



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 56

**Review of
The Strata Titles Act 1966-1970**

WORKING PAPER

FEBRUARY 1977

PREFACE

The Law Reform Commission has been asked to consider and report upon the law relating to strata titles.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms (with reasons where appropriate) on individual issues raised in the working paper, on the paper as a whole or any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 13 May 1977.

Copies of the paper are being sent to the –

Chief Justice and Judges of the Supreme Court

Judges of the District Court

Solicitor General

Under Secretary for Law

Law Society of Western Australia

Law School of the University of Western Australia

Magistrates' Institute

Secretary for Local Government

Town Planning Board

Town Planning Commissioner

Crown Solicitor

Commissioner of Titles

Commissioner for Corporate Affairs

Conveyancer, Crown Law Department

Institute of Architects -W.A. Chapter

Association of Architects, Engineers, Surveyors and Draftsmen

Insurance Council of Australia

Australian Institute of Valuers (Inc) W.A. Division

Real Estate Institute of Western Australia Inc.

Housing Industry Association

Institute of Legal Executives

W.A. Real Estate Settlement Association

Developers Institute of Australia (W.A. Division)

Master Builders Association of W.A.

Metropolitan and Regional Planning Authority

Parliamentary Commissioner for Administrative Investigations

Local Government Association of W.A.

Perth City Council

Fremantle City Council

Stirling City Council

State Energy Commission

Organisations and individuals who made preliminary submissions in writing on the project

Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of this paper and submit comments.

The research material on which this paper is based is at the offices of the Commission and will be made available on request.

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SUMMARY

General

The Commission has been asked to review the working of the *Strata Titles Act 1966*, which is based on the New South Wales *Conveyancing (Strata Titles) Act 1961*. The Western Australian Act has been in force for nine years, which is probably a sufficient time for any major defects in its actual operation to have been revealed. Further, the New South Wales legislation was completely revised in 1973. The question has arisen whether any of the New South Wales provisions should be adopted in this State.

The Commission's principal aim in this working paper is to describe the practical working of the Act, to identify problem areas and to suggest improvements. The Commission has obtained the views of solicitors, land agents, developers and local authorities. In order to help identify problems, the Commission issued a public invitation to those interested to make preliminary submissions. Eighty-three preliminary submissions were received, many from individual owners of units in strata title schemes.

The Commission hopes that all the main problems which have arisen in practice are discussed in this paper. If, however, a reader is aware of a problem which is not discussed in the paper, the Commission would like to hear of it.

Strata titles in Western Australia:

Present law

The issuing of a strata title by the Registrar of Titles means that the unit (called a "lot" in the Act) can be owned and dealt with as an estate in fee simple registered under the *Transfer of Land Act 1893*.

The strata titles system is becoming increasingly popular. As at 4 October 1976, 4,253 strata plans had been approved since the Act came into operation in September 1967. The popularity of the strata title is associated mainly with residential development. Very few office premises or factories are under strata title. The Commission estimates that residential developments known as "duplexes" comprise about ninety percent of registered strata plans.

Upon the registration of a strata plan, there comes into existence a body corporate comprising all the proprietors (i.e. the owners of the units). This paper refers to the body corporate as "the strata company". The function of the strata company is to control, manage and maintain the common property, and to attend to matters such as insurance. The powers of the strata company are exercisable by the council of the company, and the proprietors in general meeting. A strata title scheme therefore combines features of real property law and company law. Because of this dual aspect, some of the concepts involved are complex, and the Commission has tried to clarify them as much as possible for the reader.

Principal issues

The paper deals with six broad issues –

- (a) Matters relating to the ownership of a lot and the common property.
- (b) The extent of the powers and duties of the strata company.
- (c) The manner in which the powers and duties of the strata company should be exercisable.
- (d) The relationship between the strata company, its members and third parties (e.g. mortgagees, insurers, municipalities and power and water supply authorities). Problems connected with tenants and visitors are also discussed.
- (e) The statutory safeguards to be afforded to intending purchasers of units.
- (f) Problems relating to special types of strata schemes, e.g. duplexes.

The range of matters raised by these broad issues is summarised below.

(a) *Ownership*

The matters discussed include the question of who should be deemed to be the proprietor of a lot; the boundaries of a lot; subdivision within an existing strata scheme; how provision should be made for areas outside the building to be reserved for the exclusive use of a particular proprietor; staged development of projects; and rights of appeal against decisions of the local authority and the Town Planning Board relating to the approval of the strata plans. The concept of “unit entitlement”, which governs voting rights, apportionment of rates and taxes and certain other matters, is also discussed.

(b) *Powers and duties of the strata company*

The matters dealt with include the question of the need for sinking as well as administration funds, investment of money in those funds, whether interest should be payable by proprietors on unpaid contributions, the amount to which the building should be insured by the strata company and what other insurance (apart from that on the building) should be effected by the company.

(c) *Administration of strata company*

The matters discussed include the procedure to be adopted at meetings of the strata company; the types of resolutions and the matters which should be reserved for particular types of resolution; postal voting; voting where contributions are unpaid and the voting rights of a mortgagee. Also discussed are questions dealing with the membership and powers of the strata company and its relationship with its members. The question is raised whether there should be a Strata Titles Commissioner to determine disputes between proprietors, with a right of appeal to a Strata Titles Board.

(d) *Relationships with other parties*

Questions discussed include the relationship between the strata company and third parties such as mortgagees, insurers and local authorities. A significant proportion of preliminary submissions received concerned problems in these areas, such as who should be responsible for unpaid rates and unpaid electricity accounts. Also discussed is the question of

responsibility for defects in the building discovered after the proprietors have gone into occupation.

(e) *Safeguards to purchasers*

The question is discussed of the sale of units not yet constructed and the safeguards that should be imposed to protect intending purchasers.

(f) *Special schemes*

The Commission discusses problems relating to special types of strata title schemes. Particular attention is given to duplexes.

The Commission invites comment on the matters raised in the paper: see the list of questions contained in paragraph 38.1 below.

TERMS OF REFERENCE

- 1.1 "To review the *Strata Titles Act 1966-1970*."

PRELIMINARY SUBMISSIONS

2.1 In September 1975, in order to help identify problems in the operation of the *Strata Titles Act* in Western Australia, the Law Reform Commission by means of a press advertisement invited preliminary submissions from persons interested. Eighty-three preliminary submissions were received in response to the advertisement. The submissions were of great assistance and the Commission is indebted to those who made them. The names of those organisations, bodies and persons who made written submissions to the Commission are listed in the Appendix.

THE LAW IN WESTERN AUSTRALIA

General

3.1 In the 1960's, the increasing number of home unit developments in Western Australia produced a demand for a system which provided for individual ownership of the units comprising the building. This demand was sought to be met by the enactment of the *Strata Titles Act 1966* which provided for the subdivision of land on which there were one or more buildings comprising one or more floors into horizontal strata. Each strata could be divided into two or more lots. The Act provided for a registered title for each unit in the building, so that the unit could be owned and dealt with as an estate in fee simple registered under the *Transfer of Land Act 1893*. In 1969 the Act was amended to provide for strata titles to be issued in respect of a scheme where there was no lot superimposed on another, e.g. duplexes.

3.2 The existing legislation is not limited to home units and applies to any building whether residential, commercial or industrial.

3.3 The strata title system is proving to be increasingly popular in Western Australia. The Titles Office has informed the Commission that as at 4 October 1976, 4,253 strata plans had been approved under the Act since it came into operation in September 1967. The Titles Office has only been keeping a record since 1 July 1972 of the number of strata lots (as distinct from strata plans) which have been created. During the period 1 July 1972 to 30 September 1976, 10,593 strata lots were created from 2,910 strata plans.

3.4 The Titles Office has not kept a record of the number of strata plans which have been registered for various types of buildings. However, the Commission understands that there are only about twenty registered strata plans which are not for residential buildings. These are in respect of buildings for office premises and for small factories (known as factoryettes). While no records are available, it is estimated that duplexes comprise about ninety percent of the registered strata plans.

The strata plan

3.5 The system of strata titles has as its basis the registration of a strata plan at the Titles Office. The strata plan consists of a location plan showing the allotment (or the "parcel" as it is referred to in the Act) and the relationship of the building to the boundaries of the parcel. The strata plan must also include a drawing which illustrates each lot in the building and defines the boundaries of each lot by reference to floors, walls and ceilings: s.5(1). Land in the strata plan other than lots is "common property": s.3 and see paragraphs 13.1 and 13.2 below.

3.6 A strata plan lodged for registration must be endorsed with or accompanied by –

- (a) a certificate of a licensed surveyor that the building shown on the plan is within the external boundaries of the parcel and where eaves or guttering project beyond those boundaries, that a registered easement has been granted as an appurtenance of the parcel or, where the projection is over a road, that the local authority has consented to the projection;
- (b) A certificate of the Town Planning Board that the proposed subdivision of the parcel shown in the plan has been approved by the Board; and
- (c) a certificate of the local authority that the building –
 - (i) has been inspected and is consistent with the approved building plans and specifications; and
 - (ii) in the opinion of the local authority, is of sufficient standard and suitable to be divided into lots pursuant to the Act.

The local authority issues a certificate approving of the proposed subdivision if it is satisfied that the subdivision will not contravene the provisions of any town planning scheme operating within its district and that the building and the proposed subdivision of it into lots will not interfere with the existing or likely future amenity of the neighbourhood, having regard to the circumstances of the case and the public interest: s.20.

The strata title - the strata company

3.7 Upon registration of a strata plan a certificate of title is issued for each lot together with the share of the common property appurtenant to that lot: s.4(4). Upon registration of the strata plan, there comes into existence a body corporate known as "The Owners of the [name of the building]": s.13(1). The body corporate is referred to in this working paper as "the strata company". Every proprietor is a member of the strata company. The functions of the strata company are to control, manage and repair the common property and to attend to the insurance of the building: s.13. Its functions, subject to any restrictions imposed by the strata company or by the Act, are exercised by the council of the strata company: by-law 4(1) of Part I of the Schedule to the Act. The council is elected at the annual general meeting of the strata company: by-law 4(2) of Part I of the Schedule.

3.8 The strata company may make by-laws for the control, management, use and enjoyment of the lots and the common property: s.15(1). The by-laws set out in Parts I and II of the Schedule are deemed to be by-laws of the company but may be amended, repealed or added to by the company. Those contained in Part I of the Schedule may be amended, repealed or added to only by a unanimous resolution (see paragraph 15.2 below) passed at a meeting of the strata company: s.15(2). A special resolution (see paragraph 15.5 below) is required to amend, repeal or add to the by-laws set out in Part II: by-law 9 of Part I of the Schedule to the Act.

3.9 The strata company is required to establish a fund for administrative expenses and to raise the amounts needed for the fund by levying contributions on the proprietors in proportion to the "unit entitlement" of the respective lots: s.13(6). Every strata plan lodged for registration at the Titles Office must have endorsed on it the unit entitlement of each lot: s.18(1). In addition to determining the proportion payable by each proprietor of the contributions levied by the strata company, the unit entitlement so endorsed also determines –

- (a) the voting rights of a proprietor;
- (b) the quantum of the undivided share of each proprietor in the common property: s.18(2).

3.10 Paragraphs 3.5 to 3.9 above are intended as a brief outline of the constitution and working of a strata scheme under the present Act. In dealing with the particular issues raised later in this working paper, the relevant provisions of the Act will be considered in more detail.

THE LAW IN OTHER JURISDICTIONS

4.1 The Western Australian Act is modelled on the New South Wales *Conveyancing (Strata Titles) Act 1961*, which first introduced the concept of strata titles and was a completely novel piece of legislation. Since 1961 the other Australian States and New Zealand have enacted legislation providing for strata titles, as follows –

Queensland:	<i>The Building Units Titles Act 1965</i>
Victoria:	<i>Strata Titles Act 1967</i>
South Australia:	<i>Real Property Act Amendment (Strata Titles) Act 1967</i>
Tasmania:	<i>Conveyancing and Law of Property Act 1962</i>
New Zealand:	<i>Unit Titles Act 1972.</i>

4.2 These enactments broadly follow on the same pattern as the 1961 New South Wales legislation. They are therefore similar to the Western Australian Act, although there are some differences. Where those differences are considered significant they are referred to later in this paper.

4.3 In 1974, Victoria enacted the *Cluster Titles Act*. This Act is not concerned with strata titles as such. The concept of this Act is the subdivision of land into an area of small lots (on which houses could be erected) and common property. To some extent this concept has been accommodated in Western Australia by the amendment made to the *Strata Titles Act* in 1969: see paragraph 3.1 above.

4.4 In 1973, there were more than 100,000 strata lots in New South Wales. Practical experience of the legislation revealed a number of shortcomings resulting in the enactment of the *Strata Titles Act 1973* (NSW), a more detailed Act than the *Conveyancing (Strata Titles) Act 1961* which it repealed. The new Act is referred to in this paper where appropriate.

DISCUSSION

5.1 Paragraphs 6.1 to 36.11 below contain a discussion of aspects of the *Strata Titles Act 1966* of this State which may require amendment. A number of possible defects in the Act have been brought to the Commission's attention.

Proprietor

6.1 In the *Strata Titles Act 1966*, the "proprietor" of a lot means (except where a contrary intention appears) the person who is the owner for the time being of the lot: s.3. The Act grants various rights to the "proprietor" (such as the right to vote at general meetings of the strata company) and imposes various duties on him (for example, a proprietor is bound by the by-laws of the strata company). A number of people who made preliminary submissions to the Commission stated that it was not clear from the Act exactly when a person was an owner and hence the "proprietor" of that lot and therefore entitled to the rights and subject to the duties of a proprietor.

6.2 In the *Strata Titles Act*, it seems that "proprietor" does not necessarily mean the person who is registered as the proprietor of a particular lot in the (Torrens Title) Register but could include the person who is the owner in equity of the lot. Although the registered proprietor of a lot is usually the owner in equity of the lot, this is not always so. For example, immediately an unconditional contract of sale of a lot has been signed, the purchaser becomes the owner in equity of the lot, despite the fact that the certificate of title to the lot has not yet been transferred into his name: *Strahorn v Strahorn* (1905), 5SR (NSW) 382.

6.3 The definition of "proprietor" in the *Strata Titles Act* is different to that which appears in the *Transfer of Land Act 1893*. In that Act the term "proprietor" in relation to land means the owner, whether in possession, remainder, reversion or otherwise of land whose name appears or is entered as the proprietor of the land in the Register, and includes the donee of a power to appoint or dispose of the land: s.4 of the *Transfer of Land Act*.

6.4 The New South Wales *Strata Titles Act 1973* has a more precise definition of "proprietor". Under that Act, "proprietor" in relation to a lot means –

- (a) a person recorded in the (Torrens Title) Register as entitled to an estate in fee simple in that lot (s.5);
- (b) a transferee of a lot (to whom an executed transfer has been delivered) where the transferor and the transferee have given written notice of the transfer to the strata company and the name of the transferee has been entered on the strata roll (see paragraphs 7.2 and 7.3 below) as proprietor (s.5 and see ss.81 (2) and 81 (2A)); or
- (c) a person who has become entitled, otherwise than as transferee, to be registered on the (Torrens Title) Register as the proprietor of a lot where that person has given written notice in the form of a statutory declaration to the strata company and the name of that person has been entered on the strata roll as proprietor: s.5 and see s.81(9).

6.5 The Victorian *Strata Titles Act 1967* does not define "proprietor" but grants rights to and imposes duties on the "registered proprietor" of a lot: see s.14(3). The Act defines the registered proprietor of a lot as every person appearing from the (Torrens Title) Register to be the proprietor of –

- (a) an estate in fee simple; or
- (b) an estate for life

in the lot: s.14(5).

6.6 The definition of "proprietor" in Queensland's *Building Units Titles Act 1965* is the same as the definition in the Western Australian Act.

6.7 The South Australian *Real Property Act Amendment (Strata Titles) Act 1967* contains many references to the registered proprietor of a unit. The Act does not define registered proprietor but the expression obviously refers to the person whose name is registered in the (Torrens Title) Register as the proprietor of the unit concerned.

6.8 The Tasmanian *Conveyancing and Law of Property Act 1962* does not define "proprietor" but defines "owner" as the person who for the time being has the present legal estate in a unit.

6.9 The New Zealand *Unit Titles Act 1972* defines "proprietor" as follows:

" 'Proprietor', in relation to any unit, means the person or persons for the time being registered as proprietor of the stratum estate in the unit:

Provided that in sections 26, 32, 33 and 34 and subsections (11) and (12) of section 37, of this Act, in any case where a person is in actual occupation of a unit under a binding agreement for sale and purchase, unless the context otherwise requires, the term 'proprietor' means that person".

The sections referred to in the proviso to this definition relate to the guarantee by unit proprietors of the payment of rent by the strata company to the lessor where the parcel is leasehold land (s.26); recovery of contributions levied by the strata company (s.32); recovery from proprietors of money expended by the strata company for repairs which it was required to do under any Act of Parliament (s.33); recovery from a proprietor of money which the strata company expended for work made necessary because of the fault of that proprietor (s.34), and by-laws (s.37(11) and (12)).

6.10 The present definition of "proprietor" in the Western Australian Act gives rise to difficulties. For example, a purchaser of a unit can be liable to comply with by-laws regarding the use to which the unit in question is put, despite the fact that the vendor is at the relevant time still entitled under the contract of sale to the possession of the unit.

6.11 It could be argued that "proprietor" of a lot should be defined as the person recorded in the Register under the *Transfer of Land Act 1893* as entitled to an estate in fee simple in that lot. It is true that such a definition would create difficulties where a unit has been sold under a terms contract of sale, and the purchaser has gone into possession under the contract. In this situation, it would be appropriate for certain of the rights and duties imposed on the proprietor as defined in the existing Act, to be exercised and performed by the purchaser. (An example would be the duty imposed on a proprietor under by-law 1(b) to pay rates and taxes.) The New

Zealand legislation attempts to resolve this particular difficulty by the proviso referred to in paragraph 6.9 above. It is possible that a definition incorporating a purchaser in actual possession as well as the features incorporated in the New South Wales definition could resolve many of the difficulties. However, the New South Wales definition is in part dependent on the keeping of a strata roll. The Commission would welcome comment.

Strata roll

7.1 Under the Western Australian Act, problems must occasionally arise as to whether a particular person is entitled to vote at a general meeting of the strata company. The Act simply grants the right to vote to proprietors (s.18(2) and by-law 7 of Part I of the Schedule), and in certain circumstances to mortgagees: see paragraph 15.20 below. As the Chairman would usually not have any direct knowledge of who are the proprietors of units within a development and who are the mortgagees of the units, he could be placed in a difficult position when a person's claim to be entitled to exercise a vote is challenged on the ground that he is neither a proprietor nor a mortgagee. This situation might be overcome if a strata roll were kept.

7.2 Under the New South Wales *Strata Titles Act 1973*, the strata company must prepare and maintain a strata roll: s.69(1). The roll is required to be in the form of either a bound or loose leaf book containing at least one page in respect of each lot in the strata plan: s.69(2). In it, the unit entitlement is to be shown in respect of each lot. The strata company is also required to record in the roll the names and addresses for service of -

- (a) the original proprietor of the lot and any subsequent transferee of the lot;
- (b) any mortgagee of the lot and any transferee, assignee or sub-mortgagee of a mortgage;
- (c) any lessee of the lot and any assignee of a lease; and
- (d) any person who has become entitled otherwise than as a transferee to a lot: s.69(3).

7.3 Except in the case of the recording of the name and address of the original proprietor, notice must be given to the strata company by the person acquiring the estate or interest concerned. The notice must bear the written confirmation of the other party, except in the case

of a lease or assignment of lease. If the other party does not join in the notice, application can be made to the Strata Titles Commissioner (see paragraphs 27.2 and 27.3 below) for an order for the recording of the name and address which should have been recorded: s.114. The strata company is also required to record in the strata roll the discharge of any mortgage which had been recorded in the roll, the entry into possession of a lot by a mortgagee, the termination of any lease, and any change of address of a person whose name is recorded in the roll: s.69(3). The Act also contains provision for the giving of notice to the strata company of such transactions.

7.4 Under the New South Wales Act, a person is only entitled to vote in respect of any lot on any motion submitted at a general meeting of the strata company or on any election of members of the council if he is the proprietor of that lot as shown on the strata roll: clause 2(1) of Part I of Schedule 2 to the Act. However, a first mortgagee (as shown on the strata roll) of a lot may vote in respect of that lot to the exclusion of the proprietor: clause 2(2) of Part I of Schedule 2. Only the proprietor and first mortgagee of a lot, as ascertained from the strata roll, are entitled to receive notice of general meetings: clause 1(4) of Part I of Schedule 2.

7.5 The New South Wales provisions relating to a strata roll would avoid the difficulties referred to in paragraph 7.1 above which must occasionally arise under the Western Australian Act and would also lessen the possibility of a person casting a vote who was, in fact, not entitled to vote. However, the establishment and maintenance of a strata roll would throw additional administrative duties on the council of the strata company. It may well be that the additional work and expense which would be involved would not be justified. At present, the Commission has no evidence which shows the extent to which problems of voting entitlement have been encountered in practice. Further information from interested parties would assist the Commission in determining whether provision for a strata roll would be worthwhile.

7.6 New South Wales is the only Australian State where the strata titles legislation provides for a strata roll.

The lot

Boundaries - position in Western Australia

8.1 The scheme of the *Strata Titles Act* is that lots should be defined by physical features rather than by measurement. Section 5(1) (d) of the Act provides that a strata plan shall:

"define the boundaries of each lot in the building by reference to floors, walls and ceilings, without necessarily showing any bearings or dimensions of the lots".

8.2 Under the Act, a proposed lot must be the whole or part of a "building": ss.3 and 5(1). "Building" is defined by the Act to mean a building or buildings shown on a strata plan: s.3. So it is possible, for example, for a strata plan to show as one lot, portions of two separate buildings.

8.3 A lot does not necessarily have to be completely surrounded by improvements. Probably, any volume of space which is part of a building can be a lot, provided the proposed lot boundaries are capable of definition "by reference to" existing floors, walls and ceilings and provided that the position and boundary of the lot are defined in a manner which will be adequate for practical purposes: see Rath Grimes and Moore, *Strata Titles* (1966) at 15. It would be possible for a strata scheme to exist where there were two lots not separated by a dividing wall, for example, lots in a building used for commercial purposes. The boundary could be defined by a combination of physical features and related dimensions or measurements. In relation to residential buildings, the Titles Office in Western Australia will permit a proprietor's strata title to include a balcony to his unit where it is obvious that the other proprietors will not be using it. For example, where the only access to the balcony is through the unit, the Titles Office will always permit the strata title to include it. However, a lot must be part of a building. Garden areas and swimming pools outside the building, for example, cannot be part of a lot.

Common boundaries - position in Western Australia

8.4 Section 5(5) of the Western Australian Act provides: "Unless otherwise provided in the strata plan, the common boundary of a lot with another lot or with common property shall be the centre of the floor, wall or ceiling, as the case may be". It is understood that senior

officers at the Titles Office cannot recall a case where the common boundary has been other than the centre of the floor, wall or ceiling.

8.5 The strata titles legislation in each of the other Australian States (apart from New South Wales) has a provision to the same effect as s.5(5) of the Western Australian Act.

Boundaries and common boundaries - position in New South Wales

8.6 Sections 4(1) (d) and 4(3) of the New South Wales *Conveyancing (Strata Titles) Act 1961* (now repealed) were identical to ss.5(1) (d) and 5(5) of the Western Australian Act. In other words, the strata plan had to define the boundaries of each lot in the building by reference to floors, walls and ceilings without necessarily showing any bearings or dimensions of the lot, and unless otherwise provided in the strata plan, the common boundary of a lot with another lot or with common property was the centre of the floor, wall or ceiling as the case may be.

8.7 Under the *Strata Titles Act 1973* which replaced the *Conveyancing (Strata Titles) Act* in New South Wales, a lot may consist of one or more spaces forming part of the parcel, the base of each such space being designated as a lot or part of a lot on the floor plan: s.5(1). The space constituting a lot may take any shape and need not necessarily be a cube: s.5(3). The floor plan is one of the two documents which comprise the strata plan - the other is the location plan: s.8(1). Under s.5(2) of the New South Wales Act, the boundaries of a lot are either -

- (a) the inner surface of walls, the upper surface of floors and the under surface of ceilings, or
- (b) such other boundaries as are described (in the floor plan) in the manner prescribed by regulation by reference to a wall, floor or ceiling in the building.

The regulations clearly contemplate that under s.5(2) (b) a lot can be defined by a combination of physical features and related dimensions or measurements: see clause 9(c) to (f) of the *Strata Titles Act Regulations*. There is no requirement that a lot must be within a building: *Woollahra Municipal Council v Local Government Appeals Tribunal and Renwyn*

Pty. Ltd. 1975 2 NSWLR 594. The boundary of a strata lot could therefore extend to include a swimming pool or even a garden area.

8.8 However, in most instances the boundaries of a lot will be those set out in s.5(2) (a) of the Act, namely the inner surface of walls, the upper surface of floors and the under surface of ceilings. Where this is so, no notations are to be made on the floor plan for the purpose of defining the boundaries: *ibid.*, clause 9(f).

8.9 Where s.5(2) (a) applies, the lots in a strata scheme will not have common boundaries as between themselves. Each lot will be enclosed by common property, the boundary between the lot and the common property being the inner surface of walls, the upper surface of floors and the under surface of ceilings.

8.10 The *Strata Titles Act 1973* (NSW) also makes pipes, wires, cables and ducts located within a lot, and not for the exclusive enjoyment of that lot, common property. This is the combined effect of the definitions of "lot" and "structural cubic space" in s.5 of that Act.

8.11 Under the Western Australian Act, difficulties can arise as to whether the strata company or a proprietor is liable for the cost of repair work to an inner wall arising from water penetration originating beyond the inner wall. Also under the Western Australian Act, a proprietor would (in absence of an agreement to the contrary between himself and the strata company) be responsible for the repair of a water pipe which bursts within the boundaries of his lot, even though that pipe served other lots within the building.

8.12. The New South Wales provision relating to boundaries has clearly made the strata company responsible for repair work arising from water penetration originating beyond the inner surfaces of a unit. An exception could arise where the strata plan specifically defines the boundaries of a lot to be other than those set out in paragraph (a) of s.5(2) of the Act.

8.13 The Commission's tentative view is that the New South Wales provisions relating to the boundaries of lots and also to pipes, wires, cables and ducts should be adopted in Western Australia. The Commission would welcome comment.

Garages

8.14 In Western Australia, there is no difficulty in extending a strata title to include an enclosed garage. Under the present Western Australian Act, a garage could be made a separate lot on a strata plan: s.3. However, the Commission knows of no case where a garage has been illustrated on a strata plan as a separate lot. It would be most unlikely for either the local authority or the Town Planning Board to approve of such a proposal because, being a separate lot, the garage could be sold to a person outside the strata scheme. In such a case a person who purchased into a strata scheme in which the "garage lots" have been previously sold to persons outside the scheme might be forced to park his car on the streets, giving rise to on-street parking problems. In Western Australia, strata title is granted to self-contained garages but not so that the garage is a separate lot. The residential unit and the garage are each part of a lot (even though they are physically separated) and together make the one lot.

8.15 The New South Wales *Strata Titles Act 1973* allows more flexibility in relation to garages than the Western Australian legislation. Under the New South Wales Act, it is possible to obtain a separate title for a garage. The Act has a special section dealing with "utility lots" (that is lots designed to be used primarily for storage or accommodation of boats, motor vehicles or goods and not for human occupation). Section 39 of the Act provides that a local authority, when approving a plan which upon registration would result in "utility lots", may impose a condition restricting their user to use by a proprietor or occupier of a lot (not in itself a utility lot) in the same strata scheme: s.39(1). The proprietor of a utility lot which is subject to such a restriction may still sell the lot but if he sells it to a person who is not a proprietor or occupier of a lot in the same strata scheme, not in itself a utility lot, then the purchaser may be prohibited from using it.

8.16 None of the preliminary submissions made to the Commission suggested that there should be separate titles for garages. The Commission would appreciate comment on whether there should be provision for separate title for garages with power to the local authority (or the Town Planning Board) when approving the plan to impose a condition restricting user of the garage to a proprietor or occupier of a lot (not itself a garage) in the same strata scheme.

Subdivisions and structural alterations

8.17 A number of those who made preliminary submissions to the Commission pointed out that under the present Act it is too difficult to alter the boundaries of strata lots. Sometimes proprietors of units in single storey developments wish to add an additional room to their units and unless they can have the boundary of their unit altered, the new room will not be on their strata title. Also, if part of a building is destroyed by fire, it may be desired to rebuild the portion destroyed with a slightly different design and so that the floors, walls or ceilings of a unit or units are in a different position to those which were in existence before the fire. If this were done, it would be desirable to alter the boundaries of the lots concerned to conform to the new structure.

8.18 Furthermore, the proprietor of a very large residential unit such as a penthouse might wish to subdivide the unit into two lots. Again, in a building used for commercial purposes, one can easily imagine circumstances where it would be desired to alter the boundaries. For instance, the proprietor may wish to convert three strata titles into two strata titles. There may be other cases where the proprietors desire to change the boundaries of strata lots.

8.19 The present Western Australian Act makes no provision at all to enable a strata plan which has been registered to be amended. Consequently, to amend the boundaries of a strata lot, it would be necessary for there to be a "notional destruction" of the building under s.11 of the Act and for a fresh strata plan to be registered. A building is notionally destroyed only where –

- (a) the proprietors by unanimous resolution so resolve;
- or
- (b) the Supreme Court is satisfied that having regard to the rights and interests of the proprietors as a whole, it is just and equitable that the building shall be deemed to have been destroyed and makes a declaration to that effect: s.19(1).
(See also paragraphs 25.1 and 25.2 below.)

8.20 The New South Wales *Strata Titles Act 1973* makes provision for the alteration of boundaries of lots and common property within the strata scheme. The provisions include subdivisions. The Act makes provision for the alteration of the boundaries of –

- (a) one or more lots so as to create two or more different lots;
- (b) one or more lots so as to create one or more different lots and common property;
- (c) one or more lots and common property so as to create one or more different lots or one or more different lots and common property; or
- (d) common property so as to create one or more lots: ss.5(7) and 9.

The consent of the local authority to the subdivision is required. Except in the case of (a), it is also necessary for the strata company by special resolution to consent to the proposed subdivision: see s.37(4). Where an existing lot is also involved in the subdivision the consent of the proprietor is, of course, also required: s.16(a).

8.21 One of the advantages of subdivision is that the plan of subdivision simply supersedes the part of the strata plan which is affected by the subdivision. The unaffected part of the strata plan continues in operation. It is not necessary to prepare either a fresh strata plan, or fresh titles or substitute mortgages in respect of the lots unaffected by the subdivision.

8.22 The strata titles legislation in Victoria, Queensland and New Zealand contains provision for subdivision: *Strata Titles Act 1967* (Vic) ss.3 and 34; The *Building Units Titles Act 1965* (Qld) ss.2 and 20(4); *Unit Titles Act 1972* (NZ) ss.2 and 44. However, the scope of subdivision is not as wide as under the New South Wales legislation. For example, in Queensland, it is not possible to subdivide common property so as to create one or more lots. Also, where existing common property is involved in the subdivision (as can be the case in Victoria and New Zealand), it is necessary for all proprietors constituting the strata company to join in the application. This is in contrast to the position in New South Wales where only a special resolution (a resolution against which not more than one quarter in value of votes is cast) is all that is required.

8.23 The Commission's tentative view is that the New South Wales provisions should be adopted. If this were done, it would be necessary to consider whether the approval of the

Town Planning Board as well as the local authority should be required. See further paragraphs 10.1 to 10.5 below for the special problems connected with staged development.

Consolidation of two lots

8.24 Where it is only desired to consolidate two or more lots into one lot, the subdivision procedure in the New South Wales *Strata Titles Act* is simplified. Section 12 of the Act provides that "two or more lots may be consolidated into one lot by the registration of a plan as a strata plan of consolidation". None of the other Australian States nor New Zealand have a corresponding provision. It should be noted, however, that in most instances in New South Wales the boundaries of lots are the inner surface of walls, the upper surface of floors and the under surface of ceilings: see paragraphs 8.7 to 8.9 above. Where this is the case then, for example, the dividing wall between two adjoining "residential" lots will be common property. If a consolidation of these two lots takes place under s.12 of the New South Wales Act, the two lots become part lots together making one new lot with the dividing wall remaining common property. If it is desired to incorporate the dividing wall into the title of the two lots, a subdivision would be required: see paragraph 8.20 above. Provided the owner of the new lot does not breach local authority building by-laws, he may remove part of the former dividing wall.

8.25 The Commission's tentative view is that s.12 of the New South Wales Act should be adopted in Western Australia. The consent in writing of the registered proprietor of a mortgage or charge affecting any lot comprised in the consolidation, and also of any caveator would be required under Titles Office procedure.

Conversion of a lot to common property

8.26 When the strata plan is being prepared, a caretaker's flat, meeting room or games room can be included in common property. Under the Western Australian *Strata Titles Act* the strata company (which comes into existence when the strata plan is registered) has no power later to acquire a lot within the strata scheme so that the lot can be used by a caretaker. The same comment would apply to a meeting room or a games room. This is also the position under the strata titles legislation in Queensland, South Australia and Tasmania.

8.27 However, the New South Wales *Strata Titles Act 1973* provides that a strata company may with the consent of the proprietor of a lot convert that lot to common property by lodging a notice of conversion: s.13. By this means, a flat for a caretaker, for example, can be included in the common property already held by the strata company. The consent of the local authority to the proposed conversion is required: s.37(5). It is necessary for the strata company by special resolution to consent to the proposed conversion: s.37(5). Also, every mortgage, encumbrance, lease or caveat on the title for the lot in so far as it affects that lot must be discharged, surrendered, withdrawn or otherwise disposed of: s.13(2) (c).

8.28 The Commission sees merit in the New South Wales provision and tentatively considers that it should be adopted in Western Australia. If this were done, it would be necessary to consider whether the approval of the Town Planning Board as well as the local authority should be required.

Land for use in conjunction with a lot

General

9.1 In Western Australia, strata title is not granted in respect to areas outside a building, for example, garden areas, parking areas marked out on vacant ground and swimming pools: see paragraphs 8.2 and 8.3 above. These areas remain as common property.

9.2 Section 5(1) (f) of Western Australia's *Strata Titles Act* provides that a strata plan shall define any portions of the parcel not within the building, that are or are intended to be separate tenements, and used in conjunction with the building or portion of the building. Probably, the effect of this subclause is that the strata plan may provide for separate tenements which are not to be owned by a lot proprietor and which would therefore remain common property but which may be made the subject of some arrangement whether by lease or otherwise with one or more proprietors.

9.3 There are two methods (under the Act) by which proprietors can obtain exclusive possession of areas such as garden areas and swimming pools –

- (a) by lease (see paragraph 9.4 below); and

- (b) by a grant of exclusive use by the strata company under by-law 3(f) of Part I of the Schedule: see paragraphs 9.6 to 9.9 below.

The question of granting strata title in respect of these areas by providing for "accessory lots" is discussed in paragraphs 9.10 to 9.12 below.

Lease

9.4 Under s10(2) of the Act, the proprietors by unanimous resolution may direct the company to lease the common property or any part of it. It is therefore possible for the strata company to lease an area of common property such as a garden area (whether or not it is defined on the strata plan as a separate tenement) to a proprietor but a unanimous resolution of the proprietors would be first required. Furthermore, the consent of the Town Planning Board would be required if the lease or grant exceeded ten years including any option to extend or renew the term of the lease: s.10(8). Power for a strata company to lease common property pursuant to a unanimous resolution is also found in the strata titles legislation of New South Wales, Queensland and New Zealand.

9.5 The Commission can see no reason why power to the Strata company to lease the common property or part of it should not be retained.

Grant of exclusive use by strata company

9.6 By-law 3(f) of Part I of the Schedule to the Western Australian Act provides that the company may grant a proprietor the right to exclusive use and enjoyment of common property, or special privileges in respect of common property, but any such grant is determinable on reasonable notice unless the company by unanimous resolution otherwise resolves. A proprietor could be given exclusive use and enjoyment of an area of common property under this by-law. As in the case of a lease, the approval of the Town Planning Board would be required if the grant exceeded ten years including the option to extend or renew the term of the grant: s.10(8).

9.7 The same by-law is found in the strata titles legislation in Queensland and Tasmania. Under the Victorian and New Zealand legislation, the strata company may grant to the

proprietor of a lot, or anyone claiming through him, any special privilege (not being a lease) in respect of part or parts of the common property. The South Australian legislation contains a provision similar to that of Victoria and New Zealand but a unanimous resolution is required.

9.8 The New South Wales *Strata Titles Act 1973* contains a more elaborate provision. Section 58(7) of the New South Wales Act provides that a strata company may, with the consent in writing of the proprietor of a lot, pursuant to a unanimous resolution make a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment, or special privileges in respect of, the common property or any part of the common property on such terms and conditions (including the proper maintaining and keeping in a state of good and serviceable repair of the common property or that part of the common property, as the case may be, and the payment of money by that proprietor to the strata company) as may be specified in the by-law. Under the same subsection, the strata company may, pursuant to a unanimous resolution, make a by-law amending, adding to or repealing any such by-law which it has previously made pursuant to this power. For the purposes of the New South Wales Act, the unanimous resolution is not a resolution passed at a general meeting by all persons entitled to exercise the powers of voting (as is the case under the Western Australian Act), but is a resolution passed at a general meeting against which no vote is cast. If the unanimous resolution is suitably worded, the rights conferred by the by-law will "run with the land" for the benefit of any purchaser of the lot: see s.58(8) of the New South Wales Act. Under the New South Wales Act, a by-law does not take effect until it is registered at the Titles Office against the title to the common property. A consequence is that an intending purchaser of a lot could readily confirm whether or not a grant of exclusive use had been made in favour of that lot.

9.9 The Commission at this stage is of the view that the more detailed New South Wales provision should be adopted in Western Australia. It would need to be made clear that the strata company could permit the proprietor to erect improvements specified by the strata company on the land concerned.

Accessory lots

9.10 Another way of providing for exclusive use by proprietors of areas outside the building is to make provision for the creation of "accessory lots", as has been done in the

strata titles legislation of South Australia, Victoria and New Zealand. Under the legislation in those jurisdictions, strata title may be granted to areas outside the building such as parking areas, swimming pools and gardens. The method of providing for exclusive use of a particular area by way of accessory lots is not as flexible as the by-law method. It may, however, be preferred by some persons since it enables a certificate of title to be issued for the area concerned.

9.11 In South Australia, the strata plan must define the lots into which the building is divided and the accessory lot appurtenant to each lot: s.223mb(2) (c) of the *Real Property Act Amendment (Strata Titles) Act 1967*. The accessory lot may only be dealt with as part of a dealing with the lot itself: s.223nb. The legislation in Victoria and New Zealand contains similar provisions. The New South Wales legislation does not provide for accessory lots, possibly because a lot in New South Wales can itself include unenclosed areas (see paragraph 8.7 above), and because the legislation makes provision for "utility lots".

9.12 If the New South Wales provisions are to be adopted in this State, as the Commission tentatively suggests (see paragraphs 8.7 and 8.13 above), it does not seem necessary to also make provision for "accessory lots". The Commission would welcome comment.

Staged development

10.1 Under the present Act, it is not possible for a developer to undertake "staged development". This is a procedure whereby a developer constructs part of a project and then finances the construction of the balance by the sale of units in the part of the project which has been completed. Section 5 of the present Act makes it clear that this cannot be done, since the whole project would have to be completed before a strata plan could be registered.

10.2 One of the aims of the New South Wales *Strata Titles Act 1973* in permitting subdivisions to be effected in the various permutations found in s.5(7) (see paragraph 8.20 above) was to allow for staged development. The Act enables a developer to reserve a lot when registering his original strata plan, to use the proceeds of the sale of lots in the building first built to finance the construction of a further building within the reserved lot, and to register a strata plan of subdivision of the latter building. The strata plan of subdivision will show lots *and* common property - the corridors, for example, in the new building would be

common property. Once the strata plan of subdivision has been approved, the developer could proceed to dispose of the lots in that plan.

10.3 Under the New South Wales Act, the subdivision of a reserved lot into lots and common property cannot be effected unless the strata company by special resolution (see paragraph 15.5 below) consents to the subdivision: see s.37(4). This means that the purchasers of units in the first development will nearly always be in a position where they can prevent the subdivision of the second development, particularly as the voting power of the developer is reduced during the time when he is the proprietor of lots the sum of whose unit entitlement is not less than one-half of the aggregate unit entitlement: see paragraph 19.10 below. The Commission understands that the requirement of a special resolution was to protect the purchasers of units in the first development from misrepresentations by the promoter in regard to further development on the site, or from his failure to disclose his intention to effect further development on the site. However, the Commission understands that the requirement of a special resolution is restricting the flow of finance from lenders to staged development projects and that accordingly the concept is not being widely utilised. Some proprietors have tried to overcome the special resolution requirement by extracting a proxy from each purchaser in the first development entitling the promoter to exercise the voting power in respect of any motion to subdivide the reserved lot or by making contractual arrangements with each such purchaser. However, despite such arrangements, lenders may not be convinced that the financing of such staged development should be undertaken.

10.4 There are undoubtedly difficulties with staged development. A purchaser of a unit in the first development should be protected as far as practicable. The value of his unit would be affected if his view were to be built out by another development on what he reasonably might have thought was part of the gardens of the building in which he had purchased his unit. Even apart from this, the value of his unit could be affected by the increase in density of units on the parcel.

10.5 A possible alternative to the New South Wales approach, where a special resolution is required before the plan of subdivision for the second building can be approved, may be to provide that where staged development is contemplated, a sale of a unit will be of no effect unless before purchasing the unit the intending purchaser has obtained a certificate from an

independent solicitor, certifying that the solicitor has explained to him the promoter's right to future development on the parcel.

10.6 The Commission would welcome comment on the question of whether provision should be made for staged development, and if so, what procedure should be adopted so that it can be provided for and what safeguards should be provided for intending purchasers of units in the first development.

The strata plan

11.1 Section 5 of the Western Australian Act sets out the requirements for a strata plan. Briefly, the plan must delineate "the external surface boundaries of the parcel and the location of the building in relation thereto": s.5(1) (a). It must define the boundary of each lot in the building "by reference to floors, walls and ceilings, without necessarily showing any bearings or dimensions of the lot" (s.5(1) (d)) and must also "show the approximate floor area of each lot": s.5(1) (e). It must also define any portions of the parcel not within the building, that are or are intended to be separate tenements, and used in conjunction with the building or portion of the building: s.5(1) (f).

11.2 On registration of the strata plan at the Titles Office, the Registrar of Titles issues separate certificates of title for each lot together with the share of the common property appurtenant to that lot: s.4(4).

11.3 No architectural or cadastral measurements are shown on strata plans. One of those who made a preliminary submission to the Commission was Mr. R.A. Hoskin, who is a consulting surveyor and town planner. He submitted that because no architectural or cadastral measurements are shown on strata plans, there were insufficient details on them to ensure clear definition of structures and common property.

11.4 Section 5(6) (see paragraph 3.6 above) of the Act makes it necessary to lodge at the Titles Office with the strata plan –

- (a) a certificate of a licensed surveyor that the building is within the external surface boundaries of the parcel;

- (b) a certificate of the Town Planning Board that the proposed subdivision has been approved by the Board;
- (c) a certificate of the local authority that -
 - (i) the building has been inspected and is consistent with the approved building plans and specifications; and
 - (ii) it has approved of the proposed subdivision.

The local authority is required to issue its certificate approving of the proposed subdivision if it is satisfied that the subdivision will not contravene the provisions of any town planning scheme operating within its district and that the building and the proposed subdivision of it into lots will not interfere with the existing or likely future amenity of the neighbourhood, having regard to the circumstances of the case and the public interest: s.20.

11.5 It does seem that where a local authority has a town planning scheme, the requirement that a certificate must be obtained from the Town Planning Board may be unnecessary since the town planning scheme would have been approved by the Minister for Town Planning (s.7 of the *Town Planning and Development Act 1928*). It may, however, be undesirable to subdivide agricultural land under the *Strata Titles Act*, and therefore this proposal should possibly be limited to land zoned other than for agricultural purposes.

11.6 The Commission would appreciate comment on whether the requirements as to the content of strata plans should be changed and whether there should be any modification in regard to the certificates which must be lodged at the Titles Office with the strata plan.

Appeals against decisions of Town Planning Board and local authorities

12.1 Under the *Strata Titles Act*, the right of appeal in the case of a refusal by the Town Planning Board to issue a certificate under s.5(6) is to the Minister for Town Planning and in the case of a refusal by a local authority to issue a certificate is to the Minister for Local Government: s.20(2). In either case, the decision of the Minister is final: s.20(4).

12.2 In South Australia, any such appeal would be to the Planning Appeal Board: s.223me of the *Real Property Act Amendment (Strata Titles) Act 1967*. In New South Wales, where only a certificate of approval of the local authority is required, the right of appeal in the case of a refusal to issue the certificate is to the Local Government Appeals Tribunal: s.40(4) of the *Strata Titles Act 1973*. In Victoria, where also only the approval of the local authority is required, the right of appeal is to an arbitrator: s.6(7) of the *Strata Titles Act 1967*. In Queensland, where also only the approval of the local authority is required, the right of appeal is to the Minister for Local Government: s.20(3) of The *Building Units Titles Act of 1965*. The Tasmanian *Conveyancing and Law of Property Act 1962* and also the New Zealand *Unit Titles Act 1972* do not provide for any appeal.

12.3 In contrast to the position under the *Strata Titles Act* (see paragraph 12.1 above), the *Town Planning and Development Act* of Western Australia was amended in 1970 to provide that appeals under that Act could be made to either the Minister for Town Planning or the Town Planning Court (comprised of a judge and two members, one to be appointed by each of the parties to the appeal) which was constituted by the 1970 amendment. Previously appeals could only be made to the Minister for Town Planning. The *Town Planning and Development Act Amendment Act 1976* provides for the Town Planning Court to be replaced by a body to be known as the Town Planning Appeal Tribunal, the procedure of which is expected to be less formal than that of the Court. The Town Planning Appeal Tribunal will consist of three members: a legal practitioner, a person having knowledge of and experience in town planning and a person having knowledge of and experience in public administration, commerce or industry.

12.4 The Commission is tentatively of the opinion that, except in the case of a refusal by a local authority to certify that the building is consistent with the approved plans and specifications, the right of appeal from a local authority or the Board should be the same as in the case of an appeal under the *Town Planning and Development Act*. However, since the refusal of a local authority to certify that a building is consistent with the approved plans and specifications is not really a town planning matter, it could be argued that an appeal against a refusal should remain with the Minister for Local Government.

12.5 The Commission holds the same tentative opinions in regard to refusal by the Town Planning Board and the local authority to give the corresponding certificates in regard to

strata plans of subdivisions (see paragraphs 8.19, 8.20 and 8.23 above), and to notices of conversion from a lot to common property: see paragraphs 8.26 to 8.28 above.

Common property

Ownership of the common property

13.1 Common property is defined by s.3 of the present Act as the land for the time being contained in the strata plan which is not comprised in the lots shown in the strata plan. Common property does not only comprise ground space. Unless otherwise provided in the strata plan, the boundary of any lot with common property is the centre of the floor, wall or ceiling as the case may be: s.5(5). Consequently, that part of the floor, wall and ceiling which is beyond that boundary is common property. In fact all area (including air space) which is beyond that boundary is common property.

13.2 Under the present Act, the common property is held by the proprietors as tenants-in-common in shares proportional to the unit entitlement of their lots: s.9(1). A proprietor's certificate of title comprises his lot and his share of the common property: s.4(4). There are no separate certificates of title for the common property or interests in the common property. The strata titles legislation in most of the Australian States and also in New Zealand contains provisions to the same effect as ss.9(1) and 4(4) of the Western Australian Act.

13.3 Different principles were adopted in the New South Wales *Strata Titles Act 1973*. Under that Act, the common property is vested not in the proprietors but in the strata company: s.18(1). However, the strata company holds the common property as agent for the proprietors as tenants-in-common in shares proportional to the unit entitlements of their respective lots: s.20. There is a separate certificate of title for the common property. The certificate of title is in the name of the strata company and is issued by the Titles Office to the strata company: s.18(2). The strata company is required under the New South Wales Act to make the certificate of title for the common property available for inspection upon application by a proprietor or mortgagee of a lot or by a person authorised in writing by a proprietor or mortgagee.

13.4 The new provisions in New South Wales vesting common property in the strata company were adopted mainly to facilitate internal administration within the Titles Office of that State.

13.5 In Western Australia, a proprietor holds his lot and share in the common property subject to any interest for the time being notified on the registered strata plan and any amendments to lots or common property shown on that plan: *Strata Titles Act* s.4(3). An easement over the common property, for example, need only be shown on the strata plan and, if the easement is later surrendered, the surrender need only be noted on the strata plan. The certificates of title do not have to be lodged for notation. In these circumstances, there does not seem to be any real need to provide for a separate certificate of title for the common property, but the Commission would welcome comment.

Dealing in common property

13.6 Under the Western Australian *Strata Titles Act 1966*, the proprietors may by unanimous resolution direct the strata company to execute a transfer or lease of common property: s.10(2). This is a conveyancing device only as the common property is held by the proprietors as tenants-in-common. However, the strata company is unable to have land transferred to it, although it may be able to accept a lease of land, since a lease is personal property: see by-law 3(a) of Part I of the Schedule. Under the New South Wales *Strata Titles Act 1973*, the strata company itself holds the common property (see paragraph 13.3 above) and it is able, pursuant to a unanimous resolution, to have transferred or leased to it land adjoining the parcel for the purpose of creating, or adding to common property.

13.7 It would seem that the power to acquire additional land as common property would be a useful one. For example, it might be desirable to acquire additional land for the purpose of providing a further parking area or for the purpose of constructing a swimming pool. The Commission tends to favour granting the power, but would welcome comment. If the common property is to continue to be held by the proprietors as tenants-in-common and not by the strata company itself (see paragraphs 13.2 to 13.5 above), it would be desirable to provide that the strata company can act as agent for the proprietors. Such a provision would facilitate the purchase as well as other dealings with the land.

13.8 The question of conversion of a lot within a parcel to common property has already been discussed: see paragraph 8.26 and 8.28 above.

Powers and duties of the strata company

General

14.1 The strata company comes into existence upon registration of the strata plan: s.13(1). Every proprietor of a lot in the strata plan is a member of the strata company: s.13(1). The main functions of the strata company are to make by-laws for the control, management, use and enjoyment of the lots and the common property, to attend to the insurance of the building and to keep the common property in good repair and properly maintained.

Distribution of money received otherwise than by levying contributions

14.2 Under the Western Australian Act, the strata company is required to establish a fund for administrative expenses sufficient in the opinion of the strata company for the control and management of the common property, for payment of any premiums of insurance and the discharge of any other obligation of the strata company: s.13(6) and see paragraph 22.1 below. The strata company is required to raise the amounts needed for the fund by levying contributions on the proprietors in proportion to the "unit entitlement" of the respective lots: *ibid.*

14.3 The Western Australian Act contains no special provisions dealing with the distribution of money received otherwise than by levying contributions. The New South Wales *Strata Titles Act 1973* contains special provisions dealing with such money. In that State, the strata company is required to pay the money received otherwise than by levying contributions not into its administrative fund but into a separate account (referred to in the Act as "the general account") established at a bank in the name of the strata company: *Strata Titles Act 1973* (NSW) s.68(1) (o). Section 62 of the Act lays down the procedure which must be followed before the strata company may distribute any money in its general account. Each proprietor of a lot and also each mortgagee of a lot whose mortgage is noted in the strata roll must be given notice by the strata company of any proposed distribution from the account: s.62(6) (a). A unanimous resolution of the company is required. A proprietor or mortgagee

may within twenty-one days after the service of the notice make an application to the court for an order for the distribution of the money among the proprietors or mortgagees of the lots in such shares as to the court seems just: s.62(7). Where no such application has been made by a proprietor or mortgagee within the twenty-one days, the money is to be distributed among the proprietors in shares proportional to the unit entitlements of their respective lots: s.62(8).

14.4 The nearest equivalent in the Western Australian Act is by-law 3(a) of Part I of the Schedule, which would enable the strata company to acquire personal property (including money) "for use by proprietors in connection with their enjoyment of the common property". There are no special provisions relating to distribution.

14.5 The Commission understands that the main object of the provisions in s.62 of the New South Wales Act is to enable disputes among proprietors, and among proprietors and mortgagees, in regard to money derived from the sale or resumption of common property to be settled. For example, in the case of a sale of part of the common property, there may be a dispute between a proprietor and his mortgagee as to which of them should receive the share of the money which relates to the proprietor's lot. Again, in the case of a resumption of common property for road widening, the proprietors whose units front onto the road may claim that disbursement of the compensation should not be in proportion to unit entitlement because they have suffered greater loss than proprietors whose units are at the rear of the parcel.

14.6 Under the Western Australian Act, the proprietors may by unanimous resolution direct the company to execute a transfer or lease of common property. The strata company would only receive the proceeds of the sale or lease as an agent for the proprietors of the lots in the strata scheme and would be obliged, subject to the rights of any mortgagees and other persons having an interest in the common property, to pay the proceeds to the proprietors in proportion to their unit entitlements. The Act does not contain any provisions dealing with resumption; but presumably each proprietor would have a separate claim against the authority resuming the land.

14.7 It may be desirable for any new legislation in this State to adopt the provisions of s.62 of the New South Wales Act referred to above, particularly if the common property is to be vested in the strata company. The Commission would welcome comment.

Investment of money held in administrative fund

14.8 It is sometimes desirable to invest money which a strata company is collecting under s.13(6) for administrative expenses, especially where that money is being collected periodically, to meet a future liability (such as the cost of repainting the common property) which will not arise for some years.

14.9 By-law 3(d) of Part I of the Schedule to the Western Australian *Strata Titles Act* provides that the strata company may invest as it may determine any money in the administrative fund. Subject to any restriction imposed or direction given at a general meeting, this power may be exercised by the council of the company: by-law 4(1).

14.10 The strata company has the same power to invest under the strata titles legislation of Victoria, Queensland and Tasmania. However, under the New Zealand legislation, a strata company may only invest money in the administrative fund in any of the modes of investment for the time being authorised by law for the investment of trust funds. This is also the case under the New South Wales *Strata Titles Act 1973*, although in that State such money may also be invested in any investments prescribed under the Act. Investments in permanent building societies registered under the *Permanent Building Societies Act 1967* are the only investments which have been so prescribed.

14.11 The principal investments authorised by Western Australian law for the investment of trust funds are: fixed deposits at banks, savings bank accounts, deposits in or shares of building societies which have been certified as societies in which trustees may invest, government sureties (such as Commonwealth Bonds) and first mortgages of land: *Trustees Act 1962* s.16. It could be argued that the power of investment granted under Part I of the Schedule is too wide and should be limited to the modes of investment for the time being authorised by law for the investment of trust funds. However, it is to be noted that under the existing provisions the strata company by an ordinary resolution passed at a general meeting would be able to direct its council as to the modes of investment in which it could invest funds. This provision gives the proprietors substantial control over the kinds of investment which can be made. The Commission has no firm view on the question whether the Act should be altered to provide that money may only be invested in investments authorised by

law for the investment of trust funds or the present provision retained. The Commission would welcome comment on the matter.

Meetings of the strata company

Types of resolutions

15.1 The Act contains provisions for the convening and holding of general meetings of the strata company: see by-laws 6 and 7 of Part I of the Schedule to the Act. Collins and Jackson, *Strata Title Units in N.S.W.* (1974) at 113, describe the function of a meeting thus:

"The principal purpose of holding any meeting is to obtain the opinion of the people who are entitled to vote as to whether or not they wish to implement a certain course of action or approve of a specific undertaking. That opinion is sought by placing before the meeting a motion and the persons voting on that motion indicate by voting for or against the motion whether or not they wish the [strata company] to undertake the course of action proposed by that motion. If the motion is passed by the meeting, it becomes a resolution, which, in turn, becomes the decision of the [strata company] on that particular matter."

The Act contemplates that three types of resolutions can be passed at general meetings namely, unanimous, special and ordinary resolutions.

15.2 A *unanimous resolution* is a "resolution unanimously passed at a duly convened meeting of the company at which all persons entitled to exercise the powers of voting conferred by or under this Act are present personally or by proxy at the time of the motion": s.3. The effect of the requirement of a unanimous resolution under the Western Australian Strata Titles Act is that every person entitled to vote must be represented at the meeting. Thus a person entitled to vote can prevent a strata company from undertaking an action merely by staying away from the meeting and not appointing a proxy. There is also a question whether a "resolution unanimously passed" is one in respect of which every person entitled to vote casts a vote in favour of the resolution or one in respect of which no vote is cast against the resolution. As at present advised, the Commission considers that under the general law only the former resolution would be "unanimously passed". If there are ten persons entitled to vote and the result is five votes in favour of a resolution and five abstentions, it is difficult to argue that the resolution was "unanimously passed", simply because there was no vote cast against it. For the purposes of the *Strata Titles Act*, not only is it necessary that all persons entitled to

vote be present in person or by proxy at the meeting but also that all persons present in person or by proxy vote in favour of the resolution.

15.3 Section 24(6) of the present Western Australian Act provides that where a proprietor's lot is subject to a registered mortgage, the power of voting where a unanimous resolution is required shall be exercised not by the proprietor but by the mortgagee under such a mortgage first entitled in priority (see paragraph 15.20 below). This provision, however, does not apply unless the mortgagee has given written notice of his mortgage to the strata company: s.24(7).

15.4 Under the Act, a unanimous resolution is required in respect of the following matters –

- (a) a direction to the strata company to transfer or lease common property (s.10(2)) (e.g. where the proprietors direct the strata company to transfer part of the common property to an owner of adjoining land);
- (b) a direction to the strata, company to transfer the parcel or part or parts off it (s.11(3)) (e.g. where the proprietors direct the strata company to transfer the parcel to an outside party who intends to redevelop the site);
- (c) a direction to the stratal company to execute a grant of easement (e.g. a right of carriageway) or a restrictive covenant (e.g. a covenant by the proprietors not to use the land other than for residential purposes) burdening the parcel (s.12(1)(a));
- (d) a direction to the strata company to accept or surrender a grant of easement or a restrictive covenant benefiting the parcel (s.12(1) (b));
- (e) the amendment, repeal or addition of the by-laws contained in Part I of the Schedule (s.15(2), see paragraph 21.1 below);
- (f) a resolution by the proprietors that the building is destroyed for the purposes of the Act (s.19(1), see paragraphs 25.1 and 25.2 below);

- (g) a resolution that a grant to a proprietor of the right to exclusive use and enjoyment of common property, or special privileges in respect of common property shall not be determinable on reasonable notice: by-law 3(f), see paragraph 9.6 above.

All these matters (except for (e)) affect the title to the interest which a proprietor has purchased and this, no doubt, is the reason why a unanimous resolution is required. The same basis would seem to underlie the provision that the by-laws contained in Part I of the Schedule can be altered only by a unanimous resolution. Any amendment to Part I could fundamentally affect the whole strata scheme.

15.5 A *special resolution* is defined in by-law 10 of Part I of the Schedule to the Act as "a resolution passed at a general meeting of which at least fourteen days notice specifying the proposed resolution has been given by a majority of not less than three-quarters of the total unit entitlement of the lots and not less than three-quarters of the members". There are two matters under the present Act in regard to which a special resolution is required. The first is a resolution by the proprietors that the strata company insure against a risk which is not one which it is required to insure against under the Act: s.13(4)(e), see paragraph 24.12 below. The second is the amendment, repeal or addition of the by-laws contained in Part II of the Schedule to the Act: by-law 9 of Part I of the Schedule to the Act, see paragraph 21.1 below.

15.6 An *ordinary resolution* is a resolution passed by a simple majority vote at a general meeting. All matters other than those for which a unanimous resolution or a special resolution are specifically required may be dealt with by ordinary resolution. A quorum (which is one-half of the persons entitled to vote present in person or by proxy) must, of course, be present at the meeting. An example of an ordinary resolution would be a resolution that the strata company purchase a lawn mower for use on the common property.

15.7 Unless a poll is demanded, voting at general meetings is by show of hands and each proprietor has one vote: by-laws 6(9) and 7(1) of Part I of the Schedule to the Act. On a poll, the proprietors have the same number of votes as the unit entitlements of their respective lots: by-law 7(2). Co-proprietors may vote by proxy jointly appointed by them: by-law 7(7).

What should be required for a unanimous resolution?

15.8 It is evident from the preliminary submissions that it is very difficult to get all the persons entitled to exercise their powers of voting present personally or by proxy at the meeting at which the motion which requires a unanimous resolution is being dealt with. For example, a proprietor might be overseas. It has been suggested to the Commission that it should be sufficient, if a motion which at present requires a unanimous resolution, is passed by three-quarters of those entitled to vote who are present personally or by proxy at the meeting of the strata company. However, the matters for which unanimous resolutions are required are of vital consequence to proprietors (see paragraph 15.4 above) and if this approach were adopted, a minority of proprietors could in certain circumstances be treated in an inequitable way.

15.9 The strata titles legislation of the other Australian States apart from New South Wales defines "unanimous resolution" in a similar way to the Western Australian Act. However, under the New South Wales legislation a unanimous resolution is a resolution which is passed at a duly convened general meeting of a strata company against which no vote is cast. Thus, any one proprietor is given a veto so long as he or his proxy attend the meeting and votes against the resolution or submits a negative postal vote. However, the resolution would not be defeated by persons abstaining from voting.

15.10 The New Zealand definition of unanimous resolution enables a person who was not present at a meeting to agree to the motion within twenty-eight days after the meeting has been held. Section 2 of the New Zealand *Unit Titles Act 1972* defines "unanimous resolution" as:

- "(a) a resolution which is passed unanimously at a general meeting of the [strata company] at which every proprietor is present and votes either in person or by proxy; or
- (b) a resolution which is passed unanimously at a general meeting of the [strata company] by every proprietor who is present and votes either in person or by proxy, and agreed to within 28 days after the date of the meeting by every

other proprietor who was entitled to be present and vote at the meeting, or by his successor in title if he has ceased to be a proprietor after the meeting; or

- (c) while there is only 1 proprietor, a decision of that proprietor."

The provision enabling a person who was not present at a meeting to agree to the motion within twenty-eight days after the meeting has been held would assist to overcome the difficulties which can arise where a person entitled to vote does not live at the development concerned or is away on holidays or for some other reason. A disadvantage with the New Zealand procedure is that it can take up to twenty-eight days after the meeting for a decision to be reached on the matter at issue. A delay of such length could, in certain circumstances, be serious. In any event, the effect of the New Zealand provision is that every proprietor must vote for the resolution, if present, or agree to it within twenty-eight days if not. Hence, if a proprietor present at the meeting simply abstains from voting, the resolution will not be unanimous. The result is the same if a proprietor simply stays away from the meeting and declines to agree to the resolution.

15.11 The Real Estate Institute of Western Australia in its preliminary submission suggested that where it is not possible to secure a unanimous resolution because one person only has failed to vote in favour of the motion, then those who have voted in favour of the motion should have a right of appeal, for example, to a Minister of the Crown or a District Court Judge. (If a Strata Titles Board is to be instituted (see paragraphs 27.2 and 28.1 below), the appeal could be to that Board.) There is no right of appeal in this situation under the strata titles legislation of the other Australian States. However, a right of appeal exists under the New Zealand legislation where the resolution is supported by eighty percent or more of those entitled to vote. The suggestion of the Real Estate Institute would provide a means of preventing one proprietor from being able to veto a proposal found to be in the interests of the strata company and the proprietors as a whole.

15.12 The Commission would welcome comment on –

- (1) whether the existing requirements for a unanimous resolution under the Western Australian Act should be retained and, if not, what requirements should take their place;

- (2) whether there should be any right of appeal where the motion which required a unanimous resolution has not been passed, and in what circumstances should the right of appeal arise.

What should be required for a special resolution?

15.13 It has been suggested to the Commission that the requirements under the Act for a special resolution were more stringent than they need be. It has also been suggested that the number of matters for which a special resolution is required should be extended. It is proposed at this stage to consider the first of these suggestions. The second suggestion is considered in paragraphs 17.1 and 17.2 below, following the discussion on the council of the strata company.

15.14 By-law 10 of Part I of the Schedule to the Act defines a special resolution as a resolution passed at a general meeting by a majority of not less than three-quarters of the total unit entitlement of the lots and not less than three-quarters of the members. The definition requires that at least fourteen days notice of the meeting specifying the proposed resolution must be given.

15.15 The strata titles legislation of Victoria, Queensland and Tasmania contain definitions of "special resolution" which are to the same effect as that in Western Australia. However, under the South Australian legislation it is sufficient if the resolution is passed by a majority representing not less than one-half of the total unit entitlement of the lots and not less than two-thirds of the total number of persons entitled to vote: *Real Property Act Amendment (Strata Titles) Act 1967*, s.223m.

15.16 The requirements of a special resolution are also less stringent under the New South Wales *Strata Titles Act 1973*. Section 5 of that Act defines a "special resolution" as "a resolution which is passed at a duly convened general meeting of a [strata company] and against which not more than one-quarter in value of votes is cast". It is not necessary as in Western Australia for persons representing three-quarters of the total unit entitlement to vote in favour of the motion. The resolution meets the requirement of a special resolution if not more than a quarter in value of the votes actually cast are against the motion.

15.17 Comment is invited on the question of whether the existing requirements for a special resolution under the Western Australian Act should be retained and, if not, what requirements should take their place.

Postal votes

15.18 The by-laws contained in the Schedule to the Western Australian Act set out the procedures applicable to general meetings and the rights of persons to vote at meetings. No provision is made for postal votes and one of the preliminary submissions to the Commission suggested that provision should be so made where a unanimous resolution is required, due to the great difficulty involved in getting a unanimous resolution passed, even though the Act permits proxies. The New South Wales *Strata Titles Act 1973* makes provision for this type of voting for all motions. The by-laws to that Act provide that notice for an annual general meeting must include a form of motion for each proposed resolution to be considered at the meeting and be accompanied by a voting paper in respect of each of those motions: clause 1(6) Part I Schedule 2. A vote on the motion may be cast by the person entitled to vote either personally or by his duly appointed proxy or by returning to the secretary prior to the commencement of the meeting a voting-paper indicating his vote in respect of the motions set out in the notice paper. The by-laws also provide that a motion may not be submitted to amend a motion if a vote has been cast under the voting-paper system: clause 4(c) Part I Schedule 2. Such a provision is necessary because the person who has cast a vote under the voting-paper system would not have the opportunity to vote in respect of a motion moved at the meeting to amend the motion which was set out in the notice paper. The voting-paper system also applies in respect of the election of members of the council. The Commission would welcome comment on whether the voting-paper system should be adopted in Western Australia and, if so, whether it should apply to all motions or only those requiring a unanimous resolution to pass them.

Voting where contributions unpaid

15.19 The by-laws to the Western Australian Act provide that except in cases where under the Act a unanimous resolution is required, a proprietor is not entitled to vote at any general meeting unless all contributions in respect of his lot have been duly paid: by-law 7(6) of Part I

of the Schedule. A similar by-law is found in the strata titles legislation of the other Australian States and New Zealand. However, it could be argued that it is unfair to prevent a person from voting simply because his contributions are not paid up. The Commission at this stage has no firm view on the issue.

When should a mortgagee be able to vote?

15.20 Under the present Western Australian Act where the interest of a proprietor in a lot is subject to a registered mortgage, a power of voting conferred on a proprietor under the Act –

- (a) where a unanimous resolution is required shall be exercised not by the proprietor but by the mortgagee under such a mortgage first entitled in priority; and
- (b) in other cases, may be exercised by the mortgagee first entitled in priority, and shall not be exercised by the proprietor when that mortgagee is present personally or by proxy: s.24(6).

These provisions, however, do not apply unless the mortgagee has given written notice of his mortgage to the strata company: s.24(7).

15.21 Similar provisions are found in the strata titles legislation of the other Australian States and of New Zealand. Under the New South Wales Act, provided the requisite notice has been given to the strata company and the particulars in that notice have been recorded in the strata roll, the first mortgagee is entitled to vote in respect of that lot on any motion submitted at a general meeting of the strata company or on any election of members of the council. If the proprietor of that lot votes on that motion, any vote cast by him is not to be counted: clause 2(2) Part I Schedule 2, see also clause 5(2) Part II Schedule 2.

15.22 At first sight, provisions giving the mortgagee power of voting seem unduly favourable to him. However, resolutions passed by the strata company, especially those passed for the purpose of dealing in some manner with the common property, can affect the value of a mortgagee's security. The Commission at present has no reliable information on the extent to which mortgagees in practice exercise their right to vote.

15.23 The Commission would welcome comment on whether a mortgagee's existing right to vote (see paragraph 15.20 above) should be retained and if not what his rights to vote should be.

The Council

General

16.1 Under the present Act, the powers and duties of the strata company, subject to any restriction imposed by the Act and to any restriction imposed or direction given at a general meeting of the strata company, are to be exercised and performed by the council of the strata company: by-law 4(1) of Part I of the Schedule to the Act. The council of the strata company is to be elected at each annual general meeting by ordinary resolution. It is to consist of not less than three nor more than seven proprietors. However, where there are no more than three proprietors, the council is to consist of all proprietors: by-law 4(2). Except where there is only one proprietor, a quorum of the council is to be two, where the council consists of three or four members; three, where it consists of five or six members; and four, where it consists of seven members: by-law 4(5). At meetings of the council, all matters are to be determined by simple majority vote: by-law 4(8). The council, in addition to its other duties, is to –

- (a) keep minutes of its proceedings;
- (b) keep minutes of general meetings of the strata company;
- (c) keep a record of unanimous resolutions of the strata company;
- (d) keep books of account;
- (e) prepare proper accounts for each annual general meeting of the strata company;

and on the application of a proprietor or mortgagee is to make all these records (including records relating to the books of account) available for inspection: by-law 4(10).

Principal officers of the council

16.2 One of the members of the public who made a preliminary submission pointed out that the present Act does not provide for principal office bearers of the council such as secretary and treasurer. By-law 4(9) (c) in Part I of the Schedule does, however, provide that subject to any restriction imposed or direction given at a general meeting, the council may delegate to one or more of its members such of its powers and duties as it thinks fit. So it would be possible for the council under this by-law to appoint one of its members to be, for example, secretary and to delegate certain of its powers to this person.

16.3 The only Australian State which has approached this aspect differently is New South Wales. Section 73(1) of the New South Wales *Strata Titles Act 1973* provides that the members of a council shall, at the first meeting of the council after they assume office as such members, appoint a chairman, a secretary and a treasurer of the council. A person may not be appointed chairman, secretary or treasurer of the council unless he is a member of the council but he may be appointed to more than one of these offices: s.73(2). The chairman, secretary and treasurer of the council are by virtue of their offices also chairman, secretary and treasurer of the strata company: by-law 1 of Schedule I. A person who is appointed to such an office holds office until he ceases to be a member of the council or another person is appointed by the council to hold that office, whichever first happens: s.73(3).

16.4 The New South Wales Act provides that the chairman is to preside at those meetings of the strata company and the council at which he is present: s.73(4); by-law 7 Part I Schedule 2 and by-law 9 Part II Schedule 2. By-law 10 of the First Schedule to the New South Wales Act states that the powers and duties of the secretary include –

- (a) the preparation and distribution of minutes of meetings of the strata company;
- (b) the giving on behalf of the strata company of the notices required to be given under the Act;
- (c) the maintenance of the strata roll;

- (d) the supply of information on behalf of the strata company in accordance with s.70(1) (a) and (b);
- (e) the answering of communications addressed to the strata company; and
- (f) the calling of nominations of candidates for election as members of the council.

16.5 The New South Wales Act provides that the powers, authorities, duties or functions of the strata company or the treasurer of the strata company relating to the receipt or expenditure of, or accounting for, money, or the keeping of the books of account of the strata company may only be exercised by a person who is either -

- (a) a member of the strata company or of the council and is the treasurer of the strata company or of the council; or
- (b) a managing agent who is empowered to exercise or perform that power, authority, duty or function: s.74(5).

By-law II of the first Schedule to the New South Wales Act provides that the powers and duties of a treasurer of a strata company include –

- (a) the notifying of proprietors of any contributions levied pursuant to the Act;
- (b) the receipt, acknowledgement and banking of, and the accounting for, any money paid to the strata company;
- (c) the preparation of any certificate applied for under s.70(1) (c) (for example the amount of any regular contribution determined by the strata company under s.68 as payable to the fund required to be established under the Act to meet liabilities in relation to maintaining and keeping in good repair the common property, and so on);
- (d) keeping the books of account and preparing statements of accounts.

16.6 The Commission's tentative view is that provision should be made for the following principal office bearers namely, chairman, secretary and treasurer and that the duties of each of these principal officers should be set out in Part I of the by-laws in the Schedule to the Act. The Commission is also tentatively of the opinion that the same person ought to be able to hold more than one of these offices at the same time.

When meetings should be held

16.7 One of the preliminary submissions made to the Commission was that the Act should be amended so as to specify how often council meetings should be held so as to facilitate the conduct of business and enable complaints to be dealt with promptly. By-law 4(9) (a) in Part I of the Schedule to the present Act provides that the council may:

"meet together for the conduct of business, adjourn and otherwise regulate its meetings as it thinks fit, but shall meet when any member of the council gives to the other members not less than seven days notice of a meeting proposed by him, specifying the reason for calling it".

This provision therefore does not specify exactly how often the council must meet except that it must do so when a member gives the other members not less than seven days notice of a meeting proposed by him, specifying the reason for calling it.

16.8 The strata titles legislation in the other Australian States does not prescribe the precise intervals at which the council is to meet. The New Zealand legislation contains a by-law to the same effect as by-law 4(9) (a) in Part I of the Schedule of the Western Australian Act but it is prefixed by the words: "Subject to any restriction imposed or direction given at an annual general meeting".

16.9 The Commission does not consider that it would be desirable to prescribe the intervals at which the council must meet. The question of when a council should meet will depend on a number of matters, such as whether there is business to be dealt with and, if there is, how urgent the business is. The Commission believes the present by-law is basically satisfactory but tentatively favours the prefixing to it of the words which appear in the corresponding New Zealand by-law namely: "Subject to any restriction imposed or direction given at an annual general meeting". This would mean that if a strata company considered that it would be

desirable for its council to meet at least say once every three months, it could direct accordingly.

Preventing the council from dealing with a matter

16.10 Under the present Act, the council is empowered to exercise any of the powers and duties of the strata company unless the particular matter in question is one which under the Act can only be dealt with at a general meeting of the strata company, or unless at a general meeting held prior to the council meeting the strata company has restrained the council from dealing with the matter: see by-law 4(1) of Part I of the Schedule to the Act.

16.11 The position is similar under the strata titles legislation in New Zealand and the other Australian States (except New South Wales). Section 74(3) of the New South Wales *Strata Titles Act 1973* provides that a decision of a council has no force or effect if, before that decision is made, notice in writing is given to the secretary of the council by one or more proprietors, the sum of whose unit entitlements exceeds one-half of the aggregate unit entitlements, that the making of the decision is opposed by those proprietors: s.74(3). The giving of such a notice does not mean that the matter must be referred to a meeting of the strata company - it only prevents the council from determining the matter. If it is desired that the motion be dealt with at a general meeting it would be necessary for a person who is entitled to vote at a meeting of the strata company to submit the terms of the motion to the secretary, who is then required to include that motion in the agenda for the next general meeting of the strata company. Under the New South Wales Act, the opportunity is given to a proprietor to ascertain what matters are going to be dealt with at a meeting of the council, because for not less than twenty-four hours ending immediately before a council holds a meeting it is to display on the notice board (which the council is under a duty to have affixed to some part of the common property) a notice of its intention to hold the meeting containing the agenda for the meeting: by-laws 3 and 4 of Schedule I.

16.12 The Commission has no firm view on whether provisions similar to those now operating in New South Wales should be enacted in this State and would welcome comment.

Removal from office of a member of the council

16.13 It is provided in by-law 4(3) in Part I of the Schedule to the present Act that, except where the council consists of all the proprietors, the strata company may by resolution at an extraordinary general meeting remove any member of the council before the expiration of his term of office and appoint another proprietor in his place to hold office until the next annual general meeting.

16.14 It is to be noted that under this by-law as is the case in New Zealand and the other Australian States (except New South Wales) only an ordinary resolution need be passed to remove a member of the council from office. However, under the New South Wales *Strata Titles Act 1973* a special resolution is required. The Commission is tentatively of the opinion that it is desirable for members of the council to have more security of tenure than is provided to them under the present Act, and at this stage considers that a special resolution of the strata company should be required to remove a member of the council from office.

What matters should be dealt with by council?

16.15 It has already been observed (see paragraph 16.1 above) that under the present Western Australian Act, the council is empowered to exercise any of the powers and duties of the strata company, unless the particular matter in question is one which under the Act can only be dealt with at a general meeting of the strata company or unless, at a general meeting held prior to the council meeting, the strata company has restrained the council from dealing with the matter: see by-law 4(1) of Part I of the Schedule to the Act. It is possible that under this by-law a strata company could determine in advance, not only that a particular matter must be determined by the strata company in general meeting, but also that a particular class or classes of matters may only be determined by the strata company in general meeting. It should also be noted that a decision made by a council which it was empowered to make can be rescinded or varied at a subsequent general meeting of the strata company. However, for practical reasons, it may by then be too late to reverse a decision of the council: the council may have already acted on its decision and completed some transaction which cannot be reversed.

16.16 The following are the matters which under the Act must be dealt with at a general meeting of the strata company –

- (i) the directing of the company to transfer or lease common property or any part thereof (s.10(2));
- (ii) the directing of the company to transfer the parcel or any part or parts thereof (s.11(3));
- (iii) the directing of the company to execute a grant of easement or a restrictive covenant burdening the parcel, or to accept or surrender a grant of easement or a restrictive covenant benefiting the parcel (s.12(1));
- (iv) the amending, repealing or adding to the by-laws contained in Part I of the Schedule to the Act (s.15(2));
- (v) a declaration by the proprietors that the building is destroyed for the purposes of the Act (s.19(1));
- (vi) a resolution that a grant to a proprietor of the right to exclusive use and enjoyment of common property or special privileges in respect of common property shall not be determinable on reasonable notice (by-law 3(f) of Part I of the Schedule to the Act);
- (vii) a resolution that the strata company insure against a risk which is not one which it is required to insure against under the Act (s.13(4) (e));
- (viii) the amending of the by-laws contained in Part II of the Schedule to the Act (by-law 9 of Part I of the Schedule to the Act);
- (ix) the removal of a member of the council before the expiration of his term of office and the appointment of another proprietor in his place: by-law 4(3) of Part I of the Schedule to the Act.

For a decision to be effective a unanimous resolution passed at a meeting of the strata company is required on the first six matters and a special resolution is required on the seventh and eighth matters. Only ordinary resolutions are required in regard to the ninth matter.

16.17 The position is similar in most of the other Australian States. However, by virtue of s.223nd of the South Australian *Real Property Act Amendment (Strata Titles) Act 1967*, there is in that State a much larger number of matters for which a unanimous resolution of the strata company is required. That section provides that the strata company may, if authorised by a unanimous resolution of the strata company:

- "(a) purchase, hire or otherwise acquire personal property for its own use or for use in connection with the enjoyment of the common property;
- (b) borrow moneys required by it for the purpose of carrying out its duties or exercising its powers;
- (c) secure the repayment of moneys borrowed by it, and the payment of interest thereon, by negotiable instrument or mortgage of unpaid contributions from the members (whether levied or not) , or by any combination of those means;
- (d) deposit in any trading bank or savings bank account any moneys in any fund established pursuant to paragraph (d) of subsection (5) of section 223nc of this Act;
- (e) enter into and carry out an agreement with any member or any occupier of a unit for the provision of amenities or services by it to such unit or to the member or occupier; and
- (f) grant to a member, or any person who has derived an interest in a unit through a member, any special privilege (not being a lease) in respect of the enjoyment of part or parts of the common property."

16.18 The New South Wales *Strata Titles Act 1973* imposes restrictions on the amount of expenditure which a council may incur in anyone case. Section 76 of the Act provides:

"76. (1) Unless otherwise determined pursuant to a special resolution of the [strata company] or, in an emergency, authorised by the Commissioner, the council shall not, in anyone case, undertake expenditure exceeding the sum obtained by multiplying the prescribed amount by the number of lots the subject of the strata scheme.

(2) Where proposed expenditure would exceed an amount calculated in accordance with subsection (1) the council shall –

- (a) submit the proposal for determination at an extraordinary general meeting of the [strata company] convened for the purpose of, or for purposes which include, consideration of the proposal; and
 - (b) if the proposed expenditure is in respect of work to be performed or the purchase of personal property submit at least two tenders to that meeting with the proposal.
- (3) Subsection (1) does not apply to the expenditure of moneys –
- (a) in payment of any premium of insurance effected by or on behalf of the [strata company];
 - (b) to comply with a notice or order served on the [strata company] by any public authority or local council; or
 - (c) in discharge of any liability incurred in respect of an obligation of the [strata company] authorised by the [strata company] in general meeting."

16.19 The amount prescribed for the purpose of s.76(1) is \$10. Therefore in New South Wales if there are say fifty lots in a particular scheme, the council may not undertake expenditure exceeding \$500 unless it has complied with the provisions of s.76(2) and unless the motion outlining the proposal is passed pursuant to a special resolution at an extraordinary general meeting. It should be noted that if a proposal to expend more than the prescribed amount does not originate in the council and if the strata company (and not the council) is to undertake the expenditure, then the motion may be passed by an ordinary resolution at a general meeting. In those schemes where the strata company does not wish to have the restriction imposed by s.76 apply to its council, the strata company can by a special resolution exempt the council from the restriction imposed by s.76 either in a particular instance, a particular class of instances or generally. Under the New Zealand legislation there are also restrictions on the amount of expenditure which a council may incur in anyone case: by-law 4 of the second Schedule to the *Unit Titles Act 1972*.

16.20 A number of strata companies under the Western Australian *Strata Titles Act* have furnished the Commission with copies of their by-laws and, in some of these, restrictions have been imposed on the amount of expenditure which the council can incur in any one case.

16.21 It seems to the Commission that it could be argued that the Act should be amended to provide that the following matters (which at present may be dealt with by the council) must be dealt with at a general meeting of the strata company –

- (a) the purchase, hire or other acquisition of personal property;
- (b) the borrowing of money;
- (c) the securing of the repayment of money borrowed by it and of the payment of interest thereon;
- (d) investment of money in investments other than those authorised by law for the investment of trust funds;
- (e) the granting to a proprietor of the right to exclusive use and enjoyment of common property, or special privileges in respect thereof where that right or those privileges are determinable on reasonable notice;
- (f) contributions to the administrative fund and any other funds of the strata company;
- (g) the undertaking of expenditure exceeding the sum obtained by multiplying an amount (which would be prescribed by regulation) by the number of lots in the strata scheme.

16.22 The Commission would welcome comment as to whether any of these matters should only be able to be dealt with by the strata company in general meeting. In the event of the Act being amended to provide that some of these matters may only be dealt with at a general meeting by the strata company, it would seem reasonable also to provide that the strata company can exempt the council from any of the restrictions in a particular instance, a class of instances or generally. The Commission would appreciate comment on whether a unanimous resolution or only a special resolution should be required for such an exemption.

Should the number of matters requiring a special resolution be extended?

17.1 One of the members of the public who made a preliminary submission considered that the number of matters for which a special resolution is required (see paragraph 15.5 above) should be extended. The position in regard to which questions require a special or unanimous resolution is similar in the other Australian States and also in New Zealand, although as has been noted the South Australian legislation (see paragraph 16.17 above) provides that quite a number of other matters also require a unanimous resolution. Also, as has been observed, under the New South Wales legislation (see paragraphs 16.18 and 16.19 above) before the council can undertake expenditure exceeding the prescribed amount, a motion outlining the proposal must be passed pursuant to a special resolution at an extraordinary general meeting of the strata company.

17.2 It could be argued that a special resolution should be required for each of the matters referred to in paragraph 16.21. The Commission would appreciate comment on the questions -

- (a) Which (if any) of the matters listed in paragraph 16.21 should require a special resolution?
- (b) What additional matters (apart from any set out in paragraph 16.21) should require a special resolution?

Matters depending on unit entitlement

General

18.1 Under the Western Australian *Strata Titles Act 1966*, when a strata plan is lodged for registration, it is required to have written on it the unit entitlement of each lot: s.18(1). Section 18(2) of the Act provides that:

"The unit entitlement so endorsed determines –

- (a) the voting rights of a proprietor;

- (b) the quantum of the undivided share of each proprietor in the common property; and
- (c) the proportion payable by each proprietor of contributions levied pursuant to subsection (6) of section thirteen of this Act."

18.2 The contributions levied pursuant to s.13(6) which are referred to in s.18(2) (c) are those levied on proprietors to raise the amounts sufficient to meet the expenses of controlling and managing the common property, of paying any premiums of insurance and of discharging any other obligation of the strata company. Unit entitlement also determines a number of other matters, in addition to those set out in s.18(2): see paragraphs 18.3 to 18.5 below.

18.3 If the building is destroyed (see paragraphs 25.1 and 25.2 below) the company must forthwith notify the Registrar of Titles: s.11(1). The Registrar makes an entry on the registered strata plan and thereupon the proprietors of the lots in the plan become entitled to the parcel as tenants-in-common in shares proportional to the unit entitlement of their respective lots: s.11(2). Where the company pursuant to a unanimous resolution of the proprietors directs the company to transfer all or any part of the parcel (that is, the lots and the common property), the proprietors are entitled to the proceeds of the sale in shares proportional to the unit entitlement of their respective lots: s.11(3).

18.4 Where a building is uninsured or has been insured to less than its replacement value, a proprietor may effect a policy of insurance in respect of any damage to his lot in a sum equal to the replacement value of his lot less a sum representing the amount to which his lot is insured under any policy of insurance effected on the building: s.17(3). For this purpose, the amount for which a lot is insured under the policy on the building is determined by multiplying the value stated in the policy by the unit entitlement of the lot and dividing the product so obtained by the sum of the unit entitlements of all the lots in the building: s.17(4).

18.5 Unit entitlement is also a factor in determining the amount of rates payable on a lot. Section 21(2)(a) requires any authority such as the Commissioner of Taxation or a local authority valuing a parcel for rating purposes to value it as a single parcel as if it were owned by a single owner. Where any authority authorised to make and levy rates on the parcel adopts such a valuation, the value of the parcel shown in the valuation is to be apportioned by the rating authority (that is the authority authorised to make and levy rates) between the lots comprised in the parcel in proportion to the unit entitlement of the respective lots: s.21(5)(a).

The proprietor of each lot is deemed to be the owner of the lot as if it were a separate parcel with a value equal to that so apportioned to it and liable for the rates accordingly: s.21(5)(c). There is a similar formula for land tax: s.21(8).

What should unit entitlement be based on?

18.6 The present Act does not lay down any criteria to be followed when unit entitlement is allocated. Section 18(1) simply provides that every plan lodged for registration as a strata plan is to have an endorsement on it "specifying in whole numbers the unit entitlement of each lot and a number equal to the aggregate unit entitlements of all the lots". This provision leaves it free to the developer to assign whatever unit entitlement he wishes to each of the units in the building. A developer may, for example, allocate a low entitlement to a unit which he has decided to keep for himself and load the unit entitlement of the other units. By doing so, he would reduce the amount of rates and land tax he would otherwise pay (see paragraph 18.5 above) and also the amount of his contribution to the administrative fund. It is true that, upon destruction of the building (see paragraph 25.1 and 25.2 below), he may be at a disadvantage in that the proprietors become entitled to the parcel as tenants-in-common in shares proportional to the unit entitlement of their respective lots: s.11(2). However, this may not mean that he is entitled only to a corresponding share of the proceeds of sale since, under s.19, the court is empowered to make financial adjustments between the proprietors in such a case.

18.7 Despite the far reaching consequences of allocation of unit entitlement, the Act contains no provisions requiring an allocation of unit entitlement based on specific criteria nor any provisions for variation of unit entitlement. To alter unit entitlement, it would be necessary for the building to be "destroyed" (see paragraphs 25.1 and 25.2 below) and for a new strata plan to be then registered. Such a procedure would involve a considerable amount of expense.

18.8 Fourteen members of the public made a preliminary submission to the Commission on the question of unit entitlement. Most of these contended that equal unit entitlement for each of the units in the building was usually unfair. Cases were brought to the attention of the Commission where the one development contained three bedroom and two bedroom units and

where the units obviously varied in value, and yet the developer had allocated the same unit entitlement to all units.

18.9 It appears from the submissions that people often legally bind themselves to purchase units without even knowing the unit entitlement or, indeed, the implications of unit entitlement itself. Of course, it can be said that such people should have found out these things by seeking legal advice. However, in Western Australia even where purchasers do seek legal advice, they usually only do so after an offer and acceptance form is signed and by then they are already bound by their agreement.

18.10 Most of those who made submissions on this aspect considered that unit entitlement should be based on value. This is already the case in New Zealand where s.6 of the *Unit Titles Act 1972* provides as follows:

"Before the unit plan is deposited, there shall be assigned to every unit a unit entitlement to be fixed by a Valuer General or a registered valuer on the basis of the relative value of the unit in relation to each of the other units on the unit plan."

18.11 There does appear to be a fairly strong argument that a unit entitlement based on value should be the determinant in at least the following matters –

- (a) the quantum of the undivided share of each proprietor in the common property;
- (b) the shares in which the proprietors own the parcel in the event of the destruction of the building;
- (c) the division of the proceeds of sale in the event of the sale of the parcel;
- (d) in determining for the purposes of s.17(3) of the Act the amount to which a particular unit is insured under the policy on the building (see paragraph 18.4 above);
- (e) rates and taxes (except perhaps where the rate or tax is levied on the basis of the annual value of the land and building);

(f) voting.

The Commission would welcome comment on whether a unit entitlement based on value should determine all or any of these matters.

18.12 It could also be argued that a unit entitlement based on value should determine the proportions in which proprietors contribute to the expenses of maintaining the building (including the lift) and of insuring the building. On the other hand, it could be stated that the area of a proprietor's unit is a fairer determinant than value when it comes to such maintenance and insurance and that therefore contributions to these expenses should be borne by proprietors in proportion to the floor areas of their units. The Commission would welcome comment.

18.13 Two of the members of the public who made preliminary submissions contended that contributions to administrative costs such as property management, caretaker's wages, maintenance of lawns and swimming pools and lighting of hallways and other common property should be borne by the proprietors in equal shares. They argued that all proprietors receive equal benefit from these expenses. The Commission would welcome comment on whether contributions to these administrative costs should be borne equally by proprietors or be borne by them in proportions determined by unit entitlements based on the value of their units.

How should a unit entitlement based on value be achieved?

18.14 If it is decided that there is a place in the Act for a unit entitlement based on value, the question arises as to how such a unit entitlement is to be obtained. It has already been observed that in New Zealand the unit entitlement of each unit is to be fixed, before the plan is deposited, by a Valuer General or a registered valuer on the basis of the relative value of the unit in relation to each of the other units: see paragraph 18.10 above. The South Australian legislation provides that unit entitlement is to be approved by the State Commissioner of Land Tax before the strata plan is deposited at the Titles Office, but does not indicate any criteria to be followed by the Commissioner in deciding whether or not to approve the unit entitlement: s.223mf of the *Real Property Act Amendment (Strata Titles) Act 1967*. The only other Australian State where there is any control over the allocation of unit entitlement is New

South Wales. Section 119 of that State's *Strata Titles Act 1973-1976* (NSW) provides as follows:

“Where, pursuant to an application by a proprietor or a [strata company] for an order under this section, a [Strata Titles] Board considers that the allocation of unit entitlements among the lots the subject of the strata scheme concerned was, at the time the strata plan was registered or at the time any strata plan of subdivision was registered, as the case may be, unreasonably made, having regard to the respective values of the lots at that time, the [Strata Titles] Board may make an order allocating unit entitlements among the lots in the manner specified in the order.”

The New South Wales Act does not specifically state that unit entitlement is to be allocated by a developer on the basis of value but s.119 at least indicates that he ought to do so because if his allocation was unreasonable, the Strata Titles Board may on the application of a proprietor or a strata company make an order reallocating the unit entitlements.

18.15 It could be argued that the most satisfactory way to ensure that unit entitlements are in proportion to the value of the units would be to require the Commissioner of State Taxation to allocate the unit entitlement to each unit on the basis of the relative value of the unit in relation to each of the other units. This would have to be done before the strata plan could be deposited at the Titles Office. If the Commissioner wished he could employ a valuer in private practice to do the valuation for him in place of a valuer on his own staff. As the valuation would mainly be for the benefit of the future proprietors of the units, it would probably be reasonable for the developer to have to pay the Commissioner at normal commercial rates for the valuation. It may also be argued that instead of requiring allocation by the Commissioner of State Taxation, it would be equally satisfactory for the unit entitlement to be allocated on the basis of a valuation done by a qualified valuer in private practice.

18.16 The Commission would appreciate comment on the question as to how a unit entitlement based on value should be achieved.

Should there be provision for altering unit entitlements already allocated?

18.17 There is no provision under the present Act for varying unit entitlement once it has been allocated without the notional destruction (see paragraphs 25.1 and 25.2 below) of the building and the registration of a fresh strata plan. The only Australian State which has

enacted such a provision is New South Wales. In that State, where the Strata Titles Board (see paragraphs 27.2 and 28.1 below) considers that the allocation of unit entitlements among the lots the subject of a strata scheme was at the time the strata plan was registered unreasonably made, having regard to the respective values of the lots at that time, the Strata Titles Board may make an order allocating unit entitlement among the lots: *Strata Titles Act 1973-1976* (NSW), s.119. Application for such an order can be made by either a proprietor or a strata company: *ibid.*

18.18 At this stage, the Commission's tentative view is that provision should be made to enable a new allocation of unit entitlements where the existing allocation is unreasonable having regard to the value of the lots at the time that allocation was made. The provision should not only permit the increase and/or decrease of the unit entitlements of each of the lots in the strata plan but should also permit an increase or decrease for the aggregate entitlement for the strata scheme (this is now the position under s.119 of the New South Wales Act).

18.19 If under any new legislation the unit entitlements for strata plans registered after the coming into effect of that legislation are to be allocated by the Commissioner of State Taxation or in accordance with the valuation of a qualified valuer (see paragraph 18.15 above), then it may only be necessary to make provision to enable fresh allocation of unit entitlements allocated before the new legislation.

18.20 The Commission would welcome comment on whether -

- (a) provision should be made to enable a new allocation of unit entitlement where the existing allocation is unreasonable having regard to the value of the lots at the time the allocation was made;
- (b) the new allocation should be made by a court or a Strata Titles Board;
- (c) the provision enabling new allocation should be confined to allocations made before the time when the new legislation comes into effect if, under new legislation, unit entitlements for strata plans registered after the coming into effect of that legislation are to be allocated by the Commissioner of State Taxation or in accordance with a valuation of a qualified valuer.

Original proprietor

19.1 One of the members of the public who made a preliminary submission to the Commission said that in many instances quite a long period of time elapsed between the registration of the strata plan and any attempt by the proprietors to organise the strata scheme effectively. Sometimes, nothing was done about calling the first meeting of the strata company until a problem arose which made a meeting absolutely necessary. The general effect was that some schemes remained disorganised for a considerable time before the first meeting of the strata company was eventually held. It is true that the by-laws contained in Part I of the Schedule to the present Act require a general meeting to be held within three months after the registration of the strata plan: by-law 5(1). However, it seems that in many cases; this provision is not complied with.

19.2 Another problem under the present Act is that during the period when the original proprietor (i.e. the person who owns the lots comprised in the strata plan at the time of the registration of the plan) is the proprietor of lots the sum of whose unit entitlements exceeds one-half of the aggregate unit entitlement, he can dictate the manner in which the scheme will be administered. The reason is that while he retains this position he can out-vote the remaining proprietors. In fact, while the original proprietor owns all the lots in the strata plan he can have a unanimous resolution passed and can, for example, have the by-laws contained in Part I of the Schedule to the Act amended.

19.3 The only Australian State which has enacted provisions aimed at overcoming these problems is New South Wales. There are no such provisions in the New Zealand strata titles legislation. The New South Wales *Strata Titles Act 1973* implemented the aim in a three pronged way. Firstly, the original proprietor is required to manage the scheme until such time as the management structure has been established (which would generally be at what the Act defines as "the first annual general meeting of the [strata company]"). Secondly, restrictions are placed on what the strata company may do during what is referred to in the Act as the "initial period". Thirdly, under the New South Wales Act, so long as the original proprietor is the proprietor of lots the sum of whose unit entitlements is not less than one-half of the aggregate unit entitlement, his voting power is reduced to one-third of what it would otherwise be.

Management in "initial period" (N.S.W.)

19.4 With regard to the first requirement referred to in paragraph 19.3 above, the New South Wales Act imposes a duty on the original proprietor to convene the first annual general meeting of the strata company within one month after the expiration of the initial period, whether or not he is still a proprietor at the time: s.57(1). The "initial period" is the period commencing on the date on which the strata plan is registered and ending on the date on which there are proprietors of lots the subject of the strata scheme concerned (apart from the original proprietor) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement: s.5(1). The original proprietor is liable to a penalty of \$1,000 if he fails to convene and hold the first annual general meeting within one month of the expiration of the initial period. Part II of Schedule 2 to the Act sets out a detailed code for the manner of convening the meeting and the voting rights and procedures at the meeting. Schedule 2 cannot be altered and its procedures must be followed. Section 57(2) of the Act provides that the agenda for this first annual general meeting must consist of the following items -

- (a) to decide whether insurances effected by the strata company should be confirmed, varied or extended;
- (b) to decide whether any amounts determined under s.68(1) (j) and (k) , being the amounts required to be raised by way of contribution to the administrative fund and sinking fund, should be confirmed or varied (these funds are described in paragraph 22.2 below);
- (c) where there are more than three proprietors, to determine the number of members of the council and to elect the council;
- (d) to decide what matters (if any), will be "restricted matters" so that the council will be prohibited from making a decision in respect of any such matters which will only be able to be dealt with at a general meeting of the strata company;
- (e) to decide whether the by-laws in force immediately before the holding of the meeting should be amended, added to or repealed.

19.5 These are the only matters in respect of which motions may be submitted to the first annual general meeting: clause 4(1) of Part II of Schedule 2. In some schemes in New South Wales where lots have been slow to sell, it may be several years after the strata plan is registered before the first annual general meeting of the strata company is held. To enable the scheme to be administered during those years the strata company may have called several meetings at which the matters mentioned in the agenda for the first annual general meeting, were determined. However, this does not remove the duty imposed on the original proprietor requiring him to convene "the first annual general meeting" at the expiration of the initial period.

19.6 Under the New South Wales Act, until the offices of chairman, secretary and treasurer of the strata company are filled or until the first annual general meeting has been held, whichever first happens, the powers, authorities, duties and functions conferred or imposed on the holders of those offices are to be exercised and performed by the original proprietor or by his agent duly authorised in writing: clause 16 of Part I of Schedule 2 to the Act. He is also responsible for convening any general meeting of the strata company, prior to the first annual general meeting of the strata company being held, unless a council is sooner constituted: clause 17 of Part I of Schedule 2.

19.7 Section 57(4) of the New South Wales legislation provides that the original proprietor must deliver to the strata company at its first annual general meeting –

- (a) all plans, specifications, certificates (other than certificates of title for lots), diagrams and other documents, including policies of insurance obtained or received by him and relating to the parcel or building; and
- (b) if they are in his possession or under his control, the certificate of title for the common property, the strata roll, the books of accounts and any notices or other records relating to the strata scheme.

If the original proprietor fails to hand over these documents at the first annual general meeting, he is liable to a penalty of \$1,000: *ibid*. He is not required, however, to deliver any such documents which exclusively evidence rights or obligations of the original proprietor

and which are not capable of being used for the benefit of the strata company or any of the proprietors, other than the original proprietor: *ibid.*

Restrictions in "initial period" (N.S.W.)

19.8 With regard to the second requirement referred to in paragraph 19.3 above, s.66(1) of the New South Wales Act provides that unless authorised by a Supreme Court order a strata company shall not, during the initial period –

- (a) amend, add to or repeal the by-laws in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, proprietors or in respect of one or more, but not all, lots;
- (b) alter any common property forming part of the building or erect any structure on the common property (it would seem that the strata company could not, during the initial period, grant its consent to a proposal by a proprietor that he be permitted to effect alterations to the common property);
- (c) borrow money or give securities;
- (d) appoint a managing agent to hold office as such for a period extending beyond the expiration of the initial period.

An exception to (a) above is that a strata company may, during the initial period, with the written approval of the local authority make a by-law in accordance with s.58(7) (see paragraph 9.8 above) conferring on a proprietor the exclusive use and enjoyment of, or special privileges in respect of, any specified part of the common property for the purpose of authorising that proprietor to park a vehicle on that part of the common property: s.66(3). (The by-law may only be made pursuant to a unanimous resolution: s.58(7).) Without affecting any other remedy available against the original proprietor, if a strata company contravenes s.66(1), the original proprietor is liable for any loss suffered by the strata company or any proprietor as a result of the contravention and the strata company or any proprietor may recover from the original proprietor, as damages for breach of a statutory duty, any loss suffered by it or him: s.66(2).

19.9 There are three further restrictions under the New South Wales legislation governing the manner in which either lots or common property may be dealt with during the initial period. An order of the Supreme Court is a prerequisite during the initial period to –

- (a) the registration of a strata plan of subdivision (ss.9(3) (d) and 67(4));
- (b) the registration of a notice of conversion (ss.13(2)(b) and 67(4));
- (c) the registration of a dealing (with common property) for the purposes of division 2 of Part II of the Act: s.28(4). The acquisition of additional common property by the strata company or the creation of an easement over common property would be examples of such a dealing.

Voting power of original proprietor (N.S.W.)

19.10 The third requirement referred to in paragraph 19.3 above, involves limiting the degree of control which the original proprietor can exercise over the scheme during the period when he is the proprietor of lots the sum of whose unit entitlements is not less than one-half of the aggregate unit entitlement. The Act, in these circumstances, reduces his voting power at meetings of the strata company to one-third of what it would otherwise be, ignoring any fraction: clause 11(4) of Part I of Schedule 2 and clause 12(4) of Part II of Schedule 2. A similar reduction in the voting power of the original proprietor exists in the case of election to the council: clause 10 of Part I of Schedule 2.

19.11 The Commission would appreciate comment on whether new legislation in Western Australia should contain provisions aimed at having the original proprietor leave behind him a viable management structure before he departs from the scheme. It would also welcome comment on whether any new legislation should restrict the matters which can be dealt with by the strata company between registration of the strata plan and the date on which there are proprietors of lots (other than the original proprietor) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement. It would also appreciate comment on whether the voting power of the original proprietor should be reduced during the period when he is proprietor of lots the sum of whose unit entitlements is not less than one-half of the aggregate

unit entitlement. Should such provisions be the same as those contained in the New South Wales legislation (which are outlined in paragraphs 19.3 to 19.10 above) and, if not, what should they provide?

Managing agents

20.1 By-law 4(9)(b) of Part I to the Schedule to Western Australia's *Strata Titles Act 1966* provides that the council of the strata company may employ for and on behalf of the company such agents and servants as it thinks fit in connection with the control and management of the common property, and the exercise and performance of the powers and duties of the company. There would seem to be no bar to a strata company employing one of the proprietors in the scheme in such a capacity. A similar provision is found in the corresponding by-laws in the strata titles legislation of each of the other Australian States and also of New Zealand. (By-law 4(9)(c) of Part I of the Schedule to the Western Australian Act also provides that, subject to any restriction imposed or direction given at a general meeting, the council may delegate to one or more of its members such of its powers and duties as it thinks fit, and at any time revoke the delegation. The strata titles legislation of most other Australian States (but not of New South Wales) contains a similar provision).

20.2 In Western Australia, it is fairly common in larger strata title developments for the council to avail itself of the power contained in by-law 4(9)(b) and employ an agent to do most of the day-to-day administration of its scheme. In the cases which have come to the knowledge of the Commission where such an agent has been employed, the agent has always been a land agent or an accountant. Where the managing agent is a land agent, the *Land Agents Act 1921-1974* will afford some protection to the strata company: for example, a land agent must keep full accounts of all money received by him and of all payments made by him of the money (*Land Agents Act* s.14G(2)(a)(i)); he must have his trust account audited annually (*ibid.*, s.14G(4)(a)) and in the event of the agent stealing money entrusted to him a claim can be made against the Land Agents Fidelity Guarantee Fund: *ibid.*, ss.26-27. There are, however, no similar statutory provisions governing accountants.

20.3 But an agent employed by a council need not, under the Act, be either a land agent or an accountant - he is not required to have any qualifications. The agents employed by councils appear to carry out such duties as keeping the minutes of proceedings of the council and

minutes of general meetings, keeping the books of account of the strata company (including the preparation of an annual balance sheet and annual statement of income and expenditure), paying accounts of the strata company, attending to correspondence on behalf of the strata company, forwarding of levy notices in relation to the administrative fund and the forwarding of meeting notices. It may be that one of the benefits of the appointment of a managing agent would be to lessen the possibility of animosity between members of the strata scheme concerned. The agent's fee is not fixed by law and appears to be a matter which is negotiated in each case before he takes on his duties.

20.4 The only strata titles legislation in Australia to regulate the position of agents in any way is that of New South Wales. Section 78(1) of that State's *Strata Titles Act 1973* provides that a strata company may in writing appoint a person (or company) as its managing agent and delegate in writing to him (or it) –

- (a) all of its powers (other than the power of delegation), authorities, duties and functions;
- (b) any one or more of its powers (other than the power of delegation), authorities, duties and functions specified in the instruction of appointment; or-
- (c) all of its powers (other than the power of delegation), authorities, duties and functions except those specified in the instrument of appointment.

20.5 It can be seen that, depending on the document of instruction, the powers and duties of a managing agent under the New South Wales legislation can be very extensive: broader than the powers and duties which a council under by-law 4 (9) (b) of Part I of the Schedule to the Western Australian Act can employ an agent to do. Under the New South Wales legislation a managing agent may be appointed by an ordinary resolution, but the Act is not clear on the question whether if appointed by an ordinary resolution, a managing agent can exercise powers which require a special resolution or unanimous resolution of the strata company. The position, probably, is that the only powers and duties which a strata company is capable of delegating are -

- (a) if the delegation is made pursuant to an ordinary resolution - those powers and duties which may be exercised pursuant to an ordinary resolution;
- (b) if made pursuant to a special resolution - those powers and duties which may be exercised pursuant to such a resolution; or
- (c) if made pursuant to a unanimous resolution - those powers and duties which may be exercised pursuant to a unanimous resolution.

Any act or thing done or suffered by a managing agent while acting in the exercise of a delegation has the same force and effect as if it had been done or suffered by the strata company and is deemed to have been done or suffered by the strata company: s.78(5). However, notwithstanding any delegation to a managing agent, the strata company may continue to exercise or perform all or any of the powers, authorities, duties or functions delegated: s.78(4). Where the instrument of his appointment so provides, a managing agent has all the powers, authorities, duties and functions of the chairman, secretary or treasurer of the strata company and the council or such of those powers, authorities, duties and functions as may be specified in the instrument: s.78(6).

20.6 Under the New South Wales legislation, any person may be appointed a managing agent, as it is not necessary that he hold any professional qualification. However, before a person may act as a managing agent, it is necessary for him to obtain from an insurer approved by the Minister administering the Act a bond in the prescribed form and for the prescribed amount and to lodge that bond with the Strata Titles Commissioner. The prescribed amount is the amount obtained by multiplying the number of residential lots by the amount of \$200: Regulation 44(1). For example, if there are fifty residential lots in the scheme, the bond must be for a minimum amount of \$10,000. The strata company can, if it wishes, require the agent to obtain a bond for a greater sum. The bond requires the insurer to make good any loss caused by the managing agent as a result of his failure duly to account to the strata company for money received or held by him as managing agent.

20.7 The Commission would welcome comment as to whether the legislation should provide for a managing agent and whether express provision should also be made enabling a

strata company to employ one of the proprietors in the strata company to act as agent, and laying down the conditions of his appointment.

By-laws

Present position

21.1 Under the present Western Australian Act, the strata company can make by-laws for –

- (a) its corporate affairs; and
- (b) the control, management, use and enjoyment of the lots, the common property and the parcel: s.15(1).

In the Schedule to the Act there is a set of by-laws which are deemed to be by-laws of the company: s.15(2). They are divided into Parts I and II. Briefly, Part I sets out -

- (a) the duties of a proprietor;
- (b) the duties and powers of the company;
- (c) the duties and powers to be exercised by a council;
- (d) requirements for general meetings (when they are to be held, how they are to be conducted and the voting procedure).

Part II contains only two by-laws. The first by-law prohibits a proprietor from –

- (a) using his lot for any purpose that may be illegal or injurious to the reputation of the building;
- (b) making undue noise; or
- (c) keeping animals after notice from the council.

The second by-law in Part II provides that where the purpose for which a lot is intended to be used is shown expressly or by necessary implication by the registered strata plan, a proprietor may not use his lot for any other purpose or permit it so to be used. The by-laws contained in Part I of the Schedule may only be amended, repealed or added to by unanimous resolution:

s.15(2). Those in Part II may be amended, repealed or added to by a special resolution: by-law 9 of Part I of the Schedule to the Act.

21.2 Section 15(3) of the Act provides that no by-law or addition to or amendment or repeal of a by-law is capable of operating so as to prohibit or restrict the devolution of a lot or any transfer, lease, mortgage or any other dealing with a lot or to destroy or modify any easement implied or created by the Act. An amendment, repeal or addition to a by-law contained in Part I of the Schedule does not have effect until –

- (a) the company has lodged a notification thereof with the Registrar of Titles; and
- (b) the Registrar of Titles has made reference thereto on the appropriate registered strata plan.

The by-laws for the time being in force bind the company and the proprietors to the same extent as if they had been signed and sealed by the company and such proprietor: s.15(6). They are enforceable not only by the strata company but by any proprietor: s.15(6).

Enforcement of by-laws

21.3 Many of the preliminary submissions which the Commission received related to the question of by-laws. Ten of the submissions made the point that it is expensive and impractical to enforce the by-laws. The Commission agrees with this view. The only way in which the by-laws may be enforced are by means of an action for damages or an injunction. An action for damages is a cumbersome and expensive remedy, and the damages recovered would be confined to the loss suffered by reason of the breach. Usually the loss suffered is only nominal. The costs of obtaining an injunction to compel a proprietor to comply with or to restrain him from breaching a by-law could be considerable.

21.4 It was suggested to the Commission that enforcement of by-laws "should be handled not by a court but in a speedy and effective manner by a body specially established for the purpose, such as a Tribunal or a Commissioner". This has been the approach in New South Wales where, if a proprietor or other person bound by the by-laws fails to comply with a by-law, then the strata company, a managing agent, a proprietor, any person having an estate or

interest in a lot or an occupier can make an application to the Strata Titles Commissioner for an order that the proprietor or other person comply with the by-law: s.105 of the *Strata Titles Act 1973* (NSW) and see paragraphs 27.1 to 27.6. There is a right of appeal from the Commissioner to the Strata Titles Board.

21.5 In one of the submissions to the Commission it was contended that the Western Australian Act should provide for a penalty for breach of a by-law and that provision should be made for the secretary of the council or some similar person to prosecute in a court of law for breach of the by-law. The Commission's initial reaction to this suggestion is that it is going too far to make the breach of a strata scheme by-law an offence which may be the subject of a prosecution and the imposition of a penalty. This would put the by-law on the same footing as the by-laws of local government authorities, for example.

21.6 The Commission at this stage considers that there is merit in the suggestion that enforcement of by-laws should be by way of an order to comply made by some competent authority. There is a question whether the power to make orders requiring persons in breach to comply with a by-law should be vested in a Strata Titles Commissioner, as in New South Wales, or in the Local Court or a designated magistrate: see paragraphs 29.2 to 29.3 below. The Commission would appreciate comment on the best way of enforcing by-laws.

21.7 It is evident from the preliminary submissions that breaches of parking by-laws are a major concern of people living in strata title units. Proprietors, occupiers of units and visitors appear often to ignore the by-laws, thus causing annoyance and inconvenience to others. One case was brought to the attention of the Commission where the strata company for a development within the City of Perth had been able to call a Perth City Council parking inspector onto the land and he had imposed a fine on the owner of a car which was parked illegally on the land. The parking inspector imposed the fine under by-law 43 of the City of Perth *Parking Facilities By-law* (made pursuant to s.21(1)(ka) of the City of Perth *Parking Facilities Act*) which provides:

"No person shall stand or permit a vehicle to stand on land which is not a road or parking facility without the consent of the owner or person in occupation of such land."

21.8 Another instance (not within the City of Perth) was brought to the Commission's notice in which a strata company was endeavouring to have its common property defined as a "prescribed area" for the purposes of the *Road Traffic Act 1974*. Section 86(2) of that Act provides:

"No person shall, within a prescribed area, park a vehicle on land which is not a road, unless he has been authorised to do so by the owner, or person in possession of that land."

"Prescribed area" is defined in s.86(1) to include "any area defined for the purposes of this section by the Governor by notice published in the [*Government*] *Gazette*".

21.9 Where the common property is within the City of Perth, or where it has been made a prescribed area under the *Road Traffic Act*, obviously a trespasser which has parked his car on the common property without the consent of a proprietor of a lot is guilty of an offence. But it must be doubtful whether a proprietor of a lot who parks his car on the common property in a position which contravenes a parking by-law of the strata company is guilty of an offence. The same query must arise in regard to a lawful visitor to the development who parks his car on the common property with the consent of a proprietor of a lot, but in a position which contravenes a parking by-law of the strata company, particularly since the strata company by-laws do not bind visitors.

21.10 The remedies presently available to enforce rights under Western Australia's *Strata Titles Act*, namely damages or an injunction, are obviously impractical in relation to parking. One solution would be to amend the *Traffic Act* to provide that a person who parks a vehicle on common property in contravention of the by-laws of the strata company is guilty of an offence and to allow Road Traffic Authority officers and parking inspectors to enter the common property to police the by-laws and if necessary institute proceedings against offenders. This solution would seem to involve giving greater protection to strata title proprietors, than other land owners. The Commission would welcome any other suggestions or comments on the enforcement of by-laws of strata companies relating to parking. If under any new legislation there is to be a Strata Titles Commissioner (see paragraphs 27.1 to 27.7 and 29.1 and 29.2 below), proceedings before the Commissioner might not be the best solution as he would have no jurisdiction over visitors or trespassers.

Who should be bound by the by-laws?

21.11 Under the Western Australian Act, only the strata company and the proprietors are bound by the by-laws: see paragraph 21.2 above. As a number of those who made preliminary submissions pointed out the by-laws do not bind tenants or other occupiers. Some by-laws endeavour to control tenants and other occupiers by extending a proprietor's responsibilities under the by-laws beyond himself to anyone present in his lot. Hence, one set of by-laws has a by-law reading:

"A proprietor shall not make or permit to be made or suffer any undue noise in any lot owned by him. "

Such provisions seem to be fairly ineffectual in practice and it would be far better if the strata company could look to the tenant direct. Under the New South Wales legislation, by-laws bind the strata company, the proprietor, any mortgagee in possession and also a tenant or occupier. Section 58(5) of that State's *Strata Titles Act 1973* provides as follows:

"Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the [strata company] and the proprietors and any mortgagee in possession (whether by himself or any other person), or lessee or occupier, of a lot to the same extent as if the by-laws had been signed and sealed by the [strata company] and each proprietor and each such mortgagee, lessee and occupier respectively and as if they contained mutual covenants to observe and perform all the provisions of the by-laws."

The term "occupier" is wider than "tenant" and is defined by the Act to mean any person in lawful occupation of a lot. It may include the wife or child of a proprietor living in the unit with the proprietor. The Commission's tentative view is that by-laws made by a strata company under any new legislation in Western Australia should bind the same persons as those bound under s.58(5) of the New South Wales Act.

Should some by-laws become sections of the Act?

21.12 The provisions relating to by-laws in the *Conveyancing (Strata Titles) Act 1961* (NSW), including the by-laws in Parts I and II of the Schedule, were very similar to those in the present Western Australian Act. In New South Wales, most of the by-laws contained in Part I of the Schedule to the 1961 Act have been re-enacted in the 1973 Act, not as by-laws but as a section or subsection in the 1973 Act. This is especially so in the case of powers

conferred on the strata company (s.65), duties imposed on the strata company (s.68), and the constitution of the council: s.71. The Commission at this stage favours this approach.

21.13 Unlike a section of the *Strata Titles Act* itself, by-laws to the Act can always be amended by the strata company. If a provision is one which the strata company should not need to alter, then it should be placed in the Act, not in the by-laws. The principal purpose of by-laws should be to provide a code to govern those matters which would be applicable in some schemes and not in others. For example, different by-laws would be needed for a high-rise residential development of eighty units than for a single level residential development of three units.

21.14 One of the disadvantages of the present Western Australian legislation is that the developer can alter the by-laws as he wishes, during the period when he is the owner of all the lots in the strata plan. During that time he is in a position to have a unanimous resolution passed. In New South Wales, this can no longer happen in regard to those by-laws which have been re-enacted as sections or subsections in the new Act. (See also paragraph 19.8 above concerning amendment of by-laws in New South Wales during the initial period).

21.15 A further advantage of having a provision as a section of the Act and not as a by-law is that it will bind the world at large and not merely those bound by the by-laws.

Alteration of the by-laws

21.16 Subject to two exceptions, under the New South Wales *Strata Titles Act 1973* by-laws may be amended, added to or repealed by special resolution of the strata company: s.58(2). The first exception is a by-law conferring on a proprietor the exclusive use and enjoyment of or special privileges in respect of the common property or part of it: s.58(7), see paragraph 9.8 above. In this case a unanimous resolution is required. The other exception arises when an order of a Strata Titles Board has effect as if its terms were a by-law. A by-law created in this way may only be added to, amended or repealed by a unanimous resolution: s.58(11).

21.17 If the New South Wales approach of re-enacting most of the Part I by-laws as sections or subsections in the Act is adopted in Western Australia, then it could be argued that, as in New South Wales, only a special resolution (and not a unanimous resolution) should be

required to alter the remaining Part I by-laws. Once most of the lots have been sold, it is often more difficult to obtain a unanimous resolution than a special resolution. The Commission has no final view on whether only a special resolution should be required and would welcome comment.

Should a Board or Commissioner be given power to revoke, revive or repeal by-laws?

21.18 Under the Western Australian Act, where there has been an amendment or repeal of a by-law or an addition of a new by-law, no power is granted to a court or any other body to revoke the amendment, revive the repealed by-law or repeal the additional by-law. This is also the position under the strata titles legislation in New Zealand and in the other Australian States (apart from New South Wales).

21.19 Under the New South Wales *Strata Titles Act 1973* the Strata Titles Board has the power to revoke, revive or repeal a by-law where it considers that, having regard to the interest of all proprietors in the use and enjoyment of their lots or the common property, an amendment or repeal of a by-law or addition of a new by-law should not have been made or effected. The Commission has no definite view on whether such a provision should be adopted in Western Australia and would welcome comment.

Finances

General

22.1 Under the Western Australian Act, the strata company is required to establish a fund for administrative expenses sufficient, in the opinion of the strata company, for the control and management of the common property, for payment of any premiums of insurance and the discharge of any other obligation of the strata company: s.13(6)(a). The strata company is to determine from time to time the amounts to be raised for these purposes: s.13(6) (b). It is to raise the amounts so determined by levying contributions on the proprietors in proportion to the unit entitlements of their respective lots: s.13(6)(c).

Should there be a separate sinking fund?

22.2 Under the Western Australian Act, the strata company is only to establish the one fund and this is also the position under the comparable legislation of New Zealand and the other Australian States (apart from New South Wales). The New South Wales legislation provides for an administrative fund and a sinking fund. The principal matters for which money is to be paid into the administrative fund are the following –

- (a) the proper maintenance and keeping in good and serviceable repair of -
 - (i) the common property; and
 - (ii) any personal property (such as lawn mowers and washing machines) which may be vested in the strata company;
- (b) the payment of insurance premiums: s.68(1)(j).

The principal matters for which money is to be paid into the sinking fund are the following -

- (a) the painting or repainting of any part of the common property which is a building or other structure;
- (b) the acquisition of any personal property (such as lawn mowers and washing machines);
- (c) where it is necessary, the renewal or replacement of any fixtures or fittings comprised in the common property (such as carpets, the lift, intercom systems) and of any personal property vested in the strata company: s.68(1) (k).

There is an overlapping provision contained in the Act which enables the strata company to take into account under either the administrative fund or the sinking fund, matters which are not specifically catered for in the Act under either of those funds: s.68(1) (j) and s.68(1) (k).

22.3 The Commission sees merit in the establishment of a sinking fund. Expenses such as painting the common property can be expected to arise at fairly regular intervals and common sense usually dictates that periodic amounts be collected for such purposes from proprietors

by way of provision. It seems to be advisable for these collections to be kept in a separate fund to lessen the possibility of their being eaten away to pay day-to-day expenses, and to facilitate investment of the collections in a productive way until the expenses arise. The requirement of a sinking fund as well as an administrative fund would, of course, mean more work for the treasurer of the council, as there would be two lots of contributions to collect and two accounts to look after. It is, of course, possible to separate the two funds for accounting purposes only without constituting two physically separate funds and so avoiding the collection of separate amounts and the maintaining of separate accounts. The Commission invites comment on the issue of whether there should be a sinking fund.

Interest on unpaid contributions

22.4 Under the New South Wales *Strata Titles Act 1973*, if a contribution levied by the strata company is not paid when it becomes due and payable then it bears interest at the rate of ten per centum per annum simple interest, unless, pursuant to a special resolution, the strata company determines (either generally or in a particular case) that an unpaid contribution shall bear no interest or interest at a lesser rate: s.59(7). The Western Australian Act makes no provision for interest on contributions. At this stage, the Commission favours the adoption of the New South Wales provision regarding interest but would welcome comment on the issue.

Should purchaser be liable for arrears of contributions?

22.5 Section 13(7) of the Western Australian Act provides that, subject to the provisions of s.13(8), any contributions levied by the strata company may be recovered by the company, in any court of competent jurisdiction, from the proprietor entitled at the time when the resolution imposing the levy was passed and from the proprietor entitled at the time when the action was instituted both jointly and severally. Under s.13(8), the strata company must on the application of a proprietor or any person authorised in writing by him, certify -

- (a) the amount of any contributions due or payable by the proprietor;
- (b) the manner in which the contribution is payable;
- (c) the extent to which the contribution has been paid by the proprietor.

For the benefit of any person dealing with that proprietor, the certificate is conclusive evidence of the matters certified therein: *ibid*.

22.6 Similar provisions are found in the strata titles legislation of the other Australian States.

22.7 The above provisions provide some protection to both the strata company and to a purchaser of a strata lot. The strata company has the right to sue both the vendor and the purchaser. However, the purchaser can, obtain a certificate under s.13(8) and, if there are any arrears, protect himself by ensuring that the arrears are paid at settlement on completion of the sale.

22.8 It was suggested to the Commission that a strata company should have the right to lodge a caveat against a lot in respect of arrears of contributions owing by the owner of the lot. A drawback to this proposal is that a caveat would only operate in respect of the arrears owing at the time it was lodged. It would not operate in respect of arrears not then accrued. To completely safeguard itself, the strata company would need to lodge a fresh caveat in respect of further arrears after they had arisen.

22.9 It could be argued that a purchaser should not in any event be liable for arrears arising before he purchased the lot. If this proposal were adopted, the present method of facilitating payment of arrears on settlement (see paragraph 22.7 above) could no longer be utilised. It would probably be desirable to provide some protection to the strata company and it may well be that the best way of doing this would be to make provision for the strata company to lodge a caveat. However, in order to give the strata company a caveatable interest, it would be necessary for the legislation to charge the strata lot of a defaulting proprietor with arrears of contributions.

22.10 There is a certain amount of expense involved in lodging and withdrawing a caveat. The Commission at this stage has no firm view on whether ss.13(7) and 13(8) are satisfactory. The Commission would welcome comment on whether the provisions of ss.13(7) and 13(8) should be utilised in any new legislation and, if not, what procedure should be adopted with a view to protecting the strata company and the purchaser in regard to arrears of contributions arising before the sale.

Tenants, occupiers and visitors - complaints

General

23.1 Several of those who made preliminary submissions to the Commission were unit owners who complained of the conduct and attitude of tenants occupying other units in the same building. The complaints ranged from allegations of disregard of the strata company's by-laws, to allegations of damage by tenants to common property, of rowdiness and of failure to co-operate in maintaining the common property.

Unrestricted power of proprietor to lease

23.2 Western Australia's *Strata Titles Act 1966* imposes no restriction on the right of a proprietor to lease his lot. The Act, in fact, specifically provides that no by-law or addition to or amendment or repeal of a by-law is capable of operating so as to prohibit or restrict any lease of a lot: s.15(3). The position is the same under the strata titles legislation of the other Australian States and of New Zealand. Prior to the enactment of the *Strata Titles Act 1966* the normal method of unit ownership had been through the company structure. This involves the incorporation of a company which becomes the registered proprietor of the land and building. There are classes of shares and each class carries with it a lease or right to exclusive occupation of a unit in the building. Under this company structure, restrictions can be imposed on the transfer and leasing of units.

23.3 It could be argued that the *Strata Titles Act* should impose restrictions on a proprietor's ability to lease his lot. It could, for example, be argued that a proprietor should not be able to lease his unit without the prior approval of the council of the strata company. However, it is fundamental to strata titles legislation that each unit should be owned and can be dealt with as if it were real estate registered under the *Transfer of Land Act 1893*: see s.4(2) and (6) of Western Australia's *Strata Titles Act 1966*. To impose restrictions on a proprietor's ability to lease his lot would be to depart from this fundamental principle. Furthermore, such restrictions would, the Commission believes, adversely affect the market value of units and a purchaser's ability to raise money against his title. The Commission's tentative view is that

there should be no alteration to the present law regarding a proprietor's ability to lease his unit.

Control of tenants and occupiers by by-laws

23.4 Under the Western Australian Act, only the strata company and the proprietors are bound by the by-laws. The Commission has already expressed the tentative opinion in this working paper that by-laws should bind the strata company, the proprietors, any mortgagee in possession (whether by himself or any other person), or tenant or occupier of a lot: see paragraph 21.11 above.

23.5 In New South Wales, virtually all of the provisions of the Act and by-laws which are concerned with regulating the conduct of persons in a strata scheme apply equally as much to a tenant or occupier as they do to a proprietor. Those provisions may be enforced against a tenant or occupier, or a tenant or occupier may institute proceedings under the disputes provisions of the Act to enforce most of those provisions against a proprietor or another tenant or occupier in the scheme. One of the most important of the provisions is s.80, which amongst other things provides that a proprietor, mortgagee in possession, tenant or occupier of a lot: shall not –

- (i) use or enjoy that lot, or permit that lot to be used or enjoyed, in such a manner or for such a purpose as to cause a nuisance or hazard to the occupier of any other lot: (whether that person is a proprietor or not); or
- (ii) use or enjoy the common property in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is a proprietor or not) or by any other person entitled to the use and enjoyment of the common property.

These provisions may only be declaratory of the general law of nuisance in its application to a strata scheme. However, in legislation which is a "code" for strata schemes, such a provision is useful. In the event of a failure to comply with a by-law, application can be made to the Strata Titles Commissioner for an order requiring compliance: see paragraphs 27.1 to 27.6 below.

23.6 The Commission feels that generally those provisions of the Act and by-laws which are concerned with regulating the conduct of persons in the strata scheme should apply equally as much to a tenant or occupier as they do to a proprietor. This would give the strata company much more control over tenants and occupiers.

23.7 Section 58(4) of the New South Wales Act provides that a lease of a lot or common property shall be deemed to contain an agreement by the lessee that he will comply with the by-laws for the time being in force. The Commission's present opinion is that this provision should be adopted in Western Australia.

Visitors

23.8 One of the members of the public who made a preliminary submission complained that people visiting a tenant in the building in which she owned a unit conducted themselves in a noisy manner and disregarded the by-laws relating to parking on the common property. The provisions of the Western Australian Act and by-laws made under that Act do not bind invitees. This is also the position in the other Australian States and in New Zealand. However, by-law 19 in Schedule 1 to the New South Wales Act provides that:

"A proprietor or occupier of a lot shall take all reasonable steps to ensure that his invitees do not behave in a manner likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or of any person lawfully using common property."

If a proprietor or occupier fails to observe this by-law an application may be made under s.105 of the Act to the Strata Titles Commissioner for an order: see paragraphs 27.1 to 27.6 below. At this stage, the Commission is of the opinion that a by-law substantially in the terms of by-law 19 in Schedule 1 to the New South Wales Act should be adopted in Western Australia.

Insurance

General

24.1 Under the Western Australian *Strata Titles Act 1966*, the strata company is required to insure the building to its replacement value against fire and such other risks as may be prescribed by regulation, unless the proprietors by unanimous resolution otherwise resolve: s.13(4)(c). No risks have been prescribed for the purposes of s.13(4)(c). The Commission considers that the Government should give consideration to prescribing storm, tempest and earthquake as risks for the purposes of s.13(4) (c). It is true that the proprietors can require the strata company to insure against such risks. However, a special resolution is required, and it seems preferable to add them to fire as risks which must be insured against, unless all the proprietors decide otherwise.

24.2 Subject to s.19 of the Act, the strata company must forthwith apply insurance money received by it in respect of damage to the building in rebuilding and reinstating the building so far as that may lawfully be effected: s.13(4)(f). (Section 19 of the Act deals with the "destruction" of the building. As to when a building is "destroyed", see paragraphs 25.1 and 25.2 below. Section 19 also deals with the situation where the building is damaged but is not "destroyed". When the Court makes a declaration that the building shall be deemed to have been destroyed or where the building is damaged but is not "destroyed", the Court is given wide powers to adjust the interests of those involved: see s.19(2) and (4). Also under s.19, the Court may make provision for the winding up of the affairs of the company: see s.19(8)).

24.3 The strata company is deemed to have an insurable interest to the replacement value of the building (s.13(5)) and the policy is not liable to be brought into contribution with any other policy of insurance except with another policy taken out under the same provision of the *Strata Titles Act* in respect of the same building: s.13(9). The proprietors may resolve to insure for less than replacement value or they may even decide not to insure the building at all. Where a building is uninsured or insured to less than its replacement value a proprietor may insure his own lot for its replacement value or any difference there may be: s.17(3).

24.4 Similar provisions to the above are found in the strata titles legislation of New Zealand and the other Australian States (apart from New South Wales).

What should be insured?

24.5 Under the Western Australian Act, it is the responsibility of the strata company not only to insure the whole of the building but also every fixture and structure forming part of the building: s.13(4)(c). This means that the strata company is paying for the cost of insuring fixtures and structures which a proprietor attaches to his unit. Sometimes such improvements are effected in a lavish way. They might include such things as built-in furniture, air conditioning units, and expensive wall to wall carpet. Yet the strata company still has to pay the cost of insuring them. This situation is avoided by the New South Wales *Strata Titles Act 1973*. Under that Act, the strata company's responsibility is to insure the whole of the building and every fixture and structure forming part of the building, as at the date of registration of the strata plan, together with any further fixture or structure added to the building after that time *and which is not for the exclusive use and enjoyment of a lot*: ss.82 and 83. The proprietor may still himself insure the fixtures and structures which have been attached to the unit after the registration of the strata plan. The Commission's tentative view is that the adoption of similar provisions in Western Australia would be an improvement on the existing position.

Amount of insurance

24.6 The New South Wales Act provides for two types of policies. For the sake of convenience, the first is referred to in this working paper as a "rebuilding policy" and the second as a "limited liability damage" policy. A rebuilding policy is defined in s.82(1) of the Act as a contract of insurance providing, in the event of the building being destroyed or damaged by fire, lightning, explosion or any other occurrence 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 its 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 and other persons whose services are necessary as an incident to the rebuilding, replacement, repair or restoration: s.82(1).

This type of policy does not set out to cover the building for an insured sum but seeks to ensure that the building will be replaced by a building no worse nor less extensive than the original building was when it was new.

24.7 In contrast, a limited liability damage policy is one which provides that, instead of the work and the payment specified in the definition of the "rebuilding policy" (see paragraph 24.6 above) being carried out or made upon the occurrence of any of the events specified in that definition, the liability of the insurer shall, upon the occurrence of any such event, be limited to an amount specified in the policy and not exceeding an amount calculated in the prescribed manner: s.82(2).

24.8 The amount is prescribed by regulation 57 and is the amount calculated by adding together -

- (a) the estimated cost, as at the date of the contract of insurance, of the rebuilding of the building or its replacement by a similar building so that every part of the rebuilt building or the replacement building is in a condition no worse nor less extensive than when the building was new;
- (b) the estimated cost, as at the date of the contract of insurance, of removing debris from the parcel in the event of the building being destroyed by an occurrence specified in the policy;

- (c) the fees (estimated as at the date of the contract of insurance) payable to architects and other professional persons employed in the course of the rebuilding or replacement referred to in paragraph (a); and
- (d) the estimated amount by which expenditure referred to in paragraphs (a), (b) and (c) may increase during the period of eighteen months following the date of the contract of insurance.

Under this type of policy, the liability of the insurer is limited to the amount stated in the policy which should have been calculated in accordance with regulation 57.

24.9 Under the New South Wales Act, the strata company must insure the building under either a rebuilding policy or a limited liability policy with an approved insurer: s.83(1). However, the Strata Titles Commissioner may, upon application in writing by a strata company pursuant to a unanimous resolution, and if the Commissioner considers that in particular circumstances compliance with the requirements of s.83(1) is unnecessary or impracticable, by order in writing –

- (a) exempt the strata company from compliance with the requirements absolutely;
or
- (b) with the consent in writing of the strata company given pursuant to a unanimous resolution, exempt it from compliance with the requirements subject to a condition that it effects such insurance in respect of the building as may be specified in the order: s.83(2).

24.10 One of the most obvious differences between the Western Australian legislation and the New South Wales legislation is that, under the latter, the consent of the Strata Titles Commissioner is necessary if the insurance requirements are to be avoided. Under the Western Australian legislation, the strata company can avoid the requirement to insure to replacement value by passing a unanimous resolution. Such a unanimous resolution could be passed at the instance of the developer while he is still the proprietor of all the lots in the strata plan. It could be argued that insurance of the building to its replacement value is such an important matter that the strata company should not be able to avoid the requirement,

except with the approval of a court or of an authority such as a Strata Titles Commissioner as in New South Wales. Admittedly, a unanimous resolution must be passed by all persons entitled to vote but a person who at a later date purchases a unit could well be seriously disadvantaged by the fact that the building is not insured to its replacement value. The purchaser, however, could take out his own insurance: see paragraph 24.3 above.

24.11 Where the requirement under s.13(4) (c) of the Western Australian Act of insuring the building to its "replacement value" applies, the amount of the insurer's liability shown in the policy should be an amount equal to the replacement value of the building at the time the policy is entered into or renewed, as the case might be. The insurer will only be required to expend the amount stated in the policy. Building cost increases, for example, could result in this amount being insufficient to replace the building, in the event of its destruction, by a building as good and extensive as the original building. As explained above, ss.82(1) and 82(2) of the New South Wales Act provide for a rebuilding policy and a limited liability damage policy. Even the limited liability damage policy appears to provide more protection than a policy under s.13(4)(c) of the Western Australian Act because the estimated cost of removing debris from the parcel and estimated cost increases during the eighteen months following the date of the contract of insurance must be included as part of the amount insured. The Commission would welcome comment on whether provisions similar to ss.82(1) and 82(2) should be adopted in Western Australia.

Other insurance by strata company

24.12 Under the Western Australian Act, the strata company must (in addition to its responsibilities in regard to insuring the building):

- "(d) effect such insurance as it is required by law to effect;
- (e) insure against such other risks as the proprietors may from time to time determine by special resolution in accordance with the by-laws": s.13(4) (d) and (e).

The corresponding provisions under the New South Wales Act require the strata company to effect insurance in respect of any occurrence against which it is required by law to insure and also –

- (a) in respect of damage to property, death or bodily injury occurring upon the common property; and
- (b) against the possibility of the proprietor becoming jointly liable by reason of a claim arising in respect of any other occurrence against which the strata company, pursuant to a special resolution, decides to insure: s.84(1).

The insurance required to be effected under (a) above will provide wider cover than public risk insurance, and would extend to cover not only persons who might enter upon the common property, but also residents of the scheme themselves.

24.13 The Commission at this stage feels that it should be obligatory for a strata company to insure in respect of damage to property, death or bodily injury occurring upon the common property.

Insurance of mortgaged lot

24.14 The Act provides for insurance of the building as a whole: see paragraph 24.1 above. A financier proposing to lend money on the security of a particular unit would be reluctant to lend unless his position was fully protected in the event of the destruction of the unit. If the unit were destroyed, he would wish to receive back immediately the money he had invested. But as the Act provides for the insurance of the building as a whole by the strata company there are difficulties in the way of protecting the financier through the insurance policy on the building. Furthermore, the prospect of rebuilding would become remote where some of the lots were subject to mortgages if the mortgagees were to obtain first claim on the insurance money.

24.15 To overcome these problems, the Act provides that a proprietor may insure against damage in a sum equal to the amount of any mortgages over his lot: s.17(1) and (3)(b). In the event of damage, the insurer makes payment to the mortgagee and takes either an assignment of the mortgage or a sub-mortgage depending on whether or not the payment is sufficient to discharge the mortgage: s.17(2). The sub-mortgage is on terms and conditions agreed upon, or failing agreement, on the same terms and conditions as those contained in the mortgage by the proprietor: s.17(2)(d). It is not double insurance; it merely substitutes the insurer as

mortgagee. The insurance money received by the strata company will be applied in rebuilding and reinstating the building so far as that may lawfully be effected. The proprietor continues to make his mortgage payments but instead of making them to the original mortgagee makes them to the insurer who issued the mortgage policy. Mortgage insurance is a normal requirement of lenders who advance money on the security of strata units. Because of the premium which is involved, the insurance is unpopular with mortgagors. The mortgage insurance concept operates under the strata titles legislation of each of the other States and of New Zealand. The Commission feels that despite the extra cost mortgage insurance must continue to be provided for in the legislation, otherwise the flow of finance to assist in the purchase of units will be adversely affected.

"Destruction" of the building

25.1 In paragraph 8.19 above, the Commission outlined the circumstances under which a building can be notionally destroyed (that is, by being deemed to have been destroyed). This can be done either by the proprietors by unanimous resolution, or by the Supreme Court. The object of notional destruction of a building is to terminate the strata titles in relation to the parcel. Upon receipt of the notice of destruction, the Registrar of Titles is obliged to make an entry on the relevant strata plan, and thereupon the proprietors of lots in that plan are entitled to the parcel as tenants-in-common in shares proportional to the unit entitlement of their lots: s.11(2). However, if the notional destruction is by way of a declaration by the Supreme Court, the Court can impose conditions for the purpose of adjusting as between the company and the proprietors, and the proprietors as between themselves, the effect of the declaration: s.19(2).

25.2 Even though the building is notionally destroyed, the strata company continues to exist, and under s.19(8) of the Western Australian *Strata Titles Act* the Court may on application of the company or any member, dissolve the company.

25.3 Although the Commission does not consider that there is any substantial defect in the substance of these provisions, it is of the opinion that the device of deeming the building to be destroyed is artificial. The object of the provision is to enable the proprietors if they are unanimous, and the Court if they are not, to bring the strata title scheme to an end and convert it into a single parcel of land held by the proprietors as tenants-in-common. It is unnecessary to deem this a "destruction" of the building. The Commission considers that express provision

should be made for the strata scheme to be terminated by deregistration of the strata plan and the conversion of the form of title to a tenancy-in-common.

Unfair actions by the council

26.1 Situations can arise where some of the proprietors in a strata scheme consider that the council of the strata company has acted in an unfair way and to the detriment of those proprietors. The members of the council of the strata company are at least in a position analogous to company directors and may even have a higher fiduciary duty: *Steel and the Conveyancing (Strata Titles) Act 1961* [1968] 2 NSW 796. They are required to manage the affairs of the strata company bona fide for the benefit of all the proprietors: *ibid.*, at 799. The exercise by the members of the council of any of their powers in circumstances which might suggest a conflict of interest and duty requires them to justify their conduct to the Court and the onus lies on them to prove affirmatively that they had not acted in their own interests or for their own benefit: *ibid.*, at 799.

26.2 Section 23 of the Act is one which could be availed of where a council has not acted in good faith. It provides that the Supreme Court may in its discretion on cause shown, appoint an administrator for an indefinite or definite period on such terms and conditions as to remuneration or otherwise as it thinks fit: s.23(2). The administrator has, to the exclusion of the strata company, the powers and duties of the company or such of those powers and duties as the Court may order: s.23(4). However, the appointment of an administrator is in the discretion of the Court and in many instances the Court would no doubt consider that the appointment of an administrator was not justified. Any court is reluctant to involve itself in the domestic affairs of a company.

26.3 A proprietor who considers that he has been unfairly dealt with by the council may, depending on the circumstances, have a right of action against the members of the council. However, such proceedings could be complex and expensive.

The New South Wales Strata Titles Commissioner

27.1 Under the Western Australian Act, any dispute which arises in a strata scheme with respect to the failure of a proprietor or the strata company to comply with duties imposed by the Act can only be remedied by instituting court proceedings.

27.2 The New South Wales *Strata Titles Act 1973* adopted a completely new approach to the question of disputes arising within the strata scheme. The Act created the position of Strata Titles Commissioner and vested in him the power to determine a wide range of disputes and complaints capable of arising within a strata scheme. The object in creating the position was to ensure that disputes arising between those concerned in the scheme are dealt with as speedily, informally and inexpensively as possible, and by a person who has a practical working knowledge of strata titles schemes. It also made provision for a Strata Titles Board (see paragraphs 28.1 to 28.6 below) which, in addition to hearing appeals from decisions of the Commissioner, also has original jurisdiction to hear certain types of disputes, which because of their nature, merited judicial determination. The Act does not prohibit the taking of proceedings in the ordinary courts. However, if the court considers that the matter could have been dealt with adequately by the Commissioner or the Board, it must order that the plaintiff pay the defendant's costs: s.146(2).

27.3 An application for an order by the Commissioner must be lodged with him. The application need not be in any particular form but must be in writing, specifying the terms of the order which the applicant is seeking and the grounds on which the application is made: s.100(1). The Commissioner must give written notice of the application to the strata company and to any person who, in his opinion, would be affected if the order sought were made. On receipt of a notice, the strata company must display the notice or a copy of it inside the building on some part of the common property and must serve a copy of it on each person whose name appears on its strata roll: s.103. The strata company, any of its members, and any other person to whom a notice is given may make a written submission to the Commissioner, within the time specified in the notice, in respect of the matter to which the application relates: s.101(1)(d). The parties do not appear before the Commissioner and he makes his decision in private after considering the application and the submissions.

27.4 The applicant for the order, any person who made a written submission to the Commissioner, or any person who is required by the Commissioner's order to do or refrain from doing a specified act, may appeal to the Strata Titles Board against the order by lodging with the Commissioner a written notice of appeal: s.128.

27.5 Any person who contravenes an order made by the Commissioner which requires that person to do or refrain from doing a specified act is liable to a penalty of \$100 and a further penalty not exceeding \$10 for every day during which the contravention continues: s.142. The maximum penalty, however, that may be recovered under such prosecution is \$500: *ibid*. Proceedings to recover the penalty may not be taken before the Commissioner, but only before a Court of Petty Sessions presided over by a stipendiary magistrate: s.157. The penalty and costs are payable to the person who instituted the prosecution, and not the Crown: s.142.

27.6 The Commissioner's principal powers are conferred on him by s.105 of the Act. Section 105(1) provides that, except in the case of a dispute complaint which under the Act is determinable by a Strata Titles Board, the Commissioner may make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the performance of, or the failure to perform, a power, authority, duty or function conferred or imposed by the Act or the by-laws in connection with that strata scheme on the strata company, a managing agent, a proprietor, any person having an estate or interest in a lot or an occupier of a lot (including a tenant) or the chairman, secretary or treasurer of the strata company or the council. An application for such an order may be made by a strata company, a managing agent, a proprietor, any person having an estate or interest in a lot or an occupier of a lot in respect of a strata scheme: *ibid*. For the purposes of s.105, if the subject-matter of the application is one in which the strata company has a discretion (such as investment of money held in the sinking fund), then it is deemed to have failed or refused to exercise the power, authority, duty or function conferring the discretion only if it has resolved not to do so: s.105(2). The Commissioner may not make an order in respect of any matter which, in accordance with any provision of the Act or the by-laws, may only be exercised or performed pursuant to a unanimous resolution or special resolution: s.105(3).

27.7 Section 105 is an umbrella-type disputes provision but, in addition, other provisions of the Act empower the Commissioner to make orders in certain specified circumstances. For example –

- (a) Section 110 provides that where, pursuant to an application by a proprietor, the Commission considers that the strata company has determined an unreasonable rate as the rate of interest chargeable for the late payment of a contribution levied on proprietors under the Act, the Commissioner may, in respect of such contributions as are specified in the order, order that no interest be so chargeable or that the rate be as specified by him in the order instead of the rate so determined.
- (b) Section 112 provides that where, pursuant to an application by a strata company, a proprietor, any person having an estate or interest in a lot or an occupier of a lot, the Commissioner considers that a person is keeping an animal on a lot or common property in contravention of the by-laws, the Commissioner may order that person to cause the animal to be removed from the parcel within a specified time, unless the keeping of the animal on the lot or common property, as the case may be, is subsequently authorised pursuant to the by-laws.
- (c) Under s.114, where a person fails to provide written confirmation of a notice under s.81 providing information for the strata roll, and a strata company, managing agent, proprietor or other person having or acquiring an estate or interest in a lot applies for an order, the Commissioner may order the strata company to enter the information in the notice in the strata roll, notwithstanding that it does not bear that confirmation.

The New South Wales Strata Titles Board

28.1 The Strata Titles Board established under the New South Wales *Strata Titles Act 1973* is comprised by a stipendiary magistrate. Unlike proceedings before the Commissioner, the parties have a right of appearance before the Board which may examine witnesses upon oath or affirmation. The Board, however, may inform itself in such manner as it thinks fit, without regard to legal forms or solemnities, and is not bound to apply the rules of evidence: s.132. A Board may not make any order for the payment of costs: ss.116 and 129(1) (c).

28.2 The Commissioner may refer to a Board any application made to him for an order if he is of the opinion that the application raises matters of legal complexity, that the importance of the subject-matter of the application or the possibility of the frequent recurrence of like applications warrants its reference to the Board, or that for any other reason it should properly be referred to a Board: s.100(2). Furthermore, a right of appeal to a Board exists against any order of a Commissioner: s.128.

28.3 The Act delineates the other circumstances where a Board may make an order. For example -

- (a) Under s.119 a Board may make an order reallocating unit entitlements where it considers that the allocation was, at the time the strata plan was registered or at the time any strata plan of subdivision was registered, as the case may be, unreasonably made, having regard to the respective values of the lots at that time: see paragraphs 18.17 to 18.18 above.
- (b) Under s.120, a Board may make an order revoking an addition to, or an amendment of or repeal of a by-law by the strata company where the Board considers that, having regard to the interest of all proprietors in the use or enjoyment of their lots or the common property, the addition, amendment or repeal should not have been effected.
- (c) Under s.121, pursuant to an application by a proprietor of a lot, the Board may order that the applicant, and any occupier of the lot of which the applicant is the proprietor, may use specified common property in such a manner, for such purposes, and upon such terms and conditions, if any, as are specified in the order. The Board may not, however, make such an order unless it is satisfied firstly that the lot concerned is otherwise incapable of reasonable use and enjoyment by the proprietor or an occupier, and secondly that the strata company has refused to grant a licence to use common property upon such terms as would enable that proprietor or an occupier reasonably to use and enjoy that lot.

- (d) Under s.123, where the Board considers that any amount proposed to be levied by way of contributions is inadequate or excessive, or that the manner of payment of contributions is unreasonable, the Board may-
 - (i) order payment of a different amount;
 - (ii) order payment of contributions in a different manner; or
 - (iii) make both such orders.

28.4 Under s.127, where –

- (a) in consequence of the making of an order by the Commissioner or the Board a duty is imposed on the strata company;
- (b) a duty is otherwise imposed by the Act or the by- laws on a strata company;
- (c) a duty is imposed by the Act or the by-laws on the chairman, secretary or treasurer of a strata company or of the council of a strata company; or
- (d) a judgment debt is owed by a strata company

the Board may appoint a managing agent to perform that duty and any other duty specified in the order or to pay that judgment debt, as the case may require.

28.5 The provisions in the Act regarding penalties for contravening an order of the Board are the same as those for contravening an order of the Commissioner: see paragraph 27.5 above.

28.6 An appeal lies to the Supreme Court on a question of law from a decision of a Board: s.130.

Should there be a Commissioner or Board in Western Australia?

29.1 A number of those who made preliminary submissions expressed dissatisfaction at the fact that, under the present Act, disputes can only be determined by instituting court proceedings. They claimed that court proceedings did not provide a practical solution, since they involved procedures which were too formal and costly.

29.2 The Commission considers that there is some substance in the views of these commentators and it sees much merit in principle in the provisions of the New South Wales Act regarding disputes. However, it may be that because of the smaller number of strata lots in Western Australia as compared with New South Wales, the provision of both a Commissioner and a Strata Titles Board would be difficult to justify and that it would be sufficient to designate one official to perform the duties of both.

29.3 On the other hand, this would leave the parties without a right of appeal from a government official which is probably undesirable. In New South Wales the functions of the Strata Titles Board, which in addition to its original jurisdiction also hears appeals from decisions of the Strata Titles Commissioner, have been vested in the Fair Rents Board, which is comprised by a magistrate. Western Australia has no equivalent of the Fair Rents Board. It would be possible to vest the functions of a Strata Titles Commissioner and the Strata Titles Board either in the Local Court or a designated magistrate. In either case it would be necessary to provide for a simple informal procedure. It would also be desirable to provide for an appeal to a higher court, such as the District Court.

29.4 The Commission would welcome comment.

Rates and taxes

General

30.1 Section 21 of the present Act contains detailed provisions to determine liability for rates and taxes. Subsection (2) (a) of that section provides that the parcel is to be valued as a single entity and as if it were owned by a single owner. The valuation mayor may not be made by the rating authority (i.e. the authority levying rates), depending on whether the rating authority is also the valuing authority. For example, a local authority under s.533(2)(a) of the *Local Government Act 1960* may have adopted a valuation supplied by the Commissioner of State Taxation as the unimproved value of the parcel. The rating authority is then required to apportion the valuation of the parcel between the lots in proportion to their unit entitlements: s.21(5)(a). The proprietor of each lot is deemed to be the owner in fee simple in possession of the lot as if it were a separate parcel with a value equal to that apportioned to it under s.21(5)

(a) and liable accordingly: s.21(5)(c). The strata company is not liable for rates, except under s.14 where in default of payment by a proprietor of a "tax or rate levied ...by any local or public authority" the authority may recover the unpaid taxes or rates from the strata company. The strata company in turn may recover the amount so paid from the person who is the proprietor of the lot concerned at the time when action to recover the amount is instituted by it in a court of competent jurisdiction. The strata company cannot, however, be liable for land tax in any event: s.21(8)(b).

Apportionment according to unit entitlement

30.2 The rating authority is to apportion the valuation of the parcel between the lots in proportion to their unit entitlements and the proprietor of a lot is assessed for rates and taxes on the basis of the value so apportioned to his lot: see paragraph 30.1 above. Under the present Act, a developer is free to assign whatever unit entitlement he wishes to each of the units in the building: see paragraph 18.6 above. Often the unit entitlement allocated by the developer does not reflect the value of the units themselves. The present system of allocation of unit entitlement is unsatisfactory as far as the assessment of rates and taxes is concerned, as a proprietor's assessment need not be directly related to the value of his unit.

30.3 In paragraph 18.11 above, the Commission said that there appeared to be a fairly strong argument that a unit entitlement based *on value* should be the determinant in at least certain matters, including rates and taxes (except perhaps where the rate or tax is levied on the basis of the annual value of the land and building). If unit entitlement were based on value, then assessments would be placed on a more equitable footing. This would not assist in those cases where an allocation of unit entitlements not directly related to value has already been made. However, in paragraph 18.18 above, the Commission expressed the tentative view that provision should be made (as in New South Wales) to enable a fresh allocation of unit entitlements where the existing allocation is unreasonable, having regard to the value of the lots at the time when the allocation was made.

30.4 The simplest solution may be to provide that instead of the parcel being valued as a single entity and as if it were owned by a single owner, each unit should be valued separately and assessed for rates and taxes on that basis.

30.5 New South Wales did not, however, adopt this approach in its *Strata Titles Act 1973*. There, the rateable value of a lot is still determined by valuing the parcel as a single entity and apportioning the valuation between the lots in proportion to their unit entitlements: s.90(1), s.92(2)(c) and s.95(7)(a). It could be argued that the suggested solution should be limited to developments whose strata plans are registered after the provision comes into effect, as some purchasers (but not necessarily all: see paragraph 18.9 above) may have taken the impact of rates and taxes assessed under the present method into account in the price offered by them for their unit.

30.6 The Commission would appreciate comment on the question whether the present position regarding the assessment of rates and taxes should be altered -

- (a) by unit entitlement being based on value, with provision for fresh allocation of unit entitlements where the existing allocation is unreasonable, having regard to the value of the lots at the time that the allocation was made; or
- (b) by providing that each unit should be valued separately and assessed for rates and taxes on that basis, and if so whether this should apply to developments where the strata plans are already registered.

Should the strata company be liable?

30.7 Under s.14 of the Act, where a proprietor defaults in payment of a tax or rate (other than land tax) levied by a local or public authority, the authority may recover the unpaid taxes or rates from the strata company: see paragraph 30.1 above. Although the strata company may in turn recover the amount so paid from the person who is the proprietor of the lot concerned at the time when action to recover the amount is instituted by it in a court of competent jurisdiction, it may well experience considerable difficulty in doing so because of the practical inhibitions against taking court proceedings. The Commission can see no compelling reason why the strata company should, in effect, guarantee the payment of the rates and taxes by the proprietors of the units within its scheme. Under the New South Wales *Strata Titles Act 1973*, the strata company cannot become liable for rates and land taxes: s.92(2) and s.95. However, charges or fees for water, sewerage or drainage services rendered in respect of a parcel other

than rates, and otherwise than in respect of a lot exclusively for its use and benefit, are payable by the strata company.

30.8 At this stage the Commission tentatively considers that rating authorities should only be able to recover from the proprietors of the lots, and that the strata company should never become liable for the payment of rates and taxes.

Appeal against a rating valuation

30.9 For the purposes of objection and appeal against the valuation of the valuing authority, the parcel and improvements on it are deemed to be owned by the strata company: s.21(2)(b). This means that an individual proprietor cannot object or appeal. Only the strata company can do this. One of those who made a preliminary submission said that a proprietor should be able to appeal or object. Under the New South Wales *Strata Titles Act 1973*, the first step in determining liability for rates and land tax is still the valuation of the parcel and improvements on it. Only the strata company can object against that valuation (s.90(1)), despite the fact that the strata company cannot become liable for rates and land tax: see paragraph 30.7 above.

30.10 The Commission's tentative view is that only the strata company should be able to object to the valuation if the valuation is to be of the parcel as a whole. However, if the law is amended to require the rating authorities to value each lot individually (see paragraphs 30.4 and 30.6 above), then it would follow that there should be provision for appeals to be made by individual proprietors against the valuation of their lots.

Defects appearing after unit sold

31.1 Instances can arise where the builder has left the building in a defective state but this has not come to the notice of a purchaser of a unit until after he had purchased his unit from the developer. There would have been a building contract between the builder and the developer, and if the builder breaches the contract the developer can take action against him. Even if there is no stipulation in the contract as to the manner in which it is to be carried out, a condition that the work shall be done in a good and workmanlike manner is implied: see Hudson's *Building and Engineering Contracts* (10th ed. 1970) at 305.

31.2 Where a person buys a unit from a developer he has none of these contractual rights against the builder. Generally, the contract between the purchaser of a unit and the developer contains no warranties as to the condition of the building. Nor will there be any implied warranties - the only exception might be where the builder and the developer are the same person and a purchaser contracts to buy a unit to be erected or in the course of erection, as in this case there would probably be an implied warranty that the unit and the building would be completed in a workmanlike manner with proper materials: *Ramsden and Carr v Chessum & Sons and Ward* (1913) 110 LT 274.

31.3 In a submission made to the Commission by the Shire of Belmont it was suggested that one way of improving the purchaser's situation would be to provide that the builder should be responsible to the developer for the normal maintenance period and that the developer should be responsible to the initial purchaser for a period of three months, presumably from the date of purchase. This proposal appears to have merit and the Commission would welcome comment on it.

State Energy Commission

Master meter and submeters

32.1 Many of the buildings in this State which are under the strata title system (particularly the older ones) have only one master electricity meter with each strata unit within the building having a subsidiary meter (more commonly known as a submeter). Where this occurs and the building is not a duplex the State Energy Commission (referred to in this paper as the S.E.C.) will only contract with the strata company to supply electricity and will not enter into a contract with an individual unit owner. As the contract has been made with the strata company, the account for the electricity supplied to the building is sent by the S.E.C. to the strata company. However, provided certain requirements (prescribed by regulation) as to the location of the submeters are met, the S.E.C. will read the submeters and send the readings to the strata company when sending the account for the electricity supplied to the building. As the strata company is the party which has entered into the contract with the S.E.C., it is liable to pay the whole account. In practice, except in small developments, after the account and submeter readings have been received the council of the strata company will calculate each

proprietor's share of the account and send him a bill. However, the strata company has only a limited time in which to pay its account, since if the account is not paid in full within the specified time, the S.E.C. can cut off the supply to the whole building. Strata companies (particularly in larger developments) will often have to pay the account before all proprietors have paid their shares to the strata company.

32.2 Many duplexes under the strata titles system have only the one master meter and a submeter. The proprietor whose unit has the master meter is the person who signs the contract with the S.E.C. and is the sole person liable to the S.E.C. for the payment of the electricity supplied to the building. The S.E.C. will not send a separate account to the person utilising a sub-meter for the electricity used by his unit. In practice, the proprietor with the master meter informs the other proprietor of the submeter reading and of his calculation of the amount payable of that reading so that the other proprietor can pay his share. Because of the right of the S.E.C. to cut off the supply of electricity to the whole building if the account is not paid within a certain time, cases have arisen where one of the unit proprietors has, to his annoyance and inconvenience, been forced to pay the whole account out of his own money.

32.3 Sometimes in the past the S.E.C. insisted on the installation of one master meter and a submeter or submeters. The requirement was motivated by safety considerations. For example, one of the situations where only one master meter was permitted was in the case of a duplex, which was designed to look like a single house from the street, where the party wall did not go right up to the roof. It was feared that if there were two master meters someone working in the roof of the building might only have seen one of the master meters and, thinking that the building was a normal house, turned off only that one. Because the other meter was a master meter there would, in fact, still be power running through the wires serviced by it.

32.4 The S.E.C., however, has now modified its stance and, provided certain requirements are met, each unit (whether it is in a small development or a large one) can now have a master meter. For example, in the case referred to in paragraph 32.3, a master meter for each unit would now be permitted provided the meters were erected next to each other (so that it could be seen that the building has two meters and not one).

32.5 Where a home unit development has had only the one master meter installed in it when it was constructed, it can now be altered so that each unit has a master meter (and not a submeter), provided certain requirements are met in effecting the alterations.

32.6 Several of the preliminary submissions received related to submeters. In a number of these it was contended that where a unit is serviced by a submeter the proprietor of that unit should be the party liable to the S.E.C. for the electricity used by him. The Commission understands from the S.E.C. that, although this would involve the S.E.C. in more administrative work, this is not the reason for its unwillingness to adopt this approach. Officers of the S.E.C. say that the reasons are technical, and not administrative. For example, the S.E.C. would be unable to cut off the power at the submeter because the wires leading from the master meter to the submeter are the property of the house owner and not of the S.E.C. Furthermore the S.E.C. has no certain knowledge of what area such submeter serves.

Should a master meter be required for each unit?

32.7 At present a developer of a multi-unit building can, if he wishes, still install a master meter and submeters. A number of those who made preliminary submissions maintained that in order to avoid the difficulties created where there are submeters that it should be compulsory for all future strata title developments to be constructed with a master meter for each unit. The Commission invites comment on this proposal.

Adjustment of account for electricity on sale of unit

32.8 One of the preliminary submissions received suggested that the account for electricity should be adjusted on the sale of a strata title unit.

32.9 Where a unit has a master meter (and not a submeter), the vendor can terminate his contract with the S.E.C. before vacating the premises. The S.E.C. will disconnect the power from the unit and send an account to the vendor for the power used to the time of disconnection. It is then left to the purchaser to enter into his own contract with the S.E.C. and the purchaser alone will be liable to the S.E.C. under that contract.

32.10 A different situation exists where a unit which is serviced by a submeter is sold. Here, the vendor does not have his own contract with the S.E.C. The contract is between the strata company and the S.E.C. When a unit has been sold, the S.E.C. will effect a reading of the submeter to enable the vendor's share to be calculated (although generally it requires the request for the reading to come from an officer of the council of the strata company). It appears that in practice, difficulties sometimes arise. For example, a reading may not have been made or the strata company may not have even been informed of the sale.

32.11 The Commission recognises the problem and invites comment on the formulation of a procedure to be adopted in such cases.

Accounts for electricity where a unit is leased

32.12 Where a unit has a master meter, and the proprietor wishes to lease the unit, he can if he wishes cancel his contract with the S.E.C. The S.E.C. will disconnect the power and it will be left to the tenant to make his own contract with the S.E.C. The tenant alone will be liable to the Commission under that contract.

32.13 However, difficulties arise where a unit is serviced by a submeter. It was suggested to the Commission that where a unit is serviced by a submeter, the Act should expressly provide that the proprietor was the person responsible to the strata company for the electricity used by the tenant. It would then be left to the proprietor to recover the cost from the tenant. Comment is invited on this suggestion.

Sale of units

Sale of units not yet constructed

33.1 Under s.20(1) of the *Town Planning and Development Act 1928*, a person may not, without the approval of the Town Planning Board, sell a lot on a strata plan until that Board has approved the strata plan.

33.2 This is subject, however, to s.20B which was introduced into the Act in 1967. Under s.20B an agreement to sell a lot shall not be deemed to have been entered into in contravention of s.20(1) if –

- (a) the agreement is entered into subject to the approval of the Town Planning Board to the subdivision of the land being obtained, and
- (b) application for the approval of the Board to the subdivision is made within a period of three months after the date of the agreement.

The agreement has no effect unless and until the Town Planning Board gives its approval to the subdivision within six months after the date of the agreement or within such further period as is stipulated in that agreement, or in a subsequent agreement, in writing made by all the parties to the first mentioned agreement: s.20B(2). If the agreement does not take effect the purchaser is entitled to a refund of any consideration paid by him: s.20(1)(b).

33.3 In practice, the approval of the Town Planning Board is not given to a strata plan until after the building has been completed. Where a sale takes place under s.20B of a unit before the building is completed, the section provides some protection to the purchaser. The sale does not take effect unless, within six months after the date of the agreement for sale or within such further period as is stipulated in that agreement or in a subsequent written agreement between the parties, the Town Planning Board has approved the plan. If the Board does not approve the strata plan within the operative time, the purchaser is entitled to a refund of any consideration paid by him.

33.4 Victoria has adopted a different approach. Under s.7 of the *Victorian Strata Titles Act 1967* -

- (a) A person may not sell a unit before the strata plan has been approved by the Registrar of Titles or registered by the Registrar of Titles unless the contract provides that the deposit and all other money payable by the purchaser are to be paid to a specified solicitor or licensed estate agent, to be held by him on trust for the purchaser until the plan has been so approved or registered: s.7(1).

- (b) The deposit and all other money payable under any such contract by the purchaser prior to the approval or registration of the strata plan must be paid to the solicitor or estate agent so specified: s.7(2).
- (c) If the strata plan is not approved or registered within six months after the sale the purchaser can avoid the sale at any time after the expiration of the six months but before the plan is approved or registered: s.7(4).
- (d) Where a purchaser avoids a sale pursuant to the section all money (including the deposit) is recoverable by him from the solicitor or estate agent or other person to whom it was paid. The purchaser is, however, liable to pay an occupation rent for any period during which he was in actual occupation of the unit or entitled to the receipt of the rents and profits from it: s.7(5).
- (e) Until the Registrar has approved a plan of re-subdivision, the provisions of the section also apply with such modifications as may be necessary: s.7(8).

33.5 The Victorian approach is an interesting one and the Commission would appreciate comment on whether -

- (a) It should be adopted in any new strata titles legislation in Western Australia. (This would mean that ss.20 and 20B of the *Town Planning and Development Act* would no longer apply to strata lots.)
- (b) It should be necessary for the money to be paid to a solicitor or licensed land agent. Would it be sufficient to require the vendor or whoever else receives the money to pay it into a trust account with a bank?
- (c) Sections 20 and 20B of the *Town Planning and Development Act* provide sufficient protection for the purchaser when the home units are not yet built.

33.6 The adoption of s.7 of the Victorian *Strata Titles Act* would safeguard the purchaser in a case where he enters into a contract for the sale of a unit which has not yet been built. However, the provision would not safeguard the purchaser in a case where the unit has been

built but where he buys the unit from a person who is not the registered proprietor of it, or where a mortgage exists over the whole parcel. Paragraphs 33.7 to 33.13 below discusses ways of protecting the purchaser in such cases.

Sale by a person other than the registered proprietor

33.7 Under s.13 of Western Australia's *Sale of Land Act 1970*, a person who would otherwise have the right to sell five or more lots in a subdivision or proposed subdivision must not sell a lot unless he is, or is presently entitled to become, the registered proprietor of that lot or unless he sells the lot as one of five or more lots to one person in the one transaction. For the purposes of the section, a lot includes a proposed lot. A person is deemed not to be presently entitled to become the proprietor of a lot unless he is, at the date he sells the lot, entitled to be registered as proprietor of it under one or more registrable instruments or applications which have been lodged at the Titles Office.

33.8 Section 13 is designed to protect the ultimate purchaser who is the last in a chain of transactions. For example, suppose A, a registered proprietor, sells land under a terms contract to B who subdivides and sells the subdivided lots to numerous purchasers. If B then breaks a condition of his contract with A, A can rescind the contract and defeat any claims by the ultimate purchasers to the land, leaving them only personal claims against B which may be worthless. Because of s.13 of the *Sale of Land Act*, B must not sell a lot unless he is, or is immediately entitled to become, the registered proprietor of that lot. The provision is aimed at the more irresponsible speculators who could not normally finance the purchase and transfer of land into their own name. It does not apply to a person who owns less than five lots in the subdivision.

33.9 Section 13 does not, however, apply to the sale of lots as defined in the *Strata Titles Act 1966*: s.12 of the *Sale of Land Act 1970*. Consequently, the original developer could sell all the unsold units under a terms contract to another developer who in turn could offer them for sale to the public.

33.10 In its Report, *Protection for Purchasers of Home Units* (Project No. 1 Part III, 1973), the Commission recommended that Part III of the *Sale of Land Act* (which includes s.13) should be extended to strata title lots. This is still the Commission's opinion.

Where the lots are subject to a mortgage

33.11 Under s.14 of the *Sale of Land Act 1970*, a person who has the right to sell five or more lots in a subdivision or proposed subdivision may not sell any of such lots that is subject to a mortgage unless -

- (a) the mortgage relates only to that lot and the lot is sold under a contract which provides for the price to be satisfied, to the extent of any money owing under the mortgage at the date upon which the purchaser is entitled to possession or to the receipt of rents and profits, by the purchaser assuming on and from that date the obligations of the mortgagor under the mortgage (s.14(1));
- (b) the person sells the lot as one of five or more lots sold to one person in the one transaction (s.14(2) (a)); or
- (c) the lot is sold under a contract which provides that –
 - (i) the mortgage affecting it is to be discharged as to that lot prior to or upon the purchaser becoming entitled to possession or to receipt of the rents and profits, and
 - (ii) the deposit and all other money payable under the contract (other than money payable in excess of the amount required to discharge the mortgage) are to be paid to a legal practitioner or a land agent, to be applied by him in or towards discharging the mortgage.

If the mortgage is not so discharged the purchaser may rescind the contract and recover the money he has paid (s.14 (2) (b)).

33.12 Section 14 is aimed at protecting the ultimate purchaser from the claims of the vendor's mortgagee. This protection is more likely to be needed where the vendor has heavily mortgaged the land before sale. As in the case of s.13 (see paragraph 33.7 above) s.14 does not apply to a person who owns less than five lots in a subdivision.

33.13 Section 14 of the *Sale of Land Act* also does not apply to the sale of a lot as defined in the *Strata Titles Act 1966*: s.12 of the *Sale of Land Act 1970*. In its Report, Protection for Purchasers of Home Units (Project No. 1 Part III, 1973), the Commission recommended that Part III of the *Sale of Land Act* (which includes s.14) should be extended to strata title lots. The Commission is unaware of any reason why this should not be done and invites further comment.

What information should be provided by vendor to purchaser?

33.14 It was suggested to the Commission that prospective purchasers should be warned that it was advisable for them to ascertain the implications of buying a unit which has a strata title. It was also suggested that prospective purchasers should be informed of the redress (if any) they would have against the builder in regard to defects or faults in the building: see paragraphs 31.1 to 31.2 above. A further suggestion was that buyers should be provided with a copy of the by-laws operating in the strata scheme, before they sign any offer and acceptance form.

33.15 The strata titles legislation of the other Australian States and New Zealand does not require the vendor to inform the purchaser on any of these matters.

33.16 It can be argued that before a purchaser signs an offer and acceptance form or otherwise becomes legally bound to buy a unit, the vendor should provide him with the following information –

- (a) the unit entitlement of each of the units in the strata scheme;
- (b) the matters determined by unit entitlements or in regard to which unit entitlement is relevant;
- (c) the fact that an administrative fund has been established or will be established and the purposes for which contributions are to be paid by proprietors into the fund;

- (d) if under any new legislation there is to be a sinking fund (see paragraphs 22.2 and 22.3 above), the fact that a sinking fund has been established and the purpose for which contributions are to be paid by proprietors into the fund;
- (e) how the amounts to be raised for the purposes of the funds referred to in (c) and (d) are determined;
- (f) what redress (if any) the purchaser would have against the builder in regard to defects or faults in the building;
- (g) the contents of the existing by-laws of the strata company.

33.17 In the case of vertical subdivisions (such as a duplex), it can be argued that the vendor should also have to illustrate to the purchaser the lot proposed to be sold to him, to inform him what parts of the parcel are common property, and that the common property is owned by the proprietors of all the units.

33.18 The Commission would appreciate comment on whether the vendor should be required to provide the purchaser with such information before he signs an offer and acceptance form or otherwise becomes legally bound to buy a unit.

Duplexes

General

34.1 The Western Australian *Strata Titles Act* is aimed at providing title to part of a building. The Act, however, originally made no provision for schemes where there was no lot superimposed on another. Sections 3 and 4 made it clear that for a strata plan to be approved –

there must be a building or buildings on the parcel, and at least part of the building or buildings must be divided horizontally into two or more levels.

34.2 In the 1960's in Western Australia, particularly in the metropolitan area, there was a rapid increase in the number of buildings comprising two complete and self-contained

dwellings existing side by side and constructed on a single lot. This type of building is commonly known as a duplex.

34.3 Originally the normal method of ownership was by means of tenancy-in-common. Usually, the block of land on which the building was erected was owned by two proprietors as tenants-in-common, each occupying a unit. The more prudent proprietors entered into a written agreement in which it was agreed that one proprietor was entitled to exclusive occupation of one of the units, and the other proprietor entitled to exclusive occupation of the other unit. But a major drawback with these agreements concerned the enforcement of obligations against subsequent purchasers with whom there may be no privity of contract. This difficulty rendered the interest of a tenant-in-common unattractive as security for a mortgage.

34.4 A demand therefore arose to extend the provisions of the *Strata Titles Act* so that strata titles could be granted to single storey dwellings. The demand was met by the *Strata Titles Act Amendment Act 1969* which amended the definition of strata plan accordingly. Henceforth, it would be sufficient for a strata plan to show "the whole or any part of the land comprised therein as being divided into two or more lots".

34.5 Fourteen of the preliminary submissions made to the Commission related to duplexes. The main complaints arose out of the view that the present *Strata Titles Act* is designed primarily for high rise buildings, rather than duplexes, thus giving rise to many practical problems. The following sets out some of the views expressed –

- (a) In a high rise development, it makes sense for the land surrounding the building to be common property and for all the proprietors to have the right to use that common property. However, usually the layout of a duplex on a block of land is such that it is in the interests of privacy and convenience for one of them to have exclusive possession of part or parts of the land surrounding the building and for the other to have exclusive possession of the balance.
- (b) The concept of a council to exercise the powers and duties of the strata company is inappropriate and also unnecessary, as the strata company would only consist of two proprietors. The provisions of the *Strata Titles Act*, by

virtue of which the strata company is required to insure the building and to keep in repair and maintain the exterior of the building, are inappropriate for duplexes - each owner should be able to separately insure his unit and separately maintain the exterior of his unit.

- (c) 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.)
- (d) 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.
- (e) 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 (see paragraph 8.4 above) and therefore even the external walls of the building are usually common property.

34.6 The Commission is sympathetic to the argument that the strata title system established under the present *Strata Titles Act* is not suited to duplexes. The duplex is a different concept to the multi-storey development. The latter involves high density living. The owner of a unit in such a development lives in close proximity to many other people. Co-operation between owners is essential to the successful operation of the scheme. An owner of a unit will not have the same degree of privacy as the owner of a residential house. On the other hand, many owners of units in high rise developments like the fact that there are others around them. The owners are relieved from the personal care of garden and home maintenance and this naturally

appeals to those who do not wish to maintain personally a garden and house and to those whose health or age do not permit it. But the owner of a duplex unit is usually a person who prefers to live in more conventional housing, who values his privacy and who enjoys caring for a garden and utilising the grounds around the building. He sees in the duplex unit a form of housing which can provide him with these advantages. He regards his unit in the same way as a house owner regards his house.

Consideration of special provisions relating to title for duplexes

34.7 If in any new legislation there are to be special provisions relating to title for duplexes (as distinct from other strata title developments), there seem to be four possible solutions. These are –

- (a) title to a lot could provide for the proprietor to have exclusive use of portions of the parcel defined by the title (see paragraphs 34.10 to 34.12 below);
- (b) provision could be made for accessory lots (see paragraphs 34.13 to 34.14 below);
- (c) the proprietor could be given normal fee simple title to the land on which his unit is erected and to a specified part of the land adjoining his unit (see paragraphs 34.15 to 34.18 below);
- (d) provision could be made for the parcel to be subdivided into two normal fee simple lots: see paragraphs 34.19 to 34.26 below.

34.8 The Commission stresses that utilisation of any of these alternatives would of course be subject to local authority and town planning approvals.

34.9 Each of these four possible solutions is considered below.

(a) *Exclusive use of portions of the parcel*

34.10 Section 5(1) (f) of the present Act provides that a strata plan shall define any portions of the parcel not within the building that are or are intended to be separate tenements, and used in conjunction with the building or portion of the building: see paragraph 9.2 above. The import of this provision is not clear, but probably the effect is that the strata plan may provide for separate tenements which remain common property but may be made the subject of some arrangement, whether by lease or otherwise, with one or more of the proprietors. The Commission is informed that it is not the policy of the Titles Office to carry any reference to these tenements forward from the strata plan to the strata lot titles.

34.11 One way of making the present Act more appropriate for duplexes would be to stipulate that –

- (a) the actual title conferring the strata title to the lot could also provide for the proprietor to have exclusive use of portions (of the parcel) defined by his title; and that
- (b) the proprietor could effect improvements on these areas.

34.12 Another way of enabling a proprietor to obtain exclusive use of part of the parcel beyond the building may be to adopt the position in New South Wales, under which the boundary of a lot could be so drawn as to extend beyond the building: see paragraph 8.7 above. In fact, a total subdivision could be effected by this means, so that there would be no common property.

(b) *Accessory lots*

34.13 The strata titles legislation of South Australia, Victoria and New Zealand makes provision for accessory lots: see paragraphs 9.10 and 9.11 above. An accessory lot does not have to be enclosed by floor, walls and ceilings (although it may be). The principal purpose of an accessory lot is to enable the proprietor of a principal unit to have strata title to areas such as swimming pools and gardens.

34.14 The concept of accessory lots would seem to be of particular usefulness in the duplex situation.

- (c) *Fee simple title to the land on which the unit is created and to part of the land adjoining it*

34.15 In 1974, Victoria enacted the *Cluster Titles Act*. The Act is not concerned with strata titles as such. The concept of the Act was the subdivision of land into an area of small lots which would be individually owned and common property. Units can be erected on the lots but the area of a proprietor's lot need not be limited to the land on which his unit is erected. Because proprietors of the lots will also own the common property as tenants-in-common and will need machinery to control its use, the proprietors become a statutory strata company along the same lines as a strata company under the *Strata Titles Act*.

34.16 The Victorian *Cluster Titles Act* is not limited to duplexes and extends to all vertical subdivisions, as distinct from subdivisions into horizontal strata. The Commission understands that in Victoria, duplexes are very rarely built. However, the Victorian Act may be one which can be appropriately applied to duplexes in this State.

34.17 Applying the concept to the duplex situation, each parcel would have the following components –

- (a) common property which would be owned by the two proprietors as tenants-in-common;
- (b) two areas each owned by one of the proprietors (under normal fee simple title), each such area not being limited to the area on which the unit is erected.

34.18 It would probably have to be left in each case to the Town Planning Board or (where there is a town planning scheme) to the local authority to approve of the subdivision. If the example of the Victorian *Cluster Titles Act* is followed, in order to control the use of the common property, the proprietors would become a strata company under the *Strata Titles Act*.

(d) *Subdivision of the parcel into two lots*

34.19 Several of those who made preliminary submissions contended that the subdivision of a duplex block into two separate lots should be permitted. Where there is a party wall between the two units, party wall easements could be granted. Where a driveway intended to be used by both proprietors passes over land owned by one of the proprietors, a right of carriageway could be granted to the other proprietor. It was suggested that in the case of vacant sites, the time for applying for a duplex subdivision should be the time when an application is made to the local authority for a building licence. This would have the advantage that the proposed design of the building could be taken into account in determining how the block should be divided.

34.20 The subdivision of a duplex block into two separate lots would, of course, mean that the land would not be subject to the *Strata Titles Act*. Each lot would be individually owned.

34.21 In those municipalities where by-law 11.4(1) of the *Uniform Building By-laws 1974* is operative, a duplex site must have an area of not less than 911 square metres (36.02 perches) and a street frontage of not less than 20 metres (65 feet 7 inches approximately).

34.22 While some duplex blocks exceed these requirements, in most cases their subdivision would produce two lots of comparatively small area and of fairly narrow frontage. It could be argued that such subdivisions will create lots which are too small from a town planning point of view. However, owners of duplex units have in effect the exclusive use of their back and front yards and it could be argued that formal subdivision would not increase the danger of duplexes becoming substandard residences. Moreover, it might be contended that small blocks should be encouraged because they tend to militate against "suburban sprawl" and the cost to the community of providing public services such as transport.

34.23 Subdivisions into small blocks are already permitted in certain circumstances. For example, in those municipalities where General Residential Zone classes 4, 5 and 6 under the *Uniform Building By-laws 1974* are operating, subdivisions of this nature for town houses may be permitted with the consent of the Town Planning Board: see Table 11.13 Parts A, B and C of the By-laws. There must, however, be a minimum of four dwellings and each lot must have the following minimum areas and street frontages –

Class	Area	Street frontage
4	300 sq. metres (11.86 perches)	12 metres (39 ft. 4 ins. approx.)
5	220 sq. metres (8.70 perches)	10 metres (32 ft. 10 ins. approx.)
6	150 sq. metres (5.93 perches)	6.6 metres (21 ft. 8 ins. approx.)

Admittedly, these classes represent the higher density zones.

34.24 The City of Subiaco Town Planning Scheme No. 1 makes provision for "attached houses". An "attached house" is defined as a dwelling constructed as one of a group of two or more dwellings having one or more common party walls with another dwelling or other dwellings each of which is situated on a separate lot: clause 7 of the Scheme. A duplex unit could therefore be an attached house within the meaning of the definition. Attached houses may be constructed in the lower density residential areas. In the lowest density residential area (referred to in the Scheme as Residential R25), the minimum area for each attached house is 350 square metres (13.84 perches) and the minimum frontage is 10 metres (32 ft. 10 ins. approximately).

34.25 Although titles to the lots become available a little earlier than in the case of a development under the *Strata Titles Act*, the construction of town houses and attached houses on land subdivided into small blocks pursuant to the schemes mentioned in the previous two paragraphs has not been popular. The reason for this is probably because of the higher cost involved, in comparison with a similar development under the *Strata Titles Act*. For example -

- (a) Each unit must have its own sewerage connection from the sewer main. If, instead, the development takes place under the *Strata Titles Act*, the one sewerage connection can service all units, leading to a significant reduction in cost.
- (b) Each of the small blocks must have frontage to a public road and in practice each of the units has its own driveway. In a development under the *Strata Titles Act*, this need not be so.

- (c) Surveying expenses will be somewhat larger than in the case of development under the *Strata Titles Act*, as the surveyor will have to see that the party wall is erected on the correct position. Where the development takes place under the *Strata Titles Act*, the survey does not take place until the building has been completed.

34.26 Inevitably, there will be duplex developments which will not be suitable for subdivision. Because of this, it would be necessary in any case to retain a strata title system of some sort for such duplexes even if it did become permissible to subdivide duplex blocks.

34.27 The Commission would appreciate comment on the suitability of the four proposals considered above namely –

- (a) exclusive use of portion of the parcel (paragraphs 34.10 to 34.12);
- (b) accessory lots (paragraphs 34.13 and 34.14);
- (c) fee simple title to the land on which the unit is erected and to part of the land adjoining it (paragraphs 34.15 to 34.18);
- (d) subdivision of the parcel into two lots (paragraphs 34.19 to 34.26),

and any other proposals relating to title for duplexes.

Position of common boundary

34.28 Section 5(5) of the present Act provides:

"Unless otherwise provided in the strata plan, the common boundary of a lot with another lot or with common property shall be the centre of the floor, wall or ceiling, as the case may be": see paragraph 8.4 above.

It is extremely rare for a strata plan to specify the common boundary with the result that the common boundary is virtually always the centre of the floor, wall or ceiling.

34.29 It may well be that s.5(5) is not appropriate for duplexes. If the proposals considered in paragraphs 34.19 to 34.26 above (subdivision of the parcel into two lots) is adopted, the issue will not arise. If the proposal suggested in paragraphs 34.15 to 34.18 above (fee simple title to the land on which the unit is erected and to part of the land adjoining it) is adopted, then the exterior of the walls of the unit should be either on or inside the boundary of the land owned solely by the unit owner. If the proposals considered in paragraphs 34.10 to 34.12 above (exclusive use of portions of the parcel) and paragraphs 34.13 to 34.14 above (accessory lots) are adopted, then it could be argued that the boundary of a unit with common property should be the exterior surface of the floor, wall or roof as the case may be. The boundary between one unit and another unit should remain the centre of the dividing wall. The Commission would appreciate comment.

Machinery provisions

34.30 Many of the machinery provisions in the *Strata Titles Act* are inappropriate for duplexes. In the event of any of the proposals outlined in paragraphs 34.10 to 34.18 above namely –

- (a) exclusive use of portions of the parcel;
- (b) accessory lots;
- (c) fee simple title for unit and part of land adjoining it

being adopted, consideration would need to be given to the following:

Firstly, as there are only two lots involved, it appears to be unnecessary for there to be a council to exercise the powers and duties of the strata company. The proprietors in general meeting could exercise those powers and duties themselves.

Secondly, provided the exterior of the walls and roof of the unit are to be either on or inside the boundary of the area of land owned solely by the unit owner (see paragraphs 34.28 to 34.29 above), then there is a strong argument in favour of the proposition that each unit owner should separately insure his own unit. Under the present Act, the whole building is to be insured by the strata company: see paragraph 24.1 above. It may be desirable to provide in the legislation that, except where an order of the

Supreme Court is obtained, insurance money received in respect of damage to a unit is to be applied in rebuilding and reinstating the building. In the absence of such a provision, where only one of the two units is destroyed by fire, the value of the undamaged unit may be depreciated if the unit which has been destroyed by fire is not rebuilt.

Thirdly, it can be argued that it should be left to each proprietor to maintain and repair the exterior of his own unit, especially if under new legislation the exterior of the walls and roof of the unit is to be either on or inside the boundary of the area of land owned solely by the unit owner: see paragraphs 34.28 to 34.29 above. Even so, provision would need to be made in any new legislation that each unit proprietor must maintain the exterior of his unit in good repair, order and condition. Failure by a proprietor to do this could significantly depreciate the value of the other proprietor's unit. It could be provided that if a proprietor is not maintaining his unit in good repair, order and condition or if he carries out repairs to his unit in a way which detracts from the aesthetic appearance of the building, then the other proprietor might apply to the proposed Strata Titles Commissioner for an order requiring the defaulting proprietor to rectify the position.

Pipes, wires, cables and ducts used in connection with the enjoyment of both lots would need to be the responsibility of the strata company. Painting of the exterior of the building and also re-roofing would need separate consideration. In the case of painting it might be desirable (for aesthetic reasons) that when units are in need of painting that they be painted at the same time and in the same colour scheme. Similar considerations apply to re-roofing. In regard to painting, one approach would be to provide in the legislation that when the exterior of the building or part of the exterior is in need of painting either of the proprietors could give notice in writing to the other which would –

- (a) specify the parts of the building which the proprietor giving the notice considers to be in need of painting (e.g. the guttering).
- (b) specify the colour and type of paint which that proprietor proposes should be used;

- (c) contain a proposal for carrying out the painting.

If within twenty-one days after the giving of the notice the two proprietors do not agree as to the above matters, then the Strata Titles Commissioner on the application of either of the proprietors may make an order determining all or any of such matters. A similar procedure could apply where the roof or part of it needs re-roofing.

Fourthly, the inconvenience of establishing and maintaining an administrative fund would not be justified if each owner is to separately insure his unit and to maintain and repair the exterior of his own unit.

34.31 The question arises in regard to duplexes of whether there should be a sinking fund (see paragraphs 22.2 and 22.3 above) as distinct from an administrative fund. It may be desirable to provide for a sinking fund for repainting the exterior of the building to ensure that money would be available when the time to repaint arrives. The fund would be in the name of the strata company. However, there could be difficulties with this proposal. For example, if a proprietor wishes to sell his unit and there was a considerable amount standing to the credit of the sinking fund, he would have to make an appropriate increase in his price, as the purchaser would get the benefit of the money which the vendor had paid into the fund. The proprietor wishing to sell his unit would have to explain this to any prospective purchaser.

34.32 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 and this leaves the other proprietor with no effective voice on such resolutions. A solution to this problem might be to provide that if at a duly convened meeting of the strata company a motion is not unanimously passed (i.e. passed by both proprietors), then provided the matter at issue is one which is within the powers of the strata company either proprietor could make application to the Strata Titles Commissioner for an order.

34.33 Comment is invited on whether the propositions considered in paragraphs 34.30 to 34.32 above or any of them should be adopted. The Commission would also be pleased to

hear of any other provisions in the *Strata Titles Act* which are considered to be inappropriate for duplexes.

Should proposals for duplexes extend to other vertical subdivisions?

35.1 The duplex (or even the triplex) as well as the traditional high rise development are not the only permissible form of subdivision under the *Strata Titles Act*. Town house developments, which may involve vertical or horizontal subdivision or a combination of both, are becoming increasingly popular. Such developments may contain a number of units spread around a single parcel. It could be argued that the proposals considered in paragraphs 34.10 to 34.25 above with respect to duplexes should apply not only to duplexes, but to town house and similar developments. On the other hand, broadly speaking, the larger the development in terms of units the more suited it becomes to provisions governing high rise developments. This would be particularly so in a multi-level town house development. Furthermore, in larger developments, the fencing off of back yards and the exclusive use of front gardens, may, in some cases at least, involve the danger of such properties becoming substandard residences. If any of the proposals considered in paragraphs 34.10 to 34.25 above are adopted, then it may well be desirable to provide that they may only be utilised for subdivisions other than duplexes with the consent of the local authority and/or Town Planning Board. Comment is invited on this proposal.

Conversion to strata title

Certificate of local authority

36.1 In Western Australia there are many home unit developments (including duplexes) which are not under the *Strata Titles Act*. These were mainly built before the enactment of the *Strata Titles Act 1966*. In the case of duplexes which are not under the Act, the method of ownership would be usually by means of tenancy-in-common: see paragraph 34.3 above. In larger developments not under the Act, the company structure is often utilised (see paragraph 23.2 above), although tenancy-in-common is sometimes used.

36.2 The provisions for bringing property under the *Strata Titles Act* (see paragraphs 3.5 to 3.6 above) apply both to new and existing buildings. One of the certificates which must be

lodged at the Titles Office with the strata plan is the certificate of the local authority and among other things this must certify that the building, in the opinion of the local authority, is of sufficient standard and suitable to be divided into lots pursuant to the *Strata Titles Act 1966*.

36.3 It was pointed out to the Commission that the requirements of local authorities as to when a building is of "sufficient standard and suitable to be divided into lots" are not uniform throughout the State. It could be argued that requirements as to the construction of the building should be uniform throughout Western Australia. This could be achieved by passing regulations detailing the construction requirements before a building can be divided into strata title lots.

36.4 On the other hand, it may be that different requirements are appropriate in different localities. For example, it may be that requirements in places like Port Hedland which are in the cyclonic zones should be different from those in the metropolitan area.

Titles Office procedure on a conversion

36.5 Before the Registrar of Titles registers a strata plan, some of the encumbrances on the title to the land may have to be discharged or withdrawn. The Registrar will require any mortgage registered against the land to be discharged, unless it relates to the whole interest in the land. A mortgage of an undivided share in the land would have to be discharged. There are a number of such mortgages because where the tenancy-in-common method of ownership is used (see paragraph 34.3 above), a proprietor may have mortgaged his undivided share to assist him to raise money to pay for the share. After the strata plan has been registered, one of the lots will be transferred to that proprietor and the mortgagee will take a fresh mortgage over that lot in place of the discharged mortgage. However, the Registrar would not require a mortgage of the whole interest in the land to be discharged as a prerequisite to registration of the strata plan. Assuming that the mortgagee does not discharge such a mortgage before registration of the strata plan, it will be carried forward and will appear as an encumbrance on the certificates of title which will issue for each of the lots on the strata plan.

36.6 In practice, the Registrar requires a caveat with respect to part of the land in the title, or with respect to an undivided share in the land, to be withdrawn (although if it can be seen

from a caveat against part of the land that it only relates to what will be common property, he will permit it to be carried forward). The caveator who has withdrawn his caveat can, if he wishes, re-lodge it after the registration of the strata plan against the title or titles to the lot or lots (on the plan) in which he is interested. A caveat against the whole interest in the land may be carried forward.

36.7 Easements to which the land is subject have to be discharged unless the rights conferred by them are over the common property only. Restrictive covenants, however, are generally carried forward and appear as encumbrances on the certificates of title which issue after the registration of the strata plan.

36.8 After the registration of the strata plan, the certificates of title which issue for each lot on the strata plan will all be in the names of those who were the registered proprietors of the land immediately before the registration of the strata plan. Assuming that it is intended that particular proprietors should become the sole proprietors of particular lots on the strata plan, then transfers have to be registered to give effect to this.

36.9 Where an existing building is converted to the strata title system there will be considerable expense involved in the preparation and registration of legal documents. It has been suggested to the Commission that most of this could be avoided by a procedure which would only involve endorsement of consents on the strata plan. For example, all the registered proprietors of the land immediately before the registration of the strata plan could endorse their consent on the strata plan to the certificate of title to a particular lot on the strata plan issuing in the sole name of a particular proprietor. In the case of a mortgage of an undivided share in the land, the mortgagee and other encumbrancers of the land or of interests in the land could endorse their consent on the strata plan to the mortgage being over a particular lot on the strata plan instead of over the undivided share. The problem with this proposal is that a lot on a strata plan can only be transferred in the same manner and form as land under the *Transfer of Land Act* is transferred: s.4(2) and s.4(6) of the *Strata Titles Act 1966*. A formal transfer in the form prescribed under the *Transfer of Land Act* must therefore be prepared and registered in order to transfer the estate and interest of the transferors to the transferees. A mere consent is not sufficient. Similarly, a mortgage (or other dealing with the legal title) must be in the same manner and form as in the case of land held under the *Transfer of Land Act*: *ibid*. Under that Act, the property mortgaged cannot be changed from an undivided share

in the parcel to a mortgaged strata lot by consent. The only way in which it can be done under the *Transfer of Land Act* is for the original mortgage to be discharged and for a fresh mortgage to be registered over the strata lot.

36.10 The reason why the Registrar requires a caveat with respect to an undivided share in the land to be withdrawn is that such a caveat would otherwise be carried onto the titles to all the lots on the strata plan, despite the fact that the caveator would normally be only interested in particular lots on the strata plan. It is for a similar reason that a caveat with respect to part of the land in the title (except where it can be seen that it only relates to what will be common property) is required to be withdrawn.

36.11 The Commission would appreciate any suggestions on simplifying the existing procedure relating to conversion to the strata titles system.

Transitional provisions

37.1 The Commission at this stage considers that, with appropriate transitional provisions most of the proposals considered in this working paper could be satisfactorily applied to existing strata title developments. The Commission, however, would appreciate submissions on which proposals should not apply to existing strata title developments.

QUESTIONS FOR DISCUSSION

38.1 The Commission invites comments on the issues raised in this paper or on any other matters within the terms of reference. In particular, the Commission invites answers to the following questions. It would be helpful if reasons were given, where appropriate, for the views expressed.

- Proprietor* (1) How should "proprietor" of a lot be defined?
(paragraphs 6.1 to 6.11)
- Strata Roll* (2) Should the strata company be required to establish and maintain a strata roll to record such details as the names and addresses for service of the proprietor, mortgagee and lessee of a lot?
(paragraphs 7.1 to 7.6)
- The Lot* (3) Unless otherwise described in the strata plan, should the boundaries of a lot be the inner surface of walls, the upper surface of floors and the under surface of ceilings?
(paragraphs 8.1 to 8.13)
- (4) Should pipes, wires, cables and ducts located within a lot, and not for the exclusive enjoyment of that lot, be common property?
(paragraphs 8.10 to 8.13)
- (5) Should there be provision for separate title for garages with power to the local authority or Town Planning Board to restrict use of the garage to a proprietor or occupier of a principal lot in the same strata scheme?
(paragraphs 8.14 to 8.16)
- (6) Should there be provision for subdivision within existing strata schemes so that the boundaries of lots and common property

can be altered? If so, by what means and under what conditions should it be permitted?

(paragraphs 8.17 to 8.23)

(7) Should there be provision for consolidating two or more lots into one lot?

(paragraphs 8.24 to 8.25)

(8) Should there be provision for converting a lot to common property? What type of resolution by the strata company should be required before the conversion can proceed?

(paragraphs 8.26 to 8.28)

Land for use in conjunction with a lot

(9) Should the grant to a proprietor of exclusive use and enjoyment of part of the common property be made by by-law, as in New South Wales? If so, should such a by-law be made or repealed only by unanimous resolution?

(paragraphs 9.6 to 9.9)

(10) Should strata title be able to be granted to areas such as swimming pools and gardens? If so, should this be achieved by means of "accessory lots" or by enabling such areas to be included as part of the principal lot?

(paragraphs 9.10 to 9.12)

Staged development

(11) Should there be provision for staged development? If so, what procedure should be adopted so that it can be provided for? What safeguards should be laid down for protecting purchasers of units in the first development?

(paragraphs 10.1 to 10.6)

The strata plan

(12) Should the requirements as to the contents of strata plans be changed and if so how? Should there be any modification in regard to the certificates which must be lodged at the Titles

Office with the strata plan?

(paragraphs 11.1 to 11.6)

*Appeals against
decisions of Town
Planning Board and
local authorities*

- (13) (a) If the Town Planning Board will not approve a strata plan, where should the right of appeal lie to?

(paragraphs 12.1 to 12.4)

- (b) If the local authority will not certify that the building is of sufficient standard and suitable to be divided into lots, where should the right of appeal lie to?

(paragraphs 12.1 to 12.4)

- (c) If the local authority will not certify that the building is consistent with the approved plans and specifications, where should the right of appeal lie to?

(paragraphs 12.1 to 12.4)

Common property

- (14) Should a proprietor's certificate of title comprise his lot and his share of the common property (as at present) or should there be a separate certificate of title in the name of the strata company for the common property, with the company holding the common property as agent for the proprietors?

(paragraphs 13.1 to 13.5)

- (15) Should a strata company be able to acquire land (whether in its own name or as agent for the proprietors) and, if so, what sort of resolution should be required to authorise the company to enter into the transaction?

(paragraphs 13.6 to 13.8)

*Powers and duties of
the strata company*

- (16) What procedure should be followed before distributing money received otherwise than by levying contributions?

(paragraphs 14.2 to 14.7)

- (17) Should the power of the strata company to invest money be limited to the modes of investment authorised by law for the investment of trust funds?

(paragraphs 14.8 to 14.11)

Meetings of the strata company

- (18) (a) What should the requirements be for a unanimous resolution?

(paragraphs 15.8 to 15.12)

- (b) Should there be any right of appeal where the motion which required a unanimous resolution has not been passed and, if so, in what circumstances should the right of appeal arise?

(paragraphs 15.11 to 15.12)

- (19) What should the requirements be for a special resolution?

(paragraphs 15.13 to 15.17)

- (20) Should provision be made to enable persons to lodge a vote on a motion without attending at the meeting? If so how should this be done?

(paragraph 15.18)

- (21) Should a proprietor be able to vote if his contributions are not paid up?

(paragraph 15.19)

- (22) What should be the rights of the first mortgagee to vote?

(paragraphs 15.20 to 15.23)

The council

- (23) Should the Act provide for a chairman, secretary and treasurer for the strata company? If so, should their respective duties be set out in the by-laws in the Schedule to the Act? Should the same person be able to hold more than one such office at the

same time?

(paragraphs 16.2 to 16.6)

- (24) Should the by-laws to the Act be amended to provide expressly that the strata company can direct how often council meetings are to be held?

(paragraphs 16.7 to 16.9)

- (25) Should provision be made to enable proprietors to prevent the council from determining a matter? If so, should this power be exercisable only if proprietors representing more than half the aggregate unit entitlement are opposed to the council determining the matter?

(paragraphs 16.10 to 16.12)

- (26) Should an ordinary resolution of the strata company or a special resolution be required to remove a member of the council from office?

(paragraphs 16.13 to 16.14)

- (27) (a) What additional matters should be dealt with by the strata company in general meeting and not by the council?

(paragraphs 16.15 to 16.22)

- (b) Should the strata company be able to permit the council to deal with any such additional matter in a particular instance, a class of instances or generally?

(paragraph 16.22)

- (c) If the answer to (b) is yes, then should a unanimous resolution or a special resolution be required for such permission?

(paragraph 16.22)

- Matters requiring a special resolution* (28) What matters should require a special resolution?
(paragraphs 17.1 to 17.2)
- Unit entitlement* (29) (a) Should unit entitlement be based on value in respect of matters referred to in paragraph 18.11?
(paragraphs 18.6 to 18.11)
- (b) Should a unit entitlement based on value determine the proportions in which proprietors contribute to the expenses of maintenance and insurance of the building, or should floor area be the determinant in these cases?
(paragraph 18.12)
- (c) Should contributions to administrative costs such as property management, maintenance of lawns and lighting of common property be borne equally by proprietors or in proportions determined by unit entitlement based on the value of their units?
(paragraph 18.13)
- (30) How should a unit entitlement based on value be achieved?
(paragraphs 18.14 to 18.16)
- (31) (a) Should provision be made to enable a new allocation of unit entitlement where the existing allocation is unreasonable, having regard to the value of the lots at the time the allocation was made?
(paragraphs 18.17 to 18.20)
- (b) Should the new allocation be made by a court or a Strata Titles Board?
(paragraphs 8.17 to 8.20)

- (c) If under any new legislation unit entitlement for strata plans registered after the coming into effect of that legislation is to be allocated by the Commissioner of State Taxation or in accordance with a valuation of a qualified valuer, should the provision enabling new allocation be confined to allocations made before the new legislation come into effect?

(paragraphs 18.17 to 18.20)

- Original proprietor* (32) Should any new legislation aim at having the original proprietor leave behind him a viable management structure before he departs from the scheme? If so, how should this be done?

(paragraphs 19.1 to 19.7 and 19.11)

- (33) Should any new legislation restrict the matters which can be dealt with by the strata company during the time between registration of the strata plan and the date on which there are proprietors of lots (other than the original proprietor) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement. If so what should the restricted matters be?

(paragraphs 19.8, 19.9 and 19.11)

- (34) Should the voting power of the original proprietor be reduced during the time when he is the proprietor of lots the sum of whose unit entitlement is not less than half of the aggregate unit entitlement. If so, by what fraction should his voting power be reduced?

(paragraphs 19.10 to 19.11)

- Managing agents* (35) Should a strata company be able to delegate its powers to a managing agent and/or to one of the proprietors in the strata company? If so, what type of resolution should be required to

effect the delegation?

(paragraphs 20.1 to 20.7)

- (36) Should a managing agent be required to enter into a bond?
(paragraph 20.6)

By-laws

- (37) What is the best way of enforcing by-laws?
(paragraphs 21.3 to 21.6)

- (38) How should by-laws of strata companies relating to parking be enforced? Should the *Road Traffic Act* be amended to provide that a person who parks a vehicle on common property in contravention of the by-laws is guilty of an offence, and to allow Road Traffic Authority officers and parking inspectors to enter the common property to police the by-laws and institute proceedings against offenders?
(paragraphs 21.7 to 21.10)

- (39) Who should be bound by the by-laws of the strata company?
(paragraph 21.11)

- (40) (a) If an existing by-law to the Act is one which a strata company should not need to alter, should it become a section of the Act, instead of remaining as a by-law?
(paragraphs 21.12 to 21.15)

- (b) If this were to be done, should only a special resolution (and not a unanimous resolution) be required to alter the remaining by-laws?
(paragraphs 21.16 to 21.17)

- (41) Should a court or some other body (such as a Strata Titles Board if it is established) have the power to revoke, revive or repeal a by-law. If so, what should the court or body have

regard to in reaching a decision?

(paragraphs 21.18 to 21.19)

Finances

(42) Should the strata company be empowered to establish a sinking fund, as well as an administrative fund?

(paragraphs 22.1 to 22.3)

(43) Should unpaid contributions bear interest?

(paragraph 22.4)

(44) Should the provisions of ss.13(7) and 13(8) of the present Act, dealing with unpaid contributions, be utilised in any new legislation and, if not, what procedure should be adopted with a view to protecting the strata company and the purchaser in regard to arrears of contributions arising before the sale of a lot?

(paragraphs 22.5 to 22.10)

*Tenants, occupiers
and visitors -
complaints*

(45) Should there be any control over the proprietor's right to lease his lot?

(paragraphs 23.2 to 23.3)

(46) Should those provisions of the Act and by-laws which are concerned with regulating the conduct of persons in the strata scheme apply to tenants or occupiers as well as proprietors?

(paragraphs 23.4 to 23.6)

(47) Should a lease of a lot or common property be deemed to contain an agreement by the lessee that he will comply with the by-laws of the strata company?

(paragraph 23.7)

(48) What controls should there be over a proprietor's visitors?

(paragraph 23.8)

- Insurance* (49) What provision should there be for insurance of -
- (a) the building,
 - (b) other risks,
 - (c) mortgaged lots?
- (paragraphs 24.1 to 24.15)
-
- Strata Titles Commissioner, Strata Titles Board* (50) What provision should there be for settlement of disputes between members of a strata titles scheme? Should there be instituted a Strata Titles Commissioner and Strata Titles Board as in New South Wales (either with or without modification) , or should special jurisdiction to determine disputes in relation to the scheme be given to the Local Court or a designated magistrate?
- (paragraphs 26.1 to 29.4)
-
- Rates and Taxes* (51) What provision should there be in regard to the assessment of (including appeals against valuation) and payment of, rates and taxes relating to a particular strata title scheme?
- (paragraphs 30.1 to 30.10)
-
- Defects appearing after unit sold* (52) What rights, if any, should the proprietor have against –
- (i) the builder,
 - (ii) the developer,
- if defects in the unit appear after the proprietor has bought it?
- (paragraphs 31.1 to 31.3)
-
- State Energy Commission* (53) What should be the arrangement between the S.E.C., the strata company and individual proprietors regarding the supply of, and payment for, electricity? What should be the position as regards the account for electricity when a unit is sold or leased?
- (paragraphs 32.1 to 32.13)

Sale of units

(54) What restrictions, if any, should be placed on the sale of units not yet constructed?

(paragraphs 33.1 to 33.6)

(55) Should Part III of the *Sale of Land Act 1970* (W.A.), which restricts the sale of land other than by a proprietor and the sale of land subject to a mortgage, apply to the sale of strata title lots?

(paragraphs 33.7 to 33.13)

(56) What information should a vendor of a strata title lot be obliged to give an intending purchaser of the lot?

(paragraphs 33.14 to 33.18)

Duplexes and other vertical subdivisions

(57) What special legislative provision should be made for duplexes and other vertical subdivisions? Should there be special provision made for the title to duplexes, such as -

- (a) exclusive use of portions of the parcel;
- (b) provision for a lot to extend beyond the boundary of the building;
- (c) accessory lots;
- (d) fee simple to the land on which the unit is erected and part of the land adjoining;
- (e) subdivision of the parcel into two lots;
- (f) the position of the common boundary?

(paragraphs 34.1 to 34.29)

(58) Are the machinery provisions in the *Strata Titles Act* (e.g. those dealing with the formation of a council, maintenance and repair, and the establishment of an administrative fund) suitable for duplexes? If not, what machinery provisions should there be?

(paragraph 34.30)

- (59) Should any special provisions relating to duplexes extend also to certain other developments, such as town houses?

(paragraph 35.1)

- Conversion to strata title* (60) What legislative provision should there be for conversion of developments which are not under the *Strata Titles Act* to strata titles?

(paragraphs 36.1 to 36.11)

- Transitional provisions* (61) What transitional provisions should there be if a new Act is passed?

(paragraph 37.1)

APPENDIX

List of bodies, organizations and individuals who made preliminary submissions in writing.

ORGANIZATIONS AND BODIES

City of Fremantle
City of Nedlands
City of Perth
City of South Perth
City of Stirling
Delphine Home Units
Irish Young & Outhwaite
J.L. Gladstone & Co.
Keall Brinsden & Co.
Kevin J. McMahon & Assoc.
Muir Williams, Nicholson and Co.
Peet & Co. Ltd.
Richard A. Hoskin
Robert A. Casey & Co.
Sanford & Handcock
Shire of Belmont
Silverwood Pty. Ltd.
The Institution of Surveyors, Australia (W.A. Division)
The Owners of Chekea Gardens
The Proprietors Sorrento Terrace
The Real Estate Institute of Western Australia Inc.
Villa Court Home Units
Town of Albany
Town of Canning

INDIVIDUALS

Barry, G. & N.
Biggsby, R. & J.
Buffham, I.A.
Butterworth, T.
Cochrane, D.M.
Cowper, A.W.
Dickey, A.F.
Dodd, A.H.
Filmer, E.
Fletcher, R.W.
Gard, R.C.
Hammond, C.E.
Hardie, J.
Hawkins, H.A.
Henson, A.
Hogan, J.P.
Hogg, E.J.R.
Jackson, S.H.
Johnston, G.I.
Low, D.
MacFarlane, J.
May, S.A.
McGilligan, G.
Pilbeam, A.A.
Rundell, K.
Smith, F.M.
Snedden, O.
Symons, F.C. & H.M.

Taylor, M.

Thompson, D.F.

Twist, B.A.

Vigus, M.

White, A.E.

Young, D.

In addition, twenty-five people made oral submissions.