Company title neighbourhood disputes at VCAT

Exposure Draft: Company Title (Home Units) Bill 2012

Submission 4th September 2012

About Strata Community Australia (Vic) Inc.

SCA (Vic), formerly OCV, is the pre-eminent professional association of the owners corporation industry, and was formed in 1990 to provide a forum for improved standards and education in the industry. Supporting more than 80% of all owners corporation managers it is the only organisation solely focused upon representing this increasingly significant industry, and reaches and represents 450 owners corporation professionals who manage approximately 375,000 lots. It also represents industry suppliers and owners corporations, making it the voice of all with an interest in the management of owners corporations. SCA (Vic) is a Corporate Member of SCA, which represents practitioners throughout Australia. More information about the Associations is available at www.vic.stratacommunity.org.au and www.stratacommunity.org.au

About the owners corporation or strata title industry in Victoria

Changing lifestyle choices of Victorians and demographic shifts have led to rapid growth in higher density dwellings and the owners corporation industry. With 88,475 owners corporations and 747,336 lots in Victoria and about 1,500,000 Victorians or 1 in 4 people living in or affected by owners corporations, it represents the management of property worth over $50 billion. More than $1 billion per year is collected and spent. They comprise residential properties ranging from 2 units in a suburban street to many hundreds of units in inner city apartment buildings. Owners corporations also encompass commercial, retail, lifestyle resorts, retirement villages, car parks, storage facilities, industrial and, increasingly, mixed developments comprising more than one form of development.

Owners corporation managers facilitate the management of:

- People in a community living environment
- Billions of dollars of other people's money on an on-going and not a single transaction basis
- Entire communities and their current and future assets and facilities

About the owners corporation or strata title industry in Australia

The industry continues to grow rapidly in Australia with around 270,000 owners corporations comprising 2,000,000 lots Australia wide. It represents the management of property worth more than $500 billion. There are approximately 2,500 owners corporation managers in Australia; with 3.5 million people living or working in owners corporation schemes. Conservatively, it is estimated 20,000 Australians work in and derive their income from the strata title industry. Urban planning policies around Australia are targeting annual growth of more than 10% for the next 15-25 years, so the prevalence and importance of this sector is increasing.

Background

The Exposure Draft of the Company Titles (Home Units) Bill 2012 confers jurisdiction on VCAT to hear and determine neighbourhood disputes in relation to company title corporations and service companies for building subdivisions [stratum].

The Bill is proposed to commence on 1 July 2013, unless brought into operation at an earlier date.

Feedback has been sought from SCA (Vic).

Accompanying the Exposure Draft is an Explanatory Statement with extensive background. Both of these can both be accessed at http://www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/company-titles-home-units-bill

Submissions are due Friday 21st September 2012.

This reform issue is about whether to bring under the owners corporation laws the orphan company share and stratum properties that are currently governed by ASIC under the Corporations Act.

SCA (Vic) Position

The Bill is welcome news notwithstanding its limited application to only "neighbourhood disputes".

Name of Bill

The Bill itself is called the Company Titles (Home Units) Bill which is a little misleading. The definition of "company title corporation" in the Bill covers only company share properties as there is a separate definition of a service company. Also, there is no reference anywhere in the Bill to a "**home**" unit.

Drafting deficiencies

In Clause 3 it is not clear why the definition of a "rule" does not extend to the "term" of a service agreement. Service agreements invariably include Schedules incorporating covenants by the registered proprietor which have effect as if they are rules, for example, not to park in a carspace allocated to another owner, not to make structural alterations and additions, not to create a nuisance. Similarly, service agreements also include covenants by the service company, for example, to repair and maintain the residual land.

As whether or not a term of a service agreement has been met is an issue for a neighbourhood dispute (see Clause 5(2)), the reason for the differentiation is not clear. The term of a service agreement is equally as much a "rule' as is a clause in the constitution. However, an order can be made to comply with a term of a service agreement. See Clause 8(1)(b).

Also, an order can be made varying the term of a contract or agreement or declaring it void (this would appear to cover a service agreement and other agreements) but this power does not extend to a rule. So an order of this kind could be made in relation to a service agreement but not in relation to the constitution of a company. This may explain the reason for the differentiation referred to above. See Clause 8(1)(d) and (e).

Clause 5(3)(e) states that a neighbourhood dispute does not include presumably an express **claim** for relief under Part2F.1 of the Corporations Act arising from the oppressive conduct of the affairs of a company but somewhat inconsistently similar relief - if there is a neighbourhood dispute - is available in VCAT in that account can be taken of a resolution or proposed resolution which is "unfairly prejudicial to or unfairly discriminates against a shareholder or shareholders." Clause 10(d)

It is noted in Clause 7(d) & 7(e) that occupiers as well as owners [shareholders] can make an application to VCAT to resolve a neighbourhood dispute. However, an occupier cannot be bound by a rule unless the occupier has entered into an agreement with their landlord or less likely the company to observe the rules.

Clause 9 enables VCAT to impose a civil penalty up to $250.00 on a person found to have failed to comply with a rule. That power should be extended to cover a civil penalty for breach of a term of a service agreement for the reasons outlined above.

The intention of Clause 11 concerned with monetary orders to be paid from contributions appears to be to enable VCAT to order that a corporation or company not levy or exempt a particular shareholder from contributions if that shareholder is successful in an action against the company or corporation. Clause 11(c) should, therefore be amended to read:

> "prohibit a corporation or company from levying a contribution from a shareholder who is a party to the neighbourhood dispute."

There must be a reference to a shareholder because a company or corporation has no power to levy any person who is not a shareholder.

The subject matter of neighbourhood disputes over which VCAT has jurisdiction is set out in the Schedule to the Bill. It is not clear why the matters listed in item 4 should be confined to company title properties and not also extend to properties with service companies, for example, repair and maintenance of units. There is invariably a covenant by an owner in the Schedule to a service agreement to keep the unit in good and tenantable repair and maintain all services on and servicing the owner's unit.

This dichotomy is reflective of a distinction pervading the list of matters whereby a company title corporation is taken to have more control over units than a service company. Another example of this distinction is Matter 6.1. This distinction is questioned.

Also the list of matters is prescriptive and apparently random but neighbourhood issues may well arise from matters not listed.

Victorian Property Fund

Though at as broader level than just this specific Bill, there is an issue relating to the Victorian Property Fund [VPF].

Clause 16 provides that all penalties [including all civil penalties in Clause 9] are to be paid into the VPF established under the Estate Agents Act 1980.

This follows similarly the situation for owners corporations.

It is submitted that the VPF is too broad for it to be established under the Estate Agents Act 1980 and without the VPF giving proper recognition of appropriate purposes related to the strata sector.