Report prepared by:

Ms Cathy Sherry
School of Law, Faculty of Law
The University of New South Wales

and

Professor Peter Butt
Emeritus Professor of Law
University of Sydney

For:

The Administration of Norfolk Island

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White Paper
Strata title on Norfolk Island

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Authorised Contact:
Paula Sissian-Turnbull
Consulting and Contracts Officer
Research Partnerships Unit
Division of Research
The University of New South Wales
UNSW SYDNEY | NSW | 2052
T: +61 2 9385 1655
F: +61 2 9385 6545
E: p.sissianturnbull@unsw.edu.au
W: www.unsw.edu.au

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This White Paper considers whether Norfolk Island should legislate for strata title. The Paper was undertaken under a contract between the Administration of Norfolk Island and the University of New South Wales. The University then engaged Cathy Sherry, Senior Lecturer in Law, and Emeritus Professor Peter Butt, to carry out the research and prepare this Paper.

Before submitting this Paper, the Administration of Norfolk Island was invited to comment on a Draft. This White Paper incorporates the Administration’s comments.

The White Paper is in two parts. Part 1 discusses the nature of strata title, and reviews the strata/community title regimes in a number of mainland states. The purpose is to highlight those aspects of a strata title system that, in our view, would best suit Norfolk Island if the Administration were to legislate for it.

Part 2 considers the special situation of Norfolk Island. It discusses whether strata/community title is appropriate for the Island and, if so, what particular issues need to be addressed. It also takes account of various concerns which Islanders expressed to us in the course of preparing this Paper.

The Paper concludes that strata title is appropriate for Norfolk Island, subject to safeguards to protect the Island’s unique environmental and historical heritage. It considers that those safeguards are, for the most part, already provided by the Island’s planning and building laws. It proposes a strata title statute tailored to the Island’s needs, rather than one simply adopted from the mainland. It also recognises that in some administrative areas capacity-building may be necessary, but considers that this would not require large expenditure.
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Summary of recommendations

We set out below a summary of our recommendations, with cross-references to the fuller discussion of the issues.

1. Norfolk Island should adopt strata title. It should do so in a way that is sensitive to the Island’s unique environmental and cultural heritage (§19.1)

2. Any strata/community title development should be subject to the same planning controls that apply to other development on the Island (§19.4). Specifically, strata/community title development should be subject to the normal controls under:
   - The Planning Act and the Norfolk Island Plan (§18.1)
   - The Subdivision Act (§18.2)
   - The Environment Act (§18.3)
   - The Norfolk Island Planning and Environment Board Act (§18.3)
   - The Building Act (§18.4)
   - The existing tourist accommodation legislation (§18.5).

   These controls would preclude any use of strata/community title to effect subdivision by stealth.

3. The legislation should facilitate the provision of shared services such as water and waste management; it should also accommodate a ‘tiering’ structure, so as to allow for different uses within a single overall scheme (such as part residential /part tourist accommodation; or part tourist accommodation/ part shops) (§2).

4. The Norfolk Island Plan should indicate which ‘zones’ on the Island may be developed by way of strata/community title (§19.3). Subject to that, the legislation should not limit strata/community title to tourist accommodation, shopping and commercial developments, and retirement villages (§19.2).

5. The legislation should provide for staged development, with the developer being required to clearly indicate what development must be completed and what development may or may not be completed (§11).

6. The Administration should give consideration to whether an applicant to convert an existing building to strata/community title should be required to upgrade the building, and (if so) to what standard. It should also give consideration to whether existing ‘second buildings’ may be converted to strata (§19.6)
7. The Administration should give consideration to the need to certify builders who undertake strata/community title construction or repair work (§15.3).

8. Only land under ordinary Torrens title should qualify for strata/community title. (§19.7). This would include unalienated Crown land of which the Crown itself was the registered owner (§19.7). However, Crown leasehold land, not converted to freehold, should not qualify (§19.7).

9. The legislation should be uncomplicated and tailored to the Island’s needs. It should not be simply copied from the mainland (§§1, 19.8). It should be a single Act, dealing with both the creation of strata/community title and matters of ongoing management (§1).

10. The legislation should use the term ‘body corporate’ to denote the corporate entity that comes into existence on registration of a strata/community scheme (§5).

11. There should be limits on a developer’s right to demand proxy votes from purchasers of units in strata/community schemes (§5).

12. The body corporate’s power to make by-laws should be limited to a specific list of topics. An appropriate model is section 138 and Schedule 1 of the Owners Corporation Act 2006 (Vic)). In relation to individual lots, the power should be limited to the external appearance of lots and behaviour on lots that causes noise or nuisance (§15.1).

13. An owner who considers that the body corporate has failed to enforce by-laws should be able to seek an enforcement order from the strata title tribunal (§8).

14. Unit entitlement should determine both proportionate interest in the common property and the liability to pay levies (§4).

15. Strata managing agents should not require a licence, until licensing requirements are introduced for property professionals generally. However, they should be subject to a Code of Conduct, modelled on the Queensland Code. Breach of the Code should be actionable by the wronged body corporate or owner, and should lead to the imposition of a fine or disqualification from practice as a strata manager (§6).

16. A Code of Conduct should also apply to caretakers and building managers of strata/community title developments (§7)

17. A Code of Conduct should also apply for committee members, accompanied by plain language explanations and answers to ‘frequently asked questions’ provided through media available to Norfolk Islanders, including the internet (see §15.2).
18. The legislation should list mandatory requirements for bodies corporate and committee members regarding insurance, maintenance and repair of common property, financial accountability, meeting procedures, voting, minute taking and record-keeping, of the kind found in mainland strata legislation (§15.2).

19. The legislation should permit the termination of a strata/community title scheme on a 90% vote for schemes more than twenty years old. It should also give a general power to the Supreme Court to terminate schemes where it is just and equitable to do so (§13).

20. The legislation should allow bodies corporate to terminate management contracts where the services are no longer required or are not being performed to a satisfactory standard (§15.3).

21. The legislation should impose statutory fiduciary duties on developers when they act in the capacity of the body corporate (§15.3).

22. Jurisdiction to resolve disputes should be given to a local strata title tribunal (with a right of appeal to the Supreme Court). The tribunal should have the power to refer difficult issues to the Chief Magistrate. Before taking a dispute to the tribunal, parties must have attempted to mediate their dispute between themselves (§10). If that proves unsuccessful, they must have referred their dispute to mediation before a body with functions similar to those of the Employment Conciliation Board (§§10, 19.9).

23. The Registrar of Titles should be provided with training from experienced strata surveyors, and given any necessary financial assistance, to enable his office to deal with any surveying and registration issues that might arise (§19.5).

24. The Administration should give prompt consideration to introducing a general property law statute (§17).

Background research and interviews

In preparing this White Paper we undertook extensive canvassing of Island views. Cathy Sherry interviewed a number of people by phone, and Peter Butt spent a week on the Island interviewing citizens and officials. We list the interviewees in Schedule 1 at the end of this Report.

Peter Butt also held a widely-advertised and well attended public meeting on the Island. The purpose was to assess local opinion about strata title and to answer questions. To
show the depth of interest and the breadth of issues raised, we reproduce a list of the questions in Schedule 2 at the end of this Paper.
Part 1: Overview of strata/community title

1 Terminology and basic concepts

This section of the White Paper considers existing strata title legislation in Australia.

We begin with a point of terminology. The term ‘strata title’ is often used on the mainland in the context of high-rise, concentrated development. But strata title is also suitable for low-rise, low-density development. Small scale residential development, tourist accommodation and shopping precincts could all be developed under a strata title system that was sympathetic to Norfolk Island’s needs.

A related concept of ‘community title’ is also used on the mainland, usually involving low-rise master planned estates with houses or townhouses, and areas of vacant land as well. Many Islanders may prefer this terminology, as it reflects the concept of development that is smaller in scale, environmentally conscious, and less commercial in nature. However, the legal fundamentals of community title are very similar to strata title. Most developments of a community title nature can be undertaken under a strata title legislative scheme. For this reason, and so as not to prejudge the legislative label that the Norfolk Island Assembly might use if it were to introduce ‘strata title’ or ‘community title’, this White Paper generally uses the compound term ‘strata/community title’. This is something of a mouthful, but is intended to make the point that there is very little substantive difference between the two systems. It is also intended to help dispel any concerns that ‘strata title’ would necessarily bring with it development that was out of character with the Island’s landscape and history.

To illustrate the mainland strata/community systems, we will take New South Wales as a guide. NSW has five Acts which create and regulate strata/community title:

- **Strata Schemes (Freehold Development) Act 1973**. This creates freehold title for apartments or units in strata schemes. They may be residential, commercial, industrial, tourist or retirement developments.
- **Strata Schemes (Leasehold Development) Act 1986**. This creates leasehold title for apartments, finger wharves or other schemes. They are generally residential schemes. The freehold is most commonly owned by a government entity.
• *Strata Schemes Management Act* 1996. This governs the on-going management of freehold and leasehold strata schemes.

• *Community Land Development Act* 1989. This creates freehold title to generally low-rise schemes, which may themselves contain strata schemes.

• *Community Land Management Act* 1989. This governs the on-going management of low rise schemes.

This legislative scheme is detailed and extensive. However, we recommend that any system of strata/community title on Norfolk Island should be as uncomplicated as possible. It should not, and in fact need not, reflect the complexity of mainland strata and community title legislative schemes.

Both strata title and community title share four key concepts:

1. A person or a company owns a ‘lot’ (which may comprise, for example, a house, townhouse, block of land, apartment, hotel room, commercial suite, or industrial shed).

2. The person or company automatically becomes a member of a collective governing body.

3. The person or company also becomes a co-owner of the common property (such as gardens, driveways, entrance passages and stairwells).

4. The legislation specifies how the ‘scheme’ as a whole is to be managed and maintained.

Importantly, neither strata title legislation nor community title legislation has anything to do with density or height of development. Density and height are determined exclusively by planning legislation, not by strata/community title legislation.

It will be noted that the NSW legislation separates out the creation of strata and community title schemes from the on-going management of such schemes. This is a relatively recent development (as late as 1996). Most states have only one Act. We recommend that a single Act would be appropriate for Norfolk Island.

That is not to diminish the importance of separating titling from on-going management. The separation reflects the two distinct stages in the life of a
strata/community title scheme. The first is its birth — that is, the creation of multiple individual titles to lots, as well as a collective title to common property. This happens on the registration of a strata/community title plan of subdivision (discussed under §3 below). The second stage is the on-going life of the scheme—that is, the management of the legal, social and economic relationships that have been created. We deal with both aspects in detail later in this Paper.

Elsewhere we discuss the land title system on Norfolk Island and recommend that Crown leaseholds should not qualify for strata/community title. If this recommendation is accepted, Norfolk Island will have no need for a strata leasehold development Act. In New South Wales, the Strata Schemes (Leasehold Development) Act 1986 (NSW) is predominantly used by the government in relation to land which it cannot currently exploit, but which it does not wish to lose permanently—for example, Harbour-front sites at Woolloomooloo and Walsh Bay. The government grants developers 99-year leases over the land; the developers then subdivide the leasehold title and build apartments. At the end of 99 years, the land will revert to the State government, by which time the apartments are likely to be in need of redevelopment.

One issue raised in the feedback on our Draft White Paper was whether, if strata/community title legislation were introduced, the Crown itself could develop unalienated Crown land under the legislation. In our view, it could – in the same way as any other owner of land could do so. We return to this later, in §19.7

2 Community title

We should say something further about community title in particular. Community title is a popular option in local government areas of Australia which may have high residential growth but insufficient infrastructure. Large-scale community title developments are essentially mini-suburbs, where most of the community facilities and infrastructure are built by the developer and handed over to be privately owned by the purchasers. Councils are relieved of the responsibility of maintaining parks, bushland, roads, drains and sewers.

We recommend this model as beneficial on Norfolk Island, where there is less public provision of services. For example, facilities for water and waste management—such as water tanks, septic tanks, or aerobic wastewater treatment systems—can be common property in a community title scheme, with clear ownership rights and
maintenance obligations. All owners, including absentee owners, can be compelled to pay levies in accordance with their unit entitlement (see §4 below), for the proper maintenance and repair of common property tanks and treatment systems.

On the mainland, larger community title schemes are often tiered. There is an overarching community scheme, smaller precinct schemes (optional), and then neighbourhood or strata schemes, as in the following diagram:

A ‘tiered’ structure of this kind allows the development to have the following characteristics:

- It can be physically divided into different sections, with each section having its own common property. For example, there may be a group of townhouses built around a pool (a neighbourhood scheme), or a high-rise building with a lift (a strata scheme within the community title structure).
- The on-going management can be split between the various tiers. Each scheme has its own body corporate (discussed at §5 below), which will in turn is a member of the higher body corporate. For example, neighbourhood associations and strata bodies corporate are members of the precinct association above them, and the precinct association is a member of the community association.
- It can be sold in stages, allowing the developer to build one stage and convey titles, before building subsequent stages.
A useful illustration of a large-scale community title scheme can be seen at http://www.planning.nsw.gov.au/asp/pdf/bp_breakfast_point_concept_plan.pdf. This is the concept plan for Breakfast Point, a large residential development built on the site of the former Mortlake Gasworks, on the Parramatta River, Sydney.

The advantage of tiered schemes is that large sites can be master-planned with a mix of housing types, rationally situated on the site. Smaller schemes can have their own common property, which they pay for themselves, while still having access to and obligations towards the common property of the overarching community scheme (for example, the main access roads or a ‘village green’).

It is unlikely that Norfolk Island would ever need large-scale community title developments. Nevertheless, we recommend that the concept of tiering may be useful. For example, a low-rise development that contains both residential and tourist accommodation might be divided into two separate neighbourhood schemes, each with its own facilities and budgets, sharing a common access road owned by an overarching community association.

## 3 Strata and community plans of subdivision

Land can be subdivided vertically, just as it can be subdivided horizontally. However, vertical subdivision is more complicated, and is not of much use unless connected with the enjoyment of parts of a building. Strata/community title legislation facilitates vertical subdivision through the registration of strata plans of subdivision.

Strata plans are drawn up by surveyors, usually when a building is almost complete, and include a ‘location plan’ and a ‘floor plan’:

- the location plan shows the relationship of the building to the boundaries of the land;
- the floor plan shows the size and location of ‘lots’ within the overall scheme. In larger schemes, the floor plan contains multiple sheets, with each sheet relating to a separate level of the building.

In all strata/community title legislation, the term ‘lot’ is used to refer to an individual unit of ownership. Any part of the building or land that does not fall within a ‘lot’ in a strata scheme is ‘common property’. Thus, ‘lots’ and ‘common property’ are mutually exclusive. Common property comprises such areas as stairs, lifts, passage
ways, landings, balconies, the building facade and external windows, gardens, and ceiling cavities. In some developments, common property might include a pool, gym or tennis courts. In typical community title developments, common property might extend to parks, roads, clubhouses and sewers. Common property vests in the ‘body corporate’, which holds it for the benefit of all lot owners. We say more of the body corporate, below.

The strata plan must delineate the boundaries between lots, and between lots and common property. Initially, in NSW, the boundary was the centre of a wall, ceiling or floor. However, in 1974 the legislation was altered, and the boundaries are now defined by the inner skin of the lot—specifically, the underside of the ceiling, the upper surface of the floor, and the inner surface of the walls at the date of registration of the strata plan, unless otherwise specified. Thus, cavity spaces above ceilings and below floors, as well as the external walls of the unit, are common property.

The NSW legislation also defines ‘lot’ to exclude ‘structural cubic space’. Structural cubic space is the pipes, ducts, cables and wires that service the whole building, as well as structural supports such as pillars. By excluding them from the definition of a ‘lot’, they become common property, even if they are physically situated within a lot. The Queensland legislation uses a different term, ‘utility infrastructure’. Cables, wires, pipes, sewers, drains, ducts, plant and equipment that service more than one lot are ‘utility infrastructure’ and are common property.

Because infrastructure and structural supports are designated as common property, the responsibility to maintain them (as for common property generally) rests with the body corporate. In this way, the cost is shared by all. Individual owners bear the cost of repairing and maintaining their own lots. Strata plans almost invariably designate balconies and external windows as common property, because the external appearance of the building is a legitimate concern of all owners.

Disputes can arise if strata plans fail to clearly differentiate between ‘lots’ and common property. For example, a visual inspection of a ground floor apartment may show an enclosed small garden, which may appear to be part of that apartment. However, if the strata plan has drawn the boundary of the lot as the back wall of the apartment, the garden will be common property. The body corporate must maintain it, and all owners may use it. Further, any paving or garden beds an ‘owner’ constructs will become fixtures and the property of the body corporate. It is possible to partially rectify this situation with ‘exclusive use by-laws’ which allow individual owners
exclusive use of parts of common property and impose on them an obligation to maintain it; but it is preferable for the strata plan to be drawn optimally at the outset and include the garden area as part of the lot (if that is what is intended).

Many strata and community developments include car parking spaces and storage areas. Formerly in NSW, strata plans provided for parking and storage by way of ‘utility lots’, which had separate titles. This is rarely done any longer, as separation of ownership of lots and parking spaces and storage areas caused problems within buildings and for local councils. Nowadays, parking and storage spaces are drawn on the strata plan as part of the particular lot. For example, the sheet of the floor plan that relates to the basement will delineate parking spaces, marking them ‘Pt 1’, ‘Pt 2’, ‘Pt 3’ etc, meaning that those car parking spaces are part of Lot 1, Lot 2 and Lot 3 etc.

Norfolk Island is unlikely to need complex strata or community schemes. The scale of operations on the Island simply will not require them. Nevertheless, the importance of a well-drawn plan for the long-term harmonious functioning of any scheme, large or small, cannot be overstated. The strata or community plan determines legal title, as well as financial responsibility, so it must delineate common property and lots clearly and fairly.

4 Unit entitlement

All strata and community schemes allocate a ‘unit entitlement’ to each lot. In most jurisdictions the unit entitlement is based on the relative market value of the lot, minus the fixtures and fittings.

Unit entitlement is important for a number of reasons. It determines the proportion of levies (annual payments to the body corporate) attributable to a lot, as well as the lot’s proportionate ownership of common property. In mainland states, unit entitlement also determines each lot’s proportion of the rates and taxes payable on the building as a whole. On termination of a strata or community title scheme (see §13 below), unit entitlement will also determine an individual owner’s rights and liabilities in relation to the whole parcel of land.

Sometimes discrepancies occur in unit entitlements. For example, it has not been unknown for the developer to retain the penthouse apartment and allocate it an artificially low unit entitlement to minimise his or her obligation to pay levies.
Tribunals are given the power to change the unit entitlement in the scheme so that it is fair to all lot owners; we return to this, later.

Unit entitlement in Queensland has been more contentious than in other states, and was recently the subject of legislative revision. Queensland has two different unit entitlements. One determines the proportionate interest in common property; this is based on the market value of lots. The other determines levy contributions, and is based either on a principle of equality (all lots pay equal amounts) or a principle of relativity (differences in use of lots, structure of the scheme, market value of lots, etc, can lead to unequal contribution to levies). It remains to be seen if the new Queensland system is workable. However, it seems unnecessarily complicated for Norfolk Island.

We recommend that unit entitlement should determine both proportionate interest in the common property and the liability to pay levies.

5 The body corporate

When a strata or community plan is drawn up, it is lodged for registration. The act of registration creates the legal title: the apartment or land as a legal entity comes into existence at this time. The registration of the plan also brings the strata or community ‘scheme’ as a whole into existence, including the ‘body corporate’.

The term ‘body corporate’ is no longer used in NSW strata or community title legislation. In that state, strata title legislation now uses ‘owners corporation’, while community title legislation now uses ‘community/precinct/neighbourhood association’.

We recommend that any strata/community title legislation in Norfolk Island should use the generic term ‘body corporate’. It remains more widely understood than other terms.

The body corporate is the collective governing body. It is made up of all of the lot owners. Renters (tenants) are not members of the body corporate and cannot vote in any of its decisions.

Strata and community title legislation provides that the common property vests in the body corporate as ‘agent’ for the individual lot owners. ‘Agent’ is arguably not the
correct term, and courts have habitually characterised the body corporate’s interest in common property as ‘legal’ and the lot owners’ interest as ‘beneficial’. For most practical purposes the distinction is not important. The crucial point is that the body corporate has responsibility for and control over the common property and must exercise this role in the interests of the lot owners.

A body corporate does not have the power of a natural person. It has only the functions and duties imposed on it by legislation. In theory this means that it can only act in ways specified in the legislation—an important protection for minority owners if the majority decide that the body corporate should do something novel.

Strata/community title legislation typically requires the body corporate to meet at least once a year, although it can meet more often by calling extraordinary general meetings. The legislation sets out how meetings should be conducted, the matters that must be considered, quorum, proxies, and voting requirements. Most matters require a simple majority decision of the body corporate. However, more serious decisions, such as by-law changes or the acquisition of more common property, require a special (75%) or unanimous resolution.

A quorum can be as little as one-quarter of persons entitled to vote. As it is often impossible to ensure that all owners attend meetings, strata and community titles legislation usually specifies that decisions can be made by the required proportion of those who actually attend (as long as there is a quorum). So, a special majority does not need the in-favour vote of 75% of all owners, but only 75% of those who actually attend. Similarly, a unanimous resolution requires only the unanimous vote of those who actually attend (or, more precisely, a resolution against which no vote was cast). The legislation typically provides that abstention is not considered a vote against a resolution.

A quorum of only one quarter may seem low. However, a quorum is relevant only if people choose not to attend meetings or organise a proxy vote. If people want to be involved in the running of the scheme, or cast a vote on particularly important issues, there is nothing to prevent them doing so. Proxy voting allows them to vote without being physically present. However, if people choose not to participate or organise a proxy, then a low quorum ensures that the scheme can still function through the activity of the involved minority.
Proxy voting has caused some problems in Australia. Unscrupulous developers have required proxies of all buyers in contracts of sale, effectively guaranteeing that the body corporate is controlled by the developer, not the owners. Building and strata managers have also been involved in the improper garnering of proxies, as have factions that form in schemes.

This has brought a legislative response. For example, New South Wales now outlaws developers or those associated with them from taking proxies, and limits the validity of proxies to a year. In Queensland, a person cannot be required by contract to give their proxy to another, and proxies are valid for one meeting only. The number of proxies someone can hold is limited to 5% of the lots in residential schemes and 10% in tourist schemes, or if the scheme has less than 20 lots, one proxy only. We recommend similar limits on the use of proxies in Norfolk Island.

The body corporate frequently operates through its ‘executive committee’, elected annually. In NSW, the executive committee can have up to nine members, and must elect a chairman, treasurer and secretary, who perform statutorily defined roles. These roles are substantial, particularly for the secretary and treasurer, and can expose office bearers to personal liability. While remuneration can be paid, the roles are usually performed voluntarily. Decisions of the executive committee are decisions of the body corporate. However, there are certain matters which the executive cannot decide, such as setting levies or amending by-laws. The owners corporation must meet to decide these issues.

6 Strata managing agents

Running a strata or community scheme may require time, and administrative and financial skill. As a result, many schemes on the mainland employ a managing agent as their delegate to perform the functions of the body corporate and/or executive committee. A managing agent can also be appointed by a tribunal on the application of dissatisfied lot owners.

The extent of the managing agent’s responsibilities depends on the terms of their appointment. The mainland legislation allows the body corporate either to delegate all of its duties and responsibilities to the strata managing agent, or (if it wishes) to delegate some powers only, reserving others to the body corporate. The appointment must be in writing, and must be agreed to by ordinary resolution of the body corporate in a general meeting. Even where the body corporate makes a complete (full)
delegation to a strata manager, the legislation specifies that some key matters cannot be delegated, including the power to determine levies and the ability to sub-delegate.

On the mainland, strata managers must be licensed. In NSW, the licensing is done under the *Property, Stock and Business Agents Act 2002* (NSW) — the same Act that regulates estate agents. Strata managing agents are required to have acquired a certificate IV level of competence in a range of areas, including trust accounting, managing conflicts and disputes, and running a business. The Act requires the keeping of trust accounts, books and records, annual auditing of trust accounts; the payment of money towards a property services compensation fund; and the production of accounts for official inspection. Licensing and control of strata managers is seen as an essential protection for owners of strata properties. Strata funds contain large sums of owners’ money and can be potential targets for fraud and maladministration.

Should strata managers be required to have a licence on Norfolk Island? On the one hand, best practice would require a system of licensing. Consumer protection requires it. Several interviewees favoured it. One suggested that existing licensed managers of tourist accommodation should automatically qualify as managing agents. On another suggested a licensing system based on ‘one-strike-you’re-out’, where no prior qualifications would be needed for a licence, but the Supreme Court could disbar a managing agent for life, for any breach of the licensing conditions. Yet another reminded us of a 2007 recommendation to the relevant Minister that all agents (including real estate agents, business agents, employment agents and travel agents) should be licensed and registered under a system based on the *Agents Act 2003* (ACT).

However, the kind of strata development on Norfolk Island is likely to be small, compared to the much larger developments on the mainland. This means that the kind of work undertaken by managing agents on the Island is also likely to be less complex than on the mainland. Also, the reality is that at present many other property-related professions and trades on Norfolk Island do not require licences and are unregulated. For example, real estate agents are not licensed or regulated (except for auction sales); nor, we were informed, are builders. It would be unrealistic, in our view, to require managing agents to be licensed and registered when other property-related professions are not. If in the future licensing requirements were to be introduced for other property-related professions, then licences should also be introduced for strata managing agents (perhaps

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with some kind of ‘grandfathering’ clause, to allow existing agents to continue to practice for a limited time). But until legislation of that kind is introduced, in our view, strata managing agents should not require a licence.

**We recommend that**, until licensing requirements are introduced for property professionals generally, strata managing agents should be entitled to practice on Norfolk Island without a licence.

However, some degree of consumer protection would still be desirable. In our view, this can be achieved by a Code of Conduct for strata managers. Codes of this kind are in force on the mainland, often in addition to licensing. Such a Code on Norfolk Island would require strata managers to act with fairness, honesty and professionalism, to avoid conflicts of interest, and to ensure that their staff do the same. The Queensland Codes of Conduct for Body Corporate Managers and Caretaking Service Contractors, in the *Body Corporate and Community Management Act* (Qld) 1997, are excellent models.

**We recommend that** a Code of Conduct is a desirable option for Norfolk Island. Breach of the Code should be actionable by a body corporate or an owner who has suffered loss, and should lead to the imposition of a fine or disqualification from practice as a strata manager.

It is also important to remember that the common law of agency applies to strata managing agents, as it does to all agents. The principles that regulate agents have been worked out over centuries to remedy abuse and malpractice. They would continue to apply in Norfolk Island.

### 7 Caretakers and building managers

Legislation on the mainland differentiates strata managing agents from building managers or caretakers. Building managers or caretakers do not have the powers of managing agents, but merely help with the management, control, maintenance and repair of common property.

Caretaker and building manager businesses have emerged to service the needs of strata and community title schemes. New strata/community schemes often have extensive common property such as pools and gyms. They may also have a significant number of rental apartments. Under the NSW strata legislation, a caretaker
is a person who assists the body corporate with the management, control, maintenance and repair of common property. Caretakers often live on-site in a lot or on the common property, are paid fees by the body corporate for their work on common property. They may also earn commissions from running a letting pool for the rental properties in the scheme. Bodies corporate often enter into long-term caretaking or business management contracts of up to ten years or more. The contracts are usually assignable with body corporate approval.

Caretakers are often installed by developers before the sale of any units. This has led to a number of problems, which we discuss below in the section headed ‘Developer Abuse’.

**We recommend that** a Code of Conduct should be developed for caretakers and building managers of strata/community title developments on Norfolk Island (in the same way as for strata managers). This would help ensure that they act fairly and honestly towards the body corporate.

### 8 By-laws

All strata/community title schemes have a set of by-laws which regulate the use of lots and common property. They are essentially the local ‘law’ of the strata/community scheme. On the mainland, sets of widely used model by-laws can be adopted for particular kinds of schemes, or by-laws can be written specifically for the scheme in question. The mainland strata/community title legislation requires by-laws to be identified or included with the documents that are lodged for registration with the plan.

By-laws are not immutable. They can be amended, added to or removed by a special resolution of the body corporate, but they must be registered to take effect. On the mainland they are typically registered on the title to the common property; any person who searches the Register will find them.

By-laws typically cover such matters as noise, safety and security, pets, parking, floor coverings, garbage disposal, and architectural and landscaping guidelines. Most by-laws can be categorised as behavioural or aesthetic. They bind the body corporate, all owners and occupiers, and they become implied terms of every lease, thus binding all tenants.
The mainland strata/community titles legislation also stipulates how by-laws are enforced. Typically, an owner who believes that a by-law has been breached notifies the body corporate. If the body corporate considers that a breach has occurred, it can pass a resolution to this effect and then issue a notice to the defaulter, requiring them to comply with the by-law. If they breach the by-law again, the body corporate can apply to the relevant tribunal for an order requiring the person to pay a fine for each breach. (In NSW, the fine is up to $550.) As a safeguard for procedural fairness, the body corporate cannot impose the fine itself.

It will not always be appropriate for the body corporate to instigate formal proceedings against an owner in breach of by-laws. However, the relevant strata title tribunal is generally given a power to review a body corporate’s failure to act if another owner believes the failure was improper. We recommend that any strata/community title legislation for Norfolk Island should contain such a provision.

Codes of conduct for committee members (considered below) can also assist in ensuring decisions not to enforce by-laws are properly made.

The potential reach of by-laws is wide. The only general limitation is that they must be for the purpose of ‘the control, management, administration, use or enjoyment of the lots or the lots and common property’. However, mainland legislation typically prohibits three types of by-laws.

The first type of prohibited by-law is one that purports to place restrictions on the sale or letting of lots. The legislation favours the free alienability of lots in strata/community plans. This contrasts, for example, with the former practice in relation to the older-style company title units on the mainland, where existing owners have the power to ‘vet’ prospective purchasers and tenants. This practice is seen as potentially discriminatory and can lead to housing problems for certain groups of people. It can also significantly reduce the value of investment properties and make it difficult to obtain finance (because banks fear problems if and when they need to exercise their power of sale).

The second type of prohibited by-law is one that purports to guide dogs or assistance animals.

The third type is a by-law that prohibits people under-18 living in the scheme (with the exception of retirement villages). This is a response to problems the United States
experienced with widespread exclusion of families from condominium schemes, which eventually had to be redressed with Federal legislation.

Of course, by-laws must not breach any other law. They are ineffective to the extent that they are inconsistent with any legislation. On the mainland, this invalidates (for example) by-laws that are inconsistent with State or Federal discrimination legislation. NSW courts have ruled that by-laws are also subject to the administrative law principles that govern the validity of delegated legislation; in short, they must be ‘reasonable’ (as that concept is understood in administrative law). In other states such as Queensland, the requirement of reasonableness is expressly stated in legislation. Either way, these principles have not been extensively tested with litigation. To a large degree, developers and strata communities have traditionally had carte blanche on by-law content. This a potential area of abuse in strata/community schemes, which we discuss in more detail elsewhere (see §§15.1, 15.3 below).

By-laws can be an effective way of creating a particular culture or aesthetic for a community, for they operate as a micro-private planning system. By-laws can be much more specific than local government regulations, and can mandate many things. For example, they can reach from curtain and plant colours, to solar panels, to recycled water, and to permaculture gardening. In rural areas of Australia they are commonly used to create eco-communities. On Norfolk Island they could be used to ensure that strata and community developments reflect and preserve Norfolk Island’s unique environment.

9 Repair

Building repair is a significant issue in strata and community schemes, for a number of reasons. First, the legislation splits responsibility for repair between individual owners and the body corporate. Owners are responsible for their strata lots, the body corporate for common property. While this division of responsibility is clear in theory, disputes can arise in practice because of difficulties in knowing precisely whether the disrepair is within a lot or outside it—for example, a faulty water-proof membrane under balcony tiles. If the damaged area is part of the lot, the owner must pay for the repair; if part of the common property, the cost is shared amongst all owners. For this reason, strata plans need to clearly delineate the boundaries between lots and common property. We recommend below (at §19.5) that the Registrar’s office be given training funds to ensure that staff are alerted to the need for the clear
delineation of boundaries in strata/community title plans that are lodged for registration.

Secondly, while it may be acceptable for people to allow their individually-owned house to fall into disrepair, strata/community schemes are different. The lots may be individually owned, but they are part of a collective; so too is the common property. A decision not to repair a lot or common property is a decision to devalue everyone’s asset.

Thirdly, unattended disrepair in larger buildings, particularly those with lifts or underground car parks, may become more difficult and expensive to remedy than similar disrepair in freestanding houses. Left unattended, minor disrepair can lead to major cost. And the present owners’ failure to attend to repairs can be visited on later owners who must pay for the work. Failure to do on-going repairs may even eventually lead to the need for demolition.

The statutory response to these issues has been to impose strict obligations on bodies corporate to repair common property. The obligation is not merely to make best efforts to repair, but to actually repair whenever necessary. An aggrieved lot owner may sue the body corporate for breach. New South Wales has introduced a requirement that all strata schemes have a 10-year projected plan for maintenance of strata schemes.

10 Dispute resolution

Close living inevitably leads to friction and disputes. As a result, strata/community title legislation provides inexpensive, accessible dispute-resolution procedures to resolve specific issues and promote on-going harmony within a scheme. The following discussion considers the procedures in two states, by way of illustration.

New South Wales has a tiered dispute-resolution process. The first step in most disputes is mediation. This requires the parties to sit down with a trained mediator and attempt to resolve their problem. If mediation fails, parties can apply for adjudication, which is done in writing, rather than in person. The parties send in their submissions and the adjudicator delivers his or her decision in writing. If dissatisfied with the result, parties can appeal to the Consumer, Trader and Tenancy Tribunal (CTTT) which will conduct a hearing. Unlike most divisions of the CTTT, parties in
the Strata and Community Title Division can choose to be represented by lawyers. Appeals from the CTTT lie to the District Court.

Certain issues are excluded from mediator, adjudicator or even CTTT consideration. For example, unit entitlement disputes cannot be the subject of mediation or arbitration, but must go to the Tribunal. Issues over title to land must also go to a court. Some disputes end up being decided by the Supreme Court, Court of Appeal or even the High Court of Australia.

Queensland has an additional layer in its dispute-resolution procedures, requiring parties to attempt self-resolution before applying for conciliation or adjudication. This might be as simple as the parties speaking to each other, or using an internal dispute-resolution forum that bodies corporate have been encouraged to set up. (For example, some eco-communities have a ‘Peace Forum’.) Mandating attempts at self-resolution is the cheapest and easiest process of dispute-resolution, and if effective will save the parties and the state money and time. It may also help preserve on-going community harmony. We recommend that this initial stage would be useful if strata/community title were introduced on Norfolk Island.

We return to the issue of dispute-resolution in Part 2 of this White Paper (see §19.9 below).

### 11 Staged development

Many developers and their financiers will only construct projects, particularly large-scale projects, in stages. This allows the developer to complete and sell part of the project, ensuring there is a market for the product and bringing in needed money, before moving to the next stage.

Strata title legislation facilitates this kind of development by provisions regulating staged development. Community title tiered development can also perform the same function. The developer is allowed to register one or more initial strata plans and create secure titles, even when the overall development is not complete. The legislation protects initial purchasers by letting them know in advance what the final development will look like and the services it will provide. The legislation generally requires developers to clearly distinguish between development that they must complete and development that they may or may not complete. In theory, armed with this information, purchasers can make informed decisions about whether to buy.
We recommend that any strata/community title legislation on Norfolk Island should provide for staged development, with the developer being required to clearly indicate what development must be completed and what development may or may not be completed.

12 Tourist strata title and management rights

Strata/community title is commonly used for tourist developments in Australia. It allows developers to finance the project by selling individual units, often ‘off the plan’. This is almost impossible in former systems of home unit development, such as ‘company title’ or ‘tenancy in common title’ (both of which we discussed in preliminary papers and which the Administration circulated in advance of Professor Butt’s visit to the Island in January/February 2012). Under these older legal structures, developers have to find the entire finance themselves. Strata/community title can allow them to split the risk between multiple owners, who each may be able to obtain individual mortgages for their investment apartments.

A strata tourist operation is generally run through ‘management rights’. At an early stage in the development, while the developer still controls the body corporate, it causes the body corporate to enter a management contract with a management provider (usually a company). The contract is typically for a number of years, with options to renew. In it, the management company undertakes to provide a range of services to the body corporate in return for an annual fee. We have already mentioned some of these (see §§6 and 7 above). The management company will typically be given exclusive possession of the foyer or reception desk, and may also be given an apartment for an on-site manager. It will also have the right to run a ‘letting pool’, made up of apartments which owners would like to lease out on a regular basis. Some developments go so far as to bind the body corporate to multiple contracts with security, service and/or facilities providers. The total package makes up the tourist development. The management and service providers usually pay the developer a fee for securing these contracts.

Management rights can be owned by large brand names (like Mantra, Peppers and BreakFree), or they can owned by small investors looking for a business opportunity. The management rights can be as complex or minimal as the market demands. They may be as simple as the management of a few holiday lettings and maintenance of a pool and

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2 This is done by selling ‘subject to the building being completed’ (or similar wording). Selling ‘off the plan’ is not restricted to strata/community developments; but it is commonly found in such developments.
gardens, or they can require the management of large-scale tourist operations. Management providers may enter contracts with other service providers, such as gardeners and cleaners, or employ staff on a casual or permanent basis to discharge their contractual undertakings to the body corporate.

For owners, in particular off-Island investors, the management rights model allows them to purchase a holiday unit with the expectation that the unit and the scheme in which it is situated will be cared for and maintained in their absence. If they choose, they may be able to use the apartment when they like and earn income from its letting the remaining portion of the year.

Management rights tap into a business potential inherent in strata/community schemes. They are endemic in the Queensland tourist industry, but are also used in schemes in other states for large numbers of rented or serviced apartments. Any scheme with a pool of owners needing a letting or security service, or with significant common property that needs to be maintained, can benefit from management rights.

However, management rights are not without problems. We discuss them in the section on Developer Abuse, at §15.3 below.

13 Retirement villages

The law relating to retirement villages on the mainland is extremely complex. This is because retirement villages have a variety of legal structures, including leasehold, license, company title and strata/community title. Many states have retirement village legislation specifically designed to protect those who enter into contacts with retirement village operators. Villages that are strata/community title will be governed by strata/community title legislation, in addition to retirement village legislation.

Retirement village legislation is beyond the ambit of this White Paper. However, the description of management rights (§12 above) applies equally to strata/community title retirement developments. As a class of owners, retirees may greatly benefit from management rights, an on-site caretaker, and at the very least contracts between their body corporate and service providers. Rather than having to maintain their own lawns, gardens or recreation facilities, retirees can purchase in a strata scheme and know that on payment of annual levies, the common property will be maintained on their behalf by the body corporate and its contractors.
14 Termination of strata schemes

Like all properties, strata/community schemes after many years may need to be demolished and redeveloped. For this to occur, the scheme in its current form needs to be terminated, and for that to occur mainland legislation generally requires the unanimous vote of all owners and mortgagees. This can be achieved by a developer gradually buying up all of the apartments and then terminating the scheme when he or she is the sole owner, or by all owners collectively agreeing to terminate the scheme. Each result can be difficult to achieve. Some owners may want to sell. Some may seek to benefit from a ‘holdout’, increasing their sale price (and while this may cause difficulty for the other owners, in itself is not illegal).

Usually, reluctant sellers can be persuaded by the offer of a high price. But some owners may not want to sell at any price. They may be elderly and attached to their home, which might be located close to family or health services. A refusal to sell is a right associated with private property. Yet if the scheme is deteriorating as a result of age and/or insufficient maintenance, a refusal to sell may be unfair to other lot owners. By refusing to participate in the termination of the scheme, some lot owners may be forcing others into an untenable position.

Some jurisdictions have alleviated this problem by allowing the termination of schemes on a less than unanimous vote of all owners. For example, the United States Uniform Condominium Act (1980) allows for termination of residential condominiums on a vote of 80%, and a lesser majority for non-residential schemes. Singapore allows for termination of schemes which are less than ten years old with a 90% majority vote, dropping to 80% for schemes older than ten years. The Northern Territory Unit Titles Scheme Act allows for termination of schemes that are more than twenty years old on the vote of 90% of lot owners. In all these jurisdictions, the dissenters are still protected, for although they will no longer own a strata lot, they will retain (and be paid for) their share of the land as a tenant in common in proportion to their unit entitlement. New South Wales and Queensland have been grappling with the issue for a number of years, but are yet to alter their legislation from the requirement of a unanimous vote.

We recommend that any Norfolk Island strata/community title legislation should provide for the termination of schemes on a less than unanimous vote. The required proportion should be linked to the age of the scheme. The Northern Territory requirement of termination on a 90% vote for schemes more than twenty years old, seems a workable model.
In addition to the power of a body corporate to terminate a scheme (whether by unanimous or lesser resolution), higher courts are usually given the power to terminate schemes where it is just and equitable to do so. Applications for terminations can be made by a single lot owner or by a mortgagee. In practice the uncertainty of success means that applications are rare. Nevertheless, we recommend that any Norfolk Island legislation should contain a similar provision.

15 Problem areas

15.1 By-laws

We end this Part with some problems areas in strata/community title, and our recommendations about how any Norfolk Island strata/community title legislation should deal with them. We deal first with by-laws.

By-laws are a double-edged sword. In theory, they enhance the value of strata/community living, and the value of strata/community properties, by requiring owners and occupiers to behave in particular ways. Rules that prevent neighbours making too much noise or hanging their laundry on the balcony (to give examples) increase the amenity of a building and correspondingly increase the value of units in the building. However, intrusive by-laws—for example, stipulating that all balcony furniture must be white, or prohibiting non-native plants in the garden—can be a source of intense irritation for owners and correspondingly reduce value.

Sometimes it is impossible to determine whether a particular by-law enhances land value. An example is ‘no pet’ by-laws, which have given rise to litigation in New South Wales and Queensland. People who favour ‘no pet’ by-laws argue that pets, in particular dogs and cats, are a source of noise, smells and parasites, and that apartment owners are entitled to decide whether to share their building with animals. They also argue that buyers and tenants are hardly likely to be ‘ambushed’ by such by-laws: buyers, because the legislation requires all by-laws to be registered on the Torrens register and to be available for search when investigating the title; and tenants, because the legislation requires landlords to give prospective tenants a copy of the by-laws before signing the lease.

People who object to ‘no pet’ by-laws argue that they decrease the value of property by excluding pet owners from the pool of potential purchasers and tenants. They point out that pets are a source of comfort and companionship to many, particularly
the elderly. They regard ‘no pet’ by-laws as inherently unreasonable, at least if pets are kept within apartments, make no noise, are carried or taken by leash across common property, and are cleaned-up after.

A ‘no pet’ by-law might have been brought into operation after residents moved in with their pets. By-laws can be changed. But invariably new ‘no pet’ by-laws include ‘grandfather’ clauses, entitling people to keep their current pets but not replace them when they die. However, some people argue that not being able to replace a pet is extremely distressing. They also argue that having purchased an apartment which was then pet-friendly, they are losing vested rights through by-law change.

These, then, are the kinds of arguments that are put for and against ‘no pet’ by-laws. To broaden the discussion: it can be argued that a by-law should never regulate behaviour within a person’s apartment if it does not affect other people. Autonomy and freedom of land use is a fundamental principle underlying all western liberal property law. This does not mean that people should never be regulated in the use of their land; rather, they should be regulated only when necessary. Activity that harms others (for example, discharging sewage, erecting over-shadowing buildings) should be restrained; but activity that is ‘self-regarding’ and harmless to others, should be left alone.

It is true that people who live in strata/community properties cannot expect to have the same freedom of land use as those living in freestanding homes. But it is important to have some limit on by-law making power, so that by-laws do not regulate essentially harmless activities.

We consider that the New South Wales provision, allowing by-laws on any topic (outside of the three prohibited topics we mentioned above) so long as they relate to the use and enjoyment of lots or common property, is too wide for Norfolk Island. The Queensland provision, that by-laws must not be unreasonable and oppressive is an improvement, but arguably does not go far enough.

There is a third option, reflected in the Victorian provision (section 138 and Schedule 1, Owners Corporation Act 2006 (Vic)). It gives the body corporate the power to make rules (by-laws) on a specific list of issues. In relation to individual lots, the power to make rules extends only to the external appearance of lots and behaviour on lots that causes noise or nuisance. We recommend that Norfolk Island should adopt a provision along the same lines.
The issue of intrusive by-laws may be a greater problem in a community like Norfolk Island, where people are accustomed to more freedom and autonomy than those living in large mainland cities. Any Norfolk Island strata/community title law should place clear limits on the ability of by-laws to regulate the private sphere. That is why we favour the Victorian solution.

15.2 Non-participation and voluntary participation in the body corporate

Like any democratic community, strata/community schemes have members (owners) who have no interest in participating in governance. Owners cannot be compelled to attend meetings or to participate in day-to-day management, and many make no effort to do so. Some mainland strata/community schemes do not even elect an executive committee, although it is mandatory to do so. Chronic non-participation means that the burden of running a scheme falls disproportionately on some members.

Non-participation can result from a lack of understanding of governance. Many owners do not realise that they, gathered in general meeting, are the ultimate authority in the scheme, and that the executive committee and strata manager are merely their agents. They mistakenly believe that the executive committee, or worse still, the strata manager, have the authority to make decisions by which they must abide. (Of course, individual owners must abide by decisions of the executive committee and strata manager, but only so long as those people have the support of the majority.)

Non-participation in governance is exacerbated by high numbers of owner-investors. They do not live on-site; and although they are members of the body corporate and able to vote, they do not do so. (Their tenants, who actually live there, have no right to vote.) Reduced involvement in the running of a scheme is reflected in reduced commitment to maintenance and repair, particularly of a capital nature.

Difficulties can arise even when people do actively participate in the governance of a scheme. Executive committee members are volunteers and may not have the necessary skills to run the scheme, particularly if it is a large scheme. Ideally, they must have financial skills, the ability to estimate and set budgets, an understanding of building maintenance and insurance, the ability to run meetings, and the ability to manage personal relationships and conflict. They should also be able to read and understand legislation. Running a large scheme is the equivalent in responsibility to
running a large business. However, as Norfolk Island is unlikely to ever have large-scale schemes, this may not present as many difficulties as it does in Australia.

Experience on the mainland shows that all schemes, even small ones, benefit from clear legislation and guidelines for bodies corporate and executive committees. For example, mandatory obligations to insure and to prepare budgets remove the need for executive committees to judge whether those actions are necessary. Clear rules on meeting procedures and voting rights help to ensure that decisions are made fairly. Mandatory maintenance of records, both procedural and financial, allows body corporate actions to be scrutinised and reviewed. We would take this a bit further.

**We recommend that** any strata/community title legislation for Norfolk Island should include mandatory requirements for insurance, maintenance and repair of common property, financial accountability, meeting procedures, voting, minute taking and record-keeping, typically found in all mainland strata legislation.

Codes of conduct for committee members are a new addition to some state legislation, and are a welcome development. Arguably, they may be most important in small communities, where committee members may have personal or family ties to other scheme members or those who provide services to the scheme. Codes of conduct require committee members to act with honesty, fairness and reasonableness, in the best interests of the body corporate; they must also disclose any conflict of interest they may have. Breaches of codes of conduct can lead to removal from a committee.

**We recommend that** any strata/community title legislation for Norfolk Island should include a Code of Conduct for committee members.

Plain language explanations of legislation on government websites are essential for both volunteers involved in the governance of schemes and owners and renters being governed. For example, Fair Trading in New South Wales and the Office of Body Corporate and Community Management in Queensland provide extensive information in fact sheets and training modules via their websites. **We recommend that** any strata/community title legislation in Norfolk Island should be accompanied by plain language explanations and answers to ‘frequently asked questions’, provided on the internet and other media accessible to Norfolk Islanders.

### 15.3 Developer abuse

A consistent factor in booming property markets throughout history and across the globe is exploitative developer practice. Property developers build to make money, and a level
of self-serving behaviour may be expected. However, developers sometimes overstep the mark, engaging in unfair or abusive practices.

Experience on the mainland has identified two major risks. The first is building defects. Many high-rise buildings across Australia have defective waterproof membranes, cracking balconies and concrete, leaking swimming pools, lifting tiles, and faulty air-conditioning. Fixing these defects is complicated by inadequate insurance, or by a lack of direct contractual relationships between the lot owners/body corporate and the company or subcontractors who did the work. Developers also manipulate bodies corporate through proxies (discussed below), ensuring that building defect litigation is not launched within the statutorily permissible period. More stringent certification of building work could have avoided many of these problems.

Norfolk Island is unlikely to ever have large-scale high rise buildings. And in-built protection already exists for Islanders, in that building work must comply with Australian Standards, and is checked by the Administration’s building inspector. Nevertheless, a lack of certification for builders could increase the risk of defective work in strata schemes. We recommend that Norfolk Island should give consideration to the need to certify builders who undertake strata/community title construction or repair work.

The second risk for strata schemes is associated with initial developer control of the body corporate. When a strata/community scheme is registered, the developer (or one of the developer’s companies) is the owner of all the lots. It is the body corporate, and can exercise the powers of the body corporate. This puts the developer in a position to use the body corporate to its advantage. To avoid abuse of this power, all strata legislation restricts the body corporate’s ability to act during an ‘initial period’, which is the period in which the developer still owns enough lots to garner a special majority vote. For example, in NSW, during this ‘initial period’ the body corporate cannot incur a debt too large to be paid out of its current funds, cannot borrow money, and cannot appoint a strata manager or caretaker beyond the first annual general meeting. In theory, these provisions protect the eventual purchasers.

In practice, however, developers often get around these restrictions. For example, caretaker contracts are formed in the initial period and then ratified at the first annual general meeting, often by the developer as ‘proxy holder’ for apartment owners. The developer obtains the proxies by requiring them of purchasers in contracts of sale. This practice has now been banned by legislation, but the example remains a valid illustration of the way bodies corporate can be manipulated.
Management rights (discussed at §§6, 7 and 12 above) are another area of manipulation. They can have their genesis in developer control of the body corporate. A New South Wales Supreme Court decision in 2007 (Community Association DP No 270180 v Arrow Asset Management Pty Ltd) ruled that the sale of management rights by a developer was a breach of the fiduciary obligation which a developer owes to a body corporate. The court ordered the developer to pay the body corporate the money earned from the sale of management rights. In Queensland, the Government decided that developers, as the creators of the structure to be managed, should be entitled to benefit from the sale of management rights; but the Queensland legislation stipulates that the management contract must be on terms that are fair to the body corporate as made up of the ultimate lot owners.

Legislation and case law aside, there is no doubt that management rights can cause serious problems if disagreement later arises between the lot owners, the body corporate and the management company. This is most likely to occur if purchasers have not understood the nature of the body corporate’s existing contractual obligations at the time they purchased their apartment.

Some Australian states require management rights contracts to be disclosed in contracts of sale to purchasers, or to be ratified by the body corporate at the first annual general meeting (the time at which, in theory, the developer no longer controls the body corporate). Unfortunately this protection is not always effective. Purchasers frequently do not read or understand large documents attached to contracts of sale, and so disclosure has little benefit. And while ratification at the first annual general meeting is meant to be a decision of the body corporate, now controlled by purchasers, confirming the management contract for themselves, in practice at this early stage many owners do not yet understand the maintenance and management needs of the scheme. Ratification then becomes mere rubber-stamping.

Problems also arise if the management company is providing a poor service or a service that the owners or residents do not need. It may be difficult for the body corporate to terminate the management contract. Ideally, management contracts should contain termination clauses that are fair for both parties, but frequently they do not.

We recommend that any strata/community title legislation on Norfolk Island should protect bodies corporate by allowing termination of management contracts where the services are no longer required or are not being performed to a satisfactory standard.
The range of questionable practices engaged in by developers is as broad as their lawyers’ imaginations and intellects. Legislation only plays ‘catch-up’; new provisions can only counter abuses that have already occurred. Legislation is also vulnerable to avoidance; clever lawyers can often work their way around specific provisions. A much better option, and the path taken in the United States after serious problems of developer abuse in the mid-1970s, is to impose statutory fiduciary duties on developers when they act in the capacity of the body corporate. This does not mean that a developer cannot act in his or her own interests when building and marketing apartments. But it does mean that if a developer causes the body corporate to act, that action must be in the interests of the body corporate alone. The advantage of a fiduciary duty is that it will capture a range of abusive practices, including those not yet devised. **We recommend that** such a provision be incorporated in any Norfolk Island strata/community title legislation.
Part 2: Particular issues for Norfolk Island

In Part 1, we discussed the nature of strata/community title, and made recommendations about whether certain aspects of the mainland legislation were appropriate for Norfolk Island. But Norfolk Island has its own legal structure, and any strata/community title legislation must fit into that structure. We therefore begin this Part of the White Paper with a discussion of Norfolk Island’s land law and land planning legislation.

16 Title structures

Norfolk Island has three land law ‘title systems’: Torrens title, common law title, and Crown leasehold. There is also some remaining Crown land, over which no interests have been granted.

1. Torrens title. The majority of land on the Island is Torrens title, governed by the Land Titles Act 1996. This Act is a fairly standard Torrens title statute, guaranteeing title and providing compensation if the title proves to be deficient or if a proprietor is defrauded out of the title.

2. Common law title (often called old system title). These titles are the original freehold titles which were granted to early settlers, and which have not yet been converted to Torrens freehold title. According to the Registrar (whom we interviewed in relation to this Paper), these comprise only about 10% of land titles on the Island. They are transferred under procedures specified in the Conveyancing Act 1913. Historically, a title of this kind is more at risk of inherent uncertainty, because (unlike Torrens title) a person’s ownership of land can be no better than the ownership of the previous owner. As it is often expressed, the strength of the title depends on proving an unbroken chain of title from the original Crown grant down to the present. Any break in the chain – for example, because of an unadministered will, or a doubtful description of the property in a will or deed of conveyance, or an ineffectively signed deed of conveyance – puts the current owner’s title at risk. (We should hasten to add that we are here discussing the potential for uncertainty in such titles. We were not referred to any actual defective titles on the Island.)

Titles of this kind are being systematically converted to Torrens title. If the title to be converted is at all doubtful, the Land Titles Act gives the Registrar a power to issue a
'qualified’ Torrens title. However, the Registrar advised us that no qualified titles have ever been issued; all conversions to date have been to ‘fully-fledged’ Torrens title.

3. **Crown leasehold**. The *Crown Lands Act 1996* provides for the grant of Crown leaseholds. Usually, these are for terms of 99 years; but in some areas of the Island they are for shorter terms (such as 28 years). They are subject to conditions, and are liable to be terminated for breach of condition. Crown leases can be registered under the *Land Titles Act*. They can also be converted to freehold, with the Crown’s consent and on payment of a fee. Many Islanders have converted their Crown leases to Torrens title freehold under the *Land Titles Act*. However, for the past few years the Commonwealth has imposed a moratorium on conversions.

4. **Unalienated Crown land**. Some Crown land on the Island remains free of any interests. It has never been granted by the Crown; nor have any lesser interests (such as leases) been granted over it. The Crown is the absolute owner of that land. That land is not currently registered under Torrens title; nor does it need to be, in the sense that the Crown does not need the aid of the *Land Titles Act 1996* to prove its ownership. Nevertheless, the Crown could, if it wished, apply to bring such land under the *Land Titles Act 1996*, and have a title issued in its own name. (It may be prudent to amend the *Land Titles Act 1996* to expressly allow this to be done, in case of argument over the Registrar’s power to take this action.) We later recommend this action if the Crown were to consider developing some unalienated Crown land under any strata/community title (see § 19.7).

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**17 No general property law statute**

Norfolk Island has no general property law statute of the kind common on the mainland. (Mainland examples are the *Conveyancing Act 1919* (NSW); *Property Law Act 1974* (Qld); *Law of Property Act 1958* (Vic).)

This means that issues of basic property law sometimes can be answered only by reference either to early English (‘Imperial’) statutes which applied to the Australian colonies before the cut-off date for the reception of English law (in the case of Norfolk Island, 1828), or by reference to ancient principles of the common law which have long disappeared into the mists of history on the mainland.
This lack of a modern property statute gives rise to several problems. First, potential investors may be deterred by the absence of a modern property law of the kind found on the mainland. Second, it is often difficult to know which Imperial statutes actually apply to the Island. And third, even if the Imperial statutes are discovered, their concepts and terminology are often hard to understand and difficult to apply in modern social conditions. All this makes it imperative, in our view, that Norfolk Island consider implementing a general property law statute as a matter of priority.

Nevertheless, we do not consider that the lack of a general property statute should delay any introduction of strata/community title. Like other title systems, strata/community title can operate independently of a general property law statute. The only statute that is an essential complement to strata/community title is a land registration (or Torrens title) statute — and Norfolk Island has such a statute.

However, if the laws of Norfolk Island are to reflect modern best practice, and provide a familiar legal environment for potential investors, the Administration should give prompt consideration to introducing a general property law statute. We recommend accordingly.

18 Planning law

Norfolk Island has a modern planning law structure, similar to that found on the mainland. The structure comprises four main Acts: the Planning Act 2002, the Subdivision Act 2002, the Environment Act 1990, and the Building Act 2002. In addition, tourist accommodation legislation imposes certain restrictions on properties used for tourism.

18.1 Planning Act 2002 (and Norfolk Island Plan)

This Act regulates land development on the Island. Its form reflects mainland planning legislation. Its objects are (in section 3):

(a) to promote the conservation of the natural environment and landscape beauty of Norfolk Island; and

(b) to promote the conservation and preservation of the unique cultural and built heritage of Norfolk Island; and

(c) to preserve the way of life and the quality of life of the people of Norfolk Island; and
(d) to promote the proper management, development and conservation of the
natural and man-made resources of Norfolk Island for the social and
economic welfare of the community and a better environment; and

(e) to determine the preferred future use, development and management of
Norfolk Island; and

(f) to promote and co-ordinate the orderly and economic use and
development of land on Norfolk Island and provision of utility and
community services and facilities; and

(g) to ensure that human health and safety, and the amenity of Norfolk
Island, are promoted by activities subject to development approval; and

(h) to provide standard development approval procedures.’

Clearly, any future strata/community title development on the Island would come within
these objectives.

The Act regulates the ‘development’ of land. ‘Development’ is defined widely (section
6) to mean:

‘the use of the land or the erection or use of any building or other structure or the
carrying out of building, engineering, mining, or other operations in, on, or under
the land, or the making of any material change to the use of any premises on the
land and includes any one or more of the following —

(a) construction, exterior alteration or exterior decoration of a
building or structure;

(b) demolition or removal of a building, structure or works;

(c) construction or carrying out of works;

(d) subdivision or consolidation of land including buildings or
airspace;

(e) placing or relocation of a building, structure or works on the
land;

(f) construction or putting up for display of a sign or hoarding;’

This definition would clearly encompass all aspects of strata/community title
development.

The Act binds the Crown (s 4).
The Act provides for the Norfolk Island Plan (‘the Plan’). The Plan (reflecting land use planning practices on the mainland) divides the Island into land use ‘zones’, and specifies for each zone what use and development is permitted or prohibited, and (if permitted) whether as of right or with consent. It also specifies standards (including subdivision standards) for development in each of the zones. The Plan may specify more detailed development conditions for designated areas of the Island, under a development control plan (Act, section 19). The Plan must be reviewed every five years, unless the Legislative Assembly fixes a different period (Act, section 17).

The Administrator may regulate to require an environmental impact assessment to be made for any development (Act, section 45). The Assembly can direct an inquiry into proposed development (Act, s 91). Also, the Act (Part 6) provides for a development contribution scheme, under which development consent can be made subject to a requirement to contribute towards public amenities and community services.

Under the Act (section 80) and the Plan, any strata/community title development would require development approval in the same way as any other proposed development on the Island. This would require careful assessment and control under the Act and the Plan, in the same way as any other development on the Island. If more detailed scrutiny were thought necessary for strata/community development than for ‘normal’ development, then it could also be made subject to an environmental impact assessment, or an enquiry. And a strata/community title developer could be required to contribute appropriately towards public amenities and community services. We recommend that in this way appropriate safeguards could (and should) be applied to ensure that any proposed strata development met the requirements and safeguards of the Planning Act and the Norfolk Island Plan.

18.2 Subdivision Act 2002

Under this Act, any ‘subdivision’ of land on Norfolk Island requires development approval under the Planning Act 2002 (Act, section 16). ‘Subdivision’ is defined to mean (amongst other things) ‘the subdivision under the Land Titles Act 1996 of a single parcel of land into 2 or more separate parcels’.

Also under this Act, the process of subdivision requires the lodgement of a proper survey plan. The plan must be certified as accurate by a surveyor authorised under the Surveys Act 1937, and certified as accurate by the Surveyor-General (section 7). Further, in considering whether to approve a subdivision, regard must be had to any relevant requirements of the Norfolk Island Plan for the subdivision (section 8).
In our view, it would follow from these provisions that any strata/community plan would require development approval under the Planning Act 2002. This is because such plans divide land into lots and common property. Further, that strata/community subdivision would be subject to the usual controls on subdivision under the Planning Act and the Norfolk Island Plan. There would be no ‘subdivision by stealth’ (to borrow a phrase used by several interviewees). We return to this issue, below (at §19.4). For present purposes it is enough to emphasise the point that strata/community title subdivisions would be subject to the same controls and protections as apply to any other subdivision on the Island.

18.3 Environment legislation

The Environment Act 1990, now over 20 years old, is described in its long title as: ‘An Act to promote the conservation of the natural environment and landscape beauty of Norfolk Island and to maintain environmental health and safety …’.

This is reflected in the Act’s objects, as set out in section 3:

‘(a) to promote the conservation of the natural environment and landscape beauty of Norfolk Island and to ensure, so far as is practicable, that physical works and other activities are in harmony with the natural environment;

(b) to preserve the way of life and quality of life of the people of Norfolk Island;

(c) to prevent so far as is practicable destruction of, damage to and degradation of the natural environment and landscape beauty of Norfolk Island;

(d) to provide a unified process for dealing with proposals which may affect the natural environment and landscape beauty of Norfolk Island; and

(e) to ensure, so far as is practicable, that physical works and other activities do not adversely affect human health or safety.’

These objects clearly reflect the values of many Islanders, whose views we mention later.

The Act introduced the concept of a Norfolk Island Planning Board. That Board has since been replaced by the Norfolk Island Planning and Environment Board, which operates under the Norfolk Island Planning and Environment Board Act 2002. The Board
gives advice and makes recommendations on all development applications for permissible (with consent) use or development, and on any matter referred to it by the Assembly. The latter includes (under (s 5(6)) matters concerning:

‘(a) conservation of the natural environment, landscape beauty and cultural and built heritage of Norfolk Island;
(b) whether physical works and other activities are or will be in harmony with the natural environment;
(c) preservation of the way of life and quality of life of the people of Norfolk Island;
(d) proposed or possible destruction of, damage to and degradation of the natural environment, landscape beauty and cultural and built heritage of Norfolk Island;
(e) the likely effect of proposed or possible physical works and other activities on human health or safety;
(f) management, development and conservation of the natural and man-made resources of Norfolk Island for the social and economic welfare of the community and a better environment; and
(g) the orderly and economic use and development of land on Norfolk Island and provision of utility and community services and facilities.’

Clearly, many of these activities would be involved in any development and use of land for strata/community title purposes. In our view, the legislation subjects those activities to the same controls as development activities generally. Strata/community title neither receives nor needs special treatment under the terms of this legislation. **We recommend accordingly.**

**18.4 Building Act 2002**

Under this Act, it is illegal to carry out building work without building approval, and the work must generally comply with the Norfolk Island Building Code (s 32). Under section 6, that Code must prescribe standards for the construction, alteration, demolition and removal of structures, and those standards must be consistent with the objects of the Planning Act 2002 (quoted above). A building approval cannot be given unless any development approval required under the Planning Act has been given (s 16(2)). A building cannot be occupied unless an occupancy certificate has first been given (s 37).
Here too, any strata/community title work – whether involving the construction of a new building, or the modification of an existing building – would require approvals under this Act. In our view, the Act would apply to regulate strata/community title-related building work in the same way as it applies to regulate building work generally. We recommend accordingly.

18.5 Tourist accommodation legislation

The **Tourist Accommodation Act 1984** requires tourist accommodation to be ‘registered’ (s 5). The regulations under the Act prescribe minimum standards and inclusions for tourist accommodation. There is also provision for ‘registering’ people as managers of tourist accommodation (s 6). Minister Nobbs (whom we interviewed), in particular, stressed the need for any potential strata/community title legislation to fit into the existing tourist accommodation legislative structure.

The **Tourist Accommodation (Ownership) Act 1989** and the related Regulations aim to prevent persons or companies acquiring dominant market share of tourist accommodation.

In our view, these Acts would apply to strata/community tourist development in the same way as they would apply to tourist development generally. We recommend accordingly.

19 Specific issues

We now consider a number of specific issues raised by strata/community title. Some of these issues were canvassed by interviewees; where that is the case, we have set out the interviewees’ comments and added our own response. Other issues we have already discussed in Part 1 of this White Paper; here we link them to issues that we see as particularly important for Norfolk Island. Yet other issues arise from our own research into this project and our experiences with strata title around Australia.

19.1 Should strata title be introduced at all?

The vast majority of interviewees were in favour of strata title (or as we are now calling it, strata/community title) for Norfolk Island. In particular, strong support came from business people, and from tourist operators.
One interviewee was strongly against strata development. Hers was the only strong opposition we encountered. She feared that strata title would change the Island’s environment forever. She feared tourist development of the Gold Coast kind, which she saw as inappropriate for Norfolk Island.³

**We recommend that** strata title should be introduced into Norfolk Island. We consider that it can be introduced in a way that is sensitive to Norfolk Island’s unique environmental and cultural heritage, within existing town planning structures. As we have already mentioned, strata does not necessarily mean ‘high-rise’. No strata/community legislation on the mainland determines matters such as density of development, height of buildings, or the like. Those matters are the remit of the planning laws. For example, strata legislation applies to all of New South Wales; but only small sections of the state are zoned for medium or high-rise development.

We expand on some of these issues, below.

**19.2 What are the main uses for strata title on Norfolk Island?**

It became clear from interviews that most people considered that strata/community title could be of particular use in three main areas:

- Tourist accommodation
- Shopping and commercial development
- Retirement village development.

(a) **Tourist accommodation**

Many tourist operators on the Island are experiencing financial difficulties. Tourist numbers are down considerably from previous decades. Some tourist operators hold antiquated accommodation stock. Because that stock is usually on a single title, they cannot divest themselves of part of it as a means of raising finance – for the Norfolk Island Plan generally does not allow subdivision into small allotments, except in

³ The same interviewee also expressed the view — which we heard from several others also — that the existing planning laws operate unfairly against rural landowners. She said that they cannot subdivide and develop their holdings, because that would detract from the natural environment, which was what brought tourists to the Island; and yet owners in the central area, who benefited from the tourists, could subdivide into smaller allotments and develop for commercial purposes or tourist accommodation. This, of course, is a concern not limited to strata/community title. Rather, it is part of a larger concern that the Norfolk Island Plan operates unfairly. But it is outside our terms of reference. We simply record it here, as a view we encountered a number of times.
restricted areas of the Island. Nor can they borrow against part only of it, because they cannot give a separate title to the bank or financier.

An example in point is Governor’s Lodge, a well-known tourist accommodation in the central area of the Island. We interviewed the proprietors, who gave permission for us to cite their operation as an example. At present, Governor’s Lodge has a large number of individual cottages spread around a large site, with common grounds and holiday facilities (tennis courts, restaurant, swimming pool). The proprietors consider that conversion to strata title might allow them to raise finance by divesting some of the cottages (including to mainland investors) or using them for raising money on mortgage. Those avenues are not possible at present on the Island.

(b) Shopping and commercial development

There are a number of shops and commercial offices on the Island. The downturn in tourism has also affected the owners and operators of these premises. The present title system on the Island generally does not permit owners of shopping precincts to sell off individual shops, for that would involve an illegal subdivision; nor can they offer individual shops to banks or financiers as security. One owner told us that one of his tenants was interested in buying the freehold of a shop in a cluster of shops; but that the present title system did not permit it. If the shopping complex were to be strata-ed, these difficulties could be overcome.

(c) Retirement village development

We have already discussed the potential for strata/community title in retirement villages (see §13 above). Several interviewees saw strata/community title as a way of encouraging retirement village development. There is no such development on the Island at present. These interviewees considered that older residents, on larger holdings in outlying parts of the Island, might wish to come into the central area to live, with smaller properties to care for, and with access to shops and medical care. One interviewee had in fact already built two retirement apartments near the main commercial centre and only a few minutes from the hospital, but told us that without strata title he had found it impossible to sell the units or raise the necessary finance to complete the development.

In our view, strata title would be particularly appropriate for these kinds of developments. However, we do not suggest that any legislation should limit strata to these three kinds of developments. However, we recommend that it should be for general adoption (subject
to planning matters, as noted at §19.4 below). Nevertheless, investors may see strata title as particularly attractive in these three areas.

19.3 Phased introduction of strata?

A number of interviewees suggested that strata/community title could be introduced in ‘stages’. For example, it could be trialled in the central commercial area, or in the areas where tourist accommodation exists. In this way, its effect on these parts of the Island could be assessed before it was made available in other areas.

In our view, however, is not necessary for any strata/community title legislation to be phased-in in this way. The same result could be achieved through the Norfolk Island Plan, by indicating the ‘zones’ in which strata title would be permitted. Initially, those zones could be (for example) commercial and tourist; later, the Plan could be amended to extend strata title other zones. **We recommend accordingly.**

19.4 Town planning issues

This leads again to town planning issues. Development on Norfolk Island is regulated by a series of statutes and by the Norfolk Island Plan. These create a complex patchwork of regulation for development. We have already set them out (see discussion at §18 above), and need not repeat the salient points here.

**We recommend that** the current regulatory and statutory regime should apply to any strata/community development proposed for the Island. Strata/community title should receive no special treatment. The existing planning and building controls adequately protect the Island from any risk of undesirable development. Strata/community development should be subject to the same environmental, planning and building regulation as any other form of development on the Island.

**Buildings only?**

One response to our Draft paper sought confirmation whether strata/community titles could be created only over buildings or parts of buildings. This reflected the concern, which we mentioned earlier, that strata/community title might allow ‘subdivision by stealth’.
Here we need to refer to the distinction on the mainland between ‘strata title’ and ‘community title’. For example, strata plans in New South Wales, and their equivalent in Queensland (‘building format plans’) subdivide buildings. However, community plans in New South Wales and standard format plans in Queensland subdivide land. Now, the point of low-rise strata/community title residential estates of the kind we envisage as appropriate for Norfolk Island is to subdivide land into individually-owned housing lots with private gardens, which then share common property like roads, parks and sewers. Lots in the estate could be sold as vacant land or with housing already built. And so, to use it to its best advantage, strata/community title should not be restricted to buildings.

However, as we have made clear, strata/community title is always subject to planning law. Both strata and community title plans effect subdivisions of land (whether built-upon or not), within the meaning of s 6 (d) of Norfolk Island’s Planning Act 2002. And it is not possible to subdivide land without planning approval. In this, it makes no difference whether it is an ‘ordinary’ plan of subdivision, or a strata or community title plan of subdivision. Registration of the plan can never occur without prior planning approval, which will depend on the plan’s conformity with density, environmental and other regulations.

Thus, in our view any strata/community title system on Norfolk Island would not introduce subdivision by stealth.4

19.5 Capacity issues: Titles Office

The Registrar of Titles raised issues about capacity and infrastructure, if strata/community title legislation were to be introduced. He was concerned about three issues in particular. We list his concerns below, with our comments.

(a) Office capacity

A strata/community title regime would increase the number of titles, with a corresponding rise in the number of dealings. For example, on the registration of a strata plan, the existing title would be cancelled, and in its place the Registrar would issue a title for the common property and separate titles for each of the strata lots. As lots were transferred, mortgaged or leased, a dealing would be registered. In this way, the number of dealings with the original parcel of land would be multiplied.

4 We discuss separately the ‘granny flat’ issue on Norfolk Island: see §19.6.
While we appreciate the Registrar’s concerns, we do not consider that this multiplication of dealings should cause undue increase in work for his office. We consider it unlikely in the short term that there would be an explosion of new strata/community title developments, and we would anticipate that any increase could be handled in the normal course of office administration.

(b) Upgrading computer facilities

Related to the previous issue was a concern that office computer facilities would need to be upgraded to deal with the new title structures. If this were to prove to be the case, then in our view financial assistance should be given to enable the computer facilities to be upgraded. Given the relatively small scale of the office’s activities, we do not foresee this as a significant budgetary issue.

(c) Survey issues

Any strata/community title development would require the services of a surveyor and also certain expertise at the land Registry. Taking strata title as an example:

- A survey would to be made (to ensure that any building was properly within the land boundaries).
- A strata plan would need to be prepared (showing the building on the site, and the location of the individual units within the building).
- The Registrar would need to ensure that the survey and strata plan met the requirements of the legislation and modern surveying standards.

Under the Surveys Act 1937, an ‘authorised surveyor’ may make a survey of land on the Island. As we understand it, no authorised surveyor resides on the Island. However, a licensed surveyor visits the Island to carry out surveys and prepare subdivision plans as required. Before registering any subdivision plan, the Registrar uses the services of the New South Wales Department of Lands to verify the adequacy of the plan. The Director-General of that Department is the Surveyor-General of New South Wales, and is also the Surveyor-General of Norfolk Island. We were informed that the Department of Lands charges no fee for this service.

The Registrar is naturally concerned that the Department of Lands may not continue to provide this free service if asked to undertake the additional work to verify strata plans. We were shown a letter (dated July 2008) from the then Surveyor-General indicating a willingness to help the Registrar with any strata title issues if strata were to be introduced;
but of course that was not a binding undertaking, and that Surveyor-General is no longer in office.

However, here too we do not consider this to be a substantial obstacle to the introduction of strata title. The number of strata plans in likely to be small, at least initially. Any existing lack of experience in strata title registration can be overcome with appropriate workshops or training (on the mainland if necessary).

We recommend that the Registrar’s office be provided with training from experienced strata surveyors, and (if needed) financial and other assistance, to ensure that it can carry out its obligations under the Land Title Act and any strata/community title legislation, without having to rely on mainland verification of this aspect of its work.

19.6 Conversion of existing buildings

Several interviewees raised the issue of the conversion of existing buildings to strata/community title. They were concerned at the prospect that substandard existing buildings might be converted to strata/community title without being upgraded. This could perpetuate substandard buildings, particularly in the tourist industry. Existing buildings might not meet modern standards for fire rating, or might not meet current health and safety requirements. One interviewee expressed the strong view that the Building Code would need strengthening to ensure that conversions were of sound quality. In her view, Norfolk Island should adopt the same standards as the mainland for strata conversions; the Island would also need to appoint a properly qualified building inspector.

One issue would be whether, as a pre-condition to conversion, a building should be brought up to ‘new’ standards, or whether some lesser standard would suffice (for example, a standard that took into account the age of the building and the expenses of building on the Island).

Ministers Nobbs and Sheridan raised the related issue of ‘second houses’ or ‘granny flats’. There is an Island tradition of owners building a second house on their parcel of land for their married children, or building a ‘granny flat’ for an elderly parent. Permission to build for these purposes is readily given. However, almost always the land on which the second building stands cannot be subdivided off from the main allotment. The members of the Planning and Environment Board, whom we interviewed, expressed a concern that strata title might be thought to undermine this prohibition on subdivision,
by allowing the whole allotment to be strata-ed, with the houses being lots 1 and 2 on the strata plan. However, as we noted above, registration of a strata/community plan can only occur if development approval for subdivision has been given. The physical existence of two houses on a single block of land would not automatically entitle the owner to register a strata plan. The practice of granting building approvals for a granny flat or second house without approval for subdivision, could continue as before.

We recommend that the Administration give consideration to whether an applicant to convert an existing building to strata title should be required to upgrade the building, and (if so) to what standard. It should also give consideration to whether existing ‘second buildings’ could be converted to strata.

19.7 What titles should qualify for strata title?

Earlier, we outlined the three title systems on the Island (see §16 above). We recommend that only freehold land under ‘fully-fledged’ Torrens title under the Land Titles Act should be able to be developed by way of strata/community title. This includes Crown leasehold land that has been converted to freehold and registered under the Land Titles Act. Unconverted common law (old system) title should not be able to be developed by way of strata/community title.

This is consistent with the legislative regimes around Australia. The reason is that strata/community title should provide the same quality of indefeasible title as ‘normal’ Torrens title. Confidence in a strata/community title system would be undermined if the title could be challenged. And so common law title, with its inherent possibility of uncertainty, and qualified Torrens title (if any were to be issued), should not come within the strata/community title scheme.

There would be nothing to stop the Crown itself from developing its own land (that is, unalienated Crown land) on a strata/community title basis, if it wished to do so. It would first need to bring that land under the Torrens system by having a certificate of title issued in its own name (as happens, for example, in most mainland states); but that would be a relatively simple procedure. We have referred to this earlier: see § 16.

Further, we recommend that unconverted Crown leases should not qualify for strata/community title, even if the leases are registered under the Land Titles Act. This is because such interests come to an end at the expiration of the lease, leaving the strata/community title owners in some uncertainty about the future of their interest—
would the Crown necessarily renew the lease? Further uncertainty follows from the fact that Crown leases are liable to termination for breach of condition. Again, some Crown leases are subject to requirements or restrictions on use which would make them unsuitable for strata/community development (such as a requirement to use the land for rural purposes only, or to build only one dwelling house). Some are also subject to a condition allowing the Crown to resume the land for public purposes on payment of compensation for the value of improvements alone.

However, in practice, the exclusion of Crown leases from the potential of strata/community title should not be a problem, as we understand that their number is relatively small compared to freehold Torrens title land.

19.8 What form should strata title legislation take – tailored or borrowed?

Assuming that strata/community title is introduced, what form should the legislation take?

(a) Adopt a strata title Act from the mainland?

One option would be to adopt a strata title Act from a mainland jurisdiction. For example, the Assembly could adopt the whole text of the New South Wales or Queensland legislation, with perhaps the deletion of some provisions thought too complex or otherwise inappropriate for Norfolk Island. One member of the Assembly suggested this in our meeting with the Assembly; the Administrator also expressed this view; and legislation by adoption is the preferred approach suggested by the 2011 ACIG Norfolk Island Public Service Review (Report, page 78).

The advantage of this procedure is that it would allow the Island to benefit from the mainland’s experience of strata title. It would also allow the Island to take advantage of the commentaries and case law that has grown up around the mainland legislation.

However, whatever the advantages of the ‘adoption-method’ for legislation in general, we do not feel it is appropriate for any strata/community title legislation for Norfolk Island. As we pointed out in Part 1 of this White Paper (see, eg, §1), mainland strata legislation is exceptionally lengthy and complex. It must cater for a wide range of developments — from small apartment blocks, to high-rise modern buildings, and even to city office buildings. That breadth of development is unlikely to occur (or be wanted) on the Island; and it seems over-kill to introduce a system whose complexity bears no relationship to practical reality on the Island. Indeed, such complexity could be counterproductive,
deterring investment rather than encouraging it. There would also be the practical issue of keeping track of mainland amendments to ensure that all amendments were suitable for Norfolk Island.

(b) **Draft an Act tailored to Norfolk Island’s needs?**

The other alternative is to tailor a strata/community title statute specifically for Norfolk Island’s particular needs. We favour this approach. The Act would be simple, substantially shorter than its mainland counterparts, and expressed in plain English. It would in fact reflect the earlier versions of strata title legislation on the mainland, while incorporating lessons learned since those earlier times. However, it would retain the terminology and concepts of mainland strata legislation, so as to also make relevant the mainland case law on strata title (should recourse to case law be necessary). **We recommend accordingly**

19.9 **Dispute resolution**

Earlier we referred to the potential for disputes between lot owners, or between lots owners and the body corporate (see §10 above). Any legislation that regulates rights between property owners requires dispute-resolution procedures. Strata/community title legislation is no different. In practice, strata/community title disputes usually involve the following matters:

- Interpretation of by-laws
- Enforcement of by-laws
- Legality of levies
- Non-payment of levies
- Disputes over voting rights

What forum on Norfolk Island should hear strata/community title disputes? In our view, two possibilities are open:

(a) **Give jurisdiction to the Court of Petty Sessions**

The Court of Petty Sessions on Norfolk Island has jurisdiction to hear civil claims involving up to $10,000 (Court of Petty Sessions Act 1960, s 107). This limit should be enough for most strata/community title disputes. (If it were felt to be too low a ceiling, a higher amount can be stated in the strata/community title legislation.)
The Court is constituted by a bench of any 3 magistrates, or by the Chief Magistrate. The Chief Magistrate is a Federal Court Magistrate, who visits the Island once every three months. The other magistrates are local citizens. We understand that the current magistrates have no legal qualifications.

Important aspects of the Court’s jurisdiction that would be relevant to conferral of jurisdiction to deal with strata/community title disputes are:

- The Court has jurisdiction even though the defendant is not on Norfolk Island (s 108).
- The Court has no power to determine title to land (s 111).
- A party may apply for the case to be removed to the Supreme Court (s 112).
- Evidence is given on oath (s 153).
- Witnesses can be compelled to appear (s 161).

The members of the Legal Services Unit expressed support for giving jurisdiction to this Court.

(b) Create a strata title tribunal

The other suggestion is to create a special tribunal to hear strata matters. A model could be that used in employment disputes, the Employment Tribunal, constituted under the Employment Act 1988. That Tribunal is in fact the Court of Petty Sessions, but sitting as a tribunal. Important aspects of its jurisdiction – which could be adopted in a strata context – are:

- The Tribunal determines its own procedures (s 81(2))
- No legal representation is allowed unless the amount in issue exceeds $1,000 (s 82(7A))
- The Tribunal is not bound by the rules of evidence (s 83)
- The Tribunal has generous powers to enforce its decisions (s 85)
- There is a right of appeal to the Supreme Court (if less than $2,500 on matters of law only; otherwise, on matters of law or fact).

Significantly, in our view, the local Magistrates with whom we met favoured this approach in preference to giving the jurisdiction to the Court of Petty Sessions — even
though in practice the same magistrates serve in both venues. They favoured the informality of a tribunal over the Court.

(c) **Prior mediation?**

Several interviewees suggested that strata disputants should be required to try to mediate their dispute before starting proceedings in the Court of Petty Sessions or in a strata title tribunal. We would go further, and require the parties first to have attempted self-mediation. We have already discussed this in Part 1 (see §10 above), and will not repeat the points here. If that proves unsuccessful, compulsory pre-judicial mediation would be a worthwhile requirement. Not only might it cut down the workload for the Court or tribunal, but it would help neighbourly relations by encouraging disputants to resolve their issues in a litigation-free environment.

However, rather than require disputants to pay the costs of professional mediators (such a local lawyers), we consider that other approaches would be better. One would be to confer powers on the Registrar of Titles to require parties to attempt to mediate. We have not put this suggestion to the Registrar, but we would understand if he were to regard this is being outside his proper role. And so another approach would be to follow procedures such as those already established under the *Employment Act*. That Act establishes an Employment Conciliation Board (in effect, several respected local citizens). Aggrieved persons may lodge a complaint to any member of the Board (s 76). The Chairman of the Board calls a meeting of the Board to hear the complaint (s 76). No legal representation is possible (s 77). The Board must try to find an amicable settlement of the complaint (s 77). A person dissatisfied with the Board’s conciliation, or who remains aggrieved by the complaint, may then proceed to the Tribunal (s 82). **We recommend** this as an appropriate model for strata/community title disputes on Norfolk Island.

(d) **External decision-making body?**

Several interviewees expressed the view that any strata title decision-making body should be external to the Island. They alleged ‘favouritism’ or ‘bias’ in local decision-making bodies. (We were not given any actual examples of this.) This led them to suggest that neither the Court of Petty Sessions nor a local tribunal would be appropriate. Instead, they suggested either: (1) a mainland strata-title tribunal; or (2) the Supreme Court of Norfolk Island.

As to suggestion (1): while we would not want to rule this out entirely, the problems of distance, and the need for video conference hearings, could make it problematic. Also, it
would require the co-operation of an external strata-title body, which may have funding issues (and even jurisdictional issues) with the suggestion.

As to suggestion (2): we do not consider this to be a practical solution. The Court sits only once each three months; and the costs of hearing would often be out of proportion to the often small nature of strata title claims.

Other suggestions for ‘external’ decision-making were:

- **The Administrator.** The Administrator’s independence from local interest-groups is highly valued. However, we doubt that the Administrator would want to take on the new and unique role of determining disputes between neighbours. Also, the Administrator has no enforcement powers.

- **The Commonwealth Ombudsman.** But again, we doubt that a quasi-judicial role, also requiring enforcement powers, would fall within the Ombudsman’s traditional function.

- **The Administrative Appeals Tribunal (a Federal body which has recently been given jurisdiction on the Island).** Several people suggested this – and it was raised in response to our Draft White Paper. However, in our view it does not seem to us to be the appropriate body. That Tribunal hears disputes between citizens and administrative decision-makers (usually government). It does not decide disputes between citizens — in our present context, disputes between unit owners over matters such as by-laws, or disputes between unit owners and the body corporate over matters such as responsibility for levies.

On balance, then, we consider that a local strata title tribunal (with a right of appeal to the Supreme Court) is the best option. This tribunal should have powers similar to those of the Employment Tribunal, constituted under the *Employment Act 1988*. Before approaching that tribunal, the parties must have attempted self-mediation. They must also have brought their dispute to a body with functions similar to those of the Employment Conciliation Board. **We recommend accordingly.**

**19.10 Lack of strata title expertise in Court or tribunal**

Whichever dispute resolution forum is chosen, the body (whether Court of Petty Sessions or a stand-alone strata title tribunal) will have no existing expertise in strata title law and practice. If the Court of Petty Sessions were given jurisdiction, then (at least where parties have legal representation), the Court could receive the benefit of legal argument
on relevant points. This should help the Court deal with the ‘novelty’ of the issues. If the (new) tribunal were chosen, such help may not be available, particularly if the tribunal decides (in the interest of informality) not to allow legal representation.

However, in our view, the benefits of informality outweigh the drawbacks of using the more technical procedures in the Court of Petty Sessions.

If the ‘novelty’ concerns were felt to be an important issue, one solution might be to allow the tribunal to call upon the expertise of the Administration’s legal services unit. A second might be to independently contract a mainland strata title adjudicator or tribunal member to sit as the Norfolk Island Tribunal. And a third solution — and in our view the most realistic one — would be for the Tribunal (if constituted by 3 local members) to put off the hearing until the Chief Magistrate is available (which would mean, at most, a 3-month delay). We recommend this third option.
Acknowledgments

We wish to acknowledge the assistance and co-operation we received from many citizens and officials on the Island. All to whom we spoke were unfailingly co-operative and helpful, even where they personally opposed the introduction of strata/community title onto the Island.

In particular, we would like to acknowledge the assistance of Alan McNeil, Planning Officer, who arranged the meetings for Peter Butt, and made himself available to arrange meetings and interviews despite his own busy work schedule. He maintained impartiality throughout, arranging for us to meet Islanders with a wide range of views about strata/community title, both for and against. His commitment to the Island and its orderly development in accordance with its planning laws was manifest.
Schedule 1: List of interviewees

Phone discussions: Cathy Sherry

David Weekley, Real Estate Agent
Brett Sanderson, Member Planning and Environment Board
Tim Sheridan, Minister for Community Services
Allen Bataille, Registrar of Titles
Wayne Richards, Crown Counsel
Garry Richards, property owner
George Douran, Manager, Westpac
Merv Johnson, property owner (Governor’s Lodge)
## On-Island interviews: Peter Butt

<table>
<thead>
<tr>
<th>Time</th>
<th>Name</th>
<th>Title</th>
<th>Meeting Venue</th>
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<tbody>
<tr>
<td>9:00am</td>
<td>Bruce Taylor</td>
<td>A/g CEO, Administration of Norfolk Island</td>
<td>CEO’s Office</td>
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<tr>
<td>9:30am</td>
<td>George Smith (radio interview)</td>
<td>Manager, Radio Norfolk</td>
<td>Radio Norfolk studios</td>
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<td>10:00am</td>
<td>Alan McNeil</td>
<td>Planning Officer</td>
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<td>11:00am</td>
<td>Allen (Ikey) Bataille, Margaret (Midge) Evans, Cheryl (Sarlu) LeCren</td>
<td>Registry Office (Lands)</td>
<td>Registrar’s Office</td>
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<td>David McCowan</td>
<td>Director, Norfolk Island Hospital</td>
<td>Norfolk Island Hospital</td>
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<td>Owen Walsh</td>
<td>Administrator</td>
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<td>3:00pm</td>
<td>Wayne Richards, John Grose, Geoff Atkinson</td>
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<td>LSU Library</td>
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<td>Position/Role</td>
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<td>Andre Nobbs, Tim Sheridan</td>
<td>Minister for Tourism, Industry &amp; Development</td>
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<td>Minister for Community Services</td>
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<td>9:30am</td>
<td>Members, Norfolk Island Legislative Assembly</td>
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<td>10:30am</td>
<td>David Bell, Fred Howe, Barry Hyatt</td>
<td>Chamber of Commerce Executive</td>
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<td>Merv Johnson, Bruce Walker</td>
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<td>Real Estate Agents</td>
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<tr>
<td></td>
<td>David Weekley)</td>
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<td>Island Realty (David Bell), L.J. Quintal</td>
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<td>Real Estate (Jackie Pye)</td>
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<td>Gary Richards</td>
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<td>Parkland Estate, Mulberry Lane</td>
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### Wednesday 1 February 2012

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<td>Duncan Evans, Elizabeth Nowell</td>
<td>ATA (Accommodation providers association)</td>
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<td>10:30am</td>
<td>George Douran, Michelle Ruka, Terence Grube, Gye Duncan</td>
<td>Banks &amp; insurance companies</td>
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<td>Robyn Menghetti</td>
<td>Property owner</td>
<td>Meeting Room, 11 Quality Row</td>
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<tr>
<td>12:45pm</td>
<td>Jodie Brown, Miriam Streulens, Alan McNeil</td>
<td>Planners</td>
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### Thursday 2 February 2012

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<tr>
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<td>Mike Zande</td>
<td>Solicitor</td>
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<tr>
<td>3:30pm</td>
<td>Peter Magri, Steve Ford, Brad Forrester, Brett Sanderson (absent), Di Singer</td>
<td>Norfolk Island Planning &amp; Environment Board</td>
<td>Meeting Room, 11 Quality Row</td>
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<td>Robyn Tavener</td>
<td>Property owner</td>
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<td>8:30am</td>
<td>Gaye &amp; Dids Evans</td>
<td>Property owners</td>
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<td>9:30am</td>
<td>Allen (Ikey) Bataille, Margaret (Midge) Evans, Cheryl (Sarlu) LeCren, Jason Adams</td>
<td>Registry Office (Lands)</td>
<td>Registrar’s Office</td>
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<td>11:15am</td>
<td>Albert Buffett, Brian McGrath, Bronwyn South</td>
<td>Magistrates</td>
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<td>John Brown (phone interview)</td>
<td>McIntyres Lawyers</td>
<td>(Phone)</td>
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<tr>
<td>12:45pm</td>
<td>David Buffett, Andre Nobbs, Tim Sheridan</td>
<td>Chief Minister, Minister for Tourism, Industry &amp; Development, Minister for Community Services</td>
<td>Hillcrest Hotel</td>
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</tbody>
</table>
Schedule 2: Questions at public meeting

1. Can you have fences? Would there be no private yards? Woodheaps etc – would these be part of the common area or part of the title?

2. What about the difference in land titles on the Island – some guaranteed titles, some leasehold, others freehold. If say, Anson Bay is a specially zoned area, could strata title apply here? Can it be applied anywhere? Comment: would need to be careful where applications for strata title should be allowed. Yet another system has to be compatible with current systems.

3. Say, under a will, land is divided between 3 children. They can’t build because of minimum size. Would strata title achieve the ability to build? Answer: depends on planning law. So, should planning laws be changed? Perhaps existing tourism and shopping complexes would be the only strata title to start with. Applications for tourist accommodation are allowed in rural areas.

4. If Governor’s Lodge were strata, would the lot include the piece of land on which the building sits? Is strata different to subdivision?

5. Is there protection for individual owners of strata title lots? Eg Hell’s Angels buy in and owners don’t like it.

6. Does the body corporate have to be an incorporated body?

7. Can each unit have a fenced-off backyard?

8. There needs to be clarity in house rules – will this protect owners?

9. How long will it take for the ‘white paper’ to be produced?

10. Will the ‘white paper’ only look at NSW law?

11. What is the minimum scale of strata?

12. With dual occupancy, can you apply to change the use of the house? Would house rules override planning laws?
13. Does your brief include looking at current planning laws? Do planning laws override anything else? Would strata introduction be staged or have a trial run?

14. If I build 3 units and strata them, do I still have title to the land? Is this a way of avoiding sub-division laws?

15. If I have a minimum 1 hectare and divide part, does strata apply to the whole block?

16. At moment, there is an oversupply of bed licences; will strata exacerbate this?

17. Does strata title allow for time-share?

18. What is the distinction between subdivision and strata? Would there be changes to density rules?

19. I have a house and shed. If I want to make the shed a cafe, can it be on a separate title as it is a separate business?

20. If I have an industrial estate which is now too big for my needs, can I divide and sell on?

21. What is the mechanism for voting rights on the body corporate?

22. How complex is it to undo strata?

23. If I bought a whole strata title block, would there be any disadvantages to it remaining strata even though I own it all?

24. Is the land tax rate calculated on the unimproved value?

25. What rights to tenants have in a strata complex?

26. What is the ultimate penalty for not following strata title rules etc?