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Disputes in company title home units

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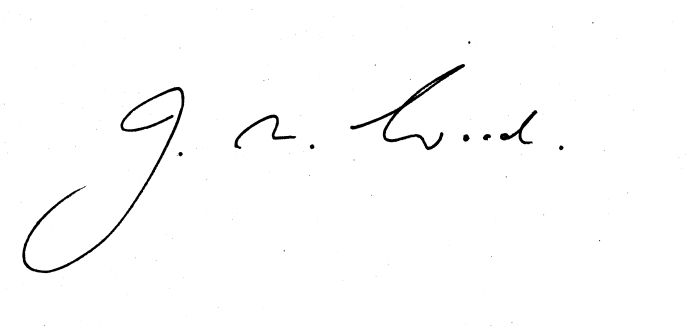
Letter to the Attorney General

To the Hon John Hatzistergos
Attorney General for New South Wales

Dear Attorney

Disputes in company title home units

We make this Report pursuant to the reference to this Commission received 16 May 2006.



The Hon James Wood AO QC

Chairperson

April 2007

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TERMS OF REFERENCE

In a letter to the Commission dated 15 May 2006, the Attorney General, the Hon R J Debus MP asked the Commission to investigate the limited dispute resolution options available to residents in company title home units.

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Recommendation 1: *see page 17*

Legislation should invest the Consumer, Trader and Tenancy Tribunal with jurisdiction to hear disputes arising in company title home unit buildings with the exception of disputes:

- relating to the sale or transfer of shares in the company or the lease of the shareholder's unit;
- in which relief is claimed against oppression under Pt 2F.1 of the *Corporations Act 2001* (Cth);
- relating to the forfeiture of shares in the company; and
- relating to the winding up of the company.

Recommendation 2: *see page 18*

The constitution of a company title home unit building may not exclude the jurisdiction invested in the Consumer, Trader and Tenancy Tribunal by Recommendation 1, and any provision that purports to do so is void.

Recommendation 3: *see page 18*

The legislation should require the Registrar of the Consumer, Trader and Tenancy Tribunal to refer company title home unit disputes to mediation before they are listed for resolution in the Consumer, Trader and Tenancy Tribunal, unless the Registrar is of the view that mediation is, in the circumstances, unnecessary or inappropriate.

Recommendation 4: *see page 19*

The legislation should state that, to the extent necessary, its provisions are Corporations legislation displacement provisions.

Recommendation 5: *see page 20*

The legislation should invest the Consumer, Trader and Tenancy Tribunal with jurisdiction to hear disputes arising in residential tenant in common buildings with less than twenty tenants in common, with the exception of disputes relating to the transfer of a tenant in common's share in the land or to leasing. The jurisdiction should not be exercised before mediation of the dispute has been attempted, unless the Registrar determines that mediation is, in the circumstances, unnecessary or inappropriate. The jurisdiction to hear such disputes may not be excluded by agreement between the tenants in common.

Recommendation 6: *see page 20*

Funding of at least $100,000 should be made available to the Office of Fair Trading and the Consumer, Tenancy and Trading Tribunal to facilitate the implementation of the Recommendations in this Report.

1. INTRODUCTION

1.1 On 15 May 2006, the then Attorney General, the Hon R J Debus MP, asked the Commission to investigate, as part of its Community Law Reform Program, the limited dispute resolution options available to residents in company title home units. The reference was prompted by the concerns expressed to the Commission by Justice Dennis Cowdroy, then of the Land and Environment Court,[1] that disputes over the use and occupancy of company title home unit buildings cannot currently be resolved in an accessible forum, such as the Consumer, Trader and Tenancy Tribunal ("CTTT" or "Tribunal"). At present, the Supreme Court is the only adjudicatory forum for resolving such disputes. In Justice Cowdroy's experience, the cost of litigating in the Supreme Court means that the owners of shares in a company title unit, such as elderly residents on fixed incomes, can effectively be without a legal remedy. Similar concerns had been raised in Parliament in 1994.[2]

1.2 In the light of our consultations and research, the Commission has come to share these concerns. The challenge has been to formulate reforms that do not destroy the unique character of company title home units, and hence what may be their appeal to residents and potential residents. It is not the purpose of this reference to equate company title with other forms of home unit title, in particular strata title. Units held under company title can be converted into strata title and procedures exist for doing so.[3] It is beyond our terms of reference to question the desirability of retaining company title as such, or the adequacy of the procedures for converting company title into strata title.

2. THE NATURE OF COMPANY TITLE

2.1 Before the introduction of strata title legislation in New South Wales in 1961, company title was the most common way of accommodating the horizontal subdivision of airspace. Company title is a system of communal land ownership where a person becomes entitled to live in a unit in a residential home unit building by acquiring shares in an incorporated body (either a company or association) that owns the building, rather than by simply acquiring an immediate estate or interest in the land. The purchase of shares in the company normally gives the shareholder a contractual right against the company confirmed by a licence or a lease from the company to the exclusive use and occupation of a specified part of the building – that is, a home unit and/or car space – and the right to use other parts of the property in common with other shareholders.[4]

2.2 The company's constitution (its memorandum and articles of association) is paramount. Most disputes in company title home units will be referable to the constitution, which will establish the company's governing body and set out how the building will

1 Justice Cowdroy was appointed a judge of the Federal Court of Australia on 13 March 2006.

2 NSW, Legislative Assembly, *Parliamentary Debates (Hansard)*, 17 March 1994, 961 (Ms Moore).

3 See G Bugden and M Allen, *New South Wales Strata and Community Titles Law* (CCH Loose-leaf Service) ¶4-510-¶4-600.

4 See Peter Butt, *Land Law* (5th ed, Lawbook Co, 2006), [2110].

operate, including how the shareholder/owner's exclusive occupation is allocated and exercised. In common with larger commercial companies, the memorandum and articles of association usually give extremely wide powers to the chairperson and other members of the board of directors to run the company.

2.3 The following paragraphs of this section describe aspects of company title home units that are crucial to this reference.

Restrictions on sale and lease

2.4 A common feature of company title is that the company's constitution usually provides that the shareholders' right to sell or transfer their shares in the company or to lease their units is subject to the approval of the board of directors. In considering such approval, the company's constitution may direct the board to exercise their powers in a particular way, for example, reasonably. Alternatively, the constitution may simply confer an unfettered discretion on the board. In the latter case, provided the directors exercise their discretion "bona fide in what they consider to be in the interests of the company, and not for any collateral purpose", their discretion is "absolute and uncontrolled".[5] Thus, in *Magill v Santina Pty Ltd*,[6] a majority of the New South Wales Court of Appeal upheld a board of directors' decision not to approve a tenancy that a shareholder proposed to enter into with her grandson at a rental below the market rate either because, on its construction, the board's power was unfettered;[7] or because it was within the power granted to refuse to grant a lease to a particular tenant for rent who may be less likely to maintain the amenity and standards of the building than a shareholder.[8]

Loss of shares

2.5 The constitutions of company title home unit buildings often provide for the forfeiture of shares by a shareholder/owner in certain circumstances, such as the non-payment of corporate levies or specified breaches of the articles of association. Procedures under the articles leading to forfeiture of shares must be strictly complied with.[9] This is hardly surprising given that forfeiture generally leads to the forced sale of the shareholder's unit and thus to the eviction of the shareholder from his or her home.

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5 *Ascots Investments Pty Ltd v Harper* (1981) 148 CLR 337, 348 (Gibbs J); *Magill v Santina Pty Ltd* [1983] 1 NSWLR 517, 527 (Glass JA). See generally R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2006) ch 7.

6 [1983] 1 NSWLR 517.

7 *Magill*, 526-27 (Glass JA).

8 *Magill,* 530 (Mahoney JA). Justice Hutley, dissenting, construed the relevant clause of the company's articles as limiting the discretion of the board of directors and holding that the board had not properly exercised this limited power: *Magill*, 522-23.

9 *Ghabrial v Romolly Pty Ltd and Anor* (1991) 5 ACSR 611, 614 (Cohen J).

Disputes and remedies

2.6 The shareholder/resident of a company title home unit may be in dispute with the board of directors (for example, over the legality of a levy) or with another resident (for example, over noise). A shareholder has standing to bring such an action if the company's constitution confers on him or her a right to do so, either personally[10] or as a member of a class of shareholders.[11] Such rights may also stem from the general law (for example, the right to notice of meetings that is sufficiently informative)[12] or from the *Corporations Act 2001* (Cth) (for example, the right to inspect the company's register).[13] The effect of a successful action will be to require the board of directors or other resident to act in accordance with the constitution of the company, the general law or statutory obligation in question. An injunction or declaration will usually be granted to achieve the desired outcome.[14]

2.7 The directors' breach of a shareholder's personal rights is most unlikely to involve a breach of fiduciary duty to the shareholder/owner of a company title home unit.[15] However, the directors' conduct may relevantly be oppressive to, unfairly prejudicial to, or discriminatory against, the shareholder, giving the shareholder the right to seek relief against the oppression.[16] In the case of a home unit company, the test of oppressive or unfairly prejudicial or discriminatory conduct is judged from the viewpoint of a reasonable person associated with a home unit company.[17] While the fact-driven nature of the oppression remedy makes it impossible to list all instances of such conduct,[18] it has included:

- a failure to give notice of a meeting to increase the amount of a levy to be paid by the shareholder;[19]

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10 R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2006), [19.2].

11 See, for example, *Wilson v Meudon Pty Ltd* [2005] NSWCA 448.

12 *Kaye v Croydon Tramsways Co* [1898] 1 Ch 358.

13 *Corporations Act 2001* (Cth) s 173.

14 Consider, for example, the declaratory relief ordered by Hutley JA in his dissenting judgment in *Magill v Santina Pty Ltd* [1983] 1 NSWLR 517, 523-24.

15 See *Fedorovitch v St Aubins Pty Ltd* [1999] NSWC 506, [51], where Young J suggested that as each shareholder in a home unit company is more concerned with his or her own unit rather than the company as a whole, fiduciary duties owed by directors to the average hypothetical member are hard to discern. Directors' fiduciary duties are, of course, generally owed only to the company, although special circumstances may cause fiduciary relationships to arise, on the facts, between particulars directors and particular shareholders: see R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2006), [8.17].

16 See generally *Corporations Act 2001* (Cth) Part 2F.1.

17 *Wilson v Meudon Pty Ltd* [2004] NSWSC 1183, [110] (Gzell J) (overruled without affecting this point [2005] NSWCA 448).

18 See generally R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (12th ed, LexisNexis Butterworths, 2005), [11.460].

19 *Ghabrial v Romolly Pty Ltd and Anor* (1991) 5 ACSR 611, 616.

- the generation of fictitious meetings and minutes, coupled with the appointment in suspicious circumstances of a solicitor for the company and an invalid attempt to impose the costs of his appointment on the shareholders;[20] and,
- the imposition of a levy on the shareholder to fund the company's defence of oppression proceedings brought by the shareholder.[21] Where oppression is made out, the court has a wide discretion in fashioning relief.[22]

2.8 It is unsurprising that relief against oppression should be sought in the context of company title home unit disputes. The companies involved are usually small private companies in which the minority shareholders are particularly prone to the oppressive conduct of the majority.[23] Because sale of their shares in the company is invariably subject to the approval of the board of directors, "owners" of a company title home unit may live in fear of compromising their ultimate weapon: the ability to sell their shares in the market and move elsewhere.[24] This gives the board of directors or its chairperson a power (however it may be limited) that can effectively be used either to threaten some unfair dealing with the shareholder's interest in the company or to achieve the same. Indeed, the conduct of the board of directors may have depressed, and may still be depressing, the value of the shares, making sale an unattractive option. "In this intimate, illiquid relationship the corporate norms of centralized control and majority rule can easily become instruments of oppression."[25]

Dispute resolution

2.9 There is no statutory provision in New South Wales that directs the resolution of company title home unit disputes in any particular forum. The forum for the resolution of these disputes is, therefore, a court of general jurisdiction. This means the Supreme Court, in particular the Equity Division of that Court, to which such disputes are generally referred, "however trivial" they may be.[26]

2.10 The constitutions of company title home units may, of course, contain dispute resolution provisions, although the constitutions to which the Commission has had access do not generally do so. One such constitution, dating from 1958, does, however, list as one of the company's objectives the reference to arbitration of any disputes by or against

20 *Fedorovitch v St Aubins Pty Ltd* [1999] NSWC 506, [52].

21 *Wilson v Meudon Pty Ltd* [2004] NSWSC 1183, [128]-[130], this order upheld on appeal [2005] NSWCA 448, [90].

22 *Corporations Act 2001* (Cth) s 233(1) (empowering the court to make such order or orders as it thinks appropriate and listing ten specific examples).

23 See I M Ramsay, "An Empirical Study of the Use of the Oppression Remedy" (1999) 27 *Australian Business Law Review* 23, 27 (noting that the oppression remedy is most widely used by shareholders in small private companies). See also E Boros, *Minority Shareholders' Remedies* (Clarendon Press, 1995) ch 2.

24 Compare E Boros, *Minority Shareholders' Remedies* (Clarendon Press, 1995), 5-6. But, as we note below (para 6.4), our consultations did not establish that restrictions on the sale of shares in home unit companies are in practice causing problems.

25 R B Thompson, "Corporate Dissolution and Shareholders' Reasonable Expectations" (1988) 66 *Washington University Law Quarterly* 193, 196-7.

26 See *Oliver v Bryant Strata Management Pty Ltd* (1995) 41 NSWLR 514, 518 (Levine J).

the company and the commitment of the company to abide by the outcome of such arbitration. Of course, disputes may be referred to mediation by agreement between the parties, and the Commission is aware of instances in which this has occurred.

3. STRATA TITLE COMPARED

3.1 Strata title legislation, pioneered in New South Wales in 1961,[27] provides for the subdivision of land into strata and for the disposition of titles to those strata. The legislation allows people to own a part of a building (a "lot") with supporting rights over other parts of the building, the land not subject to individual ownership being "common property". The common property is generally owned by the owners' corporation, a separate legal entity constituted by the proprietors from time to time of the individual lots. Every strata scheme has by-laws that regulate day to day living in the scheme,[28] including the use of common property and restrictions on the occupancy and use of lots.[29]

3.2 For the purposes of this Report, the following should be noted:

- Unlike the position in company title home units, restrictions cannot be placed on the ability of strata title unit holders to sell or lease their lots.[30]

- Strata owners who breach strata legislation or the by-laws face "relatively minor"[31] sanctions (such as pecuniary penalties) set out in the relevant legislation or rules,[32] rather than being faced, as the constitution of a company title home unit may dictate, with the forfeiture of shares (and hence of the unit itself) in particular circumstances (such as failure to pay a levy).

- Legislation contains detailed provisions for the resolution of disputes relating to strata schemes.[33] The legislation identifies the persons entitled to seek relief in relation to particular types of dispute and sets out the procedures for dealing with such disputes. The characteristics of these procedures are their reliance on flexible and informal (rather than strictly adversarial) procedures; their speed; and their relative cheapness.[34] Mediation, provided under the auspices of the Office

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27 *Conveyancing (Strata Titles) Act 1961*(NSW).

28 *Strata Schemes Management Act 1996* (NSW) ch 2 pt 5, and the model by-laws in sch 1-5.

29 For an overview of strata title law in Australia, see K Everton-Moore, A Ardill and J Warnken, "The Law of Strata Title in Australia: a jurisdictional stocktake" (2006) 13 *Australian Property Law Journal* 1, esp 10-14 (NSW).

30 *Strata Schemes Management Act 1996* (NSW) s 49(1).

31 T Cahill, "Strata and Company Title – recent developments and some 'challenges'" (Company Title and Strata Developments Papers, Continuing Professional Education Department, The College of Law, Sydney, October 2003), 19.

32 For example, *Strata Schemes Management Act 1996* (NSW) ch 5 pt 6.

33 *Strata Schemes Management Act 1996* (NSW) ch 5. For commentary, see A Ilken, *Strata Schemes and Community Schemes Management and the Law* (LBC Information Services, 1998) ch 14. Compare *Community Land Management Act 1989* (NSW) pt 4, 5.

34 See para 5.1-5.6.

of Fair Trading (OFT), is generally an essential first step. Where mediation is inappropriate or where it fails, the dispute, depending on its nature, will be heard by an Adjudicator or by the Consumer, Trader and Tenancy Tribunal. An appeal may lie to the Supreme Court against an order of the CTTT. In contrast, and as already noted, disputes in relation to company title home units can be dealt with only in the Supreme Court.[35]

4. IS THERE A NEED FOR AN ACCESSIBLE FORUM FOR COMPANY TITLE HOME UNIT DISPUTES?

4.1 By its very nature, communal living gives rise to disputes over the use, repair, occupation or disposal of particular parcels of the property. A forum is needed for the resolution of such disputes. In most cases the nature of the "title" that the disputants have in the property is irrelevant to the identification of that forum. For example, if the "owner" of a unit in a building has leaking windows, his or her complaint against a building "management" reluctant to fix the window says nothing about the forum in which the dispute is to be resolved. It is irrelevant to the identification of that forum whether the merits of the dispute are ultimately referable to the interpretation of the by-laws of a strata scheme or of the constitution of a home unit company. All other matters being equal, there is no rational reason why the nature of the "title" dictates that, in a strata scheme, the "leaking window dispute" is amenable to the jurisdiction of the CTTT; whereas, if the property in held under company title, it has to be heard in the Supreme Court. Moreover, the expertise needed to solve the problem is essentially the same. A similar comment can be made about many other disputes that arise in communal living conditions; such as, disputes over the keeping of pets or noise (which our consultations suggest are, with leasing, the most common causes of dispute),[36] or disputes about parking, exclusive use of common property, alterations and additions, and the raising of financial levies.

4.2 Disputes in company title home units and strata home units often have another feature in common. They occur in an environment in which the principle of majority rule operates; in company law, through the board of directors elected by the majority of the shareholders; in strata law, however manifest, through the decisions of the majority of the unit holders in the owners' corporation. The difference is that in strata schemes the minority, by reason of the accessibility of the dispute resolution provisions of the legislation, is able to ensure more easily that the majority acts in accordance with the legislation and rules governing the strata scheme. In contrast, the cost of litigating in the Supreme Court would seem to deter company title home unit residents from litigating all but the most serious disputes.

4.3 Indeed, even in serious disputes, company title home unit residents may hesitate to resort to litigation in the Supreme Court. The most common remedy sought in such disputes is relief against oppression.[37] Yet the law surrounding the oppression remedy and establishing its existence in a particular company is extremely complex, hinging on

35 Para 2.9.
36. See para 6.5.
37. See para 2.7.

the facts of the case.[38] The risk of not succeeding in the Supreme Court must often deter even the most eager, but well advised, litigant from pursuing the remedy, especially in view of the cost of so doing.[39]

4.4 Thus, it would seem that residents in company title home units are often disempowered, without any effective means of holding the board of directors accountable for their decisions or actions. The Commission received much anecdotal information that this is so; that many disputes in company title home units are not satisfactorily resolved; and that conflict between shareholder/owners and boards of directors often festers over many years. Bearing in mind that disputes must occur in company title units similar to those that occur in strata title units, available statistics would seem to support the anecdotal information that disputes in company title home units are not being resolved. In 2004-5 the CTTT received 1,090 Strata and Community Schemes Division applications covering the broad area of the disputes to which communal living gives rise.[40] In contrast, no more than a handful of the disputes involving company title home units that are relevant to this Report appear to have been litigated in the Supreme Court since the 1960s.[41] Even allowing for the existence of vastly more strata schemes than company title home units,[42] it is difficult to believe that the great difference in the incidence of litigation is attributable to the fact that most company title home unit disputes are settled before litigation.

4.5 It is true that, as corporate watchdog, the Australian Securities and Investment Commission ("ASIC") has power to investigate and pursue alleged breaches by the board of directors of a company title building, including breaches relating to financial accountability and transparency.[43] However, the Commission's consultations reveal that ASIC's role is regarded, at least by some professionals and by unit holders who have had dealings with it, as weak and ineffectual at best, and as uninterested at worst. The perception is that, in the broader context of corporate Australia, home unit companies are a comparatively minor concern in ASIC's wide and busy jurisdiction.

4.6 The discussion in this section points to the need for a forum for the resolution of company title home unit disputes other than the Supreme Court. Such reform could only be achieved by legislation. This raises the question whether the incidence of company title in New South Wales is sufficient to warrant the intervention of the New South Wales

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38 For an Australia-wide empirical study of 88 judgments (mainly State Supreme Court) covering almost 40 years of use of the oppression remedy in courts, see I M Ramsay, "An Empirical Study of the Use of the Oppression Remedy" (1999) 27 *Australian Business Law Review* 23.

39 The Ramsay study found that courts are slightly more prepared to find that oppression has *not* been established than they are to find for the plaintiffs (Ramsay, 29), though this may, of course, not be replicated in company title home unit disputes.

40 NSW, Consumer, Trader and Tenancy Tribunal, *Annual Report 2004-2005*, 36.

41 See *Feodorovitch v St Aubins Pty Ltd* [1999] NSWSC 506, [56], and *Feodorovitch v St Aubins Pty Ltd (No 2)* [1999] NSWSC 776, [21] (drawing attention to the lack of authority on the application of the oppression remedy in this context).

42 See para 4.6.

43 See *Corporations Act 2001* (Cth) s 5B and *Australian Securities and Investments Commission Act 2001* (Cth) s 11.

Parliament. In the Commission's view, it is. There are approximately 820 home unit companies in New South Wales.[44] In comparison, there are some 63,686 strata schemes and 500 registered community title schemes.[45] While this suggests that only around 1% of communal living in New South Wales occurs in company title home units,[46] the number of residents in such units in unknown. Moreover, the incidence of the use of company title could always increase as a response to problems that may arise in the future course of urban development.[47] In any event, the intensely personal nature of the disputes with which this Report is concerned means that their effective resolution is a matter of extreme importance to such residents. In the Commission's view, if it is possible to provide an accessible and effective forum for the resolution of such disputes, this should be done.

5. SHOULD THE CTTT BE THE FORUM FOR THE RESOLUTION OF COMPANY TITLE HOME UNIT DISPUTES?

The Consumer, Trader and Tenancy Tribunal

5.1 The CTTT has jurisdiction to determine matters arising under various legislation, including the *Residential Tenancies Act 1987* (NSW), the *Landlord and Tenant (Rental Bonds) Act 1977*, the *Strata Schemes Management Act 1996* (NSW), and the *Retirement Villages Act 1999* (NSW). A specialist Division of the Tribunal is established to determine disputes arising under each piece of legislation. For example, the Retirement Villages Division of the Tribunal deals with disputes between the operator of a retirement village and the residents. The Strata and Community Schemes Division deals with disputes between unit holders, the owners' corporation and other interested parties. This Division was set up as an alternative to litigating strata title matters in the Supreme Court.[48]

5.2 The benefits of using the CTTT for conflict resolution in strata title schemes are its simplicity, informality and relative low cost to "interested persons" involved in strata title disputes.[49] Parties can have lawyers represent them at the Tribunal if they wish. The *Strata Schemes Management Act 1996* (NSW) sets out in detail the types of orders that the Tribunal can make and who may apply for them.[50] The Act allows the CTTT to

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44 See Appendix A.

45 As at 30 June 2006: information provided by the Office of Fair Trading, 19 September 2006.

46 Among other matters, the figures do not account for all types of communal living in NSW, for example, living in community schemes regulated by the *Community Land Management Act 1989* (NSW).

47 Company title has been used to promote dual occupancy (see, for example, *1643 Pittwater Rd Pty Ltd v Pittwater Council* [2004] NSWLEC 685, [24],[25]) and for retirement villages. Although exact figures are unknown, five (out of a total of approximately 750) retirement villages are known to operate under company title: information supplied by the Office of Fair Trading, 19 September 2006.

48 G Bugden and M Allen, *New South Wales Strata and Community Titles Law* (CCH Loose-leaf Service) ¶1-300.

49 See, for example, *Strata Schemes Management Regulation 2005* (NSW) pt 6 (fees), pt 7 (proceedings).

50 *Strata Schemes Management Act 1996* (NSW) ch 5.

determine its own procedure.[51] The Tribunal can be as informal as circumstances permit and use a range of options to resolve disputes as effectively and efficiently as practical.[52]

5.3 Mediation must in most cases be attempted first before making an application for adjudication.[53] If mediation is successful, an Adjudicator at the Tribunal can then make an order to give effect to an agreement arising out of a mediation session.[54]

5.4 The Office of Fair Trading ("OFT") provides a low-cost mediation service, with mediators employed by the OFT available to assist those involved in strata title disputes.[55] The OFT mediation service is presently small with five full time mediators.[56] When an application is received by the OFT Mediation Services Unit, staff check the details to see if the matter can be resolved quickly through case management between the parties. If the matter cannot be resolved in the initial stages it is then referred for formal mediation.

5.5 In the financial year 2005-2006, the total number of strata title disputes *resolved* by the OFT Mediation Services Unit either through case management or mediation was 564 (around 50% of all strata matters brought to the Mediation Services Unit that year). Specifically, 217 matters were resolved through case management; and of the 490 matters referred for formal mediation, 347 (or 71 %) were resolved.[57]

5.6 Following an unsuccessful attempt at mediation, certain disputes go to a Tribunal Division hearing;[58] others go to an Adjudicator,[59] with an appeal to the Tribunal from an order of an Adjudicator as of right.[60] An Adjudicator may refer complex or important applications directly to the Tribunal.[61] During its investigations the Tribunal need not be bound by the rules of evidence.[62] An appeal lies to the Supreme Court against an order of the CTTT, generally only on questions of law.[63]

Expanding the jurisdiction of the CTTT

5.7 In the Commission's view, the CTTT is an appropriate forum in which most company title home unit disputes can be resolved. The present Strata and Community Schemes Division already deals with many of the sorts of disputes that are likely to arise in company title home units. Moreover, the dispute resolution processes used at the CTTT

51 *Strata Schemes Management Act 1996* (NSW) s 186.
52 NSW, Consumer, Trader and Tenancy Tribunal, *Annual Report 2004-2005*, 45.
53 *Strata Schemes Management Act 1996* (NSW) s 125(1); ch 5 pt 2. See also introductory note to ch 5.
54 *Strata Schemes Management Act 1996* (NSW) s 131.
55 See NSW, Consumer, Trader and Tenancy Tribunal, *Annual Report 2004-2005*, 34.
56 Information provided by the Office of Fair Trading, 24 July 2006.
57 Information provided by the Office of Fair Trading, 7 August 2006.
58 *Strata Schemes Management Act 1996* (NSW) s 137(3), ch 5 pt 5.
59 *Strata Schemes Management Act 1996* (NSW) section 137(2), ch 5 pt 4.
60 *Strata Schemes Management Act 1996* (NSW) s 177.
61 *Strata Schemes Management Act 1996* (NSW) s 164.
62 *Strata Schemes Management Act 1996* (NSW) s 186(2)(a).
63 *Strata Schemes Management Act 1996* (NSW) s 200(2). An appeal involving a mixed question of law and fact requires the leave of the Supreme Court.

recognise the importance of mediation in resolving disputes between persons in communal living situations.[64] Further, those processes are informal, swift and low cost.

5.8 Legislation would need to be passed to confer jurisdiction in company title home unit disputes on the CTTT. While following the order of dispute resolution set out in the *Strata Schemes Management Act 1996* (NSW) (that is, mediation, adjudication and tribunal hearing), the legislation would also need to define the nature of disputes covered by potential orders of the Tribunal or an Adjudicator; who may apply for these orders; and the processes applicable to particular applications, including which disputes must be referred to mediation.

6. SHOULD ALL COMPANY TITLE HOME UNIT DISPUTES BE RESOLVED IN THE SAME FORUM?

6.1 The rationale for investing the CTTT with jurisdiction over disputes in company title home units does not necessarily extend to all such disputes. In the Commission's view, the CTTT should not be invested with jurisdiction where, to do so, would be to defeat the reasonable expectations of shareholder-owners/residents in company title home units; or where another forum is more appropriate to deal with the particular dispute. These two considerations suggest that the jurisdiction of the CTTT should not necessarily extend to the following:

- disputes about sale, transfer or leasing;
- relief against oppression; and
- forfeiture of shares and the winding up of the company.

Sale, transfer or leasing

6.2 As already noted, a common characteristic of the constitutions of company title home unit buildings is that they place restrictions on the transfer or lease of home units without the approval of the board of directors, often with the qualification that the approval is not to be unreasonably withheld.[65] Constitutions further ensure that the board of directors retains control over the transfer of shares in the event of a shareholder's bankruptcy. It is universally agreed that these restrictions constitute distinguishing characteristics of company title as a system of land holding.[66] They enable owners, or at least the majority of owners, in communal residential buildings to exercise control over who will be their neighbours, either as owners or tenants.[67] Apart from their traditionally lower cost to purchase in comparison to strata units, this may explain why residents have chosen to live in company title home units.

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64 See further NSW Law Reform Commission, *Community Justice Centres* (Report 106, 2005), [1.4], [1.28]-[1.29], [4.2].

65 See para 2.4.

66 See *Magill v Santina Pty Ltd* [1983] 1 NSWLR 517, 528 (Mahoney JA). See also P Butt, *Land Law* (5th ed, Lawbook Co, 2006), [2109]; G Bugden and M Allen, *New South Wales Strata and Community Titles Law* (CCH Loose-leaf Service) ¶4-500.

67 See, for example, *Nevada Pty Ltd v Danzey* (1995) NSW ConvR ¶55-742.

6.3 The use of the CTTT as the forum for disputes in company title home unit buildings would potentially make it easier and cheaper for aggrieved minority shareholder/owners to seek the review of sale or leasing decisions of the board of directors with which they disagreed. In the Commission's view, restrictions on sale and leasing go to the heart of company title. The level of control given in this respect to boards of directors by company constitutions should not be subverted by the threat of a more accessible legal forum. To do so would be to defeat the reasonable expectations of those who live in company title home unit buildings. The overwhelming majority of our consultees supported this view.

6.4 Our consultations did not reveal that limitations placed on the disposition of shares in home unit companies were causing many problems in practice. This may be because consent to sell shares in the company is not generally unreasonably withheld.

6.5 On the other hand, our consultations did reveal that a major area of dispute between boards of directors and shareholders in company title home unit buildings relates to leasing. A significant reason for this is the shift in the demographics of company title home unit "ownership" to younger professional persons for whom the older company title buildings have architectural and status appeal, as well as an inner city locale. For such persons, the ability to rent out their "property" for particular periods of time (for example, while working abroad) is important. The Commission is unpersuaded that this justifies giving the review of leasing decisions to the CTTT. First, because professional persons buying into company title units can be assumed to know about, or to be advised on, the restrictions relating to leasing. Secondly, because the CTTT has no experience in dealing with such disputes in communal living schemes, since restrictions cannot be placed on the ability of strata title unit holders to sell or lease their lots.[68] The Supreme Court has dealt with disputes relating to restrictions on the sale or leasing of company title home units. It should continue to do so.

Relief against oppression

6.6 As noted above, an application for relief against oppression is squarely focussed on the facts of each case, its successful invocation giving rise to a variety of remedial responses.[69] The facts of each case must be assessed against the background of a complex body of law relating to the oppression of minorities in corporations generally.[70] The application of that law in the context of company title home units is both sparse and recent.[71] Although the doctrine of fraud on the minority is, in principle, capable of application in the context of strata title law,[72] the scope for its application in the CTTT is limited by the detailed statutory description of the rights, duties and obligations applicable in strata title complexes (making it unnecessary to investigate the motives or effect of particular conduct),[73] and of the circumstances in which the Tribunal can intervene in

68 See para 3.2.
69 See para 2.7-2.8.
70 See R P Austin and I M Ramsay, *Ford's Principles of Company Law* (12th ed, Butterworths, 2005), [11.430]-[11.493].
71 See para 2.7**.**
72 *Young v Strata Plan No 3529* (2001) 54 NSWLR 60, 72-75 (Santow J).
73 *Young v Strata Plan No 3529* is an example.

strata title disputes and of the orders it can issue.[74] In the Commission's view, it is desirable that the application of the oppression remedy in the context of company title home unit disputes should continue to be determined in the Supreme Court. We note that the *Corporations Act 2001* (Cth) limits the forums for the prosecution of oppression claims to superior courts, such as the Federal Court and the State Supreme Courts.[75]

6.7 In making this recommendation, we are mindful that litigation involving company title home units has involved the oppression remedy.[76] However, the exclusion of this jurisdiction from the CTTT in company title home unit disputes may not mean much in practice. Many disputes are capable of resolution by interpretation of the company's constitution, making reference to the motive or effect of conduct irrelevant, leaving "oppression of the minority" as a remedy of last resort.[77]

Forfeiture of shares and winding up

6.8 The forfeiture of shares in a company title home unit deprives the shareholder/owner of his or her home, while the winding up of the company deprives all residents of their homes. The first is a serious sanction unknown in strata title law. The seriousness of winding up is, however, recognised in strata law. Except where all the owners of lots in the strata plan agree,[78] the termination of a strata scheme must have the approval of the Supreme Court.[79] In the Commission's view, residents of company title units would reasonably expect that disputes relating to a loss of shares in, or to the winding up of, the company would be resolved in a superior court such as the Supreme Court.

7. PROCEDURES APPLICABLE TO COMPANY TITLE HOME UNIT DISPUTES

7.1 Chapter 5 of the *Strata Schemes Management Act 1996* (NSW) contains detailed provisions for the settlement of disputes relating to the operation and management of strata schemes. The Chapter refers to various types of orders that may be made pursuant to particular sections of the Act and identifies the procedure that must be followed in respect of each order. Detailed provisions of this nature are not necessary to implement the Commission's proposal that all disputes in company title home unit buildings be referable to the CTTT, with the exception of certain identified disputes.[80] The person who can institute proceedings in the CTTT (the "proper plaintiff"), the merits of the dispute, and

74 Especially *Strata Schemes Management Act 1996* (NSW) ch 5.

75 See *Corporations Act 2001* (Cth) s 232, 233, read with the definition of "Court" in s 58AA.

76. See para **2.7**.

77 The decision of the Court of Appeal in *Wilson v Meudon* [2005] NSWCA 448, overruling the decision of Gzell J at first instance ([2004] NSWSC 1183) can be regarded as an example of this.

78 *Strata Schemes (Freehold Development) Act 1973* (NSW) s 51A.

79 *Strata Schemes (Freehold Development) Act 1973* (NSW) s 51.

80 See Recommendation 1.

the orders that should be made – all these will be identified by reference to the constitution of the company in question and the relevant principles of company law.[81]

8. ARE THERE CONSTITUTIONAL RESTRAINTS ON NSW LEGISLATION?

8.1 As the *Corporations Act 2001* (Cth) regulates companies, the Commission has considered whether there would exist any constitutional inconsistency between prospective New South legislation investing the CTTT with jurisdiction to hear company title home unit disputes and the federal Act. The *Corporations Act* expresses the intention not to exclude or limit the concurrent operation of any State law.[82] It also contains provisions designed to avoid direct inconsistency with State legislation.[83] Relevantly for our purposes, such inconsistency is avoided if State legislation expressly states that it is a "Corporations legislation displacement provision".[84] If it does, any provision of the *Corporations Act* does not operate within this State to the extent necessary to avoid inconsistency with the State provision.[85] An intergovernmental agreement relating to the *Corporations Act* prescribes the procedures to be followed for the enactment of such legislation.[86]

8.2 There is, then, no insurmountable constitutional problem with prospective New South Wales legislation.

9. SHOULD THE CTTT HEAR DISPUTES IN TENANT IN COMMON BUILDINGS?

9.1 In the course of our consultations, it was suggested that if the Commission were to recommend that company title home unit disputes should be amenable to the jurisdiction of the CTTT, so should disputes involving home units in "tenant in common buildings", even though very few exist. Each owner of such a home unit is co-owner of the whole land as tenant in common in proportion to the share of the building that he or she occupies.[87] That occupation is generally regulated by means of a deed ("management agreement")[88] in terms of which each tenant in common surrenders the right to possess the whole of the land in return for a right to occupy a particular part of it. The management agreement will also generally regulate issues relating to the day to day use and occupation of the property that are likely to give rise to the sorts of disputes that are considered in this

81 See para 2.6.
82 *Corporations Act 2001* (Cth) s 5E(1).
83 *Corporations Act 2001* (Cth) s 5G.
84 *Corporations Act 2001* (Cth) s 5G(3), Table items 3 and 5. An example is *Legal Profession Act 2004* (NSW) s 156(5) (providing for intervention by the New South Wales Law Society in the proceedings in court of an incorporated legal practice).
85 *Corporations Act 2001* (Cth) s 5G(11).
86 Corporations Agreement 2002 cl 514 <www.ag.gov.au/cca>.
87 See generally P Butt, *Land Law* (5th ed, Lawbook Co, 2006), [2105]-[2106].
88 For examples, see Butterworths, *Australian Encyclopaedia of Forms and Precedents* vol 12 [25.60], and the Appendix to Young J's judgment in *Elton v Cavill (No 2)* (1994) 34 NSWLR 289, 305.

Report. As is currently the case with company title home unit disputes, the Supreme Court is the only possible venue in which owners of tenant in common buildings can resolve such disputes.

9.2 The Commission is of the view that the dispute resolution provisions of the CTTT should, in principle, be made generally available to owners and residents of tenant in common buildings. However, as in the case of company title home units, there is a need to reserve to the Supreme Court certain disputes that go to the heart of the effective functioning of such buildings and that would not generally arise in strata title disputes. In this context, this means disputes relating to the transfer of the owner's share as a tenant in common or to leasing. Management agreements usually contain restrictions on transfer – for example, that a co-owner cannot dispose of his or her interest in the property unless, prior to the disposition, the transferee agrees to be bound by the provision of the management agreement.[89] These restrictions run the risk of offending the law's policy against inalienability,[90] a policy that is the subject of a general body of often difficult case law,[91] which cannot arise in strata title disputes in the CTTT.

10. RECOMMENDATIONS

Recommendation 1

Legislation should invest the Consumer, Trader and Tenancy Tribunal with jurisdiction to hear disputes arising in company title home unit buildings with the exception of disputes:

- relating to the sale or transfer of shares in the company or the lease of the shareholder's unit;
- in which relief is claimed against oppression under Pt 2F.1 of the *Corporations Act 2001* (Cth);
- relating to the forfeiture of shares in the company; and
- relating to the winding up of the company.

10.1 This is the Commission's main recommendation and gives effect to the reasoning in para 4.1-6.7 of this Report.

Recommendation 2

The constitution of a company title home unit building may not exclude the jurisdiction invested in the Consumer, Trader and Tenancy Tribunal by Recommendation 1, and any provision that purports to do so is void.

89 See Butterworths, *Australian Encyclopaedia of Forms and Precedents* vol 12 [25.60] cl 6.

90 See *Elton v Cavill (No 2)* (1994) 34 NSWLR 289.

91 See Butt, [2105].

10.2 This Recommendation is designed to ensure that companies cannot opt out of the jurisdiction conferred on the CTTT by the proposed legislation. Recommendation 1 would potentially be undermined if existing provisions in the constitutions of company title home unit buildings were interpreted to exclude the jurisdiction of the CTTT, or if a majority of the board of directors of such a company now secured the passage of a resolution amending the company's constitution to exclude the jurisdiction of the CTTT.[92]

10.3 As it stands this recommendation would override arbitration clauses that may be found in the constitutions of home unit companies. The Commission's intention is that arbitration clauses should not be allowed to oust the jurisdiction of the CTTT in disputes that can be referred to it under Recommendation 1. In accordance with Recommendation 3, such disputes would ordinarily be referred to mediation, and we do not believe that the more powerful party to such a dispute should be able to insist on the more costly alternative of arbitration.

Recommendation 3

> The legislation should require the Registrar of the Consumer, Trader and Tenancy Tribunal to refer company title home unit disputes to mediation before they are listed for resolution in the Consumer, Trader and Tenancy Tribunal, unless the Registrar is of the view that mediation is, in the circumstances, unnecessary or inappropriate.

10.4 Because of the importance that we attach to the role of mediation in disputes relating to communal living arrangements,[93] the Commission is of the view that company title home unit disputes should generally be referred to mediation before listing in the CTTT. We recognise that there are circumstances where mediation is unnecessary or inappropriate – for example, because of concerns for the safety of the participants or one of them.[94] It should be left to the determination of the Registrar of the CTTT whether, in the circumstances, mediation is unnecessary or inappropriate.[95] The Commission notes that the Supreme Court has power to refer any proceedings before it to mediation.[96]

10.5 This recommendation does not, and is not intended to, inhibit the ability of parties in company title home unit disputes otherwise to agree to refer their dispute to mediation – for example, to utilise by agreement the mediation services of Community Justice Centres.

Recommendation 4

92 It is conceivable that securing the passage of such a resolution could, in particular circumstances, amount to oppression.

93 See para 5.7.

94 Consider NSW Law Reform Commission, *Community Justice Centres* (Report 106, 2005), ch 4.

95 Compare *Strata Schemes Management Act 1996* (NSW) s 125(1)(b).

96 *Civil Procedure Act 2005* (NSW) s 26(1).

The legislation should state that, to the extent necessary, its provisions are Corporations legislation displacement provisions.

10.6 Generally there would seem to be nothing in the *Corporations Act 2001* (Cth) that would prevent the New South Wales Parliament from referring the resolution of disputes in particular types of companies to a tribunal in NSW. To this extent the recommendations in this Report do not create a direct inconsistency with the *Corporations Act* and are capable of operating concurrently with it. The *Corporations Act* does, however, envisage that particular types of dispute will be resolved in particular courts. Relevantly, relief against oppression[97] and disputes in connection with the winding up of companies[98] have to be resolved in the Supreme Court, rather than before a tribunal. Recommendation 1 is consistent with this.

10.7 Recommendation 2 (which would prevent home unit companies altering their constitutions to exclude the jurisdiction of the CTTT) may, arguably, be inconsistent with the general provision that a corporation may modify its constitution by special resolution.[99]

10.8 For the avoidance of doubt, the Commission is of the view that the provisions of the legislation that deal with disputes in company title home units should be Corporations legislation displacement provisions.

Recommendation 5

The legislation should invest the Consumer, Trader and Tenancy Tribunal with jurisdiction to hear disputes arising in residential tenant in common buildings with less than twenty tenants in common, with the exception of disputes relating to the transfer of a tenant in common's share in the land or to leasing. The jurisdiction should not be exercised before mediation of the dispute has been attempted, unless the Registrar determines that mediation is, in the circumstances, unnecessary or inappropriate. The jurisdiction to hear such disputes may not be excluded by agreement between the tenants in common.

10.9 The Commission is aware that this recommendation, which mirrors our recommendations about disputes in company title home units, is strictly beyond our terms of reference. However, the need for an accessible forum in which to resolve communal living disputes must apply as much to tenant in common buildings as it does to home units held under company title.[100] Bearing in mind that the number of tenant in common buildings in New South Wales is very small (perhaps only a few dozen, mainly on Sydney's Lower North Shore, Double Bay and Vaucluse),[101] this inquiry will probably be the only opportunity to consider the provision of an accessible forum for the resolution of disputes involving owners and residents of such buildings.

97 *Corporations Act 2001* (Cth) s 232, 233, read with the definition of "Court" in s 58AA.
98 *Corporations Act 2001* (Cth) especially Pt 5.6.
99 *Corporations Act 2001* (Cth) s 136(2).
100 See para 4.1.
101 F Andreone, *Consultation* 10 August 2006; Leanne Hughes, *Consultation* 13 November 2006.

10.10 We limit the recommendation to residential tenant in common buildings with less than twenty tenants in common. This excludes:

- buildings used for commercial purposes;
- where tenants in common do not live in the same building (for example, in communes);
- where there are more than 20 tenants in common (for example, time share schemes).

Recommendation 6

Funding of at least $100,000 should be made available to the Office of Fair Trading and the Consumer, Tenancy and Trading Tribunal to facilitate the implementation of the Recommendations in this Report.

10.11 The expansion of the jurisdiction of the Tribunal needs, of course, to be properly resourced. At the request of the Commission, the OFT prepared an estimate of the costs involved in conferring on the CTTT the jurisdiction recommended in this Report.[102] That estimate takes account of the increased costs of mediation, adjudication and Tribunal hearings over a three-year period (including a projected surge of applications in the first year to deal with a log of unsolved existing disputes); and also of the costs of training and the development of resource materials to support the wider jurisdiction. The Commission supports funding being made available to the OFT in accordance with the estimate.

102. NSW Office of Fair Trading, letter to Commission, 12 March 2007, with attachment.

Appendices

- Appendix A – Incidence of home unit companies in NSW
- Appendix B - Consultations

APPENDIX A - INCIDENCE OF HOME UNIT COMPANIES IN NSW

The Australian Securities and Investment Commission ("ASIC") has provided the Commission with the following information from one of its databases.[103] At 4 September 2006, the database showed 1,872 home unit companies registered with ASIC throughout the whole of Australia, with 732 listing the locality of their business in New South Wales.[104] The Commission has taken this figure as, roughly, representing the number of company title buildings in this State.

Most company title survives in older apartment blocks in the Eastern Suburbs, Northern Beaches, City of Sydney and Lower North Shore of Sydney.

[table to be supplied]

The ASIC database covers "special purpose companies", here meaning company title buildings that are also "proprietary companies".[105] A "proprietary company" must have a maximum of 50 non-employee shareholders, otherwise it is a "public company."[106]

Muriel Barossa, one of the largest company title building managing agents in New South Wales, estimates that 12% of home unit companies have more than 50 shareholders. This would make the total number of company title buildings in New South Wales approximately 840. This is the figure the Commission has used.

103 "A Special Purpose Company - Home Unit Company" - subclass "HUNT" (home unit company).

104 The figures for all jurisdictions are: 918 (Vic); 732 (NSW); 79 (Qld); 90 (SA); 29 (WA); 19 (Tas); 4 (ACT); and 1 (NT).

105. See *Corporations (Review Fees) Regulations 2003* (Cth) reg 3 ("special purpose company" (e)).

106. *Corporations Act 2001* (Cth) s 113(1).

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