CAYMAN ISLANDS
LAW REFORM COMMISSION

FINAL REPORT

MODERNISATION OF THE REGULATION OF STRATA TITLES IN THE CAYMAN ISLANDS

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THE CAYMAN ISLANDS LAW REFORM COMMISSION

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TABLE OF CONTENTS

FINAL REPORT

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INTRODUCTION

1. Strata titles are regulated in the Cayman Islands by the Strata Titles (Registration) Law (2013 Revision) (referred to in this paper as "the Strata Law"), the Strata Titles Registration Regulations (2006 Revision) and the Registered Land Law (2004 Revision). By letter dated 31st July, 2006 the then President of the Cayman Islands Law Society, Mr. Charles Quin (now Justice Quin) requested that the Law Reform Commission consider the reform of the legislation. Mr. Quin expressed the view that many local practitioners found that the present legislation is deficient in its ability to deal with the destruction of properties which followed Hurricane Ivan.

2. The Commission agreed to this referral and on 21st January, 2009 published a press release by which members of the public were invited to submit their comments on any aspect of the regulation of strata titles in the Islands or to highlight any issues or problems which have arisen in this area of the law.

3. A wide variety of issues were raised by members of the public in response to the press release of the Commission. However, the main problem highlighted was ineffective management of strata schemes. The complaints and comments may be summarised as follows-

- the law should be changed to provide that a majority (perhaps 65%) of owners can make a decision on whether to sell a strata;
- the powers of some developers under strata schemes were too many and led to problems including unfair distribution of insurance proceeds after Hurricane Ivan;
- many strata schemes had poor strata bye-laws and strata committees which lacked accountability;
- strata committees were negligent in either not carrying out adequate research in order to obtain best insurance premiums or in not ensuring that insurance or adequate insurance was paid on premises;
- the accounts of strata corporations should be audited annually by one or more properly qualified chartered or certified public accountants or there should be an annual financial review and certification of the accounts by independent accountants;
- the method of examination of the financial statements should be determined by the proprietors at each annual general meeting for the next accounting period; and
- strata members met irregularly in many schemes.

4. Other concerns were that the existing legislation fails to address substantial issues that deal with strata titles such as strata of leasehold land. There was also the criticism that phasing provisions are minimal at best, unduly inflexible and fail to take account of market realities and changing planning and best practice standards. It was submitted that this has resulted in the need for detailed provisions in strata contracts in order to create the flexibility needed to ensure that phased developments can be completed over time in a sensible manner.

5. Several local attorneys responded to the press release and they all indicated that the law was in need of a comprehensive overhaul and most recommended reform along the lines of the strata legislation in New South Wales, Australia.

6. The strata legislation of the Cayman Islands is based on the Conveyancing (Strata Titles) Act, 1961 of New South Wales which was introduced to facilitate the subdivision of land into strata and the disposition of titles thereto. This 1961 Act has long been changed. As this aspect of land title grew the legislation in New South Wales evolved and there are now a number of pieces of legislation which deal with strata titles. These are the Strata Schemes (Freehold Development) Act, 1973, the Strata Schemes (Leasehold Development) Act, 1986, the Strata Schemes (Management) Act 1996, the Community Land Development Act, 1989 and the Community Land Management Act, 1989. These are in addition to the Real Property Act, 1900 and the Conveyancing Act, 1919.

7. The Strata Titles Registration Law of the Cayman Islands is therefore years behind its original model and it is accepted that comprehensive reform is needed. A sub-committee of the Law Reform Commission was appointed in April 2009 to deal with and advise the Commission on this reform. This sub-committee is comprised as follows-

- **Mrs. E. Nervik, LRC Commissioner and Chairperson**
- **Mrs. K. Bergstrom**
- **Mr. G. Loutas, Maples and Calder**
- **Mr. N. Klein, Appleby**
- **Mr. Ward Sykes, Dart Foundation**
- **Mr. T. Hepburn, BCQS.**

8. The sub-committee met several times between May and October 2009. A first draft of a Strata Titles Bill was submitted to the sub-committee in June 2009. The Bill was substantially amended between June 2009 and October 2010. However, during deliberations there was no consensus on issues relating to the creation of strata schemes and the staged development of such schemes. The Commission therefore decided in December 2010 that the review should be carried out in two phases in light of the complexity of this subject matter and the volume of work which is involved. The management concerns which were highlighted by the majority of responders were dealt with in a discussion paper of 4th April, 2011. An amending Bill providing for the reform of the management of strata schemes, for the termination of such schemes and for the resolution of strata disputes was appended ("the 2011 Bill").

9. The Law Reform Commission received responses to the paper and the 2011 Bill from a wide variety of persons including the legal associations, the Bankers' Association, CIREBA, individual real estate agencies, strata owners and executive committees, the Water Authority and Cayman Contractor's Association. The clauses set out in the first Bill were amended pursuant to comments submitted and those amended clauses had been inserted in a comprehensive Bill which formed a part of the second part of the review in 2012/2013.

10. In November 2012 well-known local attorney, Mr. David Ritch, agreed to act as consultant in the preparation of the legislation and his assistance has been invaluable. As a preliminary step, when a comprehensive Bill was prepared in late 2012 the Bill was submitted to the Ministry of Agriculture which has responsibility for this subject matter and their preliminary views were taken into account in the finalization before public consultation.

11. In January 2013 the Law Reform Commission submitted for public comments the Strata Titles Bill (the "2013 Bill") which was a comprehensive Bill containing the provisions of the 2011 amendment and other provisions relating to the creation of all types of strata schemes and the protection of purchasers. The deadline for submission of comments on the 2013 paper was extended several times from the original March 2013 date and the Commission received comments as late as December 2013.

12. The Commission received numerous comments on the 2013 Bill but the main areas of concern related to the following-

- **(a) the variation or termination of strata schemes by the types of resolutions provided for in the amendment to the Strata Titles Registration Law in August 2012 (the "2012 amendment");**
- **(b) the provisions relating to leasehold strata schemes;**
- **(c) the provisions which deal generally with the termination of schemes; and**
- **(d) the methods of collecting arrears of strata fees.**

13. After lengthy consultations with Mr. Ritch, the Commission in the revision of this complex piece of legislation submitted for a third round of consultation an interim report and a Strata Titles Bill, 2014 (the "2014 Bill"). The deadline for the submission of comments was 31st December, 2014 but final submissions were not submitted until the end of January 2015. The Bill was re-drafted several times since then as outstanding issues were considered.

14. This final report on the review of strata titles is accompanied by a Strata Titles Bill ("the Bill") which has seen more than 5 years of consultation and refinement. This report will give a summary of the Bill but will focus on the main areas of debate over the past several years.

MANAGEMENT OF STRATA SCHEMES

15. It is appropriate to commence our final report on the discussion of the management of strata schemes and the problems which management faces as these were the main areas of focus throughout the review of the strata titles legislation. The main comments or complaints related to the matters outlined at paragraph 3 above.

16. Essential to a strata scheme is management by a corporation. Section 5 of the Law provides that the proprietors of all of the strata lots contained in any strata plan shall, upon registration of the strata plan, become a body corporate. Every corporation is capable of suing and being sued in its name. The duties of a corporation include insuring the buildings of the lots, paying insurance premiums, maintaining and repairing the common property and complying with notices or orders by any competent public or local authority requiring repairs to, or work to be done in respect of, the parcel.

17. A corporation's powers include the establishment of a fund for administrative expenses sufficient for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any of its other obligations. The corporation also determines the amounts to be raised for the fund and raises amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective lots.

18. An executive committee must be appointed by the owners to carry out the duties and functions of the corporation. A committee may appoint a managing agent to exercise certain powers and perform certain duties of the corporation.

19. Bye-laws regulate the management of a scheme. They bind the corporation and the owners to the same extent as if they were signed and sealed by the corporation and the owner. Until bye-laws are made by a corporation, the bye-laws in the First and Second Schedule of the current law are in force from the date of the registration of the strata plan. No amendment or variation of a bye-law has effect until the corporation notifies the Registrar and he has included this on the registered strata plan.

20. One local attorney had noted that strata ownership offers many benefits, including[1]-

- **self government;**
- **shared amenities and services;**
- **shared costs of amenities;**
- **security of ownership;**
- **easily transferable strata lots that may be offered as security to lenders; and**
- **mutually enforceable rights and obligations.**

21. However, in order to enjoy such benefits a strata scheme must be efficiently managed in accordance with effective legislation and bye-laws.[2]

INSURANCE OF STRATA SCHEMES

22. One of the principal issues facing many schemes after Hurricane Ivan related to the insurance of strata schemes which had been destroyed. The word "underinsurance" was the catch word of the day and many failed to understand why, after paying their premiums, they were told that they could not obtain the full re-instatement or replacement value for their units. The issues regarding insurance continue to this day with persons submitting complaints about the failure of strata corporations to insure premises or to obtain the best insurance for a strata scheme.

23. Section 6(1) of the current Strata Law provides that a strata corporation is under a duty to insure and keep insured the building to the replacement value against fire, earthquake, hurricane and such other risks as may be prescribed. Previously this duty could be eliminated or changed by unanimous resolution, now this may be done by super-majority resolution[3]. In accordance with regulation 18 of the Strata Regulations a proprietor may, where a building is uninsured or has been insured for less than its replacement value, effect a policy of insurance in respect of any damage to his strata lot in a sum equal to the replacement value of his strata lot less any amount for which this strata lot is insured under any policy of insurance effected on the building.

24. A proprietor may also effect a policy of insurance in respect of damage to his lot in a sum equal to the amount, secured at the date of any loss referred to in such policy, by charges made upon his lot. This provision has been criticised as impractical and the Commission has been advised that it is very rarely utilised. In his paper[4] Mr. Sykes opined that "in essence, obtaining such insurance would result in an owner making premium

[1] Building better bye-laws and running better meetings", Ward Sykes
[2] ibid
[3] Changed by Law 10 of 2012; see discussion of resolutions post
[4] ibid

payments in the event of an insured loss, benefiting by simply having the charge assigned by the lender to the insurer." He noted that this is hardly a benefit.

25. One of the questions posed during the review was, should the legislation continue to allow persons to choose between indemnity and replacement insurance? Replacement is the dollar-per square foot amount it would cost to rebuild a similar home, and is the basis for insurance on most modern homes. Indemnity insurance is where the property owner is compensated to the financial position they were in at the time of the loss. The main factor to be considered is the adequate indemnification of the insured- the owner cannot receive more than the insured value at the time of the loss. In the case of indemnity insurance a person is unlikely to be able to rebuild the house for the amount insured.

26. In our research on how this aspect of the Law is dealt with we looked at the Western Australia Strata Titles Act, 1985 where it is provided that, in respect of certain strata schemes, a strata corporation is under a legislative duty to insure the building at its replacement value. Section 54 of the Act provides that, in the case of strata schemes which are not single tiered schemes[5], a strata company must insure and keep insured the building to the replacement value against fire, storm and tempest (excluding damage by sea, flood or erosion), lightning, explosion and earthquake. The strata company must also effect and maintain insurance in respect of damage to property, death, or bodily injury for which the strata company could become liable in damages in an amount of not less than $5,000,000 or such other amount as may be prescribed in place of that amount. A failure to do so carries a penalty of $400.

27. A contract of insurance entered into for these purposes may provide that, instead of the work and the payments specified in the definition of "replacement value" being carried out or made upon the occurrence of any of the events specified in the policy, the liability of the insurer shall, upon the occurrence of any such event, be limited to an amount specified in the policy.

28. It is a defence to a charge of not insuring for a strata company to prove that, despite having taken all reasonably practicable steps available to it to comply with that subsection, no insurer is willing to enter into a contract of insurance, on reasonable terms, that meets the obligation imposed by the Law.

29. In New South Wales, under the Strata Schemes Management Act, 1996 it is provided that the owners corporation for a strata scheme for the whole of a building must insure the building and keep the building insured under a damage policy with an approved insurer. The building must be insured for at least the value of the building indicated by the last valuation obtained for it. An owners corporation that breaches this obligation commits an offence.

30. Section 82 of the Strata Schemes Management Act 1996 defines "damage policy". The Act provides that a damage policy for a building means a contract of insurance providing for certain matters in the event of the building being destroyed or damaged by fire, lightning, explosion or any other occurrence specified in the policy. A damage policy must provide for the rebuilding of the building or its replacement by a similar building in the

[5] "Single tier strata scheme" includes a strata scheme in which no lot or part of a lot is above or below another lot

event of its destruction so that every part of the rebuilt building or the replacement building is in a condition no worse or no less extensive than that part when that part was new.

31. A damage policy must also provide for the following-

- **(a) the repair of damage to, or the restoration of the damaged portion of, the building in the event of it being damaged but not destroyed, so that the repaired or restored portion, is in a condition no worse or no less extensive than that portion or its condition when that portion was new;**
- **(b) the payment of expenses incurred in the removal of debris; and**
- **(c) the remuneration of architects and other persons whose services are necessary as an incident to the rebuilding, replacement, repair or restoration.**

32. In the paper entitled *"Lessons from Australia: Moving Cayman into modernity"* presented by Mr. Michael Allen at the 2007 strata conference, it was noted that the intention of the Strata Schemes Management Act is to cover all relevant costs for reinstatement or replacement of a building and to exclude additional payments by way of deductible or excess payments under normal policies.

33. It has been argued that one of the reasons for the problem of under-insurance in the Cayman Islands may have arisen from the fact that there is no obligation in case of replacement insurance to insure a strata lot or parcel in accordance with current valuations. As indicated above, a complaint made to the Commission was that some strata committees were negligent in either not carrying out adequate research in order to obtain best insurance premiums or in not ensuring that insurance or adequate insurance was paid on premises.

34. Another question posed by the Commission in the review was whether strata corporations should also be mandated to take out additional insurance to cover matters such as workmen's compensation and liability of members of the executive committee. For example, under section 87 of the Strata Schemes Management Act, in addition to property insurance, the Act directs that owners corporations must also take out insurance-

- **(a) in respect of any occurrence against which it is required by law to insure, including any insurance required by the Workers Compensation Act, 1987 and the Workplace Injury Management and Workers Compensation Act, 1998 to be taken out; and**
- **(b) in respect of damage to property, death or bodily injury for which the owners corporation could become liable in damages; and**
- **(c) against the possibility of the owners becoming jointly liable by reason of a claim arising in respect of any other occurrence against which the owners corporation, in accordance with a special resolution, decides to insure; and**
- **(d) against any damages for which the owners corporation could become liable by reason that, without fee or reward or any expectation of fee or reward, a person acting on behalf of the owners corporation does work in a building or on the common property in the strata scheme; and**
- **(e) of any other class prescribed by the regulations.**

35. A failure to take out such insurance carries a penalty under the legislation. The Act further provides that the insurance listed under paragraph (b) above must be for a cover of not less than $10,000,000 for each event in respect of which any claim or claims may be made or, if the regulations provide for another amount, that other amount.

36. The Commission is advised that many strata schemes in the Cayman Islands, in accordance with individual bye-laws, do carry liability insurance to protect the officers of the strata corporation. One writer, Mr. Twohey, opined that usually $US 1 million is sufficient and is not a significant expense.[6]

37. The Commission further queried that where it is not possible to obtain insurance for the full replacement value of the property, should the current legislation of the Cayman Islands be amended to provide for how a deductible is to be dealt with? Mr. Twohey noted[7] that each strata should have a relevant deductible available in time of trouble and stipulated that "prior to Ivan the property catastrophe deductible was 2% of the value of the property i.e. 2% of the insured property value and not 2% of the claim amount. Since Ivan that deductible has risen to 3% and in some cases higher".

38. Section 105 of the Condominium Act of Ontario expressly provides for this and indicates that if an insurance policy obtained by the corporation in accordance with the Act contains a deductible clause that limits the amount payable by the insurer, the portion of a loss that is excluded from coverage shall be a common expense.

39. In some jurisdictions[8] a penalty may be imposed where a corporation fails to carry out its duty to insure. The Commission wished to know whether this should also apply in the Cayman Islands. Also, should legislation give owners an express power to sue a corporation for such failure?

40. The Strata Titles Bill, in clauses 71 to 81, seeks to address the issues and questions raised above and deals with the following matters -

(a) insurance of buildings and corporations;
(b) insurance to protect easements;
(c) deductible;
(d) valuations to be obtained for the purposes of insurance;
(e) activity by proprietor which may cause higher premium;
(f) further insurance by corporation;
(g) insurance by proprietor;
(h) proprietor may insure if corporation in default;
(i) insurance of charged lot;
(j) insurable interest; and
(k) application of insurance moneys to rebuilding.

41. Clause 71 defines buildings for the purpose of the legislation. "Building" includes a building consisting entirely of common property; and fixtures built or installed on a strata lot, if the fixtures are built or installed by the developer as part of the original construction on the strata lot[9]. However, a building would not include fixtures removable by a lessee or sublessee at the expiration of a tenancy or anything prescribed by the regulations as not forming part of a building for the purposes of this definition.

42. Clause 72 mandates a strata corporation to keep all buildings on the strata scheme insured to the re-instatement costs of such buildings against fire, storm, lightning,

[6] N. Twohey, formerly Chief Marketing Officer, Island Heritage "Insurance Aspects of Cayman Stratas"- Strata Conference
[7] ibid
[8] New South Wales and Western Australia
[9] See section 149 of BC Act

explosion, earthquake, hurricane, flooding or inundation by the sea and all other similar perils usually insured against. A corporation must also effect and maintain insurance in respect of damage to property, death, or bodily injury for which the corporation could become liable in damages.

43. Clause 72 exempts a corporation of a two-lot strata scheme from the insurance requirements if-

- **(a) the corporation so determines by unanimous resolution;**
- **(b) the buildings comprised in one of those strata lots are physically detached from the buildings comprised in the other strata lot; and**
- **(c) no building or part of a building in the strata scheme is situated outside those strata lots.**

44. A building must be insured for at least the re-instatement cost of the building indicated by the last valuation obtained for it in accordance with the legislation. Clause 71 provides that "re-instatement cost"[10] in relation to a contract of insurance of a building, requires provision to be specified in the policy-

(a) for-

- **(i) the rebuilding of the building or its replacement by a similar building in the event of its destruction; and**
- **(ii) the repair of damage to, or the restoration of the damaged portion of, the building in the event of it being damaged but not destroyed,**

so that, in the case of destruction, every part of the rebuilt building or the replacement building and, in the case of damage, the repaired or restored portion, is in a condition no worse nor less extensive than that part or portion or its condition when that part or portion was new; and

- **(b) for the payment of expenses incurred in the removal of debris and the remuneration of architects, surveyors, engineers and other persons whose services are necessary as an incident to the rebuilding, replacement, repair or restoration.**

45. In accordance with the Bill[11]a valuation of the re-instatement cost of a building that is required to be insured must be obtained, at least once every three years or such lesser period as is provided under the bye-laws of a strata scheme, by-

- **(a) if the whole building is the subject of one strata scheme, the corporation for that strata scheme; or**
- **(b) in any other case, the corporation for each strata scheme for part of the building or for each building on the strata property.**

46. The Bill seeks to regulate deductibles in clause 73. It is proposed by that clause that, where a contract of insurance contains a deductible clause, the portion of a loss that is excluded from coverage should be collected from the proprietors by assessment, be deposited into and become payable from the reserve fund. Further, if a proprietor, a lessee of a proprietor or an occupier of a strata lot, through a negligent act or omission, causes damage to the proprietor's strata lot, the amount that is the lesser of the cost of repairing

[10] See Western Australia Strata Titles Act
[11] Clause 74

the damage and the deductible limit of the contract of insurance obtained by the corporation should be added to the contributions payable for that strata lot. It is also provided that the corporation may pass a bye-law to extend the circumstances under which an amount could be added to the contributions payable for a proprietor's strata lot if the damage to the strata lot was not caused or contributed to by an act or omission of the corporation, its directors, officers, agents or employees.

47. There were many queries regarding the right of a proprietor to effect insurance separately for his strata lot and the Commission has recommended that this legislation expressly provides for that option. Such insurance could be provided in three different circumstances. In accordance with clause 75, a proprietor must not carry on any activity on or in his strata lot which would prevent the corporation from obtaining insurance cover for the building or any part of it or which may render such cover void or voidable. However, a proprietor may carry on any activity on or in his strata lot permitted by the bye-laws which may cause the corporation to pay a higher premium under a contract of insurance than would otherwise have been payable, if the proprietor has agreed in writing with the corporation, prior to carrying out such activity, to pay and has paid that part of the premium which is in excess of the amount the corporation would be liable to pay if the activity is not to be carried out.

48. The legislation proposes also[12] that a proprietor who carries out improvements to his strata lot which increases the value of the strata lot must effect such extra insurance cover as is required to insure the strata lot to its re-instatement cost; and he must promptly, after effecting such cover, provide the corporation with all relevant information relating thereto. Where a proprietor fails to obtain the insurance cover as required he must indemnify the corporation against any under-insurance which may arise. Insurance effected by a proprietor should not affect, and must not be taken into consideration in determining the amount payable to a corporation under a contract of insurance entered into between it and an insurer, notwithstanding anything contained in that contract of insurance.

49. One of the difficulties in strata living occurs when some owners fail to pay strata fees and insurance for the property as a whole becomes affected. Persons who are interested in purchasing will generally be unable to obtain loans if the insurance for the strata building or scheme has lapsed. Clause 78 of the Bill seeks to deal with this problem by providing that if a proprietor or his chargee considers that a corporation is in breach of any obligation to insure imposed on it by the legislation or the bye-laws, the proprietor or the chargee may effect and maintain in the name of the corporation such insurance as he thinks the corporation ought to effect and maintain to meet that obligation. The cost of the insurance will be a debt due to the proprietor or his chargee from the corporation and will be recoverable as a civil debt by the proprietor or the chargee in a court of competent jurisdiction.

50. Clause 81 seeks to ensure that when insurance monies are paid out for a damaged or destroyed building the corporation must rebuild or replace the building so far as that may lawfully be effected. This would be subject to any voluntary resolution or court order to terminate a scheme.

COLLECTION OF ARREARS OF STRATA FEES

51. As indicated at paragraph 50 above, one of the main issues faced by strata owners is the failure of some strata owners to pay their strata fees. This does not only affect the

[12] Clause 77

insurance requirement for buildings, and hence provide obstacles to re-sale, it prevents or delays the proper maintenance of strata buildings, which also affects re-sale possibilities and values. Many responders to the review noted that, notwithstanding the fact that corporations frequently take delinquent owners to court, the remedies provided by the court were, in their views, rarely satisfactory. In several cases owners would owe, for example, in excess of $20,000, but the courts would order low monthly re-payments, not taking into account the fact that the owner would continue to owe the monthly strata fees as well. There continues to be widespread frustration with the collection of arrears of strata fees.

52. Debate on the most effective ways to deal with delinquent proprietors continued after the submission of the 2013 Bill as many responders felt that the legislation had not gone far enough to deal with this ever present problem. Some persons recommended giving corporations powers to cut off water and other utilities as a method of dealing with delinquency. The Commission does not support such recommendations.

53. The Commission examined how some other jurisdictions deal with the collection of strata fees and noted for example the imposition of liens on strata lots in places such as British Columbia. Under the Strata Property Act in British Columbia when an owner is in arrears, instead of pursuing a court action, a corporation may obtain a lien against the strata property. Under section 112(2) of the Act it is provided that before a strata corporation registers a lien against an owner's strata lot under section 116, the strata corporation must give the owner at least 2 weeks' written notice demanding payment and indicating that a lien may be registered if payment is not made within that 2 week period.[13] If payment is not made, the strata corporation may register a lien against the owner's strata lot by registering in the land title office a Certificate of Lien in the prescribed form. The Act provides that, on registration, the certificate creates a lien against the owner's strata lot in favour of the strata corporation for the amount owing and the strata corporation's lien ranks in priority to every other lien or registered charge except-

- **(a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation;**
- **(b) if the other lien or charge is in favour of the Crown and is not a mortgage of land; or**
- **(c) if the other lien or charge is made under the Builders Lien Act.**

54. On receiving the amount owing, the strata corporation must, within one week, remove the lien by registering in the land title office an Acknowledgment of Payment in the prescribed form. If the amount is not paid after the registration of the lien, the strata corporation may apply to the Supreme Court for an order for the sale of the strata lot. The owner is liable under the lien for reasonable legal costs, land title and court registry fees and other reasonable disbarments.

55. A similar remedy is available in other jurisdictions. This remedy was discussed by the Commission which was of the opinion that, apart from the fact that it may not harmonize with the provisions of the Registered Land Law, there are many complaints about such types of liens. While the imposition of a property lien is viewed by some as a low cost and efficient way to collect condo or strata arrears, it is argued that it is also an easy way to

[13] In some cases the mortgagee must be notified as well

hold property owners hostage and to exert a claim over valuable property. Our research revealed cases where persons go to sell their property but discover that their property is charged with a lien registered by their dentist or by a water authority. In an article[14] on the effect this has on elderly homeowners it was noted that "if homeowners are behind for just a few hundred dollars, their homes can be sold to investors at a tax lien sale for simply the back taxes owed on the property. If the owner of a $200,000 house fails to buy back the property, for example, it could be sold for as little as $1,200, and then resold for a windfall by the investor."

56. Based on our research the Commission does not recommend the introduction of property liens. However, we found another approach to the collection of arrears of fees in the Canadian jurisdiction to be of interest. Under the Condominium Property Act of Alberta a mortgagee is empowered by section 39 to pay any condominium arrears owed by an owner and to add that amount to the amount owing under the mortgage. Alternatively, where a person other than the owner is in possession of a unit and pays rent to the owner in respect of the unit, and the monthly contributions payable in respect of that unit are in arrears, the corporation may require the person in possession of the unit to pay the rent owing to the owner in respect of that unit to the corporation for the purposes of applying that rent against the monthly contributions that are in arrears. Where a person in possession of a unit, other than the owner, pays the rent to the corporation that person is deemed to have paid that rent to the owner.[15]

57. Under the same section 39 a corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner but unpaid by the owner. On the filing of the caveat, the corporation has a charge against the unit equal to the unpaid contribution and the charge has the same priority from the date of filing of the caveat as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage. If a corporation has filed a caveat, the corporation, on the payment to it of the amount of the charge, must withdraw the caveat.

58. As further protection to the interests of the scheme, if a corporation has filed a caveat and subsequent to the caveat's being filed another person gains title to the unit pursuant to a foreclosure action, an action for specific performance, or a public auction conducted under the *Municipal Government Act*, and an amount remains owing to the corporation with respect to the contribution for which the caveat was filed, that caveat shall remain registered against the certificate of title of the unit until the amount owing is paid to the corporation.

59. It was suggested to the Commission that we should insert some of the provisions relating to collection of arrears which were contained in the proposed standard bye-laws into the main part of the Bill in order to give the provisions greater effectiveness. Paragraphs 36 and 37 of the model bye-laws in the 2013 Bill provided for a method of collecting arrears which included giving the corporation power to enter into possession of a strata lot and to rent it out until arrears are paid.

60. The Commission agreed with that recommendation. Under the Bill it is provided that a corporation may proceed to recover arrears, as an alternative to court action, in accordance with the provisions set out in clause 41. Clause 41 provides that where a proprietor has failed to pay contributions levied under clause 40, he shall pay to the

[14] Tax Lien Sales: The 'Other' Foreclosure Problem Plagues Elderly Homeowners, July 12, 2012, Susanna Kim

[15] Section 39(5)

corporation within thirty-one days of demand all such contributions. Where a proprietor does not make the payments within the thirty-one days, the proprietor must pay interest thereon at the US prime lending rate of the corporation's bankers plus five per cent from time to time from the date of default; and such interest will accrue from day to day until the date of actual payment.

61. Further to this, where a proprietor does not make the payments within one hundred and twenty days of demand of the due date, where the proprietor becomes bankrupt or makes composition with his creditors, or, the proprietor, being a corporation, enters into liquidation, the proprietor will be deemed to have authorised the corporation to enter into possession of his strata lot and to have appointed the corporation to be the receiver of the rents and profits of his strata lot until such date as the payments have been made by him to the corporation or received by the corporation pursuant to the appointment. In such a case, the corporation will have the same powers as a receiver appointed by the court.[16] However, where the chargee of a strata lot has already appointed a receiver of a strata lot, the corporation does not have such power of entry and receivership.

62. It is proposed that where the corporation enters into possession under this clause the corporation will not incur any liability for any damage or loss caused to the strata lot or chattel in the strata lot where the loss or damage may have arisen after action is taken by the corporation and the executive committee, unless that loss or damage is caused by the negligence of the corporation or the executive committee.

63. Where a proprietor refuses to allow the corporation to enter into possession of his strata lot to collect payments which are due and payable or where the corporation is otherwise unable to enter into possession of the strata lot, the corporation may commence action in a court of competent jurisdiction. In such a case, a proprietor will be liable to a civil penalty of four thousand dollars and from the date of commencement of the court action, to pay interest on the monies owed at the rate of twelve per cent per annum which interest shall accrue from day to day until payment. However, a proprietor will be liable for a civil penalty only once in any year in an action by the corporation and any such penalty levied shall form part of the fund to which the contribution belongs.

64. Clause 42 of the Bill also retains the former clause 41 of the 2013 Bill which sets out the rights of chargees of strata lots. Clause 42 seeks to protect the rights of the chargees by providing that every charge of a strata lot shall be deemed to contain the following terms-

- **(a) the chargee has the right to collect the proprietor's contribution to the administrative expenses and shall promptly pay the amount so collected to the corporation on behalf of the proprietor;**
- **(b) the chargee has the right to pay-**
  - **(i) the amounts of the proprietor's contribution to the administrative expenses that fall due and are unpaid in respect of the charged strata lot; and**
  - **(ii) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in subparagraph (i);**
- **(c) payments made by the chargee under paragraph (b), together with interest and all reasonable costs, charges and expenses incurred in respect of the payments, are to be added to the debt secured by the charge and to be payable, with interest at the rate payable on the charge; and**

[16] 41 (2)

(d) if, after demand, the proprietor fails to fully reimburse the chargee, the charge immediately becomes due and payable at the option of the chargee and the chargee shall have such rights as are applicable in the circumstances in accordance with the Registered Land Law.

65. The ability of the corporation to enter a caveat was considered but not included as further input on this would be useful in making a final decision.

66. In order to give effect to the rights of the chargees, clause 42 further provides that chargees may request to be kept abreast of fees owed by the owner and, upon such request to the corporation, they shall be provided, free of charge, with a written statement setting out the administrative expenses in respect of the strata lot and, if there is a default in the payment of them, the amounts owing in respect of the strata lot. A chargee of a strata lot who wishes, without having to make a specific request each time, to receive notices of annual or special general meetings and notices of administrative expenses which are in default, shall give a chargee's request for notification in the prescribed form to the corporation and the corporation must provide the notices accordingly.

67. As should be reiterated, one of the most egregious effects of a failure to pay fees is the potential devaluation of property in the strata scheme. Persons are generally very reluctant to invest in schemes with lots carrying large debts or for which they cannot obtain insurance. Frustrated owners who wish to sell have in many instances lowered the prices of their lots thereby affecting the resale value of all of the lots in the scheme. It is hoped that these provisions on the collections of arrears will be viewed as being more effective in assisting corporations and protecting the interests of charges and those proprietors who meet their obligations.

RESOLUTIONS

68. Before 2012 the Strata Titles Registration Law required unanimous resolutions for a wide range of matters and this was a source of discontent for many owners. Unanimous resolutions were needed to decide matters such as the insurance of the buildings, the change of the statutory bye-laws, the disposal of common property and whether the scheme should determine that a building is destroyed for the purposes of the termination of a scheme.

69. Throughout the review, the arguments against the need for unanimity under the law were put forward, particularly by those who were interested in the termination and sale of a strata scheme. In the midst of the review by the Commission, the Cabinet decided to amend the law to abolish unanimous resolutions and to replace them with special majority and super-majority resolutions.

70. The Strata Titles Registration (Amendment) Law, 2012 was passed by the Legislative Assembly in August 2012 and came into force shortly thereafter. There was, at the time, no objection to the revocation of the unanimity requirement under the Law and to the new types of resolutions i.e. special majority and super-majority introduced by the legislation. Section 2 of that Law provided the following definitions for special majority and super-majority resolutions-

"special resolution" means-

(a) in the case of a strata located wholly or partly in a Beach Resort/ Residential zone, Commercial zone, Hotel Tourism zone or Industrial zone, a resolution passed at a duly convened meeting of its corporation by-
  (i) not less than two-thirds of the votes cast at the meeting; and
  (ii) the total of the unit entitlements for the strata lots for which votes are counted for the resolution is not less than two-thirds of the total of the unit entitlements for all strata lots included in the strata; and

(b) in the case of a strata not located in the zones specified in paragraph (a), a resolution passed at a duly convened meeting of its corporation by-
  (i) not less than three-quarters of the votes cast at the meeting; and
  (ii) the total of the unit entitlements for the strata lots for which votes are counted for the resolution is not less than three-quarters of the total of the unit entitlements for all strata lots included in the strata;

"super-majority resolution" means-

(a) in the case of a strata located wholly or partly in a Beach Resort/ Residential zone, Commercial zone, Hotel Tourism zone or Industrial zone, a resolution passed at a duly convened meeting of its corporation by-

  (i) not less than three-quarters of the votes cast at the meeting; and
  (ii) the total of the unit entitlements for the strata lots for which votes are counted for the resolution is not less than three-quarters of the total of the unit entitlements for all strata lots included in the strata;

(b) in the case of a strata not located in the zones specified in paragraph (a), a resolution passed at a duly convened meeting of its corporation by-

  (i) not less than nine-tenths of the votes cast at the meeting; and
  (ii) the total of the unit entitlements for the strata lots for which votes are counted for the resolution is not less than nine-tenths of the total of the unit entitlements for all strata lots included in the strata.

71. However, after the 2013 Bill, which incorporated the provisions of the 2012 amendment, was submitted for comments, there were myriad complaints, with some persons alleging breach of constitutional and human rights and the retrospective overriding of contractual rights.

72. The Commission noted in its response to many persons that the provisions of the 2012 amendments were not recommended by the Commission but by the Cabinet and they had been submitted for public consideration for the usual 21 day period before the passing of the legislation. The Legislative Drafting Department, which prepared the 2012 amendment on the instructions of the Government, had seen no public comments against the Bill prior to its enactment. However, in light of the many complaints, the Commission has provided alternative definitions of those resolutions which are based on legislative precedent in this area of the Law. Thus, clause 2(3) and (4) of the Bill provide as follows in relation thereto-

"(3) Where a motion must be passed under this Law by special resolution the resolution is passed where it is passed at a duly convened meeting of its corporation by-

  (a) not less than two-thirds of the votes cast at the meeting; and

(b) the total of the unit entitlements for the strata lots for which votes are counted for the resolution is not less than two thirds of the total of the unit entitlements for all strata lots included in the strata scheme.

(4) Where a motion must be passed under this Law by super-majority resolution, the resolution is passed where it is passed at a duly convened meeting of its corporation by-

(a) not less than eight-tenths of the votes cast at the meeting; and
(b) the total of the unit entitlements for the strata lots for which votes are counted for the resolution is not less than eight-tenths of the total of the unit entitlements for all strata lots included in the strata.".

73. The above definitions omit the unexplained distinction which was drawn between where a strata scheme is located and the type of resolution a corporation could pass which was contained in the 2012 amendment.

74. Further, the Bill takes away, to some degree, the retrospective effect of the 2012 amendments. The Bill will recognise any resolution made between the date of the commencement of the 2012 amendment and the date of the commencement of the new Bill. However, after the commencement date of the legislation any corporation which existed prior to the date of commencement will be able to revert to using the types of resolutions which existed prior to 9th October, 2012[17], the date of the commencement of the 2012 amendments. The new types of resolutions will only be mandated for corporations which are established after the commencement of the legislation.

MANAGEMENT STATEMENTS

75. Clauses 20 to 24 of the Bill deal with management statements. These clauses are based on the strata legislation of New South Wales and are designed to regulate strata living in a building which is subject to more than one strata scheme or where only part of the building contains a strata scheme.

76. While such "mixed" strata exist in Cayman, there is no express regulation of this type of strata under the Strata Law. For example, the Strata Law does not stipulate how common areas are to be managed by the relevant corporations; how insurance of the building or land is to be addressed; how disputes between residential owners and commercial owners are to be resolved.

77. Currently such matters in the Islands are dealt with by way of contract but when the concept of mixed use was legislated for in New South Wales the relevant legislation provided for the first strata plan to be accompanied by a management statement, the purpose of which is to provide for the matters highlighted above. In accordance with the Strata Schemes (Freehold Development) Act[18] such a statement must include the following matters -

(a) the establishment and composition of a building management committee and its office bearers;

[17] See Schedule 3 paragraph 20 of the Bill
[18] Similar provisions exist in the Strata Schemes (Leasehold Development) Act

(b) the functions of that committee and those office bearers in managing the building and its site;
(c) the manner in which the statement may be amended;
(d) the settlement of disputes, or the rectification of complaints, concerning the management of the building or its site, whether by requiring reference of disputes or complaints to the Director-General or the Tribunal or (with the consent of the person) to any other person for a recommendation or decision or otherwise; and
(e) the manner in which notices and other documents may be served on the committee.

78. Each corporation for a strata scheme for part of the building and any other person in whom is vested an estate in freehold or leasehold interest in any part of the building or its site that does not form part of a strata scheme must be members of the building management committee. However, any such body corporate or other person may be excluded from membership, with the consent of the body corporate supported by a special resolution or with the written consent of the other person.

79. A strata management statement may also include provisions regulating (or providing for the regulation of) any one or more of the following-

(a) the location, control, management, use and maintenance of any part of the building or its site that is a means of access;
(b) the storage and collection of garbage on and from the various parts of the building;
(c) meetings of the building management committee;
(d) the keeping of records of proceedings of the committee; and
(e) particulars relating to any one or more of the following-
    (i) safety and security measures;
    (ii) the appointment of a managing agent;
    (iii) the control of unacceptable noise levels;
    (iv) prohibiting or regulating trading activities;
    (v) service contracts; and
    (vi) an architectural code to preserve the appearance of the building.

80. Each strata management statement is taken to include the following provisions, except to the extent that it provides otherwise-

(a) the building management committee must meet at least once each year;
(b) at least 7 days' notice of a meeting must be given to each person who is a member of the committee;
(c) the quorum for a meeting of the committee is a majority of the members; and
(d) the decision of a majority of the members present and voting at a meeting of the committee is the decision of the committee.

81. Mr. Michael Allen[19], who was the main presenter at the 2007 Strata conference in the Cayman Islands, noted that the management statement was introduced in New South Wales after significant disputes arose in a large mixed use scheme in a building in Sydney in the mid 1980's. The development consisted of an expensive retail sector on the lower floors and essential plant and equipment used by both residential services and utilities were shared by both residential and commercial components. Many disputes arose

[19] "Lessons from Australia: Moving Cayman into modernity" - "Strata..*gise*, 19 April, 2007"

between the residential and commercial owners over matters such as the cost of these services and the use of foyers and similar matters. In 1992 the New South Wales government expressly provided that a building could comprise one or more strata schemes and it introduced the management statement to deal with the types of issues which had arisen in the mixed scheme mentioned. The statement has effect as an agreement under seal, binding[20]-

(a) an owners corporation of a strata scheme for part of the building;
(b) a proprietor, mortgagee in possession or lessee of any lot in such a strata scheme; and
(c) any other person in whom the fee simple of any part of the building concerned or its site (being a part affected by the statement) is vested for the time being, or the mortgagee in possession or lessee of any such part.

82. The rights and obligations in the management statement effectively run with the land. The statement can also allocate costs to the different schemes in accordance with different methods, for example other than in accordance with unit entitlement.

83. The Commission's view is that the Law should be reformed in the way set out above and hence clauses 20 to 24 and Schedule 1 of the Bill provide for a similar way of regulating the relationships between proprietors in mixed schemes. Also, in considering any reform in this area the Commission believes that the law should be changed to incorporate express words that mixed strata schemes can be established. Therefore clause 3(1) of the Bill provides that one or more strata plans may be registered in relation to one parcel of land.

STRATA BYE-LAWS

84. The Strata Titles Registration Law sets out bye-laws in the First and Second Schedule. Previously bye-laws in the First Schedule could only be amended by unanimous resolution while the bye-laws in the Second Schedule could be amended by majority resolution. The amendments in 2012 provided for the change of bye-laws in the First Schedule by super-majority resolution.

85. The Commission was advised that, prior to selling any units in a strata development, but after the registration of a strata plan, most developers amend the statutory bye-laws. It was noted that it is an almost universal practice to have new bye-laws contain a provision that permits any future amendments by a two-thirds majority rather than unanimity of proprietors[21].

86. Apart from complaints that many bye-laws were badly drafted, Mr. Sykes noted in his paper that[22]-

> **"Bye-laws must be consistent with the strata law and cannot operate as to prohibit or restrict the devolution or dealings with strata lots or to modify or destroy easements created or implied.[23] However aside from this, the Strata Law does not impose specific restrictions to the scope of bye-laws which can, in some circumstances, result in draconian bye-laws being implemented.".**

[20] Approved Form 28, Registrar General's directions, New South Wales
[21] Ante, note 2
[22] ibid
[23] Section 21 (4)

87. Legislation in some other jurisdictions expressly prohibit certain bye-laws. For example, the NSW Strata Schemes Management Act provides that bye-laws for a residential strata scheme have no force or effect to the extent to which they purport to prohibit or restrict persons less than 18 years of age occupying a lot. This does not apply to a bye-law for a strata scheme for a retirement village or housing exclusively for aged persons. Further, a bye-law has no force or effect to the extent to which it purports to prohibit or restrict the keeping on a lot of a dog used as a guide or hearing dog by an owner or occupier of the lot or the use of a dog as a guide or hearing dog on a lot or common property.

88. In South Australia under the Community Titles Act a bye-law cannot prevent access by the owner or occupier or other person to a lot or prevent an occupier of a lot who suffers from a disability from keeping a dog on the lot or restrict the use of a dog by the occupier if the dog is trained to assist the occupier in respect of that disability. A bye-law cannot legally prevent a visitor to a community parcel who suffers from a disability from using a dog trained to assist the visitor in respect of the disability. Further, a bye-law that reduces the value of a lot or unfairly discriminates against the owner of a lot may be struck out by order of the Magistrates Court or the District Court on an application made under the Act.

89. It has been suggested that there is a lack of consistency of quality and scope in the strata bye-laws on Islands as each strata scheme drafts its bye-laws to suit its perceived needs and that any new legislation should provide that all bye-laws must address certain matters in order to provide more consistency of quality and scope. For example, section 43 of the Strata Schemes Management Law provides that bye-laws may provide for the following-

- **safety and security measures;**
- **details of any common property of which the use is restricted;**
- **the keeping of pets;**
- **parking;**
- **floor coverings;**
- **garbage disposal;**
- **behaviour;**
- **architectural and landscaping guidelines to be observed by lot owners; and**
- **matters appropriate to the type of strata scheme concerned.**

90. The Commission queried in the review whether there should be some bye-laws which are mandatory for every scheme. The members of the sub-committee were of the view while the Law should provide for the areas to be dealt with in the bye-laws there was no need to have model bye-laws. The Ministry disagreed with this and opined that having model bye-laws would protect new strata owners from the additional expense of having to retain attorneys to produce bye-laws for them.[24] The draft Bill contains provisions which support both positions.

91. Clauses 50 to 59 of the Bill deal with bye-laws. Clause 50 provides that until bye-laws are made by a corporation of a residential strata scheme (not including a vacant land strata scheme) the bye-laws set out in Schedule 2 shall, as and from the registration of a strata plan relating to such strata scheme, be in force for all purposes in relation to that strata scheme. In the case of a strata scheme other than a residential strata scheme, the application for the registration of a strata plan must be accompanied by bye-laws prepared by the developer and, until bye-laws are made by the relevant corporation, such bye-laws

[24] Memorandum to the Commission dated 4th March 2011

shall, upon registration of the strata plan and approval by the Registrar, be in force for all purposes in relation to the relevant parcel and the strata lots and common property therein.

92. Clause 50 lists, as guidance, the types of matters to which bye-laws may relate and these include safety and security measures, the keeping of pets and parking. Clause 50 also provides that a bye-law may also-

(a) regulate-

(i) the position, design, dimensions, methods and materials of construction and external appearance of buildings or other improvements on strata lots;
(ii) the maintenance and repair of buildings on strata lots or on common property; and
(iii) landscaping, including the establishment, care and maintenance of lawns, gardens and other areas on strata lots;

(b) impose requirements or restrictions relating to the appearance of strata lots or buildings or other improvements situated on strata lots; and

(c) regulate the use and enjoyment of strata lots in order to prevent interference with the use and enjoyment of other strata lots and common property.

93. Model bye-laws included in Schedule 2 relate to, among other things, the procedure to be followed at meetings, the service of notices, composition of executive committees, proprietor's obligations to the corporation, the composition of executive committees and the obligation and rights of the corporation.

94. Clause 52 provides several restrictions on the making of bye-laws in response to the criticism that there is little regulation of the types of bye-laws which may be passed by a corporation. Clause 52 (1) provides that a bye-law shall not-

(a) prohibit or restrict the transfer, transmission, leasing (including the granting of a right of occupation), charging of, or other dealing with, a strata lot;
(b) prevent access by the proprietor or other person to a strata lot;
(c) prevent a proprietor who suffers from a disability from keeping a dog on the strata lot or restrict the use of a dog by the proprietor if the dog is trained to assist the proprietor in respect of that disability; or
(d) prevent a visitor to the parcel who suffers from a disability from using a dog trained to assist the visitor in respect of that disability.

95. However, a bye-law may prohibit or restrict the proprietor from leasing or granting rights of occupation to a person who is not the family member of the proprietor in respect of his strata lot for valuable consideration for a period of three months or less. These particular provisions have been inserted to deal with two issues, firstly, the many cases where bye- laws prevented the leasing by some strata owners of their lots for any period of time and conversely, the leasing by some strata owners of their units to visitors to the Islands for such short term periods that the leasing arrangements are similar to the provision of hotel accommodation contrary to the Tourism Law.

96. The current law provides in section 21(4) that a bye-law shall not operate to prohibit or restrict the devolution of strata lots or any dealing therewith. Nevertheless, as indicated above, the Commission was advised by several persons that strata schemes regularly

publish bye-laws prohibiting any kind of leasing arrangement. As many properties are bought for investment purposes or are occupied by the owners for parts of the year only such a bye-law can affect the property rights of the owner.

97. The Grand Court in *Foith and Two others v Proprietors, Strata Plan No. 463 and Three Others*[25] was called upon to determine the validity of a bye-law which restricted leasing at the Ritz Carlton and a contract which contained terms which restricted owners from leasing their lots. The plaintiffs[26]purchased strata lots governed by a bye-law which stated, inter alia, that an owner could only rent out his unit if he did so through the strata manager on terms set by the manager or executive committee, that the manager was entitled to a management fee on rentals, and that the owner was required to pay a deposit against damage by the tenant. This restriction was also included in the contract of purchase and sale for the units. The plaintiffs brought an action alleging that the bye-law and the corresponding contractual terms were invalid. While the court found that the bye-law was invalid in light of section 21(4), the court was of the view that the contract was enforceable as there was nothing in the law which indicated that contracting out was not possible and the plaintiffs did not fall into the category of vulnerable persons who would need to be protected as a matter of public policy from contracting out of the statute. According to Justice Henderson, "such purchasers have complete freedom to agree to restrictions on leasing or to look elsewhere for a strata lot. There is no question of public interest which prevents a purchaser from agreeing on leasing restrictions even though the other owners could not impose such restrictions upon him by majority vote.".

98. In order to avoid such a curious result again the Commission has provided in clause 52 (1) that any agreement which contravenes the prohibitions in this clause will be void and of no effect. This is of particular importance as the clauses deal not only with leasing of a strata lot but also with the rights of disabled owners and visitors.

99. Subclause (3) of clause 52 provides other prohibitions against the making of certain bye-laws. It is provided that a bye-law cannot empower a corporation to-

(a) screen potential lessees of a strata lot;
(b) establish screening criteria for potential lessees of a strata lot;
(c) require the approval by the corporation of lessees;
(d) restrict the leasing of a strata lot by the corporation only;
(e) require the insertion of terms in lease agreements; or
(f) otherwise restrict the lease of a strata lot except as provided in subsection (2).

100. For the purposes of this subclause, "family member" means a spouse of the proprietor, a parent or child of the proprietor or a parent or child of the spouse of the proprietor. "Child" includes an adopted child or step-child; "parent" includes an adopted parent or step-parent; and "spouse" includes an individual of the opposite sex who has lived and cohabited with the proprietor, for a continuous period of at least two years at the relevant time, in a marriage-like relationship.

101. One of the types of bye-laws discussed during the review were "exclusive use" bye-laws which would give a strata owner or a group of strata owners exclusive use of a certain part of a strata scheme to the exclusion of others. The Commission was advised that such type of bye-law does exist in the Cayman Islands but that close regulation was required in order to protect the rights of other strata owners.

[25] [2014 (1) CILR 335]
[26] [26] Excerpted from the case

102. In New South Wales for example, the exclusive use of common property in a scheme is provided for under the Strata Schemes Management Act. Under that Act, an owners corporation can make a bye-law granting to the owner of a lot or to owners of lots a right of exclusive use and enjoyment of the whole or any specified part of the common property. Alternatively special privileges in respect of the whole or any specified part of the common property can be given (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes).

103. In British Columbia exclusive use of common property as well as limited common property are provided for under the Strata Property Act. Section 73 of that Act provides that common property may be designated as limited common property by the owner developer, by an amendment to the strata plan or by a resolution passed at an annual or special general meeting of the corporation. Section 76 of the Act provides for short term exclusive use of common property. According to the Act, the strata corporation may give an owner or tenant permission to exclusively use, or a special privilege in relation to, common assets or common property that is not designated as limited common property. A permission or privilege may be given for a period of not more than one year, and may be made subject to conditions. The strata corporation may renew the permission or privilege and, on renewal, may change the period or conditions. The permission or privilege given under subsection (1) may be cancelled by the strata corporation giving the owner or tenant reasonable notice of the cancellation.

104. The Bill seeks to provide for exclusive use of common property under clause 51. It is provided that, in addition to the power of a corporation to grant a licence to use common property, instead of granting a licence, the corporation may confer on the proprietor of a strata lot, or the proprietors of a group of strata lots, the exclusive right to use a specified part of the common property for the purpose or purposes set out in the bye-law. It is proposed that such a bye-law-

- **(a) may impose conditions relating to the use of that part of the common property;**
- **(b) may impose requirements on the proprietor of the strata lot or strata lots; and**
- **(c) may require the proprietor of the strata lot or strata lots to pay a fee, whether periodically or not, to the corporation or to the proprietor or proprietors of another strata lot or strata lots.**

105. The clause prohibits a proprietor from erecting a building or installing a fixture on the part of the common property of which he has exclusive use or altering that part of the common property in any other way without the approval of a special resolution of the corporation. The clause further requires that the proprietor or proprietors to whom exclusive use has been granted shall each indemnify, defend and hold the corporation and any other proprietor to whom exclusive use has not been granted, harmless from and against-

- **(a) all claims, actions, suits, demands, assessments or judgments asserted; and**
- **(b) all losses, liabilities, damages, costs and expenses alleged or incurred,**

arising out of or relating to any operations, acts or omissions of the indemnifying proprietor or any of his agents and invitees in the exercise of the indemnifying proprietor's exclusive rights or the performance or observance of the indemnifying proprietor's obligations under the bye-law.

106. The research on this area of exclusive use shows that the rights and obligations of owners and the corporation under exclusive use agreements should be as clear as possible and that the area of exclusive use should be clearly delineated. For example, in British Columbia, the standard bye-laws under the Act provides that an owner who has the use of limited common property must repair and maintain it, except for the repair and maintenance that is the responsibility of the strata corporation under the bye-laws. The corporation's duty under the standard bye-laws to maintain limited common property is restricted to repair and maintenance that, in the ordinary course of events, occurs less often than once a year and to the following, no matter how often the repair or maintenance ordinarily occurs-

- **the structure of a building;**
- **the exterior of a building;**
- **chimneys, stairs, balconies and other things attached to the exterior of building;**
- **doors, windows and skylights on the exterior of a building or that front on the common property; and**
- **fences, railings and similar structures that enclose patios, balconies and yards.**

107. Also considered was whether the legislation should restrict developers from amending the statutory bye-laws during a particular period, as done in New South Wales. Under the Strata Schemes Management Act an owners corporation cannot, during the initial period, make, amend or repeal a bye-law in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, owners or in respect of one or more, but not all, lots. The "initial period", in relation to an owners corporation, means the period commencing on the day on which that owners corporation is constituted and ending on the day on which there are owners of lots the subject of the strata scheme concerned (other than the original owner) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement.

108. The Bill in Schedule 2 provides that the model bye-laws cannot be amended or varied except by resolution of the corporation by two-thirds majority at a general meeting. Where bye-laws are already provided by the developer, clause 55 provides that a bye-law may only be varied or repealed by a special resolution of the corporation as defined in clause 2 of the Bill, i.e. by not less than two thirds of the votes cast at the meeting; and where the total of the unit entitlements for the strata lots for which votes are counted for the resolution is not less than two-thirds of the total of the unit entitlements for all strata lots included in the strata scheme.

109. The Bill seeks to make it clear who are bound by the bye-laws. Clause 58 provides that the bye-laws for a strata scheme bind the corporation and the proprietors and any chargee, lessee or occupier of a strata lot to the same extent as if the bye-laws had been executed as a deed by the corporation and each proprietor and each such chargee, lessee and occupier and contained mutual covenants to observe and perform all the provisions of the bye-laws.

EXECUTIVE COMMITTEE; MEETINGS

110. One of the concerns of responders was the failure of some executive committees to meet regularly and to deal with strata matters in a timely manner. The First Schedule of the Strata Titles Registration Law provides that an executive committee should exercise the powers and duties of the corporation. A committee should consist of no less than three nor more than nine members to be elected at each annual general meeting. Where there are

not more than three proprietors the executive committee should consist of all of the proprietors. The committee may appoint a managing agent to exercise powers or perform certain duties of the corporation.

111. The First Schedule also provides that a general meeting must be held within three months after the registration of a plan and subsequent general meetings shall be held once a year. However, fifteen months must not elapse between the date of one annual general meeting and that of the next.

112. Proprietors entitled to twenty-five per cent of the total unit entitlement of the strata lots can convene an extraordinary general meeting. Therefore, if there is a general dissatisfaction with irregular meetings of a corporation, proprietors may by requisition convene a meeting.

113. The Commission was asked to consider whether strata committees could be made more accountable by legislating the agenda for annual general meetings as well as for other meetings. Mr. Sykes[27] noted that although, unlike some other territories, the legislation in the Islands does not provide an agenda, many bye-laws here have evolved to require that certain specific items be addressed in each annual general meeting. He was of the opinion that this practice may ensure completeness and continuity in the management of strata. This is particularly important given that a substantial portion of strata schemes have rotating volunteer executive committees with a wide variety of experience and skill.

114. The NSW Strata Schemes Management Act, 1996 provides in Schedule 2 for the matters to be considered at meetings and the procedures to be followed. In relation to the holding of the first annual general meeting of an owners corporation, the Act provides that the original owner or, in the case of a leasehold strata scheme for which there is no original owner, the lessor of the leasehold strata scheme, must convene and hold a meeting of the owners corporation within two months of the expiration of the initial period.[28] The Act imposes a penalty for failure to comply with this provision.

115. The agenda for the first annual general meeting is also legislated under that Act. The following are some of the items which must be included in the first agenda-

- **(a) to decide whether insurances taken out by the owners corporation should be confirmed, varied or extended;**
- **(b) to decide whether any determination of the amount of a contribution required to the administrative fund or sinking fund should be confirmed or varied;**
- **(c) to determine the number of members of the executive committee and to elect the executive committee;**
- **(d) to decide if any matter or class of matter is to be determined by the owners corporation in general meeting;**
- **(e) to decide whether the bye-laws for the strata scheme should be altered or added to;**

[27] Ante note 1

[28] "Initial period", in relation to an owners corporation, means the period commencing on the day on which that owners corporation is constituted and ending on the day on which there are owners of lots the subject of the strata scheme concerned (other than the original owner) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement.

(f) to decide whether a strata managing agent should be appointed by the owners corporation and, if a strata managing agent is to be appointed, which functions of the owners corporation should be delegated to the strata managing agent;
(g) to consider the accounting records and the last financial statements prepared;
(h) to decide whether an auditor should be appointed; and
(i) to decide whether certain types of insurance should be taken out.

116. The Act also specifies the types of documents and records which must be produced at the first annual general meeting. These include-

(a) all plans, specifications, certificates (other than certificates of title for lots), diagrams and other documents (including policies of insurance) obtained or received by the owner or lessor and relating to the parcel or building;
(b) all development consents, complying development certificates and related endorsed plans, "as built" drawings, compliance certificates, fire safety certificates and warranties obtained or received by the owner or lessor and relating to the parcel or any building, plant or equipment on the parcel;
(c) the certificate of title for the common property, the strata roll and any notices or other records relating to the strata scheme, if they are in the owner's or lessor's possession or under the owner's or lessor's control;
(d) the accounting records and the last preceding financial statements prepared; and
(e) any other document or item relating to the parcel or any building, plant or equipment on the parcel that is prescribed by the regulations.

117. A failure to provide such documents carries a penalty.

118. Using the above legislation as a guide, clauses 61 to 70 of the Bill and Schedule 2 seek to regulate executive committees and strata meetings. Matters covered by the clauses include-

(a) the duty of care required by members of the executive committee in carrying out their duties;
(b) the eligibility for membership of the committee;
(c) restriction on powers of expenditure by the executive committee;
(d) calling of the first annual general meeting and the business to be conducted at such meeting;
(e) voting at meetings; and
(f) performance of functions by proprietors in general meeting instead of by the executive committee.

119. The Commission was advised by some responders that some executive committees exercised powers seen by some as excessive notwithstanding that many of such powers were given to them by bye-laws. The response to the fact that the powers may be permitted by the terms and conditions of the bye-laws was that many bye-laws were created by the developers and executive committees chosen to comprise those whom the developer wanted.

120. Clause 61(3) provides that in exercising the powers and performing the functions of the corporation, each member of the executive committee must act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances. This is the type of

care which any person acting in such a fiduciary capacity should have. A failure to so act would open members to liability in tort for negligence.

121. The Bill, in further response to the complaints about the seemingly wide powers of those committees, provides in clause 65 for limitation on the powers of expenditure of the committees. Thus, for example an executive committee is prohibited, except in certain circumstances from spending in any one case a sum in excess of that sum assessed by multiplying-

(a) a sum per strata lot fixed by special resolution of the corporation; or
(b) if no such sum is fixed, the prescribed amount per strata lot,

by the number of strata lots that are the subject of the strata scheme.

122. A developer is required by clause 67 to call the first annual general meeting within 3 months of the date on which there are proprietors of strata lots the subject of the strata scheme concerned (other than the developer) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement. In order to ensure that a general meeting can be called if the developer fails to do so, it is also provided in clause 67 that any proprietor may convene the first meeting if the developer fails to do so.

123. Similar to the precedents, clause 68 sets out the matters which must be dealt with at the first meeting. The developer will be required by the legislation to provide all documents, not subject to legal privilege, which relate to the parcel, the building and the strata scheme, books of account and any other notices or records relating to the strata scheme. Also to be dealt with at the meeting will be the election of persons to the executive committee. The bye-laws in Schedule 2 also have several provisions relating the quorum of committees, voting rights, etc.

AUDITING OF STRATA ACCOUNTS

124. The keeping of the accounts by corporations has also been a source of complaint and calls were made for the legislation to provide strict accounting standards and auditing requirements.

125. In relation to the accounts of a corporation, the current statutory bye-laws provide that an executive committee shall-

- **keep proper books of account in respect of all moneys received and spent by it;**
- **prepare proper accounts relating to all moneys of the corporation and the income and expenditure thereof, for each annual general meeting; and**
- **make the books available for inspection on application of any proprietor or chargee.**

126. The recommendations for reform included the annual audit of accounts by qualified chartered or certified public accountants or at least an annual financial review and certification of the accounts by independent accountants. It had been recommended[29] that strata schemes should consider the following additional account related requirements-

- **the preparation of quarterly accounts;**

[29] Mr. Sykes, ante note 2

- **a requirement that financial statements be served with an AGM notice to enable owners to review and consider the statements prior to the AGM;**
- **a budget for the year following the AGM to be prepared and delivered with the AGM notice; and**
- **special requirements relating to the accounts of a rental pool if such exists.**

127. The Commission agreed that the law should be amended to provide more stringent accounting requirements and those requirements should form part of the substantive legislation subject to change only by the legislature. The provisions of the South Australian legislation were used in the 2011 Bill as the main precedent in the preparation of clause 23 of the Bill. Clause 23 provided for the preparation and auditing of financial statements and exemptions from the requirement to audit statements. Subclause (5) of clause 23 provided that a corporation is exempt from the requirement to have its accounts and financial statements audited if-

(a) all of the strata lots of the strata scheme are owned by the same person;
(b) the number of strata lots in the strata scheme is six or less and during the financial year to which the exemption will relate, the corporation has passed a special resolution exempting the corporation from that requirement; or
(c) the aggregate of the contributions made, or to be made, by the proprietors in respect of the year to which the statement relates does not exceed three thousand dollars and the balance standing to the credit of the administrative fund and the reserve fund at the commencement of that year does not exceed three thousand dollars for each fund.

128. The Commission sought views on clause 23 and asked whether the provisions were adequate to deal with the problems of poor account keeping of corporations or whether more detailed regulation of accounts are required.

129. The main objection to the clauses in the 2011 Bill dealing with the management of strata schemes were those relating to the auditing of accounts. Many persons objected on the ground that audits are quite expensive and most strata schemes could therefore not afford to comply with the requirements. It was suggested that accounts should only be audited where the proprietors voted to do so. Clause 38 of the Bill therefore provides that a corporation may, pursuant to a super-majority resolution, cause the accounts and financial statements of the corporation to be audited before presentation to the annual general meeting. Where it is resolved that a corporation's accounts should be audited, the accounts and financial statements of a corporation must be prepared and audited in accordance with generally accepted accounting principles. The costs of an audit would be an administrative expense payable from the administrative fund.

TWO-LOT STRATA SCHEMES

130. The Law has been further reformed by the inclusion of exemptions from certain provisions of the legislation for two to five lot strata schemes. The Bill defines a strata scheme as being a parcel divided into two or more strata lots, thereby changing the law to include two or more lots.

131. The Ministry noted previously that notwithstanding that the current law contemplates four or more units for residential occupation it is not uncommon for four units to be construed to consist of two dwelling/ business units (duplexes) and two garages or two air conditioning concrete pads. The legality of this under the Law has been questioned.

132. As an aside, it should be noted that in NSW it is possible to obtain a separate title for a garage. For example, section 39 of the Strata Schemes (Freehold) Purchase Act deals with utility lots which are lots designed primarily for storage or accommodation of boats motor vehicles or goods and not for human occupation. There are no similar provisions under the Cayman Islands Law.

133. The advantages of strata living were noted in our previous papers[30] on the management of strata schemes but it would be useful for the purposes of this discussion to repeat them. The advantages include-

- **costs of buying into strata schemes are comparatively less than the costs of buying into non-strata freehold title;**
- **simplicity of obtaining title;**
- **protection and regulation of the administration of a scheme by the legislature;**
- **ability to mortgage at reasonable rates of interest;**
- **legislated procedures for resolution of disputes; and**
- **democratic rights provided by legislation to all unit owners to have a say in the administration of a scheme.**

134. It is posited in the support of strata living that day to day living costs are reduced because services are shared and the costs of maintenance are consequently reduced. Strata schemes also have the option of strata company insurance which is generally cheaper than individual insurance.

135. Research shows that alternative methods of property division are more clumsy to administer. The problems which are faced in duplexes and triplexes generally relate to the failure of one owner to contribute to maintenance costs and insurance. It is far more difficult to compel the other owner to contribute to general costs than in a strata scheme. The regulation of noise, trespassing by neighbour, use of parking lots and related living issues are also not specifically regulated by law as in the case of a strata scheme but by the law of nuisance.

136. The Law Reform Commission of Western Australia considered in 1977 problems relating to the ownership of duplexes under the 1966 strata legislation of that time. The preliminary views submitted to the WA Law Commission indicated that the Act was not suited to deal effectively with duplexes. The following were some of the views expressed in relation to the inadequacy of the legislation in dealing with strata duplexes[31]-

- **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.**
- **The concept of a council to exercise the powers and duties of the strata company is inappropriate and also unnecessary, as the strata company would only consist of two proprietors. The provisions of the Strata Titles Act, by virtue of which the**

[30] Para 19.

[31] The Law Reform Commission of Western Australia, project No. 56 Review of the Strata Titles Act 1966-1970 Working Paper February 1977

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 to separately insure his unit and separately maintain the exterior of his unit.

- **As the two units in a duplex strata scheme usually 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).**
- **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.**
- **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 be and therefore even the external walls of the building are usually common property.**

137. In response to the above concerns, the present Strata Titles Act of Western Australia 1985, which was influenced by recommendations of the Commission on the reform of strata titles, contains special provisions relating to two-lot schemes. Under the Act, two-lot schemes are exempt from the following requirements-

- **to hold annual general meetings, after the first one has been called by the original proprietor;**
- **to keep minutes of meetings and books of account;**
- **to prepare annual accounts;**
- **to have a separate mail box for the strata company;**
- **to keep a roll of lot owners, but each lot owner must notify the other owner of his or her address for the service of notices; and**
- **to establish an administrative fund, i.e. a strata levy fund.**

138. Owners of two-lot schemes may decide to comply with any of these requirements. However, if they decide to establish an administrative fund they must first pass a bye-law to that effect.

139. Under the WA Act the same exemptions that apply to two-lot schemes may apply to schemes having three to five lots if the strata company passes a bye-law to that effect. The bye-law must be made by a resolution without dissent. Bye-laws made to adopt the exemptions can be set aside by a new bye-law passed by resolution without dissent.[32]

140. The Cayman Contractor's Association, in response to the first part of the strata titles review, called for the registration of two-lot strata schemes for business and residential purposes. In support of such call they noted that many duplexes are owned by Caymanians who should be able to sell or dispose of one of the units as they see fit. The difference between a strata duplex and a duplex is a strata duplex can have individual strata units sold

[32] A Guide to Strata Titles- www.landgate.wa.gov.au

whereas the duplex is sold as an entire unit even though there are two dwelling units in the complex. The same principle would apply in the case of a strata triplex vs. triplex or strata fourplex vs. fourplex etc.

141. The Bill contains exemptions in clauses 89 and 90 which are similar to those in Western Australia. Clause 89 provides that, in relation to a two-lot strata scheme, the sections of the Law which deal with minutes of meetings, books of account, financial statements, roll of proprietors and the administrative fund do not have to apply to two-lot schemes although schemes can make those provisions applicable. Clause 90 provides that the provisions which do not apply to two-lot schemes can also be exempted in relation to a corporation of a four or five strata lot scheme if the corporation has, by special-majority resolution, made a bye-law to that effect and that bye-law has effect under the legislation.

CREATION OF STRATA LOTS AND COMMON PROPERTY, ETC

142. The Bill also covers matters such as the following-

- **(a) new definitions of strata scheme, strata lot, proprietor, developer and common property;**
- **(b) requirements of and registration of a strata plan;**
- **(c) re-subdivision within a scheme;**
- **(d) requirements for a plan of re-subdivision;**
- **(e) consolidation of strata lots;**
- **(f) conversion of strata lots into common property;**
- **(g) registration of strata plans;**
- **(h) strata lot registers;**
- **(i) access for maintenance where part of building intrudes into another lot;**
- **(j) ownership of common property;**
- **(k) acquisition of additional common property; and**
- **(l) transfer or lease of common property.**

(a) Definitions in the Bill

143. The Bill no longer uses the term "strata" and refers instead to "strata scheme" which is defined as follows-

- **(a) the manner of division of a parcel into two or more strata lots or into strata lots and common property under a strata plan and the manner of the allocation of unit entitlements among the strata lots; and**
- **(b) the rights and obligations, between themselves, of proprietors, other persons having proprietary interests in or occupying the strata lots and the corporation, as conferred or imposed by this Law or by anything done under the authority of this Law.[33]**

144. In response to the 2011 Bill, all persons who provided feedback on the definition of a "strata" queried why, unlike every other jurisdiction where strata schemes exists, the minimum number of strata lots in a scheme is two while Cayman Islands provide for four. The legal associations, among others, indicated that there appears to be no logical reason not to permit two-lot strata schemes.

[33] See Western Australia, Strata Titles Act

145. Further the term "strata" is curiously defined by referring to four "self contained units" located on a single parcel of land. The Strata Law does not define "unit" nor is the meaning of "self-contained" provided.

146. The Commission has been advised that the reason for the use of the words "self contained unit" in the definition of strata related to the need to ensure that, for example, parking lots and air condition pads were not included in a strata plan as separate strata lots. It was also to ensure that a developer does not submit a plan for registration in relation to a strata scheme containing buildings without walls, windows and roofs.

147. In order to deal with such matters clause 6 of the Bill, which deals with the requirements of a strata plan, provides that parking stalls, gardens, garage areas, enclosed storage areas and similar areas or spaces intended to be used in conjunction with a residential strata lot shall not be designated as separate strata lots but shall be included as part of a strata lot *or* as part of the common property. Clause 6 also provides that a strata plan which relates to a strata scheme other than a vacant land strata scheme shall not be registered unless the Registrar is satisfied that the building or buildings in the scheme has or have exterior walls, roof or roofs, windows and doors.

148. Another definition of note in the Bill is that of "common property". In a response to the first discussion paper and first draft Bill, concerns were raised regarding the definition of a strata lot and that of common property. The Commission was asked to consider the inclusion of a clear definition of common property in order to ensure that there is no question of where the boundaries of strata lots are located. The question was asked as to who is responsible for the maintenance of pipes and wires that run in the slab of a strata building. A responder noted that on one occasion a builder installed insulated air conditioning lines from the outside compressor units through the common property underground slab and then into the individual units of each strata lot. The question posed was who is responsible for the cost of replacement of the AC pipe insulation that is clearly within strata common property?

149. In response thereto the Bill proposes in clause 2 the following definition-

> **"common property" means-**
>
> **(a) that part of the land and buildings shown on a strata plan that is not part of a strata lot; and**
>
> **(b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located -**
>
> **(i) within a floor, wall or ceiling that forms a boundary-**
>
> **(A) between a strata lot and another strata lot;**
>
> **(B) between a strata lot and the common property; or**
>
> **(C) between a strata lot or common property and another parcel of land; or**
>
> **(ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property.**

150. The definition of "proprietor" has been changed and a new definition, that of "developer" has been included in the Bill. The Strata Titles Law provides for the creation of strata schemes by the proprietor of land and thereafter imposes throughout rights and duties upon the proprietors of lots. In section 3 it is provided that the proprietor of land

upon which a building is or is to be constructed may apply to the Registrar for the registration of the horizontal or vertical subdivisions in accordance with a strata plan which shall accompany the application. However, section 2 of the Law provides only a vague definition of "proprietor" which is defined as meaning "the proprietor for the time being of a strata lot". The Commission queried who is included in this definition.

151. In order to determine who falls within the definition of proprietor in the Strata Law one must engage in an exercise of statutory interpretation. The ordinary meaning of the word is that it is a person who has the legal right or exclusive title to something or a person who has an interest (as control or present use) which may be less than exclusive right. This would include a fee simple owner, a lessee and a chargee.[34] The Registered Land Law (2004 Revision) provides that a proprietor means the person registered under the Law as the owner of land, a lease or a charge.

152. The Strata Law contains the definition of proprietor previously provided in the 1961 New South Wales (Conveyancing) Strata Titles Act. That definition was said to be "less definitive than explanatory" and was displaced in the 1973 Act by a more specific definition. The Bill provides a distinction between the developer and the proprietor of a strata lot as follows-

> **" "developer"[35] means a person who is registered under the Registered Land Law (2004 Revision) as the proprietor of the freehold or leasehold estate or interest in land and who, for the purpose of developing such land, registers a strata plan under this Law; and includes a successor or assignee of that person but does not include a purchaser of a strata lot or a successor or assignee of such purchaser;**
>
> **"proprietor"[36] means a person, including a developer, who is a person shown in the register as the proprietor of a freehold or leasehold estate or interest in a strata lot, whether entitled to it in the person's own right or in a representative capacity unless there is a registered life estate, in which case it means the tenant for life.".**

(b) Common property

153. Clause 31 of the Bill deals with the acquisition of common property and contains changes similar to the provisions of section 7 of the 2012 Amendment. There was no provision under the Law before 9th October of that year empowering a strata corporation to acquire more common property. It was only possible to lease or transfer land. Thus, a corporation itself could not acquire more land to provide for additional parking, adding a tennis court or constructing a swimming pool. This was unlike jurisdictions such as New South Wales where a body corporate may, pursuant to a special resolution, accept a transfer or lease of land, not being a lot within the parcel, which is contiguous to the parcel but which is not subject to a mortgage, charge or writ, for the purpose of creating, or creating additional, common property.

154. Clause 31 provides in part that proprietors may, by special resolution, direct the relevant corporation, to accept a transfer or acquire a lease of any land for the purpose of enjoying such land as common property or for such other purpose of the corporation as may be determined by special resolution of the proprietors. Every such acquisition or lease lodged for registration shall be endorsed with or accompanied by a certificate under the seal of the corporation that the resolution was duly passed, that the acquisition or lease conforms to the terms thereof and that all necessary consents were given. Such certificate

[34] See also Registered Land Law (2004 Revision)
[35] See Ontario Condominium Act
[36] BC Strata Property Act

shall, in favour of vendors of the land and in favour of the Registrar, be conclusive evidence of the facts stated therein.

155. In accordance with clause 31, upon the registration, the land comprised in the transfer, lease or sublease will be deemed to be common property of the strata scheme and thereupon is subject to such of the provisions of the legislation relating to common property.

(c) Re-subdivision within a scheme; requirements for a plan of re-subdivision; consolidation of strata lots; and conversion of strata lots into common property

156. The Bill contains provisions regulating several matters relating to changes in strata lots for which the current law does not provide. These matters are-

- **(a) re-subdivision within a scheme;**
- **(b) consolidation of strata lots; and**
- **(c) conversion of strata lots into common property.**

157. Clauses 11, 15 and 18 of the Bill deal with the above-mentioned matters. Re-subdivision and consolidation of strata lots require special resolutions while the conversion of strata lots into common property, which would effect a larger number of proprietors, requires a super-majority resolution. These provisions allow a corporation and the strata owners greater flexibility in managing and changing their living and leisure areas without the need to move away from a scheme. For example, a strata lot or common property, or a strata lot and common property, may be re-subdivided for purposes which include boundary realignment or the creation of new strata lots from a strata lot or from common property or a combination of those variations. Upon registration, a plan of re-subdivision will be deemed to be part of the strata plan as previously registered, and the Registrar will be required thereafter to amend the strata plan and the schedule of unit entitlement in the manner prescribed.

PHASED DEVELOPMENT OF STRATA SCHEMES

158. Part 7 of the Bill deals with the phased development of strata schemes. As indicated in the 2011 discussion paper[37], one local attorney was of the view that the provisions of the Strata Law which regulate phased development of strata schemes are inadequate and inflexible. This was supported by other persons who responded to the review and it had been recommended that the Strata Law be modernized by incorporating provisions similar to those in the NSW legislation.

159. Part V of the Strata Law regulates the phased development of strata schemes. This concept was first introduced legislatively in New South Wales in 1985 to provide for the development of large schemes over a period of time. Staged or phased development of schemes allows a developer to use the proceeds of sale from the early stages to finance the development of later stages. It has been noted that another advantage is that the developer can take account of the changing expectations of purchasers and adapt later stages to meet them.[38]

[37] Para. 111

[38] R.J, Webster Minister of Planning and Housing 1993 New South Wales, 1993

160. Section 17 of the Strata Law provides the procedure for the subdivision in phases by the successive registration of the following-

- **(a) a proposed strata lot development plan, which specifies all the strata lots, and the whole of the common property proposed to be included in the development when it is completed;**
- **(b) one or more phase strata plans each of which shall, in addition to satisfying the requirements of section 4 which relate to strata plans, specify-**
  - **(i) each part of any common property that has been completed, in relation to any building forming part of the development which has also been completed; and**
  - **(ii) any area (designated on the plan as a future development strata lot) in which further development subdivision and other operations are required to complete the development; and**
- **(c) a complete strata plan.**

161. Essentially, a phase strata plan sets out the initial phase of the strata plan and all subsequent phases. A future development strata lot means a strata lot that is proposed to be developed at a later phase of the development, and that is shown on a phase strata plan as a future development strata lot. A complete strata plan means a strata plan specifying all the strata lots (and the whole of the common property) of a proposed development. When all phases are completed the original strata plan and the most recent phase strata plan are replaced by the complete strata plan.

162. When a proposed strata lot development plan has been registered, the proposed strata development cannot be further altered in anyway, unless a further proposed strata lot development plan has been registered, incorporating the proposed changes. The applicant for registration of a further proposed strata lot development plan must have obtained the unanimous consent-

- **(a) of every proprietor of a strata lot (including a future development strata lot) shown on the latest phase strata plan registered in respect of the development;**
- **(b) of every other person who has a registered interest in any such strata lot; and**
- **(c) of every cautioner claiming any interest in any such strata lot.**

163. Further, the applicant for registration of the further proposed strata lot development plan must have assigned to every strata lot shown on the plan its unit entitlement.

164. It has been posited that because the above provisions are minimal, flexibility in phased development in the Cayman Islands can only be obtained through detailed provisions in strata contracts. This was the problem faced in New South Wales prior to amendments in 1993. In his paper Mr. Michael Allen[39] noted that the legislation of 1985 in New South Wales was so prescriptive and inflexible that it was ignored by the development industry and rarely used. Instead developers preferred to use the contractual process established around a series of detailed covenants and procedural steps.

165. It was suggested that our law could be reformed along the lines of the current NSW model which provides detailed regulation of this area. The Strata Schemes (Freehold Development) Act for example provides that the staged development of a parcel must be carried out subject to a strata development contract that describes separately any

[39] Strata conference 2007

proposed development that the developer for the development lot concerned warrants will be carried out and may be compelled to carry out ("warranted development"), and any other proposed development that the developer will be authorised but cannot be compelled to carry out ("authorised proposals"). Warranted development and authorised proposals are referred to as 'permitted development" because the body corporate for the strata scheme and other persons having estates or interests in lots included in the parcel must allow it to be carried out in accordance with the contract.[40]

166. A strata development contract cannot provide for the subdivision of common property without the consent, by special resolution, of the body corporate. The contract must include a concept plan. The concept plan must illustrate, in a manner approved by the Registrar-General, the sites proposed for and the nature of the buildings and works that would result from the carrying out of all permitted development under the strata development contract of which the plan forms part. It must also separately illustrate, in the manner approved by the Registrar-General, the sites proposed for and the nature of such of those buildings and works (if any) as would result from the carrying out of all warranted development.

167. A strata development contract relating to a strata scheme has effect as an agreement under seal (containing the covenants specified in the Act) entered into by the body corporate and each person who for the time being is the developer concerned, a proprietor of a lot (other than that developer), or a registered or enrolled mortgagee, chargee, covenant chargee or lessee, or an occupier of a lot. The contract ceases to have effect in relation to every one when the development scheme to which the contract relates is concluded. This however does not affect any obligation that was incurred by a person, or any right that accrued to a person, under the contract before it ceased to have effect in relation to the person.[41]

168. After a careful consideration of the NSW legislation, the Commission decided that it would be more appropriate for our purposes to build onto the current legislation and to fill in the gaps which the Strata Law appears to have.

169. Clause 95 of the 2015 Bill provides for the contents of a proposed strata development plan. It is proposed that such a plan should include a description of-

- **(a) so much, if any, of the development as the developer is permitted by the plan to carry out and may be compelled to carry out by any purchaser of a strata lot in a phase strata plan (such development being identified in the plan as "warranted development-proposed development subject to a warranty"); and**
- **(b) so much (if any) of the development as the developer is permitted by the plan to carry out but cannot, merely because it is described in the plan, be compelled to carry out (identified in the plan as "authorised proposals proposed development not subject to a warranty").**

170. Clause 95 further provides that a proposed strata development plan must also-

- **(a) include an undertaking by the developer that he will interfere as little as is reasonably practicable with the use and enjoyment of the strata lots and common property in the course of performing his obligations under the plan;**

[40] Notes to section 28A of the Strata Schemes (Freehold) Development Act
[41] Section 28I

(b) set out the means by which the developer will obtain access to the future development strata lot or common property and the part or parts of the parcel that the developer will need to occupy or have access to;
(c) set out the obligations, if any, of the corporation and proprietors and occupiers of strata lots;
(d) state the date for fulfilment by the developer of his obligations under the proposed strata development plan and the completion of the entire development, such date being no later than the tenth anniversary of the day on which the plan is registered;
(e) be endorsed with a certificate, in the form prescribed by regulation, from the person who prepared the proposed strata development plan certifying that the proposed strata development plan has been correctly prepared in accordance with this Law; and
(f) include such other documents, particulars and information as may be required by the regulations.

171. Clause 96 provides that a proposed strata lot development plan shall not be registered unless it is accompanied by a phase strata plan in respect of the same development. When a proposed strata lot development plan has been registered, the proposed strata lot development scheme should not be further altered in any way, unless a further proposed strata lot development plan has been registered, incorporating the proposed changes, in accordance with subclauses (3), (4) and (5) of clause 95.

172. Clause 96(3) provides that the applicant for registration of a further proposed strata lot development plan may, without the consent of the corporation or any person specified under subclause (4)(b)(i), (ii) or (iii) mentioned below, alter such plan where the alteration is required-

(a) to ensure compliance with any change in relevant legislation;
(b) to alter the specifications of the future development strata lots in the plan or to meet best practice standards in construction and land development;
(c) to vary the unit entitlement of any one or more future development strata lots shown on any such plan; or
(d) to alter the unit types and mix of units in any building, by adding, removing or modifying any future development strata lots to meet changes in market conditions for the sale and marketing of such strata lots, subject to obtaining and complying with all relevant planning approvals and regulations as may be relevant thereto in respect of setbacks, site density and similar matters.

173. Clause 96(4) provides that where the applicant for registration of a further proposed strata lot development plan wishes to alter the plan in order to change the basic architectural or landscaping design of the proposed strata development or the essence or theme of the proposed strata lot development scheme, he must obtain the consent, by super-majority resolution of-

(a) every proprietor of a strata lot (including a future development strata lot) shown on the latest phase strata plan registered in respect of the development;
(b) every other person who has a registered interest in any such strata lot; and
(c) every cautioner claiming any interest in any such strata lot.

174. Clause 98 deals with the use of common property and development lot by a developer. It is provided that, when carrying out development under a proposed strata development

plan, a developer is entitled to use any common property to which the plan relates to the extent necessary to carry out the development or to such other extent as may be specified in the plan. A plan may confer on the developer an exclusive or any lesser right to occupy specified common property.

175. A corporation will be required under the legislation to permit a developer to use the power, water, cable, sewage and road way facilities installed in and forming part of the common property in order to allow the developer to provide future development strata lots with such types of services. The cost of connecting such services and carrying out any repairs to the common property which may have been damaged as a result of making the connections shall be borne by the developer. A right conferred by these provisions may be exercised despite any other provision of the legislation or any provision of the bye-laws but must be exercised in a manner that does not cause unreasonable inconvenience to the occupier of any strata lot.

176. The time when the development scheme should conclude was a matter raised in discussions. Should proprietors be faced for long periods with vistas of undeveloped land which they were advised would be developed in the near future? In New South Wales section 28Q of the Strata Schemes (Freehold Development) Act provides that a strata development contract must predict a time, being no later than the tenth anniversary of the day on which the contract was registered, as the time for conclusion of the development scheme to which it relates. However, the Commission noted that such a deadline does not take into account market forces or natural disasters which may hinder the further development of a strata scheme.

177. As indicated above, clause 95 of the Bill provides that a strata plan should contain the date for fulfilment by the developer of his obligations under the proposed strata development plan and the completion of the entire development, and the date should be no later than the tenth anniversary of the day on which the plan is registered. However, clause 99 provides that where a development has not been carried out within the period specified in the strata development plan, the Registrar may, upon application and good cause shown by a developer, extend the date for fulfillment by the developer of his obligations under the proposed strata development plan referred for a further period or periods as the Registrar shall determine. The Registrar, in considering an application by a developer, shall require the developer to-

- **(a) give notice of his application to the corporation, all proprietors and registered chargees of the strata lot development scheme; and**
- **(b) provide such documents as the Registrar considers to be relevant to the application,**

and the Registrar may, upon the application of any proprietor or chargee, hear such person on any matter relating to the application of the developer.

178. Where the Registrar refuses an application to extend the period or where the developer is unable to or elects not to complete a development and the developer decides to close the strata plan, the developer may-

- **(a) subdivide any portion of the undeveloped land which he cannot be compelled to develop; or**
- **(b) where any portion of the undeveloped land is subject to development, he shall either transfer such portion to the corporation to which the phased development relates as common property where the portion is contiguous to**

the parcel, and where it is not so contiguous, compensate the corporation for the value of such land.

LEASEHOLD STRATA SCHEMES

179. Part 8 of the Bill covers matters such as -

- **the creation of leasehold strata lots;**
- **the leasehold interest of proprietors;**
- **obligations under leasehold strata schemes;**
- **amendment of leasehold strata plans;**
- **consent of lessor for transfer of common property;**
- **expiration of leasehold interests;**
- **purchase of proprietor's interest on termination; and**
- **effect of termination or expiration of a leasehold strata scheme.**

180. In Cayman most strata schemes are developed over freehold property but there are big schemes which are subject to leasehold title such as the Residences at Ritz Carlton and Villas of the Galleon.[42] However, unlike some other jurisdictions there is no express regulation of leasehold strata schemes in the Cayman Islands.

(a) Regulation of leasehold schemes in other jurisdictions

181. In New South Wales, the leasehold strata legislation is separate from the freehold strata legislation but the two laws have very similar provisions. There are however matters specific to leasehold title for which there should be express provision. For example, what happens to the scheme when the lease expires; what are conditions for renewal of a lease; what, if any, are the restrictions on the transfer of a leasehold strata scheme; can a leasehold strata scheme be converted to a freehold strata scheme?

182. The legislation of Ontario and British Columbia set out clearly the additional matters which should be considered in the case of a leasehold strata/ condominium scheme. Both jurisdictions provide for the regulation of the freehold and the leasehold schemes in one piece of legislation. For example, in the Condominium Act of Ontario, section 166(2) provides that in addition to the matters which the Act requires to be set out in the declaration (similar to the strata plan) a declaration for a leasehold condominium corporation must contain-

(a) a statement of the term of the leasehold interests of the owners;
(b) a schedule setting out the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable for at least the first five years immediately following the registration of the declaration and description;
(c) a formula to determine the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable during the remainder of the term of the owners' leasehold interests following the time for which the schedule described in clause (b) states the amount of rent payable;
(d) a schedule of all provisions of the leasehold interests that affect the property, the corporation and the owners; and

[42] "Strata Development and Conveyancing"- Norman Klein, 2007 Strata conference

(e) all other material that the regulations made under the Act require.

183. The Ontario Act provides, among other things, that all leasehold interests in units in a leasehold condominium corporation and their appurtenant common interests shall be for the same term; the term of the leasehold interests before a renewal must not be less than 40 years less a day and not more than 99 years as specified in the declaration; and the owner of a unit in a leasehold condominium corporation may, without the consent of the lessor, transfer, mortgage, lease or otherwise deal with the leasehold interest in the unit.

184. Further, at least five years before the end of the term of the leasehold interests in the units in a leasehold condominium corporation, the lessor must give the corporation, a written notice of intention to renew all the leasehold interests that sets out the provisions applicable to the renewal or a written notice of intention not to renew all the leasehold interests. A renewal of the leasehold interests must be for at least 10 years or the greater term specified in the notice.

185. The termination of a leasehold strata scheme has been a source of disagreement as the Ministry has not accepted the recommendations of the Commission on this issue. Our research shows that in Ontario upon the termination of the strata scheme or expiration of a lease of the parcel the corporation must appoint a trustee to pay out the money remaining in the corporation's reserve fund. When the Act ceases to govern the property, the trustee is required to pay out the money remaining in the reserve fund at that time in accordance with the following priorities-

(a) to the lessor, the amount, if any, that is required to repair damage to the property that has not been repaired; and
(b) to each of the owners, a share of the balance in the same proportion as their common interests, subject to the Act.

186. Before paying out a share of money payable to an owner, the trustee must deduct from the share the amount of claims against the owner that secure the payment of money and shall remit the deduction to the persons entitled to the claims.

187. In British Columbia in section 214 of the Strata Property Act the purchase of leasehold tenant's interest on termination is provided for. Section 214 provides that the leasehold landlord must purchase a leasehold tenant's interest in the strata lot on the termination of the strata lot lease. The purchase price must be arrived at as of the date the strata lot lease terminates and must be-

(a) if a basis for calculating the purchase price was set out in the strata lot lease or in a schedule filed with the leasehold strata plan, the price calculated on that basis; or
(b) if a basis for calculating the purchase price was not set out in the strata lot lease or a schedule, the fair market value of the leasehold tenant's interest in the strata lot evaluated, in accordance with the regulations, as if the strata lot lease did not expire.

188. The leasehold landlord may change the basis for calculating the purchase price of the strata lots set out in a schedule if-

(a) the leasehold tenants consent to the change by a resolution passed by a unanimous vote at an annual or special general meeting, and

(b) an amended schedule is filed in the land title office, accompanied by a Certificate of Strata Corporation in the prescribed form, stating that the resolution referred to in paragraph (a) has been passed and that the amended schedule conforms to the resolution.

189. It should be noted that in New South Wales, like British Columbia, upon termination of the leasehold strata scheme, the lessor is required to make payment to the former proprietors where the leasehold scheme is terminated by order of the court. Section 80(8) (e) of the Strata Schemes (Leasehold Development) Act provides as follows -

"(e) if the leases so provided or it is provided in any other agreement, the former lessor under the scheme is liable to pay to each former lessee such amount by way of compensation, determined in accordance with the formula set out in Schedule 2 or as otherwise agreed by the former lessor and former lessee, in respect of the value of the improvements comprised within the former parcel as is attributable to the lot leased by the former lessee."

190. Schedule 2 of the Act provides the following formula-

For the purposes of sections 37(1) (c) and 80(8) (e), the formula is:

$$A = B - (C - D)$$

where:

A represents the value, at the date of termination of the leasehold strata scheme concerned, of the improvements attributable to a lot,

B represents the market value, at that date, of the lot, being the value of the lot at that date calculated on the basis that the lot:
(a) is held for an estate in fee simple in possession, and
(b) may be used, whether or not only with development consent, for any purpose the use of the lot for which is not at that date prohibited,

$$C = E \times \frac{U_1}{U_n}$$

where:

E represents the site value, at that date, of the parcel the subject of that leasehold strata scheme, being the value of the land included in that parcel at that date calculated on the basis that the land:

(a) is held for an estate in fee simple in possession, and

E represents the site value, at that date, of the parcel the subject of that leasehold strata scheme, being the value of the land included in that parcel at that date calculated on the basis that the land:
(a) is held for an estate in fee simple in possession, and
(b) may be used for the purpose of a site for the building or part of the building subject to the scheme,

but excluding the value at that date of all improvements within the parcel,

U_1 represents the unit entitlement of the lot, and

U_n **represents the aggregate unit entitlement for that leasehold strata scheme, and**

D **represents the part of factor "B", if any, attributable to the value, at that date, of improvements to the lot effected by the lessor.**

(b) Legislative proposals in Part 8

191. The review of this part was the most problematic because as noted above the Strata Law does not deal with this area of the Law at all. The above legislation covers a wide variety of issues relating solely to leasehold strata, none of which are covered by the Strata Law. In reforming the law it is vital that this aspect of strata be dealt with in order to ensure that there are uniformity of rights and obligations under such schemes.

192. Clauses 101 to 113 of the Bill seek to regulate leasehold schemes. Clause 102 provides for example that, subject to Part 8, the provisions of the legislation relating generally to strata schemes apply with necessary modifications to a leasehold strata scheme. However, if there is a conflict between a provision of Part 8 and a provision of another Part, the provision of Part 8 prevails.

193. Clause 103 deals with the creation of leasehold strata lots and provides that an application for registration of a strata plan for a leasehold strata scheme must be accompanied by a certificate of the lessor that the developer has paid the rent for the parcel for the full term under the lease. In addition to the ordinary requirements of a plan, a strata plan relating to a leasehold strata scheme must contain the consent of the lessor to the division of the leasehold interest and all other information that the regulations made under this legislation requires. Further, the term of the unexpired leasehold interests before registration of a leasehold strata plan must not be less than fifty years in any case.

194. Clause 104 deals with the leasehold interest of proprietors and provides that all leasehold interests in a leasehold strata scheme shall be for the same term. A proprietor of a leasehold strata lot will be able, without the consent of the lessor, to transfer or otherwise deal with his interest in the strata lot.

195. The provision which was very difficult in formulating relates to the expiration or termination of a leasehold scheme. While we have no evidence of leasehold schemes being terminated to date, with the precedent of Ivan before us and a quickly developing Cayman it is not unforeseeable that a leasehold scheme may have to terminate before the expiration of the term of the lease or that the Crown may decide not to renew because the parcel may be needed for development by the Government. Clause 109 provides that at least five years before the end of the term of the leasehold interests in the strata lots in a leasehold strata scheme, the lessor i.e. the Crown, must give the leasehold strata corporation a written notice which sets out the intention to renew all the leasehold interests and the provisions applicable to the renewal or a written notice of intention not to renew all the leasehold interests.

196. The legislation provides that a renewal of the leasehold interests must be for at least thirty years or the greater term specified in the notice. If the lessor does not give the required notice, the lessor will be deemed to have given the notice required to renew the leasehold interests for thirty years subject to the same provisions that govern the leasehold interests before the renewal and the leasehold strata corporation shall send a notice of that fact to the proprietors. The leasehold interests shall be renewed for the term and subject to the provisions specified in the notice or the deemed notice, unless the proprietors by super-majority resolution vote against the renewal no later than one year after the notice or

the deemed notice was given to the leasehold strata corporation. The leasehold strata corporation must give notice to the lessor if the proprietors vote against the renewal.

197. It is proposed that if the leasehold interests are renewed subject to provisions that are different from those that applied before the renewal, the strata plan will be deemed to be amended to contain the provisions that apply upon the renewal and the leasehold strata corporation shall register a copy of the provisions as an amendment to the strata plan. Where the lessor elects not to renew the lease of the parcel to which the strata scheme relates or the proprietors vote not to renew the lease, the scheme shall be considered to have been terminated on the date the lease expires and the provisions relating to purchase of the proprietors' interest shall apply.

198. In accordance with clause 111, the lessor must purchase each proprietor's interest in the proprietor's strata lot on the termination of the leasehold strata scheme. It is provided that the purchase price shall be arrived at as of the date the leasehold strata scheme terminates and shall be, in relation to each strata lot-

- **(a) if a basis for calculating the purchase price was set out in the lease of the strata lot or in a schedule filed with the leasehold strata plan, the price calculated on that basis; or**
- **(b) if a basis for calculating the purchase price was not set out in the lease of the strata lot or a schedule, the fair market value of the proprietor's interest in the strata lot evaluated as if the lease of the strata lot had not expired and had an unexpired term of thirty years or more.[43]**

199. The lessor may change the basis for calculating the purchase price of the strata lots set out in a schedule if-

- **(a) the proprietors consent to the change by a resolution passed by a super-majority vote at an annual or special general meeting; and**
- **(b) an amended schedule is filed with the Registrar, accompanied by a certificate of the corporation in the prescribed form, stating that the resolution referred to in paragraph (a) has been passed and that the amended schedule conforms to the resolution.**

200. It is proposed that, unless expressly provided otherwise in the lease of the strata lot or agreed to in writing by the lessor and the proprietor, the purchase price must be determined, by arbitration under the Arbitration Law, 2012 if the lessor and the proprietor have failed to agree on the purchase price by thirty days before the date the lease of the strata lot expires, or thirty days after the date of a termination under clause 109. The lessor shall purchase each proprietor's interest within thirty days after the earlier of the date the purchase price is agreed to and the date the purchase price is determined by arbitration.

201. The question which the Commission asked during the review is whether the lessor should have any obligation to pay a proprietor for his interest upon the termination of a scheme. The precedents give differing approaches- no payment or payment for the interest of the proprietor or for the improved value of the parcel. What approach should the Cayman Islands take? The Ministry did not agree with the provisions relating to termination of leasehold schemes and are of the view that such provisions would be grossly disadvantageous to the Crown. The consultant to the review was of the view that the approach in the Bill complies with legislative precedent considered. Further particulars on

[43] See BC Strata Property Act

why the provisions would be "grossly disadvantageous" have not been provided by the Ministry but the Commission has given an undertaking to discuss this further.

202. The 2013 Bill provided for the regulation of leasehold strata schemes but no provision was made for circumstances where there is a desire of the parties to convert to a freehold scheme. This was noted by the Law Society and the Commission agreed in 2014 that this is a matter which should also be regulated.

203. Thus, clause 113 provides that a corporation, pursuant to a super-majority resolution, may agree to transfer the freehold reversion in each of the strata lots included in the leasehold strata scheme to each of the proprietors. Where such a resolution is passed the Registrar must register each proprietor with absolute title to his strata lot and-

- **(a) the leasehold strata plan continues as a strata plan and the land shown on the strata plan is not subject to a lease;**
- **(b) the corporation continues as if it were originally created by registration of a strata plan that was not a leasehold strata plan;**
- **(c) the leasehold strata lot ceases to exist and the proprietor ceases to be liable for the performance of obligations in respect of the leasehold strata plan and shall thereafter be liable for performance of his obligations in the freehold strata plan; and**
- **(d) any charge in existence against the proprietor's interest immediately before the registration of the strata lot becomes a charge against the absolute title acquired by the proprietor, and, if the charge was registered, the Registrar shall register it against the absolute title and shall amend the parcel number if such change is required.**

204. The Registrar may register the absolute title in the strata lot only if the Registrar has received an application for registration accompanied by a certificate that the conversion has been approved by a super-majority resolution and he has determined that all the interests are registrable.

VACANT LAND STRATA SCHEMES

205. Part 9 of the Bill deals with the following matters in relation to vacant land strata schemes-

- **registration of vacant land strata plans;**
- **contents of a vacant strata plan;**
- **buildings on common property;**
- **status of buildings in vacant land strata schemes;**
- **bye-laws; and**
- **repair and maintenance.**

206. In 1994 the Strata Law was amended to provide that a strata includes the division of a parcel which may not include a building but there are no provisions which deal particularly with such schemes. They are therefore regulated and managed in the same way as strata schemes which are in buildings, subject to private contractual agreements which may be necessary to cover those matters which are specific to vacant land strata schemes.

207. After a consideration of legislative precedents the Commission has decided to submit for discussion clauses 114 to 121. Similar to the regulation of leasehold strata schemes the

general provisions of the legislation will apply, with necessary modifications, to vacant land strata schemes and Part 9 contains those provisions which will be specific to such schemes. Thus, there will be bye-laws, executive committees, etc. and the termination and resolution provisions of the legislation will apply to such schemes.

208. Clause 114 would permit a developer to register a vacant land strata plan that creates a vacant land strata scheme in which, at the time of the registration one or more strata lots are not part of a building or structure and do not include any part of a building or structure and none of the strata lots are located above or below any other strata lot. Clause 115 provides for the contents of a vacant land strata plan. Where the scheme will include buildings or other structures to be constructed after the registration of a plan, the plan and the bye-law may include-

- **(a) the size, location, construction standards, quality of materials and appearance of the building or structure;**
- **(b) architectural standards and construction design standards of the building or structure;**
- **(c) the time of commencement and completion of construction of the building or structure; and**
- **(d) the minimum maintenance requirements for the building or structure.**

209. In relation to common property of a vacant land strata scheme, if buildings or facilities such as swimming pools or tennis courts are to be located on the common property, the vacant land strata plan cannot be registered unless all such buildings or facilities have been completed.[44]

210. One of the main differences with regard to vacant land strata schemes is that the corporation of the scheme is exempt from the obligation to obtain and maintain insurance for the scheme. A corporation will however have duties, powers and functions similar to those under other types of schemes. The corporation will be required to maintain the common property and repair it after damage, but the proprietor of an individual lot is liable for the maintenance and repair of his lot. If a proprietor of a strata lot fails to maintain his strata lot within a reasonable time or to repair it within a reasonable time after damage, the vacant land strata corporation may maintain or repair the strata lot. A proprietor will be deemed to have consented to the repairs or maintenance carried out by the vacant land strata corporation and the cost of the work shall be added to the proprietor's contribution to the administrative expenses.

PROTECTION OF PURCHASERS[45]

211. Part 10 of the Bill deals with the protection of purchasers and regulates, among other things, the following matters-

- **notifiable information to be given by the vendor;**
- **notifiable information to be given by the developer in certain cases;**
- **vendor to inform purchaser of full particulars of notifiable variation;**
- **when purchaser may avoid contract;**
- **effect of avoidance; and**
- **holding of deposit and other contract moneys when a strata lot is pre-sold.**

[44] Clause 116
[45] Based on Western Australia Strata Titles Act

212. In the review the Commission asked for feedback as to whether issues such as ignorance of purchasers of the basic rights and liabilities attached to strata lots, lack of knowledge of strata bye-laws prior to purchase, of the need to contribute to an administrative fund and of how unit entitlement affects the amount of an administrative levy are pertinent to the Cayman Islands.[46] Are consumer protection provisions required in this area of the law?

213. Mr. Michael Allen noted that one of the matters which remain to be examined in the regulation of strata in New South Wales was a better disclosure regime. He stated in relation to "off the plan sale" (i.e. sale of lots before plan is registered) that such sales are dealt with a myriad ways according to the practices of lawyers and their clients. Clients are protected by the inclusion in contracts of copious amounts of plans, bye-laws management statements, easement instruments and other documents to make title and management disclosures to intending purchasers. He opined that many of these documents are nevertheless woefully inadequate and, because contracts vary so much, neither developers nor purchasers have any certainty as to their rights and obligations under the contract when variations occur due to planning, market financier or other constraints.

214. "Off the plan sales" and other consumer related issues noted above were considered by the Law Reform Commission of Western Australia[47] . The Commission in its working paper sought feedback on issues such as 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; and whether any further financial safeguards were necessary to protect persons who agree to purchase lots before the strata plan is registered.

215. Part V of the WA Strata Titles Act 1985 contains the outcome of its review and provides for matters such as the information to be given by every vendor and by the original proprietor; provision to a purchaser of full particulars of variation in a contract; when a purchaser may avoid contract; the effect of avoidance and the holding of deposit and other contract moneys when a lot is pre-sold.

216. Part 10 of the Bill contains provisions which are influenced by the WA legislation. Clauses 123 and 124 contain the information which must be provided to a purchaser.

217. The Bill also provides that the vendor must give a purchaser full particulars of any notifiable variation of a contract of sale. A notifiable variation occurs if before the registration of the purchaser as proprietor of the strata lot or proposed strata lot or earlier avoidance of the contract-

- **(a) the vendor in his own right or exercising the power of the corporation-**
  - **(i) makes a bye-law; or**
  - **(ii) amends or repeals any bye-law;**
- **(b) the registered or proposed strata plan is varied in a material particular or the registered strata plan differs in a material particular from the proposed strata plan;**
- **(c) the unit entitlement of any strata lot or the aggregate unit entitlement is not the same as the unit entitlement or proposed unit entitlement or the**

[46] These were issues highlighted in the Western Australia review
[47] 1977-1982

aggregate unit entitlement or proposed aggregate unit entitlement, as the case may be, that was notified under clause 123; and

(d) a lease, licence, right or privilege in relation to the common property is granted or varied.

218. It should be noted that notwithstanding the disclosure procedure set out in the WA Act one commentator[48] notes that many purchasers in Western Australia still remain uninformed of what exactly they are acquiring in the purchase of a strata lot. He urged real estate agents to spend more time discussing the ramification of all of the disclosure material before finalising an offer and acceptance agreement.

219. The Society of Cayman Architects, Surveyors and Engineers (CASE)[49] supported the introduction of legislation to protect purchasers from problems which may arise from patent and latent defects in construction and advised as follows-

> "Care should be taken to ensure that the developer's duties and responsibilities to address and set right the defects and any consequence thereof, should also succeed to the proprietors of the strata scheme (both strata lots and strata common areas). The law is silent on many of these issues, and we believe should be appropriately revised to strengthen proprietors' specific rights of redress.".

220. The Law Society, on the other hand, were less accepting of the provisions noting that the requirements under this Part were excessive and "seems to place several new onerous provisions on developers in terms of documents to be supplied to purchasers.".[50]

221. The Commission believes that the provisions provide a balanced approach giving purchasers much needed protection but allowing developers the opportunity and flexibility to make such amendments to achieve the product which they wish to sell.

TERMINATION AND VARIATION OF STRATA SCHEMES

222. The issue of termination of strata schemes arose following the destruction of some schemes by Hurricane Ivan but it has also arisen in recent times in the Islands in relation to sale of strata schemes for the purpose of development. In Florida, after the market crashed in 2008, one of the casualties was the value of condo schemes and it was opined in 2010 that in accordance with estimates, as many as 15 percent of the existing condos in Florida were "legitimate targets for termination due to plummeting values caused by high foreclosure rates, unpaid maintenance fees, expired insurance, and serious code violations that jeopardize a project."[51].

223. Intertwined with the many objections to the new types of resolutions set out under the 2012 amendment was the impact of using such resolutions in cases where the sale of a strata scheme or variation of a scheme is contemplated. For example, since October 2012 section 23 of the Law has permitted the voluntary destruction of a building in a strata scheme by super-majority resolution. Based on the definition in section 2 of the Law, if the scheme is located in Seven Mile Beach, the building could be destroyed in accordance with a super-majority resolution of the corporation passed by three-quarters of the votes cast at the meeting and where the total of the unit entitlements for the strata lots for which votes

[48] Andrew Chambers "Homework important on strata title info", Western Australian News, 2007
[49] Letter to the Commission, 13 September 2011
[50] Letter to the Commission, 31 July 2013
[51] "Condo Terminations May Be Next Phase Of Real Estate Crash", Grant Stern, 2010

are counted for the resolution is not less than three-quarters of the total of the unit entitlements for all strata lots included in the strata. Thus, three-quarters of the proprietors who also own three-quarters of the unit entitlement of the scheme could decide whether to destroy and rebuild a building whereas previously such a decision had to be made by all owners. If the scheme is however located for example in Lower Valley a majority of nine-tenths is required.

224. Clause 130 of the 2013 Bill repeated the amendment of the 2012 Law by providing for the voluntary destruction of a building forming part of a strata scheme by a super-majority resolution. Clause 131 provided for the voluntary termination of a scheme also by a super-majority vote but provided that the consent of the chargees must be unanimous. Further, where the chargees do not give their unanimous consent to the termination, the strata scheme may only be terminated by an order of the court.

225. While the Commission understood the complaints regarding the retrospective application of the 2012 amendment to existing strata schemes, it should be emphasised that by legislating for the termination of strata schemes by majority vote the Cayman Islands is not breaking new ground. Rather, our research shows that in many jurisdictions a majority is all that is required for the sale or variation of a scheme.

226. For example in the UK, the Commonhold and Leasehold Reform Act, introduced in 2002, includes a procedure for winding up a scheme by a resolution passed with at least 80 percent of the members voting in favour. Where the winding up resolution is approved with less than 100 percent support, a court order is required to determine the terms and conditions on which the termination is to proceed and to specify how the assets of the commonhold association will be distributed.

227. Most North American condominium legislation provide for termination of a scheme following a resolution passed by at least 80 percent of the unit owners. For example, in Florida where there is a voluntary termination and, unless the declaration which governs the condominium scheme provides a lower percentage, the condominium form of ownership may be terminated for all or a portion of the condominium property pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium if no more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections. This does not apply to condominiums in which 75 percent or more of the units are timeshare units. In New York[52] the percentage is 80 percent in number in common interests or higher if bye-laws so provide and in California under the Uniform Condominium Act, except in the case of a taking of all the units by eminent domain (compulsory acquisition), a condominium may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage if all of the units in the condominium are restricted exclusively to non-residential uses.

228. Singapore has a very detailed procedure for terminating strata schemes. It facilitates the collective ("en bloc") sale of the whole strata building to a common purchaser, such as a developer. The Land Titles (Strata Act) regulates strata schemes and the key elements of the Singapore system are-

a. To initiate a collective sale the following levels of support must be obtained-

[52] Article 9-B: Condominium Act

(i) if the strata development is 10 years or older – from 80 percent of the owners, or
(ii) if the strata development is less than 10 years old – from 90 percent of the owners.

Once the required level of support is obtained, the owners must enter into a collective sale agreement with the purchaser.

b. The collective sale agreement must specify how the sale proceeds are to be distributed amongst all lot owners. The method of distribution is not prescribed by legislation, as the circumstances of each scheme will differ. The owners must agree on the fairest method for their scheme, which may include a distribution based on unit entitlement, the size of the unit or separate unit valuations.

c. An independent valuation report must be prepared on the value of the development at the date of sale and another valuation report on the proposed method of distributing funds.

d. An application to the Strata Titles Board for a collective sale order must then be made by the owners.

e. Before the application is lodged with the Board, notice must be given to all unit owners and registered mortgagees.

f. An objection may be made by any unit owner who has not agreed in writing to the sale or by the mortgagee of an objecting owner.

g. Even if there are no objections, the Board must not make an order unless satisfied that there was no bad faith in the transaction by taking into account:

(i) the sale price for the lots and the common property in the strata title plan;
(ii) the method of distributing the proceeds of sale; and
(iii) the relationship of the purchaser to any of the subsidiary proprietors.

h. Where an objection to the sale is lodged, the Board can refuse to make an order for sale if the objector will suffer financial loss or if the amount the objector receives from the sale would be insufficient to redeem any mortgage. A unit holder will be considered to have suffered financial loss if the sale proceeds for the unit after deductions (e.g. stamp duty and legal fees paid on purchase of the unit and the costs incurred in the collective sale) are less than what was paid for the unit.

229. Under the Units Titles Act, 2010 of New Zealand a unit plan (strata plan) can be cancelled by application to the Registrar following a special resolution of 75 percent or more of the eligible voters who vote. All owners have the right to object to the cancellation by appealing to the High Court. The High Court may authorise the cancellation of a unit plan if satisfied that the plan is just and equitable to the rights and interests of any creditor of the corporation and every person who has an interest in the unit plan.

230. On 15th May, 2014 the British Columbia Law Institute (BCLI) submitted for public comment recommendations regarding the termination of strata schemes under the Strata Property Act of BC.[53] The BCLI made tentative recommendations which included the following-

[53] Consultation Paper on Terminating a Strata- Prepared by the Strata Property Law (Phase Two) Project Committee, May 2014

- **the Strata Property Act should not continue to require the unanimous consent of strata-lot owners to the voluntary winding up of a strata without liquidator or the voluntary winding up of a strata with liquidator;**
- **the Act should allow at least 80 percent of the eligible votes to authorise the voluntary winding up of a strata without liquidator or the voluntary winding up of a strata with liquidator;**
- **the Strata Property Act should not allow stratas to specify in their bye-laws that a greater percentage of eligible votes than is required under the act is needed to authorise the voluntary winding up of the strata without liquidator or the voluntary winding up of a strata with liquidator;**
- **an "eligible vote" for the purposes of a vote on a resolution to authorise the voluntary winding up of a strata without liquidator or the voluntary winding up of a strata with liquidator should be defined as a vote as shown on the strata's Schedule of Voting Rights; and**
- **if the strata does not have a Schedule of Voting Rights, then an "eligible vote" is defined as one vote per strata lot.**

231. As noted before, the 2013 Bill provided that chargees must give their unanimous consent to a termination and where they did not give such consent the strata scheme could only be terminated by order of the court. One of the responders to the 2013 consultation queried why the unanimous consent of chargees should be required when unanimity was not required for the proprietors and why should, for example, one chargee have the power to stop or delay the termination of a strata scheme.

232. The Commission is of the view that, while the rights of the chargees are to be protected, there should be a middle road between unanimous consent and the ability of one chargee to veto a termination and no participation in the vote at all as advocated by the BCLI. In that regard, the Florida approach was considered where, under the Condominium Act, approval of a plan of termination by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75 percent of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien affecting the condominium parcel. If such approval is required and not given, a holder of a recorded mortgage lien who objects to the plan of termination may contest the plan of termination by initiating a summary procedure within 90 days after the date the plan is recorded. A unit owner or lien holder who does not contest the plan within the 90-day period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property.

233. Clause 132(1) of the Bill provides that the proprietors of strata lots and chargees of the strata lots whose interest under their respective charges is not less than 50 percent of the value of the charge may, in relation to the building which comprises their strata lots, resolve by super-majority resolution to destroy the building for the purposes of the re-development of the strata scheme. Clause 133 provides that a strata scheme may be terminated by a super-majority resolution of the proprietors and by –

> **(a) the written consent of 80 percent of all chargees of the strata lots whose interest under their respective charges is not less than 50 percent of the value of the charge; and**

(b) the written consent of 80 percent of all chargees of the whole or part of the common property.

234. The Commission believes that the above together with the power to bring an objection to the court provides adequate protection of the rights of chargees while preventing the delay by one person or institution of what may be in some instances a much needed termination.

235. The Bill was changed to apply the notification and objection provisions to the voluntary destruction of a building for the purposes of development. The 2013 Bill in section 130 had provided merely for the type of resolution which was needed and for the method of settling payment for the units. Also, in the Bill where there is to be a voluntary destruction for the purposes of re-development, in accordance with clause 134, a minimum of three months' notice must be given to every proprietor, every chargee of a strata lot, every chargee of the whole or part of the common property and any person who is the grantee of an unregistered lease or licence over the whole or part of the common property.

236.. Any person who is a proprietor, who has a reversionary interest or who is a chargee, and who is served with a notice of termination of a strata scheme may, within twenty-eight days of being served with that notice, give written notice in the prescribed form to the corporation of his objection to the resolution and his intention to apply to the court for relief on the grounds that the effect of the resolution would be unjust or inequitable for the minority. A person who has given a notice of objection shall also, within twenty-eight days of being served with that notice file with the court an application for relief in the prescribed form. The court is required to hear the objection as soon as practicable and may make any order it thinks fit, including any of the following orders-

(a) confirming the resolution;
(b) overturning the resolution;
(c) requiring the corporation to pay compensation to the person making the objection;
(d) requiring the person making the objection to pay compensation to the corporation; or
(e) granting an injunction.

237. The court will not be able to make an order unless it is satisfied that it is just and equitable to do so. If the court makes an order overturning the resolution, then the resolution is to be treated as not having been passed. If the court makes an order confirming the resolution, then the corporation may proceed to carry out the resolution subject to any terms and conditions imposed by the court.

238. In accordance with clause 136, a strata scheme may also be terminated by order of the court upon an application by a corporation, by a proprietor or by a chargee. An order for the termination of a strata scheme may be made on the ground that-

(a) a majority of the buildings comprised in the strata scheme have been destroyed or damaged and it is not reasonably practical for them to be repaired or re-instated;
(b) the buildings comprised in the strata scheme (other than those comprised in the common property) are no longer suitable for the use for which they were originally constructed;
(c) the whole of the land comprised within the strata scheme has been compulsorily purchased by Government pursuant to the Land Acquisition Law (1995 Revision) or any other legislation providing for the compulsory acquisition of land; or

(d) part of the land comprised in the strata scheme has been compulsorily purchased with the result that it is impractical or uneconomic for the remainder to be used in the manner for which it was originally intended,

and that it is just and equitable in all the circumstances for an order to be made.

DISPUTE RESOLUTION

239. The 2013 Bill provided for strata disputes to be dealt with by the summary court, and in the case of complex disputes, by the Grand Court.[54] This was included in the Bill after the Commission had asked in its 2011 discussion paper for input on what was the best approach to deal with strata disputes- voluntary mediation or adjudication by the summary court of most disputes and by the Grand Court only where the matter is complex? The few responses to this issue favoured adjudication by the court.

240. However, the Law Society in 2013 expressed the view that there could be several problems with proceedings in the summary court especially in light of the fact that the court was very understaffed. The Law Society was of the view that consideration could be given to setting up in the Lands and Surveys Department a division to deal with strata disputes and to educate strata committees on how to more effectively manage strata schemes. Local attorney Mr. Ward Sykes was of the view that alternative dispute resolution methods such as a tribunal or mediation should be used as this may be a more cost effective way to handle routine matters.

241. The dispute resolution provisions were re-visited in response to the comments given and clauses 147 to 152 of the Bill contain such provisions which include mediation. As noted in our 2011 discussion paper the literature researched by the Commission shows that in many instances mediation is often a far less expensive route than court action. In some jurisdictions when a court requires litigating parties to mediate, it usually has a list of volunteer mediators who will work for free or for a nominal fee. The growing number of persons being trained in the Cayman Islands, including a number of public officers, could provide a ready supply for a panel of mediators.

242. The Commission in its 2008 report[55] on the landlord and tenant review called for the appointment of a Residential Tenancies Commissioner who would provide mediation services in landlord and tenant disputes. The Residential Tenancies Law was passed in 2009 and that Law provided for the appointment of one or more Residential Tenancies Commissioners to mediate in tenancy matters. It had been suggested by the Commission that the Commissioner's post could be a part-time post which may be filled by an officer of the Valuation Office for example. In an emergency situation more than one Commissioner could be appointed. We believe that a similar post could be used to mediate in strata matters. However to date, seven years later, the Residential Tenancies Law has not been brought into force. As a result, no similar recommendation for a government appointed mediator will be made by the Commission at this time.

243. The Bill provides that a party to a dispute may first apply for mediation of the dispute by a person selected by the parties. Such person may be an attorney-at-law or a person trained in mediation. A mediator appointed by the parties shall, where both parties have agreed to mediation, confer with the parties and endeavour to obtain a settlement with respect to the

[54] Clause 141
[55] July 2008

disagreement submitted to mediation. [56]Each party will be required to pay the share of the mediator's fees and expenses that the settlement specifies, if a settlement is obtained or the mediator specifies in the notice stating that the mediation has failed, if the mediation fails. Where a settlement is reached it must be put in writing by the mediator and signed by the parties.

244. If mediation fails or if one or both of the parties refuse mediation then the matter may be taken to the summary court or, in the case of a complex or significant matter, to the Grand Court.

LAYERED STRATA SCHEMES

245. One of the issues brought to our attention near the end of the review in 2015 is the need to expressly provide in the legislation for layered strata schemes. Essentially, a layered strata scheme is a strata scheme in which a primary strata corporation is created by one strata plan. Primary strata lots are then divided by strata plans to create subsidiary schemes, each subsidiary scheme has its own strata corporation which will be a member of the primary strata company and the primary strata corporation manages the common property of the primary strata scheme.

246. While the 2013 Bill provided in clause 3 that a parcel may be subject to more than one strata plan, it was argued that the Bill seems to contemplate mixed-use non-layered schemes only, by providing only for strata management statements and their regulation of mixed-use in a building. A mixed-use scheme is usually where a building or buildings on a parcel contain a mix of retail, residential and office areas with different uses being accommodated in separate strata schemes in those buildings. The relationship of those schemes with each other in the building are regulated by management statements.

247. The Commission was advised that at least one layered scheme exists in the Cayman Islands and that it is regulated primarily through contractual agreements and bye-laws. The main concerns with these types of schemes which were brought to the attention of the Commission include the regulation of the responsibility of the corporations of each scheme especially with regard to the management of the common property, the levying of contributions, consumer protection and the easements which are created.

248. In considering this area of strata reform the Commission considered issues such as what information does a potential purchaser need to receive, should there be a provision for the re-allocation of unit entitlements at the conclusion of a layered scheme, should the developer in the first plan provide information about subsidiary schemes?[57]

249. The Commission recommends that a dual approach to the regulation of layered schemes be followed. The Bill is a very large, complex one and the Commission is mindful of the fact that it should remain legislation which is readily understood by most people. In order to avoid more complexity, the Bill provides a model management statement in Part B of Schedule 1 which would regulate the management of layered schemes. Like the management statement previously proposed for mixed-use schemes and now contained in Part A of Schedule 1, such a statement would have effect as a deed containing certain covenants entered into by each person who is-

(a) a corporation of a strata scheme for part of the building or part of the parcel; or

[56] Clause 149

[57] Informed by the WA Landgate review, January 2014

(b) a proprietor, chargee or lessee of any of the strata lots in such strata scheme; and
(c) any other person who is the registered proprietor in any part of that parcel or the building or its site (being a part affected by the statement) or the chargee of any such part.

250. The covenants would be those set out in clause 24(2) and these covenants are-

(a) a covenant by which those persons jointly and severally agree to carry out their obligations under the registered strata management statement in force; and
(b) a covenant by which those persons jointly and severally agree to permit the carrying out of those obligations.

251. The Bill also provides for the making of regulations by Cabinet to provide for the management of parcels to which more than one strata plan and strata scheme relates. Such regulations would cover those areas which are not covered by management statements such as initial development issues, initial disclosure regimes, conversion of existing schemes to layered schemes, tailoring phased development to accommodate layered schemes; exemption from certain provisions of the Law where this is necessary and matters which go beyond management issues. As this type of strata becomes more common, the Commission is of the view that regulations and management statements would provide a quick, effective and flexible way to keep abreast of such development.

SCHEDULES

252. Schedule 1 of the Bill contains provisions relating to management statements and Schedule 2 sets out statutory bye-laws for residential strata schemes. Such bye-laws relate to residential strata schemes only and seek to regulate, among other matters, executive committees; voting at meetings; the obligations of corporations and proprietors; indemnity for members of executive committees and the amendment of bye-laws.

253. Clause 50 of the Bill provides that until bye-laws are made by a corporation of a residential strata scheme (not including a vacant land strata scheme) the bye-laws set out in Schedule 2 shall, as and from the registration of a strata plan relating to such strata scheme, be in force for all purposes in relation to that strata scheme. In the case of a strata scheme other than a residential strata scheme, the application for the registration of a strata plan must be accompanied by bye-laws prepared by the developer and, until bye-laws are made by the relevant corporation, such bye-laws shall, upon registration of the strata plan and approval by the Registrar, be in force for all purposes in relation to the relevant parcel and the strata lots and common property therein.

254. Clause 50 further provides that bye-laws for the time being in force shall bind every corporation and the proprietors to the same extent as if such bye-laws had respectively been signed and sealed by such corporation and each proprietor and contained covenants on the part of such corporation with each proprietor and on the part of each proprietor with every other proprietor and with such corporation to observe and perform all the bye-laws.

255. Schedule 3 sets out detailed transitional provisions relating to existing schemes.

CONCLUSION

256. This Final Report sets out the main areas of the Bill which is attached as the Appendix. This review has been one of the lengthiest and more complex ones undertaken by the Commission. It is also the review which has received the most public input. This is not at all unexpected in light of the fact that a large percentage of the population of the Islands lives in strata schemes.

257. The Commission's recommendations on the regulation of leasehold strata schemes will require further discussion but it is hoped that this legislation will be favorably considered by the Government as the Commission is of the view that the draft Bill addresses many of the concerns expressed by the public, the legal associations and real estate associations.

Chairman

APPENDIX
[SEE ATTACHED]