added to by the company.²⁷

2.14 When a strata plan is lodged for registration, it is required to state the unit entitlement of each lot.²⁸ The unit entitlement of a lot is of considerable importance. It is used as a basis for assessing the municipal and sewerage rates on the lot, water rates in the case of non-residential schemes and also land tax where that is payable. The strata company is required to establish a fund for administrative expenses (such as maintenance and repair of the common property, and insurance of the building).²⁹ The company raises the amounts needed for the fund by levying contributions on the proprietors in proportion to the unit entitlement of their lots.³⁰ Unit entitlement also determines -

- (a) the voting rights of a proprietor;³¹ and
- (b) the quantum of the undivided share of each proprietor in the common property.³²

²² Id, s 13(1).

²³ Id, s 13.

²⁴ Id, schedule, part I, by-law 4(1).

²⁵ Id, schedule, part I, by-law 4(2).

²⁶ Id, s 15(1).

²⁷ In the case of part I by-laws, by a unanimous resolution (para 11.8 below) and in the case of part II by-laws, by a special resolution (para 11.8 below): WA, s 15(2) and schedule, part I, by-law 9. Any purported amendment which was inconsistent with the provisions of the Act would, of course, be void.

²⁸ WA, s 18(1).

²⁹ Id, s 13(6).

³⁰ Id, s 18(2).

³¹ Ibid.

³² Ibid. Unit entitlement is considered in chapter 12 below. Para 12.1 lists all the matters determined by unit entitlement.

2.15 A more detailed consideration of the relevant provisions of the Act is given when particular issues are raised later in this report.

4. POPULARITY OF THE STRATA TITLES SYSTEM

(a) Number of strata plans and strata lots

2.16 The strata title concept has met with wide acceptance in this State and is proving to be increasingly popular, as may be seen from the following -

- (a) By 30 September 1976 (nine years after the Act came into operation), 3,720 strata plans had been registered. By 30 June 1982 (not quite six years later), this figure had almost trebled and stood at 9,689.³³
- (b) By 30 September 1976, 15,318 strata lots had been created. By 30 June 1982, this figure had more than trebled to 47,384.

There are no figures available on the average number of people living in each home unit. Assuming an average of two occupants in each lot,³⁴ there are more than 95,000 people living in strata titled home units in Western Australia.

(b) Converted buildings

2.17 Most of the strata plans approved relate to new buildings. However, a number of established buildings have been converted to strata title schemes. In some cases, these buildings had been managed under the tenancy in common or company structure systems.

A number of blocks of flats have also been converted to strata title schemes.³⁵ One major developer in this field informed the Commission that he had created about 2,000 lots in this

³³ As at 30 June 1982, there was one strata scheme of 200 lots or more (the scheme concerned has 206 lots); four schemes of between 150 and 199 lots; eleven schemes of between 100 and 149 lots and forty-four schemes of between 60 and 99 lots. The remainder (9,629 schemes) have less than 60 lots. See also para 2.19 below.

³⁴ On 30 June 1976, the average number of occupants in each "dwelling" in Western Australia was 3.18: Western Australian Year Book 1982, 254. However, this average is for all dwellings and the Commission considers that the average for home units would be less.

way, and that many of these lots were purchased by investors intending to rent them to tenants.

(c) Commercial buildings

2.18 In February 1977 when the Commission issued its working paper, there were thought to be only about twenty registered strata plans not related to residential buildings. However, this number has rapidly increased so that about ten per cent of strata plans now being registered are for other than residential buildings. These include office premises, small factories (known as factoryettes) and medical centres.³⁵ There are also a number of developments comprising a mixture of residential, office or commercial units.

(d) Decline in percentage of duplexes

2.19 Since the Commission issued its working paper in 1977, the percentage of strata plans for duplex units has been falling. In 1977, the Titles Office estimated that about ninety per cent of all strata plans related to duplexes. That Office estimates that now only between seventy-five and eighty per cent of all strata plans relate to duplexes. Appendix II to this report contains a table prepared by the Commission showing the number of strata plans approved during 1981 and the number of lots on those plans. As the table shows, duplexes accounted for 57.9 per cent of the plans approved in that year.

(e) The future

2.20 It seems likely that the percentage of residential units in Western Australia which are strata titled will increase. The decrease in the size of the average family, the rising cost of land, transport and other services, and the increasing attractiveness to many people of a life-style based on proximity to city amenities, are all factors.

³⁵ The Commission is unable to say how many conversions have taken place. The Titles Office was unable to assist because strata plans do not show when the building was erected.

An interesting development is the announcement of plans for conversion of certain warehouses in Fremantle to residential lots: *A New Lease of Life for Old Wool Store* "The West Australian", 24 October 1981, p 1 of classified lift-out.

³⁶ In New South Wales, strata titles have been granted for spaces in a parking building: "Daily News", 6 April 1982, 31.

2.21 There will also continue to be demand for strata titled offices. Security of tenure, absence of periodical rent reviews and the possibility of capital gain are features which make them attractive to some business and professional people.

5. VIEWS COMMONLY HELD ABOUT THE INADEQUACY OF THE PRESENT ACT

2.22 The Commission is in no doubt that the strata titles concept has general acceptance throughout the community. No person submitted to the Commission that the system should be abolished, although many suggested ways of improving the legislation. Recurring themes in many of the comments related to -

- (a) the lack of a practical means of resolving disputes which arise within a strata scheme;
- (b) the absence of criteria which must be followed by a developer in allocating unit entitlement;
- (c) the present method of assessing rates on strata lots;
- (d) delays in establishing a management structure within the strata scheme;
- (e) the lack of adequate means of controlling tenants;
- (f) the alleged withholding from purchasers of information about vital aspects of the scheme by many vendors or their agents;
- (g) the apparent inappropriateness of some of the provisions of the existing legislation to duplexes.

These and other matters raised by the submissions are included in those dealt with in this report.

6. THE COMMISSION'S APPROACH IN REVIEWING THE ACT

(a) General

2.23 As many commentators on the working paper recognised, there are certain limitations inherent in living in a strata title development. Depending on the number of lots involved,³⁷ the proprietors in a strata scheme are dependent on each other to a much greater extent than neighbours in traditional houses and the possibility of friction developing is greater. Furthermore, each proprietor is required to observe a set of by-laws which are not imposed on owners of conventional houses. The same degree of privacy can not normally be expected.³⁸ An efficient council³⁹ of the strata company is usually necessary for the smooth running of a strata scheme, at least in one of any size.

2.24 Given the intrinsic nature of the strata title concept, the aim of the legislation should be to provide an appropriate framework for ensuring that as far as is reasonably practicable, such schemes function efficiently and harmoniously, and that rights and interests of all parties are equitably adjusted.

2.25 The Commission's view is that although the Act is in need of improvement in a number of respects, many of its provisions appear to be operating reasonably satisfactorily. In many cases, arrangements and understandings have been established under it, which the Commission considers should not be unnecessarily disturbed. Wherever possible, the Commission has endeavoured to make recommendations which are in conformity with the simplicity of the present legislation. In particular, the Commission has sought to ensure that the provisions relating to management of a strata scheme are not so complex or onerous as to require the strata company to engage professional agents. Whilst the accounting and management demands of a large block of units make it likely that the company will obtain the assistance of professional agents, the Commission seeks to ensure that this result is not

³⁷ Many duplexes, triplexes and even quadruplexes are treated by the proprietors as consisting of independent units, this being emphasised by the installation of fences dividing the front and back garden areas.

³⁸ Developers seem now to be aware of the need to create as much privacy as possible, for example, by the siting of individual units.

³⁹ As to the powers and duties of the council of the strata company, see paras 9.2 and 9.5 below.

unnecessarily imposed on lot proprietors in Western Australia, especially those living in developments which to date have managed without such assistance.⁴⁰

(b) Contents of report

2.26 The bulk of this report concentrates on the two main features of a strata titles system. The first is the system of title to units which permits individual ownership of a part of a building. The second concerns the rules governing the management of a strata scheme and the means of resolving disputes which arise within a strata scheme. However, the Commission has also dealt with the relationship between the strata company and its members on the one hand and third parties such as insurers, local authorities and power and water supply authorities on the other. Recommendations are also made for appropriate safeguards to protect intending purchasers of strata lots.

2.27 The report has been drafted on the basis that the present Act is satisfactory except where the Commission has indicated to the contrary. Those provisions in respect of which the Commission has made no proposals for amendment should, in the Commission's view, be carried forward into any new legislation.

2.28 There are many consequential points of detail to which the Commission has not specifically adverted but which should be dealt with in drafting any new legislation. The Commission would be pleased to assist in this regard.

⁴⁰ According to G F Bugden, *Strata Title Management Practice in New South Wales* (3rd ed, 1981), 39 an increasing proportion of Strata schemes in New South Wales are engaging outside managers. He attributes this in part to the complexity of the management provisions in the New South Wales legislation and the far reaching consequences of non-compliance.

PART II: MATTERS RELATING TO TITLE

CHAPTER 3

REQUIREMENTS FOR REGISTRATION OF A STRATA PLAN

1. PRESENT POSITION

3.1 As mentioned in paragraph 2.10 above, the system of strata titles in Western Australia has its basis in the registration of a strata plan at the Titles Office. Section 5(1) and (6) of the Act sets out the matters which must be contained in or endorsed on a strata plan. Under section 5(1), the plan must delineate the external surface boundaries of the parcel and the location of the building in relation to those boundaries.¹ It must include a drawing which illustrates each lot in the building,² by reference to floors, walls and ceilings.³ It must also show the approximate floor area of each lot,⁴ but the actual measurements of the boundaries of each lot need not be shown. It must also define any portions of the parcel not within the building that are or are intended to be separate tenements and used in conjunction with the building or portion of the building.⁵ The unit entitlement of each of the lots must be endorsed on the strata plan.⁶ In addition, the strata plan must have endorsed on it the name of the building, the address at which documents may be served on the strata company⁷ and contain such other features as may be prescribed.⁸

3.2 Under section 5(6) of the Act a strata plan lodged for registration must also be endorsed with or accompanied by -

- (a) a certificate of a licensed surveyor;⁹
- (b) a certificate of the Town Planning Board that the proposed subdivision has been approved by the Board; and

¹ WA, s 5(1)(a).

² Id, s 5(1)(c).

³ Id, s 5(1)(d).

⁴ Id, s 5(1)(e).

⁵ Id, s 5(1)(f).

⁶ Id, ss 5(1)(g) and 18. Unit entitlement is a topic which is considered in chapter 12 below.

⁷ WA, s 5(1)(h) and (i).

⁸ *The Strata Titles Regulations 1967-1981* presently prescribe certain matters relating mainly to the form of the strata plan as distinct from its contents.

⁹ For the existing requirements of this certificate, see para 3.8 below.

- (c) a certificate of the local authority that -
 - (i) the building has been inspected and is consistent with the approved building plans and specifications ,
 - (ii) the building is in the opinion of the local authority of sufficient standard and suitable to be divided into lots pursuant to the Act.

On registration of the strata plan at the Titles Office, the Registrar of Titles issues a separate certificate of title for each lot together with the share of the common property relating to the lot.¹⁰

2. REQUIREMENTS OF SECTION 5(1) OF THE ACT

3.3 The requirements of section 5(1) are similar in pattern to those contained in the corresponding provision in the strata titles legislation in each of the other Australian States¹¹ except New South Wales, which has slightly more elaborate requirements.¹² The Commission considers that, with two exceptions, the provisions of section 5(1) are satisfactory.

3.4 The first exception concerns section 5(1)(d), which regulates the manner in which the boundaries of the lots are to be defined on the strata plan. At present, it describes the lots as being "in the building". If the Commission's recommendation in paragraph 4.4 below that lots should be able to include, or consist of, space outside the building is implemented these words would no longer be appropriate and should be deleted. Apart from this, the paragraph provides that lots are to be defined "by reference to floors, walls and ceilings". This does not seem to provide a rule which can readily be applied in all cases. For example, it does not specify how the relevant lot boundary should be indicated where the wall is not vertical.

3.5 By contrast, the New South Wales legislation contains a series of definitions which together lay down detailed rules enabling a lot, which is three-dimensional, to be defined on a

¹⁰ WA, s 4(4).

¹¹ *Strata Titles Act 1967-1981* (Vic), s 5(1) ; Qld, s 9(1) ; *Real Property Act 1886-1982* (SA), s 223mb (2); *Conveyancing and Law of Property Act 1884-1980* (Tas), s 75F(1).

¹² NSW, s 8(1).

two-dimensional plan.¹³ It defines a lot as a cubic space the base of which is delineated by lines on a "floor plan", and provides that, unless otherwise indicated, where a base line corresponds to the base of a wall, that wall will be the boundary of the lot. This means that where the boundary of the lot follows a non-vertical wall there would be no need to indicate this by separate notation on the plan.¹⁴ The Commission recommends that a similar approach should be adopted in the Western Australian Act. The New South Wales legislation also provides that, where a boundary of a lot corresponds with a floor, wall or ceiling, the boundary shall be the inner surface thereof, unless otherwise indicated on the plan. In paragraph 4.14 below, the Commission recommends that a similar provision should be enacted in Western Australia. This would mean that in the above example the boundary of the lot would follow the inner surface of the (non-vertical) wall.

3.6 The New South Wales Act gives power to make regulations prescribing how the boundaries of a lot are to be described on the plan where they do not correspond with floors, walls and ceilings, for example where the lot extends beyond the building.¹⁵ The Commission recommends that a similar regulation-making power should be enacted in the Western Australian Act to avoid, as far as possible, any uncertainty as to the correct method of preparing plans.

3.7 The second exception concerns section 5(1)(f). This paragraph provides that the strata plan must define any portions of the parcel not within the building that are or are intended to be separate tenements, and used in conjunction with the building or portion of the building. Later in this report, the Commission recommends that this provision should not be included in the new legislation proposed by the Commission.¹⁶ Hence section 5(1)(f) should be deleted.

3. REQUIREMENTS OF SECTION 5(6) OF THE ACT: ENCROACHMENTS

(a) General

3.8 The surveyor's certificate which must be endorsed on or accompany a strata plan pursuant to section 5(6)(a) must certify that the building shown on the plan is within the

¹³ See the NSW definitions of "floor plan", "floor area", "lot" and "structural cubic space" in s 5(1) and the provisions of ss 5(2), 5(3) and 5(4). See also the definition of "wall" in s 5(1) which makes it clear that it includes a door, window or other structure dividing a lot from common property or from another lot. WA has no definition of "wall".

¹⁴ A similar rule applies where a floor or ceiling is not horizontal.

¹⁵ NSW, ss 5(2) and 158.

¹⁶ Para 5.14 below.

external surface boundaries of the parcel and, where eaves or guttering project beyond those boundaries, that a registered easement has been granted as an appurtenance of the parcel, or where the projection is over a road¹⁷ that the local authority has consented thereto.¹⁸

3.9 It can thus be seen that strata titles cannot be issued in respect of a parcel where the building concerned projects beyond the parcel except where the projection consists only of eaves or guttering. The reason for the limitation is that if a strata plan were registered for land which was not wholly within the subdivider's title there would be two titles over the part of the strata plan which extended into the adjoining land (that is, title evidenced through the strata plan and the freehold title for the land encroached on) .The surveyor's certificate is designed to eliminate this risk.¹⁹

3.10 However, although the Commission agrees with the general principle that the building must be within the parcel, it considers that the legislation should accommodate certain other types of encroachment in addition to eaves and guttering provided that there is an appropriate easement or consent for such encroachment. These matters are discussed in more detail below.

(b) Encroachment onto a road

(i) An encroaching wall or roof

3.11 The Commission has been informed of cases where a parcel could not be strata titled because a wall of the building which it was intended to divide into strata lots encroached onto a public road.²⁰ The encroachment could either occur inadvertently or pursuant to permission granted by the council with the approval of the Minister under section 400 of the *Local*

¹⁷ The Commission considers that "road" in s 5(6)(a) is intended to refer to a public road, and not a private road, and to include all the land within the road reserve. This should be clarified to put the matter beyond doubt.

¹⁸ In para 4.6 below the Commission recommends that where a lot is partly or wholly outside the building the surveyor should certify that lots not wholly within the building are within the boundaries of the parcel. See also paras 3.12, 3.14, 3.19 and 3.20 below for the Commission's recommendations in relation to the surveyor's certificate where the building encroaches onto a road or over other land.

¹⁹ Rath, Grimes and Moore, 13, 14 and 16.

²⁰ These usually were not buildings which were constructed with a view to being immediately strata titled, but were established buildings which the owner desired to bring under the Act. The City of Perth has informed the Commission that a number of older buildings in Perth encroach upon the road. Encroachments should, of course, only occur where buildings have been erected in areas where a set back requirement did not apply (eg some commercial areas).

Government Act 1960-1982. It could occur at ground level or the wall could encroach into the air space above the road. In order to obtain strata title, the developer must either remove the portion of the wall encroaching onto the road or request the local authority to invoke the road closure provisions contained in section 288A of the *Local Government Act 1960-1982* in respect of the portion of the road encroached upon so that the portion can be transferred to him. Removing a portion of the wall is, of course, costly and would delay the registration of the strata plan. The road closure procedure is a lengthy and cumbersome one requiring the consent not only of the local authority but also of the Governor.²¹ A transfer of the affected land by the Governor to the encroaching owner would be required. Instances were brought to the attention of the Commission where a local authority refused to invoke the procedure on the ground that closure would permanently distort the road alignment but where it probably would not have objected to the encroachment for the purpose of registration of the strata plan.

3.12 The Commission considers that section 5(6)(a) of the *Strata Titles Act*, whereby a strata plan may be registered even though eaves or guttering of the building project over a road, should be extended to include, as in New South Wales, "part of a roof or a wall or part of a wall, or of material attached externally thereto".²² This would enable a parcel to be strata titled without either requiring an encroaching wall of the building to be pulled down and rebuilt within the parcel, or requiring the portion of the road on which the wall stands to be closed, transferred to the encroaching owner and incorporated in the parcel. However, unlike New South Wales, roads in this State are vested in the Crown not the local authority.²³ For this reason, the Commission considers that the local authority should only be able to consent with the approval of a Minister of the Crown.²⁴ It recommends accordingly.

3.13 Under the Commission's proposal, the Registrar of Titles would not be granting strata title to the volume of space occupied by the encroaching wall or roof, any more than he does under the present Act in relation to eaves or guttering. The encroachment would neither be a

²¹ It was suggested to the Commission that s 231 of the *Transfer of Land Act 1893-1982* could be used instead of the road closure provisions in the *Local Government Act*. That section provides that the Commissioner of Titles may, in certain circumstances, issue a certificate of title to the encroaching owner in respect of an encroachment onto a road in the City of Perth or the City of Fremantle or in any other town to which the provision is extended by the Governor in Council. However, it may be that this section, which was enacted in 1893, is no longer operative. Section 286 of the *Local Government Act 1960-1982* provides that the property in roads is vested in the Crown and is removed from the operation of the *Transfer of Land Act*. It could accordingly be argued that the Commissioner's jurisdiction no longer exists.

²² NSW, s 38(1)(b).

²³ *Local Government Act 1960-1982*, s 286.

²⁴ Possibly the Minister for Local Government would be the most appropriate Minister.

lot or part of a lot, nor would it be common property. As in New South Wales, the Commission recommends that the encroachment should be treated for the purpose of administering the strata scheme **as if it were** common property.²⁵ Hence it would be the responsibility of the strata company to maintain the part of the roof or wall which encroaches.²⁶

3.14 Under the Act, it is the surveyor who must certify that the encroachment over a road (at present of eaves or guttering) has been consented to by the local authority. The Commission considers that, since the local authority must in any case certify as to other matters,²⁷ it is preferable that it should itself certify that it has consented to any permissible encroachment, where this is the case. The surveyor's certificate should, however, certify that the strata plan shows the extent of the encroachment and that all lots are within the boundaries of the parcel.²⁸ The Commission recommends accordingly.

(ii) *Other encroachments*

3.15 The Town Clerk of the City of Perth has drawn the attention of the Commission to that City's colonnade road widening policy for King Street and part of Hay Street, Perth.²⁹ Under this policy the City of Perth has established a new street alignment³⁰ for the purpose of providing a public footpath on the land between the old and the new street alignments while enabling the owner of the land affected to build a portion of his building above the footpath. The Town Clerk suggested that the *Strata Titles Act* should be amended to allow a building constructed in such a way to be strata titled. However, the Commission considers that difficulties could arise if the encroachment consisted of habitable or usable space. There would probably be no problem as between the participants in the strata scheme, since the user of the space could be treated as the "proprietor" for that purpose. However, the owner's relationship to third parties could cause difficulties. For example, since the owner- ship of the

²⁵ NSW, s 38(2)(b).

²⁶ It is one of the duties of the strata company to keep in good and serviceable repair and properly maintain the common property: WA, s 13(4)(h); NSW, s 68(1)(b).

²⁷ Para 3.22 below.

²⁸ As in the case of encroachment over other land: para 3.20 below.

²⁹ See the City of Perth publication, *New Street Alignment - Hay Street Colonnading*. This policy was adopted by the council of the City of Perth at its meeting on 17 July 1967. A similar policy has been adopted in regard to King Street.

³⁰ Under the *City of Perth Act 1925-1956*, any land lying between the old and the new alignment vests in the council on the date it is cleared of buildings. The owner of the land is entitled to compensation: *City of Perth Act 1925-1956*, s 5(4). The council may also purchase the land between the old and new alignment under s 4 of the *City of Perth Act 1925-1956* or s 363 of the *Local Government Act 1960-1982*.

space is vested in the council, he could not transfer or mortgage it, nor could he assert any right which depended on title against third parties.³¹ These difficulties would be unlikely to arise in the case of an encroachment consisting only of part of a roof or of a wall. The Commission accordingly does not consider that a building which encroaches other than to this limited extent should be able to be strata titled.³²

(c) Encroachment over other land

3.16 As was indicated above,³³ the only encroachments permitted over land other than a road are eaves and guttering in respect of which there is a registered easement. If a builder constructs the building so that one of its walls (or even part of a wall) is inadvertently constructed beyond the boundary of the parcel, the building cannot be divided in strata titles. Under the existing Act, the owner of the building would have to acquire title to the part of the adjoining land encroached upon before this could be done. Even if the adjoining owner were willing to sell the strip, the approval of the Town Planning Board would have to be obtained to the purchase, although if the encroachment is not more than one metre the Board is required to give its approval if it is "satisfied that there has not been collusion, but that everything has been done in good faith without intention to evade the law".³⁴

3.17 The adjoining owner may not, however, agree to sell the strip. In this situation, the only alternative open to the owner of the building is to apply to the Supreme Court under section 122 of the *Property Law Act 1969-1979* for an order vesting the strip in him. The Court is empowered to make an order under that section if the encroachment was not intentional and did not arise from gross negligence³⁵ and the Town Planning Board and the relevant local authority have given their consent. However, the Court may not be prepared to

³¹ A similar objection could be raised in regard to an encroachment authorised under s 400 of the *Local Government Act 1960-1982* which consisted of habitable space.

³² The Commission has been informed that a procedure has now been developed by the City of Perth which enables a public footpath to be created within the area covered by its colonnade policy without acquiring the ownership of the land concerned. This procedure involves revoking the new street alignment over the length of the parcel and restoring the old street alignment. The existing building is then demolished and the new building constructed on the land bounded by the restored street alignment but with a footpath provided at ground level. As the building is wholly within the boundaries of the parcel, it can be strata titled in the ordinary way. The council is given a 99 year lease of the land comprising the footpath and a new street alignment is imposed. Consideration could be given to amending the *City of Perth Act 1925-1956* to provide another, simpler, procedure to overcome the difficulty.

³³ Para 3.8.

³⁴ *Town Planning and Development Act 1928-1981*, s 25.

³⁵ Or, where the building was not erected by the encroaching owner, if in the opinion of the Court it is just and equitable to do so.

make the necessary order, perhaps because a part of the adjoining owner's building is contained in the strip concerned. An order was refused in such circumstances in *Re W H Marsh*³⁶ under similar New South Wales legislation.

3.18 Because of this, the Commission has given consideration to the question whether the *Strata Titles Act* should permit the parcel to be strata titled if an appropriate easement³⁷ is registered in respect of the encroaching wall, and has concluded that it should.³⁸ The adjoining owner may be prepared to grant such an easement even though he would not be prepared to transfer the strip or the Court may be prepared to do so pursuant to section 122 of the *Property Law Act 1969-1979* as an alternative to vesting the strip in the encroaching owner.³⁹

3.19 The type of easement required in relation to the wall would be different from that in the case of eaves and guttering. Where a builder allows eaves and guttering to project from a building beyond the boundary of the parcel, ownership of the eaves and guttering remains in the owner of the land on which the building is being erected, although the projection constitutes a trespass.⁴⁰ It has long been established that the owner of the adjoining land may grant an easement for the continued existence of eaves and guttering above his land.⁴¹ Where a builder constructs a wall so that it encroaches on the adjoining land the position is different. The part of the wall built on the adjoining land becomes the property of the owner of that land⁴² and as a result it is not possible for the owner to give an easement of the kind which he

³⁶ (1941) 42 SR (NSW) 21. Although the Court refused to make a vesting order it ordered that an easement of support be granted to the applicant.

³⁷ It would not be sufficient for the adjoining owner merely to give his consent since that would not necessarily bind subsequent owners. This problem does not arise in the case of encroachment of a wall onto a public road (para 3.12 above) since the ownership of the road would continue to be vested in the Crown.

³⁸ There is no provision to this effect in the other Australian jurisdictions or New Zealand. However, the Commission understands that consideration is being given in New South Wales to the enactment of a provision covering minor encroachments onto private land.

³⁹ S 122 of the *Property Law Act 1969-1979* gives the Court power either to vest the strip in the encroaching owner or to grant him an appropriate easement.

⁴⁰ *Fay v Prentice* (1845) 1 CB 828; and see the judgment of Kay LJ in *Lemmon v Webb* (1894) 3 Ch 1, 18.

⁴¹ *Thomas v Thomas* (1835) 2 C M & R 34; *Harvey v Walters* (1872) LR 8 CP 162. In the case of land registered under the *Transfer of Land Act 1893-1982*, the registration of the easement ensures that the benefit of the easement will pass to the successors in title of the proprietor in whose favour the easement was granted: ss 64,68 and 82.

⁴² *Waddington v Naylor* (1889) 60 LT 480. See also E P Facto, *Problem of the Encroaching Building*, (1941) 15 ALJ 11; A D McKenzie, *Encroachment of Buildings*, (1941) 15 ALJ 84. The rule that the encroachment becomes the property of the adjoining owner is subject to the principle that where a person begins to build on land which he believes is his own and the true owner perceiving that person's mistake leaves him to persevere in his error, a court of equity will not allow the true owner to assert his title to the piece of land: *Ramsden v Dyson* (1866) LR 1 HL 129, 140 per Lord Cranworth LC; E R Ives Investments

can give in relation to eaves and guttering overhanging his land. It would appear, however, that he can give an easement of support under which the part of the wall vested in him would support the part of the building which is erected on the encroaching owner's own land.⁴³ Where an easement of support is granted, the encroaching owner would be entitled to enter on his neighbour's land and carry out such repairs as are necessary for the maintenance of the support.⁴⁴ The Commission considers that, provided a registered easement of support has first been granted as an appurtenance to the parcel, the encroachment of a wall or part of a wall (including the roof immediately above it) onto the adjoining owner's land should not prevent the registration of a strata plan.⁴⁵ As in the case of an encroachment onto a public road,⁴⁶ the encroachment should be treated for the purpose of administering the strata scheme as if it were common property. The Commission recommends accordingly.

3.20 The certificate of a licensed surveyor registered under *the Licensed Surveyors Act 1909-1976* which is required under section 5(6)(a) of the Act should certify that -

- (a) the strata plan clearly indicates the extent of the encroachment and that all lots are within the boundaries of the parcel;
- (b) a registered easement of support has been granted under which the part of the building which is erected on the encroaching owner's land is entitled to the support of the wall or part of it which encroaches on the adjoining owner's land.

The Commission recommends accordingly.

3.21 The existing provision as to encroaching eaves or guttering should remain.

Ltd v High [1967] 1 All ER 504, 507-508; A J Bradbrook & M A Neave, *Easements and Restrictive Covenants in Australia* (1981), 34-38.

⁴³ *Re W H Marsh* (1941) 42 SR (NSW) 21.

⁴⁴ 14 Halsbury, *Laws of England*, (4th ed 1975), 89.

⁴⁵ For the same reason which it expressed in para 3.15 above in relation to encroachments onto a road, the Commission considers that permissible encroachments over other land should not include anything greater than that of a wall or part of a roof.

⁴⁶ Para 3.13 above.

4. REQUIREMENTS OF SECTION 5(6): THE LOCAL AUTHORITY'S CERTIFICATE

(a) General

3.22 By section 5(6)(c) of the Act, the certificate of the relevant local authority must be endorsed on or accompany a strata plan certifying that -

- (i) the building has been inspected and is consistent⁴⁷ with the building plans and specifications in respect of it which have been approved by the local authority; and
- (ii) the building, in the opinion of the local authority, is of sufficient standard and suitable to be divided into lots pursuant to the Act.

The local authority is required by section 20(1) of the Act to issue this certificate, if it is satisfied that -

- (iii) separate occupation of the proposed lots will not contravene the provisions of any town planning scheme prepared or adopted by the local authority;
- (iv) any consent or approval required under any such town planning scheme or under the provisions of the *Town Planning and Development Act 1928-1981* relating to an interim development order has been given in relation to the separate occupation of the proposed lots; and
- (v) the building and the proposed subdivision of the parcel into lots for separate occupation will not interfere with the existing or likely future amenity of the neighbourhood, having regard to the circumstances of the case and the public interest.

3.23 These requirements not only help to protect the amenity of the neighbourhood but to protect the purchasers of lots. The local authority's certificate is an assurance that at the time

⁴⁷ The Commission considers that this would be interpreted as "substantially consistent" so that minor variations from the plans and specifications would not disqualify the building from being strata titled.

of the granting of the certificate the building was of an acceptable standard.⁴⁸ It also operates as an assurance that a purchaser's occupation of his lot is in conformity with town planning requirements.

3.24 Fourteen commentators adverted to the question of a local authority's certificate. The overwhelming majority seemed to accept the need for local authority approval although some criticised the fact that at present a developer cannot obtain conditional approval before the building is completed. The Commission can see no cogent reason for abolishing the requirement for a local authority's certificate.⁴⁹ However, it recommends three changes to the Act to clarify the provisions and two changes of substance, as follows.

(b) Matters to be clarified

3.25 First, section 5(6)(c)(i) of the Act should be redrafted to provide for the case of a successful appeal to the Minister for Local Government against the refusal by a local authority to approve building plans and specifications. This right of appeal exists under section 374 of the *Local Government Act 1960-1982*.⁵⁰ The local authority's certificate should accordingly certify that the building is consistent with the building plans and specifications which were approved either by itself or by the Minister for Local Government on appeal.⁵¹ Secondly, section 20(1) suggests that a local authority **must** issue a certificate under section 5(6)(c) if it is satisfied as to the matters specified under section 20(1), whether or not it is satisfied as to the matters under section 5(6)(c). This clearly was not intended⁵² and the Commission recommends that the position be rectified in the course of the revision of section 20 of the Act which the Commission proposes below.⁵³ Thirdly, section 20(1)(c) requires the local authority to be satisfied that the building and the proposed subdivision of the parcel into lots will not interfere with the amenity of the neighbourhood. In practice, some local authorities at least require to be satisfied that, for example, the landscaping of the grounds is of an acceptable standard, although it is not clear that this is a relevant consideration under

⁴⁸ The position of purchasers of lots in relation to building defects is considered in chapter 18 below.

⁴⁹ It could be argued that the requirement referred to in para 3.22(v) above is unnecessary if there is a town planning scheme in existence. However, the Commission can see no objection to it provided that its recommendations in paras 3.30 to 3.34 below are adopted.

⁵⁰ This right of appeal is to be distinguished from the right of appeal against the local authority's refusal to issue a certificate under s 5(6)(c): para 7.1 below.

⁵¹ See para 3.35 below for the Commission's recommendation as to what the certificate should contain where the plans and specifications have been lost or destroyed.

⁵² In practice, local authorities satisfy themselves of matters under both sections.

⁵³ Paras 3.30 to 3.34.

this provision. The Commission recommends that the provision be amended to require the local authority to have regard to the development of the parcel as a whole.⁵⁴

(c) Proposed changes of substance

(i) Application to local authority for determination

3.26 The first of the two recommendations on matters of substance is as follows. At present, as some commentators pointed out, the Act does not enable a developer to apply to the local authority for a determination of any of the matters listed in paragraph 3.22(ii), (iii), (iv) and (v) above before commencing the building. It is true that in practice officers of the local authority may give an informal indication as to whether, once the building is completed in accordance with the approved plans and specifications, the local authority would be likely to issue a certificate. However, such informal indications would apparently not be binding on the local authority, since it alone has power to determine the application.⁵⁵ In particular, the question whether the building and the proposed subdivision of the parcel will not "interfere with the existing or likely future amenity of the neighbourhood, having regard to the circumstances of the case, and the public interest" calls for the exercise of a wide discretion by the local authority. A change in the council's town planning policy could occur so that earlier decisions of the local authority in similar circumstances could not necessarily be relied upon.

3.27 If the local authority refused to issue the certificate, the developer could suffer severe financial loss, particularly if the building could not readily be adapted to some other purpose. The developer could, of course, appeal to the Minister for Local Government under section 20(2) of the Act but the appeal may be unsuccessful and, even if successful, financial loss could be caused by the inevitable delay in being able to convey title to the lots.

3.28 The Commission considers that provision should be made in the Act enabling the developer, if he wishes, to apply to the local authority for determination of the matters

⁵⁴ If the Commission's recommendation in para 4.4 below is adopted, s 5(6)(c)(iii) would need to be redrafted so as to ensure that it also applies where a lot wholly encloses a building or where a lot extends beyond the building.

⁵⁵ *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204, 219.

referred to in paragraph 3.22(ii), (iii), (iv) and (v) at appropriate stages before commencing the building.

3.29 A developer cannot commence construction without a building licence from the local authority.⁵⁶ To obtain a licence, he must submit to the local authority plans and specifications of the proposed building for its approval.⁵⁷ Once it has received the plans and specifications, the local authority should be in a position to form an opinion on whether, if constructed in accordance with the plans and specifications, the building will be of sufficient standard and suitable to be divided into lots (that is, the matter referred to in paragraph 3.22(ii) above). The Commission therefore recommends that the Act should be amended to enable the developer to apply to the local authority for determination of the matter when, or at any time after, he makes application to the authority for a building licence.

3.30 A developer should be able to apply to the local authority for a determination in respect of the matters referred to in paragraph 3.22(iii), (iv) and (v) above at an even earlier stage and before incurring expenditure in preparing the detailed plans and specifications necessary to obtain a building licence. In the metropolitan area of Perth and in an increasing number of country local authority districts, it is necessary to obtain the approval of the local authority before commencing any development on a parcel, apart from a single unit dwelling house.⁵⁸ It accordingly seems appropriate that the developer should be able to apply to the local authority for determination of the matters referred to in paragraph 3.22(iii), (iv) and (v) when, or at any time after, he applies for developmental approval. The Commission recommends that the *Strata Titles Act* be amended accordingly.⁵⁹

⁵⁶ *Local Government Act 1960-1982*, s 374(1).

⁵⁷ *Ibid.*

⁵⁸ Where a local authority has a town planning scheme, it is usual for the scheme to provide that the approval of the local authority must be obtained before any development is commenced on the parcel. There are exemptions from the requirement but these rarely extend beyond the erection of a single dwelling house on residential zoned land. Similar provisions apply where interim development orders operate.

The consent of the Metropolitan Region Planning Authority must also be obtained for any development within the metropolitan area apart from the erection of a single dwelling house on zoned land: clauses 10, 24 and 30 of the Metropolitan Region Scheme made under the *Metropolitan Region Town Planning Scheme Act 1959-1981*. With limited exceptions, the power to grant approval has been delegated by the Authority to local authorities: *Metropolitan Region Town Planning Scheme Act 1959-1981*, s 19; Metropolitan Region Scheme, clauses 18 and 30; instrument of delegation published in the *Government Gazette*, 1 November 1963,3340.

⁵⁹ In those cases where no development application is required, the local authority should be required to provide guidelines for developers as to when they could make application for a determination and the amount of information to be included in the application.

3.31 The local authority should be required to determine an application under the proposals outlined in the two preceding paragraphs. A determination favourable to the developer should be able to be made subject to conditions. A reasonable time limit for the validity of the determination would need to be imposed. The Commission recommends a time limit of, say, two years unless the local authority approves a longer period which may not exceed, say, three years.

3.32 The developer should, of course, be required to pay a prescribed fee and to provide the local authority with such information of the proposed strata scheme as would enable it properly to determine the application.

3.33 The developer should have a right of appeal against the refusal of the local authority to make a favourable determination or against a condition imposed by the local authority in making its determination.⁶⁰

3.34 Once a favourable determination has been made by the local authority or on appeal, the local authority should be obliged to issue its certificate under section 5(6)(c) of the Act after the completed building has been inspected if it is satisfied as to the matters referred to in section 5(6)(c)(i)⁶¹ and that any conditions imposed in regard to the determination have been met.

(ii) *Where plan of building is lost*

3.35 The second matter of substance concerns the situation where a developer proposes to convert an old building (perhaps a warehouse) into strata title lots to be occupied as offices or for other commercial purposes or even as residences.⁶² The local authority may have no record of the building in its original form having been inspected and confirmed to be in accordance with approved plans and specifications, as is required by section 5(6)(c)(i) of the Act.⁶³ The original plans or specifications may have long been lost or destroyed. The Commission therefore recommends that in such cases it should be sufficient compliance with

⁶⁰ Paras 7.2 and 7.3 below contain the Commission's recommendations as to the appropriate appeal provisions.

⁶¹ As amended in accordance with the Commission's recommendation in the following paragraph.

⁶² The Commission has been informed that there is a trend in Sydney to convert old warehouses into strata titled flats as the desire for inner city living increases. A similar trend appears to be developing in Western Australia.

⁶³ Para 3.22 above.

section 5(6)(c)(i) if the local authority certifies that any modifications made are consistent with the building plans and specifications relating thereto that have been approved by the local authority. The local authority would of course be also required to certify under section 5(6)(c)(iii) that the building is in its opinion of sufficient standard and suitable for strata title subdivision. It is important for the protection of purchasers, particularly where change to residential use is contemplated, that the local authority should be satisfied that the building has no defects making it unsuitable for strata title occupancy.⁶⁴

5. REQUIREMENTS OF SECTION 5(6) : THE TOWN PLANNING BOARD'S CERTIFICATE

(a) General

3.36 At present, a strata plan lodged for registration must be endorsed with or be accompanied by a certificate of the Chairman of the Town Planning Board that the Board has approved the proposed subdivision of the parcel shown in the plan.⁶⁵ The working paper invited comment on whether Board approval should continue to be required for strata title subdivisions. Although most commentators on the issue expressed no objection to the present provision, two (the Institution of Surveyors and a surveyor) strongly urged that the requirement of Town Planning Board approval should be abolished. The Institution said that it was within the power of local authorities to control the density of development by adopting a town planning scheme approved by the Minister for Urban Development and Town Planning. The Institution claimed that abolition of the requirement of Town Planning Board approval could save up to two weeks in the time needed to register a strata plan, resulting in a reduction of the cost of the development because of a saving in interest on money borrowed.

3.37 In considering this issue, the Commission noted that in 1969 Parliament, on the advice of the Town Planning Board,⁶⁶ repealed⁶⁷ the requirement for Town Planning Board approval

⁶⁴ In the working paper the Commission raised the question whether the standards in this respect should be made uniform throughout the State. The Commission agrees with the general view of commentators that such a course would be inappropriate, since in determining whether the building was of a suitable standard the local authority concerned would take into account climatic conditions, the needs of the local community and the general standard of housing in the area.

⁶⁵ WA, s 5(6)(b). A similar requirement is also laid down in s 20(2) of the *Town Planning and Development Act 1928-1981* which provides that a plan of subdivision of land shall not be registered in the Titles Office unless the plan has first been approved by the Board. Since "land" is defined in s 2 of that Act as "land, tenements and hereditaments and any interest therein and also houses, buildings, and other works and structures" the requirement would appear to apply to a strata title subdivision.

⁶⁶ Western Australian *Parliamentary Debates* (1969) Vol 182, 3506.

to a strata title subdivision. However, it appears that as soon as the requirement had been repealed, a number of developers put in train plans for large scale strata title developments both within the area covered by the Metropolitan Region Scheme and in other parts of the State.⁶⁸ In some cases, it appeared that the developers did not intend to set aside land for public open space or for schools or community facilities. It was feared that the local authorities concerned may have approved such schemes without due regard "to the orderly and proper planning of the State and the preservation of the amenities of the localities affected"⁶⁹ or been powerless to prevent them. Accordingly in 1970, again on the advice of the Board, the requirement was reimposed.⁷⁰

3.38 However, as circumstances may have changed since 1970 the Commission considered that the question of the necessity for Town Planning Board approval should be re-examined. Accordingly, it sought the Board's views. The Board indicated that although there could still be danger in completely abolishing the requirement, substantial relaxation was justified. It suggested that the *Strata Titles Act* should be amended to empower the Governor in Council to make regulations exempting certain strata subdivisions in certain areas from the need for Board approval. The regulations could be amended from time to time to provide further exemptions as experience was gained. The Board proposed that its approval should not be required if -

- (a) no lot in the proposed scheme either extended beyond the building or consisted of a space outside it;⁷¹ and
- (b) the land concerned was zoned urban⁷² under the Metropolitan Region Scheme, or was zoned residential in a town planning scheme of a municipality outside the Metropolitan Region Scheme area.

The local authority should be required to certify in the certificate it issues under section 5(6)(c) of the Act that the proposed strata subdivision is not one requiring Board approval.

⁶⁷ *Strata Titles Act Amendment Act 1969*, s 5.

⁶⁸ Western Australian *Parliamentary Debates* (1969-70) Vol 186, 3817.

⁶⁹ Id, 3816.

⁷⁰ *Strata Titles Act Amendment Act 1970*, s 2.

⁷¹ This was on the assumption that the Commission's recommendation in para 4.4 below is implemented.

⁷² See the Scheme Map referred to in clause 23 of the Metropolitan Region Scheme made under *Metropolitan Region Town Planning Scheme Act 1959-1981*. The area zoned urban includes nearly all the land within the Region which is or can be used for residential or commercial purposes (excluding the central city areas in Perth and Fremantle and the Joondalup Sub-Regional Centre).

3.39 In paragraph 4.19 below the Commission recommends that the *Strata Titles Act* should permit subdivision within strata schemes. The Board agreed that its proposal should apply also to such subdivisions. For example, if a room was added onto a unit in a duplex, Town Planning Board approval would not be required if the parcel fell within category (b) in the previous paragraph, since the resultant lot would not include an area outside the building. However, Board approval would be required if it was proposed to extend a lot to include a garden plot since the lot would then include an area outside the building.⁷³

3.40 The Commission agrees with the Board's proposals and recommends their adoption.⁷⁴ Their adoption would mean that the great majority of strata subdivisions presently requiring Board approval would no longer need it. The Commission also recommends that the situation should be closely monitored with a view to widening the exemption in the light of experience and developments in the town planning field. For example, although schemes which provide for a lot or lots to extend beyond the building should initially require Board approval since they could amount to de facto conventional subdivision,⁷⁵ experience may show that in some circumstances Board approval could be dispensed with.⁷⁶

(b) The time when application should be made for the Board's approval

3.41 The owner of land proposing a subdivision, whether involving ordinary freehold lots or strata title lots, may apply to the Town Planning Board for conditional approval to the subdivision.⁷⁷ The Board may indicate to the applicant in writing that it will approve the subdivision provided certain conditions are attended to within a stated time. In the case of a proposed subdivision into ordinary freehold lots, these may include, for example, the preparation of a diagram of survey and the construction of roads.

⁷³ See the following paragraph where the Commission suggests that experience may show that the class of exemptions could be extended

⁷⁴ The Act should consequentially provide that s 20 of the *Town Planning and Development Act 1928-1981*, which prohibits a person from subdividing land without the approval of the Town Planning Board, should also not apply to such a subdivision.

⁷⁵ For example, the boundaries of duplex lots could extend to the extremities of the parcel, leaving only the air space above the building and the ground below it as common property.

⁷⁶ For example, a subdivision within an existing strata scheme consisting only of adding a small garden plot to a lot could possibly be exempted.

⁷⁷ *Town Planning Board Regulations 1962-1980*, in particular regs 9 and 10.

3.42 The Board has informed the Commission that in contrast to the practice in relation to ordinary freehold lots, application to the Board for approval of a proposed subdivision into strata lots is usually made after the building has been erected or, in the case of an existing building, after it has been modified. This is clearly inappropriate because by then the developer has invested a considerable amount of money in the project. The Board considers that it should be involved before construction commences so that it has adequate time to consider the proposal without unduly inconveniencing the developer.

3.43 The Commission agrees and accordingly recommends that the Act should be amended to provide that where the Board's approval to a strata subdivision is to continue to be required,⁷⁸ a person who intends to construct or modify a building with a view to strata titling it should be required to apply to the Board for conditional approval⁷⁹ before he commences construction or modification.⁸⁰ The form of the application and the documents which should accompany it should be prescribed by regulation.

(c) Local authority to certify compliance with conditions

3.44 The Town Planning Board agreed with the Commission's suggestion that it would be sufficient, where conditional approval has been given, for the local authority to issue a certificate that the conditions have been complied with. This certificate would take the place of the certificate of the Board which would otherwise be required to be endorsed upon or accompany the strata plan lodged for registration.⁸¹ Implementation of this proposal would avoid the need for the developer to make a further application to the Board and would save both his and the Board's time. It would not place an undue burden on the local authority since under section 5(6)(c) of the Act it is in any case required to inspect the building after

⁷⁸ Paras 3.38 to 3.40 above.

⁷⁹ The Commission suggests that consideration be given to specifying in the regulations the matters to which the Board should have regard in considering an application for strata title subdivision: cf *Town Planning Board Regulations 1962-1980*, reg 8.

⁸⁰ The position would then be analogous to that provided for in by-law 2.2(1) of the *Uniform Building By-Laws 1974-1981* which requires a person who intends to construct or alter any building to give notice of his intention to do so to the local authority. In para 4.23 below, the Commission recommends that its proposal should also apply to proposed subdivisions within strata schemes.

⁸¹ WA, s 5(6)(b). The Town Planning Board informed the Commission that it would advise the relevant local authority of the conditional approval and of the terms of it. There may be cases where the Board is prepared to give unconditional approval, for example where an owner wishes to convert an existing building to strata titles and where no modification of it is required for this to be done. In such cases the Board would itself issue the certificate as to its approval.

completion in order to issue the certificate required of it. The Commission recommends accordingly.

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

3.45 The Commission recommends that -

(a) *The New South Wales provisions relating to the delineation of the boundaries of a lot on the strata plan be adopted in Western Australia.*
(paragraphs 3.4 to 3.6)

(b) *The subdivision of a building into strata title lots should be permitted even though -*

(i) *the wall or part of the roof of the building encroaches onto a road, provided the local authority and the appropriate Minister of the Crown consent;*

(ii) *a wall of the building or the roof immediately above it encroaches onto other land, provided an easement of support is obtained from the owner of the land encroached on.*

(paragraphs 3.12 to 3.14 and 3.19 to 3.21)

(c) *When, or at any time after he applies for a building licence, a developer should be able to apply to the local authority for a determination as to whether the building, if constructed in accordance with the plans and specifications, will be of sufficient standard and suitable to be divided into lots.*

(paragraphs 3.29 and 3.31 to 3.34)

(d) *A developer should be able to apply to the local authority, when or at any time after he makes a development application, for a determination as to whether -*

(i) *separate occupation of the proposed lots will not contravene any town planning scheme;*

(ii) *any consent or approval required under any such scheme or under an interim development order has been given in relation to the separate occupation of the proposed lots; and*

(iii) *the proposed development as a whole will not interfere with the existing or likely future amenity of the neighbourhood.*

(paragraphs 3.25 and 3.30 to 3.34)

(e) *Where the local authority is unable to confirm (for the purpose of its certificate under section 5(6)(c) of the Act) that the building is in accordance with the approved plans and specifications because the original plans or specifications have been lost or destroyed, it should be sufficient if the local authority certifies that any modifications to the building are consistent with the building plans and specifications relating thereto that have been approved by the local authority.*

(paragraph 3.35)

(f) *The Act should be amended to empower the Governor in Council to make regulations exempting certain strata subdivisions in certain areas from the need for Town Planning Board approval.*

(paragraphs 3.38 to 3.40)

(g) *Where the Town Planning Board's approval to a strata subdivision is to continue to be required, a person who intends to construct or modify a building with a view to strata titling it should be required to apply to the Board for conditional approval before he commences construction or modification. Where conditional approval has been given by the Board, it should be sufficient for the local authority to issue a certificate that the conditions have been complied with.*

(paragraphs 3.43 and 3.44)

CHAPTER 4

THE STRATA LOT

1. BOUNDARIES OF THE LOT

(a) Introduction

4.1 Two principal questions arise in relation to the boundaries of strata lots. These are -

- (a) whether it should be permissible for a lot to include, or to consist of, an area outside the building, and
- (b) where a floor, wall or ceiling is a boundary of a lot, whether the boundary line should continue to be the centre of the floor, wall or ceiling unless otherwise indicated on the plan.

(b) Strata title for area outside building

(i) General

4.2 In Western Australia at present a lot must be within a building or buildings shown on the strata plan.¹ Hence the boundary of a lot may not extend into space outside the building. However, as more than one building may be shown on the strata plan, a lot can be made up of two or more parts contained in two or more buildings. For example, a lot could comprise a residential unit and an enclosed garage where the garage is on the same parcel of land but physically separated from the building in which the unit is contained. The residential unit and the garage would each be part of a lot and together make one lot.²

4.3 A significant drawback of the requirement that a lot must be within a building or buildings is that strata title cannot be given to areas such as outdoor swimming pools and garden plots. The New South Wales *Strata Titles Act 1973-1981* enables the boundary of a lot to be drawn to include an area outside the building where that is desired.³

¹ WA, ss 3 and 5(1).

² Another example is a residential unit and a storage cubicle together making one lot.

³ NSW, s 5(2).

In fact in that State a lot may be completely outside the building.⁴ In Victoria and Tasmania also, the boundary of a strata lot may also be drawn to include an area outside the building.⁵

4.4 The Commission agrees with the majority of those who commented on this issue in response to the working paper⁶ that it should be permissible for a lot to extend to include an area outside the building. The ability to provide for a strata title scheme in which boundaries of some or all of the lots extend beyond the building would be particularly useful in the case of single level or town house style developments where purchasers could thereby be assured of title to a patio, garden plot or parking space in the same way as they can be assured of title to the living area or a garage within a building. Ability to extend the boundary in this way could also be of benefit in multi-storey developments, by enabling open air balconies to be included in the lot.⁷ Those opposed to the proposal argued that the change was unnecessary since exclusive occupancy can be achieved under the present legislation by leasing the area concerned from the strata company or by the grant by it of exclusive use.⁸ However, these methods rely on action by the strata company and could be subject to onerous conditions. In any case, irrespective of the precise legal consequences, there is no doubt that many persons would be attracted to the concept of ownership, as distinct from a tenancy or a licence. The Commission considers that there is no reason why this preference should not be provided for by the legislation, subject to appropriate town planning and local authority controls as outlined earlier. The Commission accordingly recommends that the present limitation that a lot must be within the building or buildings should be removed.

4.5 In the discussion above, the Commission has spoken in terms of a lot **extending beyond** the building. However, this is only one way in which the concept can be utilised once the present limitation that a lot must be within a building is removed. A lot could comprise two physically separate parts - one inside the building and the other some distance away, for

⁴ NSW, s 5(2).

⁵ *Strata Titles Act 1967-1981*(Vic), ss 3 and 5(1); *Conveyancing and Law of Property Act 1884-1980* (Tas), s 75E.

⁶ Twenty-two commentators expressed views on the issue. Nineteen were in favour of the proposal, including the Town Planning Board, The Commissioner of Titles, the Law Society, the Institute of Architects, a number of local authorities and councils, of strata companies. The three opposed were REIWA, the Local Government Association and a real estate agent.

⁷ At present, the Titles Office in Western Australia will permit a proprietor's strata title to include a balcony where it is clear that its use will be restricted to the occupier of that lot. However, the legal basis upon which this is done is not clear.

⁸ Paras 5.3 to 5.10 below.

example, a parking space or garden plot.⁹ A lot could legally consist wholly of a cubic space outside the building.¹⁰ Indeed, this is the method by which "staged development" is presently provided for in New South Wales. A developer is able to reserve a lot when registering his original strata plan, to use the proceeds of the sale of lots in the first building to finance the construction of a further building within the reserved lot, and to register a strata plan of subdivision of the latter building. Staged development is dealt with in Chapter 6 of this report.

(ii) *Surveyor's certificate*

4.6 If the Commission's recommendation that it should be permissible for a lot to exist partly or wholly outside a building is adopted, it would be desirable that the surveyor's certificate which is required to be endorsed on or to accompany a strata plan lodged for registration¹¹ should certify that all lots not wholly within the building are within the boundaries of the parcel. The Commission recommends accordingly.

(iii) *Structural alterations*

4.7 If the Act is amended to permit a lot to include an area outside the building, as the Commission recommends, it would also be desirable to provide that the proprietor concerned should not be able to effect a structural improvement in that area¹² except where the strata company has, by unanimous resolution, consented.¹³ The reason for this is that nearly all strata developments are constructed within municipalities having building by-laws or town planning schemes which contain plot ratio and site cover limitations. These limit the total floor area in buildings which may be constructed on a parcel of land and the proportion of the

⁹ In considering whether to approve a subdivision where it was proposed to create complete lots outside the building, the Town Planning Board would no doubt take into account the possibility of such lots being transferred to persons who were not proprietors of units within the building. For example, if parking spaces were created as complete lots, they could be sold to persons who did not reside within the scheme. This could create on street parking problems and lower the amenities of the scheme as a whole. If such a danger existed, the Board could require parking spaces to be created as part lots only (that is, so that the Unit and the parking space together make up one lot). The parking space could then not be sold separately from the unit.

¹⁰ Regulations would need to be made prescribing the method by which such cubic space should be defined: para 3.6 above.

¹¹ WA, s 5(6)(a).

¹² Whether by extending his unit into the area of the lot outside the building, or by building a separate structure in a lot which is wholly outside the building. See also Chapter 6 below.

¹³ But see paras 11.17, 11.18, 11.21 and 11.22 below for the Commission's recommendations relating to unanimous resolutions.

total area of the parcel which may be built on.¹⁴ If a lot includes an area outside the building, the proprietor of the lot could extend his unit into that area and utilise the whole or part of the unused plot ratio and site cover to the detriment of other proprietors within the same strata scheme. An additional reason for requiring the consent of the other proprietors is that an extension of a unit or other structural additions could have an adverse effect on the appearance of the building, or the outlook from other units. Furthermore, the strata company (that is, all the proprietors) would be responsible for the increase in insurance premiums on the building.¹⁵

(c) Limitation on use of lot or part lot

4.8 In South Australia, Victoria, the Australian Capital Territory, the Northern Territory and New Zealand, provision is made for the creation of a special type of lot whose use is limited to particular purposes.¹⁶ In Victoria and New Zealand such lots are called "accessory units" and in South Australia, the Australian Capital Territory and the Northern Territory they are called "unit subsidiaries". An advantage of this system is that the particular purpose for which an area can be used can be determined by the strata plan. This could be desirable in some strata developments. The fact that the use to which such areas can be put is to be restricted could persuade the Town Planning Board¹⁷ and the local authority¹⁸ to approve a particular subdivision where it would not otherwise do so.¹⁹ It might also render a particular strata scheme more attractive to potential purchasers since they could be assured that the proprietors of such lots were limited in the use to which they could put them.

¹⁴ The provisions in the *Uniform Building By-laws 1974-1981* which relate to plot ratio and site cover are contained in by-laws 1.3 (the definition clause), 11.4, 11.5, 11.13 and 11.16.

¹⁵ Also, where the rates are assessed on gross rental value, the extension would also be taken into account in assessing the rates of each proprietor. However, this objection would no longer be valid if the Commission's recommendation in paras 14.5 and 14.8 below is adopted that the gross rental value of each lot should be determined separately.

¹⁶ *Real Property Act 1886-1982* (SA), ss 223m(1) and 223nb; *Strata Titles Act 1967-1981*(Vic), ss 3, 5(1)(f), 6(5A), 7A and 8; *Unit Titles Ordinance 1970-1975*(ACT), ss 10(b), 11-15; *Unit Titles Ordinance 1975-1981* (NT), ss 9(b), 10-14; *Unit Titles Act 1972-1981* (NZ), ss 2 and 10. The New South Wales legislation provides for "utility lots" which in some respects resemble the "accessory unit" concept: see NSW, s 39.

¹⁷ Paras 3.36 to 3.40 above.

¹⁸ Paras 3.22 and 3.25 to 3.35 above.

¹⁹ This may be of particular importance if the Commission's recommendation that lots should be able to be created outside the building is adopted.

4.9 For these reasons, the Commission was initially attracted to the concept of accessory lots.²⁰ However, it has decided that it is unnecessary to provide for them. The object could be achieved simply by enacting a provision to the effect that the strata plan may specify the purpose for which any lot or part of a lot can be used.²¹ The Commission accordingly recommends that this approach be adopted, thereby avoiding the need to create a further type of strata lot. It should be unlawful to use the lot concerned (or part of a lot, as the case may be) for any other purpose.²² To alter the use or remove the limitation altogether should require not only a unanimous resolution of the strata company but also the approval of the local authority, and of the Town Planning Board where the subdivision required the approval of the Board.²³ It would also be necessary to make provision for the strata plan in the Titles Office to be amended. No doubt such a limitation on use would mainly be imposed in regard to areas outside the building such as a garden plot, parking space or swimming pool. However, the limitation could also be imposed on areas within the building, for example, a storage area, garage or office.

(d) The boundary line of a lot

4.10 Section 5(5) of the Act provides that:

"Unless otherwise provided in the strata plan, the common boundary of a lot with another lot or with common property shall be the centre of the floor, wall or ceiling, as the case may be".

²⁰ Six of those who commented on this issue in the working paper, including the Town Planning Board, the Building Surveyor of the City of Nedlands and the Institution of Surveyors, favoured strata title to areas outside the building being given by means of accessory lots.

²¹ Sometimes a strata plan is registered showing that an area outside the building is to be used for a particular purpose. However, it is doubtful whether such a notation has any legal effect. Possibly the notation is made in pursuance of s 5(1)(f) of the Act which provides that a strata plan shall define any portions of the parcel not within the building that are or are intended to be separate tenements, and used in conjunction with the building or portion of the building. However, the meaning of this provision is not clear: para 5.4 below.

This recommendation is intended to apply only to lots created after the provision comes into force.

²² It should be noted that by-law 2 in part II of the schedule to the present Act provides that:

"Where the purpose for which a lot is intended to be used is shown expressly or by necessary implication on or by the registered strata plan, a proprietor shall not use his lot for any other purpose or permit it to be so used. "

However, its drawback is that, being in part II of the schedule, it is alterable merely by a special resolution and that it refers only to lots, and not part lots. If the Commission's recommendation in para 4.9 above is adopted, this by-law can be repealed in regard to future schemes.

²³ In paras 7.5 and 7.8 below the Commission sets out its recommendations as to appropriate appeal provisions.

Senior officers at the Titles Office in Perth have informed the Commission that cases where the common boundary has been other than the centre of the floor, wall or ceiling have been extremely rare.²⁴

4.11 Where the boundary between a lot and common property is the centre of the floor, wall or ceiling, the strata company is under a duty²⁵ to maintain the exterior half of the floor, wall or ceiling, as it is common property, and the proprietor of the unit is responsible for the interior half.²⁶ Sometimes it is desirable or even necessary that maintenance or repairs to both halves of a floor, wall or ceiling be effected at the same time. Often, for example, it will be impossible to fix a defect in a window²⁷ without interfering with both sides of the window. At present, simultaneous maintenance or repair is dependent on co-operation between the strata company and the lot proprietor. Similar problems can arise where the centre of a floor, wall or ceiling is the boundary between two lots.

4.12 The New South Wales *Strata Titles Act 1973-1981* adopted a new approach by providing²⁸ that where the floor, wall or ceiling of a strata lot is a boundary, unless otherwise stipulated in the strata plan, the boundary of the lot is the inner surface of the wall, the upper surface of the floor and the under surface of the ceiling, as the case may be.²⁹

4.13 The Commission agrees with the majority of the commentators on the working paper who addressed this issue that the New South Wales approach should be adopted in Western Australia.³⁰ If this were done, then normally the maintenance and repair of floors, walls and ceilings (other than those within a lot) would be solely the responsibility of the strata company. Furthermore, when it was desired to sue a third party in regard to the defective condition or repair of a floor, wall or ceiling, it would no longer be necessary for the lot proprietor to join with the strata company as one of the plaintiffs. Under the present Act,

²⁴ They have involved cases where measurements and angles related to the external walls have been used to assist in defining part lots in a garage designed to accommodate proprietors' cars where there were no internal walls separating the parking bays which formed the part lots.

²⁵ WA, s 13(4)(h).

²⁶ WA, schedule, part I, by-law 1(c).

²⁷ The Commission assumes that the word "wall" in s 5(5) is to be construed as including doors, windows etc. See the Commission's recommendation in para 3.5 above.

²⁸ NSW, s 5(2).

²⁹ In most instances the boundaries of such lots are not otherwise stipulated and will therefore be the inner surface of the wall, the upper surface of the floor and the under surface of the ceiling.

³⁰ Fourteen commentators favoured the New South Wales approach, including the Institution of Surveyors, the Urban Development Institute, the Town Planning Board, the Law Society and the Commissioner of Titles. Five were opposed, including the Town of Canning and a town planner.

doubt can arise as to whether the strata company or a proprietor is liable for the cost of repair work to the inner half of a wall arising from water penetration originating beyond that half.³¹ The proposed provision will clearly make the strata company responsible for such repairs.

4.14 The change would also help avoid disputes between proprietors of adjoining lots about which of them was responsible for water penetration damage. At present, responsibility probably depends on precisely where in the wall or ceiling the defect occurs. This could be difficult to ascertain by simple inspection. Where a lot is superimposed on another, and water penetrates through to the lower lot, investigation may be required to locate the source of the leak and the question would arise as to which of them should undertake the expense of that investigation. In any event, the defect would usually not have been caused by the fault of either of the proprietors who would be in a situation which could confront any of the proprietors in the scheme. Under the present law, repair of the leak could be the responsibility of the strata company if the water pipe concerned serves more than one lot.³² The dispute as to who should initiate the investigative work could involve not only the proprietors, but the strata company as well. The New South Wales approach overcomes these difficulties and the Commission accordingly recommends its adoption in Western Australia.³³ Following New South Wales, this recommendation is intended to apply not only to strata plans which are registered after the amendment comes into force but also to existing registered strata plans. The reasons which led the Commission to make the recommendation apply with equal force to existing as well as future schemes.

4.15 One of the commentators who objected to adoption of the New South Wales approach pointed out that proprietors would thereby be prohibited from driving nails or screws into the walls without the consent of the strata company. This does not appear to have been a practical problem in New South Wales. However, to overcome the objection, the Commission recommends that a by-law be added to those in part I of the schedule to the Act to the effect that a proprietor may, without obtaining the consent of the strata company, paint, wallpaper or decorate the structure which forms the inner surface of the boundary of his lot, or affix

³¹ See *Simons v Body Corporate Strata Plan No 5181* [1980] VR 103.

³² WA, schedule, part I, by-law 2(d).

³³ If the Commission's recommendation in this para is adopted it should be implemented by adopting s 5(2) of the New South Wales Act: para 4.12 above. It is to be emphasised that the phrase "inner surface" of the wall, floor or ceiling is meant to refer to the inner surface of the actual composition of the wall etc, and not to include the paint, wallpaper, carpet, lino or other material attached thereto. These would not be part of the common property and consequently the strata company would have no obligation to maintain them.

locking devices, flyscreens, furniture, carpets and the like thereto, if such action does not unreasonably damage the common property.

2. SUBDIVISION WITHIN STRATA SCHEMES

4.16 One of the issues raised in the working paper was whether the new legislation should enable subdivision within established strata schemes so that the boundaries of lots and common property can be altered. The Act does not provide for this. At present in Western Australia, in order to amend the boundaries of a strata lot or common property, it is necessary for there to be "a notional destruction" of the building³⁴ and for a fresh strata plan to be registered. In addition to new certificates from the local authority and the Town Planning Board being required,³⁵ a further certificate from a licensed surveyor would be necessary and also fresh mortgages and caveats to replace those on the old plan.

4.17 A common example of the situation where alteration of boundaries might be desirable is where the proprietor of a unit in a single storey strata title development wishes to extend his unit onto land which is at present common property. Conversely, the proprietor of a very large residential unit such as a penthouse might wish to subdivide the unit into two lots.³⁶ A power of subdivision might also enable a firm which is outgrowing a unit purchased for use as its office to acquire part of an adjoining unit. The fact that the proportion of strata titled developments which are not used for residential purposes is rising³⁷ will probably increase the desirability of providing for subdivision.

4.18 The Commission considers that there should be a simpler and less expensive method of achieving the desired result than that outlined in paragraph 4.16 above. Most of those who commented on this issue in the working paper were also of this view.³⁸ There are precedents

³⁴ A building is notionally destroyed where -
(a) the proprietors by unanimous resolution so resolve; or
(b) the Supreme Court is satisfied that having regard to the rights and interests of the proprietors as a whole, it is just and equitable that the building shall be deemed to have been destroyed and makes a declaration to that effect: W A , s 19(1).

See also para 20.5 below where the Commission recommends that the concept of notional destruction be replaced with that of cancellation of the strata plan.

³⁵ As to the contents of these certificates, see para 3.2 above.

³⁶ Some other examples of situations where provision to subdivide could be desirable are contained in paras 8.17 and 8.18 of the working paper.

³⁷ Para 2.18 above.

³⁸ Seventeen commentators, including the Town Planning Board, the Commissioner of Titles, the Law Society, two local authorities, the Associated Banks in WA, the Urban Development Institute and the

for this course in New South Wales, Victoria, Queensland and New Zealand, where the relevant legislation makes provision for subdivision within strata schemes.³⁹

4.19 The Commission accordingly recommends that there should be provision for the alteration of the boundaries of -

- (a) one or more lots so as to create two or more different lots;
- (b) one or more lots so as to create one or more different lots and common property;
- (c) one or more lots and common property so as to create one or more different lots or one or more different lots and common property; or
- (d) common property so as to create one or more lots.⁴⁰

4.20 In order to ensure that the procedure for subdivision makes proper provision for all the interests involved, it is necessary to outline them.

First, a subdivision will usually be of concern to all the proprietors in the strata scheme and to those holding mortgages or other encumbrances on any of the lots as to whether the proposed subdivision will detract from the amenity or value of lots or common property within the strata scheme.

Secondly, usually a reallocation of unit entitlement will be desirable when a subdivision is effected. The Commission is of the view that the unit entitlement of each lot should bear a close relationship to its capital value relative to the other lots in

Local Government Association were in favour. Three were against: a strata company, a real estate agent and a private person.

³⁹ NSW, ss 5(7), 9, 10, 11, 15, 18, 37 and 38; *Strata Titles Act 1967-1981*(Vic), ss 3, 4-6 and 34; Qld, ss 10 and 24; *Unit Titles Act 1972-1981*(NZ), ss 2 and 44.

⁴⁰ This is the scope for subdivision in New South Wales and Queensland: NSW, s 5(7); Qld, s 7(2). In Victoria and New Zealand, the scope for subdivision is not as wide: see *Strata Titles Act 1967-1981*(Vic), s 3 and *Unit Titles Act 1972-1981*(NZ), s 2. It is not, for example, possible in Victoria to convert an area of common property into a completely new lot. Consolidation (ie turning two or more lots into one lot) and conversion (ie turning a lot into common property) are dealt with in paras 4.24 to 4.32 below. Because of the possibility of altering the common property, the Act should define "common property" to mean so much of a parcel as **from time to time** is not comprised in any lot: Qld, s 7.

the strata scheme.⁴¹ If, for example, a lot is enlarged by adding a bedroom on land which had previously been common property, the value of that lot relative to the others will increase. In the absence of a reallocation of unit entitlement, the other proprietors would be obliged to pay a larger administrative fund levy brought about by the increased insurance premium for the building⁴² and by the increased cost of maintaining it. This would be unfair. A reallocation of unit entitlement in accordance with the new relative values would help ensure that these additional costs were borne more equitably.⁴³

Thirdly, there are planning requirements which should be met. Any new or restructured lots should be of sufficient standard and suitable to be lots under the strata titles legislation. Any alterations or additions to the building should be carried out in accordance with the building by-laws of the local authority and the separate occupation of any proposed lots should not contravene the provisions of a town planning scheme or interfere with the existing or likely future amenity of the neighbourhood.

Fourthly, the Titles Office will require a plan of the alterations effected by the subdivision.

4.21 Bearing these interests in mind, the Commission recommends that legislation providing for subdivision within a strata title scheme should take the following form -

Plan of subdivision

(a) A strata plan of subdivision should be lodged at the Titles Office.⁴⁴

⁴¹ See Chapter 12 below.

⁴² The strata company is obliged to insure the building to its replacement value: WA, s 13(4)(c). The addition to the building will increase its replacement value and hence probably the premium.

⁴³ A reallocation would also ensure that where rates are assessed on unimproved value (see paras 14.4 and 14.7 below) the amount payable by each proprietor closely relates to the value of his lot.

⁴⁴ The plan should consist of a sheet showing the new or altered lots as it is intended they will appear upon the subdivision being effected. If subdivision is proposed to be effected on more than one floor, such a sheet should be lodged in respect of each floor involved. The plan should be accompanied by an application by the strata company in a prescribed form requesting the Registrar to register the plan. To avoid confusion, it should be required that lots which are being created, diminished or enlarged by the subdivision be given numbers which have not earlier been used to identify lots on the strata plan. This is a matter which can be attended to by regulation.

Certificates of surveyor and relevant authorities

- (b) The strata plan of subdivision should be endorsed with or accompanied by -
- (i) the certificate of a surveyor containing the same particulars as are required in relation to registration of the initial strata plan;⁴⁵
 - (ii) where appropriate, a certificate of the Town Planning Board that it has approved the subdivision;⁴⁶ and
 - (iii) a certificate of the relevant local authority certifying -
 - (1) (with appropriate modifications) the same particulars in relation to the proposed subdivision as are required in relation to registration of the initial strata plan;⁴⁷ and
 - (2) where applicable, that the conditions under which the Town Planning Board gave approval have been complied with⁴⁸ or, as the case may be, that the approval of the Town Planning Board is not required.
- (c) The strata plan of subdivision should be accompanied by a plan prepared by the surveyor in sufficient detail to enable the Registrar, where appropriate, to amend the location plan.⁴⁹

⁴⁵ Paras 3.8,3.12,3.14,3.19,3.20 and 4.6 above.

⁴⁶ Paras 3.2 and 3.38 to 3.40 above. Where conditional approval has been given by the Board, the certificate of the local authority that the conditions have been complied with should take the place of the certificate of the Board under para 4.21(b)(ii): paras 3.43 and 3.44 above and para 4.23 below.

⁴⁷ Paras 3.22 and 3.25 above.

⁴⁸ This foreshadows the Commission's recommendation in para 4.23 below.

⁴⁹ The location plan delineates the external surface boundaries of the parcel and the location of the building in relation to those boundaries: para 3.1 above.

This should only be required where the subdivision is associated with an alteration of the external boundaries of the building or the subdivision creates or alters lots which are wholly or partly outside the building. The object of requiring the plan is to enable the Registrar to amend the location plan appearing on the strata plan: see para 4.21(h) below.

Consent of strata company

- (d) The plan should also be accompanied by a certificate under the seal of the strata company certifying that it has, by a unanimous resolution, consented to the proposed subdivision.⁵⁰

Discharges and transfers to be lodged with plan of subdivision

- (e) (i) Any transfers necessary to place each proposed lot in the name of its intended proprietor should be lodged at the Titles Office with the strata plan of subdivision.⁵¹ Any lot or part lot to be transferred should be free of registered encumbrances at the time of the registration of the transfer. It should be provided that on registration of a transfer of common property to a lot proprietor,⁵² the common property concerned should vest in the transferee free of encumbrances.⁵³
- (ii) However, no transfer of common property proposed to be created by the subdivision should be lodged at the Titles Office,⁵⁴ but the lot or part lot from which the common property is to be created should be free of registered encumbrances at the time of the registration of the plan of subdivision.

⁵⁰ Cf NSW, s 37(4); Qld, s 10(1). In New South Wales and Queensland, no such certificate is required where the subdivision consists only of the alteration of the boundaries of one or more lots so as to create two or more different lots. However, the Commission considers that as such a subdivision could affect the amenities of the scheme, it should require a unanimous resolution. Under the Commission's recommendations, a special resolution which, by declaration of the Supreme Court, is deemed to have been unanimously passed, would also be sufficient: paras 11.21 and 11.22 below.

⁵¹ No transfer would be required in respect of a lot or lots whose boundaries are to be altered where the lot or lots are owned by the same person.

⁵² Or where it is intended to create one or more lots from common property, on registration of the transfer to the person intended to be the proprietor of the lot or lots.

⁵³ For the manner in which common property may be transferred, see para 8.12 below. The provisions of s 10 of the Act which deal with the disposition of common property should be applied with appropriate modifications where it is intended to enlarge a lot by adding common property to it or to create one or more lots from common property.

Where the approval of the Town Planning Board is not to be required to such a subdivision (para 3.39 above) it should be provided that s 10(8) of the Act does not apply to the transfer: para 8.22 below.

⁵⁴ In para 4.21 (g) (ii) below, the Commission recommends that where it is intended to create common property by the subdivision, the land concerned should, ipso facto, become part of the common property.

Unit entitlement

- (f) The strata plan of subdivision should be accompanied by an application to the Registrar of Titles to alter the existing schedule of unit entitlement on the strata plan. This application, in turn, should be accompanied by -
 - (i) a certificate under the seal of the strata company certifying that the company has by unanimous resolution⁵⁵ consented to the proposed allocation of unit entitlement set out in the application;
 - (ii) a certificate from a licensed valuer that the unit entitlement proposed to be allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to the others;
 - (iii) the consent in writing of all persons (other than proprietors) who have a registered interest in any of the lots affected by the proposed allocation.⁵⁶

Consequences of registration of strata plan of subdivision

- (g) Upon registration of the strata plan of subdivision -
 - (i) Where it is intended to enlarge a lot by adding part of an existing lot to it, that part should, ipso facto, become subject to any registered encumbrance over the lot which is intended to be enlarged, and any caveat lodged with the Registrar of Titles against the lot.
 - (ii) Where it is intended to enlarge the common property by adding part of a lot to it, the land should, ipso facto, become part of the common property.

⁵⁵ Or by special resolution which, by declaration of the Supreme Court, is deemed to have been unanimously passed: paras 11.21 and 11.22 below.

⁵⁶ These requirements conform to those recommended in paras 12.25 and 12.33 below for reallocation of unit entitlement pursuant to a unanimous resolution within a strata scheme

- (iii) The share of a proprietor of a lot in the additional common property should ipso facto become subject to any registered encumbrance over his lot and any caveat lodged with the Registrar of Titles against his lot.
- (iv) The common property should be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots, as set out in the altered schedule of unit entitlement, and registered encumbrances over lots and caveats lodged against lots at the Titles Office should be deemed to be amended accordingly.
- (h) The strata plan of subdivision should be deemed to be part of the strata plan. The Registrar should be required to make appropriate amendments to the strata plan,⁵⁷ the schedule of unit entitlement and, where necessary, to certificates of title.⁵⁸

4.22 If the recommendations made above are implemented a simpler, more convenient and less costly method of effecting a subdivision will be available than the present procedure offered by way of a "notional destruction" of the building. The plan of subdivision would simply supersede the part of the original plan affected by the subdivision: the unaffected part would continue in operation. It would not be necessary to prepare a completely new strata plan. The certificates of the local authority and the Town Planning Board would only be in respect of the proposed subdivision. It would be unnecessary for substitute mortgages to be prepared in respect of lots unaffected by the subdivision or for the Registrar of Titles to issue fresh certificates of title in respect of those lots.⁵⁹

4.23 Where a subdivision occurs money will often be expended in altering the building, as for example where a proprietor has extended his unit onto common property. The certificate of the local authority to be endorsed on or accompany the plan of subdivision could not be issued until the alteration has been completed.⁶⁰ Thus the proprietor could not carry out the alterations with the certainty that the certificate would be issued. To alleviate the proprietor's

⁵⁷ Qld, s 10(8).

⁵⁸ If the Commission's recommendation in paras 8.9 and 8.10 below is adopted, it will not be necessary for the Registrar of Titles to amend the certificates of title relating to the lots except where the certificates of title were issued under the existing Act, since the latter show the quantum of the share owned by the proprietor in the common property.

⁵⁹ Except where the certificates were issued under the existing Act: see immediately preceding footnote.

⁶⁰ See paras 4.21(b)(iii) and 3.22 above.

position in this regard, the Commission recommends that its proposals in relation to an early determination by the local authority in respect of the original strata plan ⁶¹ should also apply to proposed subdivisions within strata schemes. Similarly, the Commission recommends that its proposals for conditional approval by the Town Planning Board of a proposed initial strata subdivision⁶² should also apply to proposed subdivisions within existing schemes (and also to proposed consolidations⁶³).

3. CONSOLIDATION

4.24 The Act does not make provision for consolidating two or more lots into one lot. Such a consolidation can be effected under the strata titles legislation of New South Wales and Queensland by registering a strata plan of consolidation.⁶⁴ The principal difference between the procedure in Queensland and New South Wales is that in the former the approval of the local authority to the consolidation is required⁶⁵ whereas in New South Wales it is not.

4.25 The overwhelming majority⁶⁶ of those who commented on this issue in response to the working paper were in favour of enabling two or more lots to be consolidated into one. The Commission also considers that there should be provision for consolidation. Several commentators suggested that there should be planning control over consolidations. The Commission considers that the approval of the Town Planning Board should be required to a consolidation in those cases where its approval to the original strata subdivision would be required.⁶⁷ The approval of the local authority should also be required.⁶⁸

4.26 If the Commission's recommendation in paragraph 4.14 above in relation to the boundaries of lots is implemented, in most instances the boundaries of lots will be the inner surface of walls, the upper surface of floors and the under surface of ceilings. Where this is the case then a dividing wall between two adjoining residential lots will be common property. Hence, if it were desired to incorporate the dividing wall into the title of the two lots, a

⁶¹ Paras 3.29 to 3.34 above.

⁶² Paras 3.43 and 3.44 above.

⁶³ Para 4.24 to 4.27 below.

⁶⁴ NSW, s 12; Qld, s 11.

⁶⁵ Qld, s 11 (1).

⁶⁶ Those in favour included the Town Planning Board, three local authorities, the Commissioner of Titles, the Law Society, WA Trustees and REIWA.

⁶⁷ Paras 3.38 to 3.40 above. The Board's approval is required for consolidation of ordinary freeholds: *Town Planning and Development Act 1928-1981*, s 20(1)(a).

⁶⁸ This is because some consolidations, for example a consolidation of two residential units, could be in conflict with the town planning scheme or by-laws unless structural alterations were effected.

"subdivision",⁶⁹ not a consolidation would be required.⁷⁰ For this reason, the Commission expects that applications for consolidation will be rare.

4.27 The Commission accordingly recommends that -

- (a) there should be provision enabling the proprietor of two or more lots to consolidate them into one lot;
- (b) the consolidation be effected by the registration of a plan ("the strata plan of consolidation");⁷¹
- (c) the plan of consolidation should be endorsed with or accompanied by a certificate of the Town Planning Board approving the consolidation where applicable;
- (d) the plan should also be endorsed with or be accompanied by a certificate of the local authority certifying -
 - (i) that it has approved the consolidation;
 - (ii) where applicable, that the conditions under which the Town Planning Board gave approval have been complied with or, as the case may be, that approval of the Town Planning Board is not required;
- (e) the plan should be accompanied by the consent in writing of all persons who have a registered encumbrance over either lot.
- (f) the unit entitlement of the consolidated lot should be the sum of the unit entitlements of the lots consolidated to create it;⁷²
- (g) upon registration of the strata plan of consolidation, the plan should be deemed to be part of the strata plan. The Registrar should be required to make

⁶⁹ Within the meaning of para 4.19 above.

⁷⁰ Para 4.19(c) above.

⁷¹ Qld, s 11(1). To avoid confusion the consolidated lot should be given a number which has not earlier been used to identify lots on the strata plan.

⁷² Qld, s 11(2).

appropriate amendments to the strata plan⁷³ and to the schedule of unit entitlement.

The procedure recommended above is based on existing Titles Office practice in relation to consolidation of ordinary freehold lots held under the *Transfer of Land Act 1893-1982*.

4. CONVERSION OF A LOT TO COMMON PROPERTY

4.28 Cases have been brought to the attention of the Commission where the strata company wished to acquire a lot within an established strata scheme so that the lot could be used by a caretaker. Under the Act, a unit can be included in the common property as a caretaker's flat when the strata plan is being prepared.⁷⁴ However, there is no power for this to be done after the strata plan is registered. The same deficiency in the legislation would prevent a lot within the scheme being converted to common property for other uses, such as a meeting room or games room.⁷⁵ Two of the Australian States, New South Wales and Queensland, make provision for the conversion of lots into common property.⁷⁶

4.29 All those who commented on the issue when it was raised in the working paper were of the view that there should be provision for conversion of a lot to common property.⁷⁷ The Commission agrees with these commentators and recommends accordingly.

4.30 The Town Planning Board informed the Commission that it did not consider its own approval necessary since the proposal involves the conversion of the whole of a lot. The Commission agrees. However, it is of the opinion that the approval of the local authority

⁷³ Id, s 11(3).

⁷⁴ The strata company has power under by-law 4(9)(b) of part I of the schedule to the Act to "employ for and on behalf of the company such agents and servants as it thinks fit in connection with the control and management of the common property, and the exercise of the powers and duties of the company". This would empower the company to employ a caretaker not only to supervise the common property but also carry out other tasks as, for example, collection of administrative fund levies.

⁷⁵ It is doubtful whether a strata company has power to lease a lot from a proprietor for this purpose. By-law 3(a) of part I of the schedule to the Act empowers the strata company to "purchase, hire or otherwise acquire personal property for use by proprietors in connection with their enjoyment of the common property". However, it is not clear that this would include a lease of a lot.

⁷⁶ NSW, ss 13, 18(4), 37(5) and 46(2); Qld, ss 12 and 19.

⁷⁷ One commentator submitted that in the case of a scheme of forty or more units, the developer should be compelled by law to build one of the units for caretaker purposes only. The Commission considers that this is not a matter to be dealt with in the *Strata Titles Act*. Possibly the Town Planning Board could take into account whether or not a caretaker's flat is to be provided in deciding whether to approve such a strata subdivision.

should be required since the conversion could involve a change of use affecting the amenities of the neighbourhood.

4.31 It also considers that the consent of the proprietors should be required as the conversion would result in the imposition of a greater share of the cost of administration of the strata scheme on the continuing proprietors. It would also increase the administrative burden of the strata company. The commentators were divided on the question of whether a special resolution⁷⁸ or a unanimous resolution⁷⁹ should be required before the conversion could proceed. Because the proprietors contribute to the cost of administration and maintenance of common property and because the strata company would normally be involved in considerable expenditure for the acquisition of the lot, the Commission considers that a unanimous resolution should be required.⁸⁰

4.32 The Commission accordingly recommends that -

- (a) there should be provision for the conversion of one or more lots into common property;
- (b) the conversion should be effected by the registration of a transfer executed by the proprietor of the lot and by the strata company;⁸¹
- (c) the transfer should be accompanied by -
 - (i) a certificate of approval of the local authority to the conversion; and
 - (ii) a certificate of the strata company certifying that it has by unanimous resolution consented to the conversion;
- (d) the transfer should not be registered unless the lot to which it relates is free of registered encumbrances;⁸²

⁷⁸ Only a special resolution is necessary in New South Wales: NSW, s 37(5)(a).

⁷⁹ A unanimous resolution is required in Queensland: Qld, s 12(1).

⁸⁰ See, however, paras 11.21 and 11.22 below.

⁸¹ Cf NSW, s 13(1); Qld, s 12(1).

⁸² Cf NSW, s 13(2)(c); Qld, s 12(3).

- (e) upon registration of the transfer -
 - (i) any lot thereby converted into common property and the share of the common property appurtenant to that lot should vest in the proprietors as tenants in common in shares proportional to the unit entitlement of their lots;
 - (ii) any registered encumbrance over a proprietor's share in the common property should ipso facto extend to his share in the additional common property;
 - (iii) the Registrar of Titles should strike out the references in the strata plan to the lot and to its unit entitlement in the schedule of unit entitlement and make the consequential amendment to the aggregate unit entitlement,⁸³ and to the certificates of title;⁸⁴
- (f) any registered encumbrance over a lot and an appurtenant share in the common property should be deemed to be amended in accordance with the altered schedule of unit entitlement.

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

4.33 The Commission recommends that -

- (a) *It should be possible for a lot to include an area outside the building or to consist of a space which is wholly outside the building. However, the proprietor should not be able to effect a structural improvement in the area or space, except where the strata company has by unanimous resolution consented.*

(paragraphs 4.4 to 4.7)

⁸³ Cf NSW, s 46(2); Qld, s 12(4).

⁸⁴ If the Commission's recommendation in paras 8.9 and 8.10 below is adopted, it will not be necessary for the Registrar of Titles to amend the certificates of title relating to the lots except where the certificates of title were issued under the existing Act, since the latter show the quantum of the share owned by the proprietor in the common property.

- (b) *It should be possible to specify on the strata plan the purpose for which a lot or part of a lot can be used. It should be unlawful to use the lot or part lot for any other purpose. There should be provision for altering the use or removing the limitation altogether.*

(paragraph 4.9)

- (c) *Where the floor, wall or ceiling of a lot is a boundary, unless otherwise stipulated in the strata plan, the boundary of the lot should be the inner surface of the wall, the upper surface of the floor and the under surface of the ceiling, as the case may be.*

(paragraphs 4.12 and 4.14)

- (d) *However, a proprietor, without obtaining the consent of the strata company, should be able to paint, wallpaper, or decorate the structure which forms the inner surface of the boundary of his lot, or affix locking devices, flyscreens, furniture, carpets and the like thereto, if such action does not unreasonably damage the common property.*

(paragraph 4.15)

- (e) *There should be provision for -*

- (i) *subdivision within strata schemes;*
- (ii) *consolidation of two or more lots into one;*
and
- (iii) *conversion of a lot or lots into common property.*

(paragraphs 4.19,4.21,4.23, 4.24,4.27,4.28 and 4.32)

CHAPTER 5

LAND FOR USE IN CONJUNCTION WITH A LOT

1. GENERAL

5.1 If the Commission's recommendations in Chapter 4 are implemented strata title could be granted in respect of areas outside a building. This would mean that strata title could be granted, for example, to a parking space marked out on vacant ground or a garden plot.

5.2 The adoption of the Commission's recommendations in this respect would avoid to some extent the need to make additional provision for the grant of exclusive occupation of particular areas of common property. Strata title schemes from their inception could include, for example, parking spaces as part lots. However, although the need would be reduced, it would not be overcome altogether. Circumstances may change during the life of the scheme, so that the need to provide for areas to be set aside for exclusive use may arise even though it did not exist at the time of the scheme's inception. It would also seem desirable to provide for a method of allocating exclusive use or occupation which is less formal than a grant of strata title, and which can more easily be revoked than the extinguishment of strata title.

5.3 The Act presently provides three means by which exclusive use of specific areas of common property can be granted to particular proprietors. This can be achieved by the strata company -

- (a) leasing an area of common property to a proprietor; or
- (b) granting a proprietor exclusive use and enjoyment of an area of common property -
 - (i) pursuant to by-law 3(f) of part I of the schedule to the Act; or
 - (ii) by making a by-law under section 15(1) of the Act.

5.4 Section 5(1)(f) of the Act is also of relevance. It provides that a strata plan shall define any portions of the parcel not within the building, that are or are intended to be separate tenements, and used in conjunction with the building or portion of the building. Its apparent effect is that the strata plan may provide for separate tenements which are not to be owned by

a lot proprietor (and which would therefore remain common property) but which may be made the subject of some arrangement whether by lease or otherwise with one or more proprietors.¹ Consequently, a definition of such an area on the strata plan would not of itself give a proprietor exclusive use or occupation of the area. Such a right would be required to be given by the strata company under one or other of the provisions set out in paragraph 5.3 above.

2. LEASING

5.5 Under section 10(2) of the Act, the proprietors may by unanimous resolution direct the strata company to lease the common property or any part of it. Since there is no prohibition against leasing to a proprietor this provision may be used to lease to a proprietor an area of common property for use as a parking bay or garden plot or for some other purpose. The consent of the Town Planning Board and the local authority is also required if the lease (including any option to renew or extend its initial term) exceeds ten years.²

5.6 Since the Commission does not recommend that the present power of the strata company to lease common property should be abolished, the power would provide a means by which a proprietor could be granted exclusive occupation of a specific area of common property. This method has the advantage that the proprietor's lease can be registered at the Titles Office.³ However, the Commission considers that there should be a method of granting exclusive use falling short of a lease. In the following paragraphs of this chapter, the Commission discusses the present methods of so doing and recommends certain changes.

3. GRANT OF EXCLUSIVE USE AND ENJOYMENT

(a) Discussion of present methods

5.7 The first method of granting exclusive use, falling short of a lease, is by utilising by-law 3(f) of part I of the schedule to the Act. This provides that a strata company may:

¹ This is the view of the author of the paper cited in footnote 3 to para 2.3 above.

² WA, s 10(8). See paras 8.25 and 8.26 below for the Commission's view about this requirement.

³ WA, s 10(6)(b). Alternatively, the proprietor could lodge a caveat with the Registrar of Titles.

"grant to a proprietor the right to exclusive use and enjoyment of common property, or special privileges in respect thereof, but any such grant shall be determinable on reasonable notice unless the company by unanimous resolution otherwise resolves".

It is therefore unnecessary under the by-law for the grant to be made by unanimous resolution. However, a unanimous resolution is required to avoid the possibility of the grant being withdrawn on reasonable notice.

5.8 Each proprietor is a tenant in common of the common property and, as such, has an equal right with the others to use it. The Commission accordingly considers it desirable that each proprietor should be entitled to veto a proposal to grant one of them exclusive use of any part of the common property. However, this is not possible if the grant is made under by-law 3(f) by the council of the strata company. Further, although the grant can be determined on reasonable notice (unless the strata company by unanimous resolution otherwise resolves), a proprietor who objects to the grant would have to persuade the council of the strata company to determine it or to persuade his fellow proprietors to direct the council to do so.⁴ If he cannot, the grant would continue notwithstanding his objection.

5.9 By-law 3(f) has other defects. First, although the power to make a grant under it is in the form of a by-law, a grant so made is not itself in the form of a by-law. There is no requirement that the grant be recorded at the Titles Office on the strata plan.⁵

An inspection of the plan by an intending purchaser of a lot would therefore not disclose to him the extent to which the common property was affected by such grants. Secondly, it is not clear whether a grant made under by-law 3(f) could enure for the benefit of successors in title to the proprietor in whose favour the grant was made.

5.10 The second method of granting exclusive use to a proprietor of part of the common property is by the strata company making an appropriate by-law under section 15(1) of the Act. This method does not have the defects connected with utilising by-law 3(f). Because it involves making a by-law adding to part I of the schedule to the Act, it requires a unanimous

⁴ By-law 4(1) of part I of the schedule to the Act requires the council of the strata company to comply with any direction given at a general meeting of proprietors.

⁵ Any amendment, repeal or addition to a by-law contained in part I of the schedule to the Act has no effect until the strata company has notified the Registrar of Titles and he has made reference thereto on the registered strata plan: WA, s 15(4).

resolution of proprietors⁶ and the by-law has no effect until an appropriate entry is made on the registered strata plan. Further, it would appear that it could be so drafted as to enure for the benefit of succeeding proprietors of the lot concerned.

(b) The Commission's recommendations

5.11 Because of its defects, the Commission recommends that by-law 3(f) should be repealed.⁷ It further recommends⁸ that the existing power to make a by-law granting exclusive use of common property, or special privileges in respect of common property, should be clarified along the lines of section 58(7), (8), (9) and (10) of the New South Wales *Strata Titles Act 1973-1981*.⁹ Section 58(7) of that Act, in addition to specifically providing that a strata company may by unanimous resolution make such a by-law, expressly empowers the company to impose such conditions to the grant as it may specify in the by-law, including a requirement that the proprietor pay money to the strata company as consideration for the grant (this could be either in the form of a lump sum or periodical payments, or both). The same subsection provides that the strata company may by unanimous resolution make a by-law amending, adding to or repealing such by-law. Section 58(8) provides that, while the by-law is in force, it enures as appurtenant to, and for the benefit of, the lot in respect of which the grant was made. Section 58(9) provides that the proprietor for the time being of the lot concerned is liable to pay to the strata company any money owing under the by-law and, unless excused by the by-law, is responsible for properly maintaining the area of common property the subject of the grant.¹⁰

5.12 It should be made clear that the only method (falling short of a lease) of granting to a proprietor exclusive use of, or special privileges in respect of, an area of common property should be in pursuance of a by-law made by the strata company under the provisions recommended in the previous paragraph. However, in order to preserve existing rights granted under any by-laws made pursuant to section 15 of the Act, it should be provided that the

⁶ WA, s 15(2).

⁷ Existing rights granted pursuant to the by-law should, however, be preserved.

⁸ This recommendation is in line with most of the comments on this issue in the working paper. Those in favour included the Town Planning Board, the Commissioner of Titles, the Local Government Association and the Law Society. The last two submitted that a special resolution only should be needed to make such a by-law. However, the Commission considers that, since proprietary rights are involved, a unanimous resolution should continue to be required. But see para 11.22 below.

⁹ There is a similar provision in Queensland: Qld, s 30(7), (8), (9) and (10).

¹⁰ The strata company would otherwise itself be obliged to maintain the area as part of its duty to maintain the common property (see WA, s 13(4)(h)).

proprietor should continue to be entitled to those rights, and that those by-laws should be deemed to be by-laws made under the provisions recommended by the Commission.¹¹

5.13 In New South Wales there is no requirement that a description of the area should be recorded in the Titles Office. This means that although an intending purchaser would become aware of the existence of a grant by an inspection of the strata plan in the Titles Office he would not thereby become aware of the areas of common property concerned. In the Commission's view it is desirable that a description of the specific area should accompany the notification of the by-law lodged with the Registrar of Titles and it so recommends.

(c) Consequential amendment

5.14 It would be unnecessary to retain section 5(1)(f) of the Act if the Commission's recommendations are implemented that -

- (a) a lot should be able to extend beyond the building or consist wholly of space outside it;¹² and
- (b) the strata plan may specify the purpose for which a lot or part lot can be used.¹³

4. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

5.15 The Commission recommends that -

The only method (falling short of a lease) of granting to a particular proprietor exclusive use and enjoyment of, or special privileges in respect of, a specific area of common property should be in pursuance of a by-law made by unanimous resolution and recorded at the Titles Office.

(paragraphs 5.6 and 5.11 to 5.14).

¹¹ Qld, s 5(11).

¹² Paras 4.4 and 4.5.

¹³ Para 4.9.

CHAPTER 6

STAGED DEVELOPMENT

1. PRESENT SITUATION

6.1 Under the present Act, it is not legally possible to develop a single parcel of land in stages by erecting further buildings for subdivision into strata lots after the registration of the strata plan.¹

6.2 In the working paper, the Commission asked for comment on whether the Act should make provision for staged development.² Almost all the commentators on this issue agreed that provision should be made.³ Developers, in particular, favoured the suggestion. There were, however, differences as to the circumstances in which staged development should be permitted and what safeguards there should be to protect the purchasers of lots in the preceding stages.

2. POSITION IN OTHER AUSTRALIAN STATES

6.3 One of the aims of the provisions of the New South Wales *Strata Titles Act 1973-1981* permitting subdivisions to be effected in the various ways set out in section 5(7)⁴ was to allow for staged development. The Act enables a developer to reserve a lot to himself when registering his original strata plan, then to construct a further building within the reserved lot and to register a strata plan of subdivision of that building. Once the strata plan of subdivision has been registered the developer can proceed to transfer the lots in that plan to purchasers. However, the strata plan of subdivision will almost always show common property as well as lots. Corridors in the new building, for example, will normally be common property. Under the New South Wales legislation, the subdivision of a reserved lot into lots and common property cannot be effected unless the strata company by special resolution consents to the

¹ WA, s 5 makes this clear since all the buildings which are to contain lots must be completed before a strata plan can be registered. To create further lots on the parcel a "notional destruction" of the building is required (para 20.5 below) and a fresh strata plan registered.

² Working paper, paras 10.6, and 38.1, question 11.

³ Seventeen were in favour of staged development, including the Institute of Architects, the Institution of Surveyors, the Urban Development Institute, REIWA, the Commissioner of Titles, the Law Society, and the City of Perth. However, three others expressed caution because of the lack of demand and the difficulty of balancing all the interests involved. These were the City of Canning, the Associated Banks in WA and the Local Government Association.

⁴ Para 4.19 above.

subdivision.⁵ The special resolution must also agree to each proposed unit entitlement with respect to the new lots.⁶

6.4 Apart from New South Wales, none of the Australian jurisdictions have provisions in their strata titles legislation which would permit staged development.⁷ However, New Zealand has recently enacted legislation making specific provision for staged development. An outline of the relevant provisions is set out in paragraphs 6.10 to 6.17 below.

3. ADVANTAGES OF STAGED DEVELOPMENT

6.5 Staged development offers a number of advantages. It enables a developer to construct part of a project and then finance the construction of the balance by the sale of units in the completed part.⁸ By permitting deferment of part of the project, staged development also enables a developer to take account of the possibility of changing market conditions. It is true that a developer could subdivide the land into two or more parcels at the outset,⁹ so that there will be two or more completely separate developments but the effect of the building by-laws is usually that fewer units can be built than could have been built on the land before it was subdivided. This is because of the provisions in those by-laws relating to plot ratio,¹⁰ site cover,¹¹ and the required setback of the building from the boundaries of a parcel. Furthermore, if there are two separate strata schemes instead of one, the possibility of the developer including expensive amenities such as a swimming pool, tennis court or recreation room in

⁵ NSW, s 37(4). The developer may not subdivide during the initial period without an order of the Supreme Court: id, ss 9(3)(b), 37(4) and 67. The initial period is the period expiring on the day on which there are proprietors of lots the subject of the strata scheme concerned (other than the original proprietor) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement: id, s 5(1). Furthermore, even when the initial period has expired, the voting power of the developer is reduced to one-third of its face value during the time when he is the proprietor of lots the sum of whose unit entitlement is not less than one-half of the aggregate unit entitlement: id, schedule 2, part 2, cl 12(4).

⁶ NSW, s 11(b).

⁷ Staged development of a strata scheme is possible under Queensland's *Building Units and Group Titles Act 1980-1981*: ss 7(2), 10(1), 10(5), 10(6) and 24(1). However, since that legislation requires strata lots to be wholly within the building "staged development" can only take place in a strata scheme where, for example, a converted warehouse is progressively subdivided to create further dwelling units or offices. Although the *Cluster Titles Act 1974-1981* (Vic) provides for staged development, that Act deals with the subdivision of land rather than of buildings, and the circumstances of the staged development will be different than those in a strata titles development: chapter 21 below.

⁸ A developer who embarks on a large scale strata title project would have less need to "pre-sell" if he could complete it by stages. "Pre-selling" involves certain risks to purchasers: chapter 17 below.

⁹ The approval of the Town Planning Board would be required (*Town Planning and Development Act 1928-1981*, s 20(1)) unless the land was already in separate lots.

¹⁰ Plot ratio provisions limit the total floor area in buildings which may be constructed on a parcel of land.

¹¹ Site cover provisions limit the proportion of the total area of the parcel which may be built on.

either is diminished because the cost cannot be spread over as many purchasers and, in any event, there may not be space on the parcel for the amenity.

4. THE DIFFICULTIES

6.6 There are, however, considerable problems with staged development of strata schemes. One is that the location, size, design and appearance of the subsequent stages and the number of units in those stages could all affect the value of a unit erected in one of the earlier stages.¹² Another is that if the developer did not proceed with the subsequent stages, those purchasers who acquired units on the basis of a complete development could find themselves indefinitely situated in one that was only partially completed.

6.7 The Commission has been informed that the requirement of a special resolution of existing proprietors consenting to a proposed subdivision was introduced in New South Wales¹³ in order to protect purchasers from misrepresentations or failure by the developer to disclose his intentions in regard to further development on the site. The requirement means that the purchasers of existing lots are often in a position where they can prevent the issue of strata titles to a further development if they consider that it is against their interests. This is particularly so as the voting power of the developer is reduced to one-third during the time when he is the proprietor of lots the sum of whose unit entitlement is not less than one-half of the aggregate unit entitlement.¹⁴ The risk that proprietors who buy in the earlier stages of a project will vote against resolutions required as a prerequisite to the approval and registration of further subdivision plans has inhibited free use of the provisions for staged development.

6.8 The Commission has been informed of two methods used by developers under the New South Wales provisions to circumvent the possibility of a negative vote by the proprietors. The developer may include in his contracts of sale with purchasers in the earlier stages a provision appointing him as their proxy to exercise their voting power on the motion to subdivide the reserved lot. Alternatively, the developer may include in the contracts a provision that the purchaser will exercise his vote in favour of the subdivision. However, neither of these methods may be completely satisfactory. They would not be effective where

¹² In suggesting that provision for staged development was unwarranted, the City of Canning emphasised the difficulty of protecting existing proprietors.

¹³ Para 6.3 above.

¹⁴ NSW, schedule 2, part 2, cl 12(4). During the "initial period", not even a special resolution is sufficient; he must obtain an order of the Supreme Court: see footnote on page 77 above.

the purchaser sold his lot prior to the question of further subdivision being put to the vote and may not be so where the purchaser has mortgaged his lot.¹⁵ Nevertheless, the methods have apparently been successful in enabling staged development to take place in some cases.

5. POSSIBILITY OF STAGED DEVELOPMENT UNDER COMMISSION'S PROPOSALS

6.9 The combined effect of adopting the Commission's recommendations in relation to subdivision within an existing strata scheme¹⁶ and for removing the present requirement that a lot must be within the building¹⁷ would, as in New South Wales, make staged development theoretically possible in Western Australia. However, the Commission acknowledges that, as in New South Wales, the steps involved could be daunting to a developer wishing to use the provisions for this purpose.¹⁸

6. THE NEW ZEALAND LEGISLATION ON STAGED DEVELOPMENT

6.10 As stated in paragraph 6.4 above, New Zealand has enacted legislation making specific provision for staged development.¹⁹ This legislation attempts to balance the interests of purchasers and developers.²⁰ Its provisions can be briefly summarised as follows.

6.11 In order to carry out a staged development, a developer must deposit a **proposed unit development plan** at the Titles Office. This plan must specify all the units, and the whole of the common property, proposed to comprise the development when completed.²¹ It must be accompanied by a certificate of the appropriate local authority to the effect that the proposed

¹⁵ In this case, the voting power in respect of the lot can be exercised by the first mortgagee of the lot as shown on the strata roll which in New South Wales is required to be kept by the strata company: NSW, schedule 2, part I, cl 2(2). For the Western Australian position regarding voting by mortgagees see para 11.9 below.

¹⁶ Paras 4.19 and 4.21 above.

¹⁷ Paras 4.4 and 4.5 above.

¹⁸ Under the Commission's recommendations, a strata plan of subdivision cannot be registered unless it is accompanied by a certificate of the strata company that it has consented thereto by unanimous resolution. Town Planning Board and local authority approval would also be required. The Commission has also recommended that, where a lot or part of a lot is outside the building, the proprietor thereof should not be able to effect a structural improvement in the lot except pursuant to a unanimous resolution. Thus the developer must obtain two unanimous resolutions in favour of the staged development - one before he can commence to build, and another before he can register the plan of subdivision. The proposed requirement of a unanimous resolution is, however, subject to the Commission's recommendation in para 11.22 below that a special resolution would be sufficient if the Court makes an order to that effect.

¹⁹ *Unit Titles Amendment Act 1979*.

²⁰ E K Phillips, *Unit Titles Amendment Act 1979* [1980] NZLJ 418, 420.

²¹ *Unit Titles Amendment Act 1979*, s 4(a).

development complies with the requirements of the authority's by-laws and the town planning legislation.²²

6.12 The Act also provides for the successive deposit of **stage unit plans** specifying the building or buildings which have then been completed.²³ Each successive stage unit plan supersedes the one immediately preceding it. It must specify the area or areas in which further development is still required to complete the development. Such an area is called a **future development unit**.²⁴ A stage unit plan must be accompanied by a certificate of the local authority that the plan is consistent with the proposed unit development plan.²⁵ The deposit of a stage unit plan has the effect of creating a stratum estate²⁶ for each future development unit for which a separate certificate of title may be issued.²⁷ As each successive stage unit plan is deposited, the relevant future development unit is replaced by units and common property which are thereby incorporated in the strata title scheme. When the development is completed, a **complete unit plan** must be deposited. This must specify all the units and all the common property. It must also be accompanied by a certificate of the local authority that the plan is consistent with the proposed unit development plan.

6.13 It is possible to alter a proposed unit development plan by depositing a new proposed unit development plan in the Titles Office. A new plan cannot be deposited unless it has been consented to by -

- (a) every proprietor of a lot shown on the latest stage unit plan, including a future development unit;
- (b) every other person who has a registered interest in any such unit; and
- (c) every caveator claiming any interest in any such unit.²⁸

²² Id, s 5(3)(c). New Zealand's town planning legislation is contained in the *Town and Country Planning Act 1977*.

²³ *Unit Titles Amendment Act 1979*, s 5(3)(a).

²⁴ Id, s 4(b).

²⁵ Id, s 6(1).

²⁶ Id, s 8(1).

²⁷ Id, s 8(3).

²⁸ Id, s 5(5)(a).

Where the unanimous consent of these persons cannot be obtained, but a majority of those persons are in favour of the new plan, it may be deposited with the consent of the High Court.²⁹

6.14 The unit entitlement of all the units proposed to comprise the completed development must be determined before a proposed unit development plan is deposited. Unit entitlement must be assigned to each unit on the basis of the relative prospective value of the unit in relation to each of the other proposed units.³⁰ The unit entitlement so shown must be assigned to each unit when it is completed and shown on a stage unit plan and eventually on the complete unit plan.³¹ Unit entitlements are not assigned to future development units.³²

6.15 The registered proprietor of a future development unit is not by virtue of that fact a member of the strata company for the units in the stage unit plan.³³ He is also not required to contribute to any fund established by the strata company.³⁴ On the other hand, the strata company has no duties in respect of a future development unit.³⁵ The strata company and the registered proprietor of the future development unit may, however, enter into an agreement to undertake work or for the expenditure of money for their mutual benefit.³⁶

6.16 The approval of the local authority which is required for the deposit of each successive stage unit plan cannot be refused on the ground that it does not conform to the by-laws or planning requirements in force at the time of the deposit of that plan if the proposed development complied with the by-laws and requirements in force when the proposed unit development plan was deposited.³⁷

6.17 The provisions are designed to provide certainty for the developer. Once the proposed unit development plan has been deposited in the Titles Office, he is assured that, provided he

²⁹ Id, s 5(5)(b).

³⁰ Id, s 7(1). The unit entitlement is fixed by the Valuer-General or a registered valuer. In New Zealand, unit entitlement in respect of all strata schemes is based on relative capital value. In para 12.15 below the Commission recommends that unit entitlement be based on capital value.

³¹ Id, s 7(2).

³² Id, s 7(3).

³³ Id, s 9(1).

³⁴ Id, s 9(2).

³⁵ Ibid. This refers to duties imposed on the strata company under s 15 of the principal Act. For example, it is not obliged to insure any building or improvements on a future development unit, or to repair any pipe, duct or equipment used solely for the benefit of such a unit.

³⁶ Id, s 9(3).

³⁷ Id, s 6(3).

conforms precisely to the plan, he can proceed to complete each stage of the development without obtaining the consent of the existing proprietors. The deposit of the plan is also aimed at ensuring that prospective purchasers of lots can be alerted to the fact that the lots form part of a staged development scheme. However, there is nothing in the legislation to ensure that the staged development will be proceeded with in a stated time. This means that those who purchased lots on the basis of the complete development could find themselves indefinitely situated on a partially completed one.

6.18 The New Zealand Registrar General of Land has informed the Commission that the legislation is proving to be popular with both developers and purchasers, particularly in the Auckland region.

7. THE COMMISSION'S VIEW

6.19 The Commission agrees with the majority of commentators that legislative provision should be made at an appropriate time for staged development in strata schemes and that adoption of the Commission's recommendations for permitting subdivision within strata schemes would probably be of limited use for this purpose.³⁸

6.20 The New Zealand legislation appears to have considerable merit. However, as the legislation only came into force in November 1979, it is probably too early to assess its full implications. For example, it may be too soon to assess whether the absence of a requirement that the whole development must be completed within a specified date unduly prejudices existing proprietors or has any other deleterious effect.

6.21 The Commission understands that proposals are presently being considered in New South Wales for amending the Strata Titles Act of that State to provide specifically for staged development. Although the proposals have similarities to the New Zealand legislation, they go further by requiring the developer to lodge a statement in the Titles Office showing the proposed completion date of the additional buildings. The statement must also contain a detailed account of the building operations connected with the succeeding stages, including the route over the parcel to be used to transport material to the building site, the times during which the builder will use the route and where the materials will be stored. The aim is to alert

³⁸ Although in the Commission's view adequate for incidental subdivisions within strata schemes: paras 4.19 and 4.21 above.

purchasers of lots in the earlier stages of the nature and degree of the disturbance and loss of amenities involved in constructing the additional building or buildings. Conversely, the developer would have the right to construct the additional buildings in the terms of the statement, without interference from the strata company or existing proprietors. The proposals also envisage a procedure broadly similar to that in New Zealand enabling the developer to vary the staged development plan. There would also be provision either for converting the staged development lots to common property or severing them from the strata scheme, if the staged development does not in fact proceed.

6.22 As emphasised above, the aim of any legislative framework for staged development should be to provide adequate protection for the purchasers of lots in the preceding stages without unduly restricting developers who wish to take advantage of the provisions. The Commission considers that the introduction of suitable provisions in the *Strata Titles Act* of Western Australia should be introduced only when sufficient experience has been gained of the actual working of the New Zealand legislation and the outcome of the New South Wales proposals.³⁹

8. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

6.23 The Commission recommends that -

Consideration be given to the introduction of provisions specifically providing for staged development within a strata scheme when further experience has been gained in New Zealand and New South Wales.

(paragraph 6.22)

³⁹ It might also be advantageous to wait until experience has been gained of the working of the Commission's proposals for subdivision within strata schemes. Although, as the Commission has acknowledged, these would probably only be of limited use in this regard, their working could point the way to suitable provisions designed specifically for staged development.

CHAPTER 7

APPEALS FROM DECISIONS OF LOCAL AUTHORITIES AND THE TOWN PLANNING BOARD

1. APPEALS FROM DECISIONS OF LOCAL AUTHORITIES

(a) Approval of strata plan

7.1 Under the Act, if the local authority refuses to direct¹ the issue of the certificate which must be endorsed on or accompany the strata plan before it may be registered, or fails to do so within forty days after the application is made, the applicant may appeal to the Minister for Local Government.² Briefly, the certificate is to the effect that -

- (i) the building conforms to the approved plans and specifications; and
- (ii) the building is of sufficient standard and suitable to be divided into lots.³

The certificate can only be issued if the local authority is satisfied that -

- (iii) separate occupation of the lots will not contravene any town planning scheme;
- (iv) any consent or approval required under any such scheme or interim development order has been given; and

¹ The Commission understands that some local authorities have delegated their power to issue the certificate to the town clerk or shire clerk. Where this has occurred, the council of the local authority would not "direct" or refuse to "direct" the issue of the certificate. The Commission considers that the deletion of the words "to direct the issue of a certificate" wherever they appear in s 20 and their replacement by the words "to issue a certificate" would be appropriate.

The legislation should continue to provide that the certificate of the local authority should be under the hand of the town clerk or shire clerk. This should also be the case in regard to the certificates of the local authority required for a subdivision within a strata scheme (para 4.21(b) above) and for consolidation or conversion (paras 4.27(d) and 4.32(c) above).

² WA, s 20(2). The time limit in which to appeal is thirty days: *ibid.* In New South Wales the right of appeal is to the Land and Environment Court: NSW, s 40(4); in Queensland it is to The Local Government Court: Qld, s 24(6); in Victoria it is to an arbitrator: *Strata Titles Act 1967-1981* (Vic), s 6(7); and in South Australia it is to the Planning Appeal Tribunal: *Real Property Act 1886-1982* (SA), s 223me.

³ WA, s 5(6)(c).

- (v) the building and the proposed subdivision of the parcel into lots will not interfere with the existing or likely future amenity of the neighbourhood.⁴

7.2 In the context of the existing system in Western Australia relating to appeals against administrative decisions,⁵ the Commission considers that appeals from a local authority's determination in respect of (i) and (ii) in the previous paragraph⁶ should continue to lie to the Minister for Local Government. This was the view of the majority of commentators on this issue. They are matters relating to the physical standards of the building and it seems appropriate that appeals thereon should lie to the same person who deals with similar appeals in regard to buildings which are not to be strata titled.⁷ The Commission recommended in Chapter 3⁸ that a developer should be able to apply to the local authority for a determination as to (ii) when, or at any time after, he makes application to the authority for a building licence.⁹ An appeal as to (ii)¹⁰ should be open at that stage and the Commission recommends accordingly.

7.3 However, matters covered by (iii), (iv) and (v) in paragraph 7.1 above are essentially to do with town planning. The Commission accordingly recommends that appeals from a local authority's determination under any of these three heads¹¹ should be dealt with in the same way as other town planning appeals. This would mean that under the present arrangements they would, at the option of the appellant, lie either to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal.¹² This would help ensure that town planning decisions on strata title developments and those on other developments are consistent.¹³ In Chapter 3¹⁴ the Commission has recommended that a

⁴ Id, s 20(1). See also paras 3.22,3.25 and 3.35 above.

⁵ Para 7.11 below.

⁶ Including its failure to make a determination within 40 days of the application: WA, s 20(2).

⁷ *Local Government Act 1960-1982*, s 374(2).

⁸ Para 3.29 above.

⁹ *Local Government Act 1960-1982*, s 374(2).

¹⁰ Including an appeal against the imposition of a condition to which the applicant objects: paras 3.31 and 3.33 above.

¹¹ Including its failure to make a determination within 40 days of the application: WA, s 20(2).

¹² *Town Planning and Development Act 1928-1981*, ss 36-39. This specific issue was not adverted to in the questions for discussion in para 38.1 of the working paper (although it was discussed in general terms in para 12.4). However, the views of a number of commentators are consistent with the Commission's recommendations on this matter.

¹³ At present the Minister for Local Government and the Minister for Urban Development and Town Planning are the same person so that inconsistency is unlikely to arise. However, there have been occasions where different Ministers have held these portfolios and this may be so in the future. In any case, under the Commission's recommendation the appellant would be given the option of appealing to the Town Planning Appeal Tribunal instead of the Minister.

¹⁴ Para 3.30 above.

developer should be able to apply to the local authority for a determination under (iii), (iv) or (v) before he commences development. Accordingly, an appeal should be open at that stage.¹⁵

7.4 There may be cases where the question of strata titling does not arise until after the building has been completed. For example, a person may have purchased an existing block of flats for the purpose of bringing them under strata title.¹⁶ In such cases, the developer will simply apply for a certificate from the local authority under section 5(6)(c). If the local authority refuses to issue the certificate, an appeal will lie to the Minister for Local Government if the reason for the refusal relates to (i) or (ii) and to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal if the reason relates to (iii), (iv) or (v).

(b) Subdivision, consolidation, conversion and change of use

7.5 The same principles as those outlined in paragraphs 7.2 to 7.4 above should apply to appeals from a local authority's determination in regard to a proposed subdivision within a strata scheme.¹⁷ Where a local authority refuses or fails to approve a proposed consolidation¹⁸ or conversion¹⁹ an appeal should lie at the option of the appellant, to the Minister for Urban Development and Town Planning or the Town Planning Appeal Tribunal. A similar appeal provision should be enacted in regard to a local authority's refusal or failure to approve a change of the use specified in a strata plan for a lot or part lot, or the removal of the limitation altogether.²⁰

(c) Reasons for decision

7.6 The New South Wales *Strata Titles Act 1973-1981*²¹ requires the local authority, where it refuses an application under that Act, to give written notice of its decision to the applicant -

¹⁵ Including an appeal against the imposition of a condition to which the applicant objects: paras 3.31 and 3.33 above.

¹⁶ Some developers may also choose not to seek a determination in regard to new developments before completion, on the assumption that there would be no difficulty in obtaining a certificate at that stage.

¹⁷ Paras 4.19, 4.21(b) and 4.23 above.

¹⁸ Para 4.27 above.

¹⁹ Para 4.32 above.

²⁰ Para 4.9 above.

²¹ NSW, s 40(3).

- (a) specifying the grounds of refusal; and
- (b) informing him that he has a right of appeal against the refusal and specifying the provisions under which the appeal lies.

The Commission recommends that a similar requirement should be imposed on local authorities in Western Australia as regards applications under the *Strata Titles Act*. This would ensure that the applicant was made aware of the basis for the local authority's decision and alert him to the fact that he has an opportunity of appealing against it.

2. APPEALS FROM DECISIONS OF THE TOWN PLANNING BOARD

7.7 In Chapter 3²² the Commission has made recommendations which, if implemented, will mean that in many cases it will not be necessary for a developer to obtain the approval of the Town Planning Board to a proposed strata title subdivision. However, it is necessary to consider where the appeal should lie if the Board refuses to approve a proposed strata subdivision in cases where its approval is still required. In the working paper, the Commission raised the general issue of appeals from Town Planning Board decisions under the *Strata Titles Act*.²³ The Commission expressed the tentative view that the appeal system should be the same as for conventional subdivisions, namely that at the option of the appellant an appeal should lie either to the Minister for Urban Development and Town Planning or the Town Planning Appeal Tribunal. Six of the seventeen commentators on the issue agreed. They included the Town Planning Board, the Urban Development Institute and the Local Government Association. Four commentators, including the Commissioner of Titles and the Law Society, submitted that the right of appeal should be to the Town Planning Appeal Tribunal only.²⁴

²² Paras 3.38 to 3.40 above.

²³ Working paper, paras 12.1 to 12.5. Under the Act, where the Town Planning Board refuses, or fails within forty days, to give its prior written approval to a transaction with common property listed in s 10(8) of the Act (see para 8.22 below), the applicant may within thirty days of refusal or failure appeal to the Minister for Urban Development and Town Planning. The Act appears silent on the question of a right of appeal where the Town Planning Board refuses under s 5(6) (b) to approve a proposed strata subdivision. It seems, however, that the applicant can appeal under s 26(1) of the *Town Planning and Development Act 1928-1981* (as modified by s 39) to either the Minister for Urban Development and Town Planning or the Town Planning Appeal Tribunal. The right of appeal should expressly be given in the *Strata Titles Act*: para 7. 8 below.

²⁴ Two commentators, REIWA and Silverwood Pty Ltd, said that the right of appeal should be to the Minister for Urban Development and Town Planning only.

7.8 After considering the question in the light of the comments, the Commission adheres to its provisional view that there is no good ground for treating appeals from the Board's decisions as regards strata title subdivisions differently from its decisions in respect of other subdivisions. The Commission therefore recommends that the *Strata Titles Act* be amended so as to make provision accordingly. In paragraph 3.43 above, the Commission has recommended that a developer should be required to apply for conditional approval before he commences to construct or, as the case may be, to modify the building. Hence the provisions should be drafted so as to enable an applicant to appeal against a refusal or failure of the Board to grant conditional approval or against the imposition of a condition to which the applicant objects.

7.9 The same appeal system should also apply in the case of the Town Planning Board's refusal or failure to approve -

- (a) a proposed subdivision within a strata scheme;²⁵
- (b) a proposed consolidation of lots;²⁶ or
- (c) a change of the use specified on a strata plan for a lot or part lot, or the removal of the limitation altogether.²⁷

3. DEALINGS WITH COMMON PROPERTY

7.10 The Commission's recommendation concerning the appropriate appeal system where the local authority or Town Planning Board refuses or fails to approve certain transactions involving common property is set out in paragraph 8.27 below.

4. THE COMMISSION'S REPORT, "REVIEW OF ADMINISTRATIVE DECISIONS: APPEALS"

7.11 Since the working paper was issued, the Commission has submitted its report on Project No 26 Part I - *Review of Administrative Decisions: Appeals* (1982). In that report, the Commission made recommendations designed to rationalise the existing appellate

²⁵ Paras 4.21(b) and 4.23 above.

²⁶ Paras 4.23 and 4.25 above.

²⁷ Para 4.9 above.

arrangements in Western Australia in the administrative field. As part of the rationalisation process, the Commission recommended the establishment of an Administrative Law Division of the Supreme Court and of the Local Court, together with the retention of a limited number of specialist tribunals, including the Town Planning Appeal Tribunal. The report also recommended the establishment of a review body to advise on whether certain appeals, including some which presently lie to Ministers, should instead lie to some other body. The recommendation in paragraphs 7.2 and 7.3 above that appeals in relation to the matters specified in section 5(6)(c)(i) and (iii) of the *Strata Titles Act* should continue to be determined by the Minister for Local Government, and that appeals in relation to the matters specified in section 20(1)(a), (b) and (c) should lie, at the option of the appellant, to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal are made in the context of this project. The Commission does not wish to pre-empt the decision of such a review body.

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

7. 12 The Commission recommends that -

(a) *An appeal from a local authority's determination as to whether -*

(i) *the building proposed to be strata titled conforms to the plans and specifications approved by that authority; or*

(ii) *the building is, or will be when completed, of sufficient standard and suitable to be divided into lots;*

should lie to the Minister for Local Government.

(paragraphs 7.2 and 7.4)

(b) *An appeal from a local authority's determination as to whether -*

(i) *separate occupation of the proposed lots will contravene a town planning scheme;*

- (ii) *any consent or approval required under any such scheme or interim development order has been given; or*
- (iii) *the development will interfere with the existing or likely future amenity of the neighbourhood;*

should lie, at the option of the appellant, either to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal.

(paragraphs 7.3 and 7.4)

- (c) *The appeal provisions outlined in (a) and (b) should also apply to appeals from a local authority's determination in regard to a proposed subdivision within a strata scheme.*

(paragraph 7.5)

- (d) *Where a local authority refuses or fails to approve -*

- (i) *a proposed consolidation or conversion; or*
- (ii) *a change of the use specified in a strata plan for a lot or part lot or the removal of the limitation,*

an appeal should lie, at the option of the appellant, to the Minister for Urban Development and Town Planning or the Town Planning Appeal Tribunal.

(paragraph 7.5)

- (e) *Where a local authority refuses an application under the Strata Titles Act, it should be required to give written notice of its decision to the applicant specifying the grounds of refusal and informing him of his right of appeal.*

(paragraph 7.6)

- (f) *Appeals from decisions of the Town Planning Board under the Strata Titles Act should lie, at the option of the appellant, either to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal.*²⁸

(paragraphs 7.8 and 7.9. See also paragraph 8. 27 below)

²⁸ This recommendation is made pending a review of appeal rights generally: para 7.11 above.

CHAPTER 8

COMMON PROPERTY

1. EXTENT OF COMMON PROPERTY

(a) General

8.1 Common property is so much of the parcel as from time to time is not comprised in any lot.¹ In Chapter 4 above, the Commission recommended that a lot should be able to extend beyond the building or to consist wholly of space outside it.² Where this is the case, the common property would not, as at present, include all of the space comprised in the parcel outside the building.³ In the same chapter,⁴ the Commission also recommended that where the floor, wall or ceiling of a lot is a boundary, then unless the strata plan otherwise stipulates, the boundary of that lot shall be the inner surface of the floor, wall or ceiling. Where the boundaries of all the lots in the scheme are so defined, the common property would include all the walls, floors and ceilings whose inner surfaces constitute boundaries, as well as all other areas outside the lots.

(b) Common property inside a unit

8.2 It would be unreasonable in most cases to require the proprietor of a lot to repair pillars, pipes, wires, cables and ducts which pass through his lot but whose function is the support of the building or the provision of services to the various lots in the building. For example, a water pipe may burst within the boundaries of one lot but the pipe may serve other lots within the building. For the other proprietors, the repair of the water pipe may be essential.

¹ This is also the definition of common property contained in the New South Wales and Queensland legislation (NSW, s 5(1) and Qld, s 7(1)).

² Paras 4.4 and 4.5 above.

³ It would, however, include all the space comprised in the parcel beyond the boundaries of all the lots in the scheme. For example, a scheme may include a part lot outside the building as a garden plot. The part lot would be a three-dimensional figure and the space above it and below it would be common property.

⁴ Paras 4.12 and 4.14 above.

By-law 2(d)⁵ in part I of the schedule to the Act requires the strata company to maintain and repair pipes, wires, cables and ducts existing in the parcel and capable of being used in connection with the enjoyment of more than one lot or common property. Another by-law⁶ requires proprietors to permit the strata company and its agents to enter their lots for the purpose of maintaining and repairing such pipes, wires, cables and ducts.

8.3 The New South Wales *Strata Titles Act 1973-1981* deals with the problem in a different way. The Act includes in the common property of a strata scheme -

- (a) "cubic space"⁷ occupied by a vertical structural member, not being a wall, of a building;
- (b) pipes, wires, cables or ducts in a building not for the exclusive enjoyment of one lot; and
- (c) where a structure has been built enclosing any such pipes, wires, cables or ducts, the cubic space enclosed within that structure,

unless these items are described in the strata plan as part of a lot.⁸ As the strata company has a duty to maintain and repair common property,⁹ it is responsible for maintaining and repairing these items, except in relation to an item specifically described in the strata plan as part of a lot.

8.4 The New South Wales approach, which is commendable for its simplicity, avoids the possibility of the strata company's responsibility being removed by an alteration of the by-laws and the Commission recommends that it should be adopted in Western Australia, and, as in New South Wales, should apply to existing as well as future strata schemes.¹⁰ A majority of

⁵ The Act also establishes statutory easements in favour of the proprietor and statutory easements against the proprietor: WA, ss 6-8. Except to the extent to which the provisions of those sections are reflected in the by-laws, enforcement of the easements is a matter for individual proprietors.

⁶ WA, schedule, part I, by-law 1(a).

⁷ "Cubic space" is defined to include any three dimensional geometric figure: NSW, s 5(3).

⁸ See the definitions of "common property", "lot" and "structural cubic space" in NSW, s 5(1).

⁹ NSW, s 68(1)(b).

¹⁰ By-law 2(d) in part I of the schedule to the Act should consequently be repealed.

The enactment of such a provision would not affect the right of the strata company to obtain damages from a person, including a proprietor, whose wrongful act damaged any of the items listed in para 8.3 above.

the commentators on the working paper who dealt with this question were also of this view.¹¹ Normally, pipes, wires, cables and ducts would be within the walls of the building and if the Commission's recommendation as to the prima facie rule for the boundary of a lot is adopted, they would not usually be within the lot in any case. However, the provision would still be of value to deal with cases where these items are not within the walls or where the boundary is expressed to be located either within the wall or outside it.

2. OWNERSHIP OF COMMON PROPERTY

8.5 Under the present Act, the common property is held by the proprietors as tenants in common in shares proportional to the unit entitlement of their lots.¹² A proprietor's certificate of title comprises his lot and his share of the common property.¹³ There are no separate certificates of title for the common property or interests in it.

8.6 Different principles are applied in the New South Wales *Strata Titles Act 1973-1981*. Under that Act, the common property is vested not in the proprietors but in the strata company.¹⁴ However, the strata company holds the common property as agent for the proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.¹⁵ There is a separate certificate of title for the common property. This certificate is in the name of the strata company and is issued by the Titles Office to the strata company.¹⁶ The provisions in New South Wales vesting common property in the strata company were adopted mainly to facilitate internal administration within the Titles Office of that State. Queensland in its *Building Units and Group Titles Act 1980-1981* did not follow the New South Wales precedent and there the position is still the same as it is in Western Australia.

8.7 In the working paper, the Commission sought comment on whether the New South Wales approach should be adopted in Western Australia. Only five of the eighteen who

¹¹ Twenty commentators, including local authorities, REIWA, the Law Society, the Urban Development Institute, and a number of councils of strata companies were in favour. Three - a real estate agent, a surveyor and a managing agent - submitted that the matter could be dealt with by noting on the strata plan where appropriate that the items mentioned in para 8.3 were common property. However, the Commission considers that it would be more satisfactory to deem them to be common property unless the plan indicated otherwise.

¹² WA, s 9(1).

¹³ Id, s 4(4).

¹⁴ NSW, s 18(1).

¹⁵ Id, s 20.

¹⁶ Id, s 18(2).

commented on the point were in favour. These included the Associated Banks in WA and the Commissioner of Titles.

8.8 The Associated Banks in WA argued that if the strata company owned the common property, the strata company itself could deal with the common property, although it considered that this power should only be exercised pursuant to a unanimous resolution of proprietors. However the Act already contains a provision¹⁷ enabling the strata company, acting as agent for the proprietors, to transfer or lease the common property.

8.9 The Commissioner of Titles suggested that if new legislation is to enable alteration of unit entitlement of lots within a strata scheme (as the Commission recommends in chapter 12 below), it would seem desirable to have a separate certificate of title for the common property issued in the name of the strata company. This would avoid the necessity of calling in to the Titles Office all the duplicate titles to the lots to record thereon alterations to the shares in which the common property is owned, which would follow from a change of unit entitlement.¹⁸ The Commission appreciates the difficulty, but considers that it can be overcome by providing that the certificate of title to a lot, instead of specifying in fractional terms the share in the common property held by the proprietor, as at present, states that the proprietor holds such share in the common property as corresponds to the unit entitlement shown from time to time on the strata plan.¹⁹ Further, if a certificate of title were issued in the name of the strata company, practical difficulties could arise as to the custody of the duplicate certificate of title, particularly in small schemes such as duplexes.²⁰

8.10 The Commission accordingly is of the view that there is insufficient justification to change the presently established rule whereby the common property is vested in the proprietors as tenants in common.²¹ It does, however, recommend the change outlined in the

¹⁷ WA, s 10. Para 8.12 below.

The Associated Banks in WA also suggested that if the strata company owned the common property, the need to refer to the common property when transferring lots would be avoided. However, such reference is not necessary at present, since s 10(1)(b) provides that an assurance of a lot operates to assure the share of the disposing party in the common property without express reference thereto.

¹⁸ The common property is held by the proprietors in shares proportional to the unit entitlement of their lots: WA, s 9(1).

¹⁹ This is the approach taken in Queensland and Victoria : Qld, s 20; *Strata Titles Act 1967-1981*(Vic), s 13(1).

²⁰ See paras 20.28 to 20.35 below.

²¹ A practical difficulty in a change in the rule as to the ownership of the common property is that it would be necessary to apply it to existing schemes as well as future ones, requiring the Titles Office to prepare a separate title for common property for approximately 10,000 schemes and amend all the original and

previous paragraph as to the manner of describing on each proprietor's certificate of title the share of the common property held by him.²²

3. DEALING IN COMMON PROPERTY

(a) General

8.11 Circumstances can arise during the operation of a strata scheme where the proprietors wish to transfer or lease to one or more of the proprietors or to a third party part of the common property. The proprietors might, for example, wish to sell an area of common property for which they have no need to a person outside the scheme or to a proprietor who wishes to enlarge his lot.²³ Conversely, they may wish to enlarge the common property by acquiring or leasing from a third party further land. They may wish, for example, to purchase or lease land for the purpose of laying out a tennis court or a further parking area, or to provide additional access.

8.12 Section 10 of the Act provides machinery whereby the strata company as agent for the proprietors can execute transfers or leases of common property.²⁴ The proprietors by unanimous resolution must first direct the company to transfer or lease the common property concerned and "all persons concerned"²⁵ must consent in writing to the proposed transfer or lease.²⁶

duplicate certificates of title for all the lots in those schemes. Vesting common property in the strata company would require additional provisions: see NSW, Division 2 of Part II.

²² If this recommendation is adopted it would only be necessary to call in the duplicate certificates of title in relation to existing schemes where there is a change in unit entitlement. The Titles Office could then amend the duplicate and the corresponding original.

²³ Para 4.21(e) above.

²⁴ WA, s 10(2) to 10(8). Such a transfer is not valid except with the prior approval in writing of the Town Planning Board and the appropriate local authority: id, s 10(8)(a). The prior approval of these authorities is required to some leases of common property: id, s 10(8)(b).

However, where the transfer is to a proprietor within the scheme, the Act does not contain provision for a portion of common property to be added to a lot to form an enlarged lot. Chapter 4 above includes recommendations to make this possible.

²⁵ This phrase is defined in WA, s 3.

²⁶ WA, s 10(3). Rath, Grimes and Moore, 30, argue that this machinery is optional only, and that the proprietors acting in concert, can revert to the normal methods of dealing with land held in common ownership. On this view, the prohibition in s 10(1)(a) is directed only against one or more individual proprietors of a lot disposing of their share in the common property separately from the other proprietors.

8.13 The Act also enables the strata company to act as agent for the proprietors in the creation of easements or restrictive covenants burdening the parcel, or in the acceptance or surrender of easements or restrictive covenants benefiting the parcel.²⁷

(b) Acquisition of additional land by transfer

8.14 However, the existing legislation, unlike that of New South Wales,²⁸ Queensland²⁹ and Victoria,³⁰ does not contain provision for adding to the common property by the acquisition of further land.³¹ The Commission is of the opinion that such provision should be made. This view is supported by almost all those who commented on this issue in response to the Commission's working paper. The Commission accordingly recommends that the strata company should be empowered, pursuant to a unanimous resolution of the proprietors, to accept a transfer of land for the purpose of creating additional common property. The strata company would accept the transfer, but only as agent for the proprietors in the strata scheme. The land to be transferred would have to be under the operation of the *Transfer of Land Act 1893-1982* and held in fee simple³² and free from any registered encumbrance³³ Further, before the transfer could be registered, a plan under the *Transfer of Land Act 1893-1982* should be lodged at the Titles Office showing as a single lot the land comprised in the transfer and the land comprised in the parcel.³⁴

8.15 Registration of the transfer should be effected by the Registrar entering the memorandum on the relevant strata plan³⁵ and amending that plan to show the transferred land as part of the common property.³⁶ On registration of the transfer the share of a proprietor in the additional common property should, ipso facto, become subject to any registered

²⁷ WA, s 12(1).

²⁸ NSW, ss 19 and 21

²⁹ Qld, s 21.

³⁰ *Strata Titles Act 1967-1981*(Vic), s 13(6) to 13(9).

³¹ The Commission is here speaking of acquisition of further land to be brought within the strata scheme. It is possible, of course, under the present law for the proprietors jointly to purchase land. However, such land would be completely outside the scheme. The by-laws would not apply to it and a proprietor's share in it would not pass automatically with the disposal of his lot.

³² This is necessary as only land under the *Transfer of Land Act 1893-1982* and held by the registered proprietor in fee simple may be the subject of a strata scheme: WA, ss 3 and 4.

³³ This is because on registration of the transfer, shares in the land will automatically become subject to encumbrances over the appurtenant lots: para 8.15 below.

³⁴ The transfer should be accompanied by a certificate under the seal of the strata company certifying that the resolution authorising the acceptance of the transfer was a unanimous resolution: Qld, s 21(2)(b).

³⁵ *Strata Titles Act 1967-1981*(Vic), s 13(9). Such a provision is necessary because of s 52 of the *Transfer of Land Act 1893-1982* (WA).

³⁶ *Strata Titles Act 1967-1981*(Vic), s 13(9).

encumbrance over his lot³⁷ and any caveat lodged with the Registrar of Titles against his lot. The effect would be that the additional land and the existing common property would be amalgamated.³⁸

8.16 Amalgamation into a single lot is desirable for at least two reasons. First, where the land acquired is contiguous to the parcel, a building could later be erected over the former boundary between the two pieces of land. If there were no amalgamation, in the event of a "notional destruction" (that is, cancellation of the strata plan), that boundary would be re-established. There would then be the possibility that the building would not conform to the building by-laws relating to set-backs from boundaries. Secondly, amalgamation would prevent the possibility of strata companies being used by developers to engage in land dealing, instead of using companies registered under the Companies Code, as the approval of the Town Planning Board would be required before the additional land could be separately resold.³⁹

(c) Acquisition of additional land by lease

8.17 The owner of land which the strata company wishes to use for the purposes of the strata scheme may not be willing to sell the land but may be willing to lease it. The Commission accordingly recommends that a strata company should be able, pursuant to a unanimous resolution of proprietors, to accept a lease of land outside the parcel for the purpose of creating additional common property.

8.18 The following conditions should apply to the lease. The land to be leased should be held by the lessor in fee simple and be under the operation of the *Transfer of Land Act 1893-1982*. The lease should be required to be registered at the Titles Office.⁴⁰ These requirements

³⁷ *Strata Titles Act 1967-1981* (Vic), s 13(8). At present, the lot and the corresponding share in the common property must be dealt with together: WA, s 10(1)(a).

³⁸ The approval of the Town Planning Board would consequently be required to such an amalgamation: *Town Planning and Development Act 1928-1981*, s 20(1)(a).

³⁹ *Town Planning and Development Act 1928-1981*, s 20(1)(a). Because the approval of the Board would be required to a disposition of the additional land, the Commission considers that it is unnecessary to require, as in New South Wales (NSW, s 19(2)), that the additional land be contiguous with the existing parcel in order to prevent strata companies engaging in land dealing: N J Moses and R Tzannes, *Strata Titles* (1978), para 83.

⁴⁰ Hence it should be in the form prescribed in the Eleventh Schedule of the *Transfer of Land Act 1893-1982*, as only a lease in this form may be registered under that Act: *Transfer of Land Act 1893-1982*, s 91. The lease should be accompanied by a certificate under the seal of the strata company certifying that the resolution authorising the acceptance of the lease was a unanimous resolution: Qld, s 21(2)(b).

would help ensure simplicity and would permit the lease to be examined at the Titles Office by prospective purchasers of lots and other interested persons.

8.19 Upon registration of the lease the leasehold interest should become common property subject to such of the provisions of the Act relating to common property as are capable of applying to a leasehold interest.⁴¹ The Registrar of Titles should be required to enter a memorandum on the strata plan to this effect.⁴²

8.20 The strata company should be responsible for the payment of the rent and the performance of the duties required by the terms of the lease.⁴³ In case it is desired to surrender the lease, the strata company should be empowered, pursuant to a unanimous resolution of the proprietors, to do so.⁴⁴ Similarly, subject to the terms of the lease, the strata company should be empowered, pursuant to a unanimous resolution of the proprietors, to assign the lease or sublease the land.⁴⁵

(d) Re-entry under lease or sublease of common property

8.21 Where common property has been leased out under section 10 of the Act⁴⁶ or where additional common property acquired by lease has been subleased, it may be desirable to effect re-entry of the land concerned if the lessee or sublessee is in breach of a covenant. The Commission recommends that the Act should empower the strata company to exercise the power of re-entry on behalf of the proprietors.⁴⁷ The Act should also empower the strata company, pursuant to a unanimous resolution of proprietors, to accept a surrender of the lease or sublease.⁴⁸

⁴¹ Qld, s 21(4)(a). The definition of common property in WA, s 3 should be amended so as to include common property acquired by lease.

⁴² Qld, s 21(4)(c). Because of the difference in tenure between the parcel and the leasehold land, there should be no provision extending the encumbrances over lots to the leasehold land.

⁴³ Qld, s 21(4)(b).

⁴⁴ Id, s 21(5). On registration of the surrender, an appropriate recording should be made on the strata plan: id, s 21(6).

⁴⁵ Qld, s 22(2), 22(8)(b), and 22(9).

⁴⁶ Para 8.12 above.

⁴⁷ NSW, s 25(3); Qld, s 22(3).

⁴⁸ Qld, s 22(3), 22(8) and 22(9).

4. PLANNING APPROVALS TO TRANSACTIONS WITH COMMON PROPERTY

8.22 Section 10(8) of the Act provides that certain transactions involving common property are not "valid and effective" without the prior written approval of the local authority and the Town Planning Board. These transactions are -

- (a) a transfer or mortgage of the common property or part of it; or
- (b) a lease of, or licence to use or occupy the common property or part of it for a term exceeding ten years including any option to extend or renew the term.

8.23 Section 10(8) was introduced into the *Strata Titles Act* in 1969⁴⁹ in order "to leave no doubt that the [Town Planning Board's] approval is required" to any disposition of common property of the type specified in the subsection.⁵⁰ It is to be noted, however, that the approval of the relevant local authority is also required to any such disposition. Since the local authority would need to have been satisfied under section 20(1) of the Act that the strata development would not contravene its town planning scheme or would not otherwise interfere with the amenity of the neighbourhood, it was presumably⁵¹ considered appropriate that it should have the right to veto any proposed dealing with common property that may be in breach of its scheme, or which may affect that amenity.

8.24 Although the Commission is of the view that, in general,⁵² the approval of the Town Planning Board and the local authority should be required to dispositions of common property it considers that section 10(8) should be reviewed in the light of the relevant provisions⁵³ of Part III of the *Town Planning and Development Act 1928-1981* (which deals with alienated land). Although as indicated above section 10(8) was introduced to "leave no doubt" that the approval of the Town Planning Board was required to the dealings specified, no attempt was made to clarify whether or not the relevant provisions of the *Town Planning and Development*

⁴⁹ The *Strata Titles Act Amendment Act 1969*, s 6.

⁵⁰ Western Australian *Parliamentary Debates* (1969) Vol 182, 3339, 3506.

⁵¹ The Parliamentary debates do not disclose the reason for requiring local authority approval.

⁵² Consideration could be given to empowering the Governor in Council to exempt certain categories of dealings from the need to obtain Town Planning Board approval, for example, where the strata company proposes to allocate licences to occupy parking bays among proprietors in a manner which is in accordance with the town planning scheme of the local authority.

⁵³ In particular, ss 20(1), 20B, 21 and 27.

Act 1928-1981 also applied to them. For example, section 10(8) provides that a **transfer** of part of the common property without the Town Planning Board's prior written approval is not "valid and effective" but does not in terms render it illegal. Thus, as far as the subsection is concerned, in a case where prior approval was not obtained the purchaser could apparently recover money paid by him and the proprietors could regain possession of the part of the common property concerned. Further, the subsection does not in terms render invalid or ineffective an **agreement** for sale, as distinct from a transfer. However, section 20(1) of the *Town Planning and Development Act 1928-1981* provides that a person shall not, without the approval of the Board, "sell land...unless the land is dealt with...as a lot⁵⁴ or lots...". The Supreme Court has held⁵⁵ that "sell" in section 20(1) includes an agreement for sale and is not limited to an actual transfer. Accordingly, a person agreeing to sell land in contravention of section 20(1) commits an offence.⁵⁶ In addition, it appears that such an agreement is illegal for the purposes of the law of contract,⁵⁷ which may create difficulties both as regards recovery by the purchaser of money paid by him and as regards recovery of possession of the land by the vendor. Analogous considerations apparently apply in the case of agreements to lease.⁵⁸

8.25 In the Commission's view, the relevant provisions of Part III of *the Town Planning and Development Act 1928-1981* should be reviewed with a view to clarifying their effect on contracts between the parties, including the parties to dealings with common property in a strata scheme. The interpretation problems arising out of sections 20(1) and 20B were the subject of three papers delivered at the Law Society's Law Summer School in February

⁵⁴ That is, a lot as defined in s 2 of the *Town Planning and Development Act 1928-1981*. A part of the common property the subject of an agreement for sale, but which was not depicted on a subdivisional plan approved by the Board would not be a lot as defined.

⁵⁵ *Glass v Ralph* [1966] WAR 91; *Reid Murray Developments (WA) Pty Ltd v Hall* [1968] WAR 3. See also *Wilson International Pty Ltd v International House Pty Ltd* (unreported) Supreme Court of Western Australia, No 1724 of 1979, 17 March 1981, per Smith J.

⁵⁶ *Town Planning and Development Act 1928-1981*, s 27. The Full Court of Western Australia in *Landall Construction and Development Co Pty Ltd v Bogaers* [1980] WAR 33 held that an agreement to sell land that was not a lot, but which was truly conditional upon the approval of the Board to a plan of subdivision, was an agreement to sell land only as a lot and did not contravene s 20(1).

⁵⁷ See the cases referred to in footnote 55 above and also *Landall Construction and Development Co Pty Ltd v Bogaers* (unreported) Supreme Court of Western Australia, No 2033 of 1977, 21 March 1979, per Burt CJ. But see the judgment of Wickham J in *Landall Construction and Development Co Pty Ltd v Bogaers* [1980] WAR 33 (Full Court) who said (at 34) that calling such contracts illegal "tends to obscure rather than illuminate the consequences of the transaction between the parties".

⁵⁸ *Wilson International Pty Ltd v International House Pty Ltd* (No 2) (unreported) Supreme Court of Western Australia, No 1724 of 1979, 6 January 1982, per Smith J. As a consequence, the lessee in such a case can apparently terminate the lease at any time without liability in damages for breach of the covenant to pay rent. It is true that section 20B of the *Town Planning and Development Act 1928-1981* saves certain agreements from contravening s 20(1) of that Act. However, an agreement is saved only if it is entered into "subject to the approval of the Board to the subdivision of the land being obtained" and while this may be applicable to an agreement to sell land it would not be applicable to an agreement to lease land.

1982.⁵⁹ The papers and the subsequent oral discussion indicated uncertainties, injustices and apparently arbitrary results surrounding the sections and, in the Commission's view, present an overwhelming case for their reform. The Commission recommends that the question of the consequences of dealing with the common property in a strata scheme in breach of planning requirements should be dealt with in the course of that comprehensive review. It would be inappropriate for the Commission to attempt to deal with the question in this report. The Commission accordingly makes no specific recommendation for amendment to section 10(8) of the *Strata Titles Act*.

5. APPROVALS TO GRANTS OF EXCLUSIVE USE AND ENJOYMENT

8.26 In paragraphs 5.11 and 5.12 above, the Commission recommended that the only method (falling short of a lease) of granting exclusive use or special privileges in respect of a specific area of common property to a particular proprietor should be by a by-law made by a unanimous resolution of the proprietors and recorded at the Titles Office. Under the Commission's recommendations, the by-law while it remains in force would enure as appurtenant to, and for the benefit of, the lot in respect of which the grant was made. If the grant is one which is revocable at any time by a further unanimous resolution of the strata company or is for the duration of the strata scheme, it may be that approval of the local authority and the Town Planning Board would not be required under section 10(8) of the *Strata Titles Act* before the grant is made. No doubt most grants will be made in the expectation that they will last for the duration of the strata scheme and, in fact, many will do so. In the light of this, the Commission recommends that if the proposal made in paragraphs 5.11 and 5.12 is adopted, the question of the circumstances in which a by-law should require the approval of the local authority and the Town Planning Board be dealt with in the course of the review suggested in paragraph 8.25 above.

6. APPEAL WHERE APPROVAL REFUSED

8.27 Under the Act, if the local authority refuses to give its approval under section 10(8), or fails to do so within forty days after the application is made, the applicant may appeal to the Minister for Local Government.⁶⁰ If the Town Planning Board refuses to give its approval, or fails to do so within forty days after the application, the applicant may appeal to the Minister

⁵⁹ The papers were delivered by Mr M L Bennett, Mr D K Malcolm, QC, and Mr R Halperin.

⁶⁰ WA, s 20(2). The time limit in which to appeal is 30 days.

for Urban Development and Town Planning.⁶¹ The Commission considers that the approvals which are sought are in each case essentially to do with town planning. It therefore recommends that in each case, the appeal should lie, at the option of the appellant, either to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal.⁶² This recommendation is in accordance with the Commission's recommendation in paragraphs 7.3, 7.8 and 7.9 above.

7. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

8.28 The Commission recommends that -

(a) *The Act should provide that vertical structural members (not being walls) of the building, and pipes, wires, cables or ducts not for the exclusive enjoyment of one lot should be deemed to be common property unless otherwise described in the strata plan and that this provision should apply to existing as well as future strata schemes.*

(paragraphs 8.3 and 8.4)

(b) *The certificate of title to a lot, instead of specifying in fractional terms the share in the common property held by the proprietor, as at present, should state that the proprietor holds such share in the common property as corresponds to the unit entitlement shown from time to time on the strata plan.*

(paragraphs 8.9 and 8.10)

(c) *The strata company should be empowered, pursuant to a unanimous resolution of proprietors, to acquire freehold and leasehold land for the purposes of adding to the common property. It should be similarly empowered to assign the lease, sublease the leased land or surrender the lease.*

(paragraphs 8.14 to 8.20)

(d) *A strata company should be empowered, pursuant to a unanimous resolution, to exercise the power of re-entry on behalf of the proprietors where common*

⁶¹ Ibid.

⁶² *Town Planning and Development Act 1928-1981*, ss 36-39.

property has been leased out and also to accept a surrender of the lease or sublease.

(paragraph 8.21)

- (e) *Section 10(8) of the Act (which is concerned with planning approvals to certain dealings with common property) should be reviewed as part of a comprehensive review of provisions in Part III of the Town Planning and Development Act 1928-1981 (in particular, sections 20(1), 20B, 21 and 27), which the Commission recommends should be undertaken.*

(paragraphs 8.22 to 8.25)

- (f) *The question of the circumstances in which a by-law granting exclusive use or special privileges in respect of a specific area of common property should require the approval of the local authority and the Town Planning Board should be dealt with in the course of the review recommended in (e) above.*

(paragraph 8.26)

- (g) *Appeals from a refusal or failure of the local authority or the Town Planning Board to approve a dealing with common property under section 10(8) of the Act should lie, at the option of the appellant, to the Minister for Urban Development and Town Planning or the Town Planning Appeal Tribunal.*

(paragraph 8.27)

PART III: MATTERS RELATING TO MANAGEMENT OF A STRATA SCHEME

CHAPTER 9

THE STRATA COMPANY

1. CONSTITUTION OF A STRATA COMPANY

9.1 The proprietors of the lots from time to time in a strata scheme constitute a body corporate known by the name of "The Owners of [the name of the building]" and the number of the strata plan allocated to it by the Registrar of Titles.¹ The body corporate, referred to in this report as "the strata company", comes into existence on the registration of the strata plan and has perpetual succession and a common seal.² The company is not subject to the Companies (Western Australia) Code.³

9.2 The strata company is the medium through which the proprietors control and manage the strata scheme. The Act and by-laws impose and confer upon the strata company a number of duties and powers. By-law 4(1) of part I of the schedule to the Act provides that, subject to any restriction imposed or direction given at a general meeting, the powers and duties of the strata company are to be exercised and performed by the council of the strata company.⁴ By-law 4(1) must of course be construed subject to the provisions of the Act and the other provisions of the by-laws. Accordingly, where the Act or by-laws provide that a power requires a unanimous,⁵ special⁶ or ordinary⁷ resolution, that power is exercisable only by the proprietors in general meeting and may not be exercised by the council.⁸

¹ WA, s 13(1).

² Ibid.

³ WA, s 13(3)(e).

⁴ The council is elected from among the proprietors at each annual general meeting of the strata company.

⁵ Para 11.13 below.

⁶ Para 11.23 below.

⁷ A member of the council may only be removed and another proprietor appointed in his place by an ordinary resolution passed at an extraordinary general meeting: WA, schedule, part I, by-law 4(3).

⁸ Where a power requires a unanimous, special or ordinary resolution, the power is only exercisable by the proprietors in general meeting, as those resolutions can only be passed at a general meeting.

2. SCOPE OF THIS CHAPTER

9.3 A strata company should have such powers, and be subject to such duties, as will provide an adequate basis for the efficient running of a strata scheme. In this chapter the Commission is primarily concerned with those powers and responsibilities which relate to day-to-day administration.⁹ Matters of an exceptional nature, such as the power to acquire additional common property and to take proceedings before the proposed Strata Titles Referee for the settlement of a dispute with a proprietor are dealt with elsewhere in this report.¹⁰

3. PRESENT DUTIES AND POWERS

9.4 A strata company's present duties as regards day-to-day administration are contained in sections 13(4), (6) and (8) and 15(5) of the Act and by-law 2 of part I of the schedule to the Act. Broadly speaking, it is the strata company's duty -

- (a) to enforce the by-laws;
- (b) to control, manage and maintain the common property;
- (c) to establish an administrative fund and levy contributions from proprietors in respect to it;
- (d) to insure the building, to apply insurance money received by it in reinstating the building, to effect such other insurance as the proprietors determine and to provide information to interested persons about such insurances;
- (e) to comply with any order of a public authority to do repairs or work on the building or parcel and to recover from the proprietor concerned any money so expended in respect of his lot;¹¹

⁹ The Commission has found it convenient to deal in this chapter with a strata company's capacity to sue and be sued and with the formalities associated with the making of a contract by a strata company.

¹⁰ See, for example, chapter 8 and chapter 19.

¹¹ Line 5 of s 13(6)(d) contains a misprint. The word "discretion" should be "direction".

- (f) to provide information to certain persons about -
 - (i) membership of the council of the strata company;
 - (ii) the state of a proprietor's contributions to the administrative fund; and
 - (iii) the amount of any tax or rate paid by the company on behalf of a proprietor and not recovered by it; and
- (g) to make available for inspection the by-laws for the time being in force.

9.5 It is to be noted that by-law 4(10) of part I of the schedule to the Act imposes certain important duties on the council, as distinct from the strata company itself. These duties are -

- (a) to keep minutes of general meetings;
- (b) to keep a record of unanimous resolutions;
- (c) to keep proper books of accounts;
- (d) to prepare statements of account for each annual general meeting; and
- (e) to make such records available for inspection to interested persons.

In paragraphs 9.13 to 9.15 and 9.18 below, the Commission recommends that these duties be imposed directly on the strata company.

9.6 A strata company's powers as regards day-to-day administration are contained principally in by-law 3 of part I of the schedule to the Act. This by-law enables the strata company -

- (a) to acquire personal property for use by the proprietors in connection with their enjoyment of the common property;

- (b) to borrow money and to secure its repayment by specified means;
- (c) to invest as it may determine any money in the administrative fund;
- (d) to make an agreement with any proprietor or occupier of a lot for the provision of amenities or services to that lot;
- (e) to grant to a proprietor the right to exclusive use and enjoyment of common property; and
- (f) to do all things reasonably necessary for the enforcement of the by-laws and the control and management of the common property.

9.7 In sections 4 and 5 of this chapter the Commission recommends alterations or extensions to certain of these duties and powers. Where the Commission has not made a recommendation as regards a duty or power it should be taken that the Commission considers it satisfactory. The Commission does not deal in this chapter with the strata company's powers and responsibilities as regards finance and insurance. These are dealt with in chapters 13 and 15 respectively.

4. RECOMMENDATIONS AS TO DUTIES

(a) To control and manage the common property

9.8 The present duties of a strata company in this regard are to be found in two places. One is section 13(4) (b) of the Act which simply provides that the strata company shall "control and manage the common property" and the other is by-law 2(a) in part I of the schedule to the Act which states that the company shall "control and manage the common property for the benefit of all proprietors".¹² The duty is broad in its scope and would include, for example, the duty, if necessary, to ensure that proprietors do not leave personal effects on the common property or use areas of common property which are under repair.¹³ No doubt it

¹² Under WA, schedule, part I, by-law 3(g), the strata company is given power to do all things reasonably necessary for the control and management of the common property: para 9.6(f) above and para 9. 26 below.

¹³ The power to issue such directions is given by by-law 3(g).

is implicit in section 13(4) (b) that the strata company is to control and manage the common property for the benefit of the proprietors, but the Commission considers that it is desirable to make this explicit and so recommends. By-law 2(a) in part I of the schedule could accordingly be repealed.

(b) To maintain the common property

9.9 Section 13(4)(h) of the Act provides that the strata company must "keep in a¹⁴ good and serviceable repair, and properly maintain, the common property". The duty extends equally to repairing and maintaining common property surrounding the building, for example, sheds, lawns and gardens, as it does to maintaining the parts of the building which are common property. It seems that "repair" includes renewal and replacement where necessary.¹⁵ Furthermore, the duty can extend to making good inherent defects even when these take the form of omissions in the original design or building work.¹⁶ Because proprietors may not be aware of the broad interpretation of the duty, the Commission recommends that the subsection should expressly indicate that repair includes making good inherent defects,¹⁷ and, where necessary, renewal or replacement.

9.10 By-law 2(b) of part I of the schedule to the Act requires the strata company to "keep in a state of good and serviceable repair and properly maintain the fittings and fixtures (including lifts) used in connection with the common property". In view of the fact that these fixtures and fittings would usually be common property, the provision may be unnecessary since section 13(4)(h) would probably apply. However, because proprietors in strata schemes may not be aware of this, the Commission recommends that the provision should be retained and included in the body of the Act and not as a by-law (which can be repealed by the proprietors).

¹⁴ Either the word "a" is superfluous and is a drafting or printing error, or the words "state of" should be inserted.

¹⁵ *Proprietors of Strata Plan No 6522 v Furney* [1976] 1 NSWLR 412; *Simons v Body Corporate Strata Plan No 5181* [1980] VR 103

¹⁶ In *Proprietors of Strata Plan No. 6522 v Furney* [1976] 1 NSWLR 412, it was held that the duty of the strata company to repair and maintain extended to the addition of draught resistors and waterproof flashings where they had not been originally included in the building but were necessary to make it waterproof.

¹⁷ This does not mean that the company must make formal arrangements for repair or maintenance in every case. It is common, for example, for the proprietors by informal arrangements amongst themselves to perform such work.

(c) To maintain personal property

9.11 Although by-law 3(a) of part I of the schedule to the Act empowers the strata company to purchase, hire or otherwise acquire personal property (such as washing machines and garden furniture) for use by proprietors in connection with their enjoyment of common property,¹⁸ the legislation does not expressly require it to repair and maintain that property. In New South Wales¹⁹ and Queensland,²⁰ the strata company is obliged to maintain and keep in good and serviceable repair any personal property vested in the strata company and where necessary renew or replace it. The Commission recommends that a similar provision should be included in the Western Australian legislation. In paragraph 9.23 below the Commission recommends that the power to acquire personal property should be contained in the body of the Act and not as a by-law. The duty to maintain any personal property acquired should accordingly also be included in the body of the Act.

(d) To keep records*(i) Notices and orders*

9.12 In New South Wales²¹ and Queensland,²² the strata company is required to keep proper records of notices given to it under any enactment, and of any orders made under the dispute provisions of the Act²³ or by a court and served on the strata company. In Western Australia, there is no obligation on a strata company to keep a proper record of any such notices or orders. It is essential for the efficient operation of a strata scheme that the strata company keep such records and the Commission recommends that the New South Wales requirement should be adopted in this State.

¹⁸ Strata companies should continue to have this power: para 9.23 below.

¹⁹ NSW, s 68(1)(b)(ii) and 68(1)(c).

²⁰ Qld, s 38(1)(b)(ii) and 38(1)(c).

²¹ NSW, s 68(1)(f).

²² Qld, s 38(1)(f).

²³ Chapter 19 below.

(ii) Minutes of general meetings

9.13 Under by-law 4(10) (b) of part I of the schedule to the Act, the council of the strata company is required to cause to be kept minutes of general meetings of the company. In New South Wales and Queensland the requirement to keep minutes of general meetings is included in the Act itself, not the by-laws, and the duty is imposed on the strata company, not the council.²⁴ The Commission recommends that this approach be followed in Western Australia.²⁵ There would then be no possibility of the requirement being removed by the strata company repealing the by-law. It is also preferable that the obligation be imposed directly on the company.²⁶ The provision should also expressly require the minutes to include particulars of motions passed at the meetings,²⁷ to emphasise to secretaries the importance of accurately recording particulars of the motions passed. Because the minutes may contain information which long afterwards becomes of critical importance, the Commission recommends that they should be required to be retained for 12 years or until the winding up of the strata company,²⁸ whichever is the shorter period.²⁹

(iii) Unanimous and special resolutions

9.14 By-law 4(10)(c) of part I of the schedule to the Act requires the council of the strata company to keep an additional and separate record of unanimous resolutions. The Commission considers that such a record is desirable. Generally speaking, unanimous resolutions affect the proprietary interest of the proprietors and a separate record of them provides proprietors and mortgagees, and others authorised in writing by them (such as prospective purchasers),³⁰ with a quick reference to these important resolutions. Because

²⁴ NSW, s 68(1)(g) ; Qld, s 38(1)(g).

²⁵ However, the obligation of the council under by-law 4(10)(a) of part I of the schedule to the Act to keep minutes of its own proceedings should be retained in part I in its present form.

²⁶ There could be difficulties in enforcing an obligation on an unincorporated body (which the council is) with a changing membership. Although the duty should be imposed on the strata company itself, it will normally be performed by the council on behalf of the company.

²⁷ Cf NSW, s 68(1)(g); Qld, s 38(1)(g).

²⁸ The Commission is not referring here to cancellation of the strata plan (para 20.5 below) but to the winding up of the affairs of the strata company by the Supreme Court under s 19(8) of the Act. In New South Wales and Queensland, the minutes need only be retained by the strata company for six years: NSW, s 68(1)(g) and reg 47 of the *Strata Titles Act Regulations 1974-1982* (NSW); Qld, s 38(1)(g) and reg 25(2) of the *Building Units and Group Titles Regulations 1980-1981* (Qld). However, for the reason set out above, the Commission does not consider that this time limit is sufficient.

²⁹ It should be provided that in the case of existing schemes, minutes kept by the strata company and still in its custody or under its control when the new legislation comes into effect should be retained for the remainder of the period recommended above: Qld, s 5(14)(a).

³⁰ All such persons should have access to the record of unanimous and special resolutions: para 9.20 below.

special resolutions can be of substantial interest to proprietors and prospective purchasers, the Commission considers that the record should include special resolutions as well, and recommends accordingly. As in the case of the minutes of general meetings, the Commission recommends that the requirement to keep the record should be included in the Act itself, that the duty should be imposed on the strata company, not the council, and that the record should be retained for 12 years or until the winding up of the strata company, whichever is the shorter period.³¹

(iv) *Books and statements of account*

9.15 By-law 4(10)(d) of part I of the schedule to the Act requires the council of the strata company to cause to be kept proper books of account of all money received and expended and the matters in respect of which such receipt and expenditure took place. By-law 4(10)(e) requires the council to prepare for each annual general meeting proper accounts relating to the strata company's assets and liabilities and income and expenditure. The Commission recommends that these obligations should also be included in the Act itself, as part of the duties of the strata company. The existing Act does not specify the period to be covered by the accounts. In the New South Wales and Queensland legislation it has been provided that the accounts should be in respect of each period commencing on the date of registration of the strata plan or the date up to which the last previous accounts were prepared and ending on a date not earlier than two months before each annual general meeting.³² The Commission recommends that this should also be the situation in Western Australia.³³ The Commission recommends that the books of account should be required to be retained for twelve years or until the winding up of the strata company, whichever is the shorter period.³⁴

³¹ It should be provided that in the case of existing schemes, the existing record of unanimous resolutions should be retained for the remainder of the period recommended above.

³² NSW, s 68(1)(h); Qld, s 38(1)(h). The Commission decided against recommending that the accounts should be for a set period. The reason is that although general meetings must be held once in each calendar year, subject to this restriction, they can be fifteen months apart: para 11.2 below. However, see the next footnote.

³³ It would seem desirable within this framework to arrange for accounts to cover the same twelve monthly period each year, so that proprietors will have no difficulty in comparing the financial situation of the strata scheme with the situation in the previous or an earlier annual period.

³⁴ It should be provided that in the case of existing schemes, completed books of account kept by the strata company and still in its custody or under its control when the new legislation comes into effect should be retained for the remainder of the period recommended above: Qld, s 5(14)(a).

(e) To supply information and make records available for inspection

9.16 The strata company's primary responsibility is to control and manage the strata scheme for the benefit of the proprietors. As a corollary, it should be required to supply information, or make records available for inspection, to all those who have a legitimate interest in the information or records.

9.17 The existing provisions covering this matter are found both in the Act and in the by-laws and are as follows -

- (a) Section 13(4)(j) obliges the strata company to "comply with any reasonable request" for the names and addresses of the persons who are members of the council of the company.
- (b) Section 15(5) obliges the company, on application of a proprietor, mortgagee or person authorised in writing by either of them to make available for inspection the by-laws for the time being in force.
- (c) By-law 2(e) of part I of the schedule obliges the company on the written request of a proprietor or registered mortgagee to produce to the proprietor or mortgagee, or person authorised in writing by either of them, the policies of insurance effected by the company and the receipts for the last premiums in respect of the policies.
- (d) By-law 4(10)(f) of part I of the schedule provides that, on application of a proprietor or mortgagee, or any person authorised in writing by him, the council of the company shall make the minutes of general meetings, records of unanimous resolutions, books of account and records relating to books of account, available for inspection at all reasonable times.
- (e) Section 13(8) requires the strata company to certify to a proprietor or person authorised in writing by him -

- (i) the amount of any contributions due or payable by that proprietor to the administrative fund³⁵ and the manner in which they are payable;
- (ii) the extent to which they have been paid; and
- (iii) the amount of any tax or rate paid by the company under section 14 and not recovered by it.³⁶

9.18 The Commission recommends that the obligation to make available for inspection by a proprietor, mortgagee, or person authorised in writing by either should be extended to include all records or documents in the custody or under the control of the strata company including, in addition to those referred to in paragraph 19.17(b), (c) and (d) above -

- (a) the minutes of the council of the strata company;
- (b) the record of special resolutions;
- (c) the statements of account relating to the company's assets and liabilities and income and expenditure;³⁷
- (d) any notices given to the strata company under any enactment, and any orders made under the dispute provisions of the legislation³⁸ or by a court and served on the strata company;
- (e) the plans, specifications, certificates and other documents delivered by the original proprietor to the strata company.³⁹

The obligation to allow the inspection should be included in the Act itself and not in a by-law.⁴⁰ There are similar requirements in New South Wales and Queensland.⁴¹

³⁵ Paras 13.1 and 13.2 below.

³⁶ In para 14.13 below, the Commission recommends that the strata company should no longer be liable to pay a rate or tax which a proprietor has failed to pay. If the recommendation is implemented, s 13(8)(d) can be repealed.

³⁷ These statements may already be covered in WA, schedule, part I, by-law 4(10)(f), but it would seem desirable to refer to them specifically.

³⁸ Chapter 19 below.

³⁹ Para 20.26 below.

9.19 The giving of a certificate pursuant to the obligation referred to in paragraph 9.17(e) above⁴² carries important legal consequences. In favour of any person dealing with the proprietor concerned the certificate is conclusive evidence of the matters specified therein.⁴³ Consequently it should cover the state of the proprietor's contributions to any other fund. In chapter 13 below, the Commission recommends that a strata company should be expressly empowered to establish a reserve fund for the purpose of accumulating money for expenses which are not of a routine nature. The Commission accordingly recommends that the company's obligation referred to in paragraph 9.17(e) should be extended to certifying, where there is a reserve fund, to the amount of any contributions due or payable by the proprietor to that fund and the manner in which they are payable and the extent to which they have been paid. The Commission also recommends in chapter 13 that arrears of contributions to the administrative fund and the reserve fund should bear interest until paid unless the proprietors, by special resolution, determine otherwise. Accordingly, the obligation should also extend to certifying to the amount of any interest due or payable in respect of arrears of contributions to the administrative fund or the reserve fund.

9.20 Section 13(4)(j) obliges the strata company to comply with any reasonable request for the names and addresses of members of the council of the strata company. In paragraph 10.17 below, the Commission recommends that there should be a chairman, secretary and treasurer of the strata company. Section 13(4) (j) should accordingly be extended to include the identity of those members of the council who occupy those offices. The section should also be amended to provide that a proprietor, mortgagee or person authorised in writing by either should be entitled as of right to the information.⁴⁴

(f) To install a strata company letterbox

9.21 The requirement in the existing Act that the strata company must have a letterbox suitable and suitably placed for purposes of postal delivery with the name of the company

⁴⁰ WA, schedule, part I, by-law 4(10)(f) should consequentially be repealed.

⁴¹ NSW, s 70(1)(b)(v), (vi), (vii), (viii), (ii) and (iii); Qld, s 40(1)(b)(iv), (v), (vi), (vii), (ii) and (iii).

⁴² That is, the obligation prescribed in WA, s 13(8).

⁴³ WA, s 13(8). See also para 13.11 below.

⁴⁴ The present obligation on the strata company to comply with "any reasonable request" for the information should remain. This would enable, for example, a local authority to obtain the information where it is of legitimate interest to the authority.

clearly shown on it⁴⁵ should continue, but it should be made clear that the box must be on the parcel. The significance of the letterbox is that one of the methods by which a document may be served on the strata company or council is by placing it in the letterbox.⁴⁶

5. RECOMMENDATIONS AS TO POWERS

(a) General

9.22 The Commission has recommended in paragraph 5.11 above that the power given by by-law 3(f) of part I of the schedule to the Act (grant of exclusive use of the common property) should be repealed. Subject to that, and to the alterations indicated in the following four paragraphs,⁴⁷ the strata company's powers set out in by-law 3 should continue. However, they should not be powers of which the proprietors for the time being of a strata scheme can deprive the strata company. This can be ensured by incorporating them in the Act itself and the Commission recommends that this be done.⁴⁸

(b) To acquire and dispose of personal property

9.23 The strata company should be able to purchase, hire or otherwise acquire personal property not only for use by proprietors in connection with their enjoyment of common property but also to assist in carrying out its duties or exercising its powers under the legislation.⁴⁹ This would put beyond any doubt the ability of the strata company to purchase an item such as a typewriter for use by its secretary.

⁴⁵ WA, s 26(1).

⁴⁶ WA, s 26(2). The other method is by posting the document in a pre-paid letter addressed to the company or council, as the case may be, at the address shown on the strata plan: *ibid*. Australia Post suggested that it should not be permissible for a strata plan to be registered at the Titles Office unless it is endorsed with or accompanied by a certificate from Australia Post that the location of the letter boxes for the lots has been approved. In practice, only in a fairly small percentage of strata developments does the positioning of the letterboxes create difficulties for Australia Post and the Commission considers that a requirement for such a certificate would not be justified. In any case, difficulties of this nature could be lessened by an appropriate regulation made under the *Postal Services Act* (Cwth).

⁴⁷ Paras 9.23 to 9.26.

⁴⁸ This has been the approach in New South Wales and Queensland: NSW, s 65 and Qld, s 37.

⁴⁹ Later in this report (paras 19.10(b) and 19.28 below), the Commission has recommended that where the proposed Strata Titles Referee considers that an acquisition or proposed acquisition is unreasonable he may order that the personal property be sold or disposed of or that it not be acquired.

9.24 Circumstances can arise where it is desirable for the strata company to dispose of personal property owned by it. It may, for example, wish to sell a lawn mower with a view to replacing it by a more suitable one. The Act, however, does not expressly enable the strata company to do this. The Commission accordingly recommends that the strata company should be expressly empowered to sell or otherwise dispose of personal property owned by it.

(c) To invest

9.25 It is often desirable that the strata company invest money it has collected from proprietors for the purposes of carrying out its obligations under the Act. This is particularly the case where money is being collected periodically to meet a future liability (such as the cost of repainting the common property) which will not arise for some years. At present, the strata company may invest such money "as it may determine".⁵⁰ In the working paper,⁵¹ the Commission raised the issue of whether the strata company's power to invest should be confined to investments authorised by law for the investment of trust funds. These include fixed deposits at banks, savings bank accounts, deposits in or shares of building societies which have been certified as societies in which trustees may invest, government securities (such as Commonwealth Bonds),⁵² first mortgages of land and the common trust funds of trustee companies.⁵³ The majority of those who commented on this issue, including the Law Society, REIWA and several strata companies, considered that the power of investment should be limited in this way. In New South Wales and Queensland, the strata company may invest any moneys in the administrative fund or sinking (that is, reserve) fund in any manner permitted by law for the investment of trust funds or in any prescribed investment.⁵⁴ As the money is in the nature of trust money, the Commission recommends that this provision be adopted.⁵⁵

⁵⁰ WA, schedule, part I, by-law 3(d).

⁵¹ Paras 14.8 to 14.11 and 38.1(17).

⁵² They also include investments guaranteed by the Parliament of the United Kingdom or the Commonwealth or any State of the Commonwealth or New Zealand: *Trustees Act 1962-1978* (WA), s 16(1).

⁵³ The investments in which a trustee may invest trust funds are described in full in ss 16 to 26 of the *Trustees Act 1962-1978* (WA). The Commission is at present reviewing the law relating to trustees' powers of investment and issued a working paper on the subject in December 1981 (Project No 34 Part V).

⁵⁴ NSW, s 65(1)(a) and Qld, s 37(1)(a). Later in this report, the Commission recommends that the strata company should be empowered to establish a reserve fund in addition to an administrative fund: para 13.8 below.

⁵⁵ It should be expressly stated in the legislation that interest received on an investment should form part of the fund to which the investment belongs. This was done in New South Wales and Queensland: NSW, s 65(2); Qld, s 37(2).

(d) To attend to incidental matters

9.26 By-law 3(g) of part I of the schedule to the Act empowers a strata company to do all things reasonably necessary for the enforcement of the by-laws and the control and management of the common property. This provision does not appear in the New South Wales legislation but in that State a strata company is empowered to "do and suffer all... things that bodies corporate generally may, by law, do and suffer" and that are necessary for or incidental to the purposes for which it is constituted.⁵⁶ The Commission prefers the New South Wales provision as it extends to all the purposes for which the strata company is constituted and not merely to the enforcement of the by-laws and the control and management of the common property. It recommends that the provision be adopted in Western Australia.

(e) To accept licence for boat moorings or landings

9.27 Where a strata development is close to a waterway, it may be desirable for the strata company to accept or acquire a lease, licence or permit for the purpose of providing moorings or landings for boats of proprietors. The Commission recommends that the Act should expressly empower a strata company to accept or acquire such a lease, licence or permit.⁵⁷

(f) To carry out work if the proprietor fails to do so

9.28 By-law 1(b) in part I of the schedule to the Act obliges the proprietor forthwith to carry out all work ordered by a public or local authority in respect of his lot other than work for the benefit of the building generally. There is, however, no specific power given to the strata company itself to carry out any work which the authority has directed the proprietor to do, even though the proprietor's default could result in a nuisance to other proprietors or threaten to damage their units or the common property.⁵⁸ It may be possible for the strata company to obtain an order⁵⁹ requiring the proprietor to comply with the authority's order, but this could take time. Accordingly, following New South Wales and Queensland,⁶⁰ the

⁵⁶ *Interpretation Act 1897-1980* (NSW), s 38(I)(e).

⁵⁷ Qld, s 37(1)(f). WA, schedule, part I, by-law 3(e) would empower the strata company to charge proprietors for the use of the mooring or landing.

⁵⁸ An example would be a defective gas or electrical appliance.

⁵⁹ Of a court or the Strata Titles Referee if the office is established: chapter 19 below.

⁶⁰ NSW, s 60; Qld, s 33.

Commission recommends that the strata company should be empowered to carry out the required work itself and to recover the cost of doing so from the proprietor. Such a power should be included in the Act itself, not merely in a by-law, so that it cannot be revoked.

9.29 On the same general basis, the Commission considers that it would also be desirable to empower the strata company to carry out work which a proprietor, tenant or other occupier has been ordered by a court or tribunal⁶¹ to undertake but has failed to do so. For example, a court or tribunal may have ordered that a proprietor remove a particular structure (such as an unsightly screen) which he has erected in breach of a by-law and he has not done so. The Commission accordingly recommends that such power be given in the Act (and not merely in a by-law), including power to recover the cost of so doing from the person against whom the order was made.

9.30 The Commission has recommended⁶² that the strata company should be empowered to make a by-law conferring on the proprietor of a lot exclusive use of, or special privileges in respect of, part of the common property on condition that the proprietor carry out work in respect of it, including its maintenance or repair. If such a grant were made, it would be desirable for the Act expressly to empower the strata company itself to carry out the work if the proprietor fails to do so and recover from him the cost of doing so.⁶³ The Commission recommends accordingly.

(g) To enter onto a lot

9.31 Obviously, the strata company by its agents, servants or contractors should be expressly empowered to enter on any part of the parcel (including any lot) for the purpose of carrying out its duties and powers under the Act or by-laws. By-law 1(a) of part I of the schedule to the Act obliges the proprietor to permit the strata company and its agents, at all reasonable times and on notice (except in the case of emergency), to enter on his lot for the purpose of inspecting it, maintaining the common property,⁶⁴ maintaining pipes, wires, cables and ducts capable of being used in connection with the enjoyment of any other lot or the

⁶¹ Including the Strata Titles Referee if the office is established.

⁶² Para 5.11 above.

⁶³ As in New South Wales (NSW, s 60(2)(a)) and Queensland (Qld, s 33(2)(a)).

Failure to comply with a condition of the grant of exclusive use would no doubt be a ground for its revocation. However, it may not be clear that the company can recover the cost of rectifying the default.

⁶⁴ The Commission contemplates that this would cover the duty of maintaining fittings and fixtures: para 9.10 above.

common property, and ensuring that the by-laws are being observed. The Commission recommends that the provision should be recast in the form of an equivalent power given to the strata company and be included in the Act itself.⁶⁵ This would mean that the strata company's power would be made explicit and not given merely by implication. It would also mean that not only proprietors but also tenants and other occupiers would be obliged to permit entry under the circumstances specified. The Commission also recommends that the purposes for which the strata company is empowered to enter should be extended to -

- (a) carrying out work pursuant to the powers which the Commission has recommended in paragraphs 9.28, 9.29 and 9.30 above that the strata company should be given;
- (b) carrying out work which it is required to do by the Act⁶⁶ or the by-laws or by a notice served on it by a public or local authority, or by an order.⁶⁷

9.32 Following New South Wales and Queensland, the Commission recommends that it should be an offence for anyone to obstruct or hinder a strata company in the exercise of a power of entry.⁶⁸

(h) To change address for service

9.33 The strata plan must have endorsed on it an address at which documents may be served on the strata company.⁶⁹ A document can be served on the strata company⁷⁰ by posting it in a prepaid envelope addressed to the strata company at the address for service shown on the strata plan.⁷¹ Section 5(4) of the Act provides that the strata company may change the address for service but does not require the council of the strata company to obtain authorisation of the proprietors in general meeting before doing so. The New South Wales and

⁶⁵ The power would be exercisable by the council, subject to any direction given by the proprietors in general meeting.

If the Commission's recommendation in para 8.4 above is implemented, pipes, wires, cables and ducts used in connection with the enjoyment of any other lot or common property would be included in the common property (unless these items are described in the strata plan as part of a lot).

⁶⁶ This would include the repair of personal property vested in it, if the recommendation made in para 9.11 above is implemented.

⁶⁷ That is, by an order of a court or tribunal including the Strata Titles Referee if the office is established.

⁶⁸ NSW, s 64(2); Qld, s 36(2). In both States, the maximum penalty is \$200.

⁶⁹ WA, s 5(1)(i).

⁷⁰ Or the council: WA, s 26(2).

⁷¹ WA, s 26(2).

Queensland legislation provide that a change of address for service can only be done pursuant to a resolution of proprietors.⁷² The Commission considers that a proposal to change the address for service is of sufficient importance to be placed before a general meeting of proprietors⁷³ for authorisation and recommends that the New South Wales and Queensland approach be adopted.

6. CAPACITY TO SUE AND BE SUED

9.34 Under section 13(3) of the Act a strata company:

- "(a) may sue and be sued on any contract made by it;
- (b) may sue for and in respect of any damage or injury to the common property caused by any person, whether a proprietor or not;
- (c) may be sued in respect of any matter connected with the parcel for which the proprietors are jointly liable."

In the Commission's view, these provisions are too limited and are otherwise insufficiently clear. In the following paragraphs the Commission recommends certain changes.

9.35 The Commission considers that section 13(3)(a) is too narrow since it is confined to contracts. It would not cover, for example, a case where a strata company desires to sue a person who has converted an item of personal property belonging to the company for recovery of the property or damages. The Commission accordingly recommends that the Act should instead provide that a strata company is capable of suing and being sued.⁷⁴ A strata company would thus have the same capacity as a natural person of taking proceedings or having proceedings taken against it.⁷⁵

⁷² NSW, s 61; Qld, s 34.

⁷³ For example, if the Commission's recommendation in para 19.28 below that there should be a Strata Titles Referee is implemented, the Referee would be required to give notice of any application to him to the strata company and to invite a written submission within a prescribed time. If the notice is sent to an address which is inconvenient, the strata company may not be able to make its submission in time.

⁷⁴ Cf the *Companies (Western Australia) Code*, s 35(5)(b).

⁷⁵ This would mean that a defendant in legal proceedings brought by a strata company could not successfully argue that the company had no capacity to take those proceedings. Conversely, a strata company named as a defendant could not argue that legal proceedings could not be brought against it. Adoption of the Commission's proposal would not create a cause of action which otherwise did not exist. Whether or not a good cause of action existed in favour of or against a strata company would be determined by the general law.

9.36 Section 13(3)(b) appears⁷⁶ to be intended to give a strata company the capacity to take proceedings in respect of damage or injury to the common property where that damage or injury is a wrong done to the strata company.⁷⁷ The provision would no longer be necessary if the Commission's recommendation in the immediately preceding paragraph is implemented and should consequently be repealed.

9.37 Section 13(3)(c), which provides that the strata company may be sued in respect of any matter connected with the parcel for which the proprietors are jointly liable, appears to be intended as a form of representative action. However, it differs from an ordinary representative action in that it appears to apply to cases where the strata company is not jointly liable with the proprietors. An ordinary representative action is one where proceedings are taken by or against one of "numerous persons [having] the same interest in any proceedings ..."⁷⁸ as representing all of them. A judgment or order given in such proceedings is binding on all the persons so represented in addition to the representing person.⁷⁹ However, section 13(3)(c) does not make it clear whether judgment given against the strata company would be judgment against all the proprietors. It also has the defect that it applies only where the proprietors are jointly liable and does not enable the strata company to take proceedings on their behalf.

9.38 The Commission accordingly recommends that section 13(3)(c) should be replaced by a provision similar to section 147 of the New South Wales Act. This is as follows:

"147. (1) Where the proprietors of the lots the subject of a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly (any such proceedings being proceedings for or with respect to common property), the proceedings may be taken by or against the body corporate and any judgment or order given or made in favour of or against the body corporate in any such proceedings shall have effect as if it were a judgment or order given or made in favour of or against the proprietors.

⁷⁶ If the provision is intended as a form of representative action, it would be covered by adoption of the Commission's recommendation in para 9.28 below.

⁷⁷ Although the common property is owned by the proprietors as tenants in common, the strata company has the duty of controlling, managing and maintaining it and would thus appear to have a sufficient interest to maintain an action against a wrongdoer who damaged it: *The Proprietors – Cavill Court Building Units Plan No 48 v Smith & Another* (Supreme Court of Queensland) reported in G F Bugden, *New South Wales Strata Title Law and Practice*, (1979), ¶ 30-033. Conversely, a person has a cause of action against the strata company for damage or injury arising out of its failure to properly maintain the common property: *Black v The Body Corporate Strata Plan* (unreported, Supreme Court of Victoria, 1982).

⁷⁸ *Rules of the Supreme Court 1971-1982*, O 18 r 12(1).

⁷⁹ *Id.*, O 18 r 12(3).

(2) Where a proprietor is liable to make a contribution to another proprietor in respect of a judgment debt arising under a judgment referred to in subsection (1), the amount of that contribution shall bear to the judgment debt the same proportion as the unit entitlement of the lot of the firstmentioned proprietor bears to the aggregate unit entitlement."

As can be seen, the New South Wales section applies where the proprietors are entitled to take proceedings as well as where they are liable to have proceedings taken against them, and makes it clear that judgment by or against the strata company has effect as if it were a judgment given in favour of or against the proprietors. It also clarifies the question of contribution of the other proprietors where the plaintiff enforces judgment against one of them. In such a case, the other proprietors are obliged to contribute in accordance with their unit entitlement.

7. FORMALITIES OF MAKING A CONTRACT

9.39 As was pointed out by Mr M A Lewi in a paper delivered at the 1982 Law Summer School,⁸⁰ a strata company is still subject to the common law rule that contracts entered into by a non-trading corporate body (such as a strata company) must be executed under its common seal, unless the contract is of a routine nature associated with the day to day running of the organisation or is a matter of urgent necessity.⁸¹ A contract which is required to be under seal, but which is not, cannot be enforced either by or against the corporate body while it is still executory.⁸² Speaking of the application of the rule to non-trading corporate bodies generally, the English Law Reform Committee said "if the law remains unaltered, it will continue to be ignored in a multitude of transactions, many of which fall clearly outside the recognised exceptions and many more of which fall within a category in which it is impossible to be sure whether the requirement of a seal applies or not".⁸³ The Committee recommended that contracts entered into by non-trading corporate bodies should, as far as form is concerned, be assimilated to those made by a natural person.⁸⁴

9.40 The Commission considers it unsatisfactory that strata companies should continue to be subject to the common law rule, for the reasons advanced by the English Law Reform

⁸⁰ *Statutory Bodies: Contracting Problems* (paper No 22, 1982), 7.

⁸¹ *Halsbury's Laws of England* (4th ed), Australian Commentary (1981), Ch 38, C 1370.

⁸² *A R Wright & Son, Ltd v Romford Corporation* [1956] 3 All ER 785.

⁸³ Eighth Report, *Sealing of Contracts made by Bodies Corporate*, (1958, Cmnd 622), 5.

⁸⁴ *Id.*, 6-7. The Committee's recommendation was given effect to by the *Corporate Bodies' Contracts Act 1960-1973*(UK).

Committee. Accordingly the Commission recommends that a provision be included in the Strata Titles Act to the effect that, so far as the formalities of making, varying or discharging a contract are concerned, a person acting under the express or implied authority of a strata company can make, vary or discharge a contract in the name of or on behalf of the company in the same manner as if that contract were made, varied or discharged by a natural person.⁸⁵

8. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

9.41 The Commission recommends that -

- Duties of strata Companies
- (a) *Certain of the existing duties of strata companies, namely to -*
- (i) *control and manage the common property;*
 - (ii) *maintain the common property;*
 - (iii) *keep minutes of general meetings;*
 - (iv) *keep a record of unanimous resolutions;*
 - (v) *keep books of account and prepare statements of account;*
 - (vi) *comply with any reasonable request for the names and addresses of the persons who are members of the council of the strata company;*
 - (vii) *provide information as to the position of a proprietor's contributions to the administrative fund; and*
 - (viii) *install a strata company letter box;*

⁸⁵ Cf s 80(1) of the *Companies (Western Australia) Code*. Such a provision should, of course, be made subject to the operation of any law which requires some consent to be obtained, or some procedure to be complied with (eg a unanimous resolution of proprietors), in relation to the making, variation or discharge of a contract: id, s 80(6).
Consideration could be given to enacting an appropriate provision governing non-trading corporate bodies generally, as recommended by the English Law Reform Committee.

should be delineated in more detail and where they are at present imposed by by-law should be imposed instead by the Act itself.

(paragraphs 9.8 to 9.10, 9.13 to 9.15 and 9.19 to 9.21)

(b) *The following additional duties should be imposed by the Act on strata companies -*

(i) *A strata company should be expressly required to maintain any personal property vested in it.*

(ii) *A strata company should be required to keep proper records of notices and orders given to or served on it.*

(iii) *The present duty to keep a separate record of unanimous resolutions should be extended to special resolutions.*

(iv) *A strata company's present duty to make certain records and documents available for inspection by a proprietor, mortgagee or person authorised by either should be extended to include all records or documents in the custody or under the control of the strata company.*

(v) *A strata company's present duty to provide information as to the position of a proprietor's contributions to the administrative fund should be extended to the reserve fund where one has been established.*

(paragraphs 9.11, 9.12, 9.14 and 9.18 to 9.20)

Powers of strata companies

(c) (i) *Certain of the existing powers of strata companies, namely to -*

(1) *purchase, hire or otherwise acquire personal property;*

(2) *invest money held by it;*

- (3) *attend to incidental matters; and*
- (4) *enter a lot for the purpose of inspecting it, maintaining the common property and ensuring that the by-laws are being observed;*

should be delineated in more detail and together with the other powers at present contained in by-law 3 should be provided for in the Act itself.

(paragraphs 9.22, 9.23, 9.25, 9.26, 9.31 and 9.32)

- (ii) *Strata companies should not be able to change their address for service except pursuant to an ordinary resolution passed at a general meeting of the strata company.*

(paragraph 9.33)

- (d) *The following additional powers should be granted by the Act to strata companies, namely to -*

- (i) *sell or otherwise dispose of personal property owned by it;*
- (ii) *accept a lease, licence or permit for the purpose of providing moorings or landings for boats;*
- (iii) *where a proprietor has failed to carry out work ordered by a public or local authority in respect of his lot (other than work for the benefit of the building generally), carry out the required work itself and recover the cost of doing so from the proprietor;*
- (iv) *carry out work which a proprietor, tenant or other occupier has been ordered by a court or tribunal to undertake but has failed to do so, and recover the cost from the person against whom the order was made;*
- (v) *where a by-law confers on the proprietor of a lot exclusive use of, or special privileges in respect of, part of the common*

of, or special privileges in respect of, part of the common property on condition that he carries out work in respect of it, carry out the work itself if the proprietor fails to do so and recover from him the cost;

- (vi) *enter a lot for the purpose of carrying out work which it would be empowered to under (d)(iii), (iv) and (v) or for the purpose of carrying out any work which the strata company is required to do by the Act or the by-laws, or by a notice served on it by a public or local authority or by an order of a court or tribunal.*

(paragraphs 9.24 and 9.27 to 9.32)

- (e) *Section 13(3)(a) of the Act should be amended to provide that a strata company is capable of suing and being sued.*

(paragraphs 9.35 and 9.36)

Capacity
to sue and
be sued

- (f) *Section 13(3)(c) should be replaced by a provision permitting a representative action by or against the strata company where the proprietors are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly. Contribution by a proprietor in respect of a judgment debt arising out of such an action should be in the same proportion as the unit entitlement of his lot bears to the aggregate unit entitlement.*

(paragraph 9.38)

- (g) *As far as the formalities of making, varying or discharging a contract are concerned, a person acting under the express or implied authority of a strata company should be able to make, vary or discharge a contract in the name of or on behalf of the company in the same manner as if that contract were made, varied or discharged by a natural person.*

Formalities
of making
a contract

(paragraph 9.40)

CHAPTER 10

THE COUNCIL

1. GENERAL

10.1 The council of a strata company is a small elected group of proprietors whose principal function is the day to day management of the strata scheme. If it were not for the existence of the council, each time a strata company wanted to make a decision, it would be necessary to convene a general meeting of the proprietors.¹ Subject to restrictions imposed by the Act and to any restrictions imposed or directions given at a general meeting of the strata company, the council exercises and performs the powers and duties of the strata company.² In addition, the Act and by-laws confer a number of further powers and duties on the council in furtherance of its management role.³

10.2 The members of the council of a strata company have a fiduciary duty which is analogous to that of company directors.⁴ The nature of the duty of members of the council was explained in *Re Steel and the Conveyancing (Strata Titles) Act 1961*,⁵ a decision of the Supreme Court of New South Wales. In delivering his judgment in the case, Else-Mitchell J said:⁶

"It is plain that the respondents [the members of the council] have failed to recognise that it is their duty to manage the affairs of the body corporate for the benefit of all the lot holders, and that the exercise of any of their powers in circumstances which might suggest a conflict of interest and duty requires them to justify their conduct, and that the onus lies on them to prove affirmatively that they have not acted in their own interests or for their own benefit."

¹ Where there are a large number of proprietors in a strata scheme, the convening of a general meeting involves a considerable amount of paper work, as notice of the meeting must be given to all proprietors and registered first mortgagees who have notified their interests to the strata company: WA, schedule, part I, by-law 5(5).

² Id, by-law 4(1).

³ Such as the duties described in para 9.5 above. The Commission has recommended in paras 9.13 to 9.15 and 9.18 above that these duties should be placed on the strata company itself. It would, of course, be the duty of the council to carry out these duties.

⁴ Company directors have duties of good faith "virtually identical with those imposed on trustees": L C B Gower, *Modern Company Law* (4th ed 1979), 572.

⁵ (1968) 88 WN (Pt 1) (NSW), 467.

⁶ Id, 470.

2. OUTLINE OF EXISTING PROVISIONS

10.3 Under the existing Act,⁷ the council is to be elected at each annual general meeting of the strata company.⁸ The first general meeting must be held within three months of the registration of the strata plan.⁹ The council must consist of not more than seven or less than three proprietors¹⁰ but where there are no more than three proprietors, the council consists of all the proprietors.¹¹ A casual vacancy on the council may be filled by the remaining members of the council.¹² Except where there is only one proprietor a quorum of the council is -

- (a) two, where the council consists of three or four members;
- (b) three, where it consists of five or six members; and
- (c) four, where it consists of seven members.¹³

At the commencement of each meeting the council elects a chairman for the meeting.¹⁴ At council meetings all matters are determined by a simple majority vote.¹⁵ The council must keep minutes of its proceedings and of general meetings and must also keep a record of unanimous resolutions.¹⁶ Subsequent discovery of a defect in the appointment or continuance in office of a member of the council will not invalidate acts done in good faith by the

⁷ It is to be noted that the provisions relating to the powers, duties and functions of a council of a strata company are contained in by-laws set out in the schedule to the Act. The by-laws in part I of the schedule can be amended or repealed by unanimous resolution (WA, s 15(2)) and those in part II can be amended by a special resolution (WA, schedule, part 1, by-law 9).

⁸ WA, schedule, part I, by-law 4(2).

⁹ Id, by-law 5(1). Rath, Grimes and Moore, 88, submit that this first meeting is probably an annual general meeting within the terms of a by-law in the form of WA, schedule, part I, by-law 4(2). In para 11.44 below the Commission recommends that the matter be clarified.

¹⁰ WA, schedule, part I, by-law 4(2).

¹¹ Ibid.

¹² Id, by-law 4(4). See para 10.21 below for the Commission's recommendation as to the circumstances under which a member of council vacates his office. The continuing members of the council may act notwithstanding any vacancy in the membership: id, by-law 4(6). However, if the number of members is reduced below the number fixed by or pursuant to the by-laws as the quorum of the council, the continuing members of the council may act for the purpose of increasing the number of members of the council or of convening a general meeting of the strata company, but for no other purpose: *ibid*.

¹³ WA, schedule, part I, by-law 4(5).

¹⁴ Id, by-law 4(7).

The council must meet when any member of the council gives to the other members not less than seven days' notice of a meeting proposed by him, specifying the reason for calling it: id, by-law 4(9)(a).

¹⁵ Id, by-law 4(8).

¹⁶ Id, by-law 4(10). In paras 9.13 and 9.14 above, the Commission has recommended that the duty to keep minutes of general meetings and a record of unanimous resolutions (and also special resolutions) should be placed on the strata company. The obligation to keep minutes of council proceedings would remain on the council itself.

council.¹⁷ Except where the council consists of all the proprietors, the strata company may by an ordinary resolution at an extraordinary general meeting remove a member of the council before the expiration of his term of office and appoint another proprietor in his place until the next annual general meeting.¹⁸

10.4 In chapter 9 above, the Commission has recommended that certain duties and powers which under the present legislation are imposed directly on the council of a strata company should instead be imposed on the strata company itself. Nevertheless, the council will continue to be the body through which these functions are exercised and it is therefore important that present uncertainties regarding the formation of the council, the manner of its election, the vacation of office of members and similar matters should be resolved. In this chapter, the Commission makes recommendations to this end. It also considers the question whether there should be any restrictions on the power of the council to incur expenditure and to levy contributions.

3. FORMATION OF THE COUNCIL

(a) First proprietors as council members

10.5 It is not entirely clear under the existing legislation whether there is any council of the strata company between the time of registration of the strata plan and the first annual general meeting of the strata company.¹⁹ It is clearly desirable that there should be a council of the strata company from the time the company comes into existence in order that the scheme can be managed in a proper way from the time of its inception. The Commission accordingly recommends that the by-laws contained in part I of the schedule to the Act should provide that until the first annual general meeting of the strata company, the proprietors of all the lots should constitute the council.²⁰

¹⁷ Id, by-law 4(11).

¹⁸ Id, by-law 4(3).

¹⁹ Rath, Grimes and Moore, 88, argue that by-law 4(2) of part I of the schedule to the Act is properly construed as making provision for a council during this period consisting of the first three proprietors in the strata scheme. However, the matter is not free from doubt. Their appointment would of course only last until the first general meeting if at that stage there are more than three proprietors: WA, schedule, part I, by-law 4(2).

²⁰ This is the position in New Zealand: *Unit Titles Act 1972-1981*(NZ), second schedule, rule 5. The question of a quorum may arise. WA, schedule, part I, by-law 4(5) is based on the assumption that there would be no more than seven members of the council. However, in the case referred to in this paragraph, there could be more than seven. The quorum should then be a simple majority of members.

10.6 The first general meeting must take place within three months of the registration of the strata plan. In the case of a large scheme, where there have been many sales of lots, the recommendation in the previous paragraph would result in a council of unwieldy size if this meeting were delayed for the full three months. However, the three months is a maximum, not a minimum period and the existence of an unwieldy council could provide an incentive to hold the meeting before the three months was up.²¹ At the meeting, the election of councillors to take the place of the inaugural councillors would then take place.

(b) Corporate bodies

10.7 At present, a corporate body which is the proprietor of a lot could in theory become a member of the council. However, a corporate body could only properly act as a member through a human representative. There is no provision in the existing by-laws for this. Although it would be possible for a strata company to pass a by-law to this effect, it would be preferable that such a provision apply to all strata companies without the necessity of making a by-law. Accordingly, the Commission recommends the inclusion in the body of the Act of a provision that a corporate body can act, through a natural person authorised in writing by the corporate body, as a member of the council, as an alternate councillor,²² or as chairman, secretary or treasurer of the strata company²³ or council.

(c) Co-proprietors

10.8 If there are no more than three proprietors, they will constitute a council and there will be no need for an election.²⁴ Under the Act it is unclear whether co-proprietors are "proprietors" for the purposes of determining whether there needs to be an election for membership of the council. The Commission recommends that this difficulty be resolved by providing in the by-laws contained in part I of the schedule to the Act that for the purposes of determining the number of proprietors from time to time, the co-proprietors of a lot shall be deemed to be one proprietor. Further, if the same persons own more than one lot they should be deemed to be one proprietor for the purposes of this determination.

²¹ In para 20.26 below, the Commission recommends that the duty of calling the first annual general meeting should be imposed on the original proprietor.

²² Para 10.18 below.

²³ Paras 10.15 and 10.17 below.

²⁴ Para 10.3 above.

10.9 Where a lot is owned by two or more co-proprietors, it is not clear under the present Act whether a co-proprietor is eligible to stand for election to the council and, if so, whether all or only one of them is so eligible. As the interests of the co-proprietors of a lot in the strata scheme are likely to be similar, if not identical, the Commission recommends that the by-laws should provide that only one of them should be able to stand for election by virtue of the ownership of that lot, and this person should be the one who is nominated by his co-proprietors. Failing agreement among them as to their nominee it should be the proprietor with the largest share in the lot. If the co-proprietors have equal shares then it should be the proprietor first named in the certificate of title to the lot.²⁵ Where a corporate body is a co-proprietor, the provisions recommended in this paragraph should apply in respect of its nominee.

10.10 In paragraph 10.5 above, the Commission recommended that all proprietors should, ipso facto, be members of the council from registration of the strata plan until the first annual general meeting. For the reason outlined in the previous paragraph, the Commission recommends that where there are co-proprietors of a lot only the one nominated by the others should be a member of the council. Failing agreement, it should be the proprietor with the largest share in the lot. If they have equal shares, it should be the first named in the certificate of title to the lot.²⁶

(d) Where there is no council

10.11 The Commission has been told of one case in which there were no nominations for election to the council. None of the proprietors wished to be a member of the council, and as a result the scheme was left without a council. A similar position could arise if all members of the council resigned during the term for which they had been elected. Furthermore, sufficient members of the council could resign to leave the council without a quorum²⁷ and the remaining member or members might be unable to co-opt enough proprietors to restore the quorum.²⁸ The Act does not make any express provision catering for these situations. The Commission accordingly recommends that a provision should be included in the Act to provide that, if for any reason there is no council in existence or the council has insufficient

²⁵ Or, if the shares are unequal, but there is more than one largest share, the relevant proprietor whose name first appears in the certificate of title.

²⁶ See also the immediately preceding footnote.

²⁷ Para 10.3 above.

²⁸ Ibid.

members to form a quorum, the duties and powers of the council should be exercisable by the proprietors in general meeting.²⁹

4. VOTING SYSTEM FOR COUNCIL ELECTIONS

10.12 The present by-laws do not specify a voting system to be used in council elections and the Commission has received some evidence that this can cause confusion within a strata scheme. The Commission considers it desirable that a particular voting system should be prescribed in the legislation. A number of systems including the "first past the post" system, the "points" system, the preferential system and the proportional representation system have been considered.³⁰ Under the first past the post system, each voter votes for the candidates he wishes elected, for example, by placing a cross on the ballot paper alongside their names. He must select as many candidates as there are positions to be filled. Those candidates who receive the most valid votes are elected. All votes cast are of equal value. This system is simple but has the defect that the candidate who is in reality the first preference of a majority of voters may fail to be elected. Under the points system each voter indicates his preference for the candidate by placing the figure '1' against the name of his first choice, then placing numbers in ascending order opposite the names of the other candidates in accordance with his preference for them. If, for example, there are eight candidates and five positions to be filled, the five candidates with the least votes would be elected. The system enables the voter to give votes of greater weight to the candidates he prefers.³¹ The preferential system is that adopted for the election of members of the House of Representatives of the Commonwealth Parliament and the proportional representation system is that adopted for election to the Senate.

²⁹ This provision is of sufficient importance to be included in the Act itself, and not in the by-laws. There could be cases where the strata scheme is not being properly administered, not because there is no council or because it lacks a quorum, but because the council is failing to carry out its responsibilities. It could be argued that in such cases the proprietors in general meeting should be able to exercise the council's functions. However, there are difficulties with such a proposal, not the least being that there could be difference of opinion as to whether the council was in fact in default. In the Commission's view the matter should be left to be dealt with by the Strata Titles Referee which the Commission recommends in chapter 19 below should be established. The Referee could appoint an administrator to administer the strata scheme.

The above assumes that the council is regarded as being unwilling or unable to carry out its responsibilities generally. If the council is in default only in certain matters the proprietors could avail themselves of the provision which the Commission recommends in para 11.45 below should be enacted.

³⁰ An explanation of these systems is contained in N E Renton, *Guide for Meetings and Organisations*, (3rd ed 1979), 145-151, paras 1116 to 1137.

³¹ The same result would be achieved by a scheme putting the highest number against the most preferred candidate, the next highest number against the next most preferred candidate, and so on. In this scheme the candidates with the most number of votes would be elected. This is called the "inverse points" system.

10.13 The Commission considers that the preferential and proportional systems of voting are too complicated for use in the context of a strata scheme. The practical choice accordingly is between the "first past the post" system and the "points" system. On balance, the Commission recommends that a by-law should be included in part I of the schedule to the Act providing for the first past the post system.³² Although it does not enable the voter to indicate his **degree** of preference, it is the simplest system to operate and understand. It would, of course, always be open for a strata company to amend the by-law to provide for some other voting system should it see fit.

10.14 A further issue which arises in this context is the voting power to be accorded to each proprietor. One possibility is to give equal voting power to each proprietor. Another is to allow one vote for each lot a proprietor owns in the scheme. Yet another is to calculate a proprietor's voting power in accordance with the unit entitlement of his lot or lots. The Commission has concluded that the complication which this last system would cause would not be justified. On the other hand to give all proprietors an equal vote in the election would seem unfair to a proprietor owning several lots in the one scheme. The Commission therefore recommends the enactment of a by-law to the effect that on an election of members of council each proprietor would have one vote in respect of each lot owned by him.³³ A co-proprietor of a lot should in respect of that lot be entitled to such part of the vote applicable to the lot as is proportionate to his interest in the lot.³⁴

5. PRINCIPAL OFFICE BEARERS

10.15 The Act does not provide for principal office bearers of the council such as secretary and treasurer. The council is, however, empowered to delegate to one or more of its members

³² Both New South Wales and Queensland have opted for this system: *Strata Titles Act Regulations 1974-1982* (NSW), reg 51; *Building Units and Group Titles Regulations 1980-1981* (Qld), reg 21.

³³ It would be a simple matter for a proprietor who owns more than one lot to indicate on his ballot paper the number of lots he owns. The persons counting the votes would then simply multiply the proprietor's vote by the number of lots. New South Wales (clause 10 of part 1 of schedule 2) provides for a proprietor to have one vote per lot owned.

The system recommended for voting at the election of councillors would be different from that which is prescribed for motions at general meetings where a poll is requested: para 11.6 below.

³⁴ This is the present position under WA, schedule, part I, by-law 7(8). In NSW, however, co-proprietors are only entitled to cast a vote by a person duly appointed as a proxy by them jointly: NSW, clause 2(3), part I, schedule 2.

such of its powers and duties as it thinks fit,³⁵ so it could appoint one of its members secretary and delegate certain powers to him. Almost all of the commentators on the working paper who adverted to this matter were of the view that the by-laws should provide for a chairman, secretary and treasurer, that the same person should be able to hold more than one (or all of these offices) at the same time³⁶ and that the respective duties and powers of the chairman, secretary and treasurer should be set out in the by-laws.³⁷ The Commission agrees and recommends accordingly. The provisions should be flexible enough to ensure that in the absence or unavailability of an office holder another member of the council may act in his place, and that failure by a council to elect office bearers shall not invalidate anything done by a member of the council in fulfilling any function allotted to an office bearer.³⁸ The Commission considers that these requirements would assist in the efficient operation of strata schemes. It should also be provided that the chairman, secretary and treasurer should be appointed by the members of council from themselves at the first meeting of council held after they assume office as such members.³⁹

10.16 It should also be expressly provided that the person appointed to the office of chairman, secretary or treasurer, shall hold office until -

- (a) he dies or ceases to be a member of the council;
- (b) the council receives from him a notice in writing of his resignation from the office; or
- (c) another person is appointed by the council to hold the office ,

whichever first happens.

³⁵ WA, schedule, part I, by-law 4(9)(c). This power to delegate would, however, be subject to any restriction imposed or direction given at a general meeting: WA, schedule, part I, by-laws 4(1) and 4(9)(c). Such a delegation can at any time be revoked.

³⁶ This is essential as in many strata schemes there will only be two proprietors, eg, in a duplex.

³⁷ That is, set out in part I of the schedule to the Act. There are suitable precedents in the New South Wales legislation which can be adapted for this purpose: NSW, s 73(4) (chairman), NSW, schedule 1, by-laws 10(a), (b), (d) and (e) (secretary) and 11(a), (b), (c) and (d) (treasurer).

³⁸ A council may fail to elect office bearers due to an oversight or initial lack of familiarity with the by-law imposing the requirement.

³⁹ This is the position in New South Wales: NSW, s 73(1) and (2).

10.17 The chairman, secretary and treasurer of the council should by virtue of their offices be also chairman, secretary and treasurer of the strata company.⁴⁰ This would enable the chairman to preside at general meetings of the strata company⁴¹ as well as meetings of the council,⁴² and would provide executive officers in the event that the general body of proprietors decide to exercise or perform some or all of the powers of the strata company through general meetings.⁴³

6. ALTERNATE COUNCILLORS

10.18 Not infrequently a member of the council will be unable to attend meetings of the council because of other commitments or absence on holidays. The present by-laws do not contain any provision to enable a member of the council to be represented at a meeting of the council by a delegate or alternate councillor. Non-representation at a meeting could be detrimental to the strata scheme. For example, it may reduce the likelihood of forming a quorum. In order to overcome the deficiency, the Commission recommends that a by-law should be added to those contained in part I of the schedule enabling a member of the council to appoint another proprietor to act in his place at a meeting of the council.⁴⁴ If the person appointed is a member of the council he should be able to vote separately at a council meeting in his capacity as a member and on behalf of the member in whose place he has been appointed to act.⁴⁵

7. VACATION OF OFFICE

10.19 By-law 4(3) in part I of the schedule to the Act provides that except where the council consists of all proprietors, the strata company may by resolution at an extraordinary general meeting remove any member of the council before the expiration of his term of office and

⁴⁰ This is the case in New South Wales: NSW, schedule 1, by-law 1.

⁴¹ WA, schedule, part I, by-law 6(6) should consequently be repealed. It should be provided that in the absence of the chairman from a general meeting of the strata company the persons present at the meeting and entitled to vote on motions submitted at the meeting may elect one of their number to preside at the meeting and the person so elected while he is so presiding shall be deemed to be the chairman of the strata company.

⁴² WA, schedule, part I, by-law 4(7) should consequently be repealed.

⁴³ The proprietors may decide by resolution to take away some of the powers of the council and exercise them themselves in general meeting: para 11.45 below.

⁴⁴ The appointee may be a corporate body. In this case the corporate body should be able to appoint a natural person through whom it would act: para 10.7 above.

⁴⁵ The recommendations in this paragraph generally follow the New South Wales and Queensland legislation (NSW, s 71(6)-(8); Qld, s 42(7)-(9)). However, unlike these jurisdictions, the Commission does not consider that the consent of the council should be required to such alternative appointments.

appoint another proprietor in his place to hold office until the next annual general meeting. In New South Wales and Queensland a special resolution is required to remove a member of the council.⁴⁶

10.20 Seven commentators on the working paper were of the view that an ordinary resolution should be sufficient, and four that a special resolution should be required. The Commission, in this instance, prefers the view of the minority and recommends that the New South Wales and Queensland position be adopted. It is a serious step to remove an office bearer from his position before the expiration of his term of office. It would tend to make for stability if this could be done only if a special resolution to this effect were carried.⁴⁷

10.21 Representations have been made to the Commission that the Act does not clearly identify all the circumstances in which a member of a council ceases to be a member. The Commission agrees that it would avoid confusion if these circumstances were specified. The Commission accordingly recommends that a by-law should be included in part I of the schedule to the Act to provide that a person elected as a member of a council vacates his office as member -

- (a) if he dies or ceases to be a proprietor or co-proprietor of a lot;
- (b) upon receipt by the strata company of a notice in writing by him of his resignation as member;
- (c) upon the election of the members of the council at the first annual general meeting, unless then elected,⁴⁸ or as the case may be, upon the election of the members of the council at the next annual general meeting, unless re-elected;
- (d) in a case where he is a member of the council by virtue of the fact that there are no more than three proprietors,⁴⁹ an election of the members of the council occurs upon the number of proprietors increasing to more than three and he is not then elected;

⁴⁶ NSW, s 72(1)(f); Qld, s 43(1)(j).

⁴⁷ A special resolution is one which has been passed by a majority of not less than three-quarters of the total unit entitlement of the lots and not less than three-quarters of the members: para 11.8 below.

⁴⁸ Para 10.5 above.

⁴⁹ Para 10.3 above.

- (e) if the strata company, pursuant to a special resolution, determines that his office as a member of the council is vacated.⁵⁰

10.22 At present, a vacancy arising in the circumstances referred to in (a), (b) and (c) above would be filled by the remaining members of the council.⁵¹ A vacancy arising under (f) would be filled by the strata company in general meeting appointing another proprietor to the position.⁵² The Commission recommends that the remaining members of the council should be empowered to appoint a new member in this case also unless the general meeting of the strata company has, by resolution, reserved the power to do so to a general meeting. This would avoid the need to elect another member there and then or to call another general meeting for that purpose. Whether this course would be taken would no doubt depend on the degree of confidence of the meeting in the remaining members of the council.

8. RESTRICTIONS ON POWERS OF COUNCIL

(a) General

10.23 While the council of the strata company is normally responsible for the day-to-day management of the strata scheme, its capacity is limited in certain respects. A council is not entitled to make a decision which under the Act or the by-laws may only be made by the strata company pursuant to a unanimous resolution, special resolution or ordinary resolution passed at a general meeting of proprietors.⁵³ It is also subject to any restriction imposed or direction given by the proprietors in general meeting.⁵⁴ Matters which under the Act or by-laws require a unanimous or special resolution are listed in paragraphs 11.13 and 11.23 below. An ordinary resolution is necessary for the removal of a member of the council before the expiration of his term of office and the appointment of another proprietor in his place.⁵⁵ It is unclear whether an ordinary resolution is required for contributions to be levied for the administrative fund.⁵⁶

⁵⁰ Para 10.20 above.

⁵¹ WA, schedule, part I, by-law 4(4).

⁵² Id, by-law 4(3).

⁵³ Para 9.2 above.

⁵⁴ WA, schedule, part I, by-law 4(1).

⁵⁵ WA, schedule, part I, by-law 4(3). In para 10.20 above, the Commission recommends that a special resolution should be required.

⁵⁶ Para 10.28 below

(b) Restriction on power of council to expend money

10.24 The Act does not impose any limit on the amount of expenditure which the council can incur without the authorisation of a general meeting of proprietors, although it enables the proprietors to pass an ordinary resolution imposing such a limit.⁵⁷ But until this is done the council can theoretically undertake projects involving large sums of money without bringing the matter to the attention of the other proprietors.

10.25 Section 76 of the New South Wales *Strata Titles Act 1973-1981* imposes a restriction on the amount which a council may spend in anyone case. With certain exceptions,⁵⁸ a council may not spend more than an amount determined by multiplying the number of lots in the scheme by a prescribed amount (which is at present \$25),⁵⁹ unless it is otherwise authorised by a special resolution of proprietors or, in an emergency, by the Strata Titles Commissioner. Where the proposed expenditure would exceed the amount calculated in accordance with the above formula, the council must -

- (a) submit the proposal for determination at an extraordinary general meeting of proprietors convened for the purpose; and
- (b) if the proposal concerns work to be performed or the purchase of personal property, submit at least two tenders to that meeting.

It seems that if a proposal to expend more than the prescribed amount does not originate in the council and if the strata company (and not the council) is to undertake the expenditure, then the motion may be passed by an ordinary resolution at a general meeting and without the

⁵⁷ WA, schedule, part I, by-law 4(1). In addition, a strata company can enact a by-law imposing financial limits on the council. Being a by-law the limit cannot be varied either by the council or by ordinary resolution. The Commission has been informed that some strata companies have enacted such by-laws.

⁵⁸ The exceptions are the expenditure of money -

- (a) in payment of any premium under an insurance policy effected by the strata company;
- (b) to comply with any notice or order of a public or local authority or an order of the Strata Titles Commissioner or Strata Title Board (chapter 19 below) ; or
- (c) in discharge of any obligation authorised by the proprietors in general meeting: NSW, s 76(3).

⁵⁹ *Strata Titles Act Regulations 1974-1982* (NSW), reg 43. Thus if the strata scheme comprises 20 lots, the council cannot spend more than \$500 without obtaining special authorisation, unless the expenditure relates to a matter set out in the immediately preceding footnote.

necessity of previously obtaining tenders.⁶⁰ A similar provision is contained in the Queensland *Building Units and Group Titles Act 1980-1981*.⁶¹

10.26 In the working paper, the Commission asked the question whether there should be a limit on the amount of expenditure which the council can incur without the authorisation of the proprietors in general meeting. Most of those who commented on the issue were in favour of such a limitation.⁶² Two commentators,⁶³ however, submitted that the present system (that is, that there is no limit on council expenditure unless the strata company in general meeting imposes one) was adequate.

10.27 There is undoubtedly an argument in favour of imposing a statutory limitation on councils as regards expenditure. It is possible that a council may unexpectedly commit the strata company to an outlay which would not have received majority support at a general meeting. However, no case was drawn to the attention of the Commission where a council had in fact abused its power in this manner.

Further, to impose a statutory limitation could unduly hamper a council in some cases. The Commission accordingly considers that, on balance, no such limitation should be imposed. If the general body of proprietors fear that the council may commit the strata company to unreasonable expenditure, an ordinary resolution at a general meeting would be sufficient to prevent it from doing so.⁶⁴

(c) Contributions to funds

10.28 It is not clear whether the Act empowers the council as well as a general meeting of proprietors to determine the amount of contributions payable by proprietors to the administrative fund. Section 13(6) of the Act obliges the strata company to establish an administrative fund and to determine from time to time the amounts to be raised for the purposes of that fund. Since by-law 4(1) in part I of the schedule to the Act provides that, subject to any restriction imposed or direction given at a general meeting, the powers and

⁶⁰ D A Collins and L Robinson, *Strata Title Units in New South Wales*, (2nd ed 1982), 43, para 610.

⁶¹ Qld, s 47.

⁶² These included REIWA, the Local Government Association, the Commissioner of Titles and the Law Society.

⁶³ Silverwood Pty Ltd and the Owners of Continental Court.

⁶⁴ Alternatively, they could enact a by-law imposing a financial limit.

duties of the company shall be exercised and performed by the council, it could be argued that in the absence of a contrary direction the council could determine the amount of contributions to the fund. On the other hand, section 13(7) of the Act provides that "any contributions to be levied by the company shall be due and payable on the passing of a resolution to that effect..."thus suggesting that contributions can only be levied by the proprietors in general meeting. The general practice in Western Australia is for the amount to be determined at a general meeting after a recommendation has been placed before the meeting by the council.⁶⁵ The amount of the levy is something which affects all proprietors and in the case of some proprietors may be a matter of considerable concern. Accordingly, the Commission recommends that a by-law be included in part I of the schedule to the Act providing that the amount is to be determined at a general meeting of the strata company. This should also apply in respect of any reserve fund.⁶⁶ A consequential amendment to section 13(7) of the Act would be required to make it clear that contributions can be levied by the proprietors in general meeting or by the council if the by-laws so provide. This would mean that the proprietors could, if they considered it more convenient, amend the by-law to permit the council to determine the amount of contributions.

9. RECOVERY OF BOOKS AND RECORDS

10.29 In New South Wales, some strata companies have had difficulty recovering books and records from former office bearers or managing agents whose services have been terminated.⁶⁷ As a result, the New South Wales legislation now provides that a person in possession or control of property belonging to the strata company commits an offence if he does not deliver that property to a specified member of the council within seven days of being served with a notice of a resolution of the council requiring him to do so or, in the case of a managing agent, within seven days of being served with a notice of a resolution of the council terminating his appointment.⁶⁸ The provision does not affect any lien or other right which a person has against the property concerned. The Western Australian Act does not contain any provision as to recovery of a strata company's property.

⁶⁵ However, the Commission has had its attention drawn to one case where the council concerned purported to impose a levy itself.

⁶⁶ In para 13.8 below, the Commission recommends that there should be provision for a reserve fund.

⁶⁷ G F Bugden, *New South Wales Strata Title Law and Practice*, (1979), para 11-787.

⁶⁸ NSW, s 73(6) and (7). The provision was clarified, and the maximum amount of the penalty was increased from \$500 to \$2,000, by (NSW) Act 190/1980.

10.30 The Commission has not been informed of any similar case in Western Australia where property has been wrongfully withheld. However, such a situation could arise and the Commission considers that provision should be made for such an eventuality. Accordingly, it recommends that the Act should be amended to include a provision along the lines of the New South Wales legislation.

10. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

10.31 The Commission recommends that part I of the schedule to the Act should be amended to include by-laws providing -

(a) *That until the first annual general meeting of the strata company, the proprietors of all lots shall constitute the council.*

(paragraph 10.5)

(b) *That for the purpose of determining whether there are more than "three proprietors" and hence whether there needs to be an election for membership of the council -*

(i) *the co-proprietors of a lot shall be deemed to be one proprietor; and*

(ii) *if the same persons own more than one lot they shall be deemed to be one proprietor.*

(paragraph 10.8)

(c) *That only one co-proprietor of a lot shall be a member of a council. A co-proprietor shall only be eligible if he has been nominated by all his co-proprietors. Failing such agreement, only the co-proprietor with the largest share of the lot shall be eligible. If all co-proprietors hold equal shares, only the one first named in the certificate of title shall be eligible.*

(paragraphs 10.9 and 10.10)

(d) *For the "first past the post" voting system to be used in council elections.*

(paragraph 10.13)

(e) *That on an election of members of council, each proprietor shall have one vote in respect of each lot owned by him. A co-proprietor of a lot shall be entitled to such part of the vote applicable to the lot as is proportionate to his interest in the lot.*

(paragraph 10.14)

(f) *That a council shall have a chairman, a secretary and a treasurer. Each office bearer shall be appointed by the members of the council from among themselves and hold office until he dies or ceases to be a member of the council, resigns or another person is appointed by the council to hold the office.*

(paragraphs 10.15 and 10.16)

(g) *For the duties to be performed by the office bearers.*

(paragraph 10.15)

(h) *That the chairman, secretary and treasurer of the council shall by virtue of their office also be the chairman, secretary and treasurer of the strata company.*

(paragraph 10.17)

(i) *That a member of the council may appoint another proprietor to act in his place at a meeting of the council.*

(paragraph 10.18)

(j) *That a special resolution is required to remove any member of the council before the expiration of his term of office.*

(paragraph 10.20)

(k) *That a member of a council shall cease to be a member in specified circumstances.*

(paragraph 10.21)

(l) *That where the proprietors in general meeting determine that the office of a member of the council is vacant (see (j) above), the remaining members of the council may appoint a new member unless the meeting reserved the power to do so to a general meeting.*

(paragraph 10.22)

(m) *That the amount of contributions payable by proprietors to the administrative fund and any reserve fund shall be determined at a general meeting of the strata company.*

(paragraph 10.28)

10.32 The Commission recommends that the Act include sections providing that -

(a) *A corporate body is able to act as a member of the councillor as chairman, secretary or treasurer of the strata company or council through a natural person authorised in writing by the corporate body.*

(paragraph 10.7)

(b) *If for any reason there is no council in existence or if the council lacks a quorum, the council's powers and duties can be exercised by the proprietors in general meeting.*

(paragraph 10.11)

(c) *It is an offence for a person having in his possession or control property belonging to the strata company to fail to deliver it to a specified member of the council within a specified time. (An exception should be made for any lien or right which a person has against the property.)*

(paragraphs 10.29 and 10.30)

CHAPTER 11

MEETINGS OF PROPRIETORS

1. PRESENT POSITION

11.1 Although under the Act the council of the strata company has the general responsibility of running the affairs of the company, there are certain decisions which can only be made at a general meeting of proprietors.¹ In addition, the powers of the council are subject to any restriction imposed or direction given at a general meeting of proprietors.²

11.2 General meetings of proprietors accordingly have a very important role to play in strata schemes. Through them, the proprietors come together formally, and discuss and vote upon matters affecting their interests. It is not surprising therefore that the legislation makes provision for meetings to be held periodically. The first general meeting must be held within three months of the registration of the strata plan (that is, within three months of the strata company coming into being).³ Subsequent general meetings must be held once in each calendar year and so that not more than 15 months elapses between the date of one annual meeting and the next.⁴

11.3 In addition, the council may convene an extraordinary general meeting whenever it thinks fit and must do so upon receipt of a requisition in writing made by proprietors entitled to a quarter or more of the total unit entitlement.⁵ If the council fails to convene such a meeting within 21 days of the making of the requisition, the requisitioners, or any of them representing more than one half of the total unit entitlement of all of them, may themselves convene the meeting.⁶

11.4 Seven days notice of every general meeting must be given to all proprietors and also to those registered first mortgagees of lots who have notified the strata company of the existence

¹ Para 9.2 above.

² WA, schedule, part I, by-law 4(1).

³ Id, by-law 5(1).

⁴ Id, by-law 5(2).

⁵ Id, by-law 5(4)(a).

⁶ Id, by-law 5(4)(b).

of their mortgage.⁷ The notice must specify the place, date and time of the meeting and the general nature of any special business proposed to be dealt with at it.⁸

11.5 Only those who are present in person or who have appointed a proxy may vote.⁹ There is no provision for absentee voting, for example, voting by post. One half of the persons entitled to vote present in person or by proxy constitute a quorum for a general meeting.¹⁰ If within half an hour after the time appointed for a general meeting a quorum is not present, the meeting is dissolved if it has been convened upon the requisition of proprietors.¹¹ In any other case, the meeting stands adjourned to the same day in the next week at the same place and time.¹² If at the adjourned meeting a quorum is not present within half an hour after the appointed time, those who are present and entitled to vote constitute a quorum.¹³

11.6 Except where a unanimous or special resolution is required under the Act, resolutions at a general meeting may be passed by a simple majority vote.¹⁴ A resolution is decided on a show of hands unless a poll is demanded by a proprietor.¹⁵ On a show of hands each proprietor has one vote but on a poll the proprietors have the same number of votes as the unit entitlements of their lots.¹⁶ On a show of hands or on a poll, votes may be given either personally or by proxy.¹⁷ Except where a unanimous resolution of proprietors is required by the Act, co-proprietors may only vote on a show of hands by proxy jointly appointed by them.¹⁸ On a poll, a co-proprietor is entitled to such part of the vote applicable to a lot as is proportionate to his interest in the lot.¹⁹

⁷ Id, by-law 5(5).

⁸ Ibid. By-law 5(5) provides that accidental omission to give notice to a proprietor or a mortgagee, or non-receipt of the notice by any of them does not invalidate any proceedings at the general meeting.

⁹ WA, schedule, part I, by-law 7(3).

¹⁰ Id, by-law 6(3).

¹¹ Id, by-law 6(4).

¹² Ibid.

¹³ Ibid.

¹⁴ Id, by-law 6(7).

¹⁵ Id, by-law 6(8). In the case of equality in the votes whether on a show of hands or on a poll, the question is determined in the negative: id, by-law 6(12).

¹⁶ Id, by-laws 7(1) and 7(2).

¹⁷ Id, by-law 7(3). An instrument appointing a proxy (who need not be a proprietor) must be in writing signed by the appointer or his attorney, and may be either general or for a particular meeting: id, by-laws 7(4) and 7(5).

¹⁸ WA, schedule, part I, by-law 7(7).

¹⁹ Id, by-law 7(8).

11.7 Except where a unanimous resolution is required, a proprietor is not entitled to vote at a general meeting unless all contributions payable in respect of his lot have been duly paid.²⁰

11.8 A unanimous resolution is a "resolution unanimously passed at a duly convened meeting of the [strata] company at which all persons entitled to exercise the powers of voting conferred by or under [the] Act are present personally or by proxy at the time of the motion".²¹ It is possible, although it is far from clear, that for a unanimous resolution to be passed, not only is it necessary for all persons entitled to vote to be present in person or by proxy, but also for all these persons to vote in favour of the resolution.²² A special resolution is a resolution passed by a majority of not less than three-quarters of the total unit entitlement of the lots and not less than three-quarters of the proprietors at a general meeting of which at least fourteen days' notice specifying the proposed special resolution has been given.²³

11.9 Where the interest of a proprietor in a lot is subject to a registered mortgage or mortgages, the power of voting conferred on a proprietor under the Act is restricted if a first mortgagee has given written notice of his mortgage to the strata company.²⁴ In the case of matters requiring a unanimous resolution, the voting power can only be exercised by such mortgagee and not by the proprietor.²⁵ In other cases the mortgagee may exercise the proprietor's vote when the mortgagee is present personally or by proxy.²⁶ When the mortgagee is not present (either personally or by proxy) the proprietor can exercise his vote in the normal way.

11.10 Where a proprietor is a minor, the power of voting may be exercised by his guardian,²⁷ and where a proprietor is unable to control his property²⁸ by the person lawfully authorised to control his property.²⁹ If there is no person able to vote in respect of a lot, the Master of the

²⁰ Id, by-law 7(6).

²¹ WA, s 3.

²² The Commission suggests that, subject to the recommendations in paras 11.18 and 11.22 below, the definition be redrafted so as to put beyond doubt that it is necessary for all persons present to vote in favour.

²³ WA, schedule, part I, by-law 10.

²⁴ WA, s 24(6) and (7).

²⁵ Id, s 24(6)(a) and (7).

²⁶ Id, s 24(6)(b) and (7).

²⁷ Id, s 24(1)(a).

²⁸ That is, is under a legal disability in relation to his property.

²⁹ WA, s 24(1)(b).

Where proprietors are entitled to successive interests in a lot, such as where there is a life tenant and a remainderman, the proprietor entitled to the first interest is alone entitled to vote: WA, schedule, part I,

Supreme Court, on the application of the strata company or of a proprietor, must appoint the Public Trustee or some other fit person to exercise the power of voting where a unanimous resolution is required and may do so in respect of special and ordinary resolutions.³⁰

11.11 From comments received in response to the working paper, the procedural provisions outlined in paragraphs 11.2 to 11.10 above appear to have general approval. Some suggestions for change were, however, made in relation to -

- (a) the requirements for unanimous and special resolutions;
- (b) the lack of provision for postal voting;
- (c) the rights of the first mortgagee to vote; and
- (d) voting rights when contributions are in arrears .

These are considered below. Also considered below are –

- (e) the voting rights of unpaid vendors;
- (f) the voting rights where a proprietor cannot be located by the strata company;
- (g) the right of a proprietor to place a matter on the agenda;
- (h) the status of the first general meeting; and
- (i) the responsibilities of the proprietors in general meeting when the council's powers and duties have been restricted.

by-law 7(10). Where a proprietor is a trustee he exercises the voting rights to the exclusion of the beneficiary: id, by-law 7(11).

³⁰ WA, s 24(2).

2. UNANIMOUS RESOLUTIONS

(a) General

11.12 Some commentators pointed out that, except in small developments, it was usually difficult to get all those entitled to vote to attend a meeting or to appoint another person to attend in their place.³¹ It was said that this made the passing of a unanimous resolution extremely difficult.

11.13 In considering whether the existing requirements for a unanimous resolution should continue, it is necessary to have regard to the matters which should require such a resolution. At present a unanimous resolution is required for -

- (a) the directing of the strata company to transfer or lease common property;³²
- (b) the directing of the strata company to execute a grant of easement or a restrictive covenant burdening the parcel, or to accept or surrender a grant of easement or a restrictive covenant benefiting the parcel;³³
- (c) the notional destruction of the building³⁴ and the directing of the strata company to transfer the parcel or any part thereof after the Registrar of Titles has made the prescribed entry on the strata plan;³⁵
- (d) amending, repealing or adding to any by-law set out in part I of the schedule to the Act;³⁶
- (e) exempting the strata company from the obligation to insure the building to its replacement value;³⁷ and

³¹ That is, to appoint a proxy. A person who is the proprietor of all the lots may pass a unanimous or special resolution: *Craig - Gordon v Proprietors - Strata Plan No 16* [1964-5] NSWLR 1576, 1579.

³² WA, s 10(2).

³³ Id, s 12(1).

³⁴ Para 20.5 below. The Supreme Court may also make a declaration that the building is destroyed.

³⁵ WA, ss 19(1) and 11(1) to (3).

³⁶ Id, s 15(2).

- (f) granting a proprietor a right to exclusive use and enjoyment of common property, or special privileges in respect of common property, which are not determinable on reasonable notice.³⁸

With the exception of (f), the Commission has made no recommendation for change in regard to any of the matters listed above.³⁹ As regards (f), the Commission has recommended in paragraph 5.12 above that any grant of exclusive use or special privileges in respect of common property may only be effected by a by-law made pursuant to a unanimous resolution. It also recommended that a by-law amending, adding to or repealing such a by-law should also require a unanimous resolution.

11.14 In this report the Commission has recommended that a unanimous resolution should also be required for -

- (a) effecting a structural improvement in a lot or part of a lot which is outside the building;⁴⁰
- (b) alteration of the use specified on the strata plan of a lot or part lot;⁴¹
- (c) subdivision within a strata scheme;⁴²
- (d) reallocation of unit entitlement upon a subdivision within a strata scheme;⁴³
- (e) conversion of one or more lots into common property;⁴⁴
- (f) acceptance of a transfer of land, or the acceptance of a lease of land, for the purpose of creating additional common property, and in the case of a lease, its assignment, sublease or surrender;⁴⁵

³⁷ Id, s 13(4)(c). Chapter 15 below.

³⁸ WA, schedule, part I, by-law 3(f).

³⁹ In para 20.5 below, the Commission recommends that the concept of the notional destruction of the building be replaced by the concept of cancellation of the strata plan.

⁴⁰ Para 4.7.

⁴¹ Para 4.9.

⁴² Paras 4.19 and 4.21.

⁴³ Para 4.21(f).

⁴⁴ Para 4.32.

- (g) re-entry or acceptance of a surrender of a lease or sublease where common property has been leased out;⁴⁶
- (h) reallocation of unit entitlement within a strata scheme;⁴⁷ and
- (i) exempting the strata company from its obligation to effect public liability insurance for the prescribed amount.⁴⁸

11.15 All the matters referred to in paragraphs 11.13 and 11.14 concern the fundamental rights or interests of members of the strata scheme. Most of them deal with the proprietary rights of members. The by-laws in part I of the schedule are of great importance for the proper administration of the strata scheme. Amongst other things, they prescribe certain duties which a proprietor must fulfil in relation to his lot and the common property, the functions of the council of the strata company, the circumstances under which general meetings of proprietors must be called, the procedure at those meetings and the method of voting.⁴⁹

(b) Requirement for unanimous resolutions

11.16 In response to the working paper, some commentators suggested that it should be sufficient for the passing of a unanimous resolution if no vote was cast against the resolution. This is the position in New South Wales.⁵⁰ The effect would be that each proprietor is given a veto but one which he must positively exercise⁵¹ to be effective. Those favouring the New South Wales provision argued that a resolution should not be able to be defeated merely by apathy (that is, simply by neglecting to attend the meeting).

11.17 Subject to the recommendation in paragraph 11.22 below, the Commission considers, however, that a unanimous resolution should require the agreement of all persons entitled to vote. It cannot always be assumed that a proprietor is in favour of a proposed action, or at least indifferent to it, merely because he does not attend a meeting either personally or by

⁴⁵ Paras 8.14, 8.17 and 8.20.

⁴⁶ Para 8.21.

⁴⁷ Paras 12.25 and 12.33.

⁴⁸ Para 15.27.

⁴⁹ The Commission has recommended in Chapter 9 that certain of the company's powers and duties presently set out in the by-laws should be contained in the Act.

⁵⁰ NSW, s 5(1).

⁵¹ Either by attending in person or by proxy and voting against the resolution, or by submitting a negative postal vote which it is possible to do in New South Wales: para 11.30 below.

proxy and vote against the resolution. He may, for example, have been unaware of the meeting because the notice to him went astray, or he may have been prevented from attending or appointing a proxy by an accident or sudden illness, or may simply have forgotten to attend.

11.18 The Commission sympathises with those commentators who have complained about the difficulty sometimes experienced of getting all proprietors to a general meeting or even to appoint proxies in their place. The Commission is of the view that although it is necessary that all those entitled to vote should indicate that they are in favour of the proposal, it is not essential that all should attend the meeting personally or appoint a proxy in order to do so. One possibility would be to provide for a "voting paper" system, either for all types of resolution, or confined to unanimous and special resolutions. The Commission has decided against this possibility and gives its reasons for not recommending the adoption of such a system below.⁵² However, there is a further possibility which does not have the drawbacks of a voting paper system, but which nevertheless enables the casting of a vote by those not present at the meeting. The New Zealand strata titles legislation provides that a unanimous resolution is deemed to be passed if all those attending a general meeting of the strata company who are entitled to exercise power of voting vote in its favour and the remainder (if any) of those entitled to vote agree to it within 28 days afterwards.⁵³ If any of the remainder have ceased to be a proprietor after the meeting, the resolution must be agreed to by his successor in title within the 28 days. The New Zealand provision would help to overcome the difficulties involved in ensuring the attendance of everybody at the meeting⁵⁴ and the Commission recommends that a similar provision be enacted here. It should be expressly provided that to be valid the agreement of each absent proprietor should be in writing and signed by him.

⁵² Paras 11.29 to 11.33.

⁵³ *Unit Titles Act 1972-1980 (NZ)*, s 2.

⁵⁴ The Commission in the working paper (para 15.10) suggested that a defect of such a provision was that it could take up to 28 days after the meeting for a decision to be reached on the matter at issue and that a delay of such length could be serious. However whilst it is true, for example, that a strata company may be unable to accept an offer immediately because of the absence of proprietors from the meeting, the situation would be no worse than at present (where the motion would be lost) and may be better if the offeror can be persuaded to extend the time until the required votes have been collected from those who did not attend.

(c) Application to the Supreme court

11.19 As pointed out above, a strata company cannot undertake certain courses of action unless authorised to do so by a unanimous resolution of proprietors. For example, a strata company cannot transfer part of the common property or amend the by-laws in part I of the schedule to the Act if a single proprietor fails to vote in favour of the resolution. Some commentators on the working paper told of cases where a unanimous resolution could not be obtained because of what, in their view, was the quite unreasonable refusal of a small minority of proprietors (sometimes a single proprietor) to vote in its favour. Adoption of the Commission's recommendations in chapters 4 and 8 above will make it possible for subdivision to take place within existing strata schemes, and for a strata company to acquire additional land as common property. The Commission also recommended that these actions should require a unanimous resolution for their authorisation. No doubt this latter recommendation would also be criticised on the ground that an unreasonable refusal by a single proprietor would prevent the authorisation being given.

11.20 The broad argument in favour of giving each proprietor what is in effect a right of veto is that his proprietary rights should not be affected without his consent. However, although such a principle is generally unobjectionable where a person is the sole proprietor of a piece of land, it may be unduly rigid where a person is a member of a co-operative undertaking such as a strata scheme. While the giving of an absolute right of veto to each proprietor adequately protects his interests, this may be at the expense of frustrating the reasonable objectives of the others. Some commentators accordingly suggested that there should be no requirement for a unanimous resolution at all, and that any matters for which an ordinary resolution would not be sufficient should require only a special resolution.

11.21 However, in the Commission's view, the adoption of such a proposal would unduly subordinate the interests of a minority of proprietors to that of the majority. In some cases at least, the minority may have good grounds for refusing to vote in favour of a course of action. The Commission considers that the appropriate solution would be to empower the Supreme Court to determine whether, taking into account all the circumstances, it is just and equitable that the proposal favoured by the majority should proceed. This, in effect, is the solution adopted in New Zealand. Section 42 of the New Zealand *Unit Titles Act 1972-1980* provides as follows:

"42. **Relief in cases where unanimous resolution required** - In any case where, in accordance with this Act or rules under this Act, a unanimous resolution, or the consent, of all the proprietors is necessary before any act may be done and that resolution or consent is not obtained, but the resolution or act is supported by 80 percent or more of those entitled to vote, any person included in the majority in favour of the resolution or act may apply to the Court to have the resolution as supported or the consents as obtained declared sufficient to authorise the particular act proposed; and, if the Court so orders, the resolution shall be deemed to have been passed unanimously or the consent of all the proprietors obtained, as the case may be."

11.22 The Commission recommends the inclusion of a similar provision in the *Strata Titles Act* of this State,⁵⁵ except that an application to the Court should only be possible if the motion received at least the support required for a special resolution.⁵⁶ Provision should be made for all those who voted against the motion, those who were entitled to vote but did not do so, and any other person whom the Court considers has a sufficient interest in the proceedings to be served with notice of the application and, if appropriate, to be joined as parties to the proceedings. It should also be provided that the Court should not make an award of costs against a defendant if it considers that, although the application should be granted, he had not acted unreasonably.

3. SPECIAL RESOLUTIONS

(a) General

11.23 There are at present in Western Australia two matters for which a special resolution is required. These are -

- (a) the amendment of a by-law set out in part II of the schedule to the Act,⁵⁷ and

⁵⁵ Such a provision is not without precedent in the *Strata Titles Act* itself. S 19(1)(b) empowers the Supreme Court to make a declaration that the building is destroyed even though a unanimous resolution to this effect has not been passed. See para 20.5 below.

⁵⁶ See also footnote 3 on page 168 below.
The Commission appreciates that the provision recommended in this para could not be availed of in the case of a duplex or triplex, since a special resolution requires the support of at least three quarters of the proprietors. The proposed provision is aimed at providing relief in larger strata schemes where the great majority of the proprietors are in favour of a course of action and the opposition of the minority is unreasonable.

⁵⁷ WA, schedule, part I, by-law 9. Presumably, this is intended to extend to the repeal of such a by-law or an addition to such a by-law. The Commission suggests that the wording of the by-law be clarified accordingly.

- (b) the placing of an obligation on the strata company to insure against risks which the Act does not otherwise oblige it to insure against.⁵⁸

The Commission has not recommended any change to the requirement of a special resolution in regard to either of these matters.

11.24 The Commission recommends in this report that a special resolution should be required for -

- (a) removal of a member of the council from office before the expiration of his terms;⁵⁹
- (b) application to the Land Valuation Tribunal for a reallocation of unit entitlement;⁶⁰ and
- (c) reduction of the rate of interest otherwise payable by a proprietor on an unpaid contribution.⁶¹

11.25 Commentators on the working paper were divided on whether the present requirements for the passing of a special resolution were satisfactory. Some submitted that the present provision should be retained.⁶² Others urged the adoption of the New South Wales provision that the resolution is passed if not more than one quarter in value of the votes in terms of unit entitlement vote against it.⁶³ Their argument for change was the same as in the case of unanimous resolutions, namely, the difficulty of getting members to attend meetings and that resolutions should not be defeated by mere apathy.

⁵⁸ WA, s 13(4)(e).

⁵⁹ Para 10.20.

⁶⁰ Para 12.31.

⁶¹ Para 13.16.

Under the recommendation made in para 11.22 above, the motion in question must receive at least the support required for a special resolution before application could be made to the Supreme Court for a declaration deeming the resolution to have been unanimously passed.

⁶² Those in favour of the present requirement included the Associated Banks in WA and the Law Society.

⁶³ NSW, s 5(1). Those supporting the New South Wales provision included REIWA and the Commissioner of Titles.

(b) Requirement for special resolutions

11.26 An amendment of the by-laws set out in part II of the schedule and the matters referred to in paragraph 11.24 can be of substantial interest to proprietors. As the Commission pointed out in regard to unanimous resolutions, a proprietor may be prevented from voting against the motion because of circumstances beyond his control,⁶⁴ and his absence need not mean that he is in favour of the resolution or too apathetic to care. The Commission accordingly does not favour the adoption of the New South Wales provision.⁶⁵

11.27 The Commission is appreciative of the fact that sometimes it is not easy to get three quarters of the members, and members holding three-quarters of the total unit entitlement in the scheme to a meeting, or even to appoint proxies in their place. Accordingly, the Commission considers there should be provision for recording a vote afterwards in respect of special resolutions similar to that which the Commission has recommended should operate for unanimous resolutions. The Commission therefore recommends that it should be sufficient if the resolution is passed by a simple majority vote at the meeting and agreed to within 28 days by enough proprietors to bring the majority to not less than three quarters of the total unit entitlement of the lots and not less than three quarters of the proprietors. As in the case of unanimous resolutions, it should be expressly provided that the agreement of each absent proprietor must be in writing and signed by him.⁶⁶

11.28 Unlike New South Wales and Queensland, the requirement for a special resolution is contained in part I of the by-laws in the schedule to the Act. This means that it can be amended by a unanimous resolution of proprietors. The Commission regards this position as unsatisfactory and accordingly recommends that the definition of “special resolution” be included in section 3 of the Act.

⁶⁴ Such as those referred to in para 11.17 above.

⁶⁵ Queensland did not adopt the New South Wales provision. It retained the same requirement as in the Western Australian Act: Qld, s 7(1).

⁶⁶ The recommendations made in this paragraph are intended to apply also to a motion referred to in para 11.22 above.

4. POSTAL VOTING

11.29 Under the Act, a person who is entitled to vote in respect of a motion may exercise that power in one of two ways. He may attend the meeting personally and signify his vote. Alternatively he may appoint a proxy who will attend the meeting and signify a vote.⁶⁷

11.30 Some commentators suggested that those entitled to vote at general meetings should be provided with a copy of each motion and enabled to lodge their vote before the meeting commences. This method of voting is provided for in the New South Wales legislation.⁶⁸ In that State, the notice of a general meeting must include a copy of each motion to be considered at the meeting and be accompanied by a voting paper in respect of each motion. A vote may be cast in respect of a motion by returning the completed voting paper to the secretary before the meeting either by post or by hand.

11.31 One disadvantage of this system is that it would be necessary to develop complex rules dealing with the question of motions to amend a motion. The voting paper system is also burdensome. The notice of meeting required to be given under the by-laws⁶⁹ to proprietors and first mortgagees seven days before the meeting would have to set out each of the motions to be considered at the meeting, be accompanied by a voting paper in respect of each of them and inform the recipients of the procedure to be followed if they wish to cast a vote.

11.32 Most commentators who favoured the voting paper system advocated that it should only be available in respect of unanimous or special resolutions. In respect of each of these types of resolutions, the Commission has recommended that it be possible for the resolution to be agreed to in writing within 28 days after the meeting. This would provide an opportunity for people who were unable to attend the meeting or appoint a proxy to cast a vote.

⁶⁷ Para 11.6 above. A person may be given a general proxy, in which case he is not bound to vote in a particular way, or he may be given a proxy in a form requiring him to vote only as the appointer has instructed. Except when a unanimous resolution of proprietors is required by the Act the only way in which co-proprietors may vote on a show of hands is by proxy jointly appointed by them: WA, schedule, part I, by-law 7(7).

⁶⁸ NSW, schedule 2, part I, clauses 1(4), 1(4A), 1(6), 1(7), 1(8). The voting paper system is also provided for in Queensland's *Building Units and Group Titles Act 1980-1981*, but only in respect of certain motions, eg one seeking to alter the rights, privileges or obligations of proprietors: Qld, schedule 2, part 2, clauses 1(4), 1(6), 1(7), 1(8).

⁶⁹ WA, schedule, part I, by-law 5(5).

11.33 The Commission has been informed⁷⁰ that in New South Wales the complex requirements of the voting paper system causes apprehension amongst office bearers of many strata companies, sometimes to the extent that they seek professional assistance to conduct the meeting. The Commission is firmly of the view that it would be undesirable to introduce voting procedures of such a complicated nature that the average proprietor would feel incompetent to comply with them.⁷¹ Accordingly, the Commission recommends against the inclusion of a voting paper system in the by-laws set out in the schedule to the Act.

5. VOTING RIGHTS OF FIRST MORTGAGEES

11.34 Under the Act, where the interest of a proprietor in a lot is subject to a registered mortgage, a power of voting conferred on a proprietor -

- (a) where a unanimous resolution is required, is exercisable only by the mortgagee first entitled in priority, and
- (b) in other cases, may be exercised by the mortgagee first entitled in priority, and must not be exercised by the proprietor when that mortgagee is present personally or by proxy.⁷²

These provisions, however, do not apply unless the mortgagee has given written notice of his mortgage to the strata company.⁷³

11.35 The Commission in the working paper raised the question whether the voting rights of mortgagees should be changed. Of the fifteen commentators who gave their views on this issue, some, including the Law Society, the Associated Banks in WA and WA Trustees, submitted that the present position should remain. Others, including REIWA, suggested that mortgagees should have power to vote only if the proprietor was in default under the mortgage or where the motion to be voted on might affect the strata title of the lot. Yet others suggested that the mortgagee should have no right to vote under any circumstance.

⁷⁰ Through personal discussions a member of the Commission had with legal practitioners and others in Sydney.

⁷¹ If the proprietors of a particular scheme considered that a voting paper system was suitable for adoption in their case they could change the relevant by-laws to provide for it.

⁷² WA, s 24(6).

⁷³ WA, s 24(7).

11.36 The Commission is of the view that there is no sufficiently strong case for change in this respect, and that the present position should remain. Broadly speaking, unanimous resolutions are required where the title of a lot or common property is concerned or where it is desired to amend a by-law in part I of the schedule. These are matters which directly or indirectly affect mortgagees' interests. Some ordinary resolutions can also be of concern to a mortgagee, depending on the circumstances.

11.37 The Commission understands that few mortgagees in fact give written notice of their mortgage to the strata company (which is a pre-condition of them being able to vote). However, although the right is seldom exercised, the Commission considers that it is desirable that it should continue to exist.⁷⁴ Even if the statutory right were abolished, a mortgagee could, as a condition of lending the money, insist on a proprietor giving him a general proxy to enable him to vote to the exclusion of the proprietor. This could be seen as an added complication as far as a mortgagee is concerned, and it seems simpler to retain the present provision. The restriction or abolition of a mortgagee's voting powers may affect the availability of mortgage funds to purchasers of home units and it would be undesirable to make any change which could have this consequence. It is to be noted that all other Australian jurisdictions, and New Zealand, have a provision in similar terms to that of Western Australia.

6. VOTING WHEN CONTRIBUTIONS IN ARREARS

11.38 By-law 7(6) of part I of the schedule to the Act provides that, except in cases where a unanimous resolution is required under the Act, a proprietor whose contributions payable in respect of his lot are in arrears is not entitled to vote at general meetings of the strata company.⁷⁵ Ten of the fourteen commentators who discussed the question whether a proprietor should be prevented from voting when his contributions were in arrears submitted that it was not unreasonable to impose such a rule, though some suggested the rule should require contributions to be unpaid for a certain period before the prohibition applied.⁷⁶

11.39 The view of the Commission is that the principle behind the by-law is correct and should apply not only to unpaid contributions (which is the position in the strata titles

⁷⁴ No instance has been brought to the attention of the Commission of a mortgagee exercising his vote in an unreasonable way.

⁷⁵ Limiting a proprietor's voting power may also limit that of his mortgagee: WA, s 24(6).

⁷⁶ Those in favour of abolishing the restriction included the Law Society, the Associated Banks in WA and the Institution of Surveyors.

legislation of all other jurisdictions studied by the Commission) but should also apply to any other money recoverable under the Act by the strata company, as is the position in New South Wales and Queensland.⁷⁷ The Commission recommends accordingly. Restriction of voting rights on persons who have unpaid contributions is a common rule in associations generally and provides a sanction against falling behind in payment. The council of one large strata company said that the by-law was useful in getting contributions paid. The exception in the by-law for unanimous resolutions ensures that the interests of a proprietor who has fallen behind in his payments are protected in relation to the most important matters (such as sale or subdivision of the common property) since a unanimous resolution is required in these cases.⁷⁸

11.40 There is an argument for imposing voting rights restrictions only when the contribution is in arrears for a certain period. However, any period prescribed would be arbitrary. One commentator suggested a four weeks period, another suggested three months. Whatever period was chosen might encourage some proprietors to delay payment until the period nearly expired, thus making it difficult for the strata company to budget effectively. If the Commission's recommendation in paragraph 13.16 below is adopted, unpaid contributions will carry interest unless the strata company otherwise decides. Although this would provide an incentive to pay promptly, the Commission does not consider that it would necessarily be sufficient of itself to do so.⁷⁹

7. VOTING RIGHTS OF UNPAID VENDORS

11.41 The State Housing Commission submitted to the Commission that the position in relation to voting rights should be clarified where a lot has been sold under a terms contract (that is, where the vendor retains the title until payments are complete but where the purchaser is entitled to possession). By-law 7 in part I of the schedule to the Act sets out the voting powers of "proprietors" and section 3 of the Act defines "proprietor" as "the person who is the owner for the time being of a lot". This could mean either the legal owner or the equitable

⁷⁷ NSW, schedule 2, part I, cl 2(6) : Qld, schedule 2, part 2, cl 1(6)(c)(ii). Clearly if the principle is correct for unpaid contributions, it should also extend to such matters as the cost of work carried out by the strata company which a proprietor has been ordered by a court or tribunal to undertake but has failed to do so: para 9.29 above.

⁷⁸ But see para 11.22 above.

⁷⁹ Incentive to pay promptly is not the sole purpose of the Commission's recommendation that unpaid contributions should generally bear interest. The other purpose is to compensate the strata company for late payment.

owner. If the latter is the correct interpretation, the purchaser, not the vendor, would have the right to vote, since a purchaser under an unconditional contract for sale of real property is the equitable owner of it. In paragraph 20.3 below, the Commission recommends that the definition of proprietor in section 3 of the Act should be amended so as to make it clear that "proprietor" means "registered proprietor". If this were done, the vendor would remain the proprietor and so be the person with the right to vote.

8. WHERE PROPRIETOR CANNOT BE FOUND

11.42 Section 24(2) of the Act provides that if there is no person able to vote in respect of a lot, the Master of the Supreme Court,⁸⁰ on the application of the strata company or of a proprietor, must appoint the Public Trustee or some other fit person to exercise the power of voting where a unanimous resolution is required. The Master has a discretion to make such an appointment in respect of special and ordinary resolutions. This provision probably does not cover the situation where a proprietor has the capacity to vote but cannot be located by the strata company. The Commission recommends that, following Queensland,⁸¹ the subsection should be amended so as expressly to cover such a case.

9. PLACING A MATTER ON THE AGENDA

11.43 By-law 5(5) of part I of the schedule to the Act requires a notice of the general nature of special business to be considered at a general meeting to be circulated before the meeting to proprietors and to first mortgagees who have notified their interests to the strata company.⁸² However, there is no provision in the by-laws enabling a proprietor to require a matter to be placed on the agenda for a general meeting.⁸³ The Commission has received no submission that this has caused any inconvenience, or that the council of any strata company has not had regard to the wishes of a proprietor to have a matter debated in giving the notice required under by-law 5(5) as to the general nature of the business to be discussed at the meeting.

⁸⁰ The power of the Court under s 24 is exercised by the Master: s 24(5).

⁸¹ Qld, s 130(2).

⁸² All business is deemed to be special that is transacted at an extraordinary general meeting, or at an annual general meeting with the exception of the consideration of accounts and election of members of the council: WA, schedule, part I, by-law 6(1).

⁸³ There is provision in the by-laws (schedule, part I, by-law 5(4)(a)) requiring an extraordinary general meeting to be called upon a requisition made by proprietors entitled to a quarter or more of the total unit entitlement of the lots and presumably the notice calling the meeting should include the subject matter of the business which the requisitioning proprietors wished to discuss. However, a single proprietor, unless his lot has the required unit entitlement is unable to call such a meeting.

However, it would be useful to provide expressly in the by-laws that a proprietor can, by notice in writing to the secretary, require inclusion of any item of business on the agenda of the next general meeting. This may encourage proprietors to raise matters of concern to them in ample time and give others the opportunity of formulating a view before the meeting. The Commission recommends that provision be made accordingly. It should not be necessary for the proprietor to give the actual terms of any motion he proposes to move at the meeting, although it would be preferable if he did so.

10. STATUS OF FIRST GENERAL MEETING

11.44 By-law 5(1) of part I of the schedule to the Act provides that the first general meeting of proprietors must be held within three months of the registration of the strata plan. It is not clear whether this meeting is an annual general meeting for the purposes of the by-laws.⁸⁴ The issue can be of significance. Annual general meetings must be held once in each calendar year⁸⁵ and hence the period within which an annual general meeting should be held can depend on whether the first general meeting is an annual general meeting. Accounts have to be prepared for annual general meetings. It is only at annual general meetings and extraordinary general meetings that the business transacted is deemed to be special business.⁸⁶ In the view of the Commission, there is nothing which is required to be done in relation to an annual general meeting which should not also be done at the first general meeting.⁸⁷ The commission can see no sound reason why the first general meeting should not be deemed to be an annual general meeting and the Commission recommends that the Act should expressly provide accordingly.

11. EXERCISE OF POWERS AND DUTIES OF STRATA COMPANY BY PROPRIETORS IN GENERAL MEETING

11.45 By-law 4(1) of part I of the schedule to the Act provides that the powers and duties of the strata company shall, subject to any restriction imposed or direction given at a general meeting of proprietors, be exercised and performed by the council of the strata company. However, the by-law does not expressly provide that where a general meeting has restricted

⁸⁴ Rath, Grimes and Moore, 88, are of the opinion that the first general meeting is probably an annual general meeting within the meaning of the by-laws.

⁸⁵ WA, schedule, part I, by-law 5(2).

⁸⁶ WA, schedule, part I, by-law 6(1).

⁸⁷ In para 20.26 below, the Commission recommends that the original proprietor should be required to convene the first annual general meeting and to deliver certain records to it.

the council in the exercise of a power or the performance of a duty, the power or duty, to the extent of the restriction, is exercisable by the proprietors in general meeting. Probably this is implied, since otherwise the absurd position would exist that the powers and duties concerned could not be exercised or performed at all. However, it would seem preferable for the Act to include an express provision to this effect for the guidance of proprietors. The Commission recommends accordingly.⁸⁸

12. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

11.46 The Commission recommends that -

(a) *A unanimous resolution should be deemed to be passed if all those attending a general meeting of the strata company vote in its favour and the remainder, if any, of those entitled to vote agree in writing to it within 28 days afterwards. If any of the remainder has ceased to be a proprietor after the meeting, the resolution must be agreed to by his successor in title within the 28 days.*

(paragraph 11.18)

(b) *Where a proposed action requires a unanimous resolution, and the motion to authorise it has not been unanimously passed, but received at least the support required for a special resolution, a person who voted in favour of the motion should be able to apply to the Supreme Court for a declaration which will have the effect of deeming the resolution to have been unanimously passed. Provision should be made for those who voted against the motion, those who were entitled to vote but did not do so, and any other person whom the Court considers has a sufficient interest in the proceedings to be served with notice of the application and, if appropriate, to be joined as parties to the proceedings. It should also be provided that the Court should not make an award of costs against a defendant if it considers that, although the application should be granted, he had not acted unreasonably.*

(paragraphs 11.21 and 11.22)

⁸⁸ The Commission in para 10.11 above recommends an analogous provision where there is no council in existence, or where it lacks a quorum.

- (c) *A special resolution should be deemed to be passed if it is passed by a simple majority vote at a general meeting and agreed to within 28 days by enough proprietors to bring the majority to not less than three-quarters of the total unit entitlement of the lots and not less than three-quarters of the proprietors. The definition of "special resolution" should be removed from the by-laws in part I of the schedule and included in the Act itself.*
(paragraphs 11.27 and 11.28)
- (d) *A voting paper system should not be added to the existing methods of exercising the power to vote.*
(paragraph 11.33)
- (e) *The limitation on a proprietor's right to vote when contributions are in arrears should also apply to any other money recoverable under the Act by the strata company.*
(paragraph 11.39)
- (f) *Section 24(2) of the Act should be amended so as expressly to enable the Supreme Court to appoint a suitable person to exercise the power of voting of a proprietor who cannot be located.*
(paragraph 11.42)
- (g) *The by-laws in part I of the schedule to the Act should be amended to enable a proprietor, by notice in writing to the secretary, to require the inclusion of any item of business on the agenda of the next general meeting.*
(paragraph 11.43)
- (h) *The first general meeting of proprietors should be deemed to be an annual general meeting of proprietors.*
(paragraph 11.44)
- (i) *The Act should expressly provide that where a general meeting has restricted the council in the exercise of a power, or the performance of a duty, that power*

or duty, to the extent of the restriction, is exercisable by the proprietors in general meeting.

(paragraph 11.45)

CHAPTER 12

UNIT ENTITLEMENT

1. PRESENT POSITION

12.1 When a strata plan is lodged for registration, it is required to include details of the unit entitlement of each lot.¹ The unit entitlement of a proprietor's lot is of considerable importance to him. Under the present law, unit entitlement determines -

- (a) a proprietor's voting rights;²
- (b) the amount of a proprietor's contributions to the administrative fund which the strata company is required to establish and maintain for the payment of administrative expenses such as the maintenance and repair of common property;³
- (c) the part of the value of the parcel apportioned to each lot in assessing rates and taxes on the lots;⁴
- (d) the quantum of the undivided share of each proprietor in –
 - (i) the common property;⁵ and
 - (ii) the parcel on the notional destruction of the building;⁶
- (e) the amount for which a lot is deemed to be insured under a policy of insurance which insures the building to less than its replacement value;⁷ and

¹ WA, s 18(1).

² Id, s 18(2)(a). However on a show of hands, as distinct from a poll, each proprietor has one vote: WA, schedule, part I, by-law 7(1). On a poll the proprietors have the same number of votes as the unit entitlements of their lots: id, by-law 7(2).

³ WA, s 18(2)(c) and see paras 13.1 and 13.2 below.

⁴ Id, s 21(5) and see para 14.1 below.

⁵ Id, s 18(2)(b). If part of the common property is disposed of (see para 8.12 above), the proprietors are entitled to the proceeds of the sale in accordance with the quantum of their share as tenants in common of the common property.

⁶ If the parcel or part of it is transferred pursuant to a unanimous resolution of proprietors, the proceeds of the sale are distributable to, them in proportion with their unit entitlement: WA, s 11(3).

⁷ WA, s 17(3) and (4) and see para 15.8 below.

- (f) the amount of the charge which a public or local authority has on each lot where its expenses or any other sum due to it (other than a rate or tax) is a statutory charge on all or any part of the parcel.⁸

12.2 In chapter 13 below the Commission recommends that unit entitlement should also determine the amount of a proprietor's contribution to the reserve fund which the Commission proposes that a strata company should be expressly empowered to establish to meet large expenditures for which it is desirable to accumulate funds (such as the cost of repainting the exterior of the building).⁹

12.3 The Act at present leaves it to the developer¹⁰ when preparing the strata plan to assign whatever unit entitlement he wishes to each lot. The Act does not set out any criteria which must be used in determining unit entitlement.

12.4 Also, the Act does not oblige the vendor of a lot to inform an intending purchaser of the unit entitlement of the lot or of the matters which are determined by that unit entitlement.

12.5 Finally, the Act contains no provision for varying unit entitlement once the strata plan has been registered. To alter unit entitlement it is at present necessary to terminate the strata scheme by notionally destroying the building, de-registering the strata plan and then registering a new strata plan. This is an expensive procedure and in any case cannot be achieved unless all the proprietors co-operate in the establishment of a new strata scheme, including determination of the unit entitlement of the lots in the new strata plan.¹¹

2. ISSUES RELATING TO UNIT ENTITLEMENT

12.6 The principal issues considered in this chapter are –

- (a) The matters which unit entitlement should determine.

⁸ WA, s 16.

⁹ Para 13.8.

¹⁰ That is, the person who is the proprietor of the parcel at the time of the registration of the strata plan. In most cases he will be a person whose business is or includes land development. However, in some cases he may merely be, for example, a person who owns a duplex under the tenancy in common system and who has decided to bring it under the Act.

¹¹ Although the strata plan can be cancelled by an order of the Supreme Court as well as by unanimous resolution (WA, s 19(1)) (para 20.5 below), the Supreme Court cannot make an order allocating unit entitlement in a proposed new strata plan.

- (b) Whether or not the legislation should fix criteria to be followed in allocating unit entitlement.
- (c) Whether or not there should be provision for altering unit entitlement after the strata plan is registered.

3. THE MATTERS WHICH UNIT ENTITLEMENT SHOULD DETERMINE

12.7 The present legislation is based on the concept of a single, easily applied, method of determining each proprietor's share in the common property, his voting rights, his contribution towards the administrative expenses and the value of his lot for rating purposes.¹² All these matters are determined in accordance with the unit entitlement of the proprietor's lot.

12.8 Except as to rates,¹³ most of those who commented on this issue¹⁴ were in favour of unit entitlement continuing to determine these matters, provided that it was allocated in accordance with the relative capital value of the lots. Some commentators, however, while agreeing that unit entitlement allocated in this manner should determine the first two matters, suggested that a proprietor's share of maintenance expenses should be determined by a separate rule, namely the floor area of his lot.

12.9 After taking into account the views expressed to it on this issue, the Commission has concluded that, except where rates are levied on the basis of gross rental value,¹⁵ unit entitlement should continue to determine the matters it presently determines,¹⁶ but that it is unsatisfactory that developers should be permitted to allocate unit entitlement without regard to the relative value of the lots in the scheme. In the following part of this chapter, the Commission elaborates its reasons for this view.

¹² Para 12.1 above.

With the exception of Victoria, the approach of all the other Australian jurisdictions, and New Zealand, is the same as that of Western Australia. In Victoria, there is provision for "unit liability", which determines the contribution in respect of the lot to the administrative fund (*Strata Titles Act 1967-1981*(Vic), ss 3, 5(1)(g), 10(1)(b) and 16(d)), as well as "unit entitlement", which determines the other matters. The developer may allocate both unit entitlement and unit liability as he thinks fit. However, the allocation may be altered (a) by unanimous resolution and (b) by order of the Supreme Court: *id*, s 10(2)(a).

¹³ The views of commentators on liability for rates are set out in para 14.4 below.

¹⁴ Thirty-one persons responded.

¹⁵ In paras 14.5 and 14.8 below, the Commission recommends that where rates are levied on this basis, each lot should be valued separately.

¹⁶ And also contribution to a reserve fund: para 12. 2 above.

4. ALLOCATION OF UNIT ENTITLEMENT

(a) Views of the commentators

12.10 As indicated above, there was wide agreement amongst the commentators on this issue that a developer should be required to allocate unit entitlement in accordance with the capital value of each lot, as certified by a licensed valuer.

12.11 Several commentators complained that the same unit entitlement had been allocated to all the lots in their strata schemes even though their lots were substantially less valuable than the others. As a consequence, their lots attracted the same liability for rates¹⁷ and they were obliged to make the same contribution to the administrative fund as the other proprietors. The complainants acknowledged that the proprietors of the more valuable lots had no greater voting power than they had, but considered that this was of limited significance, since the most important decisions require a unanimous resolution.¹⁸ They also acknowledged that when the scheme was terminated the other proprietors would not be entitled to any greater share in the parcel than themselves,¹⁹ but since termination would probably not take place for a considerable time, this was not considered of great importance.²⁰

12.12 Instances were also brought to the attention of the Commission where certain lots in the scheme were given a unit entitlement much higher than would have been the case if unit entitlement had been based on value. The proprietors concerned expressed resentment at the share of administrative expenses and rates they were required to pay. Although the Commission is not aware of any instance where this is the case, the present system would also permit a developer to allocate a very low unit entitlement to lots he has decided to retain for himself and load the unit entitlement of the others. The immediate financial advantages may prompt him to do this, notwithstanding that his voting power and share in the common property would be correspondingly reduced.

¹⁷ This matter is treated separately in chapter 14.

¹⁸ Paras 11.13 and 11.14 above.

¹⁹ This is because such shares are determined by the unit entitlement of the lots, not their value: WA, s 11(2).

²⁰ Further, if the scheme is terminated by the Supreme Court and not by unanimous resolution, the Court is empowered to impose conditions and give directions for the purpose of adjusting as between the proprietors the effect of such termination: WA, s 19(2). This could theoretically result in the proprietors of the more valuable lots receiving a greater financial benefit from the termination of the scheme than the others.

(b) The position elsewhere

12.13 In most Australian jurisdictions, as in Western Australia at present, no statutory criteria are laid down for allocating unit entitlement. However, two Australian jurisdictions, namely the Australian Capital Territory and the Northern Territory, require the developer to have regard to the values of lots in allocating unit entitlement.²¹ This is done in an indirect way by requiring the relevant statutory authority to be satisfied, before approving the registration of the strata plan, that the unit entitlement of each of the lots is reasonable, having regard to their respective values.²² In New Zealand, a strata plan cannot be registered unless the unit entitlement has been fixed by the Valuer General or a registered valuer on the basis of the relative value of the unit in relation to each of the other units on the unit plan.²³

(c) The Commission's recommendation

12.14 Implementation of the Commission's recommendation below concerning liability for rates levied on a gross rental value basis²⁴ would mean that unit entitlement would no longer be relevant in that respect. It would remove one source of dissatisfaction about the present system of allocating unit entitlement in those localities where rates are levied on a gross rental value basis.²⁵ However, it would not remove dissatisfaction in those areas where rates are levied on an unimproved value basis²⁶ and of course the recommendation does not have any bearing on the amount of a proprietor's contribution to the administrative fund.

12.15 The Commission accordingly agrees with the commentators that developers should not continue to be left free to allocate unit entitlement as they choose. The Commission also agrees that the unit entitlement allocated to each lot should bear a close relationship to its capital value²⁷ relative to the other lots in the scheme but that, for practical purposes, a precise

²¹ But see para 12.23 below for an outline of how the matter is dealt with in NSW.

²² *Unit Titles Ordinance 1970-1975* (ACT), s 16(1) and (2); *Unit Titles Ordinance 1975-1981*(NT), s 16. The relevant authority in the Australian Capital Territory is the Minister for the Australian Capital Territory and in the Northern Territory it is the Administrator.

²³ *Unit Titles Act 1972-1980* (NZ), s 6.

²⁴ Paras 14.5 and 14.8. The Commission's recommendation is that where rates are levied on such a basis, each lot should be given a separate gross rental valuation and the liability of each lot for rates assessed accordingly.

²⁵ Para 14.3 below.

²⁶ Para 14.4 below.

²⁷ The Commission rejected a suggestion that unit entitlement should be based on the relative floor areas of the lots because it considers that floor area is a less accurate guide than capital value to a proprietor's interest in the scheme.

correspondence is not necessary. The Commission accordingly recommends that the Act should provide that for all future schemes, the strata plan lodged for registration must be accompanied by a certificate of a licensed valuer²⁸ that the unit entitlement allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to all the others.²⁹

12.16 Adoption of such a system would mean that a proprietor's contribution to the administrative fund, his voting power and share of the proceeds of a sale of common property during the life of the scheme and of the parcel upon its termination would broadly reflect his interest in the scheme. This seems an appropriate result.³⁰

²⁸ It would be impracticable to use the Valuer General's valuation for this purpose. His statutory duty is to value properties for rating purposes, normally using gross rental value or unimproved value as the basis, neither of which directly relates to capital value: *Valuation of Land Act 1978-1981*. The Valuer General informed the Commission that there would in any case be insufficient staff to value a strata scheme before the developer would otherwise be in a position to register the strata plan. The Commission also considered the possibility of treating the sale price of the lots as their capital value in order to avoid the need for a special valuation. However, developers may, for example, vary their prices during the selling period because of market and other conditions even though the relative value of the lots remains the same. Further, no proprietor would know what his unit entitlement was until all lots had been sold.

²⁹ The Commission suggests that the certificate of the licensed valuer could be along the following lines:
 "I hereby certify that the ratio that the unit entitlement of each lot on the plan bears to the aggregate of the unit entitlement of all the lots is not more than five per cent more or five per cent less than the ratio that the capital value of that lot bears to the aggregate values of all the lots on the plan.
 Date Licensed Valuer....."

The time within which the certificate remains valid should be prescribed by regulation.

The following table illustrates the range of unit entitlements which could be allocated in a strata scheme containing four lots with the capital value indicated below.

Lots	Capital Value	Range of the unit entitlement which could be allocated to each lot
A	\$ 40,000	76- 84
B	\$ 60,000	114-126
C	\$ 80,000	152-168
D	\$100,000	190- 210

³⁰ The administrative expenses of a strata scheme include payment of insurance premiums on the building. It seems appropriate that the more valuable lots should contribute more in this regard. Administrative expenses also include general maintenance costs, such as maintenance of the grounds, painting of the building and, in some cases, maintenance of the lifts.

Taking the matter broadly, it is not unreasonable that such costs should be borne in proportion to the value of the lots. Several commentators suggested that a proprietor's share of administrative expenses should be determined by the floor area of his lot relative to the floor area of the others. However, while such a formula may produce a fair result in some cases, it may not do so in others, for example, the cost of maintaining the exterior of a unit on the top floor in a high-rise building could be significantly greater than the cost of maintaining the exterior of an identical unit on the ground floor. In such a case, the fairer rule would be of relative capital value, since the unit on the top floor would ordinarily have a greater value than a unit on the ground floor.

12.17 Implementation of the recommendation would not add significantly to developers' costs. The maximum fees currently chargeable by a licensed valuer are prescribed in the Land Valuers Licensing (Remuneration) Notice 1980.³¹ For example, the maximum fee for the valuation of a lot valued at \$50,000 is \$165 and for one valued at \$75,000 is \$215.³²

12.18 Implementation would normally not involve any delay in a developer's timetable. Representatives of the Institute of Valuers with whom the Commission discussed its proposal indicated that there are sufficient licensed valuers in active private practice for such valuations to be done promptly.³³

5. VARIATION OF UNIT ENTITLEMENT AFTER STRATA PLAN IS REGISTERED

(a) General

12.19 As explained above, the Act at present makes no provision for alteration of the schedule of the unit entitlements once the strata plan has been registered. Alteration of unit entitlement would require the notional destruction of the building and the registration of a fresh strata plan.

12.20 The question whether there should be provision for reallocation of unit entitlement after registration of the plan raises two issues, namely, whether reallocation should be permissible in respect of schemes -

- (i) which come into existence after the recommendation is implemented ("future schemes"); and
- (ii) which have come into existence before the recommendation is implemented ("existing schemes").

It is also appropriate that the amount for which a lot is deemed to be insured where the building as a whole is insured for less than its replacement value should correspond to the relative capital value of that lot: WA, s 17(3) and (4). See para 15.8 below.

³¹ *Government Gazette*, 9 May 1980. The parties can of course negotiate a lower fee.

³² Plus disbursements such as travelling expenses.

³³ As at 16 July 1982, there were approximately 360 licensed valuers in Western Australia of whom 290 are members of the Institute. Of these 290, about half are in private practice (the remainder being employed in the public sector).

12.21 If the Commission's recommendation in paragraph 12.15 above is implemented in respect to future schemes, unit entitlement at the time of registration of the plan would substantially reflect the then relative capital value of the lots. However, the relative value of the lots could subsequently change. For example, a formerly quiet street may become a busy thoroughfare, thus diminishing the value of the lots closest to the street, or the view from the lots on one side of the building could become obstructed by the erection of a building close by, thus diminishing the value of the lots whose views are affected. Conversely, the value of some lots could increase when waste land which they overlook is converted into an attractive public park. Changes in relative value could also come about by more general factors. For example, in buoyant economic times a penthouse may have a very high value relative to the other lots in the scheme, but in a subsequent recession its value may fall disproportionately. Changes in the social character of the area may cause a disproportionate fall in the value of some lots.³⁴

12.22 These factors also apply in respect to existing schemes. In addition, there could well be a large number of existing strata schemes where the schedule of unit entitlement did not reflect the relative value of the lots at the time of registration of the strata plan.

(b) Future schemes

(i) New South Wales approach not applicable

12.23 In the working paper,³⁵ the Commission drew attention to the New South Wales provision under which a reallocation of unit entitlement may take place without the notional destruction of the building. In that State, the Strata Titles Board may reallocate unit entitlement in accordance with the relative values at the time the strata plan was registered if it considers that the original allocation was unreasonably made, having regard to the respective values of the lots at that time.³⁶ Either the strata company or a proprietor may apply for such an order.³⁷ Most of the sixteen commentators who addressed themselves to the topic of reallocation of unit entitlement were in favour of introducing a provision along the lines of

³⁴ A change in zoning could bring about a change in relative values. For example, a rezoning from residential to commercial use could affect some lots in a scheme more than others. Lots on the ground floor may be able to be converted to shops and so retain or increase their value. Those on the upper floors may have no commercial use and be less attractive as residences than formerly.

³⁵ Para 18.14.

³⁶ NSW, s 119.

³⁷ Ibid.

that existing in New South Wales. These included REIWA,³⁸ the Law Society, the Local Government Association, the Institute of Valuers and a number of lot proprietors.

12.24 However, the New South Wales approach would be inapplicable to future schemes if the Commission's recommendation in paragraph 12.15 above is implemented, since the allocation of unit entitlement will have been based on the relative values of the lots at the time the strata plan was registered. If there is to be provision for reallocation in the case of future schemes, the provision could only sensibly relate to the relative values of the lots at the time of reallocation.

(ii) *Reallocation pursuant to unanimous resolution*

12.25 The Commission considers that there should be provision for a reallocation pursuant to a unanimous resolution of the strata company³⁹ so as to accord with the existing values of the lots. The Commission recommends that the application to the Registrar of Titles to alter the existing schedule of unit entitlement on the strata plan should be accompanied by -

- (a) a certificate under the seal of the strata company certifying that it has, by a unanimous resolution,⁴⁰ consented to the proposed reallocation;
- (b) a certificate from a licensed valuer that the unit entitlement proposed to be allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to the others; and
- (c) the consent in writing of all persons (other than proprietors) who have a registered interest in any of the lots affected by the proposed reallocation.⁴¹

³⁸ REIWA submitted that the application (which should be to a Board or referee) should only be pursuant to a unanimous resolution.

³⁹ Including, if the Commission's recommendation in para 11.22 above is implemented, a resolution which by declaration of the Supreme Court is deemed to have been unanimously passed.

⁴⁰ Or by a resolution which, by declaration of the Supreme Court, is deemed to have been unanimously passed: para 11.22 above.

⁴¹ The proprietor's share in the common property may alter in accordance with the new schedule. If the Commission's recommendation in para 8.10 above is adopted, it will not be necessary for the Registrar of Titles to call in for amendment the duplicate certificates of title relating to the lots. However, it will be necessary for him to do so where the certificates of title were issued under the existing Act, since these show the quantum of the share owned by the proprietor in the common property.

The Act should provide that upon receipt of the application and the requisite certificates and consents, the Registrar should amend the schedule of unit entitlement on the strata plan in a manner prescribed. It should be provided that on the making of those amendments, the common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots, as set out in the altered schedule of unit entitlement, and registered encumbrances over lots and caveats lodged against lots at the Titles Office should be deemed to be amended accordingly.

12.26 Since a change of unit entitlement could create tension among the proprietors in a strata scheme, the Commission recommends that it should not be possible to reallocate unit entitlement by unanimous resolution more than once in every five years or within five years of an order of reallocation by the Land Valuation Tribunal,⁴² as the case may be.

(iii) *Reallocation by the Land Valuation Tribunal*

12.27 The Commission also considers that there should be provision for reallocation of unit entitlement other than pursuant to a unanimous resolution. As a reallocation of unit entitlement will often be considered detrimental to their interests by one or more of the proprietors, it can be expected that in most cases where some proprietors want unit entitlement reallocated, it will not be possible to obtain a unanimous resolution. Of the Australian jurisdictions, only the strata titles legislation in Victoria and South Australia contains a provision under which a reallocation of unit entitlement may take place without regard to the original values of the lots. The Victorian legislation provides that the schedule of unit entitlement may be amended by the Supreme Court upon the application of the strata company, any proprietor or an administrator.⁴³ In determining the application, the Court is to have regard to the relative value of all the lots at the time the application is made.⁴⁴ The provision in the South Australian legislation is similar.⁴⁵ It is important to note that in neither Victoria nor South Australia is the developer required to allocate unit entitlement on the basis

⁴² See para 12.30 below for the Commission's proposal for reallocation by the Land Valuation Tribunal. The Commission is not here referring to reallocation in the special case of a subdivision within a strata scheme: para 4.21 (f) above.

⁴³ *Strata Titles Act 1967-1981*(Vic), s 10(2)(a)(ii).

⁴⁴ Ibid. In Victoria, there is also provision for "unit liability", as well as "unit entitlement": footnote 8 on page 160 above. The Court is also empowered to amend the schedule of unit liability upon the application of the strata company, any proprietor or an administrator: *Strata Titles Act 1967-1981* (Vic), s 10(2)(a)(ii). The Court is to have regard to the amount which it would be just and equitable to require each proprietor to contribute to the administrative fund.

⁴⁵ *Real Property Act 1886-1982* (SA), s 223mf (6) to (11). The South Australian Act does not include the concept of unit liability found in the Victorian legislation.

of the relative value of the lots, as the Commission has recommended should be the position in Western Australia.⁴⁶

12.28 Because an alteration of unit entitlement affects the proprietary rights of a proprietor, the Commission agrees with the Victorian and South Australian approach that reallocation should not take place without a unanimous resolution of proprietors, except pursuant to an order of a judicial body.⁴⁷

12.29 However, the Commission believes that a procedure under which any proprietor can apply to a court or tribunal for a reallocation of unit entitlement would increase the possibility of dissension in strata schemes. To decrease this likelihood, the Commission considers that the judicial body⁴⁸ should only be able to reallocate unit entitlement if there has been a significant movement in the relative value of the lots and a substantial majority of proprietors are in favour of the reallocation. Further, reallocation by a judicial body should not be able to take place until at least five years have elapsed from the original allocation or a reallocation, as the case may be.⁴⁹

12.30 The Commission considers that the judicial body which should be vested with this jurisdiction should be the Land Valuation Tribunal.⁵⁰ Proceedings would be less expensive than in the Supreme Court and the Tribunal is a body with expertise in valuation.

12.31 The Commission therefore recommends that -

- (a) Any proprietor of a strata scheme, or the strata company, may make application to the Land Valuation Tribunal for a reallocation of unit entitlement in respect of the scheme.
- (b) Such application may only be made if -
 - (i) it has been authorised by a special resolution of the strata company; and

⁴⁶ Para 12.15 above.

⁴⁷ And except, of course, in the cases of consolidation and conversion: paras 4.27 and 4.32 above.

⁴⁸ The Commission is not here referring to the special case of variation of a strata plan by the Supreme Court: paras 20.6 to 20.8 below.

⁴⁹ Apart from the exceptions referred to in the two footnotes immediately preceding and in the case of a subdivision: para 4.21(f) above.

⁵⁰ Constituted under the *Land Valuation Tribunals Act 1978*.

- (ii) the capital value of any lot relative to the capital value of any other lot in the scheme has varied by more than five per cent since the existing allocation came into effect.
- (c) The Tribunal should be required, unless it is satisfied that there are good reasons for not so doing, to allocate a unit entitlement to each lot in the scheme which is no more than five per cent more or five per cent less than its capital value relative to the others.
- (d) It should not be possible for the Tribunal to reallocate unit entitlement unless at least five years has elapsed from any previous allocation whether an original allocation or a reallocation by unanimous resolution, order of the Tribunal or order of the Supreme Court,⁵¹ as the case may be.⁵²

The Commission also recommends that provision should be made for all those who voted against the motion, those who were entitled to vote but did not do so, and any other person whom the Tribunal considers has a sufficient interest in the proceedings to be served with notice of the application and, if appropriate, to be joined as parties to the proceedings. It should also be provided that the Tribunal should not make an award of costs against a defendant if it considers that, although the application should be granted, he had not acted unreasonably.

12.32 The Act should provide that upon receipt of a copy of an order of the Land Valuation Tribunal reallocating unit entitlement, the Registrar should amend the schedule of unit entitlement on the strata plan in a manner prescribed. It should be provided that on the making of those amendments, the common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots, as set out in the altered schedule of unit entitlement. Registered encumbrances over lots and caveats lodged against lots at the Titles Office should be deemed to be amended accordingly.

⁵¹ Footnote 48 on page 169.

⁵² But see footnotes 47 and 49 on page 169.

(c) Existing schemes

12.33 In the case of existing schemes, there will have been no obligation on the developer to allocate unit entitlement in accordance with the relative value of the lots. It could accordingly be argued that the requirements for reallocation should be less strict than for future schemes, and that, for example, there should not be a requirement for a special resolution before application may be made to the Land Valuation Tribunal. However, some proprietors may have been aware of the unit entitlement when they bought their lots from the developer and when the law made no provision for reallocation. Others, although not aware of the unit entitlement, may have purchased a lot in a well-established scheme after being informed of the outgoings in respect of their lot. These persons may resent any readjustment detrimental to them. The Commission accordingly recommends that, with the modifications indicated in the following paragraph, reallocation should be permitted in these schemes only in the same limited circumstances recommended by the Commission in relation to future schemes.⁵³

12.34 As unit entitlement shown in the schedule when the strata plan was registered may have been allocated without regard to the relative value of the lots, the pre-requisite to an application to the Land Valuation Tribunal that the capital value of any lot relative to the capital value of any other lot in the scheme has varied by more than five per cent⁵⁴ would not be appropriate. It should be sufficient when it is sought to adjust an initial allocation if the unit entitlement of a lot in the scheme is more than five per cent more or five per cent less than its capital value relative to the value of all the other lots in the scheme. Also the prohibition against the Tribunal making an order within five years of the original allocation should not apply.⁵⁵

12.35 An advantage of the recommendations made in the previous two paragraphs would be that, as far as possible, the rights given to proprietors in relation to reallocation of unit entitlement would be the same irrespective of whether the scheme came into existence before or after the legislation.

⁵³ That is, reallocation pursuant to unanimous resolution or by the Land Valuation Tribunal following a special resolution: paras 12.25, 12.26 and 12.31 above. The provisions recommended in para 12.31 as to joinder of interested parties and costs should also be applied in relation to reallocation by the Land Valuation Tribunal.

⁵⁴ Para 12.31 above.

⁵⁵ As the original allocation in an existing scheme need not have been based on value: para 12.3 above.

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

12.36 The Commission recommends that -

Future Schemes (a) *For all future schemes, the strata plan lodged for registration must be accompanied by a certificate of a licensed valuer that the unit entitlement allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to the others.*

(paragraph 12.15)

(b) *For future strata schemes, there should be provision for a reallocation of unit entitlement pursuant to a unanimous resolution of the strata company. The application to the Registrar of Titles to alter the existing schedule of unit entitlement on the strata plan should be accompanied by -*

(i) *a certificate under the seal of the strata company that the company has by unanimous resolution consented to the proposed reallocation;*

(ii) *a certificate from a licensed valuer that the unit entitlement proposed to be allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to the others; and*

(iii) *the consent in writing of all persons (other than proprietors) who have a registered interest in any of the lots affected.*

It should not be possible to reallocate unit entitlement by unanimous resolution more than once in every five years or within five years of an order of reallocation by the Land Valuation Tribunal, as the case may be.

(paragraphs 12.25 and 12.26)

- (c) (i) *Application to the Land Valuation Tribunal by a proprietor or the strata company for a reallocation of unit entitlement may be made if -*
- (a) *the application has been authorised by a special resolution of the strata company; and*
 - (b) *the capital value of any lot relative to the capital value of any other lot in the scheme has varied by more than five per cent since the existing allocation came into effect.*
- (ii) *The Tribunal should be required, unless it is satisfied that there are good reasons to the contrary, to allocate a unit entitlement to each lot in the scheme which is no more than five per cent more or five per cent less than its capital value relative to the others.*
- (iii) *It should not be possible for the Tribunal to reallocate unit entitlement unless at least five years has elapsed from any previous allocation whether an original allocation or a reallocation by unanimous resolution, order of the Tribunal or order of the Supreme Court.*
- (iv) *Provision should be made for all those who voted against the motion, those who were entitled to vote but did not do so, and any other person whom the Tribunal considers has a sufficient interest in the proceedings to be served with notice of the application and, if appropriate, to be joined as parties.*
- (v) *It should also be provided that the Tribunal should not make an award of costs against a defendant if it considers that, although the application should be granted, he had not acted unreasonably.*
- (paragraphs 12.30 to 12.32)

Existing schemes

- (d) (i) *with the modifications indicated in (ii) of this subparagraph, reallocation of unit entitlement should be permitted in existing schemes only in the same limited circumstances recommended in relation to future schemes*

relation to future schemes.

- (ii) (1) *It should be sufficient when it is sought to adjust an initial allocation in respect of an existing scheme if the unit entitlement of a lot in the scheme is more than five per cent more or five per cent less than its capital value relative to the value of all the other lots in the scheme.*

- (2) *The prohibition against the Tribunal making an order within five years of the original allocation should not apply.*

(paragraphs 12.33 and 12.34)

CHAPTER 13

FINANCES

1. EXISTING POSITION

13.1 Under the Act, the strata company must establish and maintain a fund for administrative expenses¹ sufficient in its opinion to pay the costs of controlling and managing the common property, meeting insurance premiums and discharging other obligations of the strata company.² The strata company is required to determine from time to time the amounts which need to be raised so that necessary payments can be made, and to raise those amounts by levying contributions on the proprietors in proportion to the unit entitlements of their respective lots.³

13.2 The contributions become due and payable on the passing of a resolution to that effect and in accordance with the terms of the resolution.⁴ Contributions may be recovered by the strata company in a court of competent jurisdiction from a person who was a proprietor at the time when the resolution was passed and from a person who is a proprietor at the time of instituting the action. The liability is joint and several and the strata company can recover from either.⁵

13.3 The strata company must, on the application of a proprietor or any person authorised in writing by him, certify -

- (a) the amount of any contributions due or payable by the proprietor;
- (b) the manner in which the contribution is payable; and
- (c) the extent to which the contribution has been paid by the proprietor.⁶

¹ Referred to in this report as "the administrative fund".

² WA, s 13(6)(a).

³ Id, s 13(6)(b) and (c).

⁴ Id, s 13(7). In para 13.13 below, the Commission suggested that this provision be clarified.

⁵ WA, s 13(7).

⁶ Id, s 13(8)(a), (b) and (c). The company must also certify the amount of any tax or rate paid by the company and not recovered by it: WA, s 13(8)(d). The question whether the strata company should continue to be liable to pay rates and taxes overdue on lots is dealt with in paras 14.11 to 14.13 below.

In favour of any person dealing with that proprietor, the certificate is conclusive evidence of the matters certified in it.⁷

13.4 The Act does not make provision for interest to be charged on arrears of contributions.

2. ISSUES TO BE CONSIDERED

13.5 The comments received by the Commission in relation to the strata scheme's finances mainly focussed on whether or not -

- (a) in addition to the present administrative fund, there should be express provision for a reserve fund in which money is set aside for meeting non-routine expenses;
- (b) a purchaser should be liable for arrears of contributions; and
- (c) provision should be made for interest to be charged on arrears.

13.6 One other matter, not raised in the working paper or by commentators, should be dealt with, namely whether the Act should empower a strata company to charge a fee for the issuing of the certificate referred to in paragraph 13.3 above.

3. RESERVE FUND

13.7 Of the twenty commentators on this issue, eighteen submitted that the company should be expressly empowered to establish a reserve fund as well as an administrative fund. Some suggested that establishment of a reserve fund should be obligatory. This is the case in New South Wales and Queensland. The main matters for which money is to be paid into the reserve fund in those jurisdictions are -

- (a) the painting or repainting of the building;
- (b) the acquisition or replacement of any personal property; and

⁷ WA, s 13(8).

- (c) the renewal or replacement of any fixtures or fittings comprised in the common property.⁸

13.8 The Commission agrees that, in addition to an administrative fund, strata companies should be expressly empowered, but not obliged, to establish a reserve fund for the purpose of accumulating money for expenses which are not of a routine nature and recommends accordingly. The power should be exercisable by the proprietors in general meeting. It could be argued that a strata company is already impliedly empowered to establish such a fund⁹ but the Commission considers that it is desirable to put the matter beyond doubt. To place matters on a proper footing, the purposes for which the fund is intended to be used should be required to be stated in the resolution. Payment into any such fund should be made by contributions of proprietors levied in accordance with their unit entitlement.¹⁰ The amount of the contributions should be determined in the same manner as that recommended by the Commission in respect of the administrative fund.¹¹

13.9 The object of the recommendation is to encourage strata companies to put money away for the payment of major items, such as repainting the building or replacement of lifts in a high-rise scheme.

Some companies may not need to set up a separate fund because they have so organised their finances that such expenses can be met out of the administrative fund.¹² In other cases, expenses for non-routine maintenance are unlikely to be burdensome and could readily be met by a special levy at the time. Hence the Commission does not consider that the establishment of a separate reserve fund should be obligatory. However, if there is express power to do so, councils of strata companies may more readily be able to place their finances on a sound basis by persuading proprietors where appropriate of the need to set aside money for future commitments.

⁸ NSW, s 68(1)(k); Qld, s 38(1)(k).

⁹ Under by-law 3(g) of part I of the schedule to the Act. See also s 13(6) and (7).

¹⁰ As in the case of the administrative fund: para 13.1 above. Strata companies would be able to invest the money in the fund under its powers of investment: para 9.25 above. See para 10.28 above as to the manner in which contributions to the reserve fund should be levied.

¹¹ Para 10.28 above.

¹² A number of strata companies have informed the Commission that account is taken of major expenses when striking the levy for the administrative fund. The money to pay these expenses is then "earmarked" in the company's accounts for this purpose.

4. ARREARS OF CONTRIBUTIONS

13.10 At present in Western Australia, a person who becomes the proprietor of a lot in respect of which there are arrears of contributions may become jointly and severally liable for the arrears with the person who was the proprietor at the time the contribution became due.¹³ In the working paper, the question was raised whether this provision should be retained. It had been suggested to the Commission that it was unfair to require one person, the purchaser, to pay the debt of another, the vendor.

13.11 There was almost universal agreement among the commentators that the existing provision should be retained. It was pointed out that a strata scheme could become unworkable if liability for arrears remained solely with the proprietor at the time the contribution became due. Such a person may be difficult to trace and would, in any case, have little incentive to pay the arrears. A provision similar to that in the Western Australian legislation exists in all the other jurisdictions studied by the Commission.¹⁴ An intending purchaser can protect his position by requiring the vendor to warrant that there are no arrears of contributions.¹⁵ He can also obtain a certificate from the strata company as to whether or not there are any unpaid contributions, and if there are, the amount.¹⁶ Any arrears could then be adjusted on settlement.

13.12 Two commentators suggested that the position of the strata company should be strengthened by providing for arrears of contributions to be a charge on the lot concerned. Such a charge could be protected by the lodgement of a caveat at the Titles Office. However, such a provision is not made in other States or New Zealand and would seem to be unnecessary. If a proprietor refuses to pay, the strata company can take legal proceedings

¹³ WA, s 13(7). If a purchaser from a person who was a proprietor at the time the contribution became due ceases to be a proprietor before the action was instituted he would not be liable.

¹⁴ For example, NSW, s 59(4); Qld, s 32(3).

¹⁵ Such a provision is contained in clause 16 of the Law Society's *Agreement for Sale of Freehold Land* (1980 ed), clause 14 of the Society's *General Conditions for the Sale of Land (1982 revision)* and in clause 10 of REIWA's *General Conditions for the Sale of Land (1982 Revision)*.

¹⁶ He could obtain the certificate by stipulating either that it be produced to him before settlement or that the vendor authorise him to obtain the certificate.

Because the certificate is conclusive evidence of the matters specified in it (para 13.3 above), the strata company could not subsequently sue the purchaser in respect of arrears not disclosed in the certificate: see also paragraph 9.19 above.

against him and levy execution against the lot if the judgment is not satisfied.¹⁷ An additional sanction would be the right to levy interest on the arrears.¹⁸

13.13 It is appropriate at this point to draw attention to a drafting defect in section 13(7) of the Act. That subsection provides that "any contributions to be levied...shall be due and payable on the passing of a resolution to that effect and in accordance with the terms of that resolution...". This could be construed as providing that the contribution is due the moment the resolution is carried, a result which is manifestly inconvenient. The general practice in Western Australia is for the strata company at its annual general meeting to resolve that contributions be paid periodically, for example, on a stated day in each month. The Commission accordingly recommends that the subsection should be redrafted to make it clear that the strata company can choose an appropriate time or times in the future as that upon which a contribution becomes due.¹⁹

5. INTEREST ON UNPAID CONTRIBUTIONS

13.14 Under the New South Wales *Strata Titles Act 1973-1981*, contributions levied by the strata company but not paid when due bear simple interest at the rate of ten per centum per annum unless, pursuant to a special resolution, the strata company determines (either generally or in a particular case) that an unpaid contribution shall bear no interest or interest at a lesser rate.²⁰ The Western Australian Act makes no provision for interest on unpaid contributions.

13.15 Commentators on this issue unanimously agreed that arrears of contributions should bear interest, not only to provide an incentive for proprietors to pay contributions on time, but to compensate the strata company for money it could have earned by paying the money into an interest-bearing account.

¹⁷ In the case of a sale, the strata company is adequately protected by the provision which imposes liability on the purchaser for the arrears of contributions. In practice, any arrears would normally be paid by the purchaser on settlement.

¹⁸ Para 13.16 below.

¹⁹ A corresponding amendment would be required to the latter part of the subsection to provide that the strata company can recover an unpaid contribution from the person who is the proprietor at the time when the contribution falls due. See also para 10.28 above.

²⁰ NSW, s 59(7)(b). The interest forms part of the fund to which the contribution belongs: id, s 59(7).

13.16 The Commission accordingly recommends the adoption of the New South Wales provision. However, in light of the fact that interest rates fluctuate, the rate should be such as is prescribed by regulation from time to time. In prescribing the rate, regard should be had to the bank overdraft rate. It will be noted that the New South Wales provision enables the proprietors by a special resolution to decide not to impose interest, or to charge a lesser rate. This seems desirable to take account of individual hardship or other special circumstances.

6. FEE FOR ISSUE OF CERTIFICATE UNDER SECTION 13(8)

13.17 Unlike the position in New South Wales and Queensland,²¹ the Act does not expressly empower the strata company to charge a fee for the issuing of a certificate under section 13(8) of the Act. The preparation of the certificate is not only time consuming but also involves a degree of responsibility.²² The Commission recommends that the Act should be amended to provide that the strata company is only obliged to provide the certificate on payment of a fee of, say, \$5 or such other amount as is from time to time prescribed by regulation.

7. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

13.18 The Commission recommends that -

(a) *In addition to an administrative fund, a strata company should be expressly empowered (but not obliged) to establish a reserve fund for the purpose of accumulating money for expenses which are not of a routine nature. Payment into any such fund should be made by contributions of proprietors levied in accordance with their unit entitlement. The amount of the contributions should be determined in the same manner as that recommended by the Commission in respect of the administrative fund: paragraph 10.28.*

(paragraph 13.8)

(b) *Section 13(7) of the Act should be redrafted to make it clear that a strata company can choose an appropriate future time or times as that upon which a contribution becomes due.*

(paragraph 13.13)

²¹ NSW, s 70(1); Qld, s 40(1).

²² See para 13.11 above.

(c) *Arrears of contributions should bear interest at a prescribed rate until paid unless the proprietors, by special resolution, determine otherwise either generally or in a particular case.*

(paragraph 13.16)

(d) *The strata company should be expressly empowered to charge a fee for the issue of a certificate under section 13(8) of the Act.*

(paragraph 13.17)

CHAPTER 14

RATES, TAXES AND CHARGES

1. RATES AND TAXES - THE PRESENT POSITION

14.1 Section 21 of the Act contains detailed provisions to determine liability for rates and taxes in respect of a strata scheme.¹ Under the section, the parcel is valued as a single entity and as if it were owned by a single owner. For the purposes of the valuation, including objection to and appeal against the valuation, the parcel and improvements thereon are deemed to be owned by the strata company. The effect of this is that only the strata company can object to or appeal against the valuation. The rating authority is required to apportion the valuation of the parcel between the lots comprised in the parcel in proportion to the unit entitlement of the lots. The proprietor of each lot is deemed, for rating purposes to be the owner in fee simple in possession of the lot as if it were a separate parcel having a value equal to that so apportioned to it.² The rating authority then assesses the rate on each lot in accordance with that value.

14.2 However, although each proprietor is assessed separately and is liable accordingly, the rating authority may, if the proprietor defaults, recover the unpaid rates from the strata

¹ The section was amended by s 140 of the *Acts Amendment and Repeal (Valuation of Land) Act 1978* consequentially upon the enactment of the *Valuation of Land Act 1978-1981* which provides for the Valuer General to carry out a valuation of all rateable or taxable land in the State. It is the valuations in force under the *Valuation of Land Act 1978-1981* which are now used by the relevant rating and taxing authorities.

Rates - The rates which are normally payable in respect of strata schemes in the Perth metropolitan area are -

- (a) local authority rates levied under the *Local Government Act 1960-1982*;
- (b) water, sewerage and drainage rates levied under the *Metropolitan Water Authority Act 1982* and the *Metropolitan Water Supply, Sewerage, and Drainage Act 1909-1982* (these Acts are to be read together: see s 5 of the *Metropolitan Water Authority Act 1982*).

Sewerage rates are only levied where the parcel is in an area which is deep seweraged: *Metropolitan Water Authority Act 1982*, s 44(3)(b). Drainage rates are only levied where the parcel is within a metropolitan main drainage district: id, s 44(3)(c).

Where the strata scheme is outside the Perth metropolitan area, local government rates are levied under the *Local Government Act 1960-1982*. If the scheme is serviced by a water supply authority, water rates are levied under either the *Country Areas Water Supply Act 1947-1981* or the *Water Boards Act 1904-1981*. If the parcel is in an area which is deep seweraged, sewerage rates are levied under the *Country Towns Sewerage Act 1948-1981*. If the parcel is in a "drainage district" constituted under the *Land Drainage Act 1925-1981*, drainage rates are levied under that Act.

Taxes - The position in regard to taxes is set out in paras 14.9 and 14.10 below.

² WA, s 21(5)(c). Accordingly, although this makes him liable to pay the rates levied on his lot, equally he is entitled to any exemptions or concessions applicable to owners of land: *ibid*.

company.³ Where the strata company pays the amount owing, it may recover it by action in a court of competent jurisdiction. Until recovery by the strata company, the amount owing is a charge on the lot in favour of the strata company with the same priority as the rating authority had in respect of the amount.⁴

2. RATES AND TAXES - QUESTIONS AT ISSUE AND RECOMMENDATIONS THEREON

(a) Local authority rates

14.3 The Commission has received a number of complaints from proprietors about the present law whereby the unit entitlement of a lot determines the proportion of the rates levied on the parcel as a whole payable by the proprietor of that lot. In some schemes all lots have the same unit entitlement, even though some lots have a greater value than others in terms both of capital value and rental value. The complainants, whose lots have a lower value, object to paying the same amount of rates as those whose lots have a higher value. Complaints have also been made to the Commission in regard to three mixed development schemes in the Perth metropolitan area. Each scheme comprises both office and residential lots. The parcel as a whole has been given a high gross rental value⁵ because the office lots attracted a high gross rental value. The result is that the proprietors of the residential lots are liable for significantly higher amounts of rates than if their lots had been assessed on the basis of their individual gross rental value.⁶ Conversely, the proprietors of the office lots are liable for a lesser amount of rates than if their lots had been valued and assessed individually.

14.4 In the working paper, the Commission invited comment on whether each lot should be separately valued for the purpose of levying rates. A number of commentators were in favour of doing so. However, others pointed out that although it would be possible to levy rates separately on each lot where the local authority uses gross rental value as a basis, it would not be possible to do so where the authority levies rates on unimproved value. This is because

³ Id, s 14(1) and (2).

⁴ Id, s 14(4).

⁵ The local authority concerned levies rates on a gross rental value basis. "Gross rental value" is defined in s 4 of the *Valuation of Land Act 1978-1981* as the gross annual rental that the land (including buildings) might be expected to realise if let on a tenancy from year to year upon condition that the landlord were liable for all rates, taxes and other outgoings. There is a proviso that where such value cannot reasonably be determined on such a basis, "gross rental value" means such percentage of the capital value as may be prescribed. See also para 14.5 below.

⁶ In none of the schemes had the unit entitlements of the lots been allocated on a basis which corresponded with the differences in their gross rental value.

"unimproved value" is defined as the capital value of the land without regard to the existence of any building or other improvements thereon,⁷ whereas the capital value of a strata lot is partly related to the building. Accordingly, in regard to those strata schemes in areas where the local authority uses unimproved value as the basis for rating, there seems to be no practical alternative but to continue to ascertain the value of each lot for this purpose by apportioning the unimproved value of the parcel among the lots in proportion to their unit entitlements.

14.5 However, where the local authority uses gross rental value as the basis for levying rates, the Commission can see no reason why the gross rental value of each lot⁸ should not be determined separately and the liability of each lot for rates assessed accordingly. The principle underlying this view is that a strata title lot should, as far as practicable, be treated as a detached dwelling. Although section 21(2)(a) of the Act provides that the Valuer General is to value the strata scheme as a single parcel of land owned by a single owner, the Valuer General's Office has informed the Commission that to achieve the figure representing the gross rental value of the parcel, in practice he notionally values each lot separately and aggregates the total. Thus the change recommended by the Commission would involve little alteration in practice.⁹

14.6 Implementation of the Commission's recommendation would break the link between unit entitlement and liability for rates where gross rental value is the rating basis, and would remove a major source of discontent among proprietors in strata schemes to which that basis applies. Its main effect would be in the Perth metropolitan area.¹⁰ Although the Commission has not made a detailed survey, it understands that the majority of strata schemes in the metropolitan area are in locations where rates are levied on gross rental value. The

⁷ The definition of "unimproved value" is contained in s 4 of the *Valuation of Land Act 1978-1981*. In the case of land within a townsite (which includes the metropolitan region) certain improvements such as drainage and retaining walls are included.

⁸ The existence of substantial improvements on the common property would normally make no difference. Since the proprietors have equal access to the common property, the gross rental value of the lots would reflect the value of these improvements. However, where a proprietor has been given a lease or licence of exclusive use to a portion of the common property, the gross rental value should not only be of that lot but also of the part of the common property concerned. Otherwise there would be a degree of imbalance between the valuations.

⁹ However, there may be some alteration in some cases: see the immediately preceding footnote.

¹⁰ Where the overwhelming majority of strata schemes are located.

Commission understands that most of the schemes outside the metropolitan area are in areas where rates are levied on unimproved value.¹¹

14.7 As mentioned in paragraph 14.4 above, it is the Commission's view that where the local authority concerned uses unimproved value as the basis for assessing rates, the value of each lot should continue to be ascertained by apportioning the unimproved value of the parcel among the lots in accordance with unit entitlement. However, implementation of the recommendation in paragraph 12.15 above that a strata plan lodged for registration must be accompanied by a certificate of a licensed valuer that the schedule of unit entitlement is within five per cent of the relative capital value of each lot will avoid major anomalies in this respect in regard to future schemes.¹²

(b) Water, sewerage and drainage rates

14.8 In the Perth metropolitan area, water rates are levied by the Metropolitan Water Authority on a "user pays" principle in the case of residential premises. The same standard charge is levied on each lot, entitling the consumer to a set allowance of water. Any water used above the allowance is charged for in accordance with the amount used.¹³ Water rates on non-residential premises are levied by the Authority on a gross rental value basis. If the area is deep seweraged, strata schemes are also liable to pay sewerage rates and, if the parcel is within a metropolitan main drainage district, drainage rates.¹⁴ The Commission can see no reason why its recommendation in paragraph 14.5 above should not apply to those rates levied by the Metropolitan Water Authority on a gross rental value basis and it recommends accordingly.¹⁵ It also recommends that the same principle should apply to water, sewerage and drainage rates levied outside the metropolitan area.¹⁶

¹¹ Under s 533(8) of the *Local Government Act 1960-1982*, although cities and towns must use gross rental value for their valuations, the section empowers the Governor to authorise the use of unimproved value in particular cases. Conversely, although shires must use unimproved value, the Governor may authorise the use of gross rental value.

¹² As to existing schemes, see paras 12.33 to 12.35 where it is recommended that unit entitlement in such schemes should be able to be reallocated.

¹³ Paras 14.19 to 14.21 below.

¹⁴ See footnote on page 205 above.

¹⁵ The Commission has been informed that apart from water rates on residential premises, all rates levied by the Authority are on a gross rental value basis. Although the Minister has power to approve the use by the Authority of unimproved value as the basis of rating valuation (*Metropolitan Water Authority Act 1982*, s 41(2)), no approvals have been given.

¹⁶ Rates levied under the *Country Areas Water Supply Act 1947-1981* and the *Water Boards Act 1904-1981* are on a gross rental value basis. Those levied under the *Country Towns Sewerage Act 1948-1981* are on an unimproved value basis except in the district of a local authority which is levying rates on a gross

(c) Taxes

14.9 Section 21 of the Act also makes provision for the assessment of land tax. The unimproved value of the parcel is apportioned by the Commissioner of State Taxation between the lots according to their unit entitlement. However, this is solely for the purpose of calculating the aggregate unimproved value of all land held by a person at the prescribed time.¹⁷ The strata company is not itself liable for land tax in respect of the parcel nor would it be liable if the person concerned failed to pay the land tax levied on him.¹⁸ The metropolitan region improvement tax levied under the *Metropolitan Region Town Planning Scheme Act 1959-1981* is in practice dealt with on the same basis.¹⁹ These are the only taxes presently levied on land in Western Australia.

14.10 Unlike rates, these taxes do not have universal application to proprietors in a strata scheme since many of them will be exempt. Nevertheless the present principle of valuation for the purposes of these taxes could be of concern to those proprietors who are liable for such taxes. A proprietor whose unit entitlement is less than the relative capital value of his lot will pay less tax in respect of that lot than another whose unit entitlement is greater than the value of his lot. However, as indicated above,²⁰ since these taxes are levied on unimproved value the Commission can see no practical alternative to apportioning the unimproved value of the parcel among the lots in accordance with their unit entitlement. The position will be alleviated for proprietors in future schemes if the Commission's recommendation that unit entitlement is to be allocated in accordance with capital value of each lot is implemented.²¹

(d) Liability of strata company upon proprietor's default

14.11 As indicated above,²² the strata company is liable to pay the rating authority the amount of the rate levied on a lot where the proprietor has defaulted in payment. In both New

rental value basis in which case that basis must be used: s 50. Rates levied under the *Land Drainage Act 1925-1981* are on the basis of the unimproved value or area according to the determination of the relevant Board: s 73.

¹⁷ *Land Tax Assessment Act 1976-1982*, s 14.

¹⁸ WA, s 21(8)(b).

¹⁹ S 41. The Commission suggests that s 21 of the *Strata Titles Act* be amended expressly to include a reference to metropolitan region improvement tax as well as land tax.

²⁰ Para 14.4.

²¹ As to existing schemes, see paras 12.33 to 12.35 where it is recommended that unit entitlement in such schemes should be able to be reallocated in certain circumstances.

²² Para 14.2.

South Wales and Queensland the former power of a rating authority to recover from the strata company has been abolished.

14.12 The overwhelming majority of commentators on this issue were of the view that the strata company should not be liable for a proprietor's unpaid rates. These included the Department of Local Government, REIWA, and the City of Canning as well as a number of strata companies and individual proprietors.²³ No rating authority made a submission in favour of the present law.

14.13 The Act followed the original strata titles legislation of New South Wales on this point. In commenting on the provision in that State, Rath, Grimes and Moore²⁴ acknowledge that:

"The principle introduced by this section ...seems a departure from the basic scheme of the Act, viz that ownership of strata lots should be equated so far as practicable to ownership of detached cottages."

The Commission agrees with the majority of commentators that the Act should be amended by removing the liability of the strata company in this respect, and recommends accordingly.²⁵

(e) Appeals against valuation

14.14 At present, only the strata company is entitled to object to, or appeal against, a valuation.²⁶ No proprietor is entitled to do so. A commentator suggested that, in addition to the strata company, every proprietor in the strata scheme should have the right to object or appeal.

14.15 If the Commission's recommendation in paragraphs 14.5 and 14.8 above that where the valuation is on a gross rental value basis each lot should be valued separately is

²³ Only two commentators (a proprietor and a strata company) were in favour of retaining the present position.

²⁴ Rath, Grimes and Moore, 42.

²⁵ The provision imposing the liability on the strata company in respect of unpaid rates is s 14(1). Since the remainder of the section is confined to giving a right of recourse to the strata company against the proprietor in default, the whole section should be repealed if the recommendation is implemented.

²⁶ WA, s 21(2)(b). An objection is decided by the Valuer General: *Valuation of Land Act 1978-1981*, s 32. An appeal lies to the Land Valuation Tribunal against a decision by the Valuer General on an objection: *id*, s 33.

implemented, it follows that the person liable to pay the rate levied on that basis²⁷ should be able to object to or appeal against the valuation placed on that lot. It also follows that the strata company should have no right itself to object to or appeal against any such valuation. However, the commentator's suggestion remains relevant where the valuation is on the basis of the unimproved value of the parcel as a whole.²⁸ As pointed out above, the rating authority apportions the valuation of the parcel between the lots in proportion to their unit entitlement and assesses the rate on each lot in accordance with that apportionment. Thus the valuation given to the parcel is of direct concern to each proprietor.

14.16 The Commission considers that where the valuation is on an unimproved value basis it would be desirable to give each proprietor, as well as the strata company, the right to object to or to appeal against the valuation.²⁹

14.17 It may also be suggested that giving a right of objection or appeal to proprietors would add to public expense because of the need to deal with numerous objections or appeals. However, the Commission doubts that the number of cases where such a right would be exercised would be great.³⁰ Individual proprietors would be unlikely to object or appeal if the strata company itself decided to do so. Only where a proprietor felt that the council was acting unreasonably in refusing to take this course³¹ would he be likely to do so himself. In any case objections or appeals could be dealt with together thus minimising the expense.

14.18 The Commission accordingly recommends that, in addition to the strata company, each proprietor should be entitled to object to or appeal against a valuation made on an unimproved valuation basis. The costs of so doing should be borne by the proprietor himself.

²⁷ In most cases this will be the proprietor of the lot: see, for example, *Local Government Act 1960-1982*, s 560(1) and the definition of "owner" in s 6 of that Act. Occasionally, however, it may be some other person, for example, a person in possession under a contract of sale: *ibid*.

²⁸ Para 14.4 above.

²⁹ The position of shareholders of a company is not analogous for this purpose to that of proprietors in a strata scheme. In the case of an ordinary company, it is the company, not the shareholders, which owns the land, whereas proprietors in a strata scheme own the common property as tenants in common. Further, unlike proprietors, shareholders are not liable to the rating authority for payment of the rates levied pursuant to the valuation.

³⁰ It must be remembered that the Commission is here only dealing with those cases where valuation is on an unimproved value basis. Where valuation is on a gross rental value basis the person liable to pay the rate levied on that basis should of course have the right of objection or appeal: para 14.15 above.

³¹ Or where there is no council in existence (para 10.11 above) and a proprietor is unable to arrange a meeting of proprietors to make the decision.

3. EXCESS WATER CHARGES

14.19 In the case of duplex and triplex strata schemes each lot will usually be supplied by the Metropolitan Water Authority with a separate water service. Each service will be metered. If the proprietor of a lot in a residential scheme uses more than the set allowance of water applicable to his lot³² no difficulty arises. The excess used by him is measured by the Authority and charged to him, and he alone is liable to the Authority for the amount involved.

14.20 In larger strata schemes³³ usually there will only be the one water service (and only one meter).³⁴ This service will be utilised by all lots in the strata scheme. As a consequence the question of payment for excess water does not in practice arise until the amount used exceeds the set allowance for each lot multiplied by the number of lots in the scheme. Where this occurs, and the Authority has not entered into a contract with the strata company to supply water to it,³⁵ the question of allocation of responsibility among proprietors for payment for the excess water involves practical difficulties.³⁶ Since it is not possible to determine the proportions in which the proprietors used water in excess of the set allowance, the Commission considers that it is reasonable for the strata company itself to be made liable to pay for the excess water. Such a provision would save the Authority some administrative costs³⁷ and normally would not increase those of the strata company to any significant degree. The Commission therefore recommends that where a residential strata scheme is serviced for water through one meter, the strata company should be made responsible for paying for any water used beyond that allowed by the set allowance.³⁸

14.21 In non-residential premises, water rates are levied on a gross rental value basis.³⁹ Where the scheme is serviced through one meter, the Metropolitan Water Authority does not charge for excess water unless consumption within the scheme exceeds an amount which is

³² Presently 150 kilolitres

³³ That is, schemes other than duplexes or triplexes.

³⁴ However, some larger strata schemes are so unlikely to exceed their allowance that the Authority does not consider it necessary to meter their service.

³⁵ If such a contract was entered into the strata company itself would be liable for the amount by which the allowance is exceeded.

³⁶ Allocation amongst proprietors in accordance with their unit entitlement (WA, s 21(5)) does not seem to apply, because the Authority has not used a valuation of the parcel made by the Valuer General in its assessment.

³⁷ It would, for example, save the Authority the inconvenience of entering into a special contract with the strata company.

³⁸ As payment under the Commission's recommendation would be made from the administrative fund, the proprietors will have contributed to the payment in proportion to their unit entitlement.

³⁹ Para 14.8 above.

calculated by reference to the aggregate of the rates paid by the proprietors. The same difficulties as those outlined in the previous paragraph can arise where the allowance is exceeded. For the reason given in that paragraph in regard to residential schemes, the Commission recommends that the strata company itself should be made liable to pay the excess water in the case of non-residential schemes also.

4. STATE ENERGY COMMISSION CHARGES

(a) Electricity

14.22 One of the most common problems that arise in strata schemes concerns the payment of electricity accounts. Where lots are equipped with separate master electricity meters there is no difficulty, because the State Energy Commission (the "SEC") separately contracts with the proprietor of each lot for the supply of electricity. However, many strata schemes in Western Australia, particularly the older ones, have only one master meter, with each lot having a subsidiary meter (more commonly known as a submeter).⁴⁰ Where this is the case and the building is not a duplex the SEC will only contract with the strata company and will not enter into a contract with the proprietor of a lot. As a consequence, the strata company is liable to the SEC for the payment of electricity accounts. In practice, when reading the master meter for the purposes of preparing an account, the SEC also reads the submeters.⁴¹ It then sends the submeter readings to the strata company with the account. The strata company calculates the liability to it of the various proprietors in respect of the account and sends them separate accounts.⁴²

14.23 Where a duplex has one master meter and a submeter, the proprietor whose lot has the master meter is the person who contracts with the SEC and hence is liable to it for the payment of the electricity supplied to the building. The SEC will supply him with the submeter reading. It will not send a separate account to the other proprietor. In practice, the proprietor with the master meter informs the other proprietor of the submeter reading and of

⁴⁰ A master meter is a meter installed by the SEC to measure the supply of electricity to premises. A submeter measures the electricity which has passed through the master meter and has been distributed to particular units in the premises.

⁴¹ Provided requirements prescribed by the SEC as to location of the submeters have been fulfilled.

⁴² The SEC permits the strata company to retain a certain amount from the sum otherwise payable to it as recompense for the company's work in collecting the amounts from the proprietors. The amount is calculated by multiplying the difference between the SEC's fixed charge for a master meter and a submeter by the number of submeters in the strata scheme.

his calculation of the amount payable on the basis of the reading to enable the other proprietor to pay his share.

14.24 Where a lot has been sold, the SEC will effect a reading of the submeter to enable the vendor's share to be calculated (although generally the SEC requires a request for the reading from an officer of the council of the strata company).

14.25 Comments received by the Commission indicate that the submeter system may put the strata company to expense and considerable inconvenience. The strata company is obliged to pay the account within a limited time and if it fails to do so, the SEC is entitled to discontinue the electricity supply to the whole strata scheme. Strata companies (particularly in larger developments) will often be forced to pay the account before all proprietors have paid their shares to the strata company. To do this the strata company will need to draw money from its administrative fund to meet the deficiency. It is then faced with the task of recovering the money from the defaulting proprietors.

14.26 The strata company is in a vulnerable position in this regard where the proprietor sells his lot. The strata company may not have been informed of the sale⁴³ but even if it had been and was able to arrange a reading of the submeter, the proprietor may be difficult to trace. In any event, the incentive for him to pay the strata company, once he has left the scheme, is not strong. Similar difficulties to those described can be experienced by the proprietor whose duplex unit has the master meter in relation to the proprietor or tenant of the other lot.

14.27 Before 1972 the SEC, motivated by safety considerations,⁴⁴ sometimes would not permit each lot to have a separate master meter and instead required the installation of one master meter and a submeter or submeters. Since 1972, the developer has had the option of having each lot equipped with a master meter. Provided installation complies with certain requirements,⁴⁵ the SEC is agreeable to supplying each lot with a master meter. This is so also

⁴³ Under WA, schedule, part I, by-law I(f), a proprietor must "notify the company forthwith upon any change of ownership or of any mortgage or other dealing in connection with his lot". The Commission understands that breach of the by-law is common.

⁴⁴ An example was a duplex, designed to look like a single house from the street, where the party wall did not extend to the roof. The SEC feared that if there were two master meters someone working in the roof might, thinking that the building was a normal house, turn off only one of them.

⁴⁵ For example, in the case referred to in the immediately preceding footnote, master meters are permitted if there is a single inlet service to a single board and the switches for both master meters are placed close together and appropriately marked so that it can be seen that both switches must be turned off to disconnect the power throughout the whole building.

where the building was originally constructed with only one master meter and it is desired to exchange the submeters for master meters. Formerly, the SEC would permit such an exchange only if it involved all submeters in the scheme. Now, however, the SEC will permit an individual proprietor to exchange a submeter for a master meter, provided installation requirements of the SEC are met⁴⁶ and the strata company consents.⁴⁷

(b) Gas

14.28 Where a proposed strata development is to be serviced by gas, the developer may at his option have all lots equipped with master meters to measure the gas used or have one master meter installed with each lot having a submeter.⁴⁸ Similar difficulties to those outlined in paragraphs 14.25 and 14.26 above can also be experienced in relation to gas where the lots are serviced by sub- meters. Unlike the situation with electrical submeters, usually there will be no cost to the proprietors if all the lots change from sub- meters to master meters.⁴⁹

14.29 Gas is charged for at a decreasing tariff in accordance with the amount used. An advantage in utilising the submeter system in a strata scheme is that the strata company can purchase the gas at a lower cost per unit than a proprietor purchasing gas for his lot alone. SEC officers have informed the Commission that generally new strata title developments serviced by gas have a master meter for each lot. It is SEC policy that a developer is required to equip the strata scheme with the same type of metering system for both electricity and gas. Thus it will normally not permit the scheme to operate on the submeter system in relation to gas while allowing each of the lots to be equipped with master meters for electricity.

(c) The Commission's recommendation

14.30 In the working paper the Commission sought views on appropriate arrangements between the SEC, the strata company and individual proprietors regarding the supply of, and payment for, electricity. Most of those who commented on this issue suggested that each

⁴⁶ One of these is that there be a separate board for the master meter.

⁴⁷ Any exchange is made at the expense of the proprietor or proprietors concerned.

⁴⁸ Where a proposed strata development is to be serviced by gas supplied by the Fremantle Gas and Coke Co Ltd, the company requires each lot to have its own master meter. The contract is between the lot occupier and the Fremantle Gas and Coke Co Ltd. Thus the difficulties associated with a master meter-submeter system do not arise.

⁴⁹ A charge will however normally be made if only some change to master meters.

proprietor should have a separate contract with the SEC. This would mean that the proprietor, and not the strata company, would be liable to the SEC.

14.31 The SEC, however, is opposed to this suggestion in so far as it relates to strata schemes where the lots are serviced by submeters.⁵⁰ It points out that it does not have control over the submeters which, unlike master meters, may be worked on by private contractors. The SEC can discontinue the power supply serviced by a master meter by removing the service fuse but to discontinue the supply serviced by a submeter, it would have to interfere with wiring which does not belong to it.⁵¹ Further, the SEC does not have a record of the area which a submeter serves. The SEC is also opposed to entering into a separate contract for the supply of gas to proprietors whose lots are serviced by submeters and points to the same reasons as it does in the case of electricity.

14.32 The Commission does not consider that it would be appropriate for it to make any recommendation in respect of SEC policy. No doubt the SEC will continue to monitor the situation and if technological or other advances make it feasible to adopt a system whereby proprietors with submeters can be dealt with individually, it will do so.

14.33 SEC officers have informed the Commission that in the case of electricity the cost of installing master meters for each lot in a new development is little more than the cost of installing one master meter and a number of submeters. In the case of gas, there is no additional cost in installing master meters instead of submeters in a new development. The Commission is informed that increasing numbers of new strata title developments are being constructed with master meters for the supply of electricity.

14.34 The Commission is of the view that the system of master meters and submeters is generally undesirable for strata schemes in that the body of proprietors is sometimes forced to pay the share of one proprietor in the SEC account rather than have power to the whole strata scheme discontinued. Such a situation creates disharmony. Further, the submeter system seems to run counter to the concept of strata titles which is that, as far as possible, each unit should be treated as a detached dwelling.

⁵⁰ Where the lots are served by master meters, the SEC already separately contracts with proprietors.

⁵¹ The wires leading from the master meter to a submeter are the property of the house owner, not the SEC.

14.35 It was for these reasons that the Commission gave consideration to recommending that new developments should be required to have a master meter in respect of electricity for each lot as a prerequisite to the registration of the strata plan.⁵² However, it decided against making the recommendation because under present SEC policy master meters for gas would also be required. This would deny the strata scheme the option of acquiring gas at the lower tariff offered for bulk purchases.⁵³

14.36 Problems associated with submeter systems are probably less acute now than formerly. As pointed out above, the SEC now permits submeters for electricity to be exchanged for master meters providing their installation is in accordance with its requirements.⁵⁴ Further, it appears that there is a greater tendency for developers to opt for a system involving only master meters. However, there may still be problems where existing schemes continue to have at least some proprietors with a submeter and in future cases where the developer has opted for a submeter system.

14.37 To assist the strata company in its collection of submeter accounts, the Commission recommends that the by-laws in part I of the schedule to the Act should be amended to empower the strata company to require all or any of the proprietors, tenants or occupiers of lots serviced by submeters to pay the strata company an amount up to, say, \$200 as security for the payment of submeter bills.

The by-law should require the strata company to pay the sum into an interest bearing account with a savings bank or building society with interest being credited to the account. The by-law should provide that any surplus proceeds of the account would be repayable when the depositor ceases to be a proprietor.

⁵² A number of commentators supported this proposal when it was advanced in the working paper, including the City of Canning, REIWA, WA Trustees and a strata company. The Commission was informed by officers of the SEC that, with some exceptions, the submeter system is forbidden in Victoria in relation to strata schemes, and is rarely used in other states.

⁵³ The SEC indicated to the Commission that it would be opposed to such a recommendation for the reason given in this paragraph.

⁵⁴ Para 14.27.

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

14.38 The Commission recommends that -

- (a) *Where the relevant rating authority levies rates on a gross rental value basis, the Valuer General should be required to value each lot separately and the liability of each lot for rates should be assessed accordingly.*
(paragraphs 14.5 and 14.8)
- (b) *The strata company should not continue to be liable to pay the amount of the rate levied on a lot where the proprietor defaults.*
(paragraph 14.13)
- (c) *In addition to the strata company, each proprietor should be able to object to or appeal against a valuation of the parcel where the valuation is on an unimproved value basis. Where the valuation of a lot is on a gross rental value basis, only the person liable to pay the rate should be able to object to or appeal against the valuation placed on it.*
(paragraphs 14.15 and 14.18)
- (d) *Where a strata scheme is serviced for water through one meter, the strata company should be liable to pay for any excess water.*
(paragraphs 14.20 and 14.21)
- (e) *The by-laws in part I of the schedule to the Act should be amended to empower the strata company to require all or any of the proprietors or occupiers of lots serviced for electricity or gas by submeters to pay the strata company a prescribed amount of money as security for the payment of submeter accounts.*
(paragraph 14.37)

CHAPTER 15

INSURANCE

1. THE PRESENT POSITION

(a) Insurance of the building

15.1 Special features apply to the insurance of a strata scheme which do not normally apply to insurance of detached dwellings erected on ordinary freehold land. If a lot is damaged or destroyed in a strata scheme, the interests of the other proprietors are also likely to be affected, either physically or because of the aesthetic damage to the scheme as a whole.

15.2 Accordingly, to protect the interests of the general body of proprietors, it is normally¹ desirable that a lot which has been damaged or destroyed be reinstated. The most satisfactory way of achieving this is to oblige the strata company to insure the building as a whole and, in the event of a claim, to apply the insurance money in reinstating the lot or lots affected. To require each proprietor separately to insure his lot and to apply the proceeds of the policy in reinstating the lot would be unlikely to be effective. First, it would be difficult to ensure that all proprietors complied with an obligation to insure their lots to their full replacement value. Secondly, even if such insurance is effected, it would be difficult to ensure that a proprietor whose lot was damaged or destroyed used the insurance money in rebuilding it.²

15.3 The Act accordingly obliges the strata company to insure and, in the event of a claim, to rebuild.³ This is also the approach in the strata titles legislation elsewhere in Australia and New Zealand.

¹ But see para 15.5 below.

² This would particularly be so if the lot is mortgaged. The mortgagee would normally wish to use the proceeds of the policy in paying off the mortgage debt and may then be unwilling to lend any further money to the proprietor for the purpose of rebuilding the lot.

A further argument in favour of insuring the building as a whole is that, except perhaps in a small development, the cost of so doing is much less than the aggregate cost of effecting separate insurances on each lot: Rath Grimes and Moore, 45. A representative of the Insurance Council of Australia has confirmed this in discussion with a member of the Commission.

³ WA, s 13(4)(c) & (f). It is the building or buildings shown on the strata plan which must be insured: *id*, ss 13(4)(c) and 3. S 13(5) provides that for the purpose of effecting such insurance the strata company is deemed to have an insurable interest to the replacement value of the building. In the absence of such a provision, the strata company would not be able to enter into a valid contract of insurance since it does not have a proprietary interest in the building and therefore no insurable interest in it: see E R H Ivamy, *General Principles of Insurance Law* (3rd ed, 1975), ch 5.

15.4 As the obligation to insure the building as a whole is designed to protect the interests of the proprietors, the Act exempts the strata company from this obligation if all proprietors so agree by unanimous resolution.⁴ This is also the pattern of strata titles legislation elsewhere in Australia, except that, in the case of New South Wales, an order of the Strata Titles Commissioner is also required.⁵ In New Zealand the obligation to insure is apparently absolute.⁶

15.5 If a strata building is extensively damaged, it may not be desirable to rebuild at all. In such a case the Act⁷ enables the proprietors by unanimous resolution, or the Supreme Court on application, to declare that the building is "destroyed".⁸ Once a notice to this effect has been lodged with the Titles Office the proprietors become entitled to the parcel as tenants in common in shares proportional to the unit entitlement of their lots.⁹ Any insurance money received by the strata company would be divided among the proprietors by court order.¹⁰ Alternatively, if some of the proprietors wish to rebuild the building, the Supreme Court may settle a scheme for the reinstatement of the building whether in whole or in part, the transfer of the interests of those proprietors whose lots have been wholly or partially destroyed to the other proprietors, the application of insurance money, the payment of money by the company or by the proprietors and the amendment of the strata plan.¹¹

(b) Risks against which the building must be insured by the strata company

15.6 The Act obliges the strata company to insure the building against fire and "such other risks as may be prescribed" unless the proprietors by unanimous resolution otherwise resolve.¹² No other risks have been prescribed.

⁴ For example, they might decide that in the circumstances it is advantageous to insure separately, as where both proprietors of a duplex block are eligible to insure at very cheap rates under the Defence Service Homes Insurance Scheme established under the *Defence Service Homes Act 1918-1980*(Cth).

⁵ NSW, s 83(2). In Queensland, only a special resolution is required to exempt the strata company from its obligation to insure the building: Qld, s 55.

⁶ *Unit Titles Act 1972-1981*(NZ), s 15(1)(b).

⁷ WA, s 19.

⁸ The effect of such a resolution or declaration is to cancel the strata plan: para 20.5 below.

⁹ WA, s 11(2).

¹⁰ Id, s 19(2) and (8). S 19(8) gives the Supreme Court power to wind up the affairs of the strata company and so to provide for distribution of the insurance money received by the strata company. A winding up order would be appropriate where the proprietors themselves unanimously resolve that the building is destroyed. Where the Court declares the building is destroyed, it may make an order for distribution of the insurance money under s 19(2): see para 15.29 below for the Commission's proposal to extend the Court's power as to distribution of the money.

¹¹ Id, s 19(3) and (4). See para 20.6 below.

¹² Id, s 13(4)(c).

(c) Other insurance to be taken out by the strata company

15.7 In addition to insuring the building against fire and prescribed risks, the strata company is required to insure against such other risks as the proprietors may from time to time determine by special resolution.¹³ Furthermore, the strata company must "effect such other insurance as it is required by law to effect".¹⁴ This would cover the case where the company employs a "worker" under the *Workers' Compensation and Assistance Act 1981*. Such an obligation cannot be avoided by a resolution of proprietors.

(d) Insurance of a lot by a proprietor

(i) Where strata company does not insure or underinsures

15.8 The Act provides that, where the strata company has not insured the building, or has insured it to less than its full replacement value, a proprietor may insure his lot to its replacement value or any difference there may be between the amount for which his lot is insured under the policy taken out by the strata company and the replacement value of the lot.¹⁵

(ii) Where a lot is subject to a mortgage

15.9 Where a lot is subject to a mortgage, the Act also expressly authorises a proprietor to effect a policy of insurance in respect of damage to his lot for the amount outstanding under the mortgage, notwithstanding that the strata company has insured the building to its replacement value.¹⁶ However, in the event of a claim arising under such a policy, payment is made to the mortgagee, not the proprietor.¹⁷ If the amount so paid is sufficient to discharge the mortgage, the insurance company is entitled to an assignment of the mortgage to secure

¹³ Id, s 13(4)(e). For example, the proprietors may determine that the strata company take out public liability insurance in respect of the common property (para 15. 27 below) or that the company insure the building in respect of other risks in addition to fire and prescribed risks.

¹⁴ Id, s 13(4)(d).

¹⁵ WA, s 17(3). For the purposes of this provision, the amount for which a lot is insured under a policy of insurance effected in respect of the building is determined by multiplying the value stated in the policy by the unit entitlement of the lot and dividing the product so obtained by the sum of the unit entitlement of all the lots in the building; id, s 17(4).

¹⁶ WA, s 17(1) and (3). S 17(3) covers the case where the building is insured for less than its replacement value or is uninsured.

¹⁷ WA, s 17(2) and (3)(b).

the amount paid.¹⁸ If the amount paid is insufficient to discharge the mortgage, the insurance company is entitled to a sub-mortgage of the mortgage.¹⁹

15.10 The object of this provision is to facilitate a proprietor obtaining finance through a mortgage over his lot while at the same time avoiding the dangers of "double insurance".²⁰ Where a person lends money on the security of another's property, the lender will normally make it a condition of the loan that he has first claim on any insurance money payable if the property is damaged or destroyed. Where a strata lot has been mortgaged, the insurance money collected by the strata company in respect of damage to a lot must normally be applied towards reinstating the lot.²¹ Therefore money payable under the policy effected by the strata company cannot be paid to the mortgagee. Although the mortgagee's security would be restored when the lot is reinstated, this could take a considerable time (particularly if the building has been extensively damaged) and meanwhile the mortgagee would have an impaired security. Without a provision such as that referred to in paragraph 15.9 above, many financiers could well be reluctant to lend money on the security of strata lots.

15.11 In fact, mortgagees of strata lots usually insist on the mortgagor effecting insurance over the lot for the amount secured by the mortgage.²² Accordingly the proprietor concerned not only contributes through the administrative fund to the cost of insuring the building as a whole but also has to meet the premiums on the policy taken out over his own lot. In contrast, the proprietor of a detached dwelling erected on ordinary freehold land who mortgages his title needs only one policy. This difference in the insurance requirements of freehold and strata titled property has been the subject of complaint by some proprietors of strata lots. However, the two situations may be distinguished: in the case of an ordinary freehold dwelling there is no problem in the mortgagee having first claim on the insurance money whereas, as explained above, the insurance money received by the strata company must normally go towards reinstating the building and not to mortgagees of individual lots. Fortunately, the premium rate on a mortgage policy will be small by comparison with the

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ If a proprietor could achieve both reinstatement of his lot through the insurance money received by the strata company and repayment of his mortgage, there could be an incentive for him to destroy the lot intentionally. Under this provision, however, all he would gain by so doing is a change in the identity of his mortgagee: Rath, Grimes and Moore, 46.

²¹ W A , s 13(4) (f) .This obligation is subject to W A , s 19: para 15.5 above.

²² G F Bugden, *New South Wales Strata Title Law and Practice*, (1979), para 10-500.

average contribution by each proprietor to the premium payable in respect of the insurance on the building.²³

(e) Contribution

15.12 An ancillary provision in the Act has the effect that a policy of insurance taken out by a strata company in respect of the building is not liable to be brought into contribution with any other policy of insurance save another policy taken out by the strata company in respect of the same building.²⁴ There is a corresponding provision²⁵ in regard to insurance taken out by a proprietor in the circumstances referred to in paragraphs 15.8 and 15.9 above. Thus, for example, where a proprietor has separately insured his lot for the amount of his mortgage neither the strata company's insurer nor the individual proprietor's insurer can refuse to make payment on the ground that the loss has been made up by the other insurer.

2. RECOMMENDATIONS

(a) Insurance of the building

(i) Replacement value

15.13 If the insurance policy which the strata company is required to take out in respect of the building is to be completely effective, it is necessary to ensure that the policy not only covers the value of the building itself, but also the costs associated with repair or replacement. Such costs would include those of removing the debris and the fees of the architect, surveyor and other persons whose services are necessary as an incident to the repair or replacement.

15.14 In inflationary times it is also necessary to ensure that the sum for which the building is insured takes into account the fact that the costs involved in effecting replacement will probably increase during the year covered by the premium.

²³ This is because in the event of a successful claim the insurer would eventually be repaid an amount equivalent to the insurance money on the termination of the mortgage: para 15.9 above.

²⁴ WA, s 13(9).

²⁵ WA, s 17(7).

15.15 The Commission accordingly recommends that in delineating the strata company's statutory obligations to insure the building to its replacement value, the expression "replacement value" should be defined to include -

- (i) the reasonable cost of the removal of debris necessarily incurred in the replacement or repair of the building ;
- (ii) the reasonable cost of architects', surveyors' and engineers' fees necessarily so incurred; and
- (iii) a reasonable estimate of the amount by which the costs involved in effecting the replacement (including those referred to in (i) and (ii)) will increase during the year.²⁶

15.16 In theory, the most desirable policy is one under which the insurer undertakes to replace the building without specifying a limiting amount. However, as far as the Commission is aware, this type of policy is presently unavailable to strata companies in Western Australia, although at least one insurer provides such policies in respect of single residential properties. The Commission recommends that the legislation should specifically provide for such a policy in case insurers decide to issue strata title policies on this basis. However, because of the present unavailability of such policies, the legislation should permit as an alternative the type of policy which limits the insurer's liability to an amount specified in the policy.²⁷

(ii) *The risks to be insured against*

15.17 The strata company must insure the building against fire and "such other risks as may be prescribed". As pointed out above, no other risks have yet been prescribed. There was general agreement amongst commentators on the working paper that additional risks should be prescribed, but there was no consensus as to what they should be.

²⁶ This is broadly the position in New South Wales (NSW, ss 82 and 83(1) and Queensland (Qld, ss 54 and 55). The model policy drafted by the Insurance Council of Australia contains an appropriate provision: see para 15.19 below.

All commentators on the issue, including the Insurance Council of Australia, the Local Government Association, the Commissioner of Titles and a number of councils of strata companies were of the opinion that the building should be insured to its full replacement value. Several of them expressed the view that "replacement value" should be defined to include costs of the type referred to in this paragraph.

²⁷ This is the position in New South Wales (NSW, s 82(2)) and Queensland (Qld, s 54(2)).

15.18 After considering the matter in the light of the comments, the Commission recommends that a strata company should also be required to insure the building against storm and tempest,²⁸ lightning, explosion and earthquake. Though fire is the major risk from a practical point of view, these other risks are not insignificant, and are ones against which a prudent householder in Western Australia would normally insure.

15.19 In certain circumstances, it may be desirable for a strata company also to insure the building against malicious damage, burst water pipes or tanks and indeed other risks as well. However, the Commission considers that this should be a matter for the decision of the strata company. In this regard it is to be noted that the Insurance Council of Australia has drafted a model policy covering residential strata units for use by insurance companies if they choose. The policy includes not only fire, storm and tempest (excluding damage by sea, flood or erosion), lightning, explosion and earthquake but also malicious damage, burst water pipes and tanks, impact by motor vehicles and falling trees.

15.20 Under the Act, the company is obliged to insure against "such other risks as the proprietors may from time to time determine by special resolution".²⁹ However, this does not mean that the strata company, acting through its council in the ordinary way, has no power to insure the building against other risks in the absence of such a resolution. The Commission recommends that this should be made explicit. To make the power effective, it would be necessary to provide that the strata company should be deemed to have an insurable interest in the building for the purpose of effecting insurance of the building against those risks. Such a provision already applies in respect of risks against which the strata company is obliged to insure.³⁰

(iii) *Proprietors' fixtures*

15.21 The present requirement to insure the building would include a requirement to insure every fixture and structure forming part of the building, including fixtures and structures which a proprietor has attached to a lot for his exclusive use and enjoyment (such as an expensive built-in bar).

²⁸ Excluding damage by sea, flood or erosion. As far as the Commission is aware, no insurance company in Western Australia includes such damage in its ordinary insurance policies. Insurance against damage by these events must be separately negotiated.

²⁹ WA, s 13(4)(e).

³⁰ Id, s 13(5).

15.22 Most commentators on the working paper considered it unfair that the strata company (that is, the general body of proprietors) should be required to pay the cost of insuring such fixtures. The Commission agrees and, following the New South Wales and Queensland legislation,³¹ recommends that the Act should exempt the strata company from the requirement of insuring such items.

15.23 Over time, some fixtures and fittings which were originally included in the lot at the time the strata plan was registered may require replacement. It would be unreasonable to exclude such replacement fixtures from the strata company's obligation to insure the building. Accordingly, the Commission recommends that the exclusion from the company's requirement to insure should not extend to fixtures which are merely replacements for those which were included in the lot when the plan was registered.

(iv) Exemption from the obligation to insure the building

15.24 In the working paper, the Commission raised the question whether the proprietors by unanimous resolution should continue to be able to exempt the strata company from the obligation to insure the building altogether or from insuring it against certain risks.³²

Nine commentators responded. All but one suggested that the exemption should be abolished.³³ Some suggested that the right to exempt should be vested only in the proposed Strata Titles Referee,³⁴ while others considered that the obligation to insure should be absolute.

15.25 The Commission has given careful attention to these views but has concluded that the present position should be retained. If all the proprietors are in favour of exempting the strata company, the Commission can see no reason why they should not be able to do so.³⁵

³¹ NSW, ss 82 and 83(1); Qld, ss 54 and 55.

³² Para 15.4 above.

³³ Those in favour of abolishing the exemption were the Local Government Association, the Commissioner of Titles, REIWA, the Insurance Council of Australia and two individuals. The Law Society was in favour of the present position.

³⁴ Chapter 19 below.

³⁵ For example, the proprietors may prefer to insure their lots individually (see footnote 2 on page 222 above) or even not to insure at all. Before deciding to vote in favour of exempting the strata company, proprietors should realise that insuring their lots individually may not afford them sufficient protection; for example damage to one lot could reduce the value of another by affecting the aesthetic appearance of the whole development.

15.26 However, the Commission considers that a proprietor who changes his mind (or a subsequent purchaser who was not a party to the decision not to insure the building) should have power to restore the obligation.³⁶ Accordingly, the Commission recommends that the Act should be amended to enable a proprietor, by serving written notice on the strata company, to reinstate the obligation of the strata company to insure against all the prescribed risks, or as the case may be, those nominated by him.³⁷ The strata company should also be required to inform every proprietor of the receipt of the notice.

(b) Public liability insurance

15.27 At present the strata company is obliged to insure in respect of damage to property, death or bodily injury occurring on the common property only if required to do so by special resolution.³⁸ The Commission regards this situation as unsatisfactory. The strata company has the duty to control and manage the common property and to properly maintain it.³⁹ The company could be liable for substantial damages if, for example, a visitor who was badly injured through some defect in the common property succeeded in an action against the company for failing to maintain it.⁴⁰ A majority of those who commented on this issue advocated that strata companies should be required to insure against public liability. The Commission agrees and accordingly recommends that, following New South Wales,⁴¹ section 13(4) of the Act should be amended to oblige the company to insure against such a risk for a sum of \$750,000 or such other amount as is prescribed.⁴² As in the case of insurance on the building, it should be possible for the proprietors, by unanimous resolution, to exempt the strata company from this obligation, but, in line with the Commission's recommendation in

³⁶ This is the position in the Australian Capital Territory and the Northern Territory: *Unit Titles Ordinance 1970-1975* (ACT), s 82(4), (5) and (6); *Unit Titles Ordinance 1975-1981* (NT), s 80(4), (5) and (6).

³⁷ The present Act is silent on the question of what would revive the strata company's obligation to insure. It could be argued that, since the obligation was removed by a unanimous resolution, only a unanimous resolution can do so. On the other hand, it could be argued that since the council of a strata company is required to act in accordance with a direction given at a general meeting of proprietors (by-law 4(1), part I of the schedule to the Act) an ordinary resolution is sufficient.

³⁸ WA, s 13(4)(e). As pointed out in para 15.20 above, the absence of a special resolution does not mean that the strata company has no **power** to effect such insurance.

³⁹ Id, s 13(4)(b) and (h).

⁴⁰ In a recent case in the Supreme Court of Victoria (*Black v The Body Corporate Strata Plan No 4303*, unreported, 1982), a visitor who had leant against a defective stair-rail on the common property and had fallen and badly injured himself succeeded in an action against the strata company. He was awarded \$576,000 damages. Fortunately, the strata company was insured for \$500,000 against such a risk. However the strata company would be obliged to pay the extra \$76,000, possibly requiring a special levy on proprietors to meet the payment.

⁴¹ NSW, s 84, *Strata Titles Act Regulations 1974*, r 61. There is a similar provision in Queensland (s 56) except that the amount is \$500,000. The Commission understands that the Queensland Government is considering a proposal to increase this amount.

⁴² This would permit the amount to be increased in line with inflation or other circumstances.

paragraph 15.26 above, the obligation should be reinstated if a proprietor gives notice to the strata company to that effect.

(c) Other matters

(i) Mortgage insurance

15.28 The Commission wishes to draw attention to the fact that the existing provisions relating to insurance by a proprietor of his lot to the amount owing under a mortgage over his lot⁴³ contain a technical defect. The provisions provide, inter alia, that if the amount paid by the insurer on a claim is insufficient to discharge the mortgage, the insurer is entitled to a sub-mortgage of the mortgage.⁴⁴ The reference to a sub-mortgage is inappropriate because the Western Australian *Transfer of Land Act 1893-1982* does not provide for sub-mortgages. The problem would be overcome by providing that the insurer should be entitled to have the mortgage transferred to himself and the mortgagee as tenants in common in undivided shares proportional to the amount paid by the insurer and the balance necessary to discharge the mortgagee's interest. This is the approach adopted in Queensland⁴⁵ where the legislative equivalent to the *Transfer of Land Act*⁴⁶ does not contain provision for a sub-mortgage.

(ii) Position of mortgagee on "destruction" of building

15.29 Under section 19(1) of the Act the Supreme Court may declare that the building is "destroyed". Such a declaration may be made whether or not the building is physically damaged. Under section 19(2) the Court may by order impose such conditions and give such directions as it thinks fit, including directions for the payment of money, for the purpose of adjusting as between the company and the proprietors and as between the proprietors themselves the effect of the declaration. If the declaration is made as a consequence of the physical destruction or damage of the building, it may be desirable for an appropriate part of any insurance money received by the strata company to be paid directly to the mortgagee of a lot instead of to the proprietor of that lot. However, it is not clear whether the Court can make such an order.⁴⁷ The Commission accordingly recommends that the Court be given express

⁴³ Para 15.9 above.

⁴⁴ WA, s 17(2) and (3).

⁴⁵ Qld, s 58(1)(c).

⁴⁶ *Real Property Act 1861-1981* (Qld).

⁴⁷ In spite of the fact that a registered mortgagee may make application under s 19(1) to the Court: s 19(5).

power to do so. This would protect a mortgagee who did not require the proprietor to take out insurance over his lot to the extent of the mortgage.⁴⁸ It would also protect an insurer who has become the mortgagee pursuant to section 17(2)(c) or (d) of the Act as a consequence of paying the original mortgagee the amount owing under the mortgage.

3. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

15.30 The Commission recommends that -

(a) *In delineating the strata company's statutory obligation to insure the building to its replacement value, the expression "replacement value" should be defined to include -*

(i) *the reasonable cost of removal of debris and of architects', surveyors' and engineers' fees; and*

(ii) *a reasonable estimate of the amount by which the cost of replacement will increase during the premium year.*

(paragraph 15.15)

(b) *The Act should specifically permit a strata company to take out either an insurance policy under which the insurer undertakes to replace the building without specifying a limiting amount or a policy which limits the insurer's liability to a specified amount.*

(paragraph 15.16)

(c) *The strata company should be required to insure the building against storm and tempest, lightning, explosion and earthquake, as well as fire.*

(paragraph 15.18)

(d) *The Act should be clarified so as expressly to empower the strata company to insure the building against other risks.*

(paragraph 15.20)

⁴⁸ Paras 15.9 to 15.11 above.

- (e) *The strata company should not be required to insure against loss or damage to proprietors' fixtures.*

(paragraphs 15.21 to 15.23)

- (f) *The present provision in the Act whereby the proprietors by unanimous resolution can exempt the strata company from the obligation to insure the building should be retained, but a proprietor should be able to reinstate the requirement by serving notice on the strata company.*

(paragraphs 15.25 and 15.26)

- (g) *The strata company should be required to take out public liability insurance for \$750,000 or such other amount as is prescribed. The proprietors should be able to exempt the company from this obligation by unanimous resolution, but a proprietor should be able to reinstate the requirement by serving notice on the strata company.*

(paragraph 15.27)

- (h) *The provision in section 17(2)(d) of the Act that where an insurer pays to the mortgagee of a lot an amount less than that owing under the mortgage the insurer is entitled to a submortgage of the mortgage should be replaced by a provision entitling the insurer to have the mortgage transferred to himself and the mortgagee as tenants in common in proportional shares.*

(paragraph 15.28)

- (i) *Where the Supreme Court declares that a building is "destroyed", the Court should be empowered to order that an appropriate part of the insurance money received by the strata company be paid directly to a mortgagee of a lot.*

(paragraph 15.29)

CHAPTER 16

TENANTS, RESIDENTS, OTHER OCCUPIERS AND VISITORS

1. TENANTS, RESIDENTS AND OTHER OCCUPIERS

(a) Unrestricted right to lease and to permit occupation or residence

16.1 The existing legislation imposes no restriction on the right of a proprietor to lease his lot. It also imposes no restriction on the right of a proprietor to permit others to occupy or reside in the lot. Thus, for example, a relative or friend could live in the lot with the permission of the proprietor during his absence overseas.

16.2 The Act, in fact, specifically provides that no by-law, or addition to, amendment or repeal of a by-law is capable of operating so as to prohibit or restrict any lease of, or other dealing with, a lot.¹ This provision is consistent with the underlying concept of the strata titles system that each strata lot should be able to be dealt with in the same manner as ordinary freehold land. As a result, the strata company is unable, for example, to require that prospective tenants, occupiers or residents be approved by it.

16.3 A reference in this chapter to an occupier or resident is not intended to refer to a proprietor who is an occupier of his lot or residing in it.

(b) Complaints about conduct of tenants

16.4 A common complaint made to the Commission by resident proprietors concerned the conduct and attitude of tenants occupying other lots in the same strata scheme. Allegations made against tenants ranged from disregard of the strata company's by-laws to damage to common property, rowdiness and failure to co-operate in maintaining the common property. One real estate agent specialising in the management of strata schemes commented that in his experience "tenants have, in general, a completely apathetic attitude towards owner/occupiers, particularly in relation to rubbish disposal, parking and noise and as regards contribution of labour towards upkeep of the common property".

¹ WA, s 15(3).

16.5 No doubt tenants often do not take the same personal interest in a strata scheme as resident proprietors. Unlike the latter, tenants do not have a proprietary interest in the scheme, and often do not intend to occupy the unit for a long period. Not unexpectedly the standard of co-operation of some tenants with the strata company and other residents in the scheme falls below that which the resident proprietors consider acceptable.

(c) Control of tenants, residents and other occupiers

16.6 The controls which strata companies can exercise over tenants, residents and other occupiers are very limited. Thus, unlike proprietors, they are not at present bound by the by-laws of the strata company.² Whilst by-law 1(e) in part I of the schedule to the Act provides that a proprietor must not permit his lot to be used in such a manner or for such a purpose as causes a nuisance to an occupier of another lot or his family, there are obvious difficulties in attempting to control the activities of an occupier or resident solely through the proprietor and, in any case, the provision is restricted to acts constituting a nuisance.³ Furthermore, none of the provisions in the Act are expressly applied to tenants, residents and other occupiers although no doubt in carrying out its statutory duty⁴ to control and manage the common property the strata company could take proceedings against such a person in respect of any activity relating to the common property which amounted to a nuisance.⁵

16.7 It is not clear whether a mortgagee in possession is bound by the by-laws of the strata company.⁶

² Only the strata company and proprietors are bound by the by-laws: WA, s 15(6). This, of course, is a different question from whether the terms of a particular by-law are expressed to apply to tenants, residents and other occupiers as well as to proprietors. None of the by-laws in the schedule to the Act apply in their terms to the former. In paras 16.19 to 16.21 below, the Commission recommends that certain of these by-laws should be amended to include tenants, residents and other occupiers. However, even if they were so amended they would still not bind them in the legal sense unless WA, s 15(6) was amended so as to do so.

³ Keeping an animal in the lot, for example, may not constitute a nuisance and yet be contrary to by-laws binding proprietors.

⁴ WA, s 13(4)(b).

⁵ *The Proprietors – Cavil Court Building Units Plan No 48 v Smith and Another*, reported G F Bugden, *New South Wales Strata Title Law and Practice* (1979), ¶ 30-033

Depending on the circumstances, the local authority, or proprietors affected, can take action against a rowdy occupant or resident under the *Noise Abatement Act 1972-1981*.

⁶ A mortgagee in possession is not the legal owner of the lot and thus would not be a "proprietor" within the meaning of the Act: para 20.2 below.

2. RECOMMENDATIONS AS REGARDS TENANTS, RESIDENTS AND OTHER OCCUPIERS

(a) Right to lease, or to permit occupancy or residence

16.8 In the working paper, the Commission invited comment on whether the strata company should have control over a proprietor's power to lease his lot. Of the twenty-two commentators on this question, the overwhelming majority⁷ opposed the suggestion and favoured retention of the present position. The Commission agrees. As mentioned in paragraph 16.2 above, the Act is designed to create a form of title which, as far as possible, enjoys the same advantages as ordinary freehold title. This would include the unfettered right of the owner to transfer, lease or otherwise deal with his lot.⁸ For the same reason the Commission considers that the strata company should have no control over a proprietor's right to permit others to occupy or reside in his lot.⁹

(b) By-laws to bind tenants, residents and other occupiers

16.9 Although it would be undesirable to limit a proprietor's power to lease his lot, to permit occupancy of it or to allow others to reside in it, the Commission considers that tenants, occupiers and residents should be bound to comply with the by-laws of the strata scheme. Such an extension would result, for example, in a tenant, sub-tenant or purchaser in possession under an agreement for sale of a lot being bound to comply with the by-laws. Members of a proprietor's or tenant's family residing in the lot would also be bound, as would those living in the lot with the consent of the proprietor or tenant. However, a person staying in the lot on a temporary basis, such as a weekend visitor, would not be.¹⁰

16.10 It was apparent that those who commented on this issue in response to the Commission's working paper were of the view that the by-laws should bind tenants,

⁷ Seventeen, including the Law Society, REIWA, the Local Government Association, councils of strata companies and proprietors. Of the five in favour, four were individual proprietors and one was a council of a strata company

⁸ The unfettered power of disposition is one of the main reasons why financial institutions are prepared to lend money on the security of the title (cf home unit schemes under the purple title system: para 2.2 above).

⁹ See para 16.17 below for a discussion of the question whether there should be power to determine a particular tenancy or occupancy in certain circumstances.

¹⁰ Such a person would not be "a resident": 15 Halsbury, *Laws of England*, (4th ed 1977), para 415.

residents¹¹ and other occupiers, as well as the strata company and proprietors.¹² The Commission agrees and recommends accordingly.

16.11 As a tenant, resident or other occupier can be affected by the failure of others to comply with the by-laws, the Commission recommends that they should also be able to enforce the by-laws against the strata company, the proprietors, tenants, residents and other occupiers.¹³

16.12 The extension to occupiers in the previous two paragraphs would include a mortgagee in possession so that such a person would be bound by the by-laws and also able to enforce them.¹⁴

16.13 The recommendations in paragraphs 16.10 and 16.11, if implemented, would not mean that the by-laws set out in the schedule to the Act¹⁵ and which are at present expressed to apply to proprietors would automatically apply also to the others referred to in those paragraphs, nor is it desirable that they should. Some of these by-laws impose duties which are only appropriate to proprietors. One example is the duty to notify the strata company of a change of ownership, mortgage or other dealing in connection with the lot.¹⁶ Implementation of the recommendations would, however, mean that any by-laws which are expressed to apply to tenants, residents and other occupiers do legally bind them.¹⁷

16.14 Although the Commission does not propose a statutory obligation in this regard, it suggests that strata companies should arrange for a copy of the by-laws¹⁸ to be given to incoming tenants, residents and other occupiers as a matter of course. A number of solicitors in New South Wales who are experienced in the practical working of the strata titles legislation in that State have informed the Commission that in many cases non-compliance

¹¹ In New South Wales and Queensland, the strata company, a proprietor, a mortgagee in possession, a lessee and an occupier are all bound by the by-laws: NSW, s 58(5); Qld, s 30(5).

¹² Some commentators went further and suggested that the by-laws should also bind casual visitors. See para 16.22 below where this suggestion is discussed.

¹³ In New South Wales and Queensland the strata company, a proprietor, a mortgagee in possession, a lessee and an occupier are all able to enforce the by-laws: NSW, s 58(5); Qld, s 30(5).

¹⁴ This is the situation in New South Wales and Queensland: *ibid*.

¹⁵ Or any by-laws made by the strata company.

¹⁶ WA, schedule, part I, by-law 1(f).

¹⁷ Some strata companies have made by-laws which are expressed to apply to occupiers and residents.

The Commission's recommendations as to which of the present by-laws in the schedule to the Act should be re-drafted so as to apply to tenants, residents and other occupiers are contained in paras 16.19 to 16.21 below. The question of enforceability of the by-laws is dealt with in chapter 19.

¹⁸ Including any directions of the council (eg as to disposal of garbage) made pursuant to a by-law.

with by-laws by tenants resulted not from any deliberate intention to defy the by-laws but merely because they were unaware that the by-law in question existed. Once the by-laws were drawn to their attention tenants usually willingly complied.

(c) Compliance with by-laws to be a term of lease

16.15 The Commission also recommends that, following New South Wales and Queensland,¹⁹ a lease of a lot or common property should be deemed to contain an agreement by the lessee to comply with the by-laws of the strata company. All commentators on this issue were in favour of such a provision. Some real estate agents apparently already include such a clause in standard tenancy agreements for strata title lots.

(d) Landlord's duty in relation to compliance

16.16 During the course of the project, a number of proprietors complained to the Commission that other proprietors in their schemes who had leased their lots had shown little interest in seeing that their tenants complied with the by-laws. It could accordingly be expected that in some cases the recommendation made in the previous paragraph would not of itself be effective in achieving its purpose. The Commission considers that a proprietor should have a responsibility in this regard and accordingly recommends that a provision should be inserted in the Act requiring a proprietor to take all reasonable steps to ensure that a tenant of his lot complies with the by-laws. The provision should extend to a resident and any other occupier of the lot.

(e) Right to terminate lease or right of occupancy

16.17 It has been suggested to the Commission that, although it may be inappropriate to empower the strata company to exercise direct control over a proprietor's power to lease or permit others to occupy his lot, there may be a case for empowering a judicial tribunal to terminate a lease, or right of occupancy, where it is shown that the conduct of the tenant or occupier has been below an acceptable standard. To give a tribunal this power would mean that a lease or right of occupancy of a strata lot could be terminated otherwise than by the proprietor, a situation which does not exist in the case of land with ordinary freehold title. In

¹⁹ NSW, s 58(4); Qld, s 30(4).

the Commission's view the need for such a departure from the law governing other leases or rights of occupancy has not been demonstrated at this stage. In this chapter the Commission makes recommendations designed to give a strata company more effective control over non-proprietors. Later in the report, the Commission recommends the establishment of the office of Strata Titles Referee to which a strata company can apply for appropriate orders.²⁰ These recommendations, if implemented, will give the strata company a degree of control over non-proprietors which at present does not exist. If experience in the operation of these provisions shows that the controls are not adequate or working satisfactorily, consideration could then be given to enacting further provisions, including empowering a judicial tribunal to terminate a lease or right of occupancy of a lot.

3. BY-LAWS IN EXISTING SCHEDULE WHICH SHOULD APPLY TO TENANTS, RESIDENTS AND OTHER OCCUPIERS

16.18 The working paper invited comment on which by-laws in the existing schedule to the Act should be amended to apply to tenants, residents and other occupiers as well as proprietors. All those who commented were of the view that by-laws regulating conduct should be so applied. The Commission agrees. This would assist the strata company in the "control, management, use and enjoyment...of the parcel".²¹

16.19 In the Commission's opinion, only three of the clauses in by-law 1 of part I of the schedule can appropriately be applied to tenants, residents and other occupiers.²² The first is clause (a) which obliges the proprietor to permit the strata company to enter on his lot for the purpose of inspecting it, maintaining the common property and ensuring that by-laws are being observed. The Commission has already made recommendations in respect of this clause.²³ The others are (d) and (e) of the by-law, which provide that a proprietor must:

²⁰ Para 19.28 below.

²¹ WA, s 15(1). In this chapter, the Commission only deals with the by-laws in the existing schedule to the Act. In para 20.40 below, the Commission recommends the enactment of a set of possible additional by-laws governing conduct within a strata scheme which a strata company could adopt if it so chose.

²² The obligations of a proprietor under by-law 1 which the Commission considers should not be extended to others are the duties to -

- (i) carry out work which has been ordered by a public or local authority in respect of his lot and pay the rates, taxes, charges, outgoings and assessments payable in respect of the lot;
- (ii) repair and maintain his lot; and
- (iii) notify the strata company upon any change of ownership or of any mortgage or other dealing in connection with the lot :

WA, schedule, part I, by-law 1, clauses (b), (c) and (f).

²³ Para 9.31 above

- “(d) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors or the members of their families or visitors ;
- (e) not use his lot or permit it to be used in such manner or for such purpose as causes a nuisance to any occupier of a lot (whether a proprietor or not) or the family of such occupier”.

The Commission recommends that the duties imposed on proprietors by these clauses should also be applied to tenants, residents and other occupiers.²⁴

16.20 By-law 1 of part II of the schedule to the Act provides as follows:

“A proprietor shall not -

- (a) use his lot for any purpose that may be illegal or injurious to the reputation of the building;
- (b) make undue noise in or about any lot or common property; or
- (c) keep any animals on his lot or the common property after notice in that behalf from the council.”

These provisions regulate a proprietor's activity on the parcel and there is no reason why tenants, residents and other occupiers should not be subject to the same provisions. The Commission recommends accordingly.²⁵

16.21 By-law 2 of part II of the schedule to the Act provides that where the purpose for which a lot is intended to be used is shown expressly or by necessary implication on or by the registered strata plan, a proprietor may not use his lot for any other purpose or permit it so to be used. Although this clause would enable a strata company or proprietor to take proceedings against a proprietor whose lot was being used by an occupier or resident for a non-designated purpose, it seems desirable that proceedings should be able to be taken directly against the actual occupier or resident. The Commission accordingly recommends that the by-law should

²⁴ It would also be desirable to further amend clause (d) to include tenants, occupiers, members of their families and visitors among the class whose use and enjoyment of the common property is not to be unreasonably interfered with.

²⁵ New South Wales, Queensland and New Zealand have provisions with similar application to that recommended by the Commission: NSW, schedule 1, by-laws 12 and 27; Qld, third schedule, by-laws 21, 10 and 20; *Unit Titles Act 1972-1980* (NZ), third schedule, clauses (a), (b) and (c).

be amended so that tenants, residents and other occupiers as well as proprietors are bound by it.²⁶

4. VISITORS

16.22 Some commentators on the Commission's working paper suggested that by-laws as to conduct should also apply to visitors. However, the Commission considers it undesirable to go so far. Such persons could not be expected to be aware of the relevant by-laws and, as a practical matter, it would be very difficult to enforce the by-laws against them. There was, however, strong support from commentators for a by-law being added to those contained in part I of the schedule to the Act to oblige proprietors, tenants, residents and other occupiers to take all reasonable steps to ensure that their visitors do not behave in an unreasonable manner. The Commission agrees with this proposal and recommends that it be adopted. A suitable provision would be along the lines of by-law 19 in schedule I of the New South Wales *Strata Titles Act 1973-1981*, which provides that:

" A proprietor or occupier of a lot shall take all reasonable steps to ensure that his invitees do not behave in a manner likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or of any person lawfully using common property."

However, the Commission considers that the duty should be expressly imposed on and be for the benefit of residents²⁷ and tenants as well as proprietors and occupiers and that the word "visitors" should be used instead of invitees.²⁸ The provision would complement by-law 1(d) which obliges proprietors to use the common property in such a way as not to interfere unreasonably with the use and enjoyment thereof by other proprietors, their families or their visitors.

²⁶ See, however, para 4. 9 above where the Commission recommends that this by-law should be repealed as far as future schemes are concerned.

²⁷ It is not clear whether "occupier" in the New South Wales by-law includes all residents, for example, a member of a proprietor's family.

²⁸ "Invitees" may only be persons who come on the parcel with a proprietor's consent on business in which the proprietor and they have a common interest: see *Pearson v Lambeth Borough Council* [1950] 1 All ER 682, 688 per Asquith LJ. The express extension to visitors will ensure that the duty relates to all persons who come onto the parcel with the express or implied consent of a proprietor: *ibid*.

5. PARKING

(a) Present position

16.23 It is evident from submissions received by the Commission that parking of vehicles in a manner which inconveniences people living in the strata scheme and parking in breach of by-laws made by the strata company are of major concern to those living in strata schemes. Because of the special concern expressed by commentators in relation to this problem, and because allegations of improper parking have been made not only about tenants and visitors but also about proprietors, the Commission has decided to discuss the matter separately.

16.24 In some districts, it is an offence to park on privately owned land without the consent of the owner or person in possession of the land. Section 86(2) of the *Road Traffic Act 1974-1982* provides that it is an offence to park in this way -

- (a) in a parking region constituted under the *City of Perth Parking Facilities Act 1956-1981*; or
- (b) in an area which has been prescribed under section 86(1) of the *Road Traffic Act*.²⁹

All privately owned land within the district of the City of Perth is included in the parking region constituted under the *City of Perth Parking Facilities Act 1956-1981*.³⁰ However, no privately owned land has been prescribed under section 86(1) of the *Road Traffic Act 1974-1981*.³¹

16.25 Pursuant to power granted to it under the *City of Perth Parking Facilities Act 1956-1981*,³² the City of Perth has made a by-law³³ which provides that:

²⁹ The penalty for a first offence is ten dollars and for a subsequent offence, twenty dollars. Where the parked vehicle causes or is likely to cause an obstruction or danger to traffic, a patrolman, or the owner or the person in possession of the land -

- (i) may direct the driver or person in charge of the vehicle to remove it; or
- (ii) where no-one appears to be in charge of the vehicle may remove the vehicle from the place where it is parked: *Road Traffic Act 1974-1982*, s 86(3).

³⁰ S 20 and *City of Perth Parking Facilities Act (Constitution of Parking Regions) Regulations*, schedule.

³¹ The only land prescribed under s 86(1) is the Police and Traffic Complex, Henderson Street, Fremantle.

³² S 21(1)(ka).

"No person shall stand a vehicle or permit a vehicle to stand on land which is not a road or parking facility unless with the consent of the owner or person in occupation of such land."

In practice, the City of Perth takes action under this by-law and not under section 86(2) of the *Road Traffic Act 1974-1982*. A number of other local authorities³⁴ have made by-laws in similar terms under the power conferred by section 231(2)(na) of the *Local Government Act 1960-1982*.³⁵

16.26 Where a by-law of the type referred to in the previous paragraph has been made, a person who has parked a vehicle on the common property of a strata scheme without the consent of a proprietor or of the strata company is guilty of an offence. The same comment would apply in respect of section 86(2) of the *Road Traffic Act 1974-1982*.³⁶ However, it is not clear whether a proprietor or a visitor of a proprietor who parks a vehicle on common property in a position which contravenes a parking by-law of the strata company is guilty of an offence. In any event in both cases, local authorities would not, as far as the Commission has been able to ascertain, take any action against the driver of the vehicle. They appear to regard these situations as problems of a domestic nature in which they should not get involved.

16.27 The remedies presently available to enforce rights under the *Strata Titles Act*, namely damages or injunction, are obviously impractical in relation to parking.

(b) Recommendations

16.28 In its working paper the Commission raised the question of how by-laws of strata companies relating to parking should be enforced. Of the twenty-one commentators who

³³ By-law 43 of the City of Perth Parking Facilities By-laws. The modified penalty for breach of By-law 43 is \$25. If a strata company wishes the City of Perth to act under this by-law, it must nominate a person to make complaints with the Duty Inspector. That person must be present when an inspector arrives pursuant to a complaint, must point out the vehicle concerned and sign a certificate authorising the issue of an infringement notice.

³⁴ For example, the City of Subiaco.

³⁵ A local authority may also make a by-law defining the circumstances under which a vehicle trespassing on private land in its district may be removed by an inspector, a member of the Police Force or a person authorised by the Council: *Local Government Act 1960-1982*, s 231(1) and (2)(o). The *City of Perth Parking Facilities Act 1956-1981* empowers the Council of the City of Perth to make similar by-laws, with the approval of the Minister: ss 5, 20 and 21(1).

³⁶ It also seems that the owner of land upon which the plaintiff has wrongfully parked his car is entitled to remove it to the roadside: N E Palmer, *Bailment* (1979), 391 and 392.

responded on this issue, twelve maintained that the *Road Traffic Act 1974-1982* should be amended to make it an offence to park a vehicle on common property in contravention of the by-laws of the strata company.³⁷ The former Road Traffic Authority, however, informed the Commission that it did not have the manpower to enforce such a provision and the Commission believes that this would also be the case with some local authorities.

16.29 The Commission has decided not to recommend that the *Road Traffic Act 1974-1982* should be amended in the manner suggested in the immediately preceding paragraph. It is open to a local authority to make a by-law under section 231(2)(na) of the *Local Government Act* prohibiting parking contrary to strata company by-laws, but the Commission considers that whether local authorities enter this area is something which should be left to them to decide.

16.30 The Commission makes two recommendations in this report which should improve the position of proprietors and strata companies in relation to parking. First, it has recommended in paragraph 16.10 above that by-laws should bind tenants, residents and other occupiers as well as proprietors.

16.31 Secondly, in chapter 19 the Commission recommends the appointment of a Strata Titles Referee with power to make orders with respect to breaches of by-laws. This would include by-laws relating to parking. Three commentators on the working paper, including REIWA,³⁸ suggested that proceedings before such a referee would be the most appropriate method of enforcing such by-laws.

16.32 Proprietors, tenants, residents and other occupiers would be within the Referee's jurisdiction but visitors and trespassers would not. To assist strata schemes in relation to parking by visitors, the Commission recommends that a by-law be added to those contained in part 1 of the schedule to the Act obliging proprietors, tenants, residents and other occupiers to take all reasonable steps to ensure that their visitors comply with the by-laws of the strata company relating to the parking of motor vehicles.

³⁷ The twelve commentators included the Law Society, two councils of strata companies and a number of unit owners.

³⁸ The other two commentators were a unit owner and a local authority town planning officer.

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

16.33 The Commission recommends that -

(a) *The by-laws of a strata company should bind tenants, residents and other occupiers as well as the strata company and proprietors.*

(paragraph 16.10)

(b) *Tenants, residents and other occupiers should be able to enforce the by-laws, as well as the strata company and proprietors.*

(paragraph 16.11)

(c) *The lease of a lot or common property should be deemed to contain an agreement by the lessee to comply with the by-laws of the strata company.*

(paragraph 16.15)

(d) *A proprietor should be required to take all reasonable steps to ensure that a tenant, a resident and any other occupier of the lot complies with the by-laws.*

(paragraph 16.16)

(e) *The by-laws in the schedule to the Act which should be applied to tenants, residents and other occupiers should be those relating to -*

(i) *unreasonable interference with the use and enjoyment of common property;*

(ii) *the creation of a nuisance;*

(iii) *the use of the lot for any purpose which may be illegal or injurious to the reputation of the building;*

(iv) *the making of undue noise;*

(v) *keeping animals; and*

(vi) *the prohibition against use of the lot in a manner contrary to the purpose shown on the strata plan as that for which the lot is intended to be used.*

(paragraphs 16.19 to 16.21)

(f) *A by-law should be added to those contained in part I of the schedule to the Act obliging proprietors, tenants, residents and other occupiers to take all reasonable steps to ensure that their visitors do not behave in a manner likely to interfere with peaceful enjoyment of another lot or common property.*

(paragraph 16.22)

(g) *A by-law should be added to those contained in part I of the schedule to the Act obliging proprietors, tenants, residents and other occupiers to take all reasonable steps to ensure that their visitors comply with the by-laws of the strata company relating to the parking of motor vehicles.*

(paragraph 16.32)

PART IV: PROTECTION OF PURCHASERS

CHAPTER 17

SALE OF LOTS

1. ISSUES CONSIDERED IN THIS CHAPTER

17.1 In the working paper, the Commission canvassed various measures for the protection of purchasers of strata title property. Specifically, the Commission discussed -

- * whether vendors of strata lots, or proposed lots, should be required to provide prospective purchasers with certain information concerning the operation of the strata scheme or proposed scheme;¹
- * whether the provisions of Part III of the *Sale of Land Act 1970-1982* should be extended to strata lots;²
- * whether any further financial safeguards were necessary to protect persons who agree to purchase lots before the strata plan is registered.³

These matters are considered below.

2. INFORMATION REQUIRED TO BE PROVIDED TO PROSPECTIVE PURCHASERS

17.2 Some of the most common problems facing purchasers of strata title property arise from ignorance of the basic rights and liabilities attaching to strata lots. Submissions to the Commission indicate, for example, that prospective purchasers often do not know they will be bound by the strata company by-laws, that they will be required to pay an administrative fund levy or that a concept known as unit entitlement plays an important part in determining the amount of the levy as well as other matters.⁴

¹ Working paper, paras 33.14 to 33.18.

² Id, paras 33.7 to 33.13.

³ Id, paras 33.1 to 33.6.

⁴ Para 12.1 above.

17.3 In the working paper, the Commission asked whether vendors of lots should be required to inform intending purchasers of some of the more important details of the strata scheme. The majority of those who commented on the issue were of the view that there should be such a requirement. These included the Local Government Association, the Institution of Surveyors, the Associated Banks in WA, two councils of strata companies and a number of unit proprietors.⁵ Several commentators, however, argued that no special requirements should be imposed. The Law Society, for example, argued that a vendor of a strata lot should not be obliged to give any further information than he would be required to provide if the property sold were a detached dwelling on ordinary freehold land. In a similar vein, the Owners of Continental Court maintained that the onus should be on the purchaser to make enquiries and the Urban Development Institute contended that it should be left to the parties to include provisions in the contract of sale to protect themselves.⁶

17.4 Since the working paper was issued, Queensland has enacted certain notice requirements in its *Building Units and Group Titles Act 1980-1981*. By section 49(2), the original proprietor (which includes the person who will become the original proprietor upon registration of a proposed strata plan) is required to give to the purchaser of a lot or of a proposed lot a statement in writing which must:

- "(a) clearly identify the lot or proposed lot to which the statement relates;
- (b) state the names and addresses respectively of the original proprietor and the purchaser ;
- (c) set out or be accompanied by particulars of -
 - (i) the [unit] entitlement of every lot and the aggregate [unit] entitlement;
 - or

⁵ REIWA argued that it should be obligatory for the vendor to disclose to the purchaser the information referred to in s 13(8) of the Act, i.e. the situation in regard to contributions due or payable to the administrative fund and the amount of any rate or tax paid by the strata company on behalf of the vendor but not recovered by it. As to the purchaser's present ability to obtain this information, see paras 13.3 and 13.11 above.

⁶ The Institute drew attention to the fact that what is now clause 14 of the 1982 Revision of the Law Society's *General Conditions for the Sale of Land* contains some provisions of this nature which directly relate to sales of strata lots and if the clause is adopted by the parties in their agreement they can add further provisions of their own. The other commentators who saw no need for a special notice requirement were the Real Estate Manager of Dalgety Real Estate and the Western Australian Real Estate Settlement Association. These two commentators referred (as did the Law Society in its comment) to the fact that a purchaser is usually entitled to deliver requisitions on title. However, a requisition is a demand that some missing element in the proof of title be supplied or some obscurity in such proof be explained. A number of the matters which the Commission in paras 17.7 and 17.8 below recommends should have to be disclosed to the purchaser do not relate to title.

- (ii) the proposed [unit] entitlement of every proposed lot and the proposed aggregate [unit] entitlement;
- (d) set out or be accompanied by details of -
 - (i) any management agreement that the original proprietor has entered into in respect of the [strata] plan or proposed [strata] plan; and
 - (ii) any existing agreement for service or maintenance of the common property or any part thereof ,
 including the terms and conditions of that agreement and the estimated costs thereof to the proprietor of each lot;
- (e) set out or be accompanied by the by-laws in force in respect of the [strata] plan or the proposed by-laws in respect of the proposed [strata] plan;
- (f) state the date on which the statement is given; and
- (g) be signed by the original proprietor or on his behalf by a person authorised in writing by the original proprietor in that regard."

17.5 The Commission is of the opinion that a requirement broadly along the lines of the Queensland Act is warranted. The developer (that is, the original proprietor or the person who will become the original proprietor upon registration of the strata plan) is in a position himself to create some of the obligations and rights which will bind or benefit the purchaser when he becomes a member of the strata scheme. For example, initially at least, the developer is able to grant exclusive use and enjoyment of particular areas of the common property to the proprietor of a particular lot,⁷ to amend the by-laws of the strata company,⁸ and to engage a managing agent for a fixed term.⁹ Where a person purchases a lot shortly after registration of the strata plan, most of this information, in practice, will often only be available from the developer.¹⁰ Where the strata plan has not been registered, the developer will be the purchaser's only source of information as to what he proposes. In any event, unlike the purchaser of a detached dwelling on ordinary freehold land, the purchaser of a strata lot is

⁷ Paras 5.7 and 5.10 above. Under the Commission's recommendations, a unanimous resolution would be required for such a grant: para 5.11 above. However, so long as the developer is the proprietor of all the lots he can himself pass such a resolution.

⁸ So long as the developer is the proprietor of all the lots, he can himself pass the unanimous resolution necessary to amend the by-laws in part I of the schedule to the Act: WA, s 15(2). While his voting power remains sufficient to ensure the passing of a special resolution, he could have the by-laws in part II amended: WA, schedule, part I, by-law 9.

⁹ Such an appointment can be made by the council of the strata company: paras 20.9 and 20.18 below. Thus the developer while the proprietor of all the lots would be the sole member of the council and in that capacity could appoint a managing agent.

¹⁰ In respect of the amendment of the by-laws in part I of the schedule to the Act, the required unanimous resolution may have been passed but notification of the by-law not yet lodged at the Titles Office pursuant to WA, s 15(4). A similar situation could occur in respect of a grant of exclusive use: paras 5.6, 5.10 and 5.11 above. Management agreements are not lodged at the Titles Office.

buying into a scheme involving the participation of other members of the strata scheme and the Commission considers that it is reasonable that before entering any contract to purchase the lot he be informed by the developer of matters which will be important in determining his rights and liabilities as a participant in the scheme. The Commission accordingly recommends that developers be required to give prospective purchasers written notice of certain details of the strata scheme¹¹ before they enter into a contract to buy a strata lot.

17.6 The requirement of a statement in writing should not unduly burden the developer (that is, the original proprietor). However, the Commission believes that subsequent proprietors would find it more burdensome to comply with the requirement. It is also of the view that there is not the same need for information to be given to purchasers who are dealing with individual vendors rather than the developer. Prospective purchasers from existing proprietors will usually be in a better position than initial purchasers to inform themselves of the true position¹² and the Commission is of the view that the matter can be left to the parties to be dealt with as a matter of contract.¹³ For this reason the Commission has decided not to recommend that the statement in writing requirement extend to vendors other than the original proprietor.

17.7 The Commission has reviewed various items of information in deciding what matters should be included in the notice, Subsections (a) to (g) of section 49(2) of the Queensland Act referred to above provide a useful starting point.

- (i) Subsections (a) and (b) call for basic information identifying the lot or proposed lot and the prospective purchaser and vendor.
- (ii) Subsection (c) refers to particulars of unit entitlement and is desirable in Queensland because in that State the developer can allocate unit entitlement in whatever manner he wishes.¹⁴ In paragraph 12.15 above, the Commission recommends that for all future schemes the strata plan lodged for registration

¹¹ The details are discussed more fully in paras 17.7 to 17.11 below.

¹² As to the strata company's obligations to keep information and make it available, with the authorisation of the proprietor of a lot, to other people, see paras 9.17 to 9.20 above.

¹³ The Law Society's *Agreement for Sale of Freehold Land* (1980 edition) contains a clause (clause 16) aimed at protecting purchasers and so does the Society's *General Conditions for the Sale of Land Revision(1982 Revision)* (clause 14). The provisions referred to do not appear in REIWA's *General Conditions for the Sale of Land (1982 Revision)*.

¹⁴ As he can at present in Western Australia: para 12.3 above.

must be accompanied by a certificate of a licensed valuer that the unit entitlement allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to the others. If this recommendation is implemented, there would be less need for the particulars referred to in subsection (c) to be included in the statement, but the information would remain of value.

- (iii) Subsection (d) relates to management and maintenance agreements. The importance of this information to prospective purchasers was demonstrated by one commentator who purchased into a scheme where the original proprietor had arranged for the appointment of a managing agent.¹⁵ The commentator complained to the Commission that the council of the strata company could itself have done the agent's work and saved expense. Apart from considerations of expense, there is the possibility that the original proprietor will arrange for the appointment of one of its own subsidiaries as managing agent for a fixed period of time not determinable on notice. The same problems arise with regard to agreements for service or maintenance of common property. It is thus important to ensure that prospective purchasers are aware of these agreements, particularly those which may play a significant role in the every day operation of the strata scheme. The requirement should, however, be redrawn so as to relate to any such agreement which has been entered into by the strata company, or which the original proprietor proposes to enter into, exercising the power of the strata company.¹⁶
- (iv) Subsection (e) relates to the by-laws and is clearly an essential matter to be drawn to the attention of purchasers since by-laws represent the fundamental controls over the management and use of both lots and common property.
- (v) Subsection (f) is important as fixing the date on which the information in the statement is given.

¹⁵ Para 20.9 below.

¹⁶ The original proprietor himself would not be able to enter into any such agreement which would bind the strata company.

With the clarification proposed in subparagraph (iii), the Commission recommends that the written statement to be given to prospective purchasers should include the information set out in subsections (a) to (f) of section 49(2) of the Queensland Act and, as in that State,¹⁷ should be signed by the original proprietor or on his behalf by a person authorised in writing by him.

17.8 The Commission further recommends that certain information not required by the Queensland Act be included in the written statement to be given to purchasers. These matters are -

- * details concerning the administrative fund and an explanation of its purpose, including insuring the building and maintaining the common property, including lifts, stairs, gardens and the like;
- * existing or proposed reserve fund;
- * details of any proposed staged development;
- * details of any leases granted or proposed to be granted in relation to the common property;
- * details of any licences granted or proposed to be granted (whether to the purchaser or any other person) in relation to the common property, including those granting exclusive use and enjoyment or special privileges.

17.9 The Commission considers that to be of most benefit, the statement of particulars should be given to a purchaser before he enters into a contract to purchase.¹⁸ The Commission also considers that the procedures and safeguards found in sections 49(4) to (12) of the Queensland Act should be adopted. Under these provisions, the original proprietor must give notice of certain specified changes relating to any management or maintenance agreements, the by-laws or the unit entitlements which occur between the time when the original information was given and the time when the purchaser becomes the registered proprietor of the lot.¹⁹ If his rights have been materially affected by the changes, the purchaser may avoid

¹⁷ Qld, s 49(2)(g).

¹⁸ It could be included in the offer and acceptance form.

¹⁹ Qld, s 49(4).

the contract within thirty days of receipt of the notice and recover all moneys paid.²⁰ If the original proprietor does not provide the statement of information required under the Act, or fails to give the required notice of changes and the change materially affects the purchaser, the purchaser may avoid the contract within thirty days of becoming aware of the failure and recover all moneys paid.²¹ It is important to note that the requirements and protections of these provisions cannot be waived.²² It should also be noted that the provisions do not apply to contracts entered into before the commencement of the Act.²³ The Commission recommends that the procedures and safeguards found in sections 49(4) to (12) of the Queensland Act should be adopted, subject to the matters referred to in paragraph 17.11 below.

17.10 In paragraph 17.8 above, the Commission recommended that certain information not required by the Queensland Act be included in the written statement required to be given to purchasers. If this recommendation is implemented it would be desirable for the original proprietor also to be required to give similar notice of -

- (a) changes made to any proposed staged development;
- (b) details of any leases granted over the common property other than those referred to in the original statement; and
- (c) details of any licences granted in relation to the common property other than those referred to in the original statement,

between the time when the original information was given and the time when the purchaser becomes the registered proprietor of the lot. The Commission recommends accordingly.

17.11 The recommendations made by the Commission in the previous paragraphs are aimed at protecting purchasers of lots or proposed lots. They are not intended to act as a device to enable such purchasers to escape obligations entered into in good faith by both parties but

²⁰ Qld, s 49(4) and (6). He may avoid the contract even after the lot has been registered in his name: id s 49(8).

²¹ Id, s 49(5), (6) and (8).

²² Id, 49(9).

²³ Id, 49(12).

with deficiencies in minor technical respects.²⁴ For this reason, the Commission recommends that it be made clear that a purchaser may not avoid the contract on the ground that a statement or notice does not comply with the Act if that statement or notice substantially complies with the Act. Further, where the original proprietor fails to provide the required particulars or to give notice of any specified changes to those particulars, the Queensland Act permits the purchaser to avoid the contract within 30 days of becoming aware of that failure.²⁵ Thus, in some circumstances, a purchaser might be able to avoid the sale long after registration of the transfer to him. This could produce unjust results.²⁶ Accordingly, the Commission recommends that a purchaser should only be able to avoid the contract within 30 days from becoming aware of the failure or within 30 days from the registration of the transfer to him, whichever period first expires. Where the purchaser is unaware of the failure, upon becoming the registered proprietor he will have access to all the records of the strata company²⁷ and so should then be able to ascertain for himself whether the original proprietor's obligations have been fulfilled.

3. SALE OF LAND ACT 1970-1982

(a) The present position

17.12 The *Sale of Land Act 1970-1982* affords purchasers of land some measure of protection from risks inherent in certain kinds of land dealings. Some of the provisions of this Act apply to strata lots, others do not. The Act is divided into parts. The relevant parts of the Act and their application to strata title developments are discussed below.

(i) *Part II - Sale of land under terms contract*

17.13 Part II of the *Sale of Land Act 1970-1982* provides protection to persons who purchase land under a terms contract.

²⁴ According to W D Duncan, *More Mythology on Section 49 of the Building Units and Group Titles Act 1980*, August 1982, Queensland Law Society Journal 174, 176-177, the section "is certainly being used by purchasers busy 'looking for loop-holes' who have entered into the contract many months prior to the time when settlement was required and who, since then, have suffered financial difficulties disabling them from completing the contract".

²⁵ Para 17.9 above.

²⁶ See W D Duncan, Section 49 of the *Building Units and Group Titles Act 1980*, October 1982, Queensland Law Society Journal 235, 239 where this criticism is made of Qld, s 49.

²⁷ See the recommendation made in para 9.18 above.

A terms contract is one under which the purchase price is to be paid by two or more instalments as well as the deposit or in which the purchaser is entitled to possession before being entitled to a transfer. The purchaser under this form of financing is particularly vulnerable because the contract may be rescinded for some failure strictly to comply with the contract terms, and his rights to the land extinguished. Moreover, the vendor may remain free during the course of the contract to mortgage or otherwise encumber the land in which case the purchaser runs the risk that the vendor may subsequently default on the mortgage or in some other way endanger the purchaser.

17.14 Part II of the *Sale of Land Act 1970-1982* addresses both of these problems. The Act provides that a terms contract cannot be rescinded on account of a breach of any of its terms unless the vendor first gives the purchaser written notice of the breach and an opportunity to remedy it.²⁸ In addition, the Act requires the vendor to give prospective purchasers written notice of any mortgage or other encumbrance²⁹ and further provides that the vendor may not encumber the land unless he first obtains the consent of the purchaser or leave of the Supreme Court.³⁰ The land to which these provisions apply is defined as "land of any tenure and buildings or parts of buildings"³¹ and thus includes strata title lots.

(ii) *Part III -Restrictions on sale of subdivisional land*

(a) Sale of lots by persons other than the registered proprietor

17.15 Section 13 of the *Sale of Land Act 1970-1982* is designed to protect a purchaser who, in a chain of transactions, is dealing with a vendor other than the registered proprietor. For example, a registered proprietor may sell a parcel of land under a terms contract to a developer who may in turn contract to sell lots to a number of purchasers. If the developer breaches his contract with the registered proprietor, the latter may rescind the contract with the developer and thereby defeat the claims of the ultimate purchasers, leaving them only with personal claims against the developer. These may well be worthless in the circumstances.

²⁸ *Sale of Land Act 1970-1982*, s 6.

²⁹ *Id.*, s 7.

³⁰ *Id.*, s 8.

³¹ *Id.*, s 5.

17.16 Section 13 forbids a person who has the right to sell five or more lots in a subdivision or proposed subdivision,³² to sell a lot³³ unless he is or is presently entitled to become the registered proprietor of the lot.³⁴ A person is not deemed to be presently entitled to become the registered proprietor unless the appropriate instruments have been lodged in the Titles Office. Sales of strata title lots are, however, expressly excluded.³⁵

(b) Sale of lots which are subject to mortgage

17.17 Land which is being developed may sometimes be heavily mortgaged to finance the development and lots may be sold before the mortgage is discharged. In these circumstances the lots which are purchased will be subject to the claims of the developer's mortgagee if the developer defaults.

17.18 Section 14 of the *Sale of Land Act 1970-1982* is aimed at protecting the purchaser of such encumbered sub divisional property. It provides that lots subject to a mortgage must not be sold unless -

- (a) the mortgage relates only to the lot sold and the lot is sold under a contract which provides for the purchaser to assume the burden of the mortgage and for the price to be reduced by an amount equal to the amount owing under the mortgage;³⁶ or
- (b) the lot is sold under a contract which provides that -

³² The section does not apply, however, where five or more lots are sold to one person in the same transaction.

³³ "Sell" is defined widely to include, inter alia, an agreement to sell and an offer to sell. "Lot" is also defined widely to include an area of land in respect of which it is represented that it will constitute a lot: see para 17.23 below.

³⁴ See immediately preceding footnote for the definition of "lot".

³⁵ *Sale of Land Act 1970-1982*, s 12. The reason for the exclusion of sales of strata title lots from the operation of ss 13 and 14 of the *Sale of Land Act* was that the Government of the day intended to impose restrictions only where known abuses had occurred. In 1970 (when the relevant amendments were enacted) abuses related only to broadacre subdivisions: Western Australian *Parliamentary Debates* (1970) Vol 188, 1742, 1887; Vol 189, 2350-2352, 2824-2828.

However, as a strata lot is in effect defined in the *Sale of Land Act* to mean a lot shown as such on a strata plan, it may be that section 13 applies to a contract to sell a unit in a proposed strata title subdivision, that is, a contract for the sale of a unit which is entered into before a strata plan complying with the *Strata Titles Act* comes into existence: *Sale of Land Act 1970-1982*, s 12 and *Strata Titles Act 1966-1978*, s 3.

³⁶ *Sale of Land Act 1970-1982*, s 14(1).

- (i) the mortgage affecting it is to be discharged as to that lot prior to or upon the purchaser becoming entitled to possession or to receipt of the rents and profits, and
- (ii) that so much of the deposit and other money paid by the purchaser as is required to discharge the mortgage is to be paid to a legal practitioner or land agent, to be applied for that purpose.³⁷

If the mortgage is not so discharged the purchaser may rescind the contract and recover the money he has paid.

This section, like section 13, does not apply to a person who has the right to sell less than five lots in a subdivision or proposed subdivision³⁸ or to strata title lots.³⁹

(b) The Commission's previous recommendation

17.19 As noted above, Part II of the *Sale of Land Act 1970-1982* which deals with terms contracts applies to strata title lots while Part III dealing with sales by persons other than the registered proprietor and sales of encumbered property does not. The Commission recommended in its report on Project No 1, Part III: *Protection for Purchasers of Home Units* (1973) that the provisions of Part III of the *Sale of Land Act 1970-1982* should be extended to strata title lots. The Commission considered that purchasers of strata lots were subject to the same risks and should be entitled to the same protections as purchasers of any other sort of subdivisional land.

17.20 The question of the application of Part III of the *Sale of Land Act 1970-1982* to strata title lots was raised again in the working paper on this project.⁴⁰ All but one of the persons who commented on the issue agreed that the sale of strata lots should be covered by the provisions of Part III.⁴¹

³⁷ Id, s 14(2)(b).

³⁸ Id, s 14(1). Similarly, it does not apply where five or more lots are sold to one person in the same transaction: id, s 14(2)(a).

³⁹ *Sale of Land Act 1970-1982*, s 12. It may, however, apply to the sale of a unit in a proposed strata title subdivision: footnote 35 above.

⁴⁰ Working paper, para 33.13.

⁴¹ The only commentator not favouring the extension was a real estate agent who opposed the change on the grounds that present business practice allowed for the partial discharge of bridging finance mortgages and that very few abuses had occurred in Western Australia. However, the Commission's recommendation, if implemented, would not prevent the partial discharge of mortgages.

(c) **The Commission's present recommendations**

17.21 The Commission remains of the view that the provisions of Part III of the *Sale of Land Act 1970-1982* should extend to strata title developments. Applying these provisions to strata lots will afford substantial protections to purchasers, particularly to those who are dealing with financially weak developers. The provisions of Part III would also help to protect the purchaser of encumbered strata property by requiring that either the purchase moneys be deposited in a trust account of a legal practitioner or licensed real estate agent to be applied toward the discharge of the mortgage as to that lot or that the sales contract provide for the purchaser to assume the mortgage and the price to be reduced by an amount equal to the amount owing under the mortgage.⁴² The Commission recommends that Part III of the *Sale of Land Act 1970-1982* should extend to strata title developments.

17.22 It should be noted that the provisions of Part III presently are limited in their application to subdivisions of five or more lots, on the ground that abuses are more likely to occur in larger developments.⁴³ The Commission considers, however, that the special nature and problems of strata title developments require extending the protection of Part III to the situation where a person has the right to sell two or more lots in a strata title subdivision.⁴⁴ Since a strata subdivision must consist of at least two lots⁴⁵ the developer of every strata subdivision would be required to comply with Part III.

17.23 The provisions of Part III presently apply to the sale of lots in both existing and proposed subdivisions. The term "lot" is given an extended definition to include "...an area of land in respect of which it is represented, by or on behalf of any person attempting to promote the sale of that area of land, that it will constitute a lot in a proposed subdivision."

17.24 In extending Part III to include the sale of strata title lots, the Commission recommends that it should be made clear that it also applies to **proposed** strata lots.⁴⁶ The

⁴² In practice, the contract would only provide for the purchaser to assume the mortgage if he purchased all the lots over which the mortgage was registered.

⁴³ Western Australian *Parliamentary Debates* (1970) Vol 189, 2351.

⁴⁴ The development of a duplex subdivision could involve at least as great a financial commitment by a developer (and thereby stretch his resources to the same extent) as that of developing five vacant lots in a conventional subdivision.

⁴⁵ WA, s 3 (definition of strata plan).

⁴⁶ See footnote 35 on page 230 and footnote 39 on page 231.

application of the provisions of Part III to sales of proposed strata lots and the question of the need for additional protection is discussed in the following paragraphs.

4. WHETHER FURTHER PROTECTION IS REQUIRED IN RESPECT OF SALES OF LOTS BEFORE REGISTRATION OF THE STRATA PLAN

17.25 Increasingly in Western Australia strata title units are sold prior to completion of the building.⁴⁷ In some cases, units may be sold on the basis of building or floor plans before construction has even commenced.⁴⁸ Indeed, in a buoyant property market a unit may be bought and sold several times before it is completed. In these circumstances, the strata lot is not yet in existence because certificates of title to individual strata lots do not issue until the plan is registered and the plan is not registered until the building is completed.

17.26 The purchase moneys for lots sold before the registration of a strata plan are handled in various ways. In a typical case, a portion of the deposit is payable on the signing of the contract and the remainder of the deposit is payable on the commencement of the construction of the building. The purchaser usually will have paid a total of between ten and twenty percent of the purchase price by the time the foundations of the building are laid. In some cases the money is held pending settlement in the trust account of a solicitor or agent. In other cases the money may be used by the developer to help pay for the cost of the development or for purposes unconnected with the project. The developer may or may not pay interest on the money depending on the agreement between the parties.⁴⁹ Even where the developer does apply the money toward the cost of the project, there is always the possibility that he will be unable to complete the building.⁵⁰

17.27 In the working paper, the Commission raised the question whether any special restrictions should be placed on the sale of units not yet constructed.⁵¹ The paper drew

⁴⁷ The practice of selling a unit before the registration of a strata plan is commonly described as “selling off the plan” or “pre-selling”.

⁴⁸ The procedure has been used not only in respect of buildings which it is proposed to construct but also existing buildings which it is intended to modify and then bring under the *Strata Titles Act*.

⁴⁹ An example of a project where the part payment is to be invested in an interest bearing trust account was advertised in *The West Australian*, 27 March 1982. In relation to sales of land which are not on terms, the common practice in Western Australia is for the deposit to be held by the vendor's agent as a stakeholder pending settlement of the transaction: see the Law Society's *General Conditions for the Sale of Land (1982 Revision)*, clause 3 and REIWA's *General Conditions for the Sale of Land (1982 Revision)*, clause 2.

⁵⁰ Instances in which developers received deposits on proposed strata title home units but in which it later appeared that they would be unable to construct the building were referred to in an article “Home Unit Deposits in Jeopardy”, *Daily News* (City edition), 13 July 1977, 1 and 3.

⁵¹ Para 33.5.

attention to the provisions of the Victorian *Strata Titles Act 1967-1981* by which if a purchaser buys a proposed lot before the strata plan is registered, purchase moneys must be paid to a solicitor or licensed real estate agent specified in the agreement for sale, to be held by him in trust until the strata plan is registered. If the plan is not registered within six months after the sale, the purchaser can avoid the sale and recover the money from the solicitor or licensed estate agent.⁵²

17.28 Thirteen commentators responded on this issue. Seven, including REIWA and the Institution of Surveyors, considered that purchase moneys should be required to be held in trust for the purchaser at least until the strata plan is registered. Four commentators considered the existing legal position to be satisfactory.

17.29 In view of the other recommendations made in this chapter, the Commission does not consider it necessary to recommend other special provisions to deal with the sale of lots before a strata plan is registered, such as those contained in the Victorian *Strata Titles Act 1967-1981*. The Commission considers that its recommendation to extend the provisions of Part III of the *Sale of Land Act 1970-1982* to strata property will assist to protect purchasers of proposed strata lots from the major risks which arise from speculative land development.⁵³ As applied to proposed strata lots, section 13 of the Act will mean that, subject to the qualifications set out in paragraph 17.22 above, a person cannot contract to sell an area of land in respect of which it is represented that it will constitute a lot in a proposed strata development unless he is or is presently entitled to become the proprietor of that land. Since the lot is not yet in existence, the developer could not be the registered proprietor of the lot itself at the time the contract is made; however, the developer will be in compliance with section 13 if he is or is presently entitled to become the registered proprietor of the parcel which is being developed. When the strata plan is registered, the developer will then become the registered proprietor of the lot and will be in a position to transfer title to the lot to the purchaser.

⁵² The purchaser is, however, liable to pay an occupation rent for any period during which he is in actual occupation of the unit or entitled to the receipt of the rents and profits from it: *Strata Titles Act 1967-1981*(Vic), s 7(5). For a more detailed description of the Victorian provisions, see para 33.4 of the working paper.

⁵³ Part III of the *Sale of Land Act 1970-1982* may, in fact, already apply to a contract of sale of a unit which is entered into before a strata plan complying with the *Strata Titles Act* comes into existence: footnote 35 on page 230.

17.30 Section 14 of the *Sale of Land Act 1970-1982*, subject again to the qualifications set out in paragraph 17.22 above, will assist to protect purchasers of proposed strata lots where the land being developed is heavily mortgaged to secure advances for the construction of the building. It is these circumstances which afford the greatest risk of loss of purchase moneys. As applied to proposed strata lots, section 14 of the Act will mean that if a developer desires to sell an area of land in respect of which it is represented that it will constitute a lot in a proposed strata development and the parcel being developed has been mortgaged, he must provide in the contract of sale that any mortgage affecting the proposed lot will be discharged as to that lot before the purchaser becomes entitled to possession.⁵⁴ In addition, the contract must provide that any money due under the contract is to be paid to a legal practitioner or real estate agent to be applied toward discharging the mortgage. The provisions of section 14 are important because if the development falters and the building is not constructed, there is no "lot" for the purchaser to take. By providing that purchase moneys be held in trust, section 14 helps to ensure that the purchaser is able to recover any money he has paid if the strata development does not proceed. Section 14 is also important because any mortgage over the whole parcel will be transferred automatically to the individual strata lots when the plan is registered and separate certificates of title are issued. By providing that moneys are to be applied toward the discharge of the mortgage as to that lot, section 14 will thus help to ensure that the purchaser of a proposed strata lot gets the unencumbered property which he bargained for. Although the Commission acknowledges there may be circumstances when lots are sold before registration of the plan where the *Sale of Land Act 1970-1982* requirements will not apply because the property is not encumbered, the Commission does not consider that special restrictions should be placed on the use of purchase moneys in these cases, particularly since the Law Society's and REIWA's *General Conditions for the Sale of Land* provide that the deposit is to be held by the vendor's agent as stakeholder.⁵⁵

⁵⁴ As the Commission pointed out in its earlier report on *Protection for Purchasers of Home Units* (1973), it would be impossible for a developer to comply with first alternative in s 14(1) (which requires in part that the mortgage relate only to the lot sold) since the lot would not yet be in existence. See para 17.18 above.

⁵⁵ See footnote 49 on page 233 above.

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

17.31 The Commission recommends that -

- (a) *Developers should be required to give prospective purchasers written notice of certain details of the strata scheme before they enter into a contract to buy a strata lot (and to give notice to the purchaser if certain specified changes to the particulars occur between the time when the original information was given and the time when the purchaser becomes the registered proprietor of the lot).*

(paragraphs 17.4 to 17.10)

- (b) *Subject to (c) below, the procedures and safe-guards found in section 49(4)-(12) of the Queensland Building Units and Group Titles Act 1980-1981 should be adopted, including those relating to the right of a purchaser to avoid the contract -*

- (i) *where the developer does not comply with his obligation to give the required particulars;*
- (ii) *where the developer gives notice of a specified change and the rights of the purchaser have been materially affected by the changes; or*
- (iii) *where the developer does not comply with his obligation to give notice of a specified change to the particulars and the change materially affects the purchaser.*

(paragraph 17.9)

- (c) (i) *A purchaser should not be able to avoid a contract on the ground that a statement or notice does not comply with the Act if that statement or notice substantially complies with the Act;*
- (ii) *A purchaser should only be able to avoid the contract -*

(1) *within 30 days after becoming aware of the failure of the original proprietor to provide the required particulars or to give notice of any specified changes to those particulars, or*

(2) *within 30 days after the registration of the transfer to him,*

whichever period first expires.

(paragraph 17.11)

(d) *Part III of the Sale of Land Act 1970-1982 should be extended to the sale of lots in a strata subdivision where the vendor has the right to sell two or more of such lots.*⁵⁶

(paragraphs 17.21 and 17.22)

(e) *The extension of Part III of the Sale of Land Act should be so drafted as to apply to the sale of proposed strata lots as well as strata lots.*

(paragraphs 17.23 and 17.24)

⁵⁶ Part III is aimed at ensuring that a purchaser obtains a title to his lot and that, unless the mortgage relates only to that lot and the contract provides for the purchaser to assume the obligations under the mortgage -

- (a) the mortgage is to be discharged, and
- (b) any money prepaid by the purchaser is used towards so discharging it.

CHAPTER 18

BUILDING DEFECTS

1. THE PRESENT POSITION

(a) Statutory controls over building construction

18.1 As well as the obligations imposed at common law in contract or tort discussed below,¹ a number of statutory controls in Western Australia exist to safeguard against the erection of defective buildings, including -

- (a) Building by-laws made by various local authorities² providing minimum standards relating to materials and methods of construction and the inspection procedures of that authority designed to ensure compliance with those by-laws. Breach of the by-laws may involve an offence.
- (b) Provisions of the *Builders' Registration Act 1939-1982* requiring that, within the area to which the Act applies,³ builders must be registered with the Builders' Registration Board.⁴ To obtain such registration persons must satisfy the Board as to their training and experience. Registration may be cancelled or suspended for negligence or incompetence in connection with the performance of any building work.⁵ In addition, the Board may make orders for the rectification of faulty or unsatisfactory work.⁶

18.2 In relation to strata title buildings, section 5(6)(c)(i) and (iii) of the *Strata Titles Act* also requires that a strata plan lodged for registration under that Act must be accompanied by

¹ Paras 18.3 to 18.9 below.

² In most places these are the *Uniform Building By-laws 1974-1981* made under the *Local Government Act 1960-1982*.

³ The Act applies only within the area described in the schedule to the Act. The Governor may make regulations from time to time amending the schedule: *Builders' Registration Act 1939-1982*, s 3(2). At present the Act applies only to the Perth metropolitan area (from and including the Shire of Wanneroo in the north, the hills suburbs in the east and Rockingham in the south). See the *Builders' Registration (Area of Application) Regulations 1980* (*Government Gazette*, 21 March 1980, 986).

⁴ Officers of the Crown or of any local authority (that is, where the officer directs or supervises the carrying out of any contract or engagement in the performance of his duties as such an officer), persons who build single dwellings or duplexes for themselves or any case where the building work is not more than \$6,000 in value are exempted: *Builders' Registration Act 1939-1982*, s 4.

⁵ Id, s 13.

⁶ Paras 18.10 to 18.15 below.

a certificate of the local authority that, in its opinion, the building is consistent with the building plans and specifications approved by the local authority and that the building is "of sufficient standard and suitable to be divided into" strata lots.

(b) The position of purchasers of lots in relation to building defects

(i) The purchaser's remedies in contract

18.3 Despite these safeguards, instances may arise where the building is constructed in a defective manner. However, this may sometimes not come to the purchaser's notice until after the lot has been purchased from the developer. Some commentators outlined their experience in this regard to the Commission. One group of proprietors, who had purchased lots in a high-rise residential building, informed the Commission that a number of defects had appeared in the building (including faulty exterior paintwork), which necessitated a large expenditure by the proprietors to correct. Another group referred to the cracking of brick exterior walls after their lots had been purchased.

18.4 In many cases, strata buildings are constructed pursuant to a building contract between a builder and the developer. In such cases, the building contract will usually contain express terms which in effect require the builder to construct the building properly and use suitable materials. If the builder does not do so he will be in breach of the contract and the developer, subject to the normal rules relating to the recovery of damages for breach of contract, will be able to recover damages from him for any loss the developer has suffered as a result thereof. Even if there is no express term in the contract concerning the manner in which the building work is to be carried out, a condition that the work shall be carried out in a good and workmanlike manner is implied.⁷ However, as persons who purchase lots from the developer are not party to this contract, they are unable to recover damages in contract if it is breached, even though this causes them loss. In addition, if the developer sells the lots in a strata building before it becomes apparent that the building, or a particular lot is defective, he may

⁷ See generally I N Duncan Wallace, *Hudson's Building and Engineering Contracts* (10th ed, 1970 and First Supplement (1979)), 305 (hereinafter referred to as *Hudson*); J B Dorter and J J A Sharkey, *Building and Construction Contracts* (1981), 37. Sometimes an old building is converted to strata titles. If renovations were carried out for this purpose, the statement would apply to the renovating builder in regard to those renovations.

then have no worthwhile remedy against the builder in respect of the defect⁸ and even where he does have, he may have no incentive to enforce it.⁹

18.5 The purchaser of a lot will also usually not have any contractual remedies against the developer who sold it to him in respect of defects, latent or otherwise, in the lot at the time of sale or which occur in it thereafter. This is because the contract of sale between the purchaser of a lot and the developer will generally not contain any express warranties concerning the condition of the lot¹⁰ and no such warranties are implied by law.¹¹ However, the purchaser may have a remedy in two situations. First, if the developer fraudulently conceals any defect in the lot,¹² or if during the course of pre-contractual negotiations he or his agent makes an innocent¹³ or fraudulent¹⁴ misrepresentation about it, the purchaser may be able to rescind the contract and in some cases, either as an alternative or in addition to rescinding the contract, recover damages.¹⁵ Secondly, if the purchaser contracts with the developer to purchase a lot

⁸ Notwithstanding *Jackson v. Horizon Holidays Ltd* [1975] 3 All ER 92, It would appear that in an action for breach of contract, a party to a contract can recover as damages only the loss he has actually suffered as a result of the breach and not the loss suffered by a third party: *Beswick v Beswick* [1967] 2 All ER 1197, 1221; *The Albazero* [1976] 3 All ER 129; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571. Consequently, in the situation under consideration, the developer would not be able to recover damages for breach of contract in respect of the loss suffered by persons who purchase lots from him. Also in a normal case the purchaser would not be able to rely on s 11 of the *Property Law Act 1969-1979* as the building contract would not purport to confer a benefit on him.

⁹ If the developer is able to recover damages for breach of contract in respect of a lot he has sold, where he has not suffered loss himself, those damages would be payable to the person who has suffered loss as a result of the breach: *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, 96. As in such a case the developer would not benefit financially, he is likely to be disinclined to enforce any right of action he may have against the builder.

¹⁰ Neither the *Law Society of Western Australia General Conditions for the Sale of Land* (1982 Revision) nor REIWA's *General Conditions for the Sale of Land (1982 Revision)* contain such a warranty. There is, of course, no legal impediment to a warranty being included in the contract between the developer and the lot purchaser.

¹¹ *Miller v Canon Hill Estates Ltd* [1931] All ER Rep 93, 96; *Bottomley v Bannister* [1931] All ER Rep 99, 102 and 106; *Otto v Boulton* [1936] 1 All ER 960; see generally P N Wikrama, *Voumard's The Sale of Land*, (3rd ed 1978), 193.

¹² *Pickering v Dowson* [1803-1813] All ER Rep 491, 493; P N Wikrama, *Voumard's The Sale of Land*, (3rd ed 1978), 192.

¹³ In the case of innocent misrepresentation, unless there is a total failure of consideration, rescission is not possible once the sale has been completed by the execution of a conveyance or registration of a transfer to the purchaser: *Seddon v North-Eastern Salt Co Ltd* [1905] 1 Ch 326; *Svanosio v McNamara* (1956) 96 CLR 186, 198. Where the contract of sale has not been completed, rescission is possible at common law if there has been a total failure of consideration and in equity, whether or not there has been a total failure of consideration: *Wilson v Union Trustee Co of Aust Ltd* (1923) 44 ALT 165.

¹⁴ In the case of fraudulent misrepresentation, rescission is possible regardless of whether there has been a total failure of consideration: *Brown v Smitt* (1924) 34 CLR 160, and regardless of whether or not the sale has been completed by the execution of a conveyance to the purchaser: *Svanosio v McNamara* (1956) 96 CLR 186, 198.

¹⁵ If the misrepresentation amounts to a collateral contract, damages may be recoverable for breach of this contract: *Miller v Cannon Hill Estates Ltd* [1931] All ER Rep 93. If the misrepresentation is fraudulent, damages will be recoverable for the tort of deceit, the amount recoverable depending upon whether the purchaser has rescinded the contract of sale or not: *Holmes v Jones* (1907) 4 CLR 1692, 1702-1704, 1709

which has yet to be constructed or which is in the course of construction, in the absence of an express provision to the contrary, a term will be implied that the lot will be properly built and fit for habitation.¹⁶

(ii) *The purchaser's remedies in tort*

18.6 Independently of his contractual obligations to the owner, when erecting a building the builder is under a duty to carry out the necessary work with reasonable skill and care, measured by the standard of the time, so as to avoid causing injury or damage to persons whom he can reasonably foresee might be affected by the work.¹⁷ Thus for example, if there is a fault in construction,¹⁸ if the foundations are inadequate¹⁹ or if the land upon which the building was erected was too unstable for the building,²⁰ liability can arise in negligence.

18.7 As the builder's duty of care is owed to anyone whom he can reasonably foresee might suffer injury or damage it extends to the first and subsequent purchasers of a strata lot²¹ and also to residents and visitors.²² If the duty is breached, damages are recoverable in respect of any personal injury²³ or property damage suffered. It also appears that if the purchaser of a strata lot suffers economic loss in the form of the costs of repairing a building defect or diminution in the value of the lot caused by it, damages are recoverable for this loss and for consequential expenses such as renting alternative accommodation whilst repairs are being carried out.²⁴

and 1715-1717; *Alati v Kruger* (1955) 94 CLR 216, 222. If the misrepresentation is innocent, damages can be recovered for the tort of negligence provided, in relation to the representation, the purchaser was owed a duty of care by the developer: *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5. However, it has been suggested that it may be more difficult to establish that such a duty of care exists in relation to a contract for the sale of land (which is what a sale of a strata title lot is) than it is in relation to other contracts: *Ellul & Ellul v Oakes* (1972) 3 SASR 377, 380. If the misrepresentation amounts to a breach of s 52 or s 53A of the *Trade Practices Act 1974-1982* (Cth), damages may be recoverable pursuant to s 82 of the Act.

¹⁶ *Miller v Cannon Hill Estates, Ltd* [1931] All ER Rep 93; *Hancock v B W Brazier (Anerley) Ltd* [1966] 2 All ER 901.

¹⁷ The leading cases establishing this proposition appear in the following footnotes. Although these cases were not decided in respect of strata buildings, the rules they establish would appear to be equally applicable to such buildings

¹⁸ *Sharpe v E T Sweeting & Son Ltd* [1963] 2 All ER 455.

¹⁹ *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394.

²⁰ *Batty v Metropolitan Property Realizations Ltd* [1978] 2 All ER 445.

²¹ *Anns v London Borough of Merton* [1977] 2 All ER 492, 504.

²² *Gallagher v McDowell* [1961] NI 26; *Sharpe v E T Sweeting & Son Ltd* [1963] 2 All ER 455.

²³ *Ibid.*

²⁴ *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462; *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Carosella & Carosella v Ginos and Others* (1981) 27 SASR 515.

18.8 It was at one time held that the duty of care outlined above was not applicable as between a builder who sold a building and the first and subsequent purchasers.²⁵ However, this is no longer the position.²⁶ Nevertheless, in such cases the terms of the contract of sale between the builder/vendor and the first purchaser may be relevant when deciding whether or not the builder has been negligent.²⁷

18.9 The purchaser of a strata lot may also be able to recover damages for the tort of negligence from the relevant local government authority if, in relation to the construction of the strata building, the authority or its officers negligently exercise its statutory powers and duties under the *Strata Titles Act*, the *Local Government Act 1960-1982* or its building by-laws.²⁸ For example, a purchaser who, when purchasing a lot, relied on a certificate issued under section 5(6)(c) of the *Strata Titles Act* that the building was consistent with the building plans and suitable for division into lots, might be able to recover damages for loss suffered as a result of the certificate being inaccurate.²⁹ Similarly, if the building inspector failed to inspect the foundations of the building before they were covered, the council may be liable for damage sustained by a lot due to structural movement caused by the foundations being inadequate and not in accordance with the building plans.³⁰ However, because bodies such as local government authorities are public bodies, special considerations apply to them which tend to reduce the scope of their civil liability.³¹ Thus, for example, although local authorities can be held liable to pay damages because their statutory powers have not been exercised properly or at all, this can only happen if the exercise or non-exercise of the power was outside the scope of the discretion associated with it, vested in the council or its officers.³²

²⁵ *Bottomley v Bannister* [1931] All ER Rep 99; *Otto v Bolton* [1936] 1 All ER 960.

²⁶ *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462, 472; *Anns v London Borough of Merton* [1977] 2 All ER 492, 504.

²⁷ The contract of sale may, for example, contain an exemption clause restricting or excluding altogether the builder's liability to the purchaser in negligence. Although such a clause would not protect the builder in an action brought by a subsequent purchaser, the contract of sale is relevant because it determines what the builder was asked to do: see *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 85; *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, 406-407; *Anns v London Borough of Merton* [1977] 2 All ER 492, 504.

²⁸ Under s 374 of the *Local Government Act 1960-1982* builders are required to obtain the approval of the local government council to the specifications and plans of the proposed buildings and of proposed alterations to an existing building. Once an approval has been given and the building commenced, the local government building surveyor may enter and inspect the building to ascertain whether the builder is complying with or has complied with the council's building by-laws: *Uniform Building By-laws 1974-1981*, 3.1.

²⁹ See *Shaddock (L) & Associates Pty Ltd v Parramatta City Council* (1981) 36 ALR 385.

³⁰ *Anns v London Borough of Merton* [1977] 2 All ER 492. (See also *Commonwealth v Turnbull* (1976) 13 ACTR 14.)

³¹ *Anns v London Borough of Merton* [1977] 2 All ER 492, esp 498-504.

³² *Ibid.*

(iii) *Liability under Builders' Registration Act*

18.10 Although the principles outlined above could provide an adequate remedy to purchasers in certain cases, their imprecise nature and the cost of taking proceedings in the courts might make purchasers reluctant to take advantage of them except in clear cases or where relatively large amounts of money are in issue. However, a further remedy may be available to them. Section 12A of the *Builders' Registration Act 1939-1982* empowers the Builders' Registration Board to order persons who have carried out building work, including additions and renovations, to remedy faulty or unsatisfactory work, or pay to the building owner such costs of remedying the work as the Board considers reasonable.³³

18.11 The power of the Board to order rectification or payment of the cost of so doing was created in 1970,³⁴ when according to the Minister in charge of the amending Bill in the Legislative Assembly, the public had come to believe that the Board not only had the responsibility of controlling the registration of builders but also the right to demand that a registered builder remedy defects.³⁵ The relevant clause in the Bill was designed to "give legal form to this belief".³⁶ In 1975 section 12A was widened to enable the Board to make an order against any person who carries out building work, whether or not he carries on the trade of a builder and whether or not he is a registered builder,³⁷ and also empowered the Board to make an order where the building itself was not defective, but for example had not been correctly located on the site.³⁸

³³ Faulty work is not confined to structural faults, but extends to such matters as painting or plumbing. In the case of painting work that has not been carried out properly, a remedy is also available under the *Painters' Registration Act 1961-1976*. This Act enables a person dissatisfied with painting work carried out by a registered painter to complain to the Painters' Registration Board which may, if it finds that the complaint has been proved, order the painter to rectify the work: s 16(3). If the painter does not comply with such an order, the Board may have the work carried out and recover the cost of so doing from him.

³⁴ *Act No 58 of 1970*, s 2. It is unclear whether, if an order for rectification is not complied with, the Board can rescind that order and replace it with an order to pay the cost of remedying the building work: see generally, *R v Builders' Registration Board Western Australia; Ex parte O'Dea* (unreported) Supreme Court of Western Australia Appeal No 1597 of 1982 in which Burt CJ left this question undecided and Olney J decided that the Board could not do so.

³⁵ Western Australian *Parliamentary Debates* (1970) Vol 188, 1056.

³⁶ *Ibid.*

³⁷ By *Act No 97 of 1975*, s 11. Thus the Board can now make an order against a builder who should have been registered and was not, and also against an owner-builder who is permitted to build a single dwelling or a duplex without being registered.

³⁸ The Board had received a number of complaints that buildings had been erected too close to boundaries or to drainage pipes. Until 1975 the Board had no power to make an order in such a case.

18.12 The power is expressed very widely. It is not subject to any statutory maximum in terms of money or value.³⁹ The power can be availed of not only by the person for whom the building was originally constructed, but by subsequent purchasers.⁴⁰ The section does not prescribe any time within which the Board's powers must be exercised although the Board generally adheres to the periods set out in the *Limitation Act 1935-1978* for the limitation of court proceedings; generally six years from the time of construction. The power therefore is not limited by two factors which limit the position in contract the parties between whom the building contract is made and short defect or maintenance periods.

18.13 The procedure for dealing with complaints is as follows. The Board requires the owner to advise the builder of the complaint and to allow a reasonable time to attend to the problem. If the builder does not make an adequate response, the owner completes a "complaint notice" specifying details of the defects.⁴¹ The Board then arranges a site inspection at which the owner, the builder and a Board inspector are present and then decides whether or not to make an order against the builder.⁴² The Act does not prescribe a procedure for the exercise by the Board of its decision-making powers. However, although a hearing is not specifically required by the Act, because these powers are judicial in character they "...cannot... be lawfully made without first giving the builder a right to be heard".⁴³

18.14 There is a right of appeal to the Local Court by a person against whom an order has been made. The Local Court may either uphold the order or vary it wholly or in part.⁴⁴ The making of an order does not affect any other remedy a complainant or any other person may otherwise have, except that in determining any matter between the person against whom the

³⁹ The Secretary of the Board informed the Commission that although orders are usually for smaller sums rectification orders have been made involving sums up to \$20,000. There are no statutory limits in this regard, and orders could involve much greater amounts.

⁴⁰ However, it appears that only the person for "whom [the] building work has been carried out" can complain to the Board in a case where the building itself was not defective but had, for example, been incorrectly located: s 12A(la).

⁴¹ No fee is charged.

⁴² This account of the procedure followed by the Board is taken from a pamphlet (No c 67) published by the Board. The Commission suggests that consideration be given to prescribing an appropriate procedure either in the Act or its regulations: see generally in this respect, *R v Builders' Registration Board of Western Australia; Ex Parte O'Dea* (unreported) Supreme Court of Western Australia, Appeal No 1597 of 1982.

⁴³ *R v Builders' Registration Board of Western Australia; Ex parte O'Dea* (unreported) Supreme Court of Western Australia, Appeal No 1597 of 1982 per Burt CJ.

⁴⁴ The appeal involves a re-hearing de novo with the respondent being called upon to justify the order made and the appellant having a right of reply: *Re Ryan; Ex parte Travaglini* [1979] WAR 23 (a decision of the Full Court); *Re Iddison and Builders' Registration Board of Western Australia; Ex parte Heah* (unreported) Full Court of the Supreme Court of Western Australia, 25 June 1981.

order was made and the person for whom the building work was carried out, a court may have regard to an order by the Board and any variation thereof by the Local Court.⁴⁵

18.15 Within the geographical area to which the *Builders' Registration Act 1939-1982* applies,⁴⁶ the powers of the Board provide a remedy for purchasers in regard to building defects. A number of proprietors of strata lots have availed themselves of the Board's powers under the section and the Board has ordered rectification of substantial structural defects as well as matters of lesser significance. With strata schemes the usual practice is for complaints to be made by the council of the strata company, but there seems no reason why an individual proprietor should not complain either in respect of his own lot or as a part owner of the common property.

2. ISSUES

18.16 In the working paper,⁴⁷ the Commission invited comment on the question of the rights, if any, which a proprietor should have against -

- (i) the builder and/or
- (ii) the developer

where defects in the building appear after the proprietor has purchased his lot. The Commission outlined the suggestion made by the City of Belmont that the builder should be responsible to the developer in terms of the building contract, but that the developer should be responsible to initial purchasers for a period of three months from the date of purchase.⁴⁸

18.17 Nineteen persons responded to the question. Nine⁴⁹ supported the proposal of the City of Belmont, or some variation of it. Others suggested other solutions. The council of one strata company suggested that on the sale of the last lot the developer should be required to hand over to the strata company a capital sum to be used solely for the repair, maintenance

⁴⁵ *Builders' Registration Act 1939-1982*, s 12A(6).

⁴⁶ See footnote 3 on page 238 above.

⁴⁷ Para 38.1 (52).

⁴⁸ Working paper, para 31.3.

⁴⁹ These included the City of Stirling, REIWA, the Local Government Association and the Commissioner of Titles, as well as a strata company and a proprietor.

and refurbishing of the common property. Three other commentators⁵⁰ suggested that the builder be made directly liable to the purchaser of a lot, the latter becoming, in essence, the assignee of the developer's rights against the builder. Two⁵¹ suggested that rectification of defects should be the joint and several responsibility of the builder and the developer.

18.18 On the other hand the Urban Development Institute of Australia and the Law Society considered that there should be no change to the present law. The Institute was of the view that the City of Belmont's proposal was unacceptable in that it would discriminate in favour of strata title owners as against purchasers of single dwellings, who would not have this protection, and "could expose the developer to unreasonable situations whereby the purchaser may abuse the privilege". The Law Society was of the view that a purchaser's right to redress should be limited to whatever contractual rights he had negotiated with the developer under the agreement to purchase (and no doubt to any other existing statutory or legal rights as well).

18.19 The Commission has considered the proposals of the commentators. The suggestion that the benefit of the developer's rights against the builder should be assigned to the purchaser of a lot could be difficult to implement. For example, to be effective in practice it would be necessary to provide that the developer and the builder could not extinguish those rights by agreement before the lots are sold.⁵² However, even if this were done the developer could sell all the lots to an associate. The associate would then be the initial purchaser of all the lots and persons who purchased from him would not be protected.⁵³ The provisions that would be necessary to overcome this device would be very complex.⁵⁴ More importantly, a position would be created in which purchasers of strata lots would be in a different position from purchasers of other buildings.

18.20 The suggestion that on the sale of the last lot the developer should be required to hand a capital sum to the strata company to be used for the repair and maintenance of the common property has even more difficulties. The developer could withhold one or more lots (perhaps

⁵⁰ The Institute of Architects, the City of Canning and the manager of a real estate company.

⁵¹ The building surveyor of the City of Nedlands and a private person.

⁵² Either by the developer before the strata plan is registered or afterwards as proprietor of all the lots.

⁵³ This is also a difficulty with the City of Belmont's proposal. The fact that ad valorem stamp duty would be payable on the conveyance might of course be a deterrent to the use of this device.

⁵⁴ This could possibly be achieved by treating the sale to the associate as no sale or by providing that the developer would be responsible to a subsequent purchaser notwithstanding the sale to an associate. There would be difficulty in defining who was an associate and of ensuring that bona fide sales were not caught by the legislation.

leasing them to gain an income from them) so that the condition for handing the capital sum to the strata company would never come about. The developer would no doubt be tempted if possible to increase the selling price of the lots by a corresponding amount in order to establish the fund, and the proprietors would in effect be no better off. Most importantly, the problem would be to fix a suitable amount since there may in any case be no substantial defects.

18.21 As far as the Commission is aware, no Australian legislation attempts to control the contractual relationships between builder, developer and purchaser in ways suggested by the commentators or the City of Belmont. However, the United Kingdom *Defective Premises Act 1972*⁵⁵ imposes a statutory duty upon a person "taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building)" to see that "the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed".⁵⁶ This duty is owed to the person for whom the dwelling is erected and "to every person who acquires an interest (whether legal or equitable) in the dwelling".⁵⁷ Any agreement which purports to exclude or restrict the duty is void.⁵⁸ Similarly, the South Australian *Defective Houses Act 1976* implies into contracts for the construction or sale of new houses warranties that the house has been properly constructed, has been constructed with suitable materials and is reasonably fit for human habitation. The benefit of these warranties is available to the first purchaser and to anyone who purchases the house within 5 years of the date on which it was first occupied as a residence. Both Acts apply to dwellings whether or not they are subject to multiple ownership.⁵⁹ However, neither applies to commercial buildings.

18.22 It is not within the Commission's terms of reference to recommend whether legislation in the wide terms of the English and South Australian Acts should be enacted in this State. In any case, it can be argued that the recent developments in the common law as regards liability

⁵⁵ This Act implements, with modifications, a report of the Law Commission entitled *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970).

⁵⁶ *Defective Premises Act 1972*, s 1.

⁵⁷ Ibid. Thus, tenants as well as purchasers are given a right of action.

⁵⁸ *Defective Premises Act 1972*, s 6(3). However, the duty does not arise in cases covered by a scheme approved by the relevant Minister: id, s 2. The scheme concerned is that of the National House-Builders Registration Council, under which the builder gives warranties in terms similar to the duty imposed by the Act: *Halsbury's Statutes of England* (3rd ed), continuation Volume 1972, 1399, notes to s 2.

⁵⁹ There is no strata titles legislation in England. "Multiple ownership" arrangements are often regulated through long term leases.

of builders and others for building defects has for many practical purposes overtaken the legislation. Further, the powers given to the Builders' Registration Board of Western Australia to order rectification or payment in lieu would seem to reduce the need for such legislation in Western Australia. It is to be emphasised that the rights given to purchasers and tenants under the English and South Australian Acts must be litigated in the ordinary courts, whereas the Builders' Registration Board may proceed at little cost to the complainant.

3. RECOMMENDATIONS

18.23 The Commission has accordingly concluded that because -

- (a) an intending purchaser of a strata lot can, if he wishes, insist on inclusion of warranties concerning the construction and fitness of the building before he agrees to purchase a lot;
- (b) the common law right of a purchaser to sue the builder and the local authority for negligence has been the subject of significant developments in recent years; and
- (c) the Builders' Registration Board has wide power to order rectification of building defects or money in lieu,

there is no need, at this stage, to provide special protection in the *Strata Titles Act* for purchasers of strata title lots as regards building defects.⁶⁰

18.24 However, as the Commission has pointed out above, the *Builders' Registration Act 1939-1982* only applies to the Perth metropolitan area.⁶¹ Although the overwhelming majority of strata title developments take place within this area, there is significant strata title activity in other places.⁶² At present, the Governor's power is confined to extending the Act as a whole⁶³ so that the registration provisions, as well as the Board's power to order rectification,

⁶⁰ As regards all these remedies, their efficacy ultimately depends on the person concerned being in a financial position to comply with the order. Awards against local authorities aside, the vicissitudes of the building industry are likely to mean that he is not always in this position. The *Builders Licensing Act 1971-1980* (NSW) provides for an insurance fund, to which a builder must contribute, which can be used to remedy defects in a dwelling house should he become insolvent: Part VI. A similar provision exists in New Zealand: *Building Performance Guarantee Corporation Act 1977-1978* (NZ). It may be desirable to investigate the introduction of similar legislation in Western Australia.

⁶¹ Footnote 3 on page 270.

⁶² For example in Mandurah.

⁶³ Footnote 3 on page 270.

would apply to the new area. There may be good reasons which would make this undesirable.⁶⁴ Nevertheless, these reasons may not apply to extension of the area of application of section 12A alone if legislation were enacted to make this possible. The Commission accordingly recommends that consideration be given to extending the application of the *Builders' Registration Act 1939-1982* to places presently beyond its scope or, if that is undesirable, to introducing legislation to enable section 12A alone to be so extended.

4. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

18.25 The Commission recommends that -

- (a) *a purchaser's existing remedies in contract, tort and under the Builders' Registration Act 1939-1982 should continue to apply;*
- (b) *consideration should be given to extending the area of application of the Builders' Registration Act 1939-1982 to places presently not covered by the Act or to introducing legislation enabling section 12A alone of that Act to be so extended.*

(paragraphs 18.23 and 18.24)

⁶⁴ Builders in some places outside the Perth metropolitan area, although competent to erect certain sorts of buildings, may not have the qualifications necessary to obtain registration.

PART V: RESOLUTION OF DISPUTES

CHAPTER 19

1. GENERAL

19.1 A number of persons who made submissions to the Commission complained about the difficulty of protecting rights and enforcing obligations as between participants in a strata scheme. The Act does not lay down any special procedure in this regard. Apart from section 27, which makes it an offence to fail to comply with certain duties laid down in the Act,¹ civil proceedings must be taken in the courts in the ordinary way for the purposes of obtaining an injunction, declaration or, possibly, damages.²

19.2 In the working paper the Commission outlined the special system in the New South Wales *Strata Titles Act* for the determination of disputes within a strata scheme and invited comment on the question whether a similar system should be set up in Western Australia.³

19.3 The New South Wales *Strata Titles Act* provides for a Strata Titles Commissioner, appointed under the *Public Service Act*,⁴ with wide powers to determine disputes between

¹ These appear to cover principally the cases where a default could affect the interests of third parties: for example, failure of the strata company to register with the Registrar of Titles a notice of any change in the address of the company endorsed on a strata plan; failure of the strata company to make available for inspection a copy of the by-laws in force; failure of a proprietor to surrender his duplicate certificate of title for cancellation where the company transfers all or part of the parcel after notional destruction of the building.

² In this regard s 15(6) of the Act is of importance. That subsection provides that the by-laws for the time being in force shall bind the company and the proprietors to the same extent as if the by-laws had been "signed and sealed by the company and each proprietor and contained covenants on the part of the company with each proprietor and on the part of each proprietor with any other proprietor and with the company to observe and perform all the provisions of the by-laws". In appropriate cases, therefore, an injunction could be obtained by a proprietor or the strata company restraining a breach of a by-law or for its enforcement, as the case may be: see, for example, *The Proprietors – Strata Plan No. 464 v Oborn and Another* (Supreme Court of New South Wales, 1975) reported in G F Bugden, *New South Wales Strata Title Law and Practice* (1979), ¶ 30-016. It is to be noted that the subsection relates only to the by-laws. However, the strata company or a proprietor could seek the aid of the court in enforcing the provisions laid down in the Act itself: see, for example, *Allen and Another v Proprietors - Strata Plan No 2110* [1970] 3 NSW 339. In an extreme case, application could be made to the Supreme Court under s 23 by the strata company or "any person having an estate or interest in a lot" for the appointment of an administrator to run the strata company's affairs. The Court could lend its aid to the administrator by making appropriate orders in this respect.

³ At the time the working paper was issued (February 1977), New South Wales was the only jurisdiction studied by the Commission which had provided for a special system. A broadly similar system now exists in Queensland: para 19.4 below.

⁴ The Strata Titles Commissioner exercises jurisdiction throughout New South Wales. The present Commissioner is a solicitor. The salary range for the position as at 1 November 1982 is \$33,777 to \$35,488 per annum.

participants in a strata scheme. The legislation further provides for a Strata Titles Board, constituted by a magistrate, to hear appeals from decisions of the Strata Titles Commissioner.⁵ The Board also has original jurisdiction to deal with certain matters which were considered not appropriate to be dealt with by the Commissioner.⁶ It is to be noted that the New South Wales Act does not prohibit the taking of proceedings in the ordinary courts.⁷

19.4 A broadly similar system has been established pursuant to the Queensland *Building Units and Group Titles Act 1980-1981*. A significant difference between the New South Wales and Queensland systems is that the equivalent in Queensland of a Strata Titles Board, called "a tribunal", exercises only appellate jurisdiction. The original jurisdiction is vested in a person called "a referee".⁸ The original jurisdiction of the referee is broadly the same as that of the New South Wales Strata Titles Commissioner and the Strata Titles Board.

19.5 Twenty-four persons commented on the question whether or not special provision should be made for the settlement of disputes between members of a strata titles scheme. All of the commentators favoured the creation of a simple disputes resolution system as an alternative to the courts. However, there was disagreement as to the structure of the system. Five commentators, including the Commissioner of Titles and a strata company, favoured a system consisting of two bodies along the lines of that existing in New South Wales. Eighteen⁹ favoured a single body. In view of the general support for a single body amongst the commentators, and the Commission's recommendation below¹⁰ that a system based on a referee be introduced, emphasis is given in the following discussion to the Queensland system.

⁵ There are a number of Strata Titles Boards. Every Fair Rents Board constituted under the *Landlord and Tenant (Amendment) Act 1948* is also a Strata Titles Board: NSW, s 5(6). There is only one Fair Rents Board for the Sydney metropolitan area. The practice is for the same magistrate to sit on the Sydney Strata Titles Board for a period of eighteen months or so.

⁶ NSW, ss 119-127.

⁷ But as to costs in a court see para 19.39 below.

⁸ The Queensland Act makes provision for the appointment under the *Public Service Act* of more than one referee: Qld, s 69(1). However, only one has so far been appointed. His is a full-time appointment. His salary as at 1 November 1982 is approximately \$32,000 per annum.

⁹ Including the Law Society, REIWA, and two strata companies.

¹⁰ Para 19.28.

2. THE QUEENSLAND SYSTEM

(a) Procedure

19.6 An outline of the Queensland procedural provisions is as follows -

- (a) An application for an order by the referee need not be in any particular form but must be in writing, specifying the terms of the order which the applicant is seeking and the grounds on which the application is made.¹¹ It must be accompanied by the prescribed fee and the prescribed deposit.¹² At present the fee is ten dollars. No deposit has been prescribed.
- (b) The referee must give written notice of the application to the strata company and to any person who, in his opinion, would be affected if the order sought were made.¹³ The notice must specify the order sought and invite the strata company and any member thereof and any other person to whom the notice was given to make a written submission in respect of the matter to which the application relates.¹⁴
- (c) On receipt of the notice, the strata company must display it, or a copy of it within the parcel on some part of the common property and must serve a copy of it on each person whose name appears on its strata roll.¹⁵
- (d) The referee may require the applicant to provide such further information as, in the referee's opinion, may assist in the investigation of the application.¹⁶ The referee may also make such further investigation as he thinks fit,¹⁷ and may enter upon the parcel at any reasonable time for the purpose of carrying out his

¹¹ Qld, s 72.

¹² Upon the determination of an application, the prescribed deposit must be refunded to the applicant unless the referee otherwise directs on the ground that the application was vexatious or frivolous in its nature: Qld, s 110. The position is the same in New South Wales: NSW, ss 100(1) and 139. The fee in New South Wales is \$20. No deposit has been prescribed in that State.

¹³ Qld, s 73(1)(c).

¹⁴ Id, s 73(1)(d).

¹⁵ Id, s 74.

¹⁶ Qld, s 73(1)(a).

¹⁷ Id, s 73(1)(f).

investigation upon notice being given to the strata company and to every person who has been notified of the application.¹⁸

19.7 The referee has power to delegate his powers, duties and functions to a person employed under the *Public Service Act 1922*.¹⁹ Notwithstanding any such delegation, the referee may continue to exercise all or any of the powers, authorities, duties or functions so delegated.

19.8 Any person who contravenes an order of the referee which requires that person to do or refrain from doing a specified act commits an offence and is liable to a fine of \$100 and a further fine of \$10 for every day during which the contravention continues.²⁰ The maximum amount that may be recovered in any such prosecution is \$500.²¹ In the special case of a breach of an interim order²² there is no provision for daily penalties. A person who contravenes such an order is liable to a maximum fine of \$500.²³ Proceedings in respect of an offence in either case may only be taken by the applicant for the order or the strata company concerned. A penalty imposed under these provisions operates as a judgment under the *Magistrates Courts Act 1921-1976* against the defendant and in favour of the prosecutor for the amount of the penalty.²⁴

(b) Power to make final orders

19.9 The referee's principal powers are conferred on him by section 77 of the *Queensland Building Units and Group Titles Act 1980-1981*. This section provides that the referee may make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform a power, authority, duty or function conferred or imposed by the Act on any person entitled to make an application under the section, or on the chairman, secretary or treasurer of the body corporate. An application for such an order may be made by a strata company, a managing agent, a proprietor or a person having an estate or interest in a lot or an occupier of a lot. For the purposes of section 77, if the subject matter of the application is one in which the strata

¹⁸ Id, s 73(1)(g).

¹⁹ Id, s 70.

²⁰ Id, s 113(1).

²¹ Id, s 113(2).

²² Para 19.11 below.

²³ Qld, s 113(3).

²⁴ Id, s 113(5)(a).

company has a discretion (such as investment of money held in the administrative fund), it is deemed to have failed or refused to exercise the power only if it has decided not to do so.²⁵ The referee may not, however, make an order under section 77 in respect of any matter which, in accordance with any provision of the Act or the by-laws, may only be exercised or performed pursuant to a unanimous resolution, resolution without dissent²⁶ or special resolution.²⁷

19.10 Section 77 is a general dispute-resolving provision but, in addition, other provisions of the Act empower the referee to make orders in the following circumstances -

(a) *Consents affecting common property*

Where, pursuant to an application by a proprietor, the referee considers that the strata company has unreasonably refused to consent to a proposal by that proprietor -

- (i) to effect alterations to the common property; or
- (ii) to have carried out repairs to any damage to the common property or any other property of the strata company,

the referee may make an order that the strata company consent to the proposal.²⁸

(b) *Disposal of personal property*

Where, pursuant to an application by a proprietor, the referee considers that an acquisition or proposed acquisition of personal property by the strata company is unreasonable, he may order -

- (i) that the personal property acquired be sold or otherwise disposed of by the strata company; or

²⁵ Qld, s 77(2).

²⁶ There is no provision for such a resolution in Western Australia. The Commission has not recommended that such a resolution should be introduced.

²⁷ Qld, s 77(3).

²⁸ Id, s 79.

(ii) that the personal property be not acquired.²⁹

(c) *Acquisition of personal property*

Where, pursuant to an application by a proprietor, the referee considers that the strata company has unreasonably refused to acquire personal property, he may order it to do so.³⁰

(d) *To pursue insurance claim*

Where, pursuant to an application by a proprietor, the referee considers that the strata company has unreasonably refused to make or pursue an insurance claim in respect of damage to the building or any other property insured by the strata company, the referee may order it to do so.³¹

(e) *Varying rates of interest*

Where, pursuant to an application by a proprietor, the referee considers that the strata company has determined an unreasonable rate as the rate of interest chargeable for the late payment of a contribution levied on proprietors under the Act, the referee may, in respect of such contributions as are specified in the order, order that no interest be so chargeable or that the rate be as specified by him in the order instead of the rate so determined.³²

(f) *Supply of information or documents*

Where, pursuant to an application by any person entitled to the information, the referee considers that the strata company, a managing agent or the chairman, secretary or treasurer of the strata company has wrongfully -

²⁹ Id, s 80.

³⁰ Id, s 81.

³¹ Id, s 82.

³² Id, s 83.

- (i) withheld from the applicant any information to which he is entitled under the Act; or
- (ii) failed to make available for inspection by the applicant or his agent any record or document which he is entitled to inspect,

the referee may order the person concerned to give the information or make the record available.³³

(g) *Animal kept contrary to by-laws*

Where, pursuant to an application by a strata company, a proprietor, any person having an estate or interest in a lot or an occupier of a lot, the referee considers that a person is keeping an animal on a lot or common property in contravention of the by-laws, the referee may order that person to cause the animal to be removed from the parcel within a specified time, unless the keeping of the animal on the lot or common property, as the case may be, is subsequently authorised pursuant to the by-laws.³⁴

(h) *Animal kept pursuant to by-laws*

Where, pursuant to an application by the strata company, a proprietor, any person having an estate or interest in a lot or an occupier of a lot, the referee considers that an animal kept on the lot or common property in accordance with the by-laws causes a nuisance or hazard or unreasonably interferes with the use and enjoyment of another lot or the common property, he may order -

- (i) the animal to be removed; or
- (ii) the person keeping the animal to take such action as will terminate the nuisance, hazard or unreasonable interference.³⁵

³³ Id, s 84.

³⁴ Id, s 85.

³⁵ Id, s 86.

(i) Confirming information for roll

Pursuant to an application by the strata company, a managing agent, proprietor or other person having or acquiring an estate or interest in a lot, the referee may order the strata company to enter information on the roll of the strata company.³⁶

(j) Revoking a by-law

Pursuant to an application by a person entitled to vote at a meeting of the strata company, the referee may make an order revoking an addition to, or an amendment of, or repeal of a by-law by the strata company where the referee considers that, having regard to the interest of all proprietors in the use and enjoyment of their lots or the common property, the addition, amendment or repeal should not have been effected.³⁷

(k) Granting licence to use common property

Pursuant to an application by a proprietor of a lot, the referee may order that the applicant, and any occupier of the lot of which the applicant is the proprietor, may use specified common property in such a manner, for such purposes, and upon such terms and conditions, if any, as are specified in the order. The referee may not make such an order unless he is satisfied that the lot concerned is otherwise incapable of reasonable use and enjoyment by the proprietor or occupier, and that the strata company has refused to grant a licence to use common property upon such terms as would enable that proprietor or occupier reasonably to use and enjoy that lot.³⁸

³⁶ Id, s 87.

³⁷ Id, s 88. In one case in New South Wales under a similar provision, a by-law authorising the locking of entrance doors to a home unit building was challenged. The application was dismissed because it was considered to be in the interest of all proprietors that the premises be secured from intruders: Case 301, (NSW) Strata Titles Board, G F Bugden, *New South Wales Strata Title Law and Practice* (1979), ¶ 31-301.

³⁸ Qld, s 89. In a case in New South Wales the applicant made a claim for exclusive use of an area of common property in order to improve the privacy of his unit. The application was dismissed because the Strata Titles Board considered that measures, other than the grant of exclusive use of the area, could be adopted to solve the problem: Case 400, (NSW) Strata Titles Board, G F Bugden, *New South Wales Strata Title Law and Practice* (1979), ¶ 31-400.

(l) *Invalidating purported by-law*

Pursuant to an application by a person entitled to vote at a meeting of the strata company, the referee may declare a purported by-law invalid if he considers that the company did not have power to make it.³⁹

(m) *Varying amount of contribution*

Where the referee considers that any amount proposed to be levied by way of contributions is inadequate or excessive, or that the manner of payment of contributions is unreasonable, he may -

- (i) order payment of a different amount;
- (ii) order payment of contributions in a different manner; or
- (iii) make both such orders.⁴⁰

(n) *Declaring resolution a nullity*

The referee, if satisfied that a resolution would not have been passed at a general meeting of the strata company but for the fact that the applicant was improperly denied a vote or was not given due notice of the item of business, may order that the resolution be treated as a nullity.⁴¹

(o) *Varying amount of insurance*

The referee, on the application of a proprietor or mortgagee of a lot, may order that the strata company vary the amount of insurance required to be taken out by the strata company if he considers that the amount of insurance is not reasonable.⁴²

³⁹ Qld, s 90.

⁴⁰ Id, s 91.

⁴¹ Id, s 92.

⁴² Id, s 93.

(p) Appointment of managing agent

Where -

- (i) in consequence of the making of an order by the referee a duty is imposed on the strata company;
- (ii) a duty is otherwise imposed by the Act on a strata company;
- (iii) a duty is imposed by the Act on the chairman, secretary or treasurer of a strata company or of the council of a strata company; or
- (iv) a judgment debt is owed by a strata company,

the referee may appoint a managing agent to perform that duty and any other duty specified in the order or to pay that judgment debt, as the case may require.⁴³ The referee may also order that the managing agent may exercise and perform all or anyone or more of the powers, duties and functions of the strata company or of an officer of the strata company including the treasurer. No other person may exercise or perform any power, duty or function which the managing agent is authorised to perform.⁴⁴

(c) Power to make interim orders

19.11 Where an applicant for an order under section 77⁴⁵ so requests, the referee may make an interim order if he considers that the urgency of the case warrants it,⁴⁶ for example, to prevent a proprietor making building alterations to the common property without the consent of the strata company. Such an order ceases to have effect three months from the date on which it takes effect or, where the referee has renewed the interim order (which the section empowers him to do), six months from that date. The section provides that the power to make

⁴³ Id, s 94. Applications under (i) must be made by the person who obtained the order. Applications under (ii) and (iii) must be made by a person having an estate or interest in a lot and applications under (iv) must be made by a judgment creditor. Appointment of a managing agent may be made on such conditions (including his remuneration by the strata company) and for such duration as the referee specifies.

⁴⁴ Ibid.

⁴⁵ Para 19.9 above.

⁴⁶ Qld, s 76.

an interim order may be exercised notwithstanding that the normal procedure of dealing with an application is not followed.

(d) Other powers

19.12

(i) Power to call meetings of strata company

Section 29(6) provides that, where the original proprietor does not convene the first annual general meeting within three months after the registration of the strata plan, as the Queensland Act obliges him to do,⁴⁷ the referee may, on the application of the strata company, a proprietor or a mortgagee of a lot, appoint a person to convene the meeting. Section 29(7) empowers the referee, if there is not a council of the strata company, to appoint a person to convene a general meeting within a specified time. Section 29(8) and (9) empowers the referee to make consequential orders.

(ii) Incidental powers

The referee is empowered to make an order that -

- (a) requires a party to a dispute before him to pay a sum not exceeding \$1,000 to a person specified in the order;
- (b) requires a party to a dispute to do or refrain from doing some specified act to which the application relates ;
- (c) strikes out for want of jurisdiction the dispute before him;⁴⁸
- (d) exempting a strata company from certain provisions of the Act.⁴⁹

⁴⁷ Para 20.26 below.

⁴⁸ Qld, s 78.

⁴⁹ Id, s 41(2). This subsection empowers the referee to exempt a strata company from certain statutory obligations, principally relating to postal voting. Since the Commission has not recommended that the by-laws in part I of the schedule to the Act contain any requirements for postal voting, a similar provision relating to the powers of the proposed Western Australian Strata Titles Referee would be inappropriate.

The Commission has been informed that the power to order the payment of a sum of money has been used on at least one occasion to reimburse a strata company for work it performed because a proprietor failed to perform his duty to carry out the work.

3. COMPARISON OF THE QUEENSLAND AND NEW SOUTH WALES SYSTEMS

(a) Persons or bodies exercising jurisdiction

19.13 The matters which may be dealt with in the disputes resolution systems in Queensland and New South Wales are substantially the same. However, as explained above, this jurisdiction is exercised by a single person in Queensland, while in New South Wales it is divided between the Strata Titles Commissioner and the Strata Titles Board. In New South Wales the matters referred to in (a), (b), (c), (d), (e), (f), (g), (h) and (i) of paragraph 19.10 above and paragraph 19.12(i) are dealt with by the Commissioner and the matters referred to in (j), (k), (l), (m), (n), (o) and (p) of paragraph 19.10 above are dealt with by the Board.⁵⁰ The Commissioner also has a general disputes resolution power similar to that of the referee referred to in paragraph 19.9 above⁵¹ and power to make interim orders.⁵² In both States the general disputes resolution power cannot be used "...in respect of any matter dealt with in any other section".⁵³ Nor can an order be made where the State's Supreme Court has exclusive jurisdiction under the Act.⁵⁴

(b) Procedure

19.14 The procedure of the New South Wales Strata Titles Commissioner is similar to that of the referee in Queensland. The procedure of the New South Wales Strata Titles Board, which is constituted by a stipendiary magistrate, usually involves a formal hearing. A hearing

⁵⁰ The Board may also make an order reallocating unit entitlements where it considers that the allocation was, at the time the strata plan was registered or at the time any strata plan of subdivision was registered, as the case may be, unreasonably made, having regard to the respective values of the lots at that time: NSW, s 119. There is no power to reallocate unit entitlement in Queensland. The New South Wales Act does not contain any provision equivalent to the power referred to in para 19.12(ii)(a) and (d) above.

⁵¹ NSW, s 105.

⁵² Id, s 104A.

⁵³ Qld, s 77(5); NSW, s 105(5).

⁵⁴ Qld, s 77(4); NSW, s 105(4).

need not be held in every case.⁵⁵ However, unlike a court, the Board may inform itself in such manner as it thinks fit, without regard to legal forms or solemnities, and it is not bound to apply the rules of evidence.⁵⁶ The parties have a right of appearance before the Board which may examine witnesses upon oath or affirmation. A party may appear personally, or be represented by counsellor a solicitor, or by an agent authorised in writing.⁵⁷

(c) Appeals

19.15 A right of appeal to a Board exists against any order of the Strata Titles Commissioner.⁵⁸ This right may be exercised by -

- (a) the applicant for the order ;
- (b) a person who made written submissions to the Commissioner; or
- (c) the person who is required to do or refrain from doing a specified act pursuant to the Commissioner's order.

In Queensland appeals lie from the decisions of the referee to "a tribunal". Every stipendiary magistrate constitutes a tribunal for the purposes of the Act.⁵⁹ The procedure of a tribunal is similar to that of a New South Wales Strata Titles Board.⁶⁰ In both Queensland and New South Wales there is a further appeal on questions of law to the State's Supreme Court.⁶¹

19.16 The New South Wales Strata Titles Commissioner has power to refer to the Board any application made to him for an order if he is of the opinion that the application raises matters of legal complexity, that the importance of the subject-matter of the application or the possibility of the frequent recurrence of like applications warrants its reference to the Board,

⁵⁵ NSW, s 132. See Case 203, (NSW) Strata Titles Board, G F Bugden, *New South Wales Strata Title Law and Practice* (1979), ¶ 31-203, where an application was determined without a hearing.

⁵⁶ NSW, s 132.

⁵⁷ Id, s 134.

⁵⁸ Id, s 128.

⁵⁹ Qld, s 96.

⁶⁰ Id, ss 97 to 105.

Both Queensland and New South Wales require the appellate body to make a thorough investigation without regard to legal forms or solemnities before making an order: Qld, s 97(1); NSW, s 132(1). Both States also empower the appellate body to admit evidence other than evidence which was before the referee or Commissioner: Qld, s 97(1); NSW, s 129(1).

⁶¹ Qld, s 108; NSW, s 130.

or that for any other reason it should properly be referred to a Board.⁶² The Queensland referee has no power to refer such matters to a tribunal or court.

(d) Costs

19.17 Neither the referee nor the tribunal in Queensland, nor the Strata Titles Commissioner or Strata Titles Board has power to award costs.⁶³

(e) Enforcement of orders

19.18 The manner in which orders of the referee can be enforced has been referred to in paragraph 19.8 above. Orders of a tribunal are enforceable in the same way.⁶⁴ The same offence, penalty and method of enforcement is provided in New South Wales.⁶⁵

(f) Jurisdiction of courts unaffected

19.19 In both Queensland and New South Wales, although a disputes resolution system is provided, there is no derogation from "...any rights or remedies that a proprietor or mortgagee of a lot or a [strata company] may have in relation to any lot or the common property".⁶⁶ However, if proceedings are taken in a court to enforce such rights or remedies, the court must order the plaintiff to pay the defendant's costs in such amount as may be determined by the court if it is of the opinion that "...having regard to the subject-matter of the proceedings, the taking of the proceedings was not, in the circumstances of the case, warranted by reason that [the disputes resolution system] makes adequate provision for the enforcement of those rights or remedies".⁶⁷

⁶² NSW, s 100(2).

⁶³ Qld, ss 75(7) and 107(1)(d); NSW, ss 104(5), 116 and 129(1)(c).

⁶⁴ Qld, s 107(2).

⁶⁵ NSW, s 142.

⁶⁶ Qld, s 119(1); NSW, s 146(1).

⁶⁷ Qld, s 119(2); NSW, s 146(2). The sections appear to be deficient in that they do not apply to all of the classes of persons who may make application to a referee or Strata Titles Commissioner, for example, they do not apply to a managing agent or a person having an estate or interest in the lot, such as a lessee, or to an occupier.

4. THE WORKING OF THE SYSTEMS IN NEW SOUTH WALES AND QUEENSLAND

19.20 From personal accounts given to a member of the Commission by the New South Wales Strata Titles Commissioner and by a Sydney solicitor and a real estate agent specialising in the strata titles area,⁶⁸ the establishment of a special system for resolving disputes in strata schemes has been a success. The solicitor did, however, suggest that if such a system were to be implemented in Western Australia, it might be preferable to adopt a version similar to that of Queensland under which the tribunal acts as an appellate body, all original jurisdiction being vested in the referee.⁶⁹ At present in New South Wales, in the average case, the time from the filing of the initial application to the determination is a little over a month.⁷⁰ Apart from dealing with disputes, the Commissioner's office provides information to the public relating to the New South Wales *Strata Titles Act 1973-1981* and the operation of strata title schemes.⁷¹

19.21 The view of the Queensland referee is that the system is also functioning satisfactorily in that State.⁷² He has informed the Commission that until recently nearly all orders were made by him personally.⁷³ The referee's office also provides an information service for the public.

⁶⁸ The solicitor was Mr G F Bugden, the editor of *New South Wales Strata Title Law and Practice*. The real estate agent was Mr P Clisdell, the secretary of the New South Wales Home Unit Owners' Association and the managing agent for a large number of strata schemes.

Both are members of the New South Wales Strata Titles Review Committee appointed by the Government to monitor the working of the New South Wales legislation and to recommend any changes considered desirable.

The Commission is indebted to the Strata Titles Commissioner and Messrs Bugden and Clisdell for their assistance.

⁶⁹ Para 19.4 above.

⁷⁰ In practice, most of the orders are made by a public service officer called the deputy Strata Titles Commissioner, to whom the Commissioner has delegated his power to do so. The Commissioner also holds a number of other positions such as that of Fair Rents Controller and it would be impossible for him to exercise all the powers of the Commissioner personally.

On-site investigations are normally carried out by designated inspectors of the Department of Consumer Affairs. They submit a report on the result of their investigation to the Commissioner or his delegate. The report is taken into account in determining the application.

⁷¹ In the nine months to 31 March 1982, 668 enquiry letters and 2,683 telephone calls had been received: G F Bugden, *New South Wales Strata Title Law and Practice* (1979), ¶¶ 13-935 and 13-940. Some of these probably related to the procedure for commencing proceedings rather than as to the operation of strata title schemes.

⁷² This view was given in correspondence with the Commission. The system has only been in operation in Queensland since November 1980 and his experience is necessarily limited.

⁷³ As were most on-site inspections. However, temporary allocation to other duties associated with the legislation has meant that most applications are currently being dealt with by his delegate.

5. THE COMMISSION'S VIEW

(a) The need for an alternative disputes resolution system

19.22 From preliminary submissions, comments made on the working paper and enquiries made by it, the Commission is convinced that there is a need for a simple and inexpensive system for the settlement of disputes in strata schemes. Although sometimes the acts or decisions complained of may seem relatively minor to outsiders, nevertheless they can be a source of friction and disharmony within a strata scheme. The person or persons affected may be unwilling to take legal proceedings (supposing a remedy were available) because of the trouble and expense involved, or may lack the financial means of doing so.

19.23 Allegations have been made to the Commission by some proprietors that the strata companies concerned had -

- (i) refused to perform their duties under the Act or by-laws, for example, by refusing to repair and maintain the common property or to provide proprietors with information to which they were entitled;
- (ii) used their powers unreasonably or made by-laws which were unreasonable.

19.24 Office bearers of councils of strata companies also have complained to the Commission about the impracticability of enforcing by-laws under the existing Act. Allegations have been made of proprietors and tenants parking their vehicles in a manner contrary to that prescribed by by-law of the strata company, of noisy behaviour by residents, and of the unauthorised construction by proprietors of improvements on the common property for their own use. The councils concerned found that they were unable to deal effectively with such matters.

19.25 There are also problems arising from the inability of the proprietors in some strata schemes to organise the scheme on a business-like basis. This may arise not from any lack of goodwill on the part of those involved, but from their lack of management skills. In such cases, it may be desirable for an administrator to be appointed.⁷⁴

⁷⁴ Para 19.44 below.

19.26 The Commission considers that the Supreme Court should continue to have exclusive jurisdiction in regard to fundamental matters, such as cancellation of a strata plan,⁷⁵ variation of a strata scheme⁷⁶ and the winding up of a strata company.⁷⁷ It is also of the view that the courts should not be excluded from continuing to deal with other matters arising under the Act or by-laws as cases will arise where proceedings before a court are warranted. However, for the reasons stated above, the Commission considers that an alternative system should be established for the determination of disputes where the circumstances would not justify the expense of court proceedings.

19.27 The use of a special procedure for settling disputes between members of a private organisation is not unprecedented in Western Australia. Section 96 of the *Credit Unions Act 1979-1982* provides that the Registrar of Credit Unions (a public official) may determine disputes between a member of a credit union and the credit union concerned. Unlike a member of a voluntary association, a proprietor in a strata scheme who believes that he is being treated unfairly or even oppressively cannot readily withdraw from the scheme.

(b) Appointment of a Strata Titles Referee

19.28 The Commission accordingly recommends that a new, simple, disputes resolution procedure be provided in the Act. Of the two systems studied by the Commission, those in New South Wales and Queensland, the Commission recommends the adoption of the Queensland approach under which disputes are dealt with by a person called a referee.⁷⁸ Generally the procedure to be followed and the powers and jurisdiction of the Western Australian Referee should be as provided for in the Queensland *Building Units and Group Titles Act 1980-1981*.⁷⁹

⁷⁵ Para 20.5 below.

⁷⁶ Paras 20.6 to 20.8 below.

⁷⁷ WA, s 19(8). The jurisdiction to deem a special resolution to be a unanimous resolution would, under the Commission's recommendation in para 11.22 above, be vested exclusively in the Supreme Court. However, the Commission recommends in para 19.44 below that the jurisdiction of the Supreme Court to appoint an administrator of the strata company should be vested instead in the proposed Strata Titles Referee, subject to the power of a Judge of the Supreme Court to order that the application be determined by that Court: para 19.43 below.

⁷⁸ As emphasised above, the jurisdiction of the courts should remain.

⁷⁹ Paras 19.6 to 19.12 above. That is, except those matters which the Commission has not recommended should be adopted in Western Australia, for example, entering information on the roll (para 19.10(i) above and footnote 5 on p 275 and empowering the referee to exempt a strata company from certain obligations principally concerned with Queensland's requirements as to postal voting (para 19.12(d)

(c) Referee's probable work load

19.29 In its consideration of the question whether or not a Strata Titles Referee should be appointed, the Commission has endeavoured to formulate an opinion on his probable work load. To assist it the Commission has ascertained the number of first instance applications being made to the Commissioner of Strata Titles and the Strata Titles Board in New South Wales and to the referee in Queensland. In the year commencing 1 January 1981, excluding applications which would not be available in Western Australia, 799 such applications were lodged in New South Wales and 98 in Queensland.⁸⁰

19.30 On 1 January 1981, there were approximately 200,000 strata lots in New South Wales and 34,000 lots in Queensland. This means that in 1981 about one application for every 250 lots was made in New South Wales and one application for every 350 in Queensland.

19.31 In Western Australia, 47,348 lots were created by 30 June 1982. If the frequency of applications to the proposed Referee in this State lay half way between that in New South Wales and Queensland, there would be about 157 applications each year (an average of about three a week), not all of which would require inspections. The number of applications may, in fact, be less than this figure because of the large number of strata titled duplexes in Western

above). The notice referred to in para 19.6(c) above should, in Western Australia, be served on each proprietor and any mortgagee of a lot who has given written notice of his mortgage to the strata company. There are other areas in which it would not be appropriate to adopt the Queensland legislation without amendment.

First, Qld, s 77 confers power on the referee to settle disputes or rectify complaints with respect to powers, authorities, duties or functions conferred or imposed by the Act. Following New South Wales (NSW, s 105), the Commission considers that the Referee should be expressly empowered to make orders with respect to matters arising under the by-laws of a strata company. Also following New South Wales, the Referee should have power to make an order on the council of a strata company.

Secondly, Qld, s 77 refers to a "resolution without dissent": para 19.9 above. There is no such resolution in the Western Australian Act and the Commission does not recommend that such a resolution should be introduced.

Thirdly, a number of sections in the disputes part refer to a "managing agent". In Western Australia the corresponding officer is called an "administrator": para 19.44 below.

Fourthly, the Referee should be expressly empowered to appoint an administrator (para 19.10(p) above) where a duty is imposed by the by-laws on a strata company, or the chairman, secretary or treasurer of the strata company or of the council.

Fifthly, a number of sections in the disputes part refer to an "occupier of a lot". In order to conform to the Commission's recommendations it would be necessary to provide for applications to be made by a tenant, occupier or resident: paras 16.10 and 16.11 above.

⁸⁰ Appendix III contains a table of the applications under each section of the New South Wales and Queensland legislation during that year. The applications which would not be available in Western Australia are indicated in the table by an asterisk.

Although application for a reallocation of unit entitlement would on the Commission's recommendation be available here, as in New South Wales, the power to reallocate would vest in the Land Valuation Tribunal : paras 12.30 and 12.33 above.

Australia. Since each proprietor in a duplex tends to go his own way, treating his unit as an ordinary freehold dwelling, the occasions on which disputes are likely to arise would be less than if the lots formed part of a larger scheme.⁸¹

(d) Part-time office only

19.32 From the above, the Commission estimates that the making of determinations would occupy the proposed Strata Titles Referee about one day per week.⁸² The Commission considers that it is important that the Referee should where practicable undertake on-site inspections himself. Allowing for two or three inspections per day, this would accordingly occupy another day, making a total of two days per week.⁸³ The office of Strata Titles Referee could accordingly be combined with another office. One possibility is to combine it with the office of referee under the *Small Claims Tribunals Act 1974-1981*, particularly as the person appointed as the Strata Titles Referee should possess legal qualifications.⁸⁴

19.33 An alternative means of providing for a Strata Titles Referee would be the appointment of a small panel of legal practitioners who could act as referee as the need arose. An existing registry, such as that of the Town Planning Appeal Tribunal or the Land Valuation Tribunal, could be used. The senior member of the panel could deal with the applications himself or allocate them to other members of the panel.

19.34 However, the Commission prefers the appointment of a referee, perhaps a part-time referee, under the *Small Claims Tribunals Act 1974-1981* to the office of Strata Titles Referee. The temperament required to deal with consumer disputes would make such a person well suited to deal with those likely to arise in strata titles schemes. There would, however, be differences in the manner in which matters are dealt with under the strata titles legislation.

⁸¹ From submissions made to the Commission it appears that the main source of disharmony between proprietors of duplexes arises from the use of a common driveway.

⁸² The New South Wales Strata Titles Commissioner informed the Commission that, on average, his office determines four applications a day, only three of which require an inspection of the strata scheme. An inspector, on average, makes three inspections a day: footnote 70 on page 264.

⁸³ Initially at least. This may eventually change as the State's population grows and the number of persons living in strata title developments increases.

⁸⁴ S 7 of the *Small Claims Tribunals Act 1974-1981* provides that a referee under that Act must be a legal practitioner admitted to practice in Western Australia.

The Commission recommends in para 19.40 below that failure to comply with an order of the Strata Titles Referee should be an offence. It is therefore particularly important that the Referee's investigation is conducted fairly with due regard to the interests of all parties and that the terms of the order leave no doubt as to what the person affected is to do or refrain from doing. A lawyer's training in litigation and the preparation of documents would assist in this regard.

First, most matters would be dealt with administratively rather than with an informal hearing as occurs in the Small Claims Tribunal. Secondly, in the case of small claims applications legal representation is generally not permitted⁸⁵ whereas there is no reason why such representation should not be permitted on those occasions when the Strata Titles Referee considers it desirable to hold a hearing.

19.35 Although the staff of the Registry of the Small Claims Tribunal are public servants employed in the Department of Labour and Industry, the Small Claims Tribunal referees are independent officials appointed by the Governor. The Commission considers that the Strata Titles Referee should have a similar status.

19.36 As emphasised above, the Commission considers that it is important that the Strata Titles Referee should generally determine all but the simplest applications personally. This would tend to promote expertise and more consistent decisions. The Referee should be able to obtain the assistance of experts within the Public Service, including officers of the State Housing Commission, to deal with certain applications such as water penetration, the location of air-conditioners or vehicle access.⁸⁶ Occasionally, matters arising in towns outside easy travelling distance from Perth would need to be dealt with urgently or be of a nature not requiring the Referee's personal attention. In such cases it would be reasonable for him to delegate power to make the determination to an appropriate person in the town concerned or a nearby town, such as the resident stipendiary magistrate.

19.37 The creation of an office of Strata Titles Referee with a registry would also provide an avenue for people to obtain basic information about the Act and the operation of strata title schemes. The number of requests made to this Commission for such information suggests that the registry of the Referee could perform a valuable role in this regard. It is a role which is performed by the referee's office in Queensland and the Strata Titles Commissioner's office in New South Wales.⁸⁷ It would, of course, be necessary for those giving the information to ensure that they did not become involved in disputes which might ultimately have to be dealt with by the Strata Titles Referee. In these cases, people should be directed to legal practitioners or the Legal Aid Commission for advice.

⁸⁵ *Small Claims Tribunals Act 1974-1981*, s 32.

⁸⁶ Referees of the Small Claims Tribunal have access to such experts. The Strata Titles Referee would also require clerical and administrative assistance to help him process the applications and to answer enquiries.

⁸⁷ Paras 19.20 and 19.21 above.

19.38 In both Queensland and New South Wales, a small application fee is charged.⁸⁸ While it seems to be desirable to have an application fee, say \$20, to discourage frivolous applications, a fee designed to recoup the full cost of dealing with each application would probably prove prohibitive in most cases and defeat the purpose of the scheme. As with the Small Claims Tribunal, it seems that most of the cost of dealing with applications would have to be borne by the Government as part of the cost of the administration of justice in the State. This may not be unreasonable in view of the social benefit in having disputes in strata schemes settled with the minimum of expense and delay.

(e) Other rights and remedies not to be affected

19.39 The Commission has emphasised above⁸⁹ that the courts should continue to have jurisdiction in regard to disputes within strata schemes. To ensure that there is no doubt on the matter, the Commission recommends the adoption of a provision along the lines of that contained in section 119(1) of the Queensland Act and section 146(1) of the New South Wales Act referred to in paragraph 19.19 above. However, in order to discourage persons from commencing court proceedings in those cases which could satisfactorily be dealt with by the Referee, the Commission recommends the adoption of a provision which is also contained in the Queensland and New South Wales Acts and which empowers the court to order that the plaintiff pay the defendant's costs if it is of the opinion that "...having regard to the subject-matter of the proceedings, the taking of the proceedings was not, in the circumstances of the case, warranted by reason that [the disputes resolution system] makes adequate provision for the enforcement of those rights or remedies."⁹⁰

(f) Enforcement of orders of the Referee

19.40 If a person failed to comply with an order of the Referee to do or refrain from doing a specified act it would appear that he would commit an indictable offence under section 178 of the *Criminal Code*. This section provides:

"Any person who, without lawful excuse, the proof of which lies on him, disobeys any lawful order issued by any Court of justice, or by any person authorised by any public Statute in force in Western Australia to make the order, is guilty of a misdemeanour,

⁸⁸ The fee in Queensland is \$10 and in New South Wales \$20.

⁸⁹ Para 19.26.

⁹⁰ Para 19.19 above.

unless some mode of proceeding against him for such disobedience is expressly provided by Statute, and is intended to be exclusive of all other punishment.

The offender is liable to imprisonment for one year."

The Commission considers that, as in Queensland and New South Wales,⁹¹ it would be preferable to provide instead for a simple offence to be tried summarily in a Court of Petty Sessions. However, the provision in those jurisdictions should be modified in three ways. **First**, there should be no limitation on those who should be able to a complaint for the offence.⁹² **Secondly**, the fine should not be payable to a private prosecutor but to the Treasurer in the usual way.⁹³ A provision for the fine to be paid to private prosecutors could encourage prosecutions for trivial breaches of the Referee's orders. **Thirdly**, there should be no maximum limit on the aggregate penalty where the offence is of a continuing nature. In Queensland and New South Wales there is a penalty not exceeding ten dollars for every day during which the contravention continues with a maximum sum payable of five hundred dollars.⁹⁴ The provision of such a maximum sum would make it more likely that a person would treat that sum as a fee for continuing to act in contravention of the order.⁹⁵

(g) Appeals from decisions of the Referee

19.41 Following Queensland, the Commission recommends that the decisions of the Referee should be subject to appeal. If the Commission's recommendations for the establishment of an administrative appeal system in its report, *Review of Administrative Decisions: Appeals*,⁹⁶ are adopted the Commission considers that that system would provide a satisfactory means of dealing with appeals from decisions of the Referee.

19.42 As, on the whole, the matters considered by the Referee would not be likely to involve complex questions of fact, law or discretion the Commission considers that appeals should lie

⁹¹ Paras 19.8 and 19.18 above.

⁹² In Queensland and New South Wales, proceedings may only be commenced by the applicant for the order or the strata company concerned: Qld, s 113(4); NSW, s 142(3).

⁹³ *Fines and Penalties Appropriation Act 1909*, s 2 and *Justices Act 1902-1981*, s 168.

⁹⁴ Qld, s 113(1) and (2); NSW, s 142(1) and (2).

⁹⁵ See *The Proprietors - Strata Plan No. 9616 v Knaggs* (Supreme Court of New South Wales, 1982), reported in G F Bugden, *New South Wales Strata Title Law and Practice* (1979), ¶ 30-037, for an instance of such a situation. In that case the proprietor concerned had refused to comply with the Strata Titles Commissioner's order to remove alterations to the common property which he had effected without the company's consent. The strata company was obliged to take proceedings in the Supreme Court for an injunction requiring the proprietor to restore the common property.

⁹⁶ This report was submitted in January 1982.

to the proposed Administrative Law Division of the Local Court rather than the proposed Administrative Law Division of the Supreme Court.⁹⁷ There would be a further right of appeal on questions of law to the Administrative Law Division of the Supreme Court and then the Full Court.

(h) Remittals

19.43 As some applications to the Referee may warrant determination by the Supreme Court the Commission recommends that an applicant or anyone on whom a notice has been served should be able to apply to a Supreme Court judge for an order that the matter be remitted to the Supreme Court. In considering whether or not to grant an application for remittal, the judge should have regard to -

- (a) whether the matter involves a difficult question of law;
- (b) whether the matter involves a question of public importance; or
- (c) such other matters as he thinks fit.

In dealing with a matter remitted to the Supreme Court, a judge should, in addition to his existing powers, have all of the powers of a Referee.

(i) Appointment of an administrator

19.44 Section 23(1) of the Act provides that the strata company, a creditor of the company, or any person having an estate or interest in a lot may apply to the Supreme Court for the appointment of an administrator of a strata titles scheme. The administrator has, to the exclusion of the strata company, the powers and duties of the company or such of those powers and duties as the Court may order.⁹⁸

⁹⁷ The Commission recommended the establishment of such a Division in para 4.2 of its report on *Review of Administrative Decisions: Appeals* (1982). If the Commission's recommendations in that report have not been implemented, the Commission suggests that appeals from decisions of the Referee should lie to the Local Court nearest to the strata scheme.

⁹⁸ WA, s 23(4).

19.45 If the recommendation in para 19.28 above that the proposed Referee should have powers and jurisdiction similar to those of the referee in Queensland is adopted, it would mean that the Referee would be able to appoint an administrator, or managing agent as he is called in Queensland. It would then be unnecessary to retain section 23 of the present Act giving that power to the Supreme Court. However, the Commission considers that it would be preferable to retain the title of administrator for such an appointee rather than to use the term "managing agent" as in Queensland.⁹⁹

6. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

19.46 The Commission recommends that -

- (a) *The Act should be amended to provide for the appointment of a Strata Titles Referee to determine disputes between participants in a strata scheme.*
(paragraph 19.28)
- (b) *The procedure to be followed and the jurisdiction and powers of the Referee should generally be as contained in the Queensland Building Units and Group Titles Act 1980-1981.*
(paragraph 19.28)
- (c) *Taking into account the fact that the office of Referee could be combined with another office, a Referee under the Small Claims Tribunals Act 1974-1981 should be appointed as the Strata Titles Referee.*
(paragraph 19.34)
- (d) *The Registry Office of the Strata Titles Referee should also have the role of providing basic information to members of the public about the Act and the operation of strata title schemes.*
(paragraph 19.37)
- (e) *The legislation should make it clear that the jurisdiction of the courts to deal with matters arising in strata schemes is unaffected but that the court should*

⁹⁹ Paras 19.10(p) above and 20.13 and 20.17 below.

be empowered to order that the plaintiff pay the defendant's costs if it considers that the taking of proceedings was not warranted by reason of the fact that the disputes resolution system makes adequate provision for the enforcement of the rights or remedies concerned.

(paragraph 19.39)

(f) *It should be an offence to fail to comply with an order of the Strata Titles Referee.*

(paragraph 19.40)

(g) *There should be a right of appeal from a decision of the Strata Titles Referee to the proposed Administrative Division of the Local Court.*

(paragraphs 19.41 and 19.42)

(h) *There should be power to remit a matter from the Referee to the Supreme Court.*

(paragraph 19.43)

(i) *The Strata Titles Referee, rather than the Supreme Court, should be able to appoint an administrator of a strata titles scheme.¹⁰⁰*

(paragraph 19.45)

¹⁰⁰ Subject to the power of a Judge of the Supreme Court to order that the application be remitted to the Supreme Court for determination by it: para 19.43.

PART VI: OTHER MATTERS

CHAPTER 20

1. INTRODUCTION

20.1 In this chapter the Commission makes recommendations regarding a number of matters which could not readily be included in the previous chapters.

2. THE PROPRIETOR

20.2 The present Act defines a "proprietor" of a lot to mean "the person who is the owner for the time being" of the lot.¹ It is not clear whether the word "owner" refers to the legal owner of the lot (that is the person whose name is registered under the *Transfer of Land Act 1893-1982* as proprietor of the lot),² or to the equitable owner of the lot. In most instances, the legal owner and the equitable owner are one and the same person. However, in some instances the legal ownership of a lot and the equitable ownership of the same lot vest in different persons. For example, where the legal owner has entered into an unconditional contract of sale with a purchaser, the purchaser becomes the equitable owner³ of the lot notwithstanding that the name of the vendor remains on the certificate of title.⁴ Another example is that a registered proprietor who holds a lot as trustee for a beneficiary is the legal owner and the beneficiary is the equitable owner. The *Strata Titles Act* grants various rights (for example, the right to vote at general meetings of the strata company⁵) and imposes various duties (for

¹ WA, s 3.

² Registration of a proprietor under the *Transfer of Land Act 1893-1982* is effected by the Titles Office entering a person's name on the certificate of title as proprietor of the lot following lodgement at that Office of appropriate documents.

S 4(2) of the *Strata Titles Act* does not, in terms, deem a strata title lot to be land held under the provisions of the *Transfer of Land Act* (although only land under the operation of the *Transfer of Land Act* may be subdivided into strata lots and common property). This may possibly mean that, for example, the provisions relating to indefeasibility of title and the Assurance Fund may be held not to apply to strata title lots. The Commission accordingly suggests that a provision along the lines of NSW, s 6 should be introduced into the *Strata Titles Act*. This would have the effect that the *Transfer of Land Act* applies to lots and common property in the same way as it applies to other property, except to the extent that it is inconsistent with the *Strata Titles Act* or is incapable of applying to lots and common property. The Commissioner of Titles also is of the view that the applicability of the *Transfer of Land Act* should be put beyond doubt.

³ *Chang v The Registrar of Titles* (1976) 137 CLR 177, 181.

⁴ The purchaser will have his name endorsed on the certificate of title of the lot when the transfer is registered in the Titles Office. Normally, this will not take place until the property is paid for, either fully in cash or by borrowing from the vendor or a third party usually on the security of a mortgage over the property.

⁵ WA, schedule, part I, by-law 7.

example, to pay maintenance levies⁶) upon proprietors of lots. It is therefore important that there should be certainty as to who the proprietor of a particular lot is.

20.3 After considering the comments received on this issue in response to the working paper, the Commission recommends that "proprietor" should be defined in section 3 of the *Strata Titles Act* to mean the person for the time being registered under the *Transfer of Land Act 1893-1982* as proprietor of an estate in fee simple in the lot or, as the case may be, an estate for life⁷ in the lot.⁸ Such a definition has three important advantages. First, it provides certainty as to who the proprietor is at any particular time.⁹ Secondly, a strata company can verify a person's claim that he is a proprietor by simply inspecting the certificate of title. Thirdly, it means that the strata company need not have regard to equitable owners.

20.4 Most commentators on this issue agreed with this proposal except that some suggested that it should be qualified along the lines of the New South Wales definition so as to include a person who has become entitled to be registered as proprietor under the *Transfer of Land Act* and whose name has been entered on the strata company's strata roll pursuant to a notice given by that person.¹⁰ However, the Commission does not consider it necessary to add such a qualification which could produce administrative complexity.¹¹ Should such a person wish to become a proprietor under the *Strata Titles Act*, in many cases he could readily do so by arranging for his registration as proprietor under the *Transfer of Land Act 1893-1982*. A

⁶ WA, s 13(7).

⁷ It is possible for one person to be the registered proprietor of a life estate in the lot and another to be the registered proprietor of the remainder. The proposed definition of proprietor under the *Strata Titles Act* should deem the registered proprietor of the life estate to be the proprietor for the purposes of that Act. This would enable WA, schedule, part I, by-law 7(10), which deals with voting rights where there are successive interests in a lot, to be repealed.

⁸ This is the definition of "proprietor" in the Victorian *Strata Titles Act 1967-1981*: s 14. The definitions in the South Australian *Real Property Act 1886-1982* (s 223nc(2)) and the Tasmanian *Conveyancing and Law of Property Act 1884-1980* (s 75D) are to a similar effect.

⁹ There may, of course, be cases where the person registered under the *Transfer of Land Act 1893-1982* is not able to vote or cannot be found. This problem arises no matter how "proprietor" is defined for the purposes of the *Strata Titles Act*. In any case s 24 of the Act contains provisions aimed at overcoming these difficulties: para 11.42 above.

¹⁰ NSW, s 5. In Queensland "proprietor" means the person for the time being registered or entitled to immediate registration under the *Real Property Acts* as the proprietor of a lot: Qld, s 7. In New Zealand "proprietor" is defined as the registered proprietor save that for certain sections of the Act where a purchaser is in actual occupation of a unit under a binding contract of sale the term proprietor means that person: *Unit Titles Act 1972-1981* (NZ), s 2.

¹¹ If the New South Wales qualification were adopted, it would be necessary to require the company to maintain a strata roll of proprietors as is necessary in New South Wales and provide that only persons appearing on the strata roll may vote. The Commission would be reluctant to recommend the imposition of such a requirement on strata companies.

prospective purchaser under a terms contract of sale who wished to exercise the right to vote could negotiate with the vendor to be given a proxy to vote in his place.

3. EXTINGUISHMENT AND VARIATION OF STRATA PLANS

20.5 Sections 11 and 19 of the Act provide, inter alia, for a procedure referred to as the "destruction of the building". The object of the procedure is simply to enable the proprietors (if they are unanimous) or the Supreme Court¹² (if they are not) to bring the subdivision of the parcel into lots and common property to an end. There need be no physical destruction or even damage to the building. While the Commission sees no substantial defects in the "destruction" procedure,¹³ it is artificial and confusing to characterise it as a "destruction of the building". Accordingly, the Commission recommends that sections 11(1) and 19 be redrafted by replacing the concept of notional destruction of the building with the concept of cancellation of the strata plan.

20.6 In addition to empowering the Supreme Court to make a declaration "destroying the building" and to make orders for the purpose of giving effect to the declaration, section 19 empowers the Court, where the building is physically damaged, to settle a scheme which does not involve cancellation of the strata plan. The scheme may include provisions for -

- (a) the reinstatement of the building in whole or in part;
- (b) the transfer of the interests of the proprietors whose lots have been wholly or partially destroyed to other proprietors in accordance with their unit entitlement.¹⁴

In the exercise of its power to settle a scheme, the Court may make such orders as it thinks fit, including orders -

- (a) directing the application of insurance money received by the company in respect of damage to the building;

¹² WA, s 19(2) empowers the Supreme Court, when it makes a declaration that the building is destroyed, to impose conditions and give directions for the purpose of adjusting the effect of the declaration as between the strata company and the proprietors and as between the proprietors themselves.

¹³ Except as indicated in para 15.29 above.

¹⁴ WA, s 19(3).

- (b) directing payment of money by the strata company or by the proprietors or one or more of them;
- (c) directing such amendment to the strata plan as the Court thinks fit, so as to include in the common property any addition thereto; and
- (d) imposing such terms and conditions as the Court thinks fit.¹⁵

Application may be made to the Court by the strata company, a proprietor or a registered mortgagee of a lot.¹⁶ An insurer who has effected insurance on the building or any part thereof has the right to be heard by the Court.¹⁷

20.7 It is not clear how far the Court's power to settle a scheme goes beyond ordering the reinstatement of the building in whole or in part, the transferring of the interests of proprietors whose lots have been damaged and making ancillary orders. The Commission accordingly recommends that the Court's power under section 19(3) should be so expressed as to enable it-

- (a) to vary the existing strata scheme in whatever manner it thinks fit; or
- (b) if it thinks fit, to substitute a new strata scheme; and
- (c) to make orders to give effect to such variation or substitution.¹⁸

An example where it may be desirable to substitute a new strata scheme would be where the current building by-laws prohibit the reinstatement of the building either in whole or in part. In such a case it may accordingly be desirable for the building to be redesigned in conformity with the new requirements and for the boundaries of lots and common property to be redrawn accordingly. Those entitled to make application to the Court to settle a scheme should be, as at present, the strata company, a proprietor and a registered mortgagee of a lot.

¹⁵ Id, s 19(4).

¹⁶ Id, s 19(5).

¹⁷ Id, s 19(6).

¹⁸ This is the position in New South Wales: NSW, s 50.

The matters referred to in section 19(3) of the Act should be expressed as those which can be made the subject of orders designed to give effect to the scheme, rather than as provisions limiting the scope of the scheme. It would also be desirable expressly to empower the Court to substitute a new schedule of unit entitlement for the existing schedule, having regard to the value of the lots at that time.

20.8 In contrast to the position in New South Wales,¹⁹ the Act makes no provision for a variation of a strata scheme where part of the parcel has been compulsorily acquired, for example, under the *Public Works Act* for a public work,²⁰ and excised from the strata scheme. An adjustment of the scheme may be desirable, for example, to take account of a reduction in the number of lots, or of the area of common property. The Commission accordingly recommends that section 19(3) of the Act should be drafted so as to empower the Supreme Court in the case of such an excision to vary the strata scheme or to substitute a new strata scheme, and to make consequential orders.

4. MANAGING AGENTS

(a) Present position

20.9 Unlike the New South Wales and Queensland legislation, the *Strata Titles Act* in Western Australia makes no specific provision for the office of a "managing agent". However, by-law 4(9)(b) of part I of the schedule to the Act provides that the council of the strata company may employ, for and on behalf of the company, such agents and servants as it thinks fit in connection with the control and management of the common property, and the exercise and performance of the powers and duties of the company. There would seem to be no restriction on the sort of person the company could appoint as its agent but a person so employed would remain either a servant or an agent rather than a delegate.²¹ Under by-law 4(9)(c) the council, subject to any restriction imposed or direction given at a general meeting, may delegate to one or more of its members such of its powers and duties as it thinks fit, and at any time revoke the delegation.

20.10 In practice, it is common in larger strata title schemes for the council to appoint a person as agent to conduct the day-to-day administration of the scheme.²² The Commission has had helpful discussions with a number of persons who act as agents pursuant to by-law

¹⁹ NSW, ss 29 to 35.

²⁰ *Public Works Act 1902-1979*, s 17.

²¹ The distinction between a delegate and an agent or servant is that a delegate may exercise the powers delegated to him at his discretion. The decision made is that of the delegate. On the other hand, an agent or servant remains under the control of the person who appointed or employed him and his decision is that of his principal or employer.

²² The attitude of the proprietors to the strata scheme and the degree to which the units are occupied by tenants may be factors which cause the council to employ an agent. The Commission emphasises that it is speaking in this Part only of agents employed by the strata company and not of a person appointed by a proprietor to let the proprietor's unit and collect the rent.

4(9)(b). Normally professional agents are real estate agents or accountants though others also carry out these functions.²³ For example, the Commission has been informed of instances where the council has engaged a proprietor in the scheme as its agent. Sometimes a proprietor carries out these duties in an honorary capacity.

20.11 The range of duties will naturally vary from scheme to scheme but may cover such matters as keeping minutes of council meetings and general meetings of the strata company, keeping books of account, preparing balance sheets and other financial statements, collecting the maintenance levy,²⁴ paying accounts, arranging for maintenance work to be carried out and so on. In addition, managing agents sometimes carry out a role as an informal arbitrator of disputes arising in the strata scheme.

20.12 The remuneration of agents is a matter for negotiation between the agent and the council of the strata company. The Real Estate and Business Agents Supervisory Board has stipulated a maximum scale of charges for this work when it is carried out by real estate agents.²⁵

(b) Position in New South Wales and Queensland -

20.13 The New South Wales *Strata Titles Act*, in addition to making provision for a by-law in similar terms to clause 4(9)(b) of part I of the schedule to the Western Australian *Strata Titles Act*, also provides in section 78 that a strata company may in general meeting by instrument in writing delegate to a managing agent -

- (a) all of its powers, authorities, duties and functions;
- (b) anyone or more of its powers, authorities, duties and functions specified in the instrument; or
- (c) all of its powers, authorities, duties and functions except those specified in the instrument.

²³ The duties of managing agent do not appear to constitute a real estate transaction for the purposes of the *Real Estate and Business Agents Act 1978-1982*, s 4, so as to require a person performing those duties to be licensed under the Act.

²⁴ This can amount to a substantial sum over the course of a year.

²⁵ *Government Gazette*, 30 November 1979, 3750, 3757.

20.14 A strata company may not, however, delegate its power of delegation nor may it delegate its powers in relation to a matter which may only be decided by unanimous resolution, special resolution or by the proprietors in general meeting.²⁶

20.15 A strata company cannot appoint a person as a managing agent unless he is the holder of a strata managing agent's licence pursuant to the New South Wales *Auctioneers and Agents Act 1941-1980*.²⁷

20.16 Any act done by the managing agent while acting in the exercise of a delegated power is deemed to have been done by the strata company.²⁸ Notwithstanding any delegation, the strata company may continue to exercise or perform all or any of the powers, authorities, duties or functions it has delegated to the managing agent.²⁹

20.17 Similar provisions are contained in Queensland's *Building Units and Group Titles Act 1980-1981*, except that there is no limitation on the strata company's power to appoint whatever person it chooses as managing agent.³⁰

(c) The Commission's view

20.18 With one exception, the Commission considers that no legislative change in regard to managing agents is required in Western Australia at this stage. It is important to note that, unlike the position in New South Wales, the vast majority of strata schemes in Western Australia involve only small developments such as duplexes. The Commission's view is that, so far as possible consistent with efficient management, proprietors should be encouraged to retain ultimate control of decisions concerning the strata scheme. No matter has been brought to the attention of the Commission which suggests that any agent has abused his position or

²⁶ NSW, ss 75, 77 and 78(1A).

²⁷ NSW, s 78(1AA). He is then subject to the general provisions of that Act including the requirement to keep a trust account. Compensation may be paid from the Auctioneers and Agents Compensation Fund in respect of any defalcation by a licensed strata managing agent: *Auctioneers and Agents Act 1941-1980*, s 75.

²⁸ NSW, s 78(5). This provision does not appear to apply to an agent appointed under the Western Australian equivalent (WA, schedule, part I, by-law 4(9)(b)) because such agents remain under control of the council of the strata company which would be expected to supervise their activities. This is a vital distinction between an agent appointed under the Western Australian provision and a managing agent appointed under NSW, s 78.

²⁹ Id, s 78(4).

³⁰ Qld, s 50.

that strict controls along the lines of the New South Wales law³¹ would be justified. However, as there is evidence to suggest that the employment of outside agents by councils of strata companies is becoming increasingly popular, the Commission considers that the matter should be kept under review.

20.19 The exception referred to in the previous paragraph relates to the position of real estate agents who act as managing agents for strata companies. Some persons with whom the Commission discussed the matter (including some real estate agents) appeared to assume that a strata company would be entitled to claim against the Real Estate and Business Agents Fidelity Guarantee Fund in the event of a defalcation by a real estate agent in his capacity as managing agent of a strata company. However, it is not clear that this would be the case. Although section 116 of the *Real Estate and Business Agents Act 1978-1982* provides for the Fund to be "applied for the purpose of reimbursing persons who may suffer pecuniary loss or loss of property by reason of any defalcation by a licensee..."it is possible that this may be construed as covering only defalcations³² arising out of, or relating to, a "real estate transaction" as defined in that Act.³³ This definition does not appear to include the collection and holding of money on behalf of a strata company.

20.20 The Commission accordingly recommends that *the Real Estate and Business Agents Act 1978-1982* be amended to provide that contributions to the administrative fund or sinking fund, or other money collected by a licensed real estate agent on behalf of a strata company, should be deemed to be collected in respect of a real estate transaction. This would compel the real estate agent concerned to keep the money in his trust account³⁴ and to comply with the other provisions of the Act in relation to such activities. It would also allow the strata company to claim against the Fidelity Guarantee Fund in the event of defalcation by the agent. This is already assumed to be the case by many persons involved in strata schemes and would no doubt often be a factor in the decision of some strata companies to appoint a real estate agent as managing agent.³⁵ It would be unfortunate if this assumption were later found

³¹ Para 20.15 above. In New South Wales there had been instances of defalcations by managing agents.

³² "Defalcation by a licensee" is defined in the *Real Estate and Business Agents Act 1978-1982* to include "criminal or fraudulent conduct...in the course of the business of the licensee and from which arises pecuniary loss or loss of property to any other person": s 4.

³³ S 4(1) and (3).

³⁴ *Real Estate and Business Agents Act 1978-1982*, s 68.

³⁵ A collateral matter concerns the possibility that the developer (ie the original proprietor) while he is the sole proprietor may appoint a person as managing agent for a set term upon conditions which may not be regarded as satisfactory by purchasers. The Commission has recommended in para 17.7 above that the

to be incorrect. Such an amendment to the *Real Estate and Business Agents Act 1978-1982* would not prevent persons who were not real estate agents from acting as managing agents as they do at present.³⁶

5. THE INITIAL PERIOD

20.21 Of the jurisdictions studied by the Commission only New South Wales attempts to regulate the rights and duties of the developer (that is, the original proprietor) in relation to the strata scheme or otherwise restrict the powers of the strata company in the period until a prescribed percentage of the lots have been sold by the developer. Under the New South Wales Act -

- (a) the original proprietor -
 - (i) must convene the first annual general meeting of the strata company within one month after the end of the initial period,³⁷ whether or not he is still a proprietor at the time;³⁸
 - (ii) is to exercise and perform all the powers, authorities, duties and functions conferred or imposed on the chairman, secretary and treasurer of the strata company until those offices are filled or until the first annual general meeting.³⁹
- (b) The voting power of the original proprietor at general meetings of the strata company or at elections to the council is reduced to one-third of what it would otherwise be during the period when he is the proprietor of lots, the sum of

developer be required to disclose to an intending purchaser any such contract or proposed contract. The purchaser would then be able to take this into account in deciding whether to purchase.

³⁶ A strata company wishing to gain protection against defalcation by an unlicensed person could require him, as a condition of appointment, to provide a guarantee by an approved insurer against defalcation by him.

³⁷ The initial period is the period commencing on the date on which the strata plan is registered and ending on the date on which there are proprietors of lots (other than the original proprietor) the sum of whose unit entitlement is at least one-third of the aggregate unit entitlement: NSW, s 5(1).

³⁸ Id, s 57(1).

³⁹ Id, clause 16 of part I of schedule 2.

whose unit entitlement is not less than one-half of the aggregate unit entitlement.⁴⁰

20.22 The New South Wales legislation also provides that, unless so authorised by a Supreme Court order, a strata company shall not, during the initial period -

- (a) amend, add to or repeal the by-laws in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, proprietors or in respect of one or more, but not all, lots;
- (b) alter any common property forming part of the building or erect any structure on the common property;⁴¹
- (c) borrow money or give securities ;
- (d) appoint a managing agent to hold office as such for a period extending beyond the expiration of the initial period.⁴²

An exception to (a) is that a strata company may, during the initial period, with the written approval of the local authority, make a by-law conferring on a proprietor the exclusive use and enjoyment of, or special privileges in respect of, any specified part of the common property for the purpose of authorising that proprietor to park a vehicle on that part of the common property.⁴³

20.23 There are three further restrictions under the New South Wales legislation governing the manner in which either lots or common property may be dealt with during the initial period. An order of the Supreme Court is a prerequisite during that period for -

- (a) the registration of a strata plan of subdivision;⁴⁴

⁴⁰ Id, clauses 10 and 11(4) of part I of schedule 2 and clause 12(4) of part II of schedule 2.

⁴¹ It would seem that the strata company could not, during the initial period, grant its consent to a proposal by a proprietor that he be permitted to effect alterations to the common property

⁴² NSW, s 66(1).

⁴³ Id, s 66(3).

⁴⁴ Id, s 67(4).

- (b) the registration of a notice of conversion;⁴⁵
- (c) the registration of a dealing with common property for the purposes of division 2 of part II of the Act.⁴⁶

20.24 The broad aim of the New South Wales provisions is to ensure that -

- (a) the original proprietor leaves behind him a viable strata scheme;
- (b) the original proprietor cannot use his voting powers in an oppressive manner in regard to those proprietors who have already purchased lots or that he and the initial purchasers cannot make decisions which may be detrimental to those who purchase the balance of the lots.

20.25 The opinion of the commentators was divided on whether the New South Wales approach should be adopted. Some saw merit in it but others considered it was unnecessary and that, by virtue of its complexity and rigidity, it could in fact do more harm than good. After considering the matter afresh in the light of the comments, the Commission is not satisfied that the adoption of the New South Wales approach is justified. Whilst it is always possible that a developer could abuse the position of original proprietor, few submissions were made to the Commission which showed clear instances of this. The adoption of the Commission's recommendation that until the first annual general meeting all proprietors are members of the council would both facilitate the creation of a viable management scheme at an early stage and provide some protection for proprietors. Further, the fact that matters vitally affecting the interests of proprietors can only be altered by unanimous resolution⁴⁷ will help protect them against any attempt by the original proprietor to use his voting powers oppressively. Again, the recommendation above⁴⁸ that a proprietor should be able to apply to a Strata Titles Referee provides another avenue of protection. Finally, the Commission's recommendation above⁴⁹ that the original proprietor should be required to give purchasers notice of various matters concerning the scheme should help ensure that intending purchasers are alerted to matters which might affect their decision to purchase.

⁴⁵ Ibid.

⁴⁶ Ibid. The creation of an easement over common property would be an example of such a dealing.

⁴⁷ Subject to the limited right of appeal to the Supreme Court recommended above: para 11.22 above.

⁴⁸ Para 19.28.

⁴⁹ Paras 17.7 to 17.10.

20.26 There are, however, two duties which the Commission recommends should be imposed on the original proprietor.⁵⁰ First, he should be required to call the first annual general meeting of the strata company. At present the by-laws provide that the first meeting of the strata company is to be held within three months of the registration of the strata plan but there is no obligation imposed on any particular person to call the meeting. Adoption of this recommendation will help ensure that the strata scheme starts on the right footing.⁵¹ Secondly, the original proprietor should be required to deliver to the first annual general meeting -

- (a) all plans; specifications; drawings showing water pipes, electric cables, drainage pipes, ventilation ducts or air conditioning systems; certificates (other than certificates of title for lots); diagrams (including lift wiring diagrams) and other documents (including policies of insurance) obtained or received by him and relating to the parcel or building; and
- (b) if they are in his possession or under his control, the books of account and any notices or other records relating to the strata scheme.⁵²

20.27 A penalty should be provided for failure to comply with either of these duties.

6. DUPLEXES

20.28 In 1969 the *Strata Titles Act* was amended so that strata titles could be granted to single storey dwellings. Prior to that amendment, the Act made no provision for schemes where there was no strata lot superimposed on another. Strata titles could therefore not be obtained for duplexes, that is buildings comprising two complete and self-contained dwellings existing side by side and constructed on a single freehold lot. Prior to the 1969 amendment, the normal method of ownership of such dwellings was by means of tenancy in common.⁵³

⁵⁰ Duties to the same effect are imposed on the original proprietor in both Queensland and New South Wales.

⁵¹ The obligation to call the meeting should remain with the original proprietor whether or not he ceases to be a proprietor.

If the original proprietor fails to call the meeting a proprietor could apply to the Strata Titles Referee (see paras 19.12 and 19.28 above) for an order appointing a person to call the meeting within such time as is specified in the order.

⁵² As in Queensland and New South Wales, there should be an exemption for documents which exclusively evidence rights or obligations of the original proprietor and which are not capable of being used for the benefit of the strata company or any of the proprietors, other than the original proprietor.

⁵³ Working paper, para 34.3.

20.29 In the working paper the Commission set out the main views expressed about duplexes by some of those who made preliminary submissions to the Commission.⁵⁴ Those were that -

- (a) In a high rise development, it makes sense for the land surrounding the building to be common property and for all the proprietors to have the right to use that common property. However, usually the layout of a duplex on a block of land is such that it is in the interests of privacy and convenience for one of them to have exclusive possession of part or parts of the land surrounding the building and for the other to have exclusive possession of the balance.
- (b) The concept of a council to exercise the powers and duties of the strata company is inappropriate and also unnecessary, as the strata company only consists of two proprietors.
- (c) The provisions of the *Strata Titles Act*, by virtue of which the strata company is required to insure the building and to keep in repair and maintain the exterior of the building, are inappropriate for duplexes - each owner should be able separately to insure his unit and separately to maintain the exterior of his unit.⁵⁵
- (d) As the two units in a duplex strata scheme often have equal unit entitlement, it is not possible to pass even an ordinary resolution unless the proprietors agree on a particular matter at issue. (On the other hand, where unit entitlement is unequal, the proprietor with the larger entitlement can have any ordinary resolution passed which leaves the other proprietor with no effective voice on such resolutions.)
- (e) In practice, virtually all owners of units in duplex strata schemes completely disregard the provisions of the *Strata Titles Act*. Most duplex strata schemes have never even had a general meeting of the strata company.

⁵⁴ Id, 34.5.

⁵⁵ It is possible under the present Act for the strata company to be relieved of its obligation to insure the building and each proprietor separately to insure his lot: para 15.25 above. It is also possible for the proprietors, acting as the council of the strata company, to authorise each proprietor to maintain the exterior of his unit separately.

- (f) The purchaser of a duplex unit usually incorrectly assumes that he is acquiring sole ownership of a specific part of the land surrounding the unit as well as the unit itself. This assumption is enhanced by the practice of dividing the backyard to the duplex development by a fence before either of the units is sold. (In fact, the purchaser will only acquire sole ownership of a unit.) Furthermore, the common boundary of a unit with common property is virtually always the centre of the floor, or ceiling as the case may be⁵⁶ and therefore even the external walls of the building are usually common property.

20.30 As a result of these views, the Commission considered four means whereby special provisions could be made relating to title for duplexes. They were that -⁵⁷

- (a) title to a lot could provide for the proprietor to have exclusive use of portions of the parcel defined by the title;
- (b) provision could be made for accessory lots;
- (c) the proprietor could be given normal fee simple title to the land on which his unit is erected and to a specified part of the land adjoining his unit ;
- (d) provision could be made for the parcel to be subdivided into two normal fee simple lots.

20.31 Twenty-five commentators on the working paper expressed views on whether or not special provision should be made for duplexes. All supported some form of special provision with approximately half of the commentators favouring the approach referred to in paragraph 20.30(d) above.

20.32 The approach referred to in paragraph 20.30(d) above has the difficulty that not all duplex sites could be dealt with in this way because lots could not be created which would conform with town planning requirements. For example, the lots created might be smaller than those required under those requirements or it may be difficult to create two lots with a road frontage. In those cases in which a duplex site could be subdivided to create two normal

⁵⁶ See para 4.10 above.

⁵⁷ Working paper, paras 34.7 to 34.29.

fee simple lots in conformity with town planning requirements, the proprietors of the lots could apply to the Town Planning Board for a subdivision of the parcel without the need for any special provision.⁵⁸

20.33 The approach referred to in paragraph 20.30(c) above was based on the Victorian *Cluster Titles Act*. It was suggested in the working paper⁵⁹ that this concept could be applied to duplexes so that each parcel would have the following components -

- (a) common property which would be owned by the two proprietors as tenants in common;
- (b) two areas each owned by one of the proprietors (under normal fee simple title), each such area not being limited to the area on which the unit is erected.

It would still be necessary for special provision to be made for dealing with the common property. In Victoria this involves the creation of a body corporate which operates in much the same way as a strata company. In Chapter 21 the Commission recommends that provision be made for the introduction of cluster titles in Western Australia. If this concept were introduced, owners of duplexes could consider converting to that system if they saw any advantage in it and if the buildings on the parcel conformed to the requirements for cluster titles.

20.34 So far as (a) and (b) in paragraph 20.30 above are concerned, the Commission has recommended that provision should be made enabling the purposes for which a lot or part of a lot can be used to be specified on the strata plan⁶⁰ and that it should be permissible for a lot to extend to include an area outside the building.⁶¹ The implementation of these recommendations would enable the objects sought to be achieved by (a) and (b) to be achieved in respect of future duplex developments. These objects could also be achieved with existing duplexes if the Commission's recommendations with respect to subdivisions within existing strata schemes are adopted.⁶²

⁵⁸ At the time separate freehold lots were created by the subdivision it would be necessary to cancel the strata plan: para 20.5 above.

⁵⁹ Para 34.17.

⁶⁰ Para 4.9 above.

⁶¹ Para 4.4 above.

⁶² Paras 4.19 and 4.21 above.

20.35 The Commission has accordingly concluded that no special provision is necessary or desirable for duplexes. Although it is acknowledged that in many cases the proprietors of units in duplex strata schemes disregard some of the provisions of the *Strata Titles Act*, for example, with regard to annual general meetings, the Commission considers that the legal framework provided by the Act should remain in place. There may be occasions in which it would be required, for example, where the proprietors wish to wind up the scheme. In addition, mortgagees, who have voting powers at general meetings,⁶³ may on occasions need to exercise that power to restrict or direct the activities of the council of the strata company, in effect, the proprietors. Equally, the concept of a council should remain so that the proprietors can exercise their powers in regard to the day-to-day administration of the scheme without the need to call a general meeting.⁶⁴ Retention of the legal framework provided by the *Strata Titles Act* would also mean that owners of duplex units would be able to avail themselves of the disputes resolution system recommended by the Commission in Chapter 19 above, if adopted.

7. SERVICE OF NOTICES

20.36 A firm of solicitors has drawn the attention of the Commission to section 401 of the *Local Government Act 1960-1982* which empowers the local authority to give the owner of a building written notice of anything in the construction of the building which -

- (a) tends to render the building unsafe or prejudicial to the public interest;
- (b) is not in compliance with the plans and specifications which have been approved by the authority; or
- (c) where permission of the authority is required for carrying it out, has been carried out without permission,

⁶³ Para 11.9 above.

⁶⁴ The requirements as to the calling of general meetings are contained in by-law 5 of part I of the schedule to the Act. These requirements could be amended by the proprietors.

and requiring the owner to alter the building to remove the cause of the objection. If, after being served with the notice, the owner does not comply the local authority may itself give effect to the requisitions and recover the cost from the owner.

20.37 The solicitors pointed out that the requirement that notice be served on the owner of the building creates a difficulty in the case of strata schemes. At least part of the building concerned would generally be common property, owned by the proprietors as tenants in common, and consequently notice would be required to be served on the proprietors rather than the strata company. The solicitors pointed out that, although section 13(4)(i) of the *Strata Titles Act* obliges the strata company to comply with notices of any competent public or local authority requiring repairs to be done in respect of the parcel or the building, a local authority has no power to serve the notice on the strata company. To deal with this problem, the Commission recommends that where an Act empowers or requires an authority to serve a notice or order on all the proprietors of a strata scheme, service on the strata company shall be deemed to be good service on the proprietors, and the strata company shall be bound to comply with the notice or order.

20.38 A similar problem arises under the *Dividing Fences Act 1961-1969*. That Act provides for adjoining owners to share in the cost of the construction or repair of a dividing fence. The owner wishing to take advantage of the Act must serve notice on the adjoining owner.⁶⁵ In the case of a strata scheme this would require him to serve the notice on all the proprietors, since they own the common property as tenants in common, a procedure which would be unduly onerous in the case of large strata schemes. The Commission accordingly recommends that the *Strata Titles Act* should be amended to provide that, for the purposes of the *Dividing Fences Act*, service on the strata company is deemed to be service on the proprietors.⁶⁶

8. EXAMPLES OF POSSIBLE BY-LAWS

20.39 Apart from suggestions as to by-laws in the strata scheme requiring residents to ensure that their visitors behave properly, no commentator on the working paper expressed views on

⁶⁵ For example, s 8 requires the owner desiring to compel the adjoining owner to join in or contribute to the cost of a dividing fence to serve notice of the proposal on the adjoining owner.

⁶⁶ The Commission has recommended in para 9.38 above that where the proprietors are jointly liable in respect to a matter relating to the common property, proceedings may be taken against the strata company. Hence if the proprietors failed to contribute to the cost of a dividing fence, the adjoining owner could take proceedings against the strata company.

whether further by-laws controlling proprietors, residents and other occupiers should be included in the schedule to the Act. In Chapter 16 above, the Commission has recommended the addition of two by-laws to enable the strata company to control more effectively the conduct of visitors. The Commission is of the view that the by-laws presently in the schedule, or as amended in accordance with the Commission's recommendations, will not provide for every contingency which will arise in strata schemes. However, because there are so many different types of schemes (for example, although most are residential, some are commercial, some industrial and some a mixture of types), the Commission has decided against recommending the imposition of a comprehensive set of by-laws designed to regulate conduct on the parcel in all cases. The proprietors of each scheme should be left to decide upon the adoption of whatever additional by-laws they consider appropriate to their particular scheme.⁶⁷

20.40 To assist in this process, the Commission recommends that a set of possible additional by-laws to govern the conduct of proprietors, tenants, residents and other occupiers should be contained in a separate schedule to the Act. A strata company should be free to adopt all or any of these by-laws.⁶⁸ The Act should also make it clear that a strata company's power to make by-laws is not confined to those contained in that schedule and that, if adopted by a strata company, they can be amended, varied or repealed in the same way as other by-laws of the company. Appendix IV to this report contains a set of by-laws which the Commission suggests are suitable for inclusion in the schedule referred to above. They are based on by-laws set out in schedules to the New South Wales and Queensland strata titles legislation.

9. EFFECT OF EXISTING BY-LAWS

20.41 Except where otherwise expressly indicated, the recommendations made in this report are intended to apply to existing as well as future strata schemes. Pursuant to the power granted to them by the Act, many strata companies have amended or added to the by-laws presently contained in the Schedule to the Act. Some of these amendments or additions may be inconsistent with provisions in new legislation implementing recommendations in this report. Inconsistency could arise either in relation to a new provision which the Commission

⁶⁷ The developer himself could do this at the outset as the original proprietor: *Craig-Gordon v Proprietors – Strata Plan No 16* [1964-5] NSW 1576, 1579 per Jacobs J. This would enable him to assure intending purchasers that the by-laws for the scheme are appropriate for it.

⁶⁸ A unanimous resolution would be required if it was desired to add the by-laws to part I of the schedule to the Act and a special resolution if it was desired to add them to part II.

recommends should be included in the body of the Act, or in relation to a new by-law⁶⁹ which the Commission recommends should be included in the schedule to the Act. In the former case, any inconsistent by-laws made by a strata company would, of course, be void since they would conflict with a provision in the Act. In the latter case, they would not necessarily be void since it would be a question whether the by-law introduced by Parliament into the schedule would prevail over a by-law previously made by a strata company.

20.42 Because of this difficulty, the Commission considers that the new legislation should contain a provision dealing with the status of existing by-laws. One possibility would be to provide that inconsistent by-laws made by a strata company should cease to have effect. The Commission is of the view that this would be an unsatisfactory approach since it would require that those strata companies which wished to retain a by-law made by it would have to make them again. The Commission considers that it would be preferable for by-laws that have been made by strata companies to continue to have effect notwithstanding their inconsistency with by-laws introduced by Parliament into the schedule of the Act. The Commission recommends accordingly.

10. CONVEYANCING PROCEDURE ON A CONVERSION TO STRATA TITLES

20.43 In the working paper,⁷⁰ the Commission outlined the complex conveyancing procedure involved in a conversion of a tenancy in common (popularly known as a "purple title") to a strata title. In addition to the registration of the strata plan, the procedure usually involves the discharge of any mortgage,⁷¹ easement⁷² or other encumbrance over the property, the transfer of the appropriate lot to each proprietor, the preparation and registration of fresh encumbrances over the appropriate lots and the issue of new certificates of title. All this involves time and considerable expense. The Commission invited suggestions on how the system might be simplified.

20.44 Most commentators supported some simplification of the present procedure. In particular, the Commissioner of Titles agreed that it should be possible to provide a

⁶⁹ Including an amendment to a by-law.

⁷⁰ Paras 36.5 to 36.11.

⁷¹ A mortgage of the whole interest in the land does not need to be discharged but a mortgage of an undivided share in the land would have to be.

⁷² An easement which is only over proposed common property will not have to be discharged but one affecting individual lots will have to be.

streamlined procedure for the special case of conversion to strata title. He envisaged that the application for registration of the strata plan would be endorsed with the consent of all proprietors and encumbrancers and contain specific instructions as to how the titles were to issue and the encumbrances dealt with. He suggested that the Registrar of Titles should be authorised to issue the titles as directed, as if the application were a transfer, and provide for encumbrances to have effect accordingly. The Commission considers that such a scheme would simplify the procedures significantly and recommends its adoption.⁷³

11. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

20.45 The Commission recommends that -

(a) *"Proprietor" should be defined in section 3 of the Strata Titles Act to mean the person for the time being registered under the Transfer of Land Act 1893-1982 as proprietor of an estate in fee simple in the lot or, as the case may be, an estate for life in the lot.*

(paragraph 20.3)

(b) *sections 11(1) and 19 of the Strata Titles Act should be redrafted by replacing the concept of notional destruction of the building with the concept of cancellation of the strata plan.*

(paragraph 20.5)

(c) *The Supreme Court's power under section 19(3) of the Strata Titles Act should be so expressed as to enable it –*

(i) *to vary the existing strata scheme in whatever manner it thinks fit;*

(ii) *if it thinks fit, to substitute a new strata scheme; and*

(iii) *to make orders to give effect to such variation or substitution.*

(paragraph 20.7)

(d) *Where part of the parcel has been compulsorily acquired and excised from the strata scheme, section 19(3) of the Act should be revised so as to empower the*

⁷³ The Commission also recommends that consideration be given to the introduction of a simplified procedure for the conversion of the company form of home unit ownership to the strata titles form. At present the procedure is very complex, involving not only a number of conveyancing steps but also the winding up of the company under the *Companies (Western Australia) Code*. Ss 56 to 65 of the *New Zealand Unit Titles Act 1972-1981* contain a precedent for such a procedure.

Supreme Court to vary the strata scheme or to substitute a new strata scheme, and to make consequential orders.

(paragraph 20.8)

- (e) *The Real Estate and Business Agents Act 1978-1982 should be amended to provide that if contributions to the administrative or sinking fund or other money is collected by a licensed real estate agent on behalf of a strata company, such money should be deemed to be collected in respect of a real estate transaction.*

(paragraph 20.20)

- (f) *The original proprietor should be required to -*

- (i) *call the first annual general meeting of the strata company;*
(ii) *deliver to the first annual general meeting various documents and accounts.*

(paragraphs 20.26 and 20.27)

- (g) *No special provision should be made for strata title duplexes.*

(paragraph 20.35)

- (h) *Where an Act empowers or requires an authority to serve a notice or order on all the proprietors of a strata scheme, service on the strata company shall be deemed to be good service on the proprietors, and the strata company shall be bound to comply with the notice or order.*

(paragraph 20.37)

- (i) *The Strata Titles Act should be amended to provide that, for the purposes of the Dividing Fences Act 1961-1969, service on the strata company is deemed to be service on the proprietors.*

(paragraph 20.38)

(j) *A set of possible additional by-laws to govern the conduct of proprietors, tenants, residents and other occupiers should be contained in a schedule to the Act. The strata company should be free to adopt all or any of these by-laws.*

(paragraph 20.40)

(k) *Any by-laws that have been made by a strata company before the coming into force of legislation introducing new by-laws recommended by the Commission into the schedule to the Act should continue to have effect, notwithstanding their inconsistency with a by-law so introduced.*

(paragraph 20.42)

(l) *A streamlined procedure for the conversion of a tenancy in common to strata titles should be provided.*

(paragraph 20.44)

PART VII: CLUSTER TITLES

CHAPTER 21

1. OUTLINE OF THE CLUSTER TITLES LEGISLATION IN VICTORIA AND QUEENSLAND

(a) General

21.1 As mentioned earlier in this report, Victoria and Queensland have enacted legislation providing for a form of title to regulate grouped housing additional to the concept of strata title. This form of title is known in Victoria as a "cluster title" and in Queensland as a "group title".¹ In the following discussion the Commission uses the Victorian term.

21.2 The legislation of both States is basically similar² and is closely analogous to the strata title system. It provides for the subdivision of land into small lots, which can be individually owned, and common property. The common property is owned by the owners of the lots as tenants in common in shares proportional to their lot entitlement.³ Upon registration of the cluster plan, a statutory company comes into existence, its members being the owners of the lots. The company controls the common property and enforces the by-laws. Each lot has statutory easements for the provision of services to the lot. Upon cancellation of the cluster plan, the lots cease to exist and the owners become tenants in common of the land comprised in the parcel.

21.3 The essential difference between strata title and cluster title systems is that a cluster title lot is an ordinary freehold lot, defined by survey, whereas a strata title lot is defined by reference to a building.⁴ It follows that, unlike a strata subdivision, lots can be created in a

¹ See the *Cluster Titles Act 1974-1981* (Vic) and the *Building Units and Group Titles Act 1980* (Qld). The original legislation providing for cluster titles in Queensland was the *Group Titles Act 1973* and that for strata titles was the *Building Units Titles Act 1965-1972*. Both Acts were repealed and their provisions re-enacted, with modifications, by the 1980 legislation.

² However the Queensland legislation, being designed primarily for small cluster schemes, is not as complex as that of Victoria: see para 21.8 below.

³ Comparable to the unit entitlement of a strata lot.

⁴ A cluster lot, like a lot in a conventional subdivision, need not have any specific boundary above or below the surface of the ground whereas a strata title lot is a volume of space whose boundaries are defined by reference to a building. Adoption of the Commission's recommendation in para 4.4 above that a lot should no longer be required to be within a building would still leave the requirement that it must be defined by reference to it.

cluster subdivision without erecting any buildings.⁵ Unless otherwise restricted⁶, it is possible for the developer to transfer vacant cluster lots to purchasers, who would then be able to build on them themselves, as in an ordinary subdivision.⁷

(b) The Victorian Approach

21.4 The reason for introducing cluster titles legislation in Victoria was given by the then Minister for Local Government in the debate on the Cluster Titles Bill in the Victorian Legislative Council in 1974.⁸ He said that there had been a move towards "planned unit developments" as they were known in the United States of America or "cluster housing subdivisions" as they were known in Victoria. This was a form of residential development:⁹

"...which allows for the free siting of houses on an area of land in such a way as to take every advantage of natural characteristics instead of being forced into the fixed and inflexible patterns imposed by conventional subdivisions,...[and] includes provision for common property which is vested in the owners of all lots in the subdivision".

21.5 The Minister said that because such developments could not be accommodated within conventional subdivisional requirements, attempts had been made in Victoria to use the *Strata Titles Act* for that purpose. However, this was found to be difficult because the building regulations then in force often had the effect of preventing more than one building being erected on anyone site. To overcome this, developers had resorted to the artificial device of "joining two distinct homes together, sometimes just by a small piece of timber". The additional difficulty that all dwellings had to be constructed before a strata plan could be registered hampered large-scale developments.¹⁰

⁵ If the Commission's recommendation in paras 4.4, 4.19 and 4.21 above is adopted, a form of staged development of a strata title scheme would become possible, so that not all the buildings in the scheme would be required to be constructed at the outset. However, the construction of some buildings would be required so as to provide reference points for the definition of the lots.

⁶ In Victoria, depending on the circumstances, the local authority may require some or all the proposed buildings to be erected before the cluster plan can be registered. The Commission has been informed that in Queensland, most local authorities require all the buildings to be at least partially completed before the plan can be registered.

⁷ Under the Victorian *Cluster Titles Act 1974-1981* the cluster plan must be accompanied by a Scheme of Development controlling the future development of each lot and the common property. The Scheme could include restrictions in regard to such matters as the height of dwellings, the building materials to be used, the erection of outbuildings and the use to which the common property can be put. The Queensland legislation makes no provision for a Scheme of Development.

⁸ Victorian *Parliamentary Debates* (1974), 1694 to 1700; 2607 to 2643; 3766 to 3772

⁹ Id, 1694.

¹⁰ Ibid.

21.6 The Victorian *Cluster Titles Act* was accordingly expressly designed to avoid these difficulties. It gives local authorities a wide discretion to vary ordinary subdivisional and building regulation requirements in relation to cluster title developments. The Act also provides for part of the land to be set aside as common property to be administered by the cluster company, with the object of giving members exclusive access to open space and other amenities.¹¹

(c) The Queensland Approach

21.7 In Queensland, the strata titles legislation then in force¹² required the strata plan to relate to a single building of at least two storeys.¹³ It was therefore not possible to use that legislation for single storeyed grouped housing developments. Although these limitations have now been dropped, the Queensland *Building Units and Group Titles Act 1980-1981* does not permit the registration of a building unit (that is, strata) plan unless each building contains two or more lots or part lots. A strata title development where each building comprises only one lot or part lot is accordingly not possible in Queensland.¹⁴

21.8 Unlike the Victorian cluster titles legislation, which appears to have been designed primarily to facilitate large-scale developments, the equivalent legislation in Queensland seems to be intended for relatively small schemes.¹⁵ For example, the legislation makes no specific provision for development of a cluster title scheme in stages, nor does it require a Scheme of Development to accompany the cluster plan.¹⁶

2. REASONS FOR THE COMMISSION CONSIDERING THE CLUSTER TITLES CONCEPT

21.9 In the working paper,¹⁷ the Commission outlined certain difficulties brought to its attention arising from regulation of duplexes through the existing *Strata Titles Act* and invited

¹¹ The Minister contemplated the creation of cluster title subdivisions of up to 1,000 lots which would include large areas of associated parkland and a wide range of amenities: id, 2621.

¹² The *Building Units Titles Act 1965-1972*.

¹³ There is no similar restriction in the *Strata Titles Act 1966-1978* (WA). The Queensland legislation also did not permit a strata lot to extend beyond the building.

¹⁴ There is no similar restriction in the *Strata Titles Act 1966-1978* (WA).

¹⁵ Queensland *Parliamentary Debates* (1972), 1835 to 1854; (1973), 1132 to 1148.

¹⁶ Footnote 80 on page 298 above. See also s 9(6) of the *Building Units and Group Titles Act 1980* (Qld) which prohibits the registration of a group titles plan of more than 50 lots except with the consent of the Attorney General or Solicitor General on the recommendation of the local authority.

¹⁷ Paras 34.1 to 34.30.

submissions on ways of overcoming them. One possibility suggested was to regulate duplexes through cluster titles legislation. The working paper invited comment on the question whether any of the proposals outlined for dealing with duplexes, including cluster titles legislation, should also be applied to other small developments.¹⁸

21.10 In paragraph 20.34 above, the Commission expresses the view that the implementation of certain recommendations in this report, such as the abolition of the present requirement that a lot must be within a building, would make it unnecessary to introduce special legislation to deal with duplexes and other small developments.

21.11 However, subsequent to the issue of the working paper, the Attorney General asked the Commission to give consideration, as part of this reference to review the *Strata Titles Act*, to the question of the general desirability of enacting cluster titles legislation in Western Australia so as to provide an additional form of title to that of strata titles.¹⁹ The Commission has accordingly considered the concept of cluster titles in that light.

3. THE COMMISSION'S RESEARCH

21.12 In considering the concept of cluster titles, the Commission studied the relevant legislation in Victoria and Queensland and certain United States material.²⁰ During a visit to Melbourne in July 1981 a member of the Commission discussed the practical working of the Victorian Cluster Titles Act with the Chairman of the Victorian Cluster Titles Committee and the Chairman of the Strata Titles Act Review Committee.²¹ He also discussed the topic in

¹⁸ Such as triplexes, quadruplexes or small town house developments.

¹⁹ The Attorney General made his request as a result of a recommendation made in the report of the Commonwealth *Committee of Inquiry into the Cost of Housing* (1978, Cwth Parliamentary Paper No 270/1978) that "The States should simplify and broaden the statutory prescription of the range of opportunities for securing tenure and title to new housing forms" (Recommendation No 18).

²⁰ Principally, the *Model Uniform Planned Community Act* adopted by the United States National Conference of Commissioners on Uniform State Laws in 1980. The Model Act is printed in the 1980 Handbook of the Conference.

²¹ The Cluster Titles Committee is composed of members representing a wide range of interests, including town planners, civil engineers, architects, surveyors, developers and statutory authorities. The current Chairman is Mr J Dwyer, a surveyor. The Committee was set up by the Victorian Minister for Local Government to advise whether cluster titles legislation should be introduced into that State and, if so, the form it should take. After the enactment of the legislation in 1975 the Committee prepared a model Cluster Code for the guidance of local authorities in laying down requirements for cluster title subdivisions. It continues to meet from time to time to monitor the working of the legislation and to recommend desirable amendments.

The Strata Titles Act Review Committee was set up by the former Attorney General of Victoria to review the *Strata Titles Act 1967*. Having completed its task it has been dissolved. It was a three-member committee of lawyers, the Chairman being Mr A Lyons, the Registrar of Titles.

Sydney with New South Wales officials and other interested persons. New South Wales does not have cluster titles legislation and the Commission wished to ascertain the extent to which grouped housing schemes could be accommodated under the *Strata Titles Act* of that State. Representatives of the Commission also discussed the cluster titles concept with representatives of the Town Planning Board of Western Australia.

21.13 The Chairman of the Victorian Cluster Titles Committee informed the Commission that the *Cluster Titles Act* of that State is not being used for large-scale developments in outer suburban areas, as originally envisaged, but principally for small-scale "in-fill" developments in substantially built-up areas. Although the Chairman considered that the general economic climate since the Act came into force may have been partly responsible for this, another important factor in his view was that Australians generally were not attracted to the life-style associated with large-scale cluster style developments.²²

21.14 Some developers have also complained of the cost and delay in obtaining approval for cluster title subdivisions brought about by the complex requirements imposed by the Victorian Act and the wide discretion vested in local authorities. This makes cluster title subdivision generally less attractive to developers than an equivalent strata titles subdivision.

21.15 The experience in Queensland has been somewhat different. Because the cluster title legislation in that State has been drawn primarily with small developments in mind,²³ it apparently has not been the subject of complaints on the ground of administrative complexity. However, possibly because of its novelty, it was initially treated with reserve by local authorities and financial institutions.²⁴ More recently there has been a marked increase in the number of cluster title plans presented to the Office of Titles for registration,²⁵ a trend which that office regards as indicative of the concept's potential in Queensland.

The Commission gratefully acknowledges the assistance it received from both Chairmen.

²² In the United States, large cluster developments usually have their own recreational and shopping facilities and often their own private security organisation.

²³ Para 21.8 above.

²⁴ This information was given to the Commission by a representative of the Queensland Titles Office. See also the Department of Regional and Town Planning, University of Queensland, *Queensland Planning Papers*, Issue No 4 (1978).

²⁵ A representative of the Titles Office suggested that this may have been due to the publicity surrounding the drafting of the *Building Units and Group Titles Act 1980-1981*, which helped clarify the objects of the legislation.

4. THE COMMISSION'S RECOMMENDATIONS

(a) "Cluster-style" developments in Western Australia

21.16 One reason for enacting cluster titles legislation in Queensland was that "cluster-style"²⁶ developments were not possible under its strata titles legislation. This was because the strata plan had to relate to a single building of at least two storeys.²⁷ In Victoria there were limitations which made cluster-style developments difficult under the existing law.²⁸

21.17 In Western Australia cluster-style developments, at least of the smaller sort, are possible under the present *Strata Titles Act* and if the Commission's recommendation that a lot should be able to extend beyond a building, or be created separately from it, is adopted greater diversity in such developments would become possible. Nevertheless, the cluster title concept has potential which would not be available with that of strata titles. As explained above, a developer could sell vacant cluster title lots and would accordingly not have to make a capital outlay for the purpose of constructing buildings on the site. A person who purchased a lot would be able to erect a dwelling in conformity with his own needs, subject to any limitations designed to ensure that it was in harmony with the rest of the development.

21.18 The Commission is aware of two large-scale subdivisions of the conventional type in Western Australia which include communal open space as part of the development:²⁹ namely, the Royale Ridge of Crestwood (a Perth suburban development), comprising about 300 residential lots, and Molloy Island (a resort development on an island in the Blackwood River), comprising about 250 residential lots. However, their establishment and operation involve complicated and expensive legal arrangements. The common facilities are controlled and managed by an association incorporated under the *Associations Incorporation Act 1895-1982*. The rules of the association provide for a wide range of matters, including the imposition of levies and other fees on members for the purpose of providing money for the

²⁶ Typically, a group of detached dwellings with associated communal open space.

²⁷ Para 21.7 above.

²⁸ Para 21.5 above.

²⁹ The Town Planning Board has informed the Commission that it has recently received enquiries from other developers who are contemplating similar developments. The Commission is also aware of a number of subdivisions where the lots are of "battle axe" shape in order to give each lot a frontage to a public road (a necessary requirement of a conventional subdivision). In a cluster title subdivision (as in a strata title subdivision) a lot need not have a road frontage, access to it being over the common property.

maintenance of the common areas. All proprietors are required to be members of the association.

21.19 Apart from the incorporation of the association, the legal framework of the schemes involve a number of other elements. The transfers from the developer to the initial purchasers contained restrictive covenants which are noted on the certificate of title of the lot as encumbrances and accordingly are binding on subsequent transferees. These covenants, for example, oblige the proprietor not to erect any dwelling or structure without the approval of the association, and restrict the erection of fences and removal of trees. With the object of ensuring that subsequent transferees become members of the association, there is a covenant not to sell the lot other than to a person who has, conditionally upon the transfer to him of the lot, become a member of the association.³⁰ There is also a covenant that the initial and any subsequent purchaser will execute a mortgage over his lot to secure the annual fees and other sums payable to the association by the proprietor.

21.20 The common areas in the Royale Ridge of Crestwood subdivision³¹ were dealt with in two ways. As a condition of approval of the subdivision by the Town Planning Board, certain lands were transferred to the local authority in fee simple and were leased back to the association for a term of 99 years. Although these lands are intended primarily for the use of the members of the scheme, and are maintained by the association, it is a term of the lease that the public have access to them free of charge at all times. Other lands were transferred from the developer to the association in fee simple and only the members of the scheme have a right of access to them.

(b) Conclusion

21.21 The Commission can see no objection in principle to the introduction of a cluster titles system into Western Australia and accordingly recommends that appropriate legislation be introduced. Such legislation would provide a relatively simple legal framework, analogous to that of strata titles, for the sale of vacant land and associated common property, thereby

³⁰ In the case of Molloy Island, the relevant town planning scheme of the Shire of Augusta-Margaret River requires land owners to be members of the association. The scheme also regulates the manner and style of the development.

³¹ The arrangements in the Molloy Island subdivision as regards common areas have apparently not been finalised. Some areas on the foreshore have vested in the Crown as a foreshore reserve. Some of the other areas are expected to be acquired by the Shire and leased to the Home Owners' Association, as in Crestwood.

avoiding the need for the complex legal structure and expensive documentation outlined in the previous paragraphs.³²

21.22 The Attorney General's reference to the Commission was to make a recommendation as to the general desirability of introducing a cluster titles system into this State. If the Government decided to introduce such legislation, the precise form it should take would necessitate a detailed study of a wide range of matters, including town planning policy, the interests of local authorities and supply authorities, and the needs of developers and the public. Many of the provisions in a revised *Strata Titles Act* could readily be adapted to the cluster titles concept, but because that concept involves title to freehold land, rather than title to a building or portion of a building, there would be significant differences.³³ The relationship of the legislation to other provisions, such as the *Uniform Building By-laws 1974-1981*, would also require careful consideration.

21.23 Regard would also need to be had to the working of the Queensland and Victorian legislation to ensure that the legislation is sufficiently comprehensive to deal adequately with cluster title developments of the sort likely to be undertaken in Western Australia³⁴ but not so complex as unduly to inhibit developers from undertaking them. One way would be to establish a committee comprised of representatives of relevant interests to formulate detailed legislative proposals, as was done in Victoria.

5. SUMMARY OF RECOMMENDATIONS MADE IN THIS CHAPTER

21.24 The Commission recommends that -

legislation providing for a cluster titles system should be enacted in Western Australia. Such legislation would provide a relatively simple legal frame-work,

³² For example, there would be no need to set up an association under the *Associations Incorporation Act* to administer the scheme. As in the case of strata titles, a cluster company would automatically come into existence on the registration of the cluster plan. It would also not be necessary to place restrictive covenants on the title of each lot: these could be provided for in the legislation itself. Finally, since access, energy and water supply could be through the common property, there would be more flexibility as regards the siting of each lot on the parcel.

³³ For example as to the cluster company's obligation to insure.

³⁴ In view of the fact that some existing "cluster style" subdivisions are relatively large scale, it would seem that the Victorian precedent would be more appropriate, although care would be required to ensure that the provisions do not unduly restrict developers: para 21.14 above.

analogous to that of strata titles, for the sale of vacant land and associated common property.

The Commission's terms of reference on this question were confined to a consideration of the general desirability of introducing such a form of title in Western Australia. If the Commission's recommendation is adopted, the precise form the legislation should take would require a detailed study of a number of factors, including -

- (a) town planning policy, the interests of local authorities and supply authorities and of the needs of developers and the public;*
- (b) the Victorian and Queensland legislation, including their practical operation; and*
- (c) the relationship between the proposed legislation and other Western Australian enactments, such as the Uniform Building By-laws.*

(paragraphs 21.21 to 21.23)

PART VIII: SUMMARY OF RECOMMENDATIONS

CHAPTER 22

GENERAL

- (a) *The report has been drafted on the basis that the present Act is satisfactory except where the Commission has indicated to the contrary. Those provisions in respect of which the Commission has made no proposals for amendment should be carried forward into new legislation.*

(paragraph 2.27)

- (b) *Except where otherwise expressly indicated, the recommendations made in this report are intended to apply to existing as well as future strata schemes.*

(paragraph 20.41)

CHAPTER 3 - REQUIREMENTS FOR REGISTRATION OF A STRATA PLAN

- (a) *The New South Wales provisions relating to the delineation of the boundaries of a lot on the strata plan be adopted in Western Australia.*

(paragraphs 3.4 to 3.6)

- (b) *The subdivision of a building into strata title lots should be permitted even though -*

(i) *the wall or part of the roof of the building encroaches onto a road, provided the local authority and the appropriate Minister of the Crown consent;*

(ii) *a wall of the building or the roof immediately above it encroaches onto other land, provided an easement of support is obtained from the owner of the land encroached on.*

(paragraphs 3.12 to 3.14 and 3.19 to 3.21)

(c) *When, or at any time after he applies for a building licence, a developer should be able to apply to the local authority for a determination as to whether the building, if constructed in accordance with the plans and specifications, will be of sufficient standard and suitable to be divided into lots.*

(paragraphs 3.29 and 3.31 to 3.34)

(d) *A developer should be able to apply to the local authority, when or at any time after he makes a development application, for a determination as to whether -*

(i) *separate occupation of the proposed lots will not contravene any town planning scheme;*

(ii) *any consent or approval required under any such scheme or under an interim development order has been given in relation to the separate occupation of the proposed lots; and*

(iii) *the proposed development as a whole will not interfere with the existing or likely future amenity of the neighbourhood.*

(paragraphs 3.25 and 3.30 to 3.34)

(e) *Where the local authority is unable to confirm (for the purpose of its certificate under section 5(6)(c) of the Act) that the building is in accordance with the approved plans and specifications because the original plans or specifications have been lost or destroyed, it should be sufficient if the local authority certifies that any modifications to the building are consistent with the building plans and specifications relating thereto that have been approved by the local authority.*

(paragraph 3.35)

(f) *The Act should be amended to empower the Governor in Council to make regulations exempting certain strata subdivisions in certain areas from the need for Town Planning Board approval.*

(paragraphs 3.38 to 3.40)

- (g) *Where the Town Planning Board's approval to a strata subdivision is to continue to be required, a person who intends to construct or modify a building with a view to strata titling it should be required to apply to the Board for conditional approval before he commences construction or modification. Where conditional approval has been given by the Board, it should be sufficient for the local authority to issue a certificate that the conditions have been complied with.*

(paragraphs 3.43 and 3.44)

CHAPTER 4 - THE STRATA LOT

- (a) *It should be possible for a lot to include an area outside the building or to consist of a space which is wholly outside the building. However, the proprietor should not be able to effect a structural improvement in the area or space, except where the strata company has by unanimous resolution consented.*

(paragraphs 4.4 to 4.7)

- (b) *It should be possible to specify on the strata plan the purpose for which a lot or part of a lot can be used. It should be unlawful to use the lot or part lot for any other purpose. There should be provision for altering the use or removing the limitation altogether.*

(paragraph 4.9)

- (c) *Where the floor, wall or ceiling of a lot is a boundary, unless otherwise stipulated in the strata plan, the boundary of the lot should be the inner surface of the wall, the upper surface of the floor and the under surface of the ceiling, as the case may be.*

(paragraphs 4.12 and 4.14)

- (d) *However, a proprietor, without obtaining the consent of the strata company, should be able to paint, wallpaper, or decorate the structure which forms the inner surface of the boundary of his lot, or affix locking devices, flyscreens,*

furniture, carpets and the like thereto, if such action does not unreasonably damage the common property.

(paragraph 4.15)

(e) *There should be provision for -*

(i) *subdivision within strata schemes;*

(ii) *consolidation of two or more lots into one;*
and

(iii) *conversion of a lot or lots into common property.*

(paragraphs 4.19,4.21,4.23, 4.24,4.27,4.28 and 4.32)

CHAPTER 5 - LAND FOR USE IN CONJUNCTION WITH A LOT

The only method (falling short of a lease) of granting to a particular proprietor exclusive use and enjoyment of, or special privileges in respect of, a specific area of common property should be in pursuance of a by-law made by unanimous resolution and recorded at the Titles Office.

(paragraphs 5.6 and 5.11 to 5.14)

CHAPTER 6 - STAGED DEVELOPMENT

Consideration be given to the introduction of provisions specifically providing for staged development within a strata scheme when further experience has been gained in New Zealand and New South Wales.

(paragraph 6.22)

CHAPTER 7 - APPEALS FROM DECISIONS OF LOCAL AUTHORITIES AND THE TOWN PLANNING BOARD

(a) *An appeal from a local authority's determination as to whether -*

(i) *the building proposed to be strata titled conforms to the plans and specifications approved by that authority; or*

(ii) *the building is, or will be when completed, of sufficient standard and suitable to be divided into lots;*

should lie to the Minister for Local Government.

(paragraphs 7.2 and 7.4)

(b) *An appeal from a local authority's determination as to whether -*

(i) *separate occupation of the proposed lots will contravene a town planning scheme;*

(ii) *any consent or approval required under any such scheme or interim development order has been given; or*

(iii) *the development will interfere with the existing or likely future amenity of the neighbourhood;*

should lie, at the option of the appellant, either to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal.

(paragraphs 7.3 and 7.4)

(c) *The appeal provisions outlined in (a) and (b) should also apply to appeals from a local authority's determination in regard to a proposed subdivision within a strata scheme.*

(paragraph 7.5)

(d) *Where a local authority refuses or fails to approve -*

(i) *a proposed consolidation or conversion; or*

- (ii) *a change of the use specified in a strata plan for a lot or part lot or the removal of the limitation,*

an appeal should lie, at the option of the appellant, to the Minister for Urban Development and Town Planning or the Town Planning Appeal Tribunal.

(paragraph 7.5)

- (e) *Where a local authority refuses an application under the Strata Titles Act, it should be required to give written notice of its decision to the applicant specifying the grounds of refusal and informing him of his right of appeal.*

(paragraph 7.6)

- (f) *Appeals from decisions of the Town Planning Board under the Strata Titles Act should lie, at the option of the appellant, either to the Minister for Urban Development and Town Planning or to the Town Planning Appeal Tribunal.¹*

(paragraphs 7.8 and 7.9. See also paragraph 8.27 above)

CHAPTER 8 - COMMON PROPERTY

- (a) *The Act should provide that vertical structural members (not being walls) of the building, and pipes, wires, cables or ducts not for the exclusive enjoyment of one lot should be deemed to be common property unless otherwise described in the strata plan and that this provision should apply to existing as well as future strata schemes.*

(paragraphs 8.3 and 8.4)

- (b) *The certificate of title to a lot, instead of specifying in fractional terms the share in the common property held by the proprietor, as at present, should state that the proprietor holds such share in the common property as corresponds to the unit entitlement shown from time to time on the strata plan.*

(paragraphs 8.9 and 8.10)

¹ This recommendation is made pending a review of appeal rights generally: para 7.11 above.

- (c) *The strata company should be empowered, pursuant to a unanimous resolution of proprietors, to acquire freehold and leasehold land for the purposes of adding to the common property. It should be similarly empowered to assign the lease, sublease the leased land or surrender the lease.*

(paragraphs 8.14 to 8.20)

- (d) *A strata company should be empowered, pursuant to a unanimous resolution, to exercise the power of re-entry on behalf of the proprietors where common property has been leased out and also to accept a surrender of the lease or sublease.*

(paragraph 8.21)

- (e) *Section 10(8) of the Act (which is concerned with planning approvals to certain dealings with common property) should be reviewed as part of a comprehensive review of provisions in Part III of the Town Planning and Development Act 1928-1981 (in particular, sections 20(1), 20B, 21 and 27), which the Commission recommends should be undertaken.*

(paragraphs 8.22 to 8.25)

- (f) *The question of the circumstances in which a by-law granting exclusive use or special privileges in respect of a specific area of common property should require the approval of the local authority and the Town Planning Board should be dealt with in the course of the review recommended in (e) above.*

(paragraph 8.26)

- (g) *Appeals from a refusal or failure of the local authority or the Town Planning Board to approve a dealing with common property under section 10(8) of the Act should lie, at the option of the appellant, to the Minister for Urban Development and Town Planning or the Town Planning Appeal Tribunal.*

(paragraph 8.27)

CHAPTER 9 - THE STRATA COMPANY

Duties of
strata
companies

- (a) *Certain of the existing duties of strata companies, namely to -*
- (i) *control and manage the common property;*
 - (ii) *maintain the common property;*
 - (iii) *keep minutes of general meetings;*
 - (iv) *keep a record of unanimous resolutions;*
 - (v) *keep books of account and prepare statements of account;*
 - (vi) *comply with any reasonable request for the names and addresses of the persons who are members of the council of the strata company;*
 - (vii) *provide information as to the position of a proprietor's contributions to the administrative fund; and*
 - (viii) *install a strata company letter box;*

should be delineated in more detail and where they are at present imposed by by-law should be imposed instead by the Act itself.

(paragraphs 9.8 to 9.10, 9.13 to 9.15 and 9.19 to 9.21)

- (b) *The following additional duties should be imposed by the Act on strata companies -*
- (i) *A strata company should be expressly required to maintain any personal property vested in it.*
 - (ii) *A strata company should be required to keep proper records of*

notices and orders given to or served on it.

- (iii) *The present duty to keep a separate record of unanimous resolutions should be extended to special resolutions.*
- (iv) *A strata company's present duty to make certain records and documents available for inspection by a proprietor, mortgagee or person authorised by either should be extended to include all records or documents in the custody or under the control of the strata company.*
- (v) *A strata company's present duty to provide information as to the position of a proprietor's contributions to the administrative fund should be extended to the reserve fund where one has been established.*

(paragraphs 9.11,9.12, 9.14 and 9.18 to 9.20)

Powers of
strata
companies

- (c) (i) *Certain of the existing powers of strata companies, namely to -*
 - (1) *purchase, hire or otherwise acquire personal property;*
 - (2) *invest money held by it;*
 - (3) *attend to incidental matters; and*
 - (4) *enter a lot for the purpose of inspecting it, maintaining the common property and ensuring that the by-laws are being observed;*

should be delineated in more detail and together with the other powers at present contained in by-law 3 should be provided for in the Act itself.

(paragraphs 9.22,9.23,9.25, 9.26,9.31 and 9.32)

(ii) *Strata companies should not be able to change their address for service except pursuant to an ordinary resolution passed at a general meeting of the strata company.*

(paragraph 9.33)

(d) *The following additional powers should be granted by the Act to strata companies, namely to -*

(i) *sell or otherwise dispose of personal property owned by it;*

(ii) *accept a lease, licence or permit for the purpose of providing moorings or landings for boats;*

(iii) *where a proprietor has failed to carry out work ordered by a public or local authority in respect of his lot (other than work for the benefit of the building generally), carry out the required work itself and recover the cost of doing so from the proprietor;*

(iv) *carry out work which a proprietor, tenant or other occupier has been ordered by a court or tribunal to undertake but has failed to do so, and recover the cost from the person against whom the order was made;*

(v) *where a by-law confers on the proprietor of a lot exclusive use of, or special privileges in respect of, part of the common property on condition that he carries out work in respect of it, carryout the work itself if the proprietor fails to do so and recover from him the cost;*

(vi) *enter a lot for the purpose of carrying out work which it would be empowered to under (d)(iii), (iv) and (v) or for the purpose of carrying out any work which the strata company is required to do by the Act or the by-laws, or by a notice served on it by a public or local authority, or by an order of a court or tribunal.*

(paragraphs 9.24 and 9.27 to 9.32)

Capacity
to sue
and be
sued

- (e) *Section 13(3)(a) of the Act should be amended to provide that a strata company is capable of suing and being sued.*

(paragraphs 9.35 and 9.36)

- (f) *Section 13(3)(c) should be replaced by a provision permitting a representative action by or against the strata company where the proprietors are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly. Contribution by a proprietor in respect of a judgment debt arising out of such an action should be in the same proportion as the unit entitlement of his lot bears to the aggregate unit entitlement.*

(paragraph 9.38)

Formalities
of making
a contract

- (g) *As far as the formalities of making, varying or discharging a contract are concerned, a person acting under the express or implied authority of a strata company should be able to make, vary or discharge a contract in the name of or on behalf of the company in the same manner as if that contract were made, varied or discharged by a natural person.*

(paragraph 9.40)

CHAPTER 10 - THE COUNCIL

The Commission recommends that part I of the schedule to the Act should be amended to include by-laws providing -

- (a) *that until the first annual general meeting of the strata company, the proprietors of all lots shall constitute the council.*

(paragraph 10.5)

- (b) *that for the purpose of determining whether there are more than "three proprietors" and hence whether there needs to be an election for membership of the council -*

- (i) *the co-proprietors of a lot shall be deemed to be one proprietor; and*
- (ii) *if the same persons own more than one lot they shall be deemed to be one proprietor.*

(paragraph 10.8)

- (c) *that only one co-proprietor of a lot shall be a member of a council. A co-proprietor shall only be eligible if he has been nominated by all his co-proprietors. Failing such agreement, only the co-proprietor with the largest share of the lot shall be eligible. If all co-proprietors hold equal shares, only the one first named in the certificate of title shall be eligible.*

(paragraphs 10.9 and 10.10)

- (d) *for the "first past the post" voting system to be used in council elections.*

(paragraph 10.13)

- (e) *that on an election of members of council, each proprietor shall have one vote in respect of each lot owned by him. A co-proprietor of a lot shall be entitled to such part of the vote applicable to the lot as is proportionate to his interest in the lot.*

(paragraph 10.14)

- (f) *that a council shall have a chairman, a secretary and a treasurer. Each office bearer shall be appointed by the members of the council from among themselves and hold office until he dies or ceases to be a member of the council, resigns or another person is appointed by the council to hold the office.*

(paragraphs 10.15 and 10.16)

- (g) *for the duties to be performed by the office bearers.*

(paragraph 10.15)

(h) *that the chairman, secretary and treasurer of the council shall by virtue of their office also be the chairman, secretary and treasurer of the strata company.*

(paragraph 10.17)

(i) *that a member of the council may appoint another proprietor to act in his place at a meeting of the council.*

(paragraph 10.18)

(j) *that a special resolution is required to remove any member of the council before the expiration of his term of office.*

(paragraph 10.20)

(k) *that a member of a council shall cease to be a member in specified circumstances.*

(paragraph 10.21)

(l) *that where the proprietors in general meeting determine that the office of a member of the council is vacant (see (j) above), the remaining members of the council may appoint a new member unless the meeting reserved the power to do so to a general meeting.*

(paragraph 10.22)

(m) *that the amount of contributions payable by proprietors to the administrative fund and any reserve fund shall be determined at a general meeting of the strata company.*

(paragraph 10.28)

The Commission recommends that the Act include sections providing that -

(a) *A corporate body is able to act as a member of the councillor as chairman, secretary or treasurer of the strata company or council through a natural person authorised in writing by the corporate body.*

(paragraph 10.7)

- (b) *If for any reason there is no council in existence or if the council lacks a quorum, the council's powers and duties can be exercised by the proprietors in general meeting.*

(paragraph 10.11)

- (c) *It is an offence for a person having in his possession or control property belonging to the strata company to fail to deliver it to a specified member of the council within a specified time. (An exception should be made for any lien or right which a person has against the property.)*

(paragraphs 10.29 and 10.30)

CHAPTER 11 - MEETINGS OF PROPRIETORS

- (a) *A unanimous resolution should be deemed to be passed if all those attending a general meeting of the strata company vote in its favour and the remainder, if any, of those entitled to vote agree in writing to it within 28 days afterwards. If any of the remainder has ceased to be a proprietor after the meeting, the resolution must be agreed to by his successor in title within the 28 days.*

(paragraph 11.18)

- (b) *Where a proposed action requires a unanimous resolution, and the motion to authorise it has not been unanimously passed, but received at least the support required for a special resolution, a person who voted in favour of the motion should be able to apply to the Supreme Court for a declaration which will have the effect of deeming the resolution to have been unanimously passed. Provision should be made for those who voted against the motion, those who were entitled to vote but did not do so, and any other person whom the Court considers has a sufficient interest in the proceedings to be served with notice of the application and, if appropriate, to be joined as parties to the proceedings. It should also be provided that the Court should not make an*

award of costs against a defendant if it considers that, although the application should be granted, he had not acted unreasonably.

(paragraphs 11.21 and 11.22)

- (c) *A special resolution should be deemed to be passed if it is passed by a simple majority vote at a general meeting and agreed to within 28 days by enough proprietors to bring the majority to not less than three-quarters of the total unit entitlement of the lots and not less than three-quarters of the proprietors. The definition of "special resolution" should be removed from the by-laws in part I of the schedule and included in the Act itself.*

(paragraphs 11.27 and 11.28)

- (d) *A voting paper system should not be added to the existing methods of exercising the power to vote.*

(paragraph 11.33)

- (e) *The limitation on a proprietor's right to vote when contributions are in arrears should also apply to any other money recoverable under the Act by the strata company.*

(paragraph 11.39)

- (f) *Section 24(2) of the Act should be amended so as expressly to enable the Supreme Court to appoint a suitable person to exercise the power of voting of a proprietor who cannot be located.*

(paragraph 11.42)

- (g) *The by-laws in part I of the schedule to the Act should be amended to enable a proprietor, by notice in writing to the secretary, to require the inclusion of any item of business on the agenda of the next general meeting.*

(paragraph 11.43)

- (h) *The first general meeting of proprietors should be deemed to be an annual general meeting of proprietors.*

(paragraph 11.44)

- (i) *The Act should expressly provide that where a general meeting has restricted the council in the exercise of a power, or the performance of a duty, that power or duty, to the extent of the restriction, is exercisable by the proprietors in general meeting.*

(paragraph 11.45)

CHAPTER 12 - UNIT ENTITLEMENT

Future schemes

- (a) *For all future schemes, the strata plan lodged for registration must be accompanied by a certificate of a licensed valuer that the unit entitlement allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to the others.*

(paragraph 12.15)

- (b) *For future strata schemes, there should be provision for a reallocation of unit entitlement pursuant to a unanimous resolution of the strata company. The application to the Registrar of Titles to alter the existing schedule of unit entitlement on the strata plan should be accompanied by -*

(i) *a certificate under the seal of the strata company that the company has by unanimous resolution consented to the proposed reallocation;*

(ii) *a certificate from a licensed valuer that the unit entitlement proposed to be allocated to each lot is no more than five per cent more or five per cent less than its capital value relative to the others; and*

(iii) *the consent in writing of all persons (other than proprietors) who have a registered interest in any of the lots affected.*

It should not be possible to reallocate unit entitlement by unanimous resolution more than once in every five years or within five years of an order of reallocation by the Land Valuation Tribunal, as the case may be

order of reallocation by the Land Valuation Tribunal, as the case may be.

(paragraphs 12.25 and 12.26)

- (c) (i) *Application to the Land Valuation Tribunal by a proprietor or the strata company for a reallocation of unit entitlement may be made if -*
- (a) *the application has been authorised by a special resolution of the strata company; and*
 - (b) *the capital value of any lot relative to the capital value of any other lot in the scheme has varied by more than five per cent since the existing allocation came into effect.*
- (ii) *The Tribunal should be required, unless it is satisfied that there are good reasons to the contrary, to allocate a unit entitlement to each lot in the scheme which is no more than five per cent more or five per cent less than its capital value relative to the others.*
- (iii) *It should not be possible for the Tribunal to reallocate unit entitlement unless at least five years has elapsed from any previous allocation whether an original allocation or a reallocation by unanimous resolution, order of the Tribunal or order of the Supreme Court.*
- (iv) *Provision should be made for all those who voted against the motion, those who were entitled to vote but did not do so, and any other person whom the Tribunal considers has a sufficient interest in the proceedings to be served with notice of the application and, if appropriate, to be joined as parties.*
- (v) *It should also be provided that the Tribunal should not make an award of costs against a defendant if it considers that, although the application should be granted, he had not acted unreasonably.*

(paragraphs 12.30 to 12.32)

Existing schemes

- (d) (i) *with the modifications indicated in (ii) of this sub-paragraph, reallocation of unit entitlement should be permitted in existing schemes only in the same limited circumstances recommended in relation to future schemes.*
- (ii) (1) *It should be sufficient when it is sought to adjust an initial allocation in respect of an existing scheme if the unit entitlement of a lot in the scheme is more than five per cent more or five per cent less than its capital value relative to the value of all the other lots in the scheme.*
- (2) *The prohibition against the Tribunal making an order within five years of the original allocation should not apply.*

(paragraphs 12.33 and 12.34)

CHAPTER 13 - FINANCES

- (a) *In addition to an administrative fund, a strata company should be expressly empowered (but not obliged) to establish a reserve fund for the purpose of accumulating money for expenses which are not of a routine nature. Payment into any such fund should be made by contributions of proprietors levied in accordance with their unit entitlement. The amount of the contributions should be determined in the same manner as that recommended by the Commission in respect of the administrative fund: paragraph 10.28.*

(paragraph 13.8)

- (b) *Section 13(7) of the Act should be redrafted to make it clear that a strata company can choose an appropriate future time or times as that upon which a contribution becomes due.*

(paragraph 13.13)

- (c) *Arrears of contributions should bear interest at a prescribed rate until paid unless the proprietors, by special resolution, determine otherwise either generally or in a particular case.*

(paragraph 13.16)

- (d) *The strata company should be expressly empowered to charge a fee for the issue of a certificate under section 13(8) of the Act.*

(paragraph 13.17)

CHAPTER 14 - RATES, TAXES AND CHARGES

- (a) *Where the relevant rating authority levies rates on a gross rental value basis, the Valuer General should be required to value each lot separately and the liability of each lot for rates should be assessed accordingly.*

(paragraphs 14.5 and 14.8)

- (b) *The strata company should not continue to be liable to pay the amount of the rate levied on a lot where the proprietor defaults.*

(paragraph 14.13)

- (c) *In addition to the strata company, each proprietor should be able to object to or appeal against a valuation of the parcel where the valuation is on an unimproved value basis. Where the valuation of a lot is on a gross rental value basis, only the person liable to pay the rate should be able to object to or appeal against the valuation placed on it.*

(paragraphs 14.15 and 14.18)

- (d) *Where a strata scheme is serviced for water through one meter, the strata company should be liable to pay for any excess water.*

(paragraphs 14.20 and 14.21)

- (e) *The by-laws in part I of the schedule to the Act should be amended to empower the strata company to require all or any of the proprietors or occupiers of lots*

serviced for electricity or gas by submeters to pay the strata company a prescribed amount of money as security for the payment of submeter accounts.

(paragraph 14.37)

CHAPTER 15 - INSURANCE

(a) *In delineating the strata company's statutory obligation to insure the building to its replacement value, the expression "replacement value" should be defined to include -*

(i) *the reasonable cost of removal of debris and of architects', surveyors' and engineers' fees; and*

(ii) *a reasonable estimate of the amount by which the cost of replacement will increase during the premium gear.*

(paragraph 15.15)

(b) *The Act should specifically permit a strata company to take out either an insurance policy under which the insurer undertakes to replace the building without specifying a limiting amount or a policy which limits the insurer's liability to a specified amount.*

(paragraph 15.16)

(c) *The strata company should be required to insure the building against storm and tempest, lightning, explosion and earthquake, as well as fire.*

(paragraph 15.18)

(d) *The Act should be clarified so as expressly to empower the strata company to insure the building against other risks.*

(paragraph 15.20)

(e) *The strata company should not be required to insure against loss or damage to proprietors' fixtures.*

(paragraphs 15.21 to 15.23)

- (f) *The present provision in the Act whereby the proprietors by unanimous resolution can exempt the strata company from the obligation to insure the building should be retained, but a proprietor should be able to reinstate the requirement by serving notice on the strata company.*

(paragraphs 15.25 and 15.26)

- (g) *The strata company should be required to take out public liability insurance for \$750,000 or such other amount as is prescribed. The proprietors should be able to exempt the company from this obligation by unanimous resolution, but a proprietor should be able to reinstate the requirement by serving notice on the strata company.*

(paragraph 15.27)

- (h) *The provision in section 17(2)(d) of the Act that where an insurer pays to the mortgagee of a lot an amount less than that owing under the mortgage the insurer is entitled to a submortgage of the mortgage should be replaced by a provision entitling the insurer to have the mortgage transferred to himself and the mortgagee as tenants in common in proportional shares.*

(paragraph 15.28)

- (i) *Where the Supreme Court declares that a building is "destroyed", the Court should be empowered to order that an appropriate part of the insurance money received by the strata company be paid directly to a mortgagee of a lot.*

(paragraph 15.29)

CHAPTER 16 - TENANTS, RESIDENTS, OTHER OCCUPIERS AND VISITORS

- (a) *The by-laws of a strata company should bind tenants, residents and other occupiers as well as the strata company and proprietors.*

(paragraph 16.10)

(b) *Tenants, residents and other occupiers should be able to enforce the by-laws, as well as the strata company and proprietors.*

(paragraph 16.11)

(c) *The lease of a lot or common property should be deemed to contain an agreement by the lessee to comply with the by-laws of the strata company.*

(paragraph 16.15)

(d) *A proprietor should be required to take all reasonable steps to ensure that a tenant, a resident and any other occupier of the lot complies with the by-laws.*

(paragraph 16.16)

(e) *The by-laws in the schedule to the Act which should be applied to tenants, residents and other occupiers should be those relating to -*

(i) *unreasonable interference with the use and enjoyment of common property;*

(ii) *the creation of a nuisance;*

(iii) *the use of the lot for any purpose which may be illegal or injurious to the reputation of the building;*

(iv) *the making of undue noise;*

(v) *keeping animals; and*

(vi) *the prohibition against use of the lot in a manner contrary to the purpose shown on the strata plan as that for which the lot is intended to be used.*

(paragraphs 16.19 to 16.21)

(f) *A by-law should be added to those contained in part I of the schedule to the Act obliging proprietors, tenants, residents and other occupiers to take all*

reasonable steps to ensure that their visitors do not behave in a manner likely to interfere with peaceful enjoyment of another lot or common property.

(paragraph 16.22)

- (g) *A by-law should be added to those contained in part I of the schedule to the Act obliging proprietors, tenants, residents and other occupiers to take all reasonable steps to ensure that their visitors comply with the by-laws of the strata company relating to the parking of motor vehicles.*

(paragraph 16.32)

CHAPTER 17 - SALE OF LOTS

- (a) *Developers should be required to give prospective purchasers written notice of certain details of the strata scheme before they enter into a contract to buy a strata lot (and to give notice to the purchaser if certain specified changes to the particulars occur between the time when the original information was given and the time when the purchaser becomes the registered proprietor of the lot).*

(paragraphs 17.4 to 17.10)

- (b) *Subject to (c) below, the procedures and safe-guards found in section 49(4)-(12) of the Queensland Building Units and Group Titles Act 1980-1981 should be adopted, including those relating to the right of a purchaser to avoid the contract -*

- (i) *where the developer does not comply with his obligation to give the required particulars;*
- (ii) *where the developer gives notice of a specified change and the rights of the purchaser have been materially affected by the changes; or*
- (iii) *where the developer does not comply with his obligation to give notice of a specified change to the particulars and the change materially affects the purchaser.*

(paragraph 17.9)

- (c) (i) *A purchaser should not be able to avoid a contract on the ground that a statement or notice does not comply with the Act if that statement or notice substantially complies with the Act.*
- (ii) *A purchaser should only be able to avoid the contract -*

- (1) *within 30 days after becoming aware of the failure of the original proprietor to provide the required particulars or to give notice of any specified changes to those particulars, or*
- (2) *within 30 days after the registration of the transfer to him, whichever period first expires.*

(paragraph 17.11)

- (d) *Part III of the Sale of Land Act 1970-1982 should be extended to the sale of lots in a strata subdivision where the vendor has the right to sell two or more of such lots.¹*

(paragraphs 17.21 and 17.22)

- (e) *The extension of Part III of the Sale of Land Act should be so drafted as to apply to the sale of proposed strata lots as well as strata lots.*

(paragraphs 17.23 and 17.24)

CHAPTER 18 - BUILDING DEFECTS

- (a) *A purchaser's existing remedies in contract, tort and under the Builders' Registration Act 1939-1982 should continue to apply.*
- (b) *Consideration should be given to extending the area of application of the Builders' Registration Act 1939-1982 to places presently not covered by the Act or to introducing legislation enabling section 12A alone of that Act to be so extended.*

(paragraphs 18.23 and 18.24)

¹ Part III is aimed at ensuring that a purchaser obtains a title to his lot and that, unless the mortgage relates only to that lot and the contract provides for the purchaser to assume the obligations under the mortgage -

- (a) the mortgage is to be discharged, and
- (b) any money prepaid by the purchaser is used towards so discharging it.

CHAPTER 19 - RESOLUTION OF DISPUTES

- (a) *The Act should be amended to provide for the appointment of a Strata Titles Referee to determine disputes between participants in a strata scheme.*
(paragraph 19.28)
- (b) *The procedure to be followed and the jurisdiction and powers of the Referee should generally be as contained in the Queensland Building Units and Group Titles Act 1980-1981.*
(paragraph 19.28)
- (c) *Taking into account the fact that the office of Referee could be combined with another office, a Referee under the Small Claims Tribunals Act 1974-1981 should be appointed as the Strata Titles Referee.*
(paragraph 19.34)
- (d) *The Registry Office of the Strata Titles Referee should also have the role of providing basic information to members of the public about the Act and the operation of strata title schemes.*
(paragraph 19.37)
- (e) *The legislation should make it clear that the jurisdiction of the courts to deal with matters arising in strata schemes is unaffected but that the court should be empowered to order that the plaintiff pay the defendant's costs if it considers that the taking of proceedings was not warranted by reason of the fact that the dispute resolution system makes adequate provision for the enforcement of the rights or remedies concerned.*
(paragraph 19.39)
- (f) *It should be an offence to fail to comply with an order of the Strata Titles Referee.*
(paragraph 19.40)

- (g) *There should be a right of appeal from a decision of the Strata Titles Referee to the proposed Administrative Division of the Local Court.*

(paragraphs 19.41 and 19.42)

- (h) *There should be power to remit a matter from the Referee to the Supreme Court.*

(paragraph 19.43)

- (i) *The Strata Titles Referee, rather than the Supreme Court, should be able to appoint an administrator of a strata titles scheme.²*

(paragraph 19.45)

CHAPTER 20 - OTHER MATTERS

- (a) *"Proprietor" should be defined in section 3 of the Strata Titles Act to mean the person for the time being registered under the Transfer of Land Act 1893-1982 as proprietor of an estate in fee simple in the lot or, as the case may be, an estate for life in the lot.*

(paragraph 20.3)

- (b) *Sections 11(1) and 19 of the Strata Titles Act should be redrafted by replacing the concept of notional destruction of the building with the concept of cancellation of the strata plan.*

(paragraph 20.5)

- (c) *The Supreme Court's power under section 19(3) of the Strata Titles Act should be so expressed as to enable it -*

(i) *to vary the existing strata scheme in whatever manner it thinks fit;*

(ii) *if it thinks, fit to substitute a new strata scheme; and*

² Subject to the power of a Judge of the Supreme Court to order that the application be remitted to the Supreme Court for determination by it: para 19.43.

(iii) *to make orders to give effect to such variation or substitution.*

(paragraph 20.7)

(d) *Where part of the parcel has been compulsorily acquired and excised from the strata scheme, section 19(3) of the Act should be revised so as to empower the Supreme Court to vary the strata scheme or to substitute a new strata scheme, and to make consequential orders.*

(paragraph 20.8)

(e) *The Real Estate and Business Agents Act 1978-1982 should be amended to provide that if contributions to the administrative or sinking fund or other money is collected by a licensed real estate agent on behalf of a strata company, such money should be deemed to be collected in respect of a real estate transaction.*

(paragraph 20.20)

(f) *The original proprietor should be required to -*

(i) *call the first annual general meeting of the strata company;*

(ii) *deliver to the first annual general meeting various documents and accounts.*

(paragraphs 20.26 and 20.27)

(g) *No special provision should be made for strata title duplexes.*

(paragraph 20.35)

(h) *Where an Act empowers or requires an authority to serve a notice or order on all the proprietors of a strata scheme, service on the strata company shall be deemed to be good service on the proprietors, and the strata company shall be bound to comply with the notice or order.*

(paragraph 20.37)

(i) *The Strata Titles Act should be amended to provide that, for the purposes of the Dividing Fences Act 1961-1969, service on the strata company is deemed to be service on the proprietors.*

(paragraph 20.38)

(j) *A set of possible additional by-laws to govern the conduct of proprietors, tenants, residents and other occupiers should be contained in a schedule to the Act. The strata company should be free to adopt all or any of these by-laws.*

(paragraph 20.40)

(k) *Any by-laws that have been made by a strata company before the coming into force of legislation introducing new by-laws recommended by the Commission into the schedule to the Act should continue to have effect, notwithstanding their inconsistency with a by-law so introduced.*

(paragraph 20.42)

(l) *A streamlined procedure for the conversion of a tenancy in common to strata titles should be provided.*

(paragraph 20.44)

CHAPTER 21 - CLUSTER TITLES

Legislation providing for a cluster titles system should be enacted in Western Australia. Such legislation would provide a relatively simple legal framework, analogous to that of strata titles, for the sale of vacant land and associated common property.

The Commission's terms of reference on this question were confined to a consideration of the general desirability of introducing such a form of title in Western Australia. If the Commission's recommendation is adopted, the precise form the legislation should take would require a detailed study of a number of factors, including -

- (a) *town planning policy, the interests of local authorities and supply authorities and of the needs of developers and the public;*
- (b) *the Victorian and Queensland legislation, including their practical operation; and*
- (c) *the relationship between the proposed legislation and other Western Australian enactments, such as the Uniform Building By-laws.*

(paragraphs 21.21 to 21.23)

Mr C W Ogilvie
Chairman

Mr H H Jackson
Member

Mr L L Proksch
Member

Dr J A Thomson
Member

Mr D R Williams, QC
Member

29 December 1982

APPENDIX I

LIST OF THOSE WHO COMMENTED ON THE WORKING PAPER

ORGANISATIONS AND BODIES

Associated Banks in WA
 Australia Post
 Building Surveyor, City of Nedlands
 City of Canning
 City of Perth
 City of Stirling
 Commissioner of Titles
 Council of Windsor Towers
 Department of Local Government
 Documentary Services
 Institute of Architects
 Institute of Valuers
 Institution of Surveyors
 Insurance Council of Australia
 Kevin J McMahon and Associates
 Law Society
 Local Government Association
 Munro George and Co
 Real Estate Manager, Dalgety Real Estate
 REIWA
 Road Traffic Authority
 Registrar of Titles
 Rural Housing Authority
 Silverwood Pty Ltd
 The Owners of 13 & 13A Burroughs Road, Karrinyup
 The Owners of Continental Court
 The Owners of Hacienda Gardens
 The Owners of Hale Court Home Units
 The Owners of Mill Point Mansions
 The Owners of 124-132 New High Road, Parkwood
 The Owners of Tranby-on-Swan
 The Owners of Villa Court Home Units
 Town Planning Board
 WA Real Estate Settlement Association
 West Australian Trustees Limited
 Urban Development Institute

INDIVIDUALS

Annear Rev F
 Bayetto P D
 Brown D L
 Cock O A
 Davison R
 Gleeson P G
 Grazer C
 Hawkins H A
 Hogg E J R
 Hollock E
 Hoskin R A
 Hosking A
 Kendall A A
 Manton M V
 McGowan V
 McIntyre J
 Peet C E
 Peet L J
 Phillips T J
 Robertson L W
 Rundell K
 Schaefer G
 Shearer D J
 Squires D R
 Symons F C
 Treloar J A D
 Twist B A
 Walker J
 White A E
 Weaver B
 Wright J K
 Yells N C
 Young D
 Young R L, Hon MLA

APPENDIX II**STRATA PLANS APPROVED FOR REGISTRATION
BY TITLES OFFICE DURING 1981**

Number of Lots on Plan	Number of Plans	Percentage of Total
2	734	57.9
3	82	6.5
4	117	9.2
5	36	2.8
6	39	3.1
7	20	1.6
8	84	6.6
9	25	2.0
10	29	2.3
11	9	0.7
12	15	1.2
13	6	0.5
14	9	0.7
15	5	0.4
16	11	0.9
17	5	0.4
18	10	0.8
19	1	0.1
20	8	0.6
21	3	0.2
22	1	0.1
23	1	0.1
24	5	0.4
25-50	11	0.9
51-100	2	0.2
	1268	100

APPENDIX III - PART A**APPLICATIONS MADE IN 1981 TO THE STRATA TITLES COMMISSIONER
AND THE STRATA TITLES BOARD UNDER THE NEW SOUTH WALES
STRATA TITLES ACT****COMMISSIONER**

Subject Matter	Number of Applications
Convening meeting of strata company during transition period (schedule 4, clause 11)	-
Convening meeting of strata company (s 57(6))	12
Convening meeting of strata company (s 57(6A))	7
*Authorising expenditure of large sums of money (s 76)	21
*Exempting strata company from requirement to insure (s 83)	2
Interim orders (s 104A)	29
General power to settle disputes (s 105)	572
Consents affecting common property (s 106)	38
*Order to comply with provision as to alteration of building (s 107)	-
Disposal of personal property (s 108)	1
Acquisition of personal property (s 109)	-
Order to pursue insurance claim (s 109A)	3
Varying rates of interest (s 110)	-
Supply of information or documents (s 111)	5
Animal kept contrary to by-laws (s 112)	60
Animal kept pursuant to by-laws (s 113)	10
*Order confirming information for roll (s 114)	-
<hr/>	
TOTAL	760
<hr/>	

(Continued on next page)

STRATA TITLES BOARD

Subject Matter	Number of Applications
*To vary or revoke an order of the Board (s 117)	4
*Reallocation of unit entitlement (s 119)	16
Revocation of by-law (s 120)	1
Granting licence to use common property (s 121)	3
Invalidating purported by-law (s 122)	6
Varying amount of contribution (s 123)	2
Declaring resolution a nullity (s 124)	-
Varying amount of insurance (s 125)	5
Appointment of managing agent (s 127)	45
*Transitional provision relating to exclusive use of common property (schedule 4, clause 15)	5
*Appeals from decision of Commissioner (s 128)	116
<hr/> TOTAL	203
<hr/> GRAND TOTAL	963
<hr/>	

APPENDIX III - PART B**APPLICATIONS MADE IN 1981 TO THE REFEREE UNDER THE QUEENSLAND
BUILDING UNITS AND GROUP TITLES ACT**

Subject Matter	Number of Applications
Convening meeting of strata company during transition period (s 5(7)(b))	7
Convening meeting of strata company (s 29(6))	7
Convening meeting of strata company (s 29(7))	-
*Exemption from certain provisions of the Act (s 41(2))	21
Interim orders (s 76)	-
General power to settle disputes (s 77(1))	65
Consents affecting common property (s 79)	10
Disposal of personal property (s 80)	-
Acquisition of personal property (s 81)	-
Order to pursue insurance claim (s 82)	1
Varying rates of interest (s 83)	-
Supply of information or documents (s 84)	3
Animal kept contrary to by-laws (s 85)	6
Animal kept pursuant to by-laws (s 86)	-
*Order confirming information for roll (s 87)	-
Revocation of by-law (s 88)	-
Granting licence to use common property (s 89)	-
Invalidating purported by-law (s 90)	1
Varying amount of contribution (s 91)	3
Declaring resolution a nullity (s 92)	-
Varying amount of insurance (s 93)	3
Appointment of managing agent (s 94)	5
Variation of period during which resolution has no force (s 111(4))	-
<hr/> TOTAL	<hr/> 132

The applications referred to above include six with respect to group title schemes.

APPENDIX IV

EXAMPLES OF POSSIBLE BY-LAWS

- | | |
|--|---|
| Vehicles. | 1. A proprietor, tenant, resident or other occupier of a lot shall not park or stand any motor or other vehicle upon common property except with the approval of the strata company. |
| Obstruction of common property. | 2. A proprietor, tenant, resident or other occupier of a lot shall not obstruct lawful use of common property by any person. |
| Damage to lawns, etc., on common property. | 3. Except with the approval of the strata company, a proprietor, tenant, resident or other occupier of a lot shall not - <ul style="list-style-type: none"> (a) damage any lawn, garden, tree, shrub, plant or flower being part of or situated upon common property; or (b) use for his own purposes as a garden any portion of the common property. |
| Behaviour of proprietors and occupiers. | 4. A proprietor, tenant, resident or other occupier of a lot when upon common property shall be adequately clothed and shall not use language or behave in a manner likely to cause offence or embarrassment to the proprietor, tenant, resident or other occupier of another lot or to any person lawfully using common property. |
| Children playing upon common property in building. | 5. A proprietor, tenant, resident or other occupier of a lot shall not permit any child of whom he has control to play upon common property within the building or, unless accompanied by an adult exercising effective control, to be or to remain upon common property comprising a laundry, car parking area or other area of possible danger or hazard to children. |
| Depositing rubbish, etc., on common property. | 6. A proprietor, tenant, resident or other occupier of a lot shall not deposit or throw upon the common property any rubbish, dirt, dust or other material likely to interfere with the peaceful enjoyment of the proprietor, tenant, resident or other occupier of another lot or of any person lawfully using the common property. |
| Drying of laundry items. | 7. A proprietor, tenant, resident or other occupier of a lot shall not, except with the consent in writing of the strata company - <ul style="list-style-type: none"> (a) hang any washing, towel, bedding, clothing or other article on any part of the parcel in such a way as to be visible from outside the building other than on any lines provided by the strata company for the purpose and there only for a reasonable period; or (b) display any sign, advertisement, placard, banner, pamphlet or like matter on any part of his lot in such a way as to be visible from outside the building. |

- Cleaning windows etc. 8. A proprietor, tenant or occupier of a lot shall keep clean all glass in windows and all doors on the boundary of his lot, including so much thereof as is common property.
- Storage of Inflammable liquids, etc. 9. A proprietor, tenant, resident or other occupier of a lot shall not, except with the approval in writing of the strata company, use or store upon his lot or upon the common property any inflammable chemical, liquid or gas or other inflammable material, other than chemicals, liquids, gases or other material used or intended to be used for domestic purposes, or any such chemical, liquid, gas or other material in a fuel tank of a motor vehicle or internal combustion engine.
- Moving furniture, etc., on or through common property. 10. A proprietor, tenant, resident or other occupier of a lot shall not transport any furniture or large object through or upon common property within the building unless he has first given to the council notice of his intention to do so sufficient in the circumstances to enable the council to arrange for its nominee to be present at the time when he does so.
- Floor coverings. 11. A proprietor, tenant or occupier of a lot shall ensure that all floor space within his lot (other than that comprising kitchen, laundry, lavatory or bathroom) is covered or otherwise treated to an extent sufficient to prevent the transmission therefrom of noise likely to disturb the peaceful enjoyment of the proprietor, tenant, resident or other occupier of another lot.
- Garbage disposal. 12. A proprietor, tenant or occupier of a lot -
- (a) shall maintain within his lot, or on such part of the common property as may be authorised by the strata company, in clean and dry condition and adequately covered a receptacle for garbage;
 - (b) comply with all local authority by-laws and ordinances relating to the disposal of garbage;
 - (c) ensure that the health, hygiene and comfort of the proprietor, tenant, resident or other occupier of any other lot is not adversely affected by his disposal of garbage.