Northern Territory Government

DEPARTMENT OF
THE ATTORNEY-GENERAL AND JUSTICE

Cancellation of units plans and schemes under the *Unit Titles Act* and the *Unit Title Schemes Act*

DISCUSSION PAPER

November 2012

CONSULTATION

Comments are sought on the issues set out in this document.

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Submissions close 31 January 2013.

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Questions

Questions that might be considered in any response to this issues paper include:

1. are there significant problems or potential problems in the NT now or can we wait to see the outcomes of reforms likely to put into effect in places such as NSW.

2. if reform is required, should it be along the lines of:

    (a) a scheme that requires positive court approval (see options 3 and 4); or

    (b) a scheme where a court only becomes involved at the instigation of unit owners who oppose termination (see options 1 and 2); or

(c) a scheme based around renewal plans (see options 5 and 6)

3. if any of the options are adopted what should be threshold level of support for the termination.

4. are there any constitutional problems in the retrospective changing of the rules regarding terminations.

ISSUE

To consider reforming the *Unit Titles Act* and the *Unit Title Schemes Act* (the Unit Titles Acts) so that there are appropriate options for the termination of schemes taking into account economic opportunities and health and safety issues as well as the wishes of individual owners.

CANCELLATION OF TITLES UNDER THE CURRENT LAW OF THE NORTHERN TERRITORY

The *Unit Titles* Act and the *Unit Title Schemes Act* provide for group titles – that is, there is shared ownership of land and buildings. Each title comprises individual freehold units and common property. The common property is owned by a body corporate established when titles are first issued. Dealings and decisions with the land as a whole are handled by the body corporate.

Typically, these group titles relate to buildings such that titles exist, in essence, for spaces in the sky or under the surface of the earth or the sea (with boundaries defined by walls and lines in the sky or under the earth or the sea). However, unit titles can also now exist for ordinary land subdivisions.

Over time buildings decay becoming uneconomic to repair. They may also become unsafe for habitation. Also the economics of land use in the vicinity of the building may change e.g. so that the site of the building would reap far better financial returns if the land were to be re-developed.

Under the *Unit Titles Act* and the *Unit Title Schemes Act* the relevant body corporate can seek the approval of the Supreme Court to the cancellation of the title. The relevant provisions are set out in Appendix A.

Also, under the *Unit Titles Act* and the *Unit Title Schemes Act*, the members of a body corporate can agree to the cancellation of the title. The details are set out in Appendix B.

WHAT ARE THE PROBLEMS?

Cancellations by agreement

The main problem is that of getting the support of all of the owners for the cancellation of a title. There is always the chance that a minority of owners have interests that differ from that of the majority of owners. For example:

- they may not want to take the risks of re-development.
- they may prefer the current living conditions compared to those under a redevelopment.
- they may prefer extensive repairs over demolition and reconstruction.
- they may simply be holding out for the highest possible returns (and thus in essence blackmailing the other owners or adopting an aggressive capitalist outlook).

The net result is that the minority interests may end up oppressing those of the majority. On the other hand there is also the possibility that a single majority owner (or group of owners) could seek to unfairly impose their will on the interests of a minority. Any solution needs to take account of both possibilities.

The *Unit Title Schemes Act* moderated this position somewhat by legislation enacted in 2008[1]. It did so by permitting cancellation if 90% of owners agree. However, this cannot occur unless the management module chosen for the scheme specifically provides for such cancellations and 20 years have passed since the scheme was registered. Section 15(b) of the *Unit Title Schemes Act* (along with the relevant regulations) permits persons seeking to register the termination of schemes under it to include in the schemes, at the time of initial registration, provisions that permit the owners of the units to agree by majority vote of 90% of the ownership entitlements that a scheme be terminated. Such a scheme must have existed for at least 20 years before such a termination can occur.

The provisions in the *Unit Title Schemes Act* do not have retrospective operation except for schemes under the *Unit Titles Act* that are brought under the *Unit Title Schemes Act*. However, a *Unit Titles Act* scheme can be brought under the *Unit Title Schemes Act* only if there is unanimous resolution (as defined in section 7(4) of the *Unit Titles Act*). See regulation 6A of the Unit Title Schemes General Provisions and Transitional Matters Regulations. It seems unlikely that schemes would ever switch from *Unit Titles Act* to *Unit Title Schemes Act*.

Cancellations by the Supreme Court

There have been almost no contested terminations by the courts. In fact there are very few applications. A reason for this is the perception that the Courts will tend not to intervene. They are seen as protectors of the castle. The legislation provides no particular guidance to the Courts other than to find an outcome that is just and equitable.

Persons seeking cancellation are not wiling to take the risk of the judicial process. This has meant that there is, in fact, almost no case law of how courts approach provisions such as section 95 of *Unit Titles Act* and section 14 of *Unit Title Schemes Act*.

Details of cancellations

For cancellations where the aim is to simply have a single lot that can be sold off the issues are relatively simple. In essence they involve agreement to a demolition, agreement regarding sale price and agreement as to how the proceeds are to be divided up amongst the owners and the creditors.

However, some cancellations can be a lot more complex. They can involve the owners effectively becoming developers of the land – with all of the inherent risks of such ventures. They might involve transferring the ownership of the land to a 3rd party developer who is then under a contractual obligation to build new units for the old owners. If the developer does a poor job or gets caught up in some economic crises or downturn the developer may not be able to honour the contractual obligations. The former owners may become both homeless and destitute.

[1] But commenced on 1 July 2009

WHAT REFORMS HAVE OCCURRED ELSEWHERE

Appendix C contains a summary of reforms that have occurred elsewhere.

In summary, the direction being followed in other jurisdictions is one that, in one way or another, gives the Court or an Administrative Tribunal the final say. In brief:

Singapore

- the Singapore *Land Titles (Strata) Act 1999* provides that, if a building development is less than ten years old, a 90% majority of the ownership interests can decide to terminate the scheme or sell the land. If the building is more than ten years old, the required level of support drops to 80%. Affected persons may object to the proposals.
- If mediation between the proponents and the objectors fails, the matter can be referred to the High Court. The Court may make such order as it considers fit.
- The process is regulated in so far as the majority owners must have entered into an agreement with the purchaser (developer) that sets out what each owner will get in terms of cash or kind (e.g. a new unit or units).

New Zealand

- the New Zealand *Unit Titles Act 2010* provides that the body corporate with the support of 75% of the votes may decide to cancel the unit scheme or sell the land.
- Applications can be made to the High Court for relief from such a decision. The criteria the Court must apply in making a decision is that the outcome is just and equitable having regard to the rights and interests of any creditor and any person with a relevant interest (e.g. owners).

South Australia

- The South Australian *Statutes Amendment (Community and Strata Titles) Act 2012* amended the two South Australian Acts (*Strata Titles Act 1988* and *Community Titles Act 1996*) so that applications for termination are heard by the Environment, Resources and Development Court (rather than the District Court or the Supreme Court) and so that criteria to be considered can be spelt out in regulations.
- The proposed SA criteria include the relevant percentages of owners for and against (i.e. taking account of the situation where one person owns many units), the adverse consequences to the minority if an application is approved and also the adverse consequences to the majority if an application is not approved and the extent to which some other order of the Court may ameliorate the situation.
- As far as is known, regulations have not yet been made specifying any relevant criteria.

Elsewhere in Australia

- the three New South Wales Acts (*Strata Schemes Management Act 1996, Strata Schemes (Leasehold Development) Act 1986* and *Strata Schemes (Freehold Development) Act 1973),* the two Victorian Acts (*Subdivision Act 1988* and *Owners Corporations Act 2006*), the Queensland *Body Corporate and the Community Management Act 1997,* Western Australian *Strata Titles Act 1995* and the Australian Capital Territory *Unit Titles Act 2001* all provide for unanimous resolution if a court or tribunal is not involved.

- Though wording varies, each Court or Tribunal has the discretion to terminate or cancel a scheme if it is just and equitable. None of those Acts spell out any detailed criteria.

MAIN OPTIONS

When this issue was discussed in various fora[2] as part of the development of the *Unit Title Schemes Act 2009* there was widespread disagreement regarding the efficacy of cancellation based on support of a specified percentage. This leads to the view that any option based on that approach is not likely to result in legislation.

The main practical options appears to be a mix of the approaches in New Zealand and in South Australia with a new option proposed by the Property Council of Australia. They are:

Option 1

This would involve the following features:

1. A right for the specified majority (e.g. 90%) of the ownership to decide that cancellation should occur.

2. That the right exist for all schemes regardless of whether they came into force before or after the enactment of the new terminations legislation.

3. A right for any person in the minority 10% to challenge the decision in court.

4. the legislation set out criteria for considering any such application. The criterion would include:

    a. any economic necessity for re-development (e.g. if the costs of repairs are such that reasonably owners would not incur them);

    b. any land use benefits for the community as a whole in the redevelopment of the land.

    c. the financial benefits and risks of the proposed redevelopment (along with the provisions of the proposed redevelopment seek to ensure that the varying interests of the owners are taken into account).

[2] Eg public sessions and industry based sessions with surveyors, real estate agents, conveyancing agents and lawyers

d. the adverse consequences to the minority if an application is approved;

e. the adverse consequences to the majority if an application is not approved; and

f. the extent to which some other order of the Court may ameliorate the situation

Option 2

Same as option 1 excepting that the percentage that would make up the 'specified majority' would vary depending on the age of the scheme for the building. Thus, for example, the percentage might be 95% for 1-5 year old schemes, 90% for 6-10 year old schemes, 80% for 11-20 years old schemes and 70% for schemes older than 20 years.

Option 3

This would be the same as Option 1 excepting that the body corporate, operating on the instructions of a specified majority would need to make an application to the court.

The main practical difference between this and options 1 and 2 is that of whether the onus for seeking a judicial decision should rest with the majority owners (option 3) or the minority (options 1 and 2).

Option 4

Same as option 3 excepting that the percentage that would make up the 'specified majority' would vary depending on the age of the scheme for the building. Thus, for example, the percentage might be 95% for 1-5 year old schemes, 90% for 6-10 year old schemes, 80% for 11-20 years old schemes and 70% for schemes older than 20 years.

Option 5

The Property Council of Australia, in its submission to the NSW "Strata & Community Title Law Reform Discussion Paper" suggested the following option:

- **notice -** termination of a scheme is initiated by either a current owner or a third party engaged by owners. The notice is issued to all owners and other interested parties (e.g. mortgagees)

- **renewal plan -** a detailed "renewal plan" is then produced by the proponents. This will set out the preferred development outcomes, proposed works and applications, architectural plans, obligations and liabilities of the parties, costings and work programs

- **relocation –** owners and tenants will be fully informed of any rehousing arrangements required during the life of the works, as well as relocation arrangements either back into the development or elsewhere following the completion of the development

- **certification –** a minimum of three months consultation will apply before the Renewal Plan is advance. It would also be submitted to an independent statutory officer to confirm that it contained all relevant content required for owners

- **voting –** after three months of consultation and certification, owners accept or reject the proposed Renewal Plan. If no more than 25% of owners disagree, the scheme will move towards termination

- **participation –** once the Renewal Plan is approved, owners then have the opportunity to participate in redevelopment of the scheme or a third party can do so. The scheme remains in force until all of the Renewal Plan conditions are met

- **fair reward –** if an owner does not participate in the redevelopment, an independent valuation is secured to preserve the entitlement of individual owners. Sales will be at the expense of existing owners. Disputes are settled by the owner appointing one appraiser, the owners corporation appointing another ad those two appraisers agreeing on a third

- **dispute resolution –** if obligations under the Renewal Plan are not being met, an application is made to an independent statutory officer regarding procedural issues and to the Supreme Court on matters of law

- **termination –** the scheme's termination sees either existing owners interests retained within a new scheme or transferred by agreement to new owners.

Option 6

Same as option 5 excepting that the percentage (25%) mentioned as determining whether a scheme is blocked could vary depending on the age of the scheme.

DISCUSSION OF THE OPTIONS

Options 1 and 2 are more efficient than options 3 and 4 in the sense that a court will only become involved if there is an actual dispute.

Options 3 and 4 have the advantage of probably ensuring that minority will always be looked after. This is said noting that often owners live outside the NT and thus may not ever be aware of the processes in place under option 1.

Options 5 and 6 offer the advantage that they should result in issues about any new scheme being sorted out as part of the development of the scheme.

It may also be possible to include in the legislation various ways of terminating a scheme – that is one out of options 5 or 6 or one of options 1,2 3 or 4.

CAN ANY REFORMS OPERATE RETROSPECTIVELY

The Northern Territory Government is liable to pay compensation if legislation operates so as to acquire property otherwise than on just terms[3]. It is not considered that any of the options described above would involve any liability for compensation if they were designed to operate in respect of schemes that came into existence prior to any new provisions dealing with termination. That is, the statutory provisions concerning termination are not property rights and don't operate so as to provide anyone with a property right of any kind.

This means that issues concerning any operation of the legislation that might, loosely speaking, be called "retrospective" are policy matters rather than constitutional matters.

[3] See Section 50 of the *Northern Territory (Self Government) Act 1987 (*Acquisition of property to be on just terms) which provides:

(1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

(2) Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.

Appendix A – cancellations by way of court order

1. Unit Titles Act

95 Court may order cancellation of units plan

(1) A corporation, the administrator of a corporation or a member of a corporation may apply to the Court for an order for the cancellation of the units plan.

(2) A copy of an application under this section shall be served on the Registrar-General.

(3) On an application made under subsection (2), the Court may make a provisional order, or a final order, for the cancellation of the units plan or may make an order dismissing the application.

(4) The Court shall not make an order for the cancellation of a units plan unless it is satisfied that, having regard to the rights and interests of all persons having estates or interests (whether registered or not) in the units, it is just and equitable to do so.

(5) If the Court considers, on an application for an order under this section, that it is necessary to impose conditions, and give directions, to be complied with before the making of a final order for the cancellation of the units plan for the purpose of adjusting, as between all persons having registered estates or interests in the units, the respective rights and duties of those persons so far as they may be affected by the cancellation of the units plan, the Court shall make a provisional order for the cancellation of the units plan specifying the conditions and directions to be complied with before the making of a final order.

(6) The Court may, if satisfied, on an application made for the purpose, that the conditions and directions specified in the provisional order have been complied with, make a final order for the cancellation of the units plan.

(7) A final order may include directions to be complied with after the cancellation of the units plan and, in such a case, the order may be enforced as if it were a judgment of the Court obtained by a person for whose benefit the directions were given against the person required to comply with the directions.

2. Unit Title Schemes Act

14 Termination by court order

(1) An application may be made to the Supreme Court for an order for the termination of a scheme.

(2) The application must be made by:

(a) if the scheme is a basic scheme – the body corporate, or a unit owner, of the basic scheme (a ***relevant scheme***); or

(b) if the scheme is a higher scheme – the body corporate, or a unit owner, of the higher scheme or any of its subsidiary schemes (each of which, including the higher scheme, is a ***relevant scheme***).

(3) The Supreme Court may approve the application only if the Supreme Court considers it is just and equitable to do so.

(4) In considering the application, the Supreme Court must take into account the view expressed by any of the following:

(a) the schemes supervisor;

(b) an affected local government authority;

(c) the body corporate, or a unit owner, mortgagee or registered lessee of a unit, of a relevant scheme or a higher scheme that is not a relevant scheme.

(5) The Supreme Court may make any order it considers necessary for the termination (including, for example, an order appointing an administrator or providing for accommodation for unit occupiers).

(6) However, the Supreme Court's power under this section does not extend to making an order relating to the consolidation or subdivision of land otherwise than in accordance with the *Planning Act* and *Land Title Act*.

Appendix B – cancellations by consent

1. Unit Titles Act

95A Cancellation of units plan by consent

(1) The proprietors of the units of a units plan may, by unanimous resolution at a general meeting of the corporation called for that purpose, authorise the corporation to apply for the cancellation of the units plan.

(2) As soon as practicable after being so authorised the corporation shall, in the prescribed form, apply to the Registrar-General for the cancellation of the units plan.

(3) An application under subsection (2) shall be accompanied by the consent in writing to the proposed cancellation of each of the proprietors and the fee prescribed under the *Registration Act*.

(4) On an application under subsection (2) being registered, sections 96 and 97, with the necessary changes, apply as if the application were a final order of the Court made under section 95.

2. Unit Title Schemes Act

15 Termination by resolution

A scheme may be terminated if:

(a) the body corporate of the scheme decides to terminate the scheme by a unanimous resolution; or

(b) all of the following conditions are satisfied:

(i) this paragraph applies under the management module;

(ii) the scheme has existed for at least 20 years after the commencement of this Act;

(iii) the body corporate of the scheme decides to terminate the scheme by a resolution prescribed by regulation that is supported by unit owners holding at least 90% of the total interest entitlements.

Appendix C – position elsewhere

Jurisdiction	Threshold(s) for cancellation/sale	Application to Court	Court Criteria
New Zealand *Unit Titles Act* 2010	Special resolution (75%) of votes s177	A body corporate after special resolution or *any* owner or the administrator s187 **An application may be made to the appropriate decision maker (a tribunal) by any person who voted against a resolution or by a person in the majority in the case of a special resolution for relief on the grounds that the effect of the resolution would be unjust or inequitable for the minority/majority s210**	Satisfied that it is just and equitable –having regard to rights and interests of any creditor and every person with an interest - s188 (2)
Singapore *Land Titles (Strata) Act* 1999	90% of the share values for buildings less than 10 years old. 80% of the share values for buildings more than 10 years old s84A	Anyone with an interest (other than a lessee) or a subsidiary proprietor s84A (4) may object. If mediation is not successful, application made to High Court	Financial considerations s84A (7) Transaction not in good faith s84A (9).

New South Wales *Strata Schemes Management Act 1996* *Strata Schemes (Leasehold Development) Act 1986* *Strata Schemes (Freehold Development) Act 1972*	Unanimous *NB*: NSW is undergoing a two year review of strata schemes (undertaken by the Australian Research Council) – it is anticipated unanimity requirements may be replaced by about 80%	Application to Supreme Court by lessor, lessee, mortgagee, body corporate s80 SSLD Act Application to Supreme Court by proprietor, lessor, mortgagee, body corporate s51 SSFD Act Or application to Registrar-General must be signed by lessors, lessees, mortgagees – unless Register-General agrees otherwise s80A SSLD Act. Or application to Registrar-General must be signed by proprietors, lessees, mortgagees – unless Register-General agrees otherwise s51A SSFD Act	No Criteria – Equity
Victoria Subdivision Act 1988 Owners Corporation Act 2006	Unanimous resolution to dissolve upon disposals 32(g)	An owner, member, administrator or mortgagee may apply to Victorian Civil and Administrative tribunal for winding up of the owners corporation s34G (1)	Tribunal decided with regard to just and equitable. s34G (2)

Queensland *Body Corporate Management Act 1997*	Must be a basic scheme or amended to be a basic scheme to be terminated s76. Unanimous resolution required along with agreement about termination issues by registered proprietors and lessees s78	Body Corporate, owner of lot or administer may make application to district court s78(4)	In making orders court can take into account the views of: registered proprietors, lessees, Local government, any scheme land is in, the urban land development authority. s8(6)
Western Australia *Strata Titles Act* 1995	Unanimous s30	A proprietor, mortgagee or the strata company may apply to the district court for termination of the scheme s31	No Criteria. See s31.
South Australia After Statutes Amendment (community and Strata Titles) Bill 2011 (not yet commenced) *Strata Titles Act 1988*	Unanimous	Application the Environment, Resources and Development Court (formerly application Supreme Court)	Proposed factors intended to be prescribed include: the relative percentages of owners for and against cancellation or amendment, the adverse consequences to the minority if the Court grants the application and conversely to the majority if the Court refuses the application and the extent to which these could be ameliorated or alleviated by court-ordered or other action.
Australian Capital Territory *Unit Titles Act 2001*	Unanimous but may exempt an [absent] non-voter s160 (3).	Owners corporation may apply to Supreme Court 161A	Just and Equitable – having regard to everyone with interests in the units 161A