



**KTH Architecture and
the Built Environment**

3D Property Rights

– An Analysis of Key Factors Based on International Experience

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Doctoral Thesis in Real Estate Planning

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Abstract

The objectives of this thesis are to establish the fundamental principles in the field of 3D property rights by studying such systems in different countries with a particular focus on management questions, to systemize the acquired knowledge and demonstrate different ways of dealing with key factors essential to a well-functioning 3D property rights system.

A theoretical background to the 3D property concept is given by presenting proposals as to a definition of 3D property and a classification of the primary forms of 3D property rights examined into specific types and categories, as well as an overview of international 3D property use. A general description of the characteristics of 3D property, with a focus on the condominium form, is also presented.

A presentation of three different 3D property rights models is given as exemplified by the countries investigated, including the independent 3D property model in Sweden, the condominium form model in Germany, and a combination of the independent 3D property form and the condominium form as evidenced by the legal systems of two Australian states, New South Wales and Victoria.

It has been possible to discern from this study a number of key factors related to 3D property rights that seem to be common for most forms and systems. These include the delimitation of property units, the content of the definition of common property, the creation of easements, the forms of cooperation between property units, management and regulation issues, as well as the settlement of disputes and insurance solutions.

The problems experienced within the 3D property systems studied to a large extent have concerned issues within these mentioned key areas, where the management aspect seems particularly difficult. Changes in society and the creation of new development forms to a large extent have also contributed to the need for statutory amendments. More or less substantial amendments have been required in both the Australian and German statutes studied, with shortcomings still remaining after many years of use. However, these systems in general seem to be working well, and the condominium form in particular seems to be a well-functioning concept. Based on these systems, it has been possible to discern a tendency that the more detailed and complex the legislation, the greater the need for gradual amendments. In conclusion, it would be of benefit for countries planning on introducing a system for 3D property rights to utilize the experiences of other countries, while not forgetting to consider differences in legal systems, society, etc.

Keywords: 3D property, property rights, condominium, apartment ownership, flat ownership, strata title, stratum

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1. Introduction

1.1 Background

Several countries have the possibility of using three-dimensional (“3D”) property formation, each with its own individual system, but with many similar problems and difficulties. 3D properties are often considered as being a special kind of property, separate from the traditional two-dimensional (“2D”) property, even though many countries have integrated these two types of property within the same legislation. Due to this, and the particularities connected with 3D properties, 3D properties are often studied as a subject of their own. This type of property was recently introduced in Sweden on 1 January 2004, the underlying motive for the research upon which this work is based.

Not until fairly recently has the third vertical dimension been specifically taken into account in property formation. The subdivision of the surface into individual property units originally only used 2D boundaries. However, since use of a property would be impossible if the right of ownership only applied to the actual surface of the earth, a person with the right to a parcel of real estate has always been entitled to use a certain space.¹ Ownership rights often were not limited to the vertical horizon, but theoretically extended from the centre of the earth to the infinite sky. This nowadays is still the case in many countries, even though the property rights can be restricted in the vertical dimension by other rights, such as mineral and flying rights.² No reference typically is given as to the exact height or depth at which property rights are restricted. Even though property units have long been considered as being three-dimensional, it is when the property is delimited also on the horizontal level that an actual 3D property emerges.

3D property is similar to the conventional 2D property in certain of its features. Just as traditional property, 3D property can be transferred, mortgaged, inherited and expropriated, as well as be created by available cadastral procedures, such as subdivision, partition, amalgamation and reallocation. The 3D property addressed in this work, however, is treated as a separate kind of property as opposed to 2D property, also referred to as regular, traditional, conventional or surface³ property. A specific feature of 3D properties is that

¹ Stoter (2004), pp. 2-3.

² Stoter (2002), p. 13.

³ Onsrud (2001), p. 191.

they actually are sections of space located on, above or below ground, under or above the traditional 2D property or another 3D property.

In the beginning of the 20th century, when regular utilization of space above surface started for high-rise constructions and aviation, the question regarding whether such space could be subdivided into separate units for ownership had to be discussed.⁴ In recent decades, there has also been an increasing interest in the utilisation of property rights in spaces both above and below ground level.⁵ There are many complex situations in urban society in which there are multiple uses of space.⁶ More and more situations are thus emerging where the vertical dimension is an important factor for real property objects. There is the pressure of human activity on the land in densely populated areas, with the resulting competition for space and environmental problems. Placing disturbing activities underground is a way of saving the surface for more attractive land use.⁷ Multi-level development has also been necessary due to railway stations occupying large areas in city centres and constructions above and below traffic routes, a phenomenon that started early in large cities in the United States.⁸

Development above and below ground can be facilitated by guaranteeing the property rights of owners. It is also believed that 3D registration of proprietary rights promotes investment in such development projects.⁹ The interest in urban areas for using land above and below ground is often connected with investors who are interested in making rights more secure and transferable. Other factors contributing to the greater interests of investors in constructions below or above the surface are increased demands for building sites in urban areas, higher land prices, new building techniques, architectural trends, as well as improved and cheaper methods for drilling in rocks. This has led to a demand from the market for facilitating financial transactions for such constructions, such as selling, buying, mortgaging and leasing.¹⁰

Among the factors stimulating the development of apartment ownership being legally recognised and encouraged, are owners of blocks of flats who rather than letting apartments subject to rent controls, were more willing to sell ownership in the apartments, and individuals who through joint financial efforts erected blocks of flats and wanted their rights to be properly defined.¹¹ Social housing factors should also be considered. Growing urbanisation and the shortage of housing has to be reconciled with the desire people have to own

⁴ Sandberg (2003), p. 125.

⁵ Mitrofanova (2002).

⁶ Stoter and Ploeger (2002), p. I.2.

⁷ Mitrofanova (2002).

⁸ Sandberg (2003), pp. 121-122.

⁹ Doytsher, Forrai and Kirschner (2001), pp. 1-2.

¹⁰ Onsrud (2001), p. 193.

¹¹ Leyser (1958), p. 32.

their homes.¹² The possibility of owning an apartment is important to individuals who cannot afford their own house, and while social forces favour ownership, and economic forces tend to favour multi-level construction, the development is heading towards condominium and air space parcel legislation in certain countries, mostly the common law jurisdictions.¹³

One parcel consequently can be used by several parties, with rights limited in the third dimension. It is possible to use 3D properties for different types of facilities, such as pipes or large facilities for a centre or for traffic, both below and above ground. Examples of such use are a building divided into several apartments with different owners, or a grant to build an office block above the tracks of a railway line.¹⁴ Underground space is often used for access and support, mining, infrastructure systems, such as cables, water and drainage, and transport, such as parking space, railway and roads.¹⁵ The facilities can be divided by several activities independent of each other. One example of 3D property enjoyment can be seen with a facility underground, such as a rock cavity for storage purposes, and a facility above ground intended for another purpose, such as housing. One single building can also be used for different activities, such as residential and office space, or shops together with parking garages and office space. There are also more complex facilities, with spaces for railroad and bus lines, combined with space for retail and offices.¹⁶

Without the possibility of using 3D properties, other legal rights have to be used to allow separate parties to use different parts of one building or property. Such rights invoked include usufructs, easements, joint property or joint ownership with an individual right to use a specific part. Each of these forms, however, has certain disadvantages and limitations.¹⁷ The need for multiple uses of space and access to three-dimensionally defined spaces in general is not resolved satisfactorily with only the traditional two-dimensional definition of property, thus calling for the introduction of ownership rights to three-dimensionally defined spaces.¹⁸

To make such rights possible, different new legal institutions have to be created, such as condominiums and air rights.¹⁹ 3D property rights can take different forms and can vary from full ownership to rights of different extents. Some common law jurisdictions have legislation permitting air space rights above ground level in forms ranging from an absolute conveyance to splitting off individual rights associated with the air space parcel. This is often used in a

¹² Leyser (1958), p. 31.

¹³ Canadian Council of Land Surveyors (1989), p. 58.

¹⁴ Stoter and Ploeger (2002), p. I.2.

¹⁵ Sandberg (2003), pp. 121-122.

¹⁶ Proposition 2002/03:116, p. 26.

¹⁷ Ibid. at p. 27.

¹⁸ Julstad (1994).

¹⁹ Sandberg (2003), p. 125.

complicated urban development in large multi-level construction projects, or in the allocation of property rights concerning underground facilities in large urban areas.²⁰

It can be said in general that the legislation found in common law legal systems allows for a vertical division of space, with one party owning the mineral strata, another one owning the land surface, and yet another owning the air rights. For civil law systems, however, this is more difficult due to a stricter adherence, as seen in German law, to the medieval maxim, *cujus est solum, ejus est usque ad coelum et ad inferos*, meaning that the owner of the land has ownership that also extends unlimited into the sky and down into the earth.²¹ This traditional doctrine was formed, however, at a time when there was little use for subsurface space.²² Both these legal families nevertheless in modern legislation have the possibility of owning apartments or other spatial units.

A reason why it is more questionable to subdivide property below and above surface is the dependence between these parts that makes them impossible to detach from each other. This dependence is stronger than that, which normally is the case between two neighbouring properties because of the vertical layering, and the mutual support between surface and subsurface. For example, the only exit from the subsurface often is going upwards through the upper layer. These factors make absolute separation between the two almost impossible. The interdependence does not, however, erase the independent nature of the parcels or the boundaries between them; and the relationship can be formalised by means of mutual easements and contracts.²³ These constraints may be overcome by solutions of a planning and technical nature. Appropriate rules already exist regarding neighbouring parcels that encounter similar interdependence problems. This can also be solved through agreements and party walls.²⁴

When several properties are in such close connection within the same building complex, it is also important that clear rules exist as to the rights between neighbours as to gaining access for reasons of maintenance, repair and building work. Accessibility to these properties from the ground level must be obtained and the facilities that are not included in the apartment units, as well as the building structure between them, must be owned and managed. These matters are not always resolved in detail by law, but may be treated differently from case to case, decided in the cadastral procedure. Fire protection and insurance for the building and its units are also issues that are more important when several property units are united in one single building.

²⁰ Mitrofanova (2002).

²¹ Powell and Rohan (1993), Vol. 2A, 263.3[1a].

²² Sandberg (2003), p. 124.

²³ Sandberg (2001), p. 203.

²⁴ Sandberg (2003), pp. 134, 136.

Concerning the interdependence between properties, it is possible to make a clear distinction between the two forms, the independent 3D property and the condominium. For the independent 3D property, the principle is that the relationship with the neighbouring properties should not be more extensive than for neighbouring surface properties. For a condominium, on the other hand, where the apartments as individual parts are closely interrelated, it is important to regulate the relationship between the individual owners of the shares, their duties and responsibilities, and the operation of the jointly owned parts.²⁵

There are several aspects to consider for 3D property rights of a legal, technical and organisational nature. Among these, the focus in this work is on the legal aspects, which can be seen as a foundation for 3D property and its other aspects. Without proper legislation, such properties cannot be formed at all. The technical and organisational sides are of a more pragmatic nature. To be able to better understand what kind of problems might occur for countries introducing a system of 3D property rights into their legislation, it naturally is both interesting and useful to look into the legal systems of other countries, where 3D property formation already is possible by law, and to gain information about what kind of problems are faced there and how they have handled them.

1.2 Objectives

The objectives of this thesis are to establish the fundamental principles in the field of 3D property rights, and, by studying such systems as existing around the world, with a particular focus on management questions, systemize the acquired knowledge and show different ways of dealing with the key factors essential for a well-functioning 3D property rights system, in order for other countries to learn from these experiences and eventually tailor solutions aimed at avoiding similar problems. This may be of specific interest for countries in the process of developing legislation allowing for 3D property rights.

The following issues are addressed:

- How can the studied types of 3D property rights be categorized and what are their specific features?
- How has the legislation developed in the countries examined and what problems have they experienced with the use of these 3D property systems?

²⁵ Onsrud (2001), p. 197.

- What changes in the legislation have these countries been forced to make due to problems that have arisen and for improvements of the system?
- What are the key factors to consider when developing a system for 3D property rights?

A main aspect considered is the changes that have taken place through the years of existing 3D property legislation in the studied countries and the factors that have led to these changes. For this purpose, not only is the current legislation described, but also the legislation that has existed since the introduction of the 3D property system in the specific countries with the management aspect in focus here.

1.3 Selection of Countries and Other Limitations

A deeper study of certain countries with 3D property systems of different types has been made here, where materials about these systems and especially the experienced problems were available. This is not intended to be a complete description of these systems, but rather to give an overview and to identify certain problems that have appeared to be significant.

In the international overview, several other countries with 3D property systems are mentioned to show how widely spread these forms are, and that they exist in many parts of the world. That overview, however, is not in any way intended to be exhaustive, as such an attempt is neither possible nor desirable to present in this thesis, and is certainly not the ambition. Creating a complete and comprehensive inventory of the entire world would be far too extensive, as it would be too difficult to obtain all relevant and current information, not to mention the difficulties of obtaining sufficient knowledge of each legal system to be able to determine whether it really contains a form of 3D property rights. Not only have time constraints and scope played a role in limiting the number of countries and systems studied. In the choice of countries made when describing types and systems of 3D property, it is also important to consider the law of diminishing returns when trying to cover a wide range of legal systems.²⁶

²⁶ Zweigert and Kötz (1998), p. 41.

Table 1.1. Selection of Countries.

	Form of 3D property right	Experience	Legal system
Sweden	independent 3D property	legislation introduced 2004	Nordic (Civil Law)
Germany	condominium	legislation introduced 1951	Romano-Germanic (Civil Law)
New South Wales (Australia)	independent 3D property + condominium (separate legislation)	legislation introduced 1961	Common Law
Victoria (Australia)	independent 3D property + condominium (integrated legislation)	legislation introduced 1967	Common Law

The countries studied specifically in this thesis have been selected based on several criteria. Firstly, they are to represent different types of 3D property rights, or combinations of such, for a specific category. I have also tried to select countries with stability, sustainability and a long history within the field. One important factor is the availability of material, especially in languages of which I have sufficient enough knowledge to be able to understand the legislation and advanced legal literature. Availability of personal contacts in the country has also been important in the choice of country.

Sweden was selected as an example of the independent 3D property form, and as a country that very recently introduced the 3D property form as influenced by other countries, but without the possibility of condominium ownership. It has also been interesting to contrast Sweden as a newcomer in the field, to Australia, which has served as a model for others as to the independent 3D property type, and Germany as a model for the condominium type.

Germany was chosen as providing a description of a typical European condominium system. Another reason for studying the German system was to select countries from different legal families and see it as a counterbalance to English-language countries. Australia is selected as representative from the Anglo-American countries in contrast to Germany as representative from the Western European countries, a distinction made for example in the *International*

*Encyclopedia of Comparative Law*²⁷ on apartment ownership. The German condominium system is also interesting in that it appears to have been functioning successfully for many years, and that their legislation on apartment ownership has influenced the condominium legislation in other countries.

When studying the systems in Australia, there are different laws and rules for the different Australian states, so I have chosen two, namely New South Wales and Victoria. These two states have a long experience of 3D property formation and have systems that have developed in different directions, which makes a comparison interesting. They are also considered to be leading within this field. New South Wales is more thoroughly described than Victoria due to the fact that the system there is more complex, and contains more development types that are interesting to compare. Another reason to choose the New South Wales Act on condominiums as a study object is that it is considered to be the most detailed statute on apartment ownership in the world. It has also served as a model for many other countries and their 3D property rights systems.

The Australian part of this thesis is longer than the others due to several factors, such as that two states were studied there with different systems, there are several forms of 3D property rights combined in these states to present, New South Wales in Australia has very detailed statutory provisions compared with other 3D property rights systems, and there has also in general been more material available about these systems. The Swedish part is considerably shorter due to its short existence with no amendments made to date, the less regulated independent 3D property type, and legislation with a low degree of detailed regulation.

This study mainly focuses on issues with an immediate relation to 3D property formation. Extensive descriptions of the general legal situation in the described countries have been avoided, as well as their ownership and property systems, for which there is no room within the scope of this work, but a brief overview is presented to the extent necessary to understand the specific 3D property legislation provisions. There also is greater description of the development of the legislation in the described countries, and the problems thus overcome, rather than detailed descriptions of the system itself and specific statutory sections. The studies are not focused on the property formation issues themselves, or when it is suitable to form a 3D property or not, but rather on more practical issues. The technical side, above all the registration of 3D properties, is not dealt with here and is already researched quite thoroughly, for example by Jantien Stoter and her colleagues at Delft University of Technology in the Netherlands.

There are many interesting aspects of 3D property formation, but this study focuses on certain key factors in particular, in order to determine what problems might exist within the specific categories. These areas were selected

²⁷ van der Merwe (1994).

based on what could be expected to be problems, but also modified according to what has been found during the studies. The key factors represent the following areas: general problems, delimitation of property units and common property, cooperation forms including joint facilities and easements, management and regulation issues, settlement of disputes and insurance.

1.4 Methods

Literature has been used both about 3D property rights in general and about the systems studied, as well as informational material intended to be of guidance to users of these systems. I have also directly examined the laws from each of the described countries concerning 3D property rights, utilizing both primary and secondary sources. Because of the difficulties in obtaining materials directly from the countries, Swedish studies of these systems have also been used. Although it would have been of great interest for this study, it has not been possible to find any particular comparative material between the different Australian states to use in this research, and the individuals I have spoken with during my interviews did not know of any such material. A study visit was made to the Australian states of New South Wales and Victoria, as well as to Germany, which made it possible for a deeper and more extensive analysis of these systems.

Interviews have been conducted with both legal experts and practitioners within the field to get a broader view, and to be able to obtain such practical information that is difficult to find especially in a foreign legal system. A reason why these sources have been used to a fairly large extent within some parts of this work is that it has not been possible to find sufficient written material concerning issues such as problems within existing legislation and practice, which is more readily available from asking people working with these questions. I have been able to use interview sources for the Australian part to a much greater extent than for the German part, which has its cause in the difficulties with finding the appropriate persons to interview in Germany, due to a lack of available contacts, lack of language skills and a higher degree of bureaucracy.

Master theses written at the Division of Real Estate Planning and Land Law (*Fastighetsvetenskap*) at the Royal Institute of Technology (*Kungl. Tekniska Högskolan, KTH*), where my PhD work have been conducted, have also been used as secondary sources. These master theses have been written for the purpose of conducting a comparative study of condominium systems in different Western European countries, and as a background for further research about 3D property rights. Because of their importance and provision of basic knowledge about the studied countries, as well as difficulties in

accessing other sources providing the same kind of information, I have decided to use them as sources for parts of my work.

The chapter on apartment ownership in the *International encyclopaedia of comparative law*²⁸ has been used as a valuable source of information for the theoretical part on the condominium type, especially when describing the important features of the condominium concept. That section is also to a large extent based on the work by van der Merwe as it is such an important work within this field.

Since apartment ownership is more common around the world than independent 3D properties, there is much more information and literature about the ownership of apartments or condominiums. Due to this, and the fact that the condominium type involves more specific issues with a greater need for regulation and management, as well as related problems, I have had access to a larger material about this type, and because of that the thesis contains more information on these aspects.

This study is a “focus study,” where a small group of countries, usually 2-5, is studied with the objective of explaining a certain situation and to make intense comparisons between them. This type of study is usually more focused on one specific aspect than what is the case for comparative case studies.²⁹ Descriptive studies have been made to provide information on the systems for 3D properties in the selected countries, as well as an analysis of these systems. In this analysis, the method of comparative law is used to some extent. However, even though the study has comparative elements, the intention is not to make a comparative case study with these countries aimed at explaining the differences between them. The descriptions are focused on the features that are specific for the 3D property system and the topic of this thesis, but a brief more general introduction of each country is also included to give a background to and some knowledge of the country and its legal system. The comparisons between the countries are not intended to be comprehensive, but just to point out some interesting areas. The selection of these areas is also based on the availability of information.

The analysis that was made has been carried out both from static and dynamic perspectives. It is static in the sense that it looks at legal systems for 3D property rights with the rules and legislation currently in force, but a dynamic analysis was also made, looking at the legal change through history and the divergence or convergence of these systems through time. From the dynamic perspective, it has been especially interesting to study the systems that have existed for a long time and the similarities that have been achieved through the convergence of these systems. This has also been a reason for choosing two states in Australia and studying how their legal systems for 3D property rights have developed in relation to each other.

²⁸ van der Merwe (1994).

²⁹ Denk (2002), p. 42.

I would like to stress that the descriptions of the respective systems do not pretend to be complete or fully accurate. In studies such as these, there are numerous possibilities for misunderstandings and fallacies. Substantial difficulties are connected with the comparison of different countries with different systems and from different legal families.³⁰ I have no firsthand knowledge of any of the foreign national legal systems. I am also not a lawyer and have no law degree, which limits my ability to understand and compare legal systems and legal peculiarities. The foreign languages involved are also a source of potential problems with misunderstandings of terminology and concepts. New legal concepts and phenomena have to be understood, where some of them are only deceptively similar to well-known concepts in one's own system. Another difficult point is the fact that legislation and practice is constantly changing, which entails that any description quickly becomes out-of-date.³¹ I would also like to mention the risk for misinterpretation of information due to lack of profound knowledge of the legal systems in other countries, and because of that I want to apologize for any such misinterpretation that I might have made of the studied material, even though I have tried my best to convey as accurate information about the studied systems as possible. A further description of the problems connected with comparative studies can be found in the section on the method of comparative law and its problems.

The legislation has continually changed during this research, and it has been necessary to continually check recent changes to determine what is about to be altered and to be sure to have accurate information about rules and legislation. The intention has not been to give a complete description of the most recent and up-to-date legislation. The main material for the contents of the country studies has been gathered during the study visits to the countries, and after that only general updates have been made, without an attempt to try to include all the latest changes and discussions. The last date for updates included in this thesis has been October 2006. After that, it has not been possible to consider all further changes to the statutes. The fact that both the New South Wales and German legislation in this field have undergone, and are undergoing, quite extensive changes recently, after I had been in the countries to gather material, has both obstructed and delayed my work. Despite the intention of describing the legislation in force, it has thus been difficult to keep up with all the changes, which means that some of the rules referred to may have been changed without my knowledge during the process of this study.

Definitions and terms for legal concepts are often given in the original language throughout, along with translations into English. The reasons for this are that it is easier for a reader familiar with one or the other of the described legal systems to understand what is being referred to, and translations may not

³⁰ Viitanen (2000), p. 82.

³¹ Ibid.

be completely accurate or contain a slightly different meaning than the original notion.

The terms “act,” “law,” “code” and “statute” have been used throughout this thesis almost interchangeably. Different legal systems use different terms and this also varies between different authors. The same terms as the authors used have been kept in most cases. In general it can be said that no particular difference in meaning is intended between these specific terms.

References made to material from Australia, especially legislation, have been made primarily according to the directives in the *Australian Guide to Legal Citation* published by the Melbourne University Law Review Association,³² which provides Australia with a uniform system of legal citation. For the translation of Swedish specific terms into English, the translations of the Swedish Land and Cadastral Legislation with adherent glossary published by the Royal Institute of Technology (*KTH*) in Stockholm and the Swedish National Land Survey have been used.³³ For the translation of certain German terms into English, the electronically available glossary within planning and building law provided by the spatial planning faculty at the University of Dortmund³⁴ have been used.

Since English is not my first language and I sometimes have had limited sources to base my text on, I want to point out that the text that I have written in many cases is quite close in wording to the original sources, but with the ambition of avoiding direct quotations.

1.5 The Method of Comparative Law and its Problems

Comparative law

I have to some extent used the method of comparative law in this study, which actually is not one specific method, but rather several methods, or ways to relate to certain material. By comparative law in general is meant the comparison of different legal systems of the world.³⁵ Legal rules and institutions are studied to find out how they differ.³⁶ Michael Bogdan presents as his definition of comparative law the comparison of different legal systems in order to find their differences and similarities, and the processing of these differences and similarities, by finding explanations, comparisons and groups,

³² Melbourne University Law Review Association (2002).

³³ *Swedish Land and Cadastral Legislation* (1998).

³⁴ Fakultät Raumplanung, Universität Dortmund.

³⁵ Zweigert and Kötz (1998), pp. 2-6.

³⁶ Mattei, Antonioli and Rossato (2000), p. 505.

as well as dealing with methodological problems connected with this data.³⁷ In order to be characterised as comparative law, and not just a study of foreign law, some sort of specific comparative reflections are to be presented, or at most it is simply descriptive comparative law. Nor are comparisons made within just one national system included in the concept.³⁸ The comparison can be either bilateral between two legal systems or multilateral between more than two systems. It can be of a material character, studying the material rules, or formal, regarding how to interpret legislation, etc.³⁹ In its most simple description, comparative law is the comparison of describing foreign legal systems, but the next step includes seeing what different legal systems have in common to improve one's own legal system, harmonising law, etc.⁴⁰ The aspect that comparative law includes a wide range of legal studies can be noted by the definition that the *Journal of Comparative Law* has of this concept, and the categories that they include in the scope of this journal, namely theoretical aspects of comparative legal studies, single-system analysis, directly comparative analysis, harmonisation, legal transplants and mixed jurisdictions, problems arising from trans-border transactions and events, conflicts of laws, divergent approaches to public international law, as well as comparative law and legal theory.⁴¹

John Merryman makes a distinction between comparative law and foreign law. He includes in his concept of foreign law describing foreign legal actors, institutions, processes, etc. Usually not included in this is much of a "real" comparison. If there is any comparison, the purpose primarily is as an aid to description. However, Merryman also argues that description is impossible without comparison.⁴² This is in fact the position I take in this work. My intention is not to make a comparative study between the chosen countries aimed at explaining the differences between them, but rather a description of foreign law, focusing on certain key factors, with the comparison used for descriptive purposes. I am also to a great extent dealing with rule-comparison. One aspect making a comparison difficult is the fact that different types of 3D property, used in different situations and contexts, have been studied.

Research related to comparative law can thus be carried out in many different ways. The dominant method in the field of comparative legal studies is rule-comparison.⁴³ Since such comparisons usually focus on a relatively limited legal problem, they are often included in the concept of micro-comparisons.⁴⁴

³⁷ Bogdan (1993), pp. 18-19.

³⁸ Zweigert and Kötz (1998), pp. 2-6.

³⁹ Bogdan (1993), p. 61.

⁴⁰ Van Hoecke (2004), pp. 165-166.

⁴¹ Foster (2006), pp. 6-7.

⁴² Legrand (1999), pp. 32, 51.

⁴³ Ibid. at p. 4.

⁴⁴ Bogdan (2004), p. 1235.

Micro-comparison, with its perspective on a smaller scale and the focus on specific legal institutions, individual concrete problems and their solutions, is in contrast to macro-comparisons made on a larger scale and concentrated more on the style, methods of thoughts and procedures of different legal systems. It is often necessary to use both aspects in a comparative study.⁴⁵ However, there are different opinions about the rule-comparison method. According to Merryman, this method is too trivial for the larger concerns of serious scholarship within comparative law, but it can be useful and important for the understanding of applicable rules on a foreign law problem.⁴⁶ Among those who do not agree with this criticism is Bogdan, who is of the opinion that there is an obvious value and use in the scientific comparison between legal rules belonging to different legal systems. Among such benefits with rule-comparison is providing a source of inspiration, as models or warnings, and contributions to a better understanding of the comparativist's own legal system. However, as Bogdan points out, it is important to consider that legal rules are not independent of the surrounding society and the general features characterising the legal system to which they belong.⁴⁷

Two different views can be discerned on how to make comparisons, functionalism and conceptualism. The functionalists compare different legal solutions to what they think are the same functional social problems. Legal comparison is also used to say something about the relative quality of legal rules and principles in relation to social functions.⁴⁸ A reason for concentrating the comparative study basically on functionality is that even though the legal system of every society faces essentially the same problems, all legal systems are formed differently and these problems are solved by different means in each system, although the result often is similar. It therefore is important to focus on the problem and not make any reference to one's own national legal system.⁴⁹ The conceptualist, on the other hand, means that the function that legal comparison has is no different from solving problems within one single legal system. Legal comparison in this case is used to improve legal thinking by taking out the elements within the comparison that are sound and use them to develop new concepts and doctrines. As an example with comparison of different solutions to problems of property relations in apartment buildings concerning different stakeholders, the functionalist would compare the different solutions that are found, while the conceptualist would think that the divergence is a result of an insufficiently adequate legal understanding of the social relations involved.⁵⁰ Another way of using the comparative perspective is

⁴⁵ Zweigert and Kötz (1998), pp. 4-5.

⁴⁶ Legrand (1999), p. 4.

⁴⁷ Bogdan (2004), pp. 1235-1236.

⁴⁸ Roos (2004), pp. 214, 217.

⁴⁹ Zweigert and Kötz (1998), p. 34.

⁵⁰ Roos (2004), pp. 214, 217.

the structural method, where the focus lies on the cognitive structures characterising each culture, and the legal mentality specific for that culture. The interesting part in that case is the deep legal structure beneath the surface rules that form a structural scheme.⁵¹

Comparative law may be carried out with either a static or dynamic analysis. Within the static analysis, a comparison is made between the legal rules in two or more legal systems at a specific time, while the dynamic analysis deals with the interaction between legal systems during history, focusing on the legal change that has taken place. Different results can be obtained from the dynamic analysis. The legal systems are usually converging toward similar solutions after starting from different points, or diverging to different solutions if starting from similar points.⁵²

Comparative law was focused on comparisons between different legal families for a long time based on a European perspective. Especially interesting was the dichotomy between the Continental-European Civil law and the Anglo-American Common law. The functional paradigm, where the functions of legal concepts are compared, was in focus. This functional approach is advocated, for example, by Zweigert and Kötz in their *Introduction to comparative law*.⁵³ Only recently has this focus shifted towards more cultural and ethnological aspects, moving away from looking only at the law as rules.⁵⁴ When looking at the development of comparative law during recent decades, it is clear that comparative law has moved beyond the simple models of legal families. The classifications are now considered more as approximations to reality. Legal traditions have become a more dynamic way of structuring, along with legal cultures as part of larger social structures. Interaction exists between them, with a constant influence and borrowing. The groupings depend on context and perspective, and are changing over time.⁵⁵ New ways of classification have been introduced, such as those presented by van Hoecke and Warrington, which are looking more at legal cultures than legal families and are making a distinction between Western and non-Western legal cultures.⁵⁶ Other authors are also mentioned that have advocated broader approaches to comparative law than just “law as rules” and are using concepts such as tradition and culture.⁵⁷ Ugo Mattei has a more global perspective on comparative law, where he makes a distinction between three patterns of law, namely the professional, political and traditional law patterns, into which he organises the various legal cultures of the

⁵¹ Samuel (2004), pp. 64-65.

⁵² Mattei, Antonioli and Rossato (2000), p. 508.

⁵³ Zweigert and Kötz (1998).

⁵⁴ Modéer (2002), pp. 8-9.

⁵⁵ Reimann (2002), pp. 676-678.

⁵⁶ Van Hoecke and Warrington (1998).

⁵⁷ *Ibid.* at p. 496.

world.⁵⁸ The division into legal families is regarded as very oversimplified and used mostly for pedagogical purposes. It is usually made based on macro-comparison between the fundamental general features of the legal systems, but can also be rule-oriented.⁵⁹ Jaakko Husa points out that even though the classifications into legal families are changing over time; the basic ideas are still the same.⁶⁰ Which division that is appropriate to use will depend on the purpose for which it is used.⁶¹ Since there is no consensus today regarding how to group the legal systems of the world, it perhaps is time to abandon or at least rethink the traditional way of classifying.⁶²

It is possible to say that what in practice determines the law of a country is primarily the majorities sitting on the highest courts and/or the legal academic scholarship, since these usually take intermediate positions between two opposite theories in their extreme forms. Legal theories are also important, both to make a desirable result fit the prevailing law and to block such results, if applying old theories.⁶³ The legal scholarship thus is a valuable source of information in addition to statutory rules and legal culture. Apart from describing the legal reality, the scholarship plays a role in systemizing the law, and it also has a part in the continual construction of the legal system. It is a kind of scientific model, containing hypotheses regarding the meaning of legal concepts, rules, principles and institutions.⁶⁴

One of the purposes of conducting a comparative study is to try to explain the differences and similarities between the studied legal systems. The differences and similarities can be explained by the same factors, and it is therefore common to concentrate on explaining only one of these two types, depending on whether the studied legal systems are basically similar or different. In order to do this, it is necessary to choose some specific factors to look at. Such factors may be the economic system of the country, the political system, religion, historical development as well as other controlling factors from outside the legal system. Despite these factors, there will always be differences and similarities that will be impossible to explain with causes unknown. The most important task, however, is to find the most important and most interesting differences and similarities between the legal systems, and striving to explain all details would be too time-consuming or even impossible.⁶⁵

⁵⁸ Mattei (1997).

⁵⁹ Bogdan (2004), pp. 1241-1242.

⁶⁰ Husa (2004), pp. 11-14.

⁶¹ Bogdan (2004), p. 1241.

⁶² Husa (2004), pp. 11, 16, 37-38.

⁶³ Van Hoecke (2004), pp. 189-190.

⁶⁴ Van Hoecke and Warrington (1998), pp. 522-530.

⁶⁵ Bogdan (1993), pp. 71-80.

There are some people who believe that it is only possible to benefit from the experience of similar or convergent systems, while others believe that we can learn something only if the systems are different or diverging. If the systems are closely related, it will be more interesting to explain the differences, whereas the interest in unrelated systems lies in the similarities, even though it is often preferences and policies that will decide which is stressed.⁶⁶

After finding the differences and similarities between the systems, it can be interesting to make an evaluation of which solution is better, given various criteria. The first step of course is to gather enough information to be able to base the decision on knowledge rather than on intuition. What can be considered as the best solution varies, however, between countries as well as within countries, which means that the decision must be made according to some specific value scale. It is also necessary to look at the purpose of the regulations, which may be the same, but may also be a compromise between several incompatible interests, or that different instruments were used to obtain this goal.⁶⁷

Benefits that may be obtained from comparative law include factors such as a better understanding of, and by that improving, one's own national law, promoting the understanding of foreign peoples that leads to developing international relations, as well as the relevance of the comparative law in historical and philosophical legal research, e.g. in pointing out the variations in the concept of law and placing oneself outside one's own legal system.⁶⁸ Even if it might seem quite pointless to study legal systems in other countries due to the large differences in the legal conditions in these countries, there is always new experience to gain from such studies. By making comparative studies, it is possible to find that certain rules or procedures might already have been tried in another legal system and that they have better and simpler and/or cheaper solutions for certain problems, or can do without specific rules in that area. By having to look more at principles broader than the actual legal acts, new ways of thinking might be the outcome. Generally, it is possible to say that the problems and the result from solving them often are the same for many countries, but there might be great differences regarding how to reach this result.⁶⁹

By looking at one's own system from another point of view, it is often possible to better understand the function of certain legal matters in one's own system. It is also possible to get new ideas and examples of experience to introduce in one's own country. Comparative law is also very useful when harmonizing legal systems, or trying to interpret rules adopted from other legal systems. The value of dividing legal systems into groups or families is that such

⁶⁶ Öricü (2000), 2.1, 3.2.

⁶⁷ Bogdan (1993), pp. 81-83.

⁶⁸ David and Brierley (1985), pp. 4-5.

⁶⁹ Bogdan (1993), pp. 29-32, 39.

legal systems are similar in many ways, and it is thus possible to use knowledge about the system in another country belonging to the same group.⁷⁰

Problems

There are a number of different problems and pitfalls to watch out for when making comparative studies. A fundamental problem concerns epistemological pessimism, where any possibility for comparing legal systems is denied. With this way of thinking, law is seen as the product of a legal culture and cultural differences will prevent foreigners from ever being able to really understand foreign law. This view of perfectionism is based on the belief that it is necessary to fully understand something to be able to understand it at all.⁷¹ It has even been debated whether legal traditions are in fact incommensurable – incomparable. On one hand, there exists a strong incommensurability across the major legal traditions of the world, but on the other hand, these traditions do not exist in isolation from one another. Since the forms of communication today are more intense and pervasive, the boundaries of the legal traditions have become more permeable. One way to overcome the incommensurability when making comparisons would be to search deep enough to find the shared terms, taking into account the diverse characteristics of what is being compared.⁷²

To compare legal systems from the common law family with those from the civil law family is a well-known problem. Pierre Legrand states that civil law and common law are “irreducibly different”. Legrand sees differences concerning the fundamental nature of reasoning, systematisation, rules, facts, rights, etc.⁷³ This makes it difficult to compare legal systems, and specific features within them, from countries belonging to each of these families, for example comparing 3D property rights in Australia with such rights in Germany, as is attempted in this study. Some restraint must also be made regarding what and how many legal systems to include in studies. From experience it is evident that diminishing returns come from trying to cover a wide range of legal systems. A reason for this is the similarities between many legal systems that come from the fact that mature legal systems are often adopted or extensively imitated by others, and it is in such cases enough to study the parent system.⁷⁴ A directly comparative analysis between two or more legal systems is even more difficult and time-consuming than a single-system analysis in the sense that there is at least double the content, but also the fact that the different legal systems are

⁷⁰ Ibid.

⁷¹ Van Hoecke (2004), pp. 172-173.

⁷² Glenn (2001), pp. 243-253.

⁷³ Legrand (1996), pp. 62-71.

⁷⁴ Zweigert and Kötz (1998), pp. 40-41.

based on different assumptions within the system that are not explicit, but have to be deduced to be able to create a third structure in which the rules from the compared systems can fit.⁷⁵

When conducting comparative studies, the real and most difficult work is not comparing different laws as such, but comparing facts and how different virtual fact models are constructed and deconstructed within different systems.⁷⁶ Criticism of the functional method includes the aspect that there are also alternative schemes to be considered when carrying out a comparative study. The functionality aspect emphasises the facts behind the law, instead of the law itself, but the facts are also not unproblematic. Difficulties that can be found in the relationship between statements in science and reality are connected with problems concerning methods to comprehend and represent facts. The idea as to the separation of legal rules and extralegal phenomena beyond the purely legal devices is also criticized, since it assumes that there is such a clear distinction when it comes to the reasoning processes in law.⁷⁷ There are difficulties connected with the different ideas of the nature of a legal rule, where some systems do not even strictly recognize legal rules, but use models instead. The legal rule itself can either be more abstract and general, or be of limited scope. The rules can also be formulated with different concepts.⁷⁸

Even though the legal comparison to a large extent is focused on rules, to be able to understand the rules it is necessary to also consider their legal and non-legal context. The lack of such a framework is a problem for foreign researchers in understanding the law of remote legal cultures, or wrongly understanding apparently identical or comparable rules. To understand foreign rules it may be necessary to consider the relevant context with enviroing legal rules, procedural rules and court structures, as well as the constitutional context, legal history, legal culture, social and economical context, their political, ethical and religious context,⁷⁹ etc., which is a real problem for the comparative researcher.⁸⁰ Legal instruments working well in one country may be of no use if implemented into another country with a different economic system, religion or morals.⁸¹ It is important to be aware that the legal rule does not consist only of the statutory provision or judicial statement, but also of general features of the legal system as a whole, such as legal culture, institutions, processes and secondary rules.⁸² Since the legal system is a part of a society in a country, it is important to understand its social environment and purpose to

⁷⁵ Foster (2006), p. 7.

⁷⁶ Samuel (2004), p. 74.

⁷⁷ Ibid. at pp. 39-40.

⁷⁸ David et al. (1974), pp. 3-4.

⁷⁹ Bogdan (2004), pp. 1236-1240.

⁸⁰ Van Hoecke (2004), pp. 166-168.

⁸¹ Bogdan (1993), pp. 81-83.

⁸² Bogdan (2004), p. 1234.

know how it works in practice, especially if the society differs significantly from one's own country.⁸³ Problems with differences in the structure of the society itself may be caused, for example, when comparing with countries with federal law, and the importance of the institutions of the country, where capitalist countries differ from socialist ones. The difference in structure can also raise questions of classification and the distinction between different types of law.⁸⁴

To be able to obtain correct information about the rules, it is necessary to use reliable and up-to-date information sources.⁸⁵ This becomes much more difficult to obtain when it comes to foreign legal systems. The primary legal sources are recommended to start with, but secondary sources in some cases can even be better, due to language barriers, difficulties of finding the right sources, etc. It might also be necessary to read some of this literature to be able to understand the primary sources. It is, however, important to check that current sources are being used if describing the existing legislation at a certain time, while older material may be used if explaining the developing of the legislation during time. Obsolete material may otherwise be of no value, or even misleading. It can sometimes be the case that some legal rules are formally still valid, but in practice no longer used, which is very difficult for someone from another country to discover. To use and interpret the legal sources existing in the foreign country in the way and the order that it is done in that specific system is another necessity, as well as looking at the whole system, even if investigating just a small question, since the solution to a problem might be found in a different place than in one's own system.⁸⁶ Another difficulty concerns the structure of law and of textbooks describing the law and the fact that this differs between countries. Certain important areas may be found in different chapters under different headings due to differing structure of law and the arrangement of it. A problem is where to find the relevant data for comparison, but also the perspective from which the problems are analysed and perceived. The problems that are discussed in the textbooks may also be completely different.⁸⁷ One of the most efficient ways to gather information is to ask colleagues in the studied countries, but it often is necessary to find the necessary information on one's own, by studying foreign legal material, such as legislation, court cases, literature, etc., but then it is necessary to know the language and to have some basic knowledge of the legal system.⁸⁸

Problems may occur when trying to find answers to specific problems in the place of the legislation where it can be expected from the experience of one's own system. It is also necessary to look outside the legislation and legal

⁸³ Bogdan (1993), pp. 57-58.

⁸⁴ David et al. (1974), pp. 4-6.

⁸⁵ Bogdan (2004), p. 1237.

⁸⁶ Bogdan (1993), pp. 42-58.

⁸⁷ Van Hoecke (2004), pp. 175-177.

⁸⁸ Bogdan (1993), pp. 42-43.

devices in case a certain issue might be dealt with by other mechanisms, such as unwritten rules or implicit agreements, which operate outside the legal system. Different legal systems may have very similar solutions to a problem even though these systems have different origins in historical development, conceptual structure and style of operation.⁸⁹ It is common to move the focus from rules to cases and the application of rules in court decisions. This generally gives a different picture, since it describes only the conflicts about the rules, which are not already solved outside of court, and only the published decisions. The advantage is that this shows how the rules work in practice and how lawyers within that system interpret the rules. However, the question is whether this gives a correct picture of the legal system. The cases show more of the divergences within a legal system than differences between legal systems. Nor are facts, which create the bases for cases, neutral data that without restriction can be compared across all legal systems, but rather socially and legally constructed. It is also difficult to find cases from different countries that have identical facts. The conclusion often is made that even though legal concepts and rules are different, the practical solutions are often the same. It is, however, also possible to focus on cases where the legislative rules are identical, but the practical result completely different, which means that legal rules do not decisively determine judicial decisions.⁹⁰

Terminology is a common methodological problem. If the concepts of one's own system do not correspond with the concept of the foreign system, the comparison will be more of the problems and how they are dealt with, and not so much the actual rules of law. Comparing systems within the same legal family is easier, but can also include deceptive terminology, where concepts seeming to be identical in fact are different.⁹¹ An important thing to look out for is assuming that legal terms, notions, institutions and ways of interpretation are the same in the foreign system as in one's own national legal system. Many legal terms have no equivalence in another language, or may not mean the same thing.⁹² Even within the same language, it is possible for the same word to have different denotations depending on country, or even professional groups. Apparently identical words may have a different meaning, in the same way as different words may have the same meaning. To be able to understand technical words in legal language, it therefore is necessary to have some insight in the rules governing the concept and the actual reality it covers.⁹³

Language is another problem to consider when doing comparative research. Not many legal texts concerning non-English speaking countries are published in English, which is the language that many researchers can

⁸⁹ Zweigert and Kötz (1998), pp. 34-39.

⁹⁰ Van Hoecke (2004), pp. 168-171.

⁹¹ David et al. (1974), pp. 3-6.

⁹² Bogdan (1993), p. 43.

⁹³ Van Hoecke (2004), pp. 174-175.

understand, and not all researchers have enough language skills to be able to read texts in several different languages.⁹⁴ When the languages of the systems are different, and the legal terms express concepts unknown in the other legal system, then translations might be impossible, or at least misleading.⁹⁵ The interpretation may result in conclusions differing from the actual wording.⁹⁶ It will lead to the tendency of focusing more on the major legal systems, such as Britain, France and Germany, as the most studied European legal systems.⁹⁷

1.6 The Structure of the Study

This thesis is divided into seven chapters. This section concludes the first chapter presenting the subject, providing its background and describing the objectives, selection of countries, limitation and methods of the study. The second chapter gives a theoretical background to the 3D property rights concept by presenting suggestions for a definition of 3D property and a division of the studied main forms of 3D property rights used around the world into specific types and categories. An overview is also included in chapter two of the international use of 3D property formation, the historical development and examples of in what countries various forms of 3D property rights can be found. Chapter three gives a general description of the characteristics of 3D property, with the interdependence as a fundamental feature, and with particular focus on general management aspects and the condominium form, containing important issues for different forms of 3D property rights, intended as a basis for valuation of the specific system studies in the following chapters, and giving the structure for the presentation of them. This is followed by a closer look at three different 3D property rights models exemplified by certain selected countries, starting with the case of independent 3D property in Sweden in chapter four, followed by the condominium case in Germany in chapter five and finally the sixth chapter is devoted to the two Australian states of New South Wales and Victoria, with a description of their systems, consisting of a combination of the independent 3D property form and the condominium form. These chapters, containing the studies of the systems in the selected countries, follow the order of the forms of 3D property rights as described in the model of 3D property rights that is given in chapter two, with the independent 3D property type, followed by the condominium type and then the combination of them both. Victoria comes after New South Wales due to the fact that the two forms there are even more merged into one single law. The structure of each such chapter, or part thereof, containing the described

⁹⁴ von Bar (2004), pp. 132-133.

⁹⁵ David et al. (1974), p. 4.

⁹⁶ Bogdan (2004), p. 1237.

⁹⁷ von Bar (2004), pp. 132-133.

countries, is basically arranged in the same way, starting with a background giving some general facts as to the country and its property system, as well as a description of how the legislation for the 3D property rights system has developed, and what kind of problems have led to amendments of the Acts. After generally describing the 3D property system and the means of subdivision for the legal system in question, the important areas with specific interest for 3D property rights are described in accordance with the characteristics presented in the third chapter, one by one, if applicable within that particular system. The themes are based on and follow the structure given in the theoretical overview of the condominium concept. Each such chapter ends with a summary on expressed views on how the system works and concluding with some problem areas that have appeared to be specific for that particular country or system. The final chapter seven summarizes the knowledge obtained from the studied 3D property rights systems, including the key factors that were considered important for the successful establishment of such rights, and adds some further material to the discussion, ending with conclusions of the main findings of the study.

The reference list at the end of this thesis has been subdivided into different categories: literature, legal documents, other documents, Internet documents and personal communications. This separation of different types of references has been made for the purpose of facilitating for the reader finding a specific type of reference and of forming a certain structure. It also means, however, that when searching for a specific reference from the footnotes, it may be necessary to look several categories in order to find it, due to the fact that all footnotes are given only by reference to author and year.

2. 3D Property Rights

2.1 Definitions of 3D Property

When discussing 3D property rights, it is necessary to define 3D property. It is not always easy to understand what is really meant by 3D property, as the concept has no simple meaning. There is no clear and unambiguous definition of this concept, especially since its forms vary in different countries and respective legislation, each having its own definition. Nor is the concept clearly defined in the academic literature on the subject. The concept is discussed below, what it includes, as well as the differences existing between countries and systems. This discussion is centred on the definition, where both the lexical and stipulative concepts of the definition are discussed. After comparing how the 3D property concept is used and defined in the literature, I summarize with an attempt to formulate a stipulative definition for use in my own research.

Definitions are used to make language more precise and to replace long and complicated expressions with shorter simpler ones.⁹⁸ Lexical definitions show the existing meaning of the defined term and how it is actually used, while the purpose of stipulative definitions is to decide how a certain term is to be understood within a certain context.⁹⁹ To avoid confusion and misunderstandings, it is necessary to make the definition as precise as possible, which can be difficult if it is a term that can be used both generally and in more specific conditions, as is the case with 3D property.

To begin the discussion on what 3D property is, it is necessary to say something about what real property is in general. It is not so easy to determine what real property really is.¹⁰⁰ Real property is not a standardised and homogenous term, and different authors present different definitions.¹⁰¹ The “real” in real property usually is associated with something solid, fixed and permanent, which has to do with land.¹⁰² The term “real property” is often used to denote a house or a building, but in a legal sense it is something else. It can be seen both as a physical object and as certain rights attached to a piece of land. If speaking of land in a broad sense, it consists of the physical area with fixtures as well as the rules, institutions and socio-economic characteristics that it is integrated with. These physical features together with its institutional rights

⁹⁸ Næss (1970), p. 30.

⁹⁹ Nationalencyklopedin (1990).

¹⁰⁰ Mattsson (2003a), p. 24.

¹⁰¹ Paasch (2004), p. 1.

¹⁰² Mattsson (2003a), pp. 24-25.

are often referred to as real property or “real estate”.¹⁰³ The law usually determines what real property is, even though the physical characteristics may be decisive. Real property often has a negative definition in the law, by stating what powers in the land that the owner does not have.¹⁰⁴ In e.g. Swedish legislation, there is no definition of real property. The Land Code tells us that real property is land, and land is divided into property units.¹⁰⁵ The closest it is possible to get to some sort of definition is to say that a property unit is what is entered in the real property register as a property unit,¹⁰⁶ but this cannot be viewed as a proper definition, since the *definiendum* is used in the *definiens*, making it a circular definition.

A distinction can be made between ownership of real property, or immovable property, and the ownership of personal property, or movable property. Ownership of immovable property can be characterized by having only one ownership right for each property unit, by being in principle unlimited since it is negatively defined and including all possible rights of use for the property, although being legally delimited in different ways at each point of time, and ultimately by giving the ownership right to the persons who have the value of the land at their disposal.¹⁰⁷ That included in property rights is normally stated by law, by generally defining the right, and in deeds, concerning more detailed stipulations.¹⁰⁸ What ownership of property is to a large extent is decided by what rights the owner of the property has received.¹⁰⁹ Ownership can thus be described as a bundle of such rights that are defined by law.¹¹⁰ A bundle of rights means that the attributes for each property unit is a system of rights that can be easily distinguished, but where the different rights are separable and may be transferable independently, being used simultaneously by different holders. Such rights, for example, are leasehold, rental tenure, road rights or easements.¹¹¹

Concerning the relationship between owners and society, it is possible to consider several aspects of property ownership. The main aspects are the right to possess and the right to dispose of the property. The right to dispose of includes the right to use, the right to transfer and the right to land division. The right to transfer appears to be of crucial importance for ownership and concerns the transferring of both the entire ownership and just the right to

¹⁰³ Larsson (1997), pp. 8-9.

¹⁰⁴ Mattsson (2003a), pp. 25-26.

¹⁰⁵ SFS (1970:994) *Jordabalken (Land Code)*, Chap. 1 s. 1.

¹⁰⁶ Mattsson (2003b).

¹⁰⁷ Bergström (1956), pp. 145, 160.

¹⁰⁸ Larsson (1997), p. 12.

¹⁰⁹ Bergström (1956), p. 146.

¹¹⁰ Larsson (1997), p. 12.

¹¹¹ Mattsson (2003a), pp. 29-30.

use.¹¹² Another important factor for ownership is the right to exclude others from use.¹¹³

Ownership ranges from being absolute down to lesser degrees with different kinds of limitations. Absolute ownership includes all potential uses of a property unit, meaning that no one else is allowed to do anything with the property without the permission of the owner. Such ownership, however, is very rare, since there are almost always certain types of regulations limiting the rights. Due to this, ownership consists of both a current and a latent component, with each to a different extent. There are a certain amount of attributes for the owners to use at their disposal, either freely or by receiving special permission to use it.¹¹⁴ These limitations of ownership rights are made by the State.¹¹⁵ Certain actions regarding the land, for example, might be prohibited by law or have to be approved by authorities.¹¹⁶ These rights may be delimited both when it comes to other people's right to use the property, such as user rights and easements, and when it comes to legal limitations, such as a need for a building permit.¹¹⁷ Right of use, as opposed to the ownership right, differs from the latter in the sense that it is fixed in duration, while ownership is of a perpetual nature.¹¹⁸

Rights *in rem* are real rights, property rights or rights to things, as opposed to personal, contractual rights. Included in such rights can be rights in land or other assets. Since the real rights run with the land and are claimed against the asset itself, they are valid against all persons and run with the land regardless of any transactions or transformations concerning the land parcel.¹¹⁹

Just as it is difficult to find a clear and unambiguous definition of real property, the same applies to the concept of 3D property, particularly as its forms vary in different countries and legislation, each with their own definition. There are also differing terms describing a 3D property. To give a more exact definition of a 3D property, it therefore is necessary to look at the legislation of different countries that have the possibility of 3D property formation. A conclusion from the first International workshop on 3D Cadastres in Delft was that the concept of property mainly depends on the national legal system, where each such system has its own instruments for multi-use of land.¹²⁰ A common lexical definition thus does not seem to exist. The researchers dealing with this subject choose their own stipulative definition or description.

¹¹² Holmström (1983), pp. 27-30.

¹¹³ Snare (1972), pp. 202-203.

¹¹⁴ Mattsson (2003a), p. 29.

¹¹⁵ Holmström (1983), p. 27.

¹¹⁶ Larsson (1997), p. 12.

¹¹⁷ Bergström (1956), p. 146.

¹¹⁸ Mattsson (2003a), p. 26.

¹¹⁹ Arruñada (2001), p. 5.

¹²⁰ *Registration of Properties in Strata* (2002).

When studying 3D property rights around the world, two main types can be identified. The independent 3D property type is the “pure” type of three-dimensional delimitation of space, and the condominium type is apartment ownership, usually connected to a building, with an owners’ association managing the common areas. In the countries and states around the world having different 3D property rights systems, there are often specific terms for forms that exist within the legislation, such as “stratum” for the independent 3D property type and “strata title” for the condominium type in New South Wales in Australia, but no general term seems to exist, including these and other forms, that can be counted as 3D property.

The issue is not only how to define 3D property, but also what term to use for this concept. In the literature concerning this subject, I have found that both “3D property” and “3D cadastre” are used as terms to describe the phenomenon. In more recent publications, 3D cadastre seems to be more widely used internationally and was used as the heading for the first international workshop devoted to 3D property aspects. The general meaning of a cadastre is a parcel-based land information system that contains records of interests in land, such as different rights.¹²¹ In connection with 3D this can be seen as a wider term, embracing a broader range of matters, but where the emphasis is often placed on technical issues, while 3D property is more connected with legal issues.¹²² To describe the legal object, I therefore prefer the term 3D property to 3D cadastre.

It appears to be difficult to find a suitable general definition for 3D property. I have found several different definitions and descriptions of 3D property in the literature. One presented by Dutch researchers is that a 3D property unit is a (bounded) amount of space to which a person is entitled by means of real rights. With this definition, a traditional parcel would also be a 3D property unit, without the particular issues connected with the third dimension. According to these researchers, what causes problems are more complex structures, which they call a 3D property situation, where property units are located on top of each other, or engage one another. Their term for this type of property is a stratified property, where several users are using an amount of space limited in three dimensions and positioned on top of each other within one surface parcel or crossing parcel boundaries, and where real rights are established to entitle persons to the separate volumes.¹²³ That definition comes closer to the subject, but is unnecessarily complicated and too narrow, since property exists that is referred to as 3D property in this study that does not fit into this description.

Barbro Julstad in her doctorate thesis about three-dimensional property enjoyment in Sweden has inclusively used this term, both for independent

¹²¹ *Registration of Properties in Strata* (2002), p. IX.

¹²² Reshetyuk (2004), pp. 8-10.

¹²³ Stoter, van Oosterom, Ploeger and Aalders (2004), p. 2.

ownership of three-dimensional space in land or buildings and other structures in the form of real or personal property, and for the right that comes with owning a property to use land or buildings on another property unit. She describes in her thesis the process of 3D property formation as all methods available for the creation of three-dimensional property enjoyment through property formation. This means changing the property rather than the state obtained through this change.¹²⁴ This does not really say anything about what 3D property is. The definitions are more concentrated on the ownership and the property formation processes than on the physical object or legal concept of a 3D property unit.

Another way of describing, but perhaps not defining, 3D property enjoyment is where different horizontal planes or floors of a property unit are used by separate persons for mainly separate purposes.¹²⁵ For this definition to include only separately owned 3D property, and not other types of rights as well, it is necessary to mention that these spaces are delimited both horizontally and vertically, i.e. three-dimensionally delimited space. In the new Swedish legislation about 3D properties, for example, such 3D property is defined as a property unit that as a whole is delimited both horizontally and vertically.¹²⁶ That definition is suitable for the Swedish type of 3D property, but is too narrow for an internationally valid definition, since there is legislation allowing for the formation of 3D property as referred to in this study, that does not have to be delimited as a whole.

Including in the definition more of the purpose and use of the 3D property, rather than what the physical object really is, Olena Mytrofanova describes 3D property as the multi-use of a land parcel where there is a need to use space under or above the land.¹²⁷ This in my opinion is not suitable as a definition for the actual 3D property unit itself, and does not define what a 3D property is, but rather what it is used for.

Another term used when describing a three-dimensional division of property is “airspace”. Powell and Rohan use the American concept airspace for independent units of real property that are created when real property is horizontally subdivided, and defines the term as “the space above a specified plane over, on or beneath a designated tract of land”. Airspace in such a case denotes the real property when described in three dimensions, whereas the air itself is not considered as real property.¹²⁸ With this definition of the term, it is space that is described, rather than what 3D property is. It is also doubtful whether this includes the subsurface space. Included in this definition can therefore be, for example, just a part of a traditional 2D property since it does

¹²⁴ Julstad (1994), pp. 17-18.

¹²⁵ Proposition 2002/03:116, p. 26.

¹²⁶ SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)*, Chap. 1 S. 1.

¹²⁷ Mytrofanova (2002), p. 4.

¹²⁸ Powell and Rohan (1993), Vol. 2A, 263.1[1].

not say that it must be delimited and subdivided from the surrounding space. In order to let airspace mean 3D property, it must be described in three dimensions with reference to a specific locus.¹²⁹ If this definition also includes “independent units of real property that are created when horizontally subdividing real estate”, it comes closer to describing what it really is.

A condominium, which is a form of 3D property right, is defined by the UN as a part of common law jurisdictions that constitutes a special form of ownership giving the holder a fee simple¹³⁰ title to individual units within a building together with an undivided interest in common areas.¹³¹ What a condominium is can also be found in the legislation of the specific countries where condominium exists.¹³² For example, the South Carolina Horizontal Property Act in the United States defines condominium ownership as “the individual ownership of a particular apartment in a building and the common right to a share, with co-owners, in the general and limited common elements of the property”.¹³³ Since condominium is considered only as a special type of 3D property, this definition is much too narrow to use for the entire 3D property concept. A 3D property does not, for instance, have to be located within a building, nor have any part in common areas. Another definition of condominium comes from other American jurisdictions, where condominium ownership of real property is defined as a separate estate in an individual airspace unit of a multi-unit property, a definition that accentuates the physical aspect of this form.¹³⁴

A three-dimensional object can be defined as something that has an extent in length (height), width and depth.¹³⁵ A 2D property, however, is not flat without any extension in the third dimension, but still contains space. What is meant by 3D here, however, is not the extent of the property unit itself, but rather its delimitation in space. The term three-dimensionally determined property therefore is sometimes used for this type of property. Focusing on this aspect, a 3D property can be defined as property delimited both horizontally and vertically, i.e. in length, width, height and depth. A definition concentrated on this aspect does not explain what a property is, but instead implies that this has already been done in the legislation. This makes it a definition that can be used internationally. If changing this definition slightly to that 3D property is a

¹²⁹ Powell and Rohan (1993), Vol. 2A, 263.1[1].

¹³⁰ Fee simple is the most common form of private ownership of real estate in common law countries, giving almost absolute title to the property with the right to control, use and transfer it. Fee simple absolute gives absolute title.

¹³¹ van der Molen (2001), p. 56.

¹³² Reshetyuk (2004), p. 26.

¹³³ van Oosterom, Ploeger and Stoter (2005), p. 10.

¹³⁴ Powell and Rohan (1993), 263.3 [1b].

¹³⁵ *Nationalencyklopedins ordbok* (2005).

volume that is delimited in length, width, height and depth,¹³⁶ we get a definition that reflects the physical nature of the 3D property.¹³⁷ It does not, however, say anything about that this volume is real property in the legal sense, and not just any volume of air.

Using the broadest definition of 3D property, we can say that 3D property is real property that is legally delimited both vertically and horizontally. This definition includes different types of property in different legal systems, but still clearly distinguishes it from the “traditional property”, 2D property, which is only delimited vertically. Whether 2D property in practice then can be legally enjoyed indefinitely upwards into the sky and downwards into the earth is a separate discussion. A problem with this definition might be that both the *definiendum* and the *definiens* contain the word “property”, but that to be defined here is not so much property, but the interesting part here rather is what three-dimensional (3D) property is, as opposed to the traditional form of 2D property. Property and real property are assumed to be defined separately.

Conclusions

The term 3D property is difficult to define in the sense that it is not often used as a general comprising term, and the concept that it defines is expressed differently with different contents depending on legislation, as well as the legal context and area where it is used. It is thus difficult to give a general definition that could be used internationally. Although 3D cadastre is a more common term for this phenomenon, I have chosen the term 3D property in my research, since cadastre has a more limited meaning.

Different definitions of 3D property are presented in the literature, but the definitions have various shortcomings, being either too narrow or too wide, focusing on use rather than on object, etc. In the Swedish legislation, the meaning of 3D property is clearer, since this concept is introduced and mentioned in the legislation. 3D property in Sweden, however, does not have the same meaning as a legal object as it has, for example, in New South Wales in Australia, due to their different legal content, which makes it difficult to find a general international definition.

Since no clear and commonly known lexical definition of 3D property seems to exist, I have chosen a stipulative definition for my thesis, trying to keep it as wide and general as possible, as I use it as a summarizing term for different forms of property rights. My definition of 3D property will thus be *real property that is legally delimited both vertically and horizontally*, a definition close to the one in the Swedish legislation. This broad definition of a 3D property is the one used throughout this thesis.

¹³⁶ Nylander and Rinman (2001), p. 8.

¹³⁷ Reshetyuk (2004), pp. 26-27.

2.2 Forms of 3D Property Rights

2.2.1 Categorisation

There are different forms of how to own or use a part of a building or other space that is three-dimensionally delimited. A categorisation of various theories on the structures of such rights would be very complex, due to a large extent to the fact that the structures are linked to the wording of each statute upon which such systems are built,¹³⁸ but an attempt at such a classification is made below. Even though a categorisation has been made subdividing the forms into specific types, it is important to emphasize here that there are no clear boundaries between certain of the forms. For example, it is difficult to draw a clear dividing line between indirect ownership forms and leased residential forms.¹³⁹ The full range of 3D property rights in the broad sense is given here, even including granted rights and leases. However, the focus in my work lies on the two main forms, independent 3D property and condominium, which can be considered as the “real” forms of 3D property. The other forms are described briefly in order to provide a wider picture.

Table 2.1. Forms of 3D Property Rights Generally.

(1) Independent 3D property	(a) Air-space parcel
	(b) 3D Construction property
(2) Condominium	(a) Condominium ownership
	(b) Condominium user right
	(c) Condominium leasehold
(3) Indirect ownership	(a) Tenant-ownership
	(b) Limited company
	(c) Housing cooperative
(4) Granted rights	(a) Leasehold
	(b) Servitude
	(c) Other rights

¹³⁸ van der Merwe (1994), p. 23.

¹³⁹ Nordic Council of Ministers (1998), p. 19.

2.2.2 Independent 3D Property

The model of splitting land into (1) *independent 3D properties* is used in some countries to divide ownership three-dimensionally. It is used particularly in those countries where the deed recordation system prevails.¹⁴⁰ It is sometimes called “air rights”, especially in the United States, or “air space rights” to make a distinction between the three-dimensional delineation of the unit and its physical content.¹⁴¹ This model can be seen as an independent form of ownership, since it provides for the registration of separate three-dimensional property units¹⁴² independent from the underlying parcel.¹⁴³ There is no need for a connection with the ground parcel. It enables ownership of air rights to be subdivided. It is also possible to subdivide air space or areas under ground into properties. Units thus can be created in subsurface space in the same manner as tracts of air.¹⁴⁴ In some legislation, a 3D property does not have to be a closed volume, but may extend from a specified level and as far into the ground or air as private ownership extends,¹⁴⁵ for instance as with the stratum in New South Wales, Australia. The relationship between the units is handled through agreements, such as easements, lease agreements or collateral reciprocal agreements, or through the general laws about neighbour relations.¹⁴⁶ This type of property can either be independent from the boundaries of the surface parcel and extending across several ground parcels, as the volumetric parcel in Queensland, Australia, the stratum in New South Wales, Australia, or the 3D property in Sweden, or the air space is limited to be located within the boundaries of the existing traditional 2D parcels, as the air-space parcel in British Columbia, Canada. The model is quite flexible and may be used for complicated infrastructure developments in a modern urban environment.¹⁴⁷ There is no requirement of any common parts for this kind of 3D ownership.

The (1)(a) *air-space parcel* type is not bound to a specific building or construction, and may in some legislation consist of just a space volume. The (1)(b) *3D construction property*, on the other hand, may only be created within a building or construction of some sort, or with the purpose of creating such a construction. If the construction is destroyed, the property ceases to exist. Such types can be found in the newly introduced 3D property legislation in Sweden and also soon in Norway.¹⁴⁸

¹⁴⁰ Sandberg (2001), p. 203.

¹⁴¹ Sandberg (2003), p. 139.

¹⁴² Sandberg (2001), pp. 203-204.

¹⁴³ Mytrofanova (2002), p. 37.

¹⁴⁴ Sandberg (2003), pp. 138, 141.

¹⁴⁵ Onsrud (2001), p. 194.

¹⁴⁶ Sandberg (2001), pp. 203-204.

¹⁴⁷ Mytrofanova (2002), p. 37.

¹⁴⁸ Valstad (2005), p. 5.

For the 3D property type and airspace projects, it is common to establish some kind of reciprocal agreement, containing covenants, agreements and easements binding the separate owners and establishing the rights and duties of the respective owner, along with mechanisms for resolution of disputes between the owners, with respect to matters such as structural damage and insurance.¹⁴⁹

2.2.3 Condominium Rights

Another model that is widely used for three-dimensional property division is the use of (2) *condominium rights*. Common terms for this type of 3D property rights for apartment ownership are “condominium” and “strata title”. There is no general term existing in international law, but all countries have their own more or less suitable name for it, such as *Wohnungseigentum*, *communio pro indiviso*, *copropriété*, *Horizontaleigentum*, *propiedad par pesos*, etc.¹⁵⁰ The term condominium perhaps is the most common denomination used for this type of ownership comprising individual ownership of dwellings in one building, not just in American English, but more in general internationally.¹⁵¹ It is derived from the common law,¹⁵² but is used in both civil law and common law countries, and is called strata title in countries with title registration systems, which are mostly common law countries.¹⁵³ The term condominium is used in this thesis to more generally describe this form. “Apartment ownership” is not as appropriate in the sense that these units are not just used for residential purposes, while “horizontal property” or “ownership of storeys” are limited in the way that the unit is subdivided both vertically and horizontally and may contain parts of one or several storeys, and strata title refers more to the document of ownership than ownership of the property itself.¹⁵⁴

The condominium model can be seen more as a sharing model than an individual one. Co-ownership is a necessary part of this model, as well as a certain framework for the relations.¹⁵⁵ The condominium is owned, and connected to it is a share in the common property. The condominiums are regarded ownership-wise as owning land. They are registered as independent units and can be owner-registered and mortgaged.¹⁵⁶ The condominium right must relate to a surface parcel on which the building containing these rights is

¹⁴⁹ Powell and Rohan (1993), Vol 2A, Appendix 18A-2.

¹⁵⁰ Bärman and Pick (2001), p. 28.

¹⁵¹ Victorin, Lilleholt, Årgale, Paal and Vainauskas (2001), p. 9.

¹⁵² Reshetyuk (2004), p. 25.

¹⁵³ Mytrofanova (2002), p. 18.

¹⁵⁴ van der Merwe (1994), p. 20.

¹⁵⁵ Sandberg (2001), p. 204.

¹⁵⁶ Bejrums, Julstad and Victorin (2000), pp. 40, 43.

erected.¹⁵⁷ The model is mostly used for multi-story buildings, but also for underground or linearly built structures, natural physical formations, or for bare parcels without any construction at all.¹⁵⁸ While some researchers consider the condominium to be a particular form of 3D property, there are others that do not share this opinion. It can also be considered as some kind of quasi-3D property.¹⁵⁹ A difference from the independent 3D property type, which legally is completely separated from the land parcel, is that the condominium ownership always includes a share in the related land parcel. Another distinction that can be made in some legislation is that separate buildings can be established as 3D property, and parts of one common building are arranged as condominiums.¹⁶⁰ This cooperative model interferes with the ability of the parties to design their property units as they wish, unlike the independent model, and it enforces a particular framework with an unavoidable measure of cooperation.¹⁶¹ At the same time as the condominium contains a certain limitation of private property rights, there are advantages of having clear and reasonable rules for managing the common elements for the benefit of all owners. By condominium is often meant a residence, but they cannot be equated. Condominiums in most countries are used for residential purposes, but in some countries, such as Germany, Austria, Switzerland and Denmark, they can also be used for commercial and industrial purposes.¹⁶² The flexibility in the common law models allows implementing both the air space rights model and the condominium model within the legislation of one country, such as in British Columbia in Canada¹⁶³ and New South Wales in Australia. These types can exist within the same building. The term “lollipop condominiums” is sometimes used for such cases where there is a division between layers that are subject to the condominium regime and layers that are independent and do not form part of the condominium.¹⁶⁴ The part strata form in New South Wales is an example of that type.

Even though condominium forms vary between countries, a common feature is the possibility to transfer and file liens on the apartment. Also common is the right for the owners to use their own apartments, as well as the ground and common property. In most cases, there are also rules for management of common property.¹⁶⁵ The rules for condominiums differ between countries, but there are certain common features. There is a need for

¹⁵⁷ Stoter (2004), p. 68.

¹⁵⁸ Sandberg (2001), p. 204.

¹⁵⁹ Reshetyuk (2004), p. 25.

¹⁶⁰ Onsrud (2001), pp. 193, 197.

¹⁶¹ Sandberg (2003), p. 138.

¹⁶² Mytrofanova (2001), pp. 21, 37.

¹⁶³ Mytrofanova (2002), p. 38.

¹⁶⁴ Sandberg (2003), p. 144.

¹⁶⁵ Brattström (1999), p. 14.

cooperation between the owners that comes from the fact that there are common facilities serving the various units in the building. The areas of cooperation include such things as support, passage, drainage and piping.¹⁶⁶ Common for most forms of condominiums is thus that there are certain demands on how to manage the common property and other ways of coordination between the condominium owners. This management can be done by an association in which all condominium owners are members, where they take care of the management themselves or let a professional manager handle this. The rules for management usually differ in details, as well as regulations for how to keep a good state of order within the building.¹⁶⁷

There are two different systems for how the apartment unit is owned. One is (2)(a) *condominium ownership*, also called the dual¹⁶⁸ or dualistic system,¹⁶⁹ or the individual ownership model,¹⁷⁰ where the apartment is owned independently like a piece of land and is regarded as a real property unit, while the land and the common parts of the building are jointly owned. Belonging to the condominium is a share in the common areas, such as stairs and ground. This can be described as a compulsory co-ownership.¹⁷¹ The condominium and the share in common property are treated as one unit legally. This type of co-ownership can also be called divided, since the right of ownership is apportioned among the co-owners in fractions, and where each fraction comprises a physically divided private portion and a share of the common portions.¹⁷² This system is used in almost all Roman law¹⁷³ countries such as Spain and France, as well as in Germany, Denmark, South and Central America,¹⁷⁴ Australia and Canada. Germany, however, has a special standing in this matter in the sense that apartment ownership is seen as a special form of co-ownership, where full ownership is granted with regard to a clearly localized part of the common property.¹⁷⁵ In the other type, the (2)(b) *condominium user right*, also called the monistic system,¹⁷⁶ the unitary system,¹⁷⁷ or the co-ownership model,¹⁷⁸ the building and the surrounding grounds are owned jointly by the condominium owners. These owners only own a certain share in the common property and connected to that share is a permanent exclusive

¹⁶⁶ Sandberg (2003), p. 142.

¹⁶⁷ Bejrum, Julstad and Victorin (2000), pp. 40, 43.

¹⁶⁸ Stoter (2004), p. 32.

¹⁶⁹ van Oosterom, Ploeger and Stoter (2005), p. 10.

¹⁷⁰ Lilleholt et al. (2002), p. 29.

¹⁷¹ Stoter (2004), p. 32.

¹⁷² Mytrofanova (2002), pp. 19-20.

¹⁷³ Bärman, Pick and Merle (2003), p. 36.

¹⁷⁴ Ibid.

¹⁷⁵ van der Merwe (1994), pp. 24-25.

¹⁷⁶ van der Molen (2001), p. 60.

¹⁷⁷ Stoter (2004), p. 33.

¹⁷⁸ Lilleholt et al. (2002), p. 29.

right to use a certain condominium apartment in the building. The share and the right to use the condominium are treated as one unit. This type of co-ownership can be called undivided, since the right of ownership is not accompanied by a physical division of the property.¹⁷⁹ This is the system used in countries such as the Netherlands, Austria,¹⁸⁰ Switzerland¹⁸¹ and Norway.¹⁸²

A special form of condominium user right is a *tenancy in common*, a system used for securing space within a building. This exists in almost all Anglo-American systems, such as in California, Canada, Australia and New Zealand.¹⁸³ Generally, if parties own property as tenants in common, they are each regarded as owning an undivided interest in the entire property, where each has the right to use and possess the entire property without the possibility of preventing any of the other owners to do the same.¹⁸⁴ By reciprocal agreement, each purchaser then gets an exclusive right to occupy a specific apartment.¹⁸⁵ The equivalent to tenancy in common within Civil Law is ownership in indivision, where each of the co-owners has an undivided ownership in the whole property.¹⁸⁶ The tenancy in common form is still in use in New South Wales in Australia, but because of the greater convenience and security that comes with the strata title system, is rarely used nowadays. This form provides a system where some people hold title as tenants in common in undivided shares in the land where the building is erected. By this they also have a share in the building, which can be equal or unequal, but usually proportionate to the value of the respective apartment occupied. This means, however, that a person has no right to occupy a certain part of the building, but only a right as co-owners to possess the entirety of the land and the building together with the other co-owners. To solve the occupancy problem and different management issues between these owners, it is necessary to make agreements. A right to exclusively occupy a part of the building is given by such an agreement, no longer the right to occupy the entirety of it. The management agreement usually also contains provisions regulating matters concerning sharing of rates and maintenance, the right to use common areas and common services, practical matters concerning noise and keeping of animals, procedural matters for the managing agent, management committee and meetings. There usually is a restriction in the agreement prohibiting parties from selling their interest as tenants in common without requiring the purchaser to enter into a covenant to observe the agreement terms, since the restrictions cannot bind a purchaser

¹⁷⁹ Mytrofanova (2002), p. 19.

¹⁸⁰ Stoter (2004), p. 33.

¹⁸¹ Ibid.

¹⁸² Bejrums, Julstad and Victorin (2000), pp. 40-42.

¹⁸³ van der Merwe (1994), p. 184.

¹⁸⁴ Tracht (2000), p. 63.

¹⁸⁵ van der Merwe (1994), p. 183.

¹⁸⁶ Tracht (2000), p. 64.

that has not signed the agreement. With the tenancy in common system, it is also possible to let everyone lease their respective area of the building instead of just being licensed to occupy it under the agreement. This gives the person a leasehold interest in a particular part of the building, and the possibility for positive covenants to be inserted into the leases is enforced. This type can also be subject to time-share schemes, or temporary multi-property,¹⁸⁷ where several people may purchase the right to occupy a specific apartment for a certain period of time each year.¹⁸⁸

The American tenancy in common is described as the unity of possession by two or more owners, where all co-owners share a single right to possession of the entire property interest, and in addition, each has a separate claim to a fractional share of this interest. These fractional shares are undivided and thus not assigned to any particular part of the property. If the tenants in common want to partition the co-tenancy, this has to be done privately without statutory support. This type does not have any right to survivorship, i.e. co-tenants have no right of succession as to the interest of other co-tenants. When compared with the condominium form, the interest that the condominium owner has in the common areas is very similar to tenancy in common, but for condominiums, there is legislation regulating and restricting co-tenant rights concerning such matters as partition and transfer.¹⁸⁹

Time-sharing has been described as a fourth dimension of ownership, where the two-dimensional ownership of land and the three-dimensional ownership of condominiums are supplemented by a division of time. Most time-share schemes are structured as condominiums. It is a form of interval ownership that has gained increasing popularity, especially in resort buildings, both for multi-unit buildings and single homes. It exists, for example, in the United States, Great Britain, Europe, Mexico, the Caribbean, Australia and Japan. With this form, several parties receive the right to use one apartment at different times. These persons successively have the exclusive right to occupy the same apartment for a specific and determinable recurrent period of time. Each owner pays a share of the common expenses as a fee. In addition to resorts, this may also be used in other sectors to achieve better utilization of units in an office block, parking garage, etc.¹⁹⁰

There is also a type of (2)(c) *condominium leasehold*, which exists in some Anglo-American systems. This comes close to ownership by an arrangement where a long-term or renewable lease is granted for apartments in a multi-unit building. When it is long-term, freely assignable, and the rent not related to the market development, it comes very close to a freehold property.¹⁹¹ The form

¹⁸⁷ Bärmann, Pick and Merle (2003), p. 37.

¹⁸⁸ Butt (2001), pp. 701-703, 728.

¹⁸⁹ Powell and Rohan (1993), Vol. 4A, 601[1], 601[2], 602[10], 607[2].

¹⁹⁰ van der Merwe (1994), pp. 19, 179-180.

¹⁹¹ Ibid. at p. 182.

existed in England, where possession of condominiums is possible in a similar way as with land, but condominiums are granted with leasehold.¹⁹² This type has been more popular in Great Britain than freehold schemes.¹⁹³ This was necessary to be able to provide regulations for cooperation between residents.¹⁹⁴ With the commonhold system, there were difficulties with the imposition of obligations on the owners of apartments, since if apartments were sold freehold, the burden of positive covenants imposed for the purposes of keeping in repair etc. would not pass to subsequent owners. That problem was overcome by selling the apartments leasehold instead of freehold.¹⁹⁵ A reform was recently made in England with the introduction of the Commonhold and Leasehold Reform Act in 2002. A new form of tenure, called commonhold, was introduced, giving a possibility of owning apartments in England that did not exist before.¹⁹⁶ This type can also be assigned to the condominium ownership type.¹⁹⁷ This system is available for new developments, and existing leaseholds can be converted into commonholds if all leaseholders agree to participate. There is also a new right to manage buildings, which enables leaseholders to take over the management of their building.¹⁹⁸ This new system is thus similar to condominium or strata title in other countries.

2.2.4 Indirect Forms of Ownership

There are other ways to obtain exclusive possession of an apartment without owning it as property, (3) *indirect forms of ownership*. Characteristic for such forms is that there is a legal person of some kind, which could be a co-operative, an association, a society or a company of some sort.¹⁹⁹ This legal person is the formal owner, and as such stands between the resident and the property.²⁰⁰ It holds the title to the premises and grants rights of occupancy to apartments by proprietary leases or other ownership-like rights, while the collective entity has the function of management and making sure that the expenses are shared proportionally.²⁰¹ Membership in such an association gives the right to use an apartment in the building. A type of user right between owning and leasing is

¹⁹² Bejrum, Julstad and Victorin (2000), p. 43.

¹⁹³ van der Merwe (1994), p. 182.

¹⁹⁴ Bejrum, Julstad and Victorin (2000), p. 43.

¹⁹⁵ Christudason (1996), p. 345.

¹⁹⁶ Office of the Deputy Prime Minister, UK (2002).

¹⁹⁷ van der Molen (2001), p. 61.

¹⁹⁸ Office of the Deputy Prime Minister, UK (2002).

¹⁹⁹ Lilleholt et al. (2002), p. 29.

²⁰⁰ Nordisk Ministerråd (1997), p. 22.

²⁰¹ van der Merwe (1994), p. 185.

(3)(a) *tenant-ownership*, which exists in Sweden. A tenant-owner association owns the building in which the members live. Because of this, the members have to provide a large amount of the capital themselves. The tenant-ownership is valid without limitation in time. It can be regarded as a kind of indirect ownership, close to the condominium system, but while the condominium is property on its own, or represents a share of a property, the tenant-ownership represents a share in the capital of the association.²⁰² While the contribution to the capital is the financial part of the right in the tenant-owner association, the other part is the membership of the association, to which the right to use the dwelling is connected. A similar form is the American cooperative, where a member buys into a corporation or association that owns the entire building, and where the member pays a monthly maintenance charge for mortgage payments, operation, repair, taxes, etc.²⁰³

There is also a (3)(b) *limited company* system, also called stock cooperative or share-block scheme. This exists, for example, in Finland,²⁰⁴ but also in several other countries. In buildings that are owned by housing stock companies, each tenant is granted an exclusive user right for a particular apartment by owning stocks in the company.²⁰⁵ This right is usually based on some form of use agreement or lease between the shareholder and the company.²⁰⁶ Since the company owns the building, there is an indirect ownership of the apartments for the tenants.²⁰⁷ Such a company normally is for non-profit.²⁰⁸ The rights and obligations between the shareholder and the company are regulated by the conditions in the offering plan, the articles of association, the by-laws and resolutions of the company, as well as the agreement between the parties.²⁰⁹ The shareholder makes the important decisions, regarding such matters as maintenance of the building.²¹⁰ Unlike the condominium form, the shareholder only has a personal right against the company and no real right in the apartment, and does not acquire an undivided share in the common parts of the building, since the company remains the owner of land and common parts. A similar type also exists in the United States and Canada, where a business trust owns and manages the property instead of a limited company.²¹¹

Another example of the limited company form is the company title in New South Wales, Australia. This was the most popular form of high-rise ownership

²⁰² Bejrum, Julstad and Victorin (2000), pp. 11-12, 46.

²⁰³ American Bar Association (1995), Chap. 2.

²⁰⁴ Viitanen (2001), p. 93.

²⁰⁵ Nordisk ministerråd (1997), p. 38.

²⁰⁶ van der Merwe (1994), pp. 186-189.

²⁰⁷ Nordisk ministerråd (1997), p. 38.

²⁰⁸ Viitanen (2001), p. 94.

²⁰⁹ van der Merwe (1994), pp. 186-189.

²¹⁰ Viitanen (2001), p. 94.

²¹¹ van der Merwe (1994), pp. 186-189.

in New South Wales before the introduction of strata title, but it is not widely used today. With this form, the land and building are owned by a company that is incorporated for that purpose. The constitution of the company gives the owner of specified blocks of shares in the company the exclusive right to occupy a particular part of the building. There are also provisions regulating matters regarding common management, such as payment for rates, maintenance, the right to use in common with other shareholders common parts of the building such as stairways, the election of some shareholders as directors of the company, the powers and duties of the directors, and meetings of the company and the board. Simply acquiring shares does not give ownership to the part of the building that the shares entitle someone to occupy; only a contractual right is acquired against the company arising from the shares. For example, there is a possibility of the company granting each shareholder a lease of the relevant part of the building, which gives the shareholder a proprietary interest as tenant. The company title can also exist in the time-share form.²¹²

There are forms of (3)(c) *housing cooperatives*, for example in Denmark and Canada. The intention is to grant the person occupying the apartment something that more or less closely approximates ownership.²¹³ The building and land are owned by private or non-profit housing societies that let the apartments to the people living in a building, and for that the members pay a deposit, often in the form of a loan,²¹⁴ which will be returned when moving out.²¹⁵ The members are thus not able to sell their interest and, when they move out, are only entitled to the return of their original investment.²¹⁶ The user right is not limited in time, but the right cannot be transferred or used for lien. The tenants receive a considerable influence on the management.²¹⁷ This form is often seen as a way to provide housing for people with lower incomes.²¹⁸ The boundary between co-operative apartments and rented apartments is not completely clear. In the Danish case, for example, private co-operative housing societies are regarded as indirectly owned housing, while the public non-profit housing organisations may be regarded as rented housing. One important difference is that co-operative shareholders run the risk of losing their shares of the housing society's assets, as well as being jointly liable for certain charges and encumbrances on the real property of the housing society even after a liquidation of the society.²¹⁹ In Iceland, there is a similar kind of non-profit housing utilities. In Finland, there is a form of tenant-

²¹² Butt (2001), pp. 703-704, 729.

²¹³ van der Merwe (1994), pp. 185-186.

²¹⁴ Ibid. at p. 186.

²¹⁵ Bejrum, Julstad and Victorin (2000), pp. 44-45.

²¹⁶ van der Merwe (1994), p. 186.

²¹⁷ Bejrum, Julstad and Victorin (2000), pp. 44-45.

²¹⁸ van der Merwe (1994), p. 186.

²¹⁹ Nordic Council of Ministers (1998), pp. 22, 77.

ownership, which provides social housing. It is a user right with deposit and is provided on social grounds.²²⁰

2.2.5 Granted Rights

Three-dimensional use of land is also made possible through (4) *granted rights*, such as (4)(a) *leaseholds*, (4)(b) *servitudes* or *easements* and (4)(c) *other rights*. This is a substitute for actually splitting the ownership into 3D units. It is often used for underground purposes, such as passage rights, transportation or piping. The use of a lease or easement makes it necessary to subject the boundaries of vertical 3D units to the original borders of the 2D parcel above ground. It also limits the possibility of sub-splitting the 3D unit further, and the freedom of freely designating the reciprocal relationship between the owners. This model is more suitable when the intention is to use, rather than to take possession of, some space.²²¹ Where civil law countries more commonly use different restricted rights of ownership such as usufruct, building or surface rights, common law countries tend to choose the solution of long leasing agreements.²²² The building or surface right, or right of superficies, is granted in buildings or other constructions fixed to the land on or above land belonging to another owner. The holder of this right is the owner of the construction, which restricts the rights of the original owner of the land.²²³ This has been a common form for socialist countries, where the occupants of the apartments have the superficial right of personal property in their apartments, but no ownership in the land.²²⁴ The lease arrangements provide ownership rights that are less than absolute, such as the right to occupy land for a limited period of time, a right to occupy only part of a building, or a building lease.²²⁵

Rent is a form of property right that can be used to occupy a part of a building, but without any ownership rights. The main differences from the condominium type are the form of ownership, responsibility for management, etc. Ownership and provision of capital, as well as the risk, are in the hands of someone other than the tenant and the association.²²⁶ A tenancy agreement is usually set up between the tenant and the owner.

²²⁰ Bejrums, Julstad and Victorin (2000), pp. 44-45.

²²¹ Sandberg (2001), p. 206.

²²² Mytrofanova (2002), p. 13.

²²³ Stoter (2004), p. 30.

²²⁴ Bärmann, Pick and Merle (2003), p. 37.

²²⁵ Mytrofanova (2002), p. 13.

²²⁶ Bejrums, Julstad and Victorin (2000), p. 37.

2.3 International Overview

To exemplify the forms of 3D property rights presented above, and to illustrate how these forms are spread around the world, an international overview is given below.

Researchers believe that people have been living in apartments, maisonettes, or condominiums for hundreds and even thousands of years.²²⁷ The origins appear to be in the oriental legal systems, several thousand years before the Christian era.²²⁸ The ancient Hebrews seem to have used a type of condominium 2500 years ago, said to be a record of sale of part of a building in ancient Babylon more than 2000 years ago. There is also evidence of use, and possibly the sale, of maisonettes by the early Greeks, Muslims and Egyptians.²²⁹

It has been debated whether apartment ownership existed within Roman law.²³⁰ The maxim *superficies solo cedit* prevailed, implying that the owner of the land is also the owner of the building, which in turn is considered as one unit,²³¹ thus not accepting the division of ownership in the horizontal plane. However, the condominium concept was well known.²³² Germanic law, on the other hand, considered ownership as relative and divisible, and allowed ownership of separate storeys or rooms within a building.²³³ During the Middle Ages, separate ownership of floors and rooms was common in various parts of Europe,²³⁴ especially in Central Europe.²³⁵ In Germany, apartment ownership appeared already in the twelfth century, and countries such as France, Italy, Switzerland and the Southern Netherlands followed. The first major condominium code in France was introduced with Code Napoleon in 1804, where an article in the Civil Code allowed for apartment ownership.²³⁶ Some of the countries adopting the French Civil Code also incorporated the provision on separate ownership of floors, but since only the most basic questions regarding repair and maintenance of the common property were regulated, other legal principles had to be developed by the case law and doctrine. It became common to settle questions concerning the rights of the owners by special agreement. The most serious among the existing problems was that the special agreement did not bind successors in title.²³⁷ The earlier forms of apartment

²²⁷ Bugden, Allen and CCH Conveyancing Law (1997), [1-000].

²²⁸ van der Merwe (1994), p. 3.

²²⁹ Bugden, Allen and CCH Conveyancing Law (1997), [1-000].

²³⁰ Blok (1982), p. 1.

²³¹ van der Merwe (1994), p. 3.

²³² Vrublevsky et al. (2003), p. 15.

²³³ van der Merwe (1994), pp. 3-4.

²³⁴ Leyser (1958), p. 33.

²³⁵ Janek (2003), p. 17.

²³⁶ van der Merwe (1994), pp. 3-5.

²³⁷ Leyser (1958), pp. 34-35.

ownership created many problems connected to the basic conflict with the principles of early Roman law.²³⁸ This type of ownership was criticized due to the many disputes caused by the excessive splitting up of the ownership in houses, as well as the lack of clear rules for repair and maintenance of the building.²³⁹ This eventually led to the objection in principle to apartment ownership in many European countries, and in Germany, it even culminated into a prohibition of the creation of separate apartment ownership during 1900-1951.²⁴⁰ Historically, the apartment is a phenomenon that most of all exists in Roman law, and more scarcely in Anglo-Saxon law, where it was introduced quite late and where indirect forms of ownership are more common.²⁴¹ However, forms of apartment ownership existed quite early in Great Britain and Scotland had a form similar to the German *Stockwerkseigentum*.²⁴²

At present, apartment ownership is a phenomenon that exists all over the world, even in the former Communist states. It started developing mainly after World War I, when the housing shortage led to the introduction of apartment ownership in many Western countries and the recognition of the need to establish proper statutes for countries already having some form of this ownership type.²⁴³ It is widely spread in the Roman countries, starting from South and Central Europe, as well as in South and Central America.²⁴⁴ Most of the countries of Western Europe enacted enabling legislation on subdivided buildings between 1930 and 1955.²⁴⁵ Most countries in Latin America and the Caribbean also have such legislation, all with influence from Spanish, Portuguese and French statutes.²⁴⁶ Special Acts for apartment ownership have been introduced, for example, in Belgium (1924), Hungary (1924),²⁴⁷ Romania (1927), Brazil (1928), Greece (1929), Poland (1934), Italy (1934), Bulgaria (1935), Chile (1937), France (1938, new 1965), Spain (1939, new 1960, amended 1988), Uruguay (1946), Peru (1946), Austria (1948, new 1975), Argentina (1948), Colombia (1948), Bolivia (1949), Belgian Congo/Zaire (1949), Puerto Rico (1951),²⁴⁸ the Netherlands (1951), West Germany (1951),²⁴⁹ Saarland in Germany (1952), Cuba (1952), Panama (1952), Israel (1952), Mexico (1954), Portugal (1955), Ecuador (1959), Venezuela (1959), Guatemala (1959), Iceland

²³⁸ Bugden, Allen and CCH Conveyancing Law (1997), [1-020]

²³⁹ Leyser (1958), p. 33.

²⁴⁰ Bugden, Allen and CCH Conveyancing Law (1997), [1-020]

²⁴¹ Utredningen om tredimensionellt fastighetsutnyttjande (1994), p. 2.

²⁴² van der Merwe (1994), pp. 4-5.

²⁴³ Bärmann, Pick and Merle (2003), p. 25; van der Merwe (1994), pp. 6-13.

²⁴⁴ Blok (1982), pp. 1-2.

²⁴⁵ Christudason (1996), p. 344.

²⁴⁶ Bärmann, Pick and Merle (2003), p. 25; van der Merwe (1994), pp. 6-13.

²⁴⁷ Blok (1982), p. 1.

²⁴⁸ Bugden, Allen and CCH Conveyancing Law (1997), [1-040].

²⁴⁹ Blok (1982), p. 1.

(1959),²⁵⁰ Paraguay (1960), Ecuador (1960), Lebanon (1962), Switzerland (1963), Honduras (1965), the Bahama Islands (1965), Costa Rica (1966), Czech Republic (1966),²⁵¹ Nicaragua (1971), El Salvador (1972), South-Africa (1972), Haiti (1975)²⁵² and Kuwait (1976).²⁵³ It is also available in former Yugoslavia, such as Slovenia (1991).²⁵⁴ Several older statutes have more recently been supplemented or replaced. In the beginning of the 1990's, the condominium form started to develop in many former socialist countries in Eastern Europe, for example in the Baltic countries Estonia (1994),²⁵⁵ Latvia (1995)²⁵⁶ and Lithuania (2000),²⁵⁷ in Russia, Ukraine and Belarus, as well as in Central Asia and the Caucasus, in countries such as Kyrgyzstan, Uzbekistan, Kazakhstan and Armenia.²⁵⁸ Japan introduced a comprehensive statute for apartment ownership in 1962, with the German, French, Italian, Austrian and South American Acts as examples. However, the country had a less sophisticated form of apartment ownership already from 1898, but this was not extensively used. Korea followed the example of Japan with legislation in 1984.²⁵⁹ The system in Denmark, introduced in 1966, has been inspired by the German *Wohnungseigentum* system.²⁶⁰ The German condominium model has also influenced the Estonian apartment ownership legislation,²⁶¹ as well as to some extent, the Sectional Titles Act in South Africa.²⁶² Luxembourg introduced their Act in 1975, based on French law. A condominium code was adopted in 1866 in Quebec, Canada. A new Act was introduced there in 1969, to a large extent based on the French laws. Turkey introduced special legislation in 1965. Ownership of parts of buildings is also allowed in Ethiopia, Tunisia and Zaire.²⁶³

Rules on 3D property rights also fit well within the Anglo-American legal systems.²⁶⁴ While in Cuba a Horizontal Property Act was passed in 1952,²⁶⁵ a similar concept was introduced in the United States in 1962,²⁶⁶ based on the

²⁵⁰ Blok (1982), p. 1.

²⁵¹ Janek (2003), p. 21.

²⁵² van der Merwe (1994), p. 11.

²⁵³ Ibid. at p. 12.

²⁵⁴ Rabenhorst (2001a), p. 2.

²⁵⁵ Victorin et al. (2001), p. 12.

²⁵⁶ Ibid. at p. 14.

²⁵⁷ Ibid. at p. 16.

²⁵⁸ Vrublevsky et al. (2003), p. 14.

²⁵⁹ Bärmann, Pick and Merle (2003), p. 25; van der Merwe (1994), pp. 6-13.

²⁶⁰ Blok (1982), p. 25.

²⁶¹ Victorin et al. (2001), p. 20.

²⁶² van der Merwe (2004), p. 20.

²⁶³ Bärmann, Pick and Merle (2003), p. 25; van der Merwe (1994), pp. 6-13.

²⁶⁴ Bärmann, Pick and Merle (2003), p. 25.

²⁶⁵ Bugden, Allen and CCH Conveyancing Law (1997), [1-040].

²⁶⁶ McGrath (1993), p. 1.2.

condominium statute enacted in Puerto Rico in 1959.²⁶⁷ The statute in Puerto Rico borrowed extensively from both European and Latin American experiences.²⁶⁸ The American state condominium statutes are different from the European and heavily oriented towards financing.²⁶⁹ The housing shortage after World War I resulted in these condominium statutes, which closely followed the concepts of the Cuban legislation, beginning with Puerto Rico in 1958 and quickly spreading across the country.²⁷⁰ The commonhold sector there grew by 200% between 1980 and 1992.²⁷¹ A number of American states have recently substantially adopted the uniform condominium and planned communities' laws.²⁷² The Uniform Condominium Act is considered one of the most sophisticated examples of condominium legislation in the world.²⁷³ All of the states within the United States from 1969²⁷⁴ have statutes such as Condominium Acts or Horizontal Ownership Acts. In comparison with the civil law condominium models, the common law model is usually more flexible and has the possibility of using condominium ownership for division of different kind of real estate for different purposes, both under and above ground and for residential, commercial, industrial or a combination of such purposes.²⁷⁵

The first system of apartment ownership under English law seems to have been of Scottish origin from about three or four hundred years ago. It was part of the process that led to the present strata title system in Australia.²⁷⁶ Victoria was a pioneer when it comes to strata titles in Australia, and forms of strata titles have been operative there since 1953, compared with 1961 in New South Wales.²⁷⁷ However, the legislation used for this in Victoria between 1953 and 1960 was the rudimentary Transfer of Land Act.²⁷⁸ Strata title or Commonhold Acts were introduced in several countries and Australian states, starting with New South Wales in 1961. In Victoria the concept of subdivision by way of strata title began in 1967.²⁷⁹ The New South Wales Conveyancing (Strata Title) Act of 1961 was the first statute in the Commonwealth to introduce enabling legislation dealing with subdivided buildings.²⁸⁰ Other Australian states,

²⁶⁷ American Bar Association (1995), Chap. 2.

²⁶⁸ van der Merwe (1994), p. 9.

²⁶⁹ Bugden, Allen and CCH Conveyancing Law (1997), [1-040].

²⁷⁰ Tracht (2000), p. 74.

²⁷¹ McGrath (1993), p. 1.2.

²⁷² Bugden, Allen and CCH Conveyancing Law (1997), [1-040].

²⁷³ van der Merwe (1994), p. 15.

²⁷⁴ *Ibid.* at p. 9.

²⁷⁵ Mytrofanova (2002), p. 25.

²⁷⁶ Bugden, Allen and CCH Conveyancing Law (1997), [1-060].

²⁷⁷ McGrath (1993), p. 1.2.

²⁷⁸ Victoria, Parliamentary Debates (session 1966-67, vol 286), p. 3554.

²⁷⁹ McGrath (1993), p. 1.2.

²⁸⁰ Christudason (1996), pp. 344-345.

Singapore and Canada have also adopted this concept, and most of the provisions of the statutes of Victoria, Tasmania, Queensland, Western Australia, South Australia and Australian Capital Territory,²⁸¹ as well as British Columbia, Alberta and Saskatchewan²⁸² in Canada, are based on this Act.²⁸³ Other states in Canada that also allow apartment ownership, such as Ontario, have developed statutes with different characteristics.²⁸⁴ The legislation for condominium issues in the Canadian provinces is rather developed.²⁸⁵ For all these cases, the system has become a success in quantitative terms. Commonhold tenure in 1993 was estimated to apply to 300 000 dwellings in New South Wales, which is the largest proportion in any state of Australia.²⁸⁶ Other similar systems can be found with the law of tenement in Scotland, unit titles in New Zealand and a Sectional Titles Act in South Africa,²⁸⁷ also based on the New South Wales statute.²⁸⁸ It also exists in Kenya.²⁸⁹

Singapore introduced apartment ownership by the Land Titles (Strata) Act in 1967 (corresponding to Cap. 158 Revised Edition of Singapore Statutes 1988), basing it also on the Act in New South Wales. Strata title legislation in Singapore consists of re-enactments of the Australian (New South Wales) legislation, with minor modifications to suit local conditions.²⁹⁰ It is considered one of the most sophisticated statutes for apartment ownership in Asia.²⁹¹ England has recently introduced this type of legislation with its concept of commonhold, and from 2002 there is a Commonhold and Leasehold Reform Act.²⁹² Even though the variety of the different legal statutes and regulations is rather great, there nevertheless are certain common fundamental rules necessary for the condominium ownership to be established and to function, and many countries incorporate the related legislative provisions into their own legislation.²⁹³ Some common features can be found in these different jurisdictions based on the New South Wales concept, such as that all the statutes are comprehensive codes, all determine the property interests of the owners, and all provide for an administrative framework for the management of the property, for the regulation of the conduct of the owners, for the

²⁸¹ van der Merwe (1994), pp. 8-9.

²⁸² Ibid. at p. 9.

²⁸³ Christudason (1996), pp. 344-345.

²⁸⁴ van der Merwe (1994), p. 9.

²⁸⁵ Mytrofanova (2002), p. 25.

²⁸⁶ McGrath (1993), p. 1.2.

²⁸⁷ Department for Constitutional Affairs, UK (2002).

²⁸⁸ McGrath (1993), p. 1.2.

²⁸⁹ Reshetyuk (2004), p. 8.

²⁹⁰ Christudason (1996), pp. 344-345.

²⁹¹ van der Merwe (1994), p. 13.

²⁹² Christudason (1996), pp. 344-345.

²⁹³ Mytrofanova (2002), p. 25.

payment of the common expenses by the owners, and for the termination of the schemes.²⁹⁴

The degree of influence on the legislation of other countries varies. The modern statutes on apartment ownership that have had the most influence are those from Belgium, Italy, Greece, Romania and Poland. The Spanish legislation has had much influence on the statutes in Latin America. The practical experiences in Germany, France and Denmark have enriched each other, as well as influenced other countries, such as Japan. The most influential Anglo-American statutes can be found in New South Wales in Australia and Ontario in Canada. The statute of New South Wales influenced, for example, early Canadian statutes, as well as South Africa and New Zealand.²⁹⁵ The system of New South Wales has been adopted also by other Australian states as well as in several other countries, and still delegations from other countries come to study their system to see how it is used and how to adapt it to their specific situations.²⁹⁶ When Germany was about to introduce their condominium legislation, they looked at the experiences of other countries, which then in their turn had to think over their systems and were influenced by the German legislation, both in theory and in practice.²⁹⁷ Among these countries are Switzerland, France, the Netherlands and Spain.²⁹⁸

In different parts of the world, there are different terms for horizontal subdivisions or subdivided buildings, when title to land can relate to a slice of defined area or cubic space that is not grounded on the surface layer of the earth and that is divided both horizontally and vertically.²⁹⁹ For the early Western European systems, more complicated terms were used, such as “division of houses according to storeys and apartments”, “co-ownership of houses according to storeys”, “houses in common ownership”, “community of houses divided by storeys” and “a house with various owners”. These were later changed to simpler terms, such as “apartment ownership” or “flat ownership”, “ownership of storeys” or “horizontal property”.³⁰⁰ The term condominium (Latin for co-ownership, or literally joint domains), “condominium ownership” or “condominium property”³⁰¹ is used in North America and Italy. The term strata title is used in New South Wales, British Columbia, Alberta and occasionally in England. The term “horizontal property” is used in South America and occasionally in Europe and in some statutes of the United

²⁹⁴ Christudason (1996), pp. 344-345.

²⁹⁵ van der Merwe (1994), p. 14.

²⁹⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly (30 October 2002), p. 6179.

²⁹⁷ van der Merwe (1994), p. 14.

²⁹⁸ Bärman (1976), p. Ia.

²⁹⁹ Christudason (1996), pp. 343-344.

³⁰⁰ van der Merwe (1994), pp. 19-20.

³⁰¹ *Ibid.* at p. 20.

States. The term “ownership of flats” is used in England, Australia and New Zealand to describe developments that are initiated in the absence of enabling legislation. The term “multi-storey building” is used in Hong Kong.³⁰² The Japanese term is “compartmented ownership of buildings”, while “sectional ownership” is preferred in South Africa. Other terms used around the world are “unit ownership” or “unit title”, and “ownership of space”.³⁰³

Independent 3D property in the form of stratum or air space, not limited to apartment ownership, may be found in several countries, such as Australia, Canada and now also in Sweden.³⁰⁴ The Swedish proposal was inspired mainly by the Australian and Canadian 3D property legislation.³⁰⁵

The form of timesharing is also internationally common with the German *Wohnungseigentum* acting as a model for the Act in Switzerland (1963, in force 1965), as well as for the newer acts in Spain, France and the Netherlands.³⁰⁶

³⁰² Christudason (1996), pp. 343-344.

³⁰³ van der Merwe (1994), p. 20.

³⁰⁴ SOU 1996:87, p. 98.

³⁰⁵ Lilleholt et al. (2002), p. 31.

³⁰⁶ Bärman, Pick and Merle (2003), p. 25.

3. The Characteristics of 3D Property

3.1 Introduction

Even though 3D property is just a form of real property with all the specific features it entails, it has its own characteristics and peculiarities that are potential sources of problems. The condominium is just one type of 3D property right, but the issues connected with it are also relevant for other forms, such as the independent 3D property type. In cases such as New South Wales and Victoria in Australia, where the forms are interconnected, this relevance becomes even more evident. The reason why the description below is based on the condominium case is the fact that there is more material and experience available about this type, and also that the condominium, due to its higher degree of interdependence with neighbouring parcels, includes a larger number of important aspects, from among which can be chosen those also relevant for the independent 3D property form.

The aspects described below in section 3.2 are based on the principles given by Elinor Ostrom in her work on governing the commons,³⁰⁷ while the remainder of the chapter is based on aspects discussed by experts dealing with this subject, for example in the section on apartment ownership in the *International Encyclopedia of Comparative Law*.³⁰⁸

3.2 Interdependence as a Fundamental Feature

Management is a fundamental aspect for 3D property relating to the interdependence between such units. In all communal ownership, such as the condominium, it is necessary to deal with externality problems that are common to all forms of co-ownership. For example, monitoring for improper behaviour becomes much more difficult when there are a larger number of co-owners. Such problems have even caused most attempts at real communal ownership, such as collectivized farms, to fail, while others, such as kibbutzim, have survived. In order for cooperative forms to survive, there must be effective mechanisms to promote effort and cooperation by the members.

³⁰⁷ Ostrom (1990).

³⁰⁸ van der Merwe (1994).

Many co-ownership schemes also rely on norms and enforcement mechanisms outside the formal legal structure.³⁰⁹

Elinor Ostrom has presented a model for governing common-pool resources.³¹⁰ By this term she refers to a resource system that excludes others from obtaining benefits from its use. She describes the processes of organising and governing such common-pool resources, and draws from some examples of those conclusions concerning what features that are needed for the creation of successful long-enduring such institutions. Whether or not the resources are sustainable does not depend on the specific operational rules for it. There are differences in those rules existing due to the fact that the physical systems differ, as do the cultural views, and the economic and political relationships. To be able to explain the reasons for why certain resources are robust, she gives a set of design principles that can be found in common for those resources.³¹¹

*Table 3.1. Design Principles for Governing Common-pool Resources.*³¹²

	Design Principles for Governing Common-pool Resources
1.	Clearly defined boundaries
2.	Congruence between appropriation and provision rules and local conditions
3.	Collective-choice arrangements
4.	Monitoring
5.	Graduated sanctions
6.	Conflict-resolution mechanisms
7.	Minimal recognition of rights to organize
8.	Nested enterprises

³⁰⁹ Tracht (2000), pp. 85-86.

³¹⁰ Ostrom (1990).

³¹¹ Ibid. at p. 89.

³¹² Ibid. at p. 90.

The first of these design principles is that there must be clearly defined boundaries. The boundaries must be clearly defined both when it comes to who has the right to withdraw resource units, and the boundaries of the common-pool resource itself. This can be seen as a first step in organising for collective action. If these boundaries are uncertain, no one knows what is being managed and for whom.³¹³

Another design principle concerns congruence between appropriation and provision rules and local conditions. This implies the importance of well-tailored appropriation rules, reflecting the specific attributes of the particular resource and restricting time, place, technology or quantity of resource units. These must be related to local conditions, and to provision rules requiring labour, materials and money. Such rules help to account for the perseverance of common-pool resources. The rules are used for assessing fees to be paid for maintenance activities, etc. A single set of rules cannot be used for all systems, but have to be adapted to local conditions in order to deal with the particular problems of each system.³¹⁴

Collective-choice arrangements are another important factor. It is important that the individuals affected by the operational rules can participate in modifying these rules. If the individuals interacting can modify the rules over time to better fit the characteristics of their setting, these institutions will be better adopted to local circumstances. There are, however, often problems concerning compliance with the rules. External authorities are not always sufficient to obtain day-to-day enforcement of the rules in use.³¹⁵

Usually reputation and shared norms are insufficient to produce stable cooperative behaviour over the long run, and thus lead to a need for active investments in monitoring and sanctioning activities. Monitoring is therefore mentioned as a design principle. Included in this principle are monitors who actively audit common-pool resource conditions and appropriator behaviour, and who are accountable to the appropriators, or are the appropriators themselves. Connected with this is the principle of graduated sanctions, which are assessed on appropriators who violate operational rules, by other appropriators or officials accountable to the appropriators. In robust self-governing institutions, the monitoring and sanctioning activities are undertaken by the participants themselves, not by external authorities. There may be an unwillingness to undertake mutual monitoring and enforcement due to the relatively high personal costs, but in many long-enduring common-pool resources, the costs of monitoring are low as a result of the rules in use.³¹⁶

The sixth design principle that Ostrom presents deals with conflict-resolution mechanisms. By this she means that appropriators and their officials

³¹³ Ibid. at p. 91.

³¹⁴ Ostrom (1990), p. 92.

³¹⁵ Ibid. at p. 93.

³¹⁶ Ibid. at pp. 93-95.

need rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials. If individuals are to follow certain rules over a longer period of time, there must be some mechanism for discussing and resolving the procedures and sanctions with respect to breaking the rules. It is difficult for a complex system of rules to be maintained over time without conflict-resolution mechanisms.³¹⁷

The last design principle necessary for all long-enduring common-pool resource institutions is minimal recognition of rights to organise. This means that the rights of appropriators to devise their own institutions are not to be challenged by external governmental authorities. If the external governmental officials give recognition to the legitimacy of rules created by the appropriators themselves, the appropriators may be able to enforce the rules themselves.³¹⁸

There is also an eighth design principle for common-pool resources that are part of larger systems, and which concerns nested enterprises. In such common-pool resources appropriation, provision, monitoring, enforcement, conflict resolution and governance activities should be organised in multiple layers of nested enterprises. There can, for example, be three or four nested levels within one complex common-pool resource, and with each also nested in local, regional and national governmental jurisdictions. Since the problems of management of the separate levels are different from each other, it is necessary to establish separate rules at all levels to make such a system complete.³¹⁹

These mentioned design principles for common-pool resources are a valuable tool for evaluating the experience of 3D property rights systems, especially the management questions and the important features within that field. The descriptions below of the condominium concept and its specific features, as well as the descriptions of the different 3D property cases, to a certain extent are based on Ostrom's principles, especially regarding the themes or key factors constituting the sections into which each such chapter has been divided.

3.3 The Nature of the Condominium

The condominium may be regarded as a form of co-ownership, referring to legal relationships of the type where two or more entities are entitled to use and enjoy property with equal rights. The condominium may be regarded as one of the most important and fastest growing areas of co-ownership.³²⁰ It has enjoyed considerable success in Western Europe and North America. There is a wide variety in the detailed structure of condominium laws in Western Europe. Some

³¹⁷ Ibid. at pp. 100-101.

³¹⁸ Ostrom (1990), p. 101.

³¹⁹ Ibid. at pp. 101-102.

³²⁰ Tracht (2000), pp. 62-63, 73.

are very comprehensive and regulate in detail the workings of condominiums, while others are more general and cover in detail only issues that are of public importance. The more general laws, however, normally are accompanied by special guidelines that cover different aspects of establishing and operating condominiums.³²¹ Differences exist concerning aspects such as the concept of the right, organisation and representation of the owners, binding force of statutory provisions and the role of the courts in the administration of the schemes.³²²

While as for co-ownership, it is the right itself that is being shared, apartment ownership is characterised by a division of the real property, but not a complete division, since only the apartments are individually owned, while the rest of the building, land, etc. is owned in common. The combination of this individual ownership and common ownership is what characterises the condominium system.³²³ Included in the ownership interests of an apartment building are usually both the individual ownership of the apartment and a share as tenant-in-common³²⁴ of the common property and the jointly owned land, which are indivisible and registered as one real property unit. The ownership of the apartment must be legally inseparable from ownership of the share of common property belonging to it according to the international standards of condominium law.³²⁵ To include these two aspects that characterise the condominium – the independence and the cooperation – it is necessary to create laws with the purpose at the same time of creating vertically layered independent property units and establishing a detailed regime of cooperation. Since the units are part of a larger complex, there is a need for cooperation in management, which also makes the sociological aspect important.³²⁶

Specific for condominium ownership is that the apartments are structurally interdependent, and that the community life within the building is much more intense than between neighbouring landowners. Such features therefore can justify stricter limitations and restrictions for the owners.³²⁷

Due to the many restrictions on condominium ownership, it has been questioned whether this is still genuine ownership,³²⁸ whether the legal nature of condominium is really a true right of ownership or if it is just some lesser real property right. This doubt stems from the limitations of this ownership

³²¹ UN/ECE (2002), p. 6.

³²² Leyser (1958), p. 37.

³²³ Blok (1982), p. 30.

³²⁴ Tracht (2000), p. 73.

³²⁵ Rabenhorst (2001a), pp. 2, 7.

³²⁶ Sandberg (2003), p. 142.

³²⁷ van der Merwe (1994), p. 78.

³²⁸ *Ibid.*

form exceeding those of the normal type of ownership of immovables, relating to the rights of the other apartment owners.³²⁹

Another issue concerns the question of which of the rights the condominium consists of are to be regarded as principal rights and which are accessory rights to other rights. Is it the ownership right of the individual apartment or is it the co-ownership share of the property owned in common? The French system regards the ownership of the apartment as the principal right, while the German system regards the co-ownership as the principal right. However, the common opinion is that these two rights are one unit and cannot be disposed of separately.³³⁰

Since the condominium form is based on a combination of individual and common ownership, an important question is where to draw the line between these two types of ownership. Reasons to choose common ownership of certain shared goods can be economies of scale for such property with respect to recreational facilities, and non-excludability for objects such as roofs and supporting structures. This can also be explained on the basis that if a property benefits just one owner, it should also belong to that owner alone so that this party bears the costs for maintenance and the loss from any destruction, while property with benefits for all owners should belong to and be paid by all, so that they as a group bear the loss from failure or destruction and by that minimize insurance costs. Belonging to the public goods provided is not only the physical property, but also the rules governing the community. The aim for condominium developers should therefore be to create such rules and structures to maximize the satisfaction of the purchasers by encouraging efficient decision-making and reducing conflicts.³³¹

The significance of individual ownership of apartments and ownership of the common parts respectively form the basis of the division into unitary and dualistic systems. In the unitary system, the apartment owner is regarded as a co-owner of the building and land with an accessory right to exclusively use an apartment. This system was mainly introduced in legal systems that wanted to keep the *superficies solo cedit* principle, where the owner of the land is considered also as the owner of any buildings erected on it. In the dualistic system, the individual ownership of the apartment is regarded as the main component, while the joint ownership of the common parts of the building and the land is accessory or equal to the individual ownership.³³²

The condominium can also be regarded as consisting of three components, the individual ownership of the apartment, common ownership of the land and common parts of the building, as well as membership of the owners' association. These elements together are called a threefold unity, a trinity, and

³²⁹ Leyser (1958), p. 38.

³³⁰ Leyser (1958), pp. 38-39.

³³¹ Tracht (2000), pp. 75-76.

³³² van der Merwe (1994), pp. 3, 24.

are inseparably linked to each other. They can only be dealt with and transferred together as a unit and thus may not be disposed of separately.³³³ The third element has been debated as to whether it really is a separate part of the condominium concept and not just a consequence of the co-ownership right to the common parts.³³⁴

Individual ownership of an apartment in the dualistic system differs from traditional ownership of land in its restrictions that come from the structural and social interdependence of the apartment owners. The co-ownership of the common parts differs from traditional co-ownership in the sense that it is indivisible and cannot be partitioned from the rest of the common property. The owners' association differs from other types of association membership in how it is linked to the apartment and that membership is possible only for apartment owners and compulsory for all such owners. Voting is generally linked to the quota of the apartment, not one vote for each member. While some statutes provide that condominium owners own the common property as tenants in common in shares that are proportional to the quota, other statutes provide that the common property vests in the owners' association as an agent for the condominium owners, although this difference in construction is mainly formal.³³⁵

3.4 Fields of Application

The condominium form, despite the scepticism with which it was first treated, has now gained success, and is one of the most important housing forms in Europe. It has become a permanent part of the legal and economic arena, often stimulated by financial support from the state. Even in the former socialist states, the number of privately owned apartments has increased significantly due to the sale of state-owned apartments to individuals and the development of condominium schemes in larger multi-unit high-rise buildings. Although most condominiums are established by new construction, there are still many condominiums created through the conversion of rental apartments.³³⁶

Although the forms of apartment ownership differ between the legal systems, they usually are introduced for the same reasons, i.e. to provide for the social and economic needs in a society. These similar pressures often result in similar solutions. Among the reasons for introducing the condominium form are remedying housing shortages by introducing other forms of housing besides purchasing a house or renting an apartment, encouraging better utilization of land and building materials by increasing the density and lowering costs,

³³³ Ibid. at p. 23.

³³⁴ Blok (1982), pp. 31-32.

³³⁵ van der Merwe (1994), pp. 26-27, 80.

³³⁶ Ibid. at p. 21.

satisfying the psychological need for home ownership and the advantages connected with such ownership, especially after the war in Western Europe, and as a hedge against inflation. Sociological goals obtained by apartment ownership are to provide for a closer social life, common amenities and a stricter security for owners. Other factors include the condominium as a mechanism for redevelopment of the city centres and to provide for public housing.³³⁷

The institute of apartment ownership has many advantages for the owner of the rights. One example is the better use of land and property, making more dense building of houses possible. It is also possible for the purchasers to get lower costs for owning their own home, as well as a social feeling of owning, where the owners will feel more responsibility in caring for their accommodation. When comparing owning with renting, it has been shown that apart from the initial phase, purchasing has more advantages, especially after the instalments are paid.³³⁸ Some benefits are the possibility of selling for the market value, individual mortgages, profit from one's own improvements of the apartment, complete protection from eviction, as well as a greater influence on the management of common property.³³⁹ Compared with single-family houses, the ownership of apartments has the advantage of the maintenance provided and guarding of the property, as well as more comfort and security. Non-residential condominium schemes bring advantages such as that smaller companies can pool their financial resources to construct a building according to their needs, developments and expenditure can be planned more accurately than with a lease, savings can be made in supplies, services and transactions, as well as the value for similar types of firms being closely located to each other.³⁴⁰

Condominium ownership can apply to different forms of real property, such as multi-apartment buildings exclusively for residential purposes, buildings containing both dwellings and units for other functions, for example commercial purposes, and other building types such as row houses, terraced housing or other joined or connected buildings used for residential, mixed or non-residential purposes.³⁴¹ Even though the condominium and cooperative forms are also used for commercial properties, the great majority is used for residential purposes.³⁴² A condominium is the part of real property that forms a clearly demarcated part of a building or a plot of land. These parts of buildings containing apartments can be owned by an individual, a family, a company or a municipality. The separate apartments, shops or offices are called units, and the rest of the building is called common property. These jointly owned parts are

³³⁷ Ibid. at pp. 16-17.

³³⁸ Bärmann, Pick and Merle (2003), pp. 25-26.

³³⁹ Blok (1982), p. 6.

³⁴⁰ van der Merwe (1994), p. 18.

³⁴¹ UN/ECE (2002), pp. 8-9.

³⁴² Tracht (2000), p. 73.

all those parts of the property, including the land plot, which cannot be clearly defined as privately owned units. Included in these parts are such engineering systems, equipment, circuits and devices that serve the entire property or parts thereof, but that cover more than one privately owned unit. Included are often for example the roof, staircases, exterior walls and windows, building foundations, infrastructure such as piping, electrical cables, etc. The land under and around the building is also jointly owned.³⁴³

Even though the condominium form was originally intended for residential housing, it has many other purposes, such as office buildings, industrial buildings, shopping centres, hotels, parking garages, parks, cemeteries and resort condominiums, including time-share schemes. These non-residential purposes seem to be more common in the United States, Canada and Brazil. The residential condominium schemes are not just used in multi-unit high-rise buildings, as originally intended, but also in low-rise buildings such as semi-detached houses, duplex flats, maisonettes and cluster housing. Most condominium statutes allow for types of use other than residential, although the provisions of the original statutes were originally designed for residential apartments. Examples of provisions not suited for non-residential purposes concern boundaries between the units and the common property, termination of the condominium scheme and improvements, modernization and re-organisation of the building or apartments.³⁴⁴

It is also possible to have mixed condominiums, where different purposes are located within the same scheme with mixed use, such as residential, commercial, industrial and professional purposes. An example of this is a building with retail outlets on the ground floor, offices on the floors above and residential apartments on the top floors.³⁴⁵

3.5 Legal Framework

It is important to create legal mechanisms to manage the legal and economic problems concerning the coordination of conflicting preferences and actions of co-owners in any case of co-ownership. The lack of such mechanisms may lead to cases where the owners impose excessive costs on their co-owners by certain activities, or invest too little into activities where the co-owners gain from the benefits. Among the legal mechanisms available to deal with such problems are doctrines imposing liability on co-owners when engaging in certain inefficient activities, legally mandated common decision-making and forced termination of the co-ownership relationship. Outside the legal mechanisms, social sanctions

³⁴³ UN/ECE (2002), pp. 8-9.

³⁴⁴ van der Merwe (1994), pp. 17-19.

³⁴⁵ Ibid. at p. 19.

and norms are important factors in the coordination. Successful legal mechanisms for regulating co-ownership lead to reductions in the transaction costs that come from negotiating, establishing and enforcing the shared ownership arrangements.³⁴⁶

There are certain preconditions that are essential in order to guarantee ownership and security of ownership for condominiums. These include clear legal definitions of the rights and obligations of ownership, a legal definition of property rights, sound administrative structures and procedures for the transfer of property rights, a clear distribution of rights and obligations between the borrower and the lender, and effective and transparent legal procedures to handle property disputes.³⁴⁷

Even though national condominium laws vary to a great extent concerning structure and content, where short laws require additional regulations and guidelines, and specific laws do not require such supplementary documentation, there is a certain content recommended to be part of a condominium law. This includes a scope of regulations and central definitions, followed by principal rules governing private and joint ownership, rights and obligations of ownership, and change in use of both privately and jointly owned units. Other features to be included concern the association of owners, such as the role, purpose and competencies, meeting and decision-making, board and management, budget, bookkeeping and accounts, joint expenses and obligations to pay, as well as third-party liability for owners.³⁴⁸

A general legal framework is needed for the owners' association in order for it to function effectively. Included in this framework may be a condominium agreement, a declaration of division of ownership, a management contract and house rules. The condominium agreement is the central document and contains more precise rules and regulations for the owners' association than normally included in national condominium laws, for example rules for voting rights of owners. A declaration of division of ownership is not normally necessary in countries where there are already satisfactory, clear and registered agreements on property division. The specific rules for calculating ownership fractions in that case are included in the national condominium laws or regulations. A management contract is needed when there is a professional manager taking care of the day-to-day running of the association. The rights and obligations of both parties are stated in such a contract. House rules are used to govern the day-to-day relationship between the owners. These can be divided into general rules and more special rules that later can be amended independently. Included in such rules can be regulations for matters concerning daily maintenance, that allowed on balconies, etc.³⁴⁹

³⁴⁶ Tracht (2000), pp. 63, 65.

³⁴⁷ UN/ECE (2002), p. 12.

³⁴⁸ *Ibid.* at p. 13.

³⁴⁹ *Ibid.* at pp. 18-20.

A number of rights and duties for the owner follow with condominium ownership. The rights and duties of the apartment owners are often regulated by special agreement with freedom for the parties to regulate the relationships, even though some provisions are of a binding character. Some statutes prescribe in detail the duties owners have if no agreement has been made regarding certain matters.³⁵⁰ Condominium owners in general acquire ownership or an exclusive right to their apartments.³⁵¹ If certain owners fail to carry out their duties, it is possible to make provisions for procedures to exclude them from the co-ownership, for example that the other owners demand that they transfer their condominium ownership.³⁵² With that follows the right to use and enjoy, alter and administer the apartment, as well as prevent others from encroaching upon their rights. The neighbour legal principles usually apply in a stricter way than for conventional ownership of land, where owners may not exercise their rights in such a way that they cause inconvenience to other owners. There are also duties, among which commonly is being obliged to maintain the apartment in a state of good repair, to allow access to the apartment for maintaining and repairing the common property, to allow encroachments and to use the apartment according to its purpose, as well as making sure that any other occupants do the same. There are often provisions regarding what alterations and improvements are allowed to be made inside the apartment. For example, there are restrictions if an alteration risks building safety, reduces its value or impairs any easement. Restrictions may also be provided for in the by-laws of the condominium scheme, for example concerning the allowance of professional activities and keeping animals in residential apartments. Rules concerning the allowance of professional activities, especially in Western Europe, have caused different interpretations and many court decisions.³⁵³

3.6 Subdivision

Condominium ownership is created when a building or buildings are divided by law into apartments and common property. It then is possible for individuals to acquire ownership to the condominium. The condominium owners usually have the right to freely dispose of their property, even though this right may be limited by statutory provisions or general principles. In Western European countries, subdivision and consolidation of apartments usually are allowed. To give effect to the condominium ownership, registration is made of a document showing how the property is divided into apartments and common property.

³⁵⁰ Leyser (1958), pp. 40, 43.

³⁵¹ van der Merwe (1994), pp. 72-74, 77.

³⁵² Leyser (1958), p. 49.

³⁵³ van der Merwe (1994), pp. 72-74, 77.

There usually are certain requirements for the buildings and land within the condominium scheme by statute as well as approval by public authorities. Most statutes allow condominiums to be established before the buildings are constructed. There are also provisions regarding whether the condominium has to be constructed on one single plot of land or whether it is possible to let a condominium scheme be developed on several plots. Most Western European and Anglo-American countries require a separate single parcel of land, while British Columbia in Canada allows separate land parcels that do not even have to border each other. The apartment itself does not have to consist of one contiguous part on one floor of the building, but may consist of several parts in different places of the building, including for example underground parking lots and storage lockers, and sometimes even including parts of the land.³⁵⁴

Most statutes require that the entire building within a condominium scheme has to be included in the scheme, while some allow partial subjection, which means that the rest of the building will be owned in another way, for example with co-ownership. One scheme may usually consist of several buildings, of single-unit or multi-unit types. There sometimes are requirements for a certain number of apartments that must be included in the condominium scheme, even though the tendency seems to be that such requirements now are eliminated from the statutes. Other statutes permit that a scheme consists of several single buildings, each with one apartment. Some Anglo-American countries even allow bare land condominiums that do not have to contain any buildings at all.³⁵⁵

Staged development is a possibility that is widely spread in the Anglo-American systems, but in the Western European countries it only relates to the vertical extension of a building by constructing new apartments on the top floor. Many states in the United States have special legislation on such phased development where it is possible to develop a condominium scheme in successive stages. The main reason for such staged development is to minimize the amount of capital at risk in multiple building projects.³⁵⁶

Condominium ownership is not formed only by constructing new buildings, but also by converting existing rental buildings. This is a common method in the United States, where over one million units were converted during the period of 1980-85, and in South Africa, where 75% of the condominium units have been converted. The conversion has the effect of revitalizing the physical condition of decaying neighbourhoods, reversing decentralization and stabilizing decaying neighbourhoods.³⁵⁷

In most systems, there is a need for dissolution of a condominium scheme in particular circumstances. When the buildings are destroyed, damaged or

³⁵⁴ van der Merwe (1994), pp. 28-29, 34, 47-49, 84-85.

³⁵⁵ *Ibid.* at pp. 30-31.

³⁵⁶ *Ibid.* at pp. 95, 98.

³⁵⁷ *Ibid.* at pp. 174-175.

deteriorated, the scheme cannot continue to exist and problems consequently arise. Because of this, statutes can provide for termination of the scheme, reconstruction of the buildings or partial termination or reconstruction with reallocation of the remaining apartments and the adjustment of their interests. In Western European systems, a scheme can generally be terminated either by unanimous agreement of the owners or when the building is destroyed or severely damaged. In the Anglo-American countries, termination of the scheme can also be made due to functional obsolescence of the building. The scheme can also be terminated by a special resolution among the owners to partition or sell the property. When the condominium scheme is to be terminated, the assets of the community have to be realized and distributed. The land has to be converted to co-ownership of the owners, or sold and the profit distributed among the owners. In the Anglo-American systems, the court is given a more extensive role in the termination of the scheme.³⁵⁸

3.7 Boundaries

There is generally no description of apartment boundaries in Western European or Latin American statutes, although it is implied that they must be isolated by walls, floors and ceilings. Since in these systems the apartments do not seem to be able to consist of parts of land or cubic airspace, parts of the surrounding masonry must be included in the apartment. For Anglo-American countries, on the other hand, it is usually possible to choose whether to locate the boundaries to the planes on the inside surfaces of walls, floors and ceilings or to the centre line of walls, floors and ceilings of the apartment. The choice is usually left to the developer. An apartment unit in these countries is usually regarded as an area or space that is enclosed by its boundaries together with all material parts included in that space. If balconies, etc. are included in the apartment, the inner surface of these walls, floors and ceilings form the boundaries, as well as the imaginary line stretching from where these walls end. When there are bare land condominium schemes, the boundaries of the units are defined by reference to survey markers.³⁵⁹

³⁵⁸ van der Merwe (1994), pp. 125-126, 131.

³⁵⁹ Ibid. at pp. 47-49.

3.8 Easements

Statutes may impose several reciprocal easements on condominium owners. Typical easements are for subjacent and lateral support, shelter, passage for water, drainage and other services, but can also be created for such things as light, overhanging eaves and other projections.³⁶⁰

3.9 Common Property

Each unit owner has a share of the common property. This ownership fraction is specific for each unit and can be based, for example, on the gross area of the unit in relation to the total area of the units, but without the area of the common property included.³⁶¹ The most common formulas in deciding the quota are based on equality, relative size or relative value of each apartment, or a combination of such. Most Western European countries use the relative value of the apartment as a quota basis.³⁶² The ownership fraction determines the responsibility each owner has for the costs of maintaining and repairing the common parts of the property and the operating costs for the owners' association. If there are parts that are of differing usefulness to different owners, this can be solved through agreements.³⁶³ An example of such property is the use of elevators for the owners of apartments on the ground or first floors.³⁶⁴

The distinction between the individual ownership of the apartment and the co-ownership of the common parts is important due to the differences in ownership and the consequences stemming from it. The owners have exclusive ownership or right to occupy the apartment, while they have less right of use as to the common parts due to its collective ownership. The responsibility for maintaining the apartment lies with its owner, while the owners' association is responsible for the maintenance of the common parts. The importance of this distinction also becomes obvious when it comes to deciding unit entitlement, and where an owner has private insurance for an apartment, it is important to know what property is included.³⁶⁵

Most statutes do not contain any list of the components that are included in the apartment, so developers and condominium owners to a certain extent can decide themselves that certain parts that usually are included in the common property will be part of the apartments instead. If nothing otherwise

³⁶⁰ Ibid. at p. 77.

³⁶¹ UN/ECE (2002), p. 9.

³⁶² van der Merwe (1994), pp. 57-58.

³⁶³ UN/ECE (2002), p. 9.

³⁶⁴ Leyser (1958), p. 42.

³⁶⁵ van der Merwe (1994), p. 45.

is stated, usually included in the apartments are all elements not expressly declared to be common property. To know what is included in the apartments, certain statutes, particularly in Western Europe and Latin America, refer to the project documents to clarify what elements belong to each category, either from the registration by the developer, or by agreement of the condominium owners. In the Anglo-American countries, on the other hand, common property is generally defined exclusively, i.e. the parts that are not included in an apartment, and because of this they usually are more detailed regarding the components of the apartment. Different terms are used in various countries to refer to the exclusive part of the condominium, among which can be mentioned “apartment”, “lot”, “section” and “exclusive part”. A common description of the apartment is an independent, separate and isolated part of a building that is intended for exclusive or independent use with a direct entrance to a public road or a common area leading to such a road. A simpler definition as found in the French statute is the parts of a building reserved for the exclusive use of the condominium owners. Israel defined the apartment as a room or compartment, or a set of those, intended to be used as a complete and separate unit for habitation, business or any other purpose. These requirements mostly apply to both residential and non-residential condominium. In Germany, parking lots may also be created in apartment buildings if they are distinct entities with clearly demarcated boundaries.³⁶⁶

Common property is usually defined in the Western European and Latin American statutes inclusively by specifying what parts of the scheme are considered to be common property. Some statutes include a list of what is not allowed to be included in the apartment. In most of these statutes, it is also possible for the developer or owners in the project documents to let parts of the common property form part of an apartment. Some statutes declare that the nature of the common property may never be changed, while other statutes have mandatory common elements along with permissive common elements, which may be designated as components of apartments either in the constitutive document or in the by-laws. For Anglo-American countries, there are both statutes with the inclusive approach, listing the components of the common property, and those with the exclusive approach, where the common property are all components other than the apartments. Another approach can be found in some former socialist countries, where common property is defined as the parts of a condominium scheme that according to their nature are destined for the common use of the owners, such as the land, façade, foundations, roof, entrances to the building and common installations.³⁶⁷ If there is a co-ownership agreement, it will normally contain a list of that included in the common property. This enumeration can vary from very

³⁶⁶ van der Merwe (1994), pp. 45-47, 50.

³⁶⁷ Ibid. at pp. 51-53.

general to a detailed list of what parts are included.³⁶⁸ That included in the common property can thus vary from being described in great detail to the exclusive definition.

The land below and surrounding the condominium building is usually included in the common property. For apartment buildings in established market economies, this usually is not an issue, since private developers build most of the condominiums, including the amount of surrounding land that they find suitable for the purpose. This land becomes common property if the building is not surrounded by municipal or state land, in the case of which easements are granted for the owners to use the land for access to their building, such as roads or pavements. However, in former socialist countries in Central and Eastern Europe where privatization of land has taken place, this may cause difficulties. When buildings and surrounding land went from public to private ownership, the question regarding how much land to include was fixed to the “footprint” of the building, i.e. the land under it. This causes problems for the apartment owners as to getting a right to use the surrounding land. In Slovenia, for example, this “functional land”, i.e. the land immediately surrounding the building and necessary for its functional use, remained in social ownership with use rights for the apartment owners. Some countries simply included the land under the building, others land to one meter around the building as well, but it was still unclear to whom the land beyond this belongs. One solution has been to let the municipality keep the ownership of the land and to grant long term use rights to the owners’ associations, where the owners are responsible for maintaining the land. Where more than one building has use for the land between buildings, such as land containing a parking place, the owners within these buildings will jointly decide how they should use and maintain this land.³⁶⁹

Some statutes distinguish between general common property and limited common property. Limited common property is the parts of a condominium building that are reserved for the use of just one or some of the owners, but not for all of them. Usually the agreement of all owners is needed to create such property. The purpose of this can be to obtain a more fair division of costs for the maintenance of that area. Examples of such property are special stairs and elevators, private entrances and bathrooms shared by the apartments on just one floor. In some statutes, common walls between apartments are also regarded as limited common property. Common walls between two apartments that are not weight bearing are otherwise considered as being common between the apartments that they separate.³⁷⁰

The shared rights and responsibilities within a condominium scheme, as well as the collective decision-making and voting, require some form of

³⁶⁸ Leyser (1958), pp. 41-42.

³⁶⁹ Rabenhorst (2001b).

³⁷⁰ van der Merwe (1994), pp. 45, 53-55.

allocation of these interests, based on a participation quota, fraction of undivided interest, proportion of the common interest or unit entitlement. The quota is usually expressed as a percentage or in fractions. It represents the numerical quantification of the share of each owner in the common property, the contribution to the financial expenses and voting right at the general meetings. As such important matters are decided by the quota, it can be a major source of conflict among the owners.³⁷¹

The rights that the owners have to use and enjoy the common property are determined by statute, by-laws and general principles of neighbour law. Among these rules are, for example, that the owners are not allowed to prevent other owners from using the common property, not appropriate any part of it for their own use, and not unilaterally carry out works on or use the common property in an unusual way. The general meeting can also adopt special rules for the use of the common property. A common problem that may arise in connection with these rules, for example, is whether the owners have the right to attach signboards or advertisements on the external boards or place a personal antenna on the roof.³⁷²

3.10 By-laws

The provisions given by statutes in most countries are often not considered sufficient when it comes to the more detailed management of a condominium scheme. Therefore, special rules adapted to the particularities of each scheme are developed in by-laws, which are binding on owners as well as other occupants within the scheme. The main purpose of by-laws is to regulate management and administration of the condominium scheme, along with the rights of use for the owners, as well as protecting the interests of the developer and credit institutions.³⁷³

By-laws can be either obligatory or optional. For the majority of the Western European countries, they are optional, while they generally are considered obligatory in the Anglo-American countries. Since they require the unanimous agreement of all owners in order to be created, although in practice drawn up by the developer, they are often considered of a contractual nature. Most statutes give the developer and owner a certain amount of freedom in making the rules of the by-laws, although there are some restrictions, especially as to not having rules in conflict with the public order or law. Other statutes list the matters to be included in the by-laws and leave the details to the developer or owners. Such by-laws can also be provided directly in the statutes, such as in

³⁷¹ Ibid. at p. 57.

³⁷² van der Merwe (1994), pp. 78-79.

³⁷³ Ibid. at p. 114.

New South Wales in Australia. To be binding for any successors in title, the by-laws must often be registered and may only be amended by unanimous resolution. In the Anglo-American statutes, a standard set of by-laws may sometimes be provided or otherwise drafted by the developer as part of the project documents of a scheme. The standard schedule of by-laws is operative until amended.³⁷⁴

The by-laws contain rules regarding the use and enjoyment of the apartment and of the common property. Since these rules often are decided by the developer or owners, some statutes state that they have to be reasonable and not arbitrary. Examples of such rules are restrictions on renting the apartment to third parties, limiting the number of occupants, prohibiting conduct that may cause nuisance and regulating pets. The by-laws can be more or less detailed. For example, the statutory model by-laws of New South Wales in Australia have very extensive provisions on the use of the common property, concerning such matters as parking vehicles, driving nails into any structure, depositing rubbish, hanging laundry or keeping animals within the common property.³⁷⁵

It is possible for by-laws to be supplemented by house rules, which are based on majority resolutions of the general meeting. Such rules exist, for example, in the German statute. They usually deal with matters of less importance, for example regulating the daily use of the common property. There usually are lower standards for the creation and cancellation of such rules than for by-laws and there is no need for these to be registered.³⁷⁶

3.11 Owners' Associations

An owners' association is considered a necessary feature for condominiums, and is essential to safeguard the interests of individual owners, the common ownership, as well as national and municipal interests. The association is considered indispensable for the management of the scheme.³⁷⁷ In some countries, the owners' association and membership is regarded as so important that it forms a part of the condominium unit. The owners' association is a legal body that has the authority to act on behalf of all the owners of the condominium. It is a private non-profit organisation with full democracy. It usually is compulsory for all owners of the condominium units to be members of such an association, as membership in the association is considered as being a legally inseparable part of the ownership of the condominium unit.³⁷⁸

³⁷⁴ Ibid. at pp. 75, 79, 114-120.

³⁷⁵ van der Merwe (1994), pp. 75, 79-81.

³⁷⁶ Ibid. at pp. 73, 114, 117-118.

³⁷⁷ Ibid. at p. 25.

³⁷⁸ UN/ECE (2002), pp. 6-9.

When establishing a condominium building, the individual property units, each with an apartment and share in the common property, are registered and then sold. An owners' association is formed and an association agreement is drafted by the founder, which is a contract that will bind all current owners as well as their successors. It contains the establishment of rights and responsibilities for the owners and the association, the legal relationship between the parties and the share in the common property for each apartment. This agreement is also registered along with the property records.³⁷⁹ The condominium owners usually automatically become members of the owners' association as soon as the apartments are conveyed to them.³⁸⁰

The owners' association can be likened to a local government in the way it operates and the functions it fulfils, such as assessing taxes or fees, providing common goods such as recreational facilities, garbage collection and dispute resolution, and controlling public spaces such as streets and parks. Furthermore, governing is made through a form of representative democracy established through a governing constitution.³⁸¹ There are differences in the legal systems regarding whether the management structure has legal personality. In some countries, the management structure does not have full legal capacity, but has limited capacity to act on behalf of the owners. In some statutes, the association has the power to enter into contracts on behalf of the owners, for example to acquire real estate on their behalf.³⁸²

If there is a multi-building condominium scheme, it is also possible, as in France, to establish a secondary association for each building in the scheme. If there is an ensemble of schemes, such as for mobile homes, several independent management associations can be amalgamated into a single management body.³⁸³

The members of the association decide by vote. A board is elected by the members and has the responsibility for the running of the association. There can be an administrator adopted by the board, a legal person who is contractually charged with the day-to-day management of the owners' association, i.e. to take care of the maintenance and operation of the common parts, as well as all matters of common interest. These duties are regulated by provisions in the condominium acts, the regulations of the association, administration contracts, as well as resolutions and decisions of the owners' meetings. Such an administrator can either be an owner of a unit in the condominium or an external professional or company. External professional parties are often contracted to carry out specific tasks, such as cleaning, repair,

³⁷⁹ Rabenhorst (2001a), pp. 2-3.

³⁸⁰ van der Merwe (1994), p. 142.

³⁸¹ Tracht (2000), p. 84.

³⁸² van der Merwe (1994), p. 142.

³⁸³ *Ibid.*

maintenance, etc. The members can also elect committees that have specific tasks, such as audit or social activities.³⁸⁴

The general assembly is regarded as the highest administrative organ of the condominium scheme. The statutes give it the competence to adopt resolutions within the provisions in statutes and by-laws. The general assembly can have both annual general meetings and extraordinary meetings. Voting at the meetings is generally based on one vote for each owner or according to the participation quota, where the by-laws in practice generally favour the quota type. The powers of the general meeting are exercised by formal resolutions passed at the meetings. A majority vote is usually sufficient for ordinary resolutions.³⁸⁵ Although it has been regarded that all co-owners have absolute rights in their property, it is still common within condominium schemes to provide for voting regimes that allow majority rules provisions in order to prevent the holdout problem where one owner may be of a different opinion than the other co-owners and thus imposing undue costs on the parties.³⁸⁶ For more important resolutions, a larger majority is required in special resolutions or unanimous resolutions, which can be an absolute majority, a qualified majority or unanimity. The validity of resolutions usually can be challenged by the owners in court. If the rights and duties of condominium ownership are regulated by special agreement, this agreement will also set out the details for the powers, functions and procedure of the owners' association which are given in more or less detail.³⁸⁷

The Latin American countries do not always organize the owners into a management body where all owners are members. The statutes provide that the community of condominium owners is managed by the general meeting as rule-making body and a manager as executive authority. Other Latin American countries organize the owners into a consortium or association without legal personality. The manager in that case does not represent the community of owners, but the individual owners. The socialist systems either have the form where the owners are to devise suitable provisions on the management, or the form of social administration, where the management is subject to state control.³⁸⁸

Even though it is considered a necessary feature for the condominium, owners' associations are not always established, for example when the privatization process of apartments took place in the former socialist republics in Central and Eastern Europe. For some of these countries, however, there were laws providing regulations for the establishment of such associations if the

³⁸⁴ UN/ECE (2002), pp. 6-9, 14.

³⁸⁵ van der Merwe (1994), pp. 143-147, 154.

³⁸⁶ Tracht (2000), p. 71.

³⁸⁷ Leyser (1958), p. 46.

³⁸⁸ van der Merwe (1994), pp. 156-159.

owners decided to form an owners' association.³⁸⁹ The formation of owners' associations has proved to be important for the success of housing privatization in transition countries. For example, in the real estate modernization project in Slovenia, the introduction of a special Condominium law or amendment to the Housing Law was proposed, in order to improve the management of condominiums, by requiring the formation of an owners' association for each apartment building with more than a specified number of apartments.³⁹⁰

3.12 Management

For the condominium scheme and the community of owners to function properly, it is important to have a structured and efficient organisation for management. The importance of this can be illustrated by the problems that existed for the earlier condominium types, such as the German *Stockwerkeigentum*, where the lack of organization caused many disputes among the owners. Not only the owners, but also the financial institutions with an interest in the scheme, have an interest in keeping the management well organised. There are therefore provisions in all statutes for the purpose of creating effective management, by making all owners participate in the management or creating a management body for it. There also generally is the general meeting of the owners to make the decisions on administration and a manager or executive board to execute the decisions.³⁹¹

The condominium scheme can be managed by the owners themselves or by the owners' association where all owners are members. In Anglo-American countries, however, an owners' association is always formed to take care of the management. Where there is an owners' association, the broad principles for management are given by the statutes, while the details can be found in the by-laws, while some countries regulate the management entirely in the by-laws.³⁹²

Since a major responsibility of the owners' association is to protect and increase the value of the owners' property, the operation of such an association can be compared to running a business, with a need for an organisational structure with clearly defined rights and obligations at each level. All the owners together act in general meetings, which is the supreme authority of the owners' association. To be more efficient, a large part of the powers for the day-to-day running of the association is delegated to a board, which is elected by the owners for a limited period. It normally consists of three to five members, but for small condominiums one person may be enough. The duties of the board are to implement the tasks of the association and specific decisions of the

³⁸⁹ Rabenhorst (2001a), p. 3.

³⁹⁰ Rabenhorst (2001b), pp. 3, 9-10.

³⁹¹ van der Merwe (1994), p. 141.

³⁹² Ibid. at pp. 141, 151.

general meetings. The board can also engage professional management to assist the association. Certain responsibilities may also be delegated to committees that are constituted of owners, for instance election, auditing as well as environmental and activity committees.³⁹³

There are certain decisions that have to be made within a condominium scheme, regardless of its ownership structure and type of scheme, with buildings for apartments, offices, shopping, etc. Such decisions concern matters regarding level of investment and maintenance, rules of behaviour in common areas or mechanisms for resolving conflicts. However, the different types of schemes need different mechanisms for management. In housing with a diverse range of occupants, such as in mixed uses, collective decision-making may be less efficient than by a landlord due to the costs involved with meetings, negotiating, voting, etc., and are therefore more likely to be centrally managed than in housing with a homogeneous group of residents.³⁹⁴

Management of condominiums includes several important tasks. Administrative work is to carry out all necessary duties to ensure proper meeting procedures, implementing all decisions taken at owners' and board meetings, proposing the annual activity plan, preparing management status reports, hiring employed personnel, assuming external contract responsibility, including insurance, legal and municipal relations, as well as communicating information to new owners. Included among the property operation tasks are the supply of utilities, maintenance, repairs and improvements, the drafting and application of house rules, as well as voluntary work by members. There are also important financial duties to be tended.³⁹⁵

Different models can be used for the management of the owners' association. Either the owners can take care of the management, or a professional person or company is contracted to carry out these tasks. An alternative can be to let State or municipal maintenance companies do it. The latter alternative, however, is only intended as a short-term solution and is used for instance within countries in transition. Volunteer management by owners is only recommended for small condominiums with up to ten units. Due to the amount of work needed for larger condominium schemes, a professional manager is usually required for those types. The developer or seller of the property can also decide the management model to be used.³⁹⁶

Management of the common parts is usually given to the co-owners as their responsibility, regardless of whether they can form a legal person or not. Provision can also be made for the appointment of someone to act on behalf of the co-owners, which in some statutes can be one of the co-owners. There usually are provisions in the legislation for the representation of apartment

³⁹³ UN/ECE (2002), pp. 20-22.

³⁹⁴ Tracht (2000), p. 78.

³⁹⁵ UN/ECE (2002), pp. 29-30.

³⁹⁶ Ibid. at pp. 30-31.

owners by an administrator or manager. In some statutes, it is compulsory to appoint a managing agent or administrator for the common parts, or a simple procedure for the appointment by court of such a person may otherwise be given. Usually the rights and duties of the administrators are listed, among which may be given the tasks to carry out the decisions of the owners' association, to take care of the maintenance of the common parts and to make sure that the co-owners pay their expenses, etc. As the legal representatives of the co-owners, legal proceedings may be taken by or against them. It is also possible, in addition, to make provisions for a special board or council to assist the administrators.³⁹⁷

In very small condominium schemes, the owners may thus decide that they will act also as managers, but for larger schemes an executive organ is always appointed, in the Western European countries usually a manager, to execute the resolutions and to supervise the day-to-day management and administration of the scheme. The managers are appointed by the owners and can be either a natural or legal person and may be chosen amongst the owners. The managers are appointed for a fixed period, but may be dismissed before the end of the period if the general assembly so decides. The assembly may also appoint an advisory board amongst the owners to assist the manager. The manager acts as the agent for the owners and the transactions bind the owners, who may challenge them in the general assembly or in court.³⁹⁸

Other parties involved are contractors for professional services such as repairs, maintenance and administration, where tendering and commercial contracts normally are used. There are also utility suppliers of water, electricity, etc., who usually have separate commercial supply contracts. The owners' associations only have supply contracts for jointly owned property. Other employees can be hired by the owners' association, such as janitors and cleaners. Such employees are contracted by the manager.³⁹⁹

Because of the interdependence between the apartment owners regarding maintenance of common parts, there must be rules regulating what can be done with the property and the distribution of costs for such measures. These measures can be of different kinds. Urgent measures can be, for example, stopping a leak from a broken pipe. Necessary operations and maintenance include the fulfilment of duties against third parties, such as taxes and insurance, and various actions that are necessary for the upkeep of the standard of the property, such as painting and repairs. Finally, there is also a need for upgrading measures and introducing new facilities, for instance to install an elevator.⁴⁰⁰

³⁹⁷ Leyser (1958), pp. 40, 45-49.

³⁹⁸ van der Merwe (1994), pp. 148-150.

³⁹⁹ UN/ECE (2002), p. 21.

⁴⁰⁰ Lilleholt et al. (2002), p. 35.

When the condominium scheme is formed, either by the construction of a new building or by the conversion of an existing one, there is a need for an initial set of documents, such as by-laws, to establish the rights and duties of the owners and to provide mechanisms for enforcing and monitoring these rules. A common distribution of the decision-making is to leave the fundamental decisions and changes of the rules to the owners by vote and the day-to-day decisions on management issues to a board elected by the owners. Voting can be in several different forms, such as majority vote, supermajority or unanimous voting, equally weighted votes or votes weighted by area or value of the unit of each owner.⁴⁰¹ The co-ownership agreements usually have to be registered to bind the successors in ownership of the apartments.⁴⁰²

In Anglo-American countries, an executive board or council is usually appointed to take care of the management. The members of the executive board hold their offices as fiduciaries of the unit owners. The board has the power to exercise all the powers and functions of the owners' association. Most Anglo-American countries also allow the appointment of professional managers, who have a contract of service to assist the executive board in the management and to whom the board may delegate some of its functions.⁴⁰³

How the condominium scheme will function depends to a large extent on its management. It therefore is important to create suitable rules for it and to appoint a professional manager to perform this task. The most serious problems both legally and economically seem to occur when the condominium building deteriorates and the owners have problems deciding whether to renovate or demolish, while the building continues to deteriorate and it becomes more difficult for the owners to sell their condominium units.⁴⁰⁴

J. Leyser noted already in 1958 in his comparative study on apartment ownership in some European countries that many predicted that apartment ownership would lead to continuous quarrels between the apartment owners. However, he points out that the court cases regarding such matters have been very few. This can partly be due to the fact that co-ownership agreements are well drafted. Belgium is mentioned as an example of a country that introduced apartment ownership early and where it was regarded that most difficulties had been regulated already in advance by special agreement.⁴⁰⁵ The importance of good management was also stressed by a German authority within the condominium field, Johannes Bärmann, who from his discussions with experts from other countries concluded that two things that are of importance for a well-functioning condominium system: good by-laws and a good manager.⁴⁰⁶

⁴⁰¹ Tracht (2000), p. 78.

⁴⁰² Leyser (1958), p. 41.

⁴⁰³ van der Merwe (1994), pp. 154-157.

⁴⁰⁴ Ibid. at p. 22.

⁴⁰⁵ Leyser (1958), p. 33.

⁴⁰⁶ Bärmann (1982), p. 33.

3.13 The Settlement of Disputes

Since condominium owners have many important obligations, it is necessary to establish efficient procedures for the enforcement of rules and obligations to avoid disturbances of the financial stability and social harmony within the condominium scheme. There are provisions in the statutes of most Western European countries with measures to enforce both financial and non-financial obligations of the owners. Such provisions may be to exclude offenders from the use of apartments for a specific period or from the community, or provisions on the sales of an apartment to secure the interests in the fulfilment of the financial obligations. For non-financial obligations, fines are another remedy. Even though the exclusion of an owner from an apartment may seem a harsh measure seriously infringing the rights of the owner, the sale price of the apartment is realized and the collective rights of the community maintaining harmony by excluding members are regarded as more important. In the Anglo-American systems, there is no right in the statutes to deny the condominium owners the use of their apartments or to exclude them from the community. Usually they provide that the owners' association or an owner may approach the court to enforce the rules.⁴⁰⁷

If the rights of the parties within a condominium scheme are clearly established by law, the costs for litigation and settlement of disputes may be reduced compared with being forced to interpret a unique agreement between the parties in each case.⁴⁰⁸ Most countries use court procedures to settle disputes between condominium owners or between the owners and the manager or the equivalent. Court procedures, however, are not always the most convenient way to settle such disputes, as they can be too cumbersome and expensive.⁴⁰⁹ It is common to provide for an easy access to a court procedure, normally in the first instance of the regular court within the district where the ownership scheme is situated.⁴¹⁰ In some countries, disputes may be submitted to arbitration. The problem with arbitration is the excessive costs involved. Another possibility is to settle the dispute in a general meeting. In some systems, a special mechanism or procedure has been introduced to solve such matters. Such special procedures are generally a more inexpensive, quicker and more appropriate way to settle disputes. The procedures are better left to an agency outside the condominium scheme, because if it were up to the executive council or the general meeting, there would be a risk that the harmony within the scheme would be destroyed. Various forums for such settlement procedures are a type of ombudsman, a more informal court or a three-tiered mechanism, such as the one in New South Wales in Australia. The type that is

⁴⁰⁷ van der Merwe (1994), pp. 104-108.

⁴⁰⁸ Tracht (2000), p. 65.

⁴⁰⁹ van der Merwe (1994), pp. 166-169.

⁴¹⁰ Leyser (1958), p. 50.

more suitable for a legal system depends on the needs of the legal system and the availability of existing structures.⁴¹¹

3.14 Insurance

In most legal systems regulating condominium schemes, it is important to clarify what parts of the scheme are covered by insurance procured by the apartment owners themselves, especially if the owners' association has also procured insurance for the whole building in the scheme. A common solution for high-rise buildings is that the owners' association insures both the apartments and the common property, where the cost is borne by the association and thus paid by the owners according to their shares.⁴¹²

⁴¹¹ van der Merwe (1994), pp. 166-169.

⁴¹² van der Merwe (2004), pp. 2, 6.

4. The Independent 3D Property Case: Sweden

4.1 Background

The legal systems in the Nordic countries, including Sweden, are attributed to the Civil Law family, also called the Romano-Germanic family,⁴¹³ but due to attributes distinct from that legal family, it is more appropriate to speak about a separate Nordic legal family. The Nordic legal family lacks the characteristic features of the Common Law and is closer to Civil Law, although the Roman law has had a lesser influence on the legal development in the Nordic countries than in other countries such as Germany. The Nordic laws are historically based on old Germanic law. Even though the Scandinavian legal systems have participated in the legal development of Continental Europe, they have at the same time maintained their local characteristics.⁴¹⁴

All land in Sweden is divided into property units or joint property units, all of which are entered into the Swedish real property register. Provisions concerning real property and its division are found in *Jordabalken*, the Land Code. Another important Act is *Fastighetsbildningslagen*, the Real Property Formation Act, which regulates the formation of property units and changes in the property division. Since property ownership is indivisible, different parties cannot own different functions within a property unit in Sweden.⁴¹⁵ Neither can a property unit be transferred for a limited period of time. Delimited areas of land and water can constitute joint property units, which are shared in fixed proportions between several property units. The transfer of an area of a property unit always has to be followed by a change in the property subdivision.⁴¹⁶

A property unit (*fastighet* in Swedish) is an owned property that is registered in the real property register with a unique registration designation. The “traditional” property is a proprietary two-dimensionally defined right in land. It is delineated on the ground with x and y co-ordinates, but the property unit

⁴¹³ David and Brierley (1985).

⁴¹⁴ Zweigert and Kötz (1987), pp. 287-288, 295.

⁴¹⁵ It is thus not possible to own separate parts intended for different uses within a property unit, by dividing, for example, a building into areas for different purposes, such as housing and commercial purposes, without actually separating it into different property units.

⁴¹⁶ Julstad and Ericsson (2001), pp. 174-176.

itself has a three-dimensional extent; see further below. Three-dimensionally (3D) delimited rights, however, are delimited in terms of height and depth.⁴¹⁷

4.2 Development of the 3D Property Legislation

Before the introduction of 3D property into Swedish legislation, real property was equal to land, with the ownership extending into space and into the ground, but in practice only as far as is reasonably possible to use.⁴¹⁸ Ownership of real property is theoretically considered as reaching to the centre of the earth and upwards towards the universe, but disputes concerning the right to this space occur only when there may be real conflicts of interests in cases where the space really can be used for a purpose.⁴¹⁹ It means at least that no one but the property owner is entitled to use the space above or below ground for the construction of different facilities.⁴²⁰ The traditional properties are then only two-dimensionally delimited, but with a three-dimensional extent.⁴²¹

A demand for three-dimensionally delimited properties has existed in Sweden for quite some time, including the possibility of dividing ownership of buildings or space below ground, so that there may be units owned by separate parties.⁴²² The building industry in particular has been requesting this, mainly for the possibility of providing more accommodations in cities by adding an additional storey on existing buildings, obtaining a more rational use of publicly owned land, and implementing major infrastructure projects.⁴²³ A need for a possibility of forming 3D property units can especially be found in large projects where significant capital is involved and where there is competition for the use of land in the area. To facilitate the administration and financing of such projects, it is often suitable to divide the ownership, separating parts with different use, such as housing, office, retail, parking, etc.⁴²⁴ This demand was further stressed by Barbro Julstad in her doctorate thesis from 1994, where she discusses the need for three-dimensional property formation in Sweden.⁴²⁵

Other means were previously used to meet this need before the possibility of 3D properties was introduced, such as the formation of easements and other transfers of rights in land. Easements (*servitut*) are a way to meet a property

⁴¹⁷ Mattsson (2003b).

⁴¹⁸ Julstad and Ericsson (2001), p. 177.

⁴¹⁹ Victorin (2004), p. 351.

⁴²⁰ Julstad and Ericsson (2001), p. 177.

⁴²¹ Mattsson (2003b).

⁴²² Julstad and Ericsson (2001), p. 174.

⁴²³ Eriksson (2005), p. 12.

⁴²⁴ Mattsson (2003b).

⁴²⁵ Julstad (1994).

unit's need of space for a particular purpose in another property unit, for instance to provide a property unit with a necessary road across another property unit. An easement in Sweden may not be granted in favour of a person, but is a right granted in favour of one or more other property units. It may be formed either by official cadastral order or created by written private agreement between property owners.⁴²⁶ Utility easements (*ledningsrätt*) are used to secure the right to land for utilities of public importance, such as power and telecommunication lines. It entitles the proprietor of the utility to use space in other property units for the construction and maintenance of the utility, where this right can be granted to either a property or a person. Joint facilities (*gemensambetsanläggning*) are established when several property units have a collective need for different types of facilities that are not publicly provided, such as roads, play grounds and car parks. It is a form of common property, where the facility will be common to the property units.⁴²⁷ The right of using a certain place in one or more property units for such a purpose is granted to the property units included in the joint facility. Different kinds of leasehold are also possible, where the right of user is granted to a person for a limited period of time. One disadvantage with such solutions, however, is that rights of use constitute personal property and cannot be separately registered or mortgaged as real property can.⁴²⁸ The lack of possibilities to form 3D properties has also led to some unusual and not always suitable solutions.⁴²⁹

A first step towards the introduction of 3D properties in Sweden was the legislative amendment in 2002 that made it possible for fixtures to be segregated from a property without being physically removed from it. Before this change, a separate transfer of objects pertaining to a property was not valid with respect to any third party unless the object was separated from the property. This principle that fixtures cannot be segregated from the property without the object being physically removed was questioned in several cases, leading to the need for a change. One situation where such a change was needed was the incorporation of local public infrastructure, which mostly had been owned by municipalities, with the ownership of the land and of the facilities concentrated in the same hands, making the facilities fixtures of municipal properties. During recent years it has become more common to transfer infrastructure and space for facilities to companies, which was done through utility easements, and not by transferring the ownership, which would have been a better solution, but not possible, since the facility remained a fixture to the municipality's property. Another situation concerned joint facilities, where space had been granted for existing facilities while the ownership remained with the original property owner. Uncertainty in such

⁴²⁶ Julstad and Ericsson (2001), pp. 174-179.

⁴²⁷ Mattsson (2003b).

⁴²⁸ Julstad and Ericsson (2001), pp. 174-179.

⁴²⁹ Mattsson (2003b).

situations could arise concerning responsibility for maintenance, the party responsible for insurance, the right to rebuild facilities and other similar problems. The new legislation aimed at making buildings or facilities legally transferable from a property to another right-holder without the fixture being physically removed. Transferring a facility, however, may only be done by special order of a cadastral authority, in order to obtain legal certainty and efficiency. The new rules made it possible for the link between real property and fixtures to be broken without removing the fixture, and thus prepared the way for 3D property.⁴³⁰

A government committee was appointed in 1994 to investigate the possibilities of solving problems with coordination of different kinds of activity within complicated building structures.⁴³¹ The purpose was to include both 3D property formation and apartment ownership, but after supplementary directives from the new government in the autumn of 1994,⁴³² the part concerning apartment ownership was excluded.⁴³³ Study visits were made, for example to New South Wales in Australia, to gain experience to implement in the Swedish case.⁴³⁴ A report proposing the introduction of three-dimensional division into property units with the same status as the traditional two-dimensional properties was presented in 1996 to the government by the commission.⁴³⁵ The reactions to the proposal were mainly positive.⁴³⁶ During the following years, the report circulated for comments and was somewhat revised. There was not much opposition, but among the main disadvantages were mentioned the relatively limited cases requiring 3D properties.⁴³⁷ A government bill with the final proposal was then finally presented in 2003.⁴³⁸ Changes in the legislation to allow for 3D property formation came into force on 1 January 2004. It is regarded as the most important basic change in Swedish cadastral legislation during the past thirty years.⁴³⁹

The purpose of the introduction of 3D property in Sweden was to create pre-conditions for a more efficient management of property units containing different types of activities and where large capital investments are made. Such properties can include, for example, subdivision of a building into parts, where one part is for dwelling purposes and the other for commercial activities.⁴⁴⁰

⁴³⁰ Mattsson (2003b).

⁴³¹ Dir. 1994:82.

⁴³² Dir. 1994:136.

⁴³³ Brattström (1999), p. 104.

⁴³⁴ SOU 1996:87, pp. 40-41.

⁴³⁵ SOU 1996:87.

⁴³⁶ Brattström (1999), p. 115.

⁴³⁷ Mattsson (2003b).

⁴³⁸ Proposition 2002/03:116.

⁴³⁹ Eriksson (2005), p. 7.

⁴⁴⁰ Ibid.

Another reason was to overcome the difficulties connected with buildings located partly on top of each other, for examples houses along hill slopes.⁴⁴¹ Other purposes are the formation of property units for bridges, tunnels and underground storage. The 3D property form was also intended to make it possible to build new structures on and above already existing buildings, and in that way facilitate an increased building of accommodations in the cities.⁴⁴²

In the short amount of time during which the 3D property legislation has been in force, there has not been as great an interest in forming such properties as was expected. Of the around 20 000 cadastral procedures carried out in Sweden each year, approximately 50 dealt with 3D property formation during 2004.⁴⁴³ Two hundred 3D property units were mentioned as an expected amount before the legislation was introduced.⁴⁴⁴ It is expected, however, that the number of 3D property units formed each year will increase during the coming years, when more awareness of the significance and value of the new 3D property legislation has developed.⁴⁴⁵ As of 15 November 2006, a total number of 112 3D property units had been registered since the legislation was introduced, including both 3D property units and 3D property space, which is space included in a traditional property unit, but that just like the 3D property is delimited both horizontally and vertically. As a factor influencing the relatively low number of 3D property units registered so far has been mentioned that the tenant-owner associations have not applied for 3D property formation to the same extent expected. There is also a certain amount of hesitation when it comes to entering into the type of relationship occurring from 3D property formation, with questions about management, co-ordination, etc.⁴⁴⁶ Another reason for why the formation of 3D properties is not yet in full swing is that the planning of development and building of such properties did not start until the legislation regulating it was in force, and since such development processes usually are long and complicated, it will take some time before we will see the system fully in use.⁴⁴⁷

The first 3D property formation procedures have mainly involved the subdivision of existing buildings into dwelling and commercial units.⁴⁴⁸ A few parking garages have been subdivided to form 3D property units.⁴⁴⁹ Most of the registered 3D property units are of the building type, and only a few are bridges and tunnels. There have been many cases in Stockholm City, due to a

⁴⁴¹ Victorin (2004), p. 353.

⁴⁴² Eriksson (2005), p. 7.

⁴⁴³ Ibid. at p. 12.

⁴⁴⁴ Den första 3D-fastighetsbildningen gjord (2004).

⁴⁴⁵ Eriksson (2005), p. 12.

⁴⁴⁶ Sjöblom (discussions 15 November 2006).

⁴⁴⁷ Julstad (email 22 March 2007).

⁴⁴⁸ Eriksson (2005), p. 12.

⁴⁴⁹ Sjöblom (discussions 15 November 2006).

shortage of available land there and the number of different interests to be coordinated within the same area. There are, however, examples from all over the country.

Apartment Ownership

Apartment ownership (*ägarlägenheter*) has been discussed in Sweden several times during the past century. It was even proposed by the parliament already at the end of the 19th century, when a housing shortage had emerged due to industrialisation.⁴⁵⁰ In 1930, legislation allowing the presently existing Swedish special type of right of use for apartments was introduced, tenant-ownership (*bostadsrätt*), where a tenant-owner association owns the apartment building.⁴⁵¹ This form has been used as a way to obtain individual rights to a specific apartment without any independent 3D property or condominium rights. It is close to condominium ownership, simply an indirect form. The right to use a specific apartment within a building exists without limitation in time and is close to the apartment ownership form, but with the ownership representing a share in the capital of the association instead of owning a physical part of the building. Only the tenant-owner association may grant the right of tenant-ownership. The association is a type of economic association, in which each tenant-owner is a member and has a share. Connected with that share is a right to use a particular apartment in the property that the association owns. The share may be transferred or lien placed on it by the tenant-owner. The tenant-owner has the responsibility of maintaining the interior of the apartment, while the association takes care of the management of the building. The management is to be in a co-operative manner. Decisions are taken by vote among the members, but decisions regarding day-to-day management, etc., are made by a governing body.⁴⁵²

Apartment ownership in Sweden was brought up for discussion again during the second half of the 20th century, when it was argued that this form would be a better security for loans than tenant-ownership.⁴⁵³ A report was presented by a government committee in 1982, proposing that it should be possible to make a property unit of an apartment,⁴⁵⁴ but due to a change in political government, a legislative bill was never submitted.⁴⁵⁵ A report was presented in 1994, comparing apartment ownership with the tenant-ownership right of use for apartments (*bostadsrätt*), where the existing system was to be

⁴⁵⁰ Brattström (1999), pp. 23-25.

⁴⁵¹ SOU 2002:21, p. 46.

⁴⁵² Brattström (1999), pp. 30, 83-87, 93, 96.

⁴⁵³ Ibid. at pp. 31-36.

⁴⁵⁴ SOU 1982:40.

⁴⁵⁵ Brattström (1999), p. 40.

supplemented with some ownership features,⁴⁵⁶ but the proposal was criticized.⁴⁵⁷ The possibilities for apartment ownership were investigated and a proposal was made and presented by Margareta Brattström in 1999.⁴⁵⁸ It recently was the object of a separate investigation by a government commission, after being separated from the investigation about 3D properties, resulting in a report in 2002.⁴⁵⁹ A suggestion for apartment ownership was presented in this report, which was to a great extent based on the proposal for 3D properties. It has, however, been removed from the Swedish legislative agenda for the time being for political reasons.⁴⁶⁰

Motives for wanting to introduce apartment ownership have been different factors in the society, such as housing shortage, incentives for construction of buildings and more influence for the residents. There have been both legal and political reasons for not having introduced apartment ownership in Sweden.⁴⁶¹ It has been considered as being too similar to the existing right of use for apartments (*bostadsrätt*) to create a new form.⁴⁶² Political objections to apartment ownership have been, for instance, the risk of segregation and speculation.⁴⁶³ The new legislation about the formation of 3D properties has enhanced the prohibition of apartment ownership by clearly stipulating that a 3D property unit must consist of at least five apartments,⁴⁶⁴ thus making it impossible to form a property unit incorporating only one apartment. The requirement for not less than five apartments within a property unit was intended to prevent evasion of the statutory regulation by forming a property unit with two apartments and then amalgamating them into one.⁴⁶⁵ This restrictive view against fragmenting of the property division was another factor for the government objecting to such a proposal.⁴⁶⁶

⁴⁵⁶ Ds 1994:59.

⁴⁵⁷ SOU 2002:21, p. 47.

⁴⁵⁸ Brattström (1999).

⁴⁵⁹ SOU 2002:21.

⁴⁶⁰ With the new government elected in the autumn of 2006, however, there is a possibility that this matter will be brought up again for discussion, with a probability that it might actually be introduced (Sjöblom (discussions 15 November 2006)).

⁴⁶¹ Brattström (1999), pp. 15, 44.

⁴⁶² Prop. 2003/04:115, p. 33.

⁴⁶³ Brattström (1999), p. 45.

⁴⁶⁴ SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)* Chap. 3, s. 1a.

⁴⁶⁵ Proposition 2002/03:116, p. 57.

⁴⁶⁶ Proposition 2003/04:115, p. 33.

4.3 The 3D Property Unit (*3D-fastighet*)

Since 3D property was introduced into Swedish legislation, the traditional 2D property still exists as the main property type in Sweden. The 3D property form was only added as a complement, and the law states that 3D property can only be used when it is considered more suitable than other ways of fulfilling the intended purpose.⁴⁶⁷ The main laws that had to be amended to allow for 3D property formation were *Jordabalken* (the Land Code) and *Fastighetsbildningslagen* (the Real Property Formation Act).

Swedish legislation enables 3D property units to be established, but the units must relate to built constructions. Such a property is called a *tredimensionell fastighet* or *3D-fastighet* for short, which means three-dimensional or 3D property unit. The 3D property is defined as a property unit, which in its whole is delimited both horizontally and vertically.⁴⁶⁸ The 3D property does not have to consist of a whole building or facility, but can comprise only part of a building or facility.⁴⁶⁹ It can be used to delimit and separate different facilities or floors within a building also in depth and height. The Swedish 3D property may also extend over or under several ground parcels, and is thus not bound to be located within one two-dimensionally delimited property. It is possible for the 3D property to consist of more than one separate parcel, i.e. several areas of space that are not connected to each other. There is also something called *tredimensionellt fastighetsutrymme*, which means three-dimensional property space. It is space that belongs to a property unit other than a 3D property, and which is delimited both horizontally and vertically.⁴⁷⁰ It contains thus a delimited space within the space of a 2D property unit other than to which it belongs. The difference from an actual 3D property unit is that it is not a separate property unit, but is included in another 2D property unit. The 3D property will create a hole in the remaining traditional 2D property unit. The remaining parcel will include the rest of the ground (if any) and all air space above and all ground below the 3D property.

The 3D property in many ways is formed and dealt with as a regular traditional 2D property, which is further enhanced by not preparing a separate law for 3D properties, but only incorporating the rules into and supplementing the existing legislation, especially the Land Code and the Real Property Formation Act. From a legal point of view, the 3D property in principle is the same as a traditional 2D property,⁴⁷¹ and regulations for property-related rights

⁴⁶⁷ SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)* Chap. 3, s. 1.

⁴⁶⁸ SFS (1970:994) *Jordabalken (Land Code)* Chap. 1, s. 1a.

⁴⁶⁹ Eriksson (2005), p. 8.

⁴⁷⁰ SFS (1970:994) *Jordabalken (Land Code)* Chap. 1, s. 1a.

⁴⁷¹ Mattsson (2003b).

will apply to them in the usual way. Only a few special regulations for 3D properties have been added.⁴⁷²

The special regulations that are valid only for 3D properties are designed to reflect the particularities connected with that specific property type. These new rules are to accord with the existing principles of real property law. An important rule is that a 3D property may only be formed if this solution is found more suitable than other measures for obtaining the purpose. Some regard this as a too conservative legislation, where 3D property formation is seen as a second-hand option, even if it should be the best alternative.⁴⁷³ Property formation resulting in a 3D property is only allowed if the 3D property accommodates, or is intended to accommodate, a building or other facility or a part of the same, and if the 3D property is assured of the rights necessary for its appropriate use.⁴⁷⁴ This means rights for access to the property and to different facilities needed for the functioning of the property, such as water and sewage, electricity, stairs, elevator, etc. The requirement for access to the ground level means that a 3D property unit cannot be formed consisting of the upper part of a building without access to a staircase or elevator, or a rock cavern without access to the ground surface. Access to the ground surface can be obtained for example through easements or joint facilities.⁴⁷⁵ To avoid obtaining any empty 3D properties in the air without any construction surrounding it, the 3D property can only be formed if the facility is already constructed, unless it is done to guarantee financing or the construction of the facility.⁴⁷⁶ In that case, a 3D property consisting of just space may be allowed, but only for a transition period.⁴⁷⁷ It must come in use shortly after the property formation, and building permission should first have been obtained.⁴⁷⁸ The cadastral surveyor sets a timeframe within which the 3D property unit must be finalised, and if this does not take place, it will be cancelled. The corresponding rules are used when a building or facility within a 3D property unit is destroyed (see below).⁴⁷⁹ There is also a limitation stating that a 3D property cannot be formed only for one dwelling, and a 3D property for housing purposes must contain at least five apartment units,⁴⁸⁰ a rule which is intended to prevent the creation of individual apartment ownership.

When a 3D property has to be dissolved, for example if the building has been destroyed and will not be rebuilt, the owner of any part of the facility is

⁴⁷² Eriksson (2005), p. 8.

⁴⁷³ Victorin (2004), p. 367.

⁴⁷⁴ SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)* Chap. 3, s. 1a.

⁴⁷⁵ Eriksson (2005), p. 8.

⁴⁷⁶ SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)* Chap. 3, s. 1a.

⁴⁷⁷ Eriksson (2005), p. 9.

⁴⁷⁸ Mattsson (2003b).

⁴⁷⁹ Eriksson (2005), p. 9.

⁴⁸⁰ SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)* Chap. 3, s. 1a.

entitled to buy up the other parts. If there is more than one party wishing to buy up the facility, the party whose share carries the highest value will have priority. If there is no purchase (*inlösen*), the cadastral authority will, at the initiation of the municipality,⁴⁸¹ ordain that the 3D properties are to be surrendered by purchase and transferred to the 2D property that would have existed if no 3D properties had been formed. This procedure will also be carried out if no facility was constructed within the time that was stipulated in the property formation order.⁴⁸²

The 3D property unit is formed by cadastral proceedings under the Real Property Formation Act, which is the responsibility of the public cadastral authorities.⁴⁸³ The measures taken in this proceeding are the same as when forming a traditional 2D property. An application is made to the cadastral authority, which will evaluate whether all necessary conditions are fulfilled, both concerning general suitability and considering the special requirements that apply to 3D properties.⁴⁸⁴ The 3D property is formed through one of the regular property formation measures, i.e. subdivision, partition, amalgamation or reallocation. The formation is accomplished by an official decision.⁴⁸⁵ By the order boundaries, rights and obligations are also described, and everything will be recorded in the real property register.⁴⁸⁶ Information about the 3D space and building type will be recorded, as well as the location, defined by x and y co-ordinates, and z co-ordinates or other types of indication of its extent in the vertical dimension.⁴⁸⁷ Information on what original property unit or units that is affected by the procedure is also entered into the register, by indicating that the space of that 2D property unit is partly occupied by a 3D property unit.

The Swedish legislation on 3D property is not very detailed in the sense that it does not give exact regulations, for example, on where the boundaries between property units are to be drawn or what forms for co-operation between property owners that are to be used. Many cadastral surveyors seem, however, to be of the opinion that there is no need for a more detailed regulation of 3D property. The legislation is based on judgments regarding what is suitable in the specific case and the property owners have the possibility of proposing solutions that would suit their individual needs.⁴⁸⁸

Since 3D property formation recently was introduced in Sweden, not so many such properties have been formed yet, but some areas of use can be mentioned, such as adding more floors to building in the cities, covering railway

⁴⁸¹ Julstad (email 22 March 2007).

⁴⁸² SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)* Chap. 8, ss. 5, 7.

⁴⁸³ Julstad and Ericsson (2001), p. 176.

⁴⁸⁴ Eriksson (2005), p. 7.

⁴⁸⁵ Julstad and Ericsson (2001), p. 176.

⁴⁸⁶ Mattsson (2003b).

⁴⁸⁷ Eriksson (2005), p. 7.

⁴⁸⁸ Sjöblom (discussions 15 November 2006).

areas with buildings for housing and offices and using space under ground for garages and archives. It is also used for dividing the ownership within different communication areas, terminals, bridges, railway stations, etc. A main purpose is to divide the ownership of different facilities and building parts for different activities within one building complex, such as forming one part for offices, one residential area, one part for retail, one for parking, etc. The 3D property space can be used for delimiting space that is more suitable to add to another property unit than where it is located, for example a parking space under another property. The 3D property form is mainly not chosen as a form for a project unless other alternatives are not possible, for instance in projects of a type where easements would have been too extensive in size. This is of course connected with the rule that a 3D property may only be formed if it is considered more suitable than other available alternatives. It is, however, regarded as a convenient form for solving complicated problems within building projects.⁴⁸⁹

4.4 Boundaries

Boundaries are normally demarcated on the ground.⁴⁹⁰ No specific rules for the demarcation of boundaries between 3D properties have been introduced, but if demarcation cannot be set out and marked in a suitable way, which is often the case for 3D properties, the boundaries are to be described with sufficient accuracy in the cadastral documents, including a map.⁴⁹¹ This can be done in different ways through text, maps and illustrations. The boundaries are often marked on building drafts with an additional explanation in words in the cadastral documents. It is not regulated by law exactly where to locate the boundary between two 3D properties, but this has to be decided from case to case by the cadastral officer in the cadastral procedure, based on what is regarded as suitable in the specific case. A common solution that is considered as being clear is to locate the boundary to the centre of the wall and joists, but another solution is to make joint facilities for these structures.⁴⁹² The boundaries can be described either with reference to walls, ceiling and floor, which is the usual case for buildings, or be fixed by x, y, and z coordinates for rock shelters, etc.⁴⁹³ When drawing the boundaries, a certain amount of air around the building may also be included to provide access for maintenance, or to allow for certain things protruding from the building, such as antennas, or

⁴⁸⁹ Hedlund (phone call 18 August 2006).

⁴⁹⁰ Eriksson (2005), p. 9.

⁴⁹¹ SFS (1970:988) *Fastighetsbildningslagen (Real Property Formation Act)* Chap. 4, s. 27.

⁴⁹² Sjödin (email 18 May 2006).

⁴⁹³ Eriksson (2005), p. 10.

for smaller future additions.⁴⁹⁴ How much air space may be included in a 3D property unit has been discussed, something which is not clearly regulated in the legislation.⁴⁹⁵

4.5 Common Property and Management

Different facilities needed for a 3D property unit are, for example, water and sewage, pipes, ventilation, stairs and elevator, as well as load-bearing structural parts, such as roofs. If these needs are not fulfilled within the property unit, it has to be supplemented with facilities outside its own unit. These can either remain in private ownership included in one of the property units involved, or be in common ownership of several property units if several property units have a common need for a certain right. The legislator has not explicitly pointed out what solutions for co-operation must be used for the access and use of these facilities. Individual solutions have to be decided by the cadastral surveyor in the cadastral procedure. The main forms are joint facilities (*gemensambetsanläggningar*), created under the Joint Facilities Act, and easements (*servitut*), of which the joint facility is given as the main alternative. Facilities that can be included in the common property of a joint facility are, for example, parts of the construction that are of common use for the property units, such as supporting constructions, façades, elevators and certain pipes. Any specific new forms of management for 3D properties have not been regarded as necessary to introduce.⁴⁹⁶

A joint facility consists of joint property belonging to the property units that are to take part in it, with a specific share for each property. There is one share for construction and one for management of the facility for each property unit to apportion the costs.⁴⁹⁷ The joint facility can be managed by an association formed by the owners, or by part-owner management. The association constitutes a legal person. The frames of the management activities are defined by statutory provision, articles of association and decisions by meetings, and the operational costs are paid by each property owner. For part-owner management, all owners of the facility have to agree on all activities.⁴⁹⁸ The association management is the most common type of these two, especially for larger joint facilities. It may seem that the property owners are not fully aware of the possibility to have part-owner management instead of association management for joint facilities, even though the part-owner management is

⁴⁹⁴ Boverket (2004), p. 16.

⁴⁹⁵ Sjödin (email 18 May 2006).

⁴⁹⁶ Proposition 2002/03:116, pp. 66, 141.

⁴⁹⁷ Eriksson (2005), p. 9.

⁴⁹⁸ Julstad and Ericsson (2001), pp. 178-179.

very suitable in situations with only two owners.⁴⁹⁹ For the relations between the property owners, the general rules for rights between neighbours are also applicable to 3D properties, but there are also some special rules concerning access to the adjacent property for repairs, construction work, etc. The law also provides protection from insufficient maintenance or damage from the adjacent property.

A difference between the two forms of joint facility and easement is that the facility is intended to fulfil a need of several property units, while the easement fulfils the need of only one unit, even though an easement can be created for several property units for the same facility as well. As mentioned previously, an easement may only be granted in favour of a property unit and not of a person. Another difference is the regulation of costs, where this can be decided on in the facility procedure according to shares for the property units participating in the facility, but not when an easement is formed.⁵⁰⁰ In the report preceding the legislation, it was mentioned that when two property units are unequal in size and value, it is more suitable that facilities are included in one of the property units and that access is given through easements, instead of forming a joint facility.⁵⁰¹

The choice of form of right to use for facilities depends also to a large extent on whether the 3D property unit is formed within an existing building or constructed with the purpose of forming 3D property units. In the latter case, the different facilities and functions can be separated as much as possible and the use of easements or joint facilities can be reduced in order to avoid the need for co-operation between the property owners as much as possible. The existing legal rules for neighbour relations are often considered sufficient to regulate the relationship between the property units.⁵⁰²

There is a variety of opinions regarding what form of co-operation is most suitable to use, some of which are more prevalent. According to a representative for the Swedish building and development industry, experience shows that a problem when deciding on the form of ownership rights to common facilities is that the commercial owners lack sufficient knowledge about the available forms such as easements and joint facilities, which makes them insecure forms for these actors and they therefore are reluctant to enter into such relationships with other owners such as tenant-ownership associations and the dependency on them that this would entail. Due to such reasons, joint facilities in particular are avoided. As another reason to choose easements over joint facilities mentioned is that a commercial property owner in relation to a tenant-ownership association is usually larger and has more competence in the field, which makes it rational to put the responsibility of

⁴⁹⁹ Skoglund (discussions 15 November 2006).

⁵⁰⁰ Lewenhaupt (2006), pp. 26-27.

⁵⁰¹ SOU 1996:87, p. 167.

⁵⁰² Hedlund (phone call 18 August 2006).

ownership and management on the larger party.⁵⁰³ Another factor that has been expressed is that when separating the ownership of different parts within a building, the desire is to separate these parts as much as possible, and by that finding solutions other than those of a common nature.⁵⁰⁴

Even though an easement often is a suitable solution, especially when common solutions are avoided, a problem with the many easements that often have to be created is that there are great costs involved in analysing the technical systems for these facilities.⁵⁰⁵ It can also be very complicated if a pipe needs to be moved and the easement as a result also has to be moved.⁵⁰⁶ This could be solved by more general easements including pipes needed for the property unit.⁵⁰⁷ Instead of showing all details, the property owners would have to dispute about it later if something is unclear.⁵⁰⁸ However, the property owners applying for the formation of a 3D property can themselves to a large extent influence the level of details for this. Since the joint facility is sometimes avoided due to the unwillingness among the property owners to enter into joint facilities, especially for professional managers to enter into joint facilities with tenant-owner associations, reciprocal easements may be chosen as an alternative solution.⁵⁰⁹

A study has been made on what forms have been used for co-operation on common property in some cases of 3D property cadastral procedures, and whether these solutions lead to satisfying legal results.⁵¹⁰ About one-third of all 3D property units formed so far in three large Swedish cities were studied. Most of them contained buildings, mainly separating garages from residential, retail and office units. The 3D property space was used when a building was divided into two property units and parts of the building were transferred to one of the units as 3D property space. The solution to form 3D property for not yet constructed buildings has been used restrictively. It was concluded that the co-operation question has not led to many problems in the cadastral procedure. The main types of co-operation forms used in the studied cadastral procedures were joint facilities and easements. The purposes for these were, generally speaking, those that were mentioned by the legislator. For supporting constructions, both joint facilities and easements were used, or even no special rights were created at all. For façades, hardly any co-operation forms had been used. For access to the ground by elevators and stairs, easements were mainly created, but also joint facilities when the use was more common between the

⁵⁰³ Hedlund (phone call 18 August 2006).

⁵⁰⁴ Julstad (email 22 March 2007).

⁵⁰⁵ Lindén (discussions 15 November 2006).

⁵⁰⁶ Kågedal (discussions 15 November 2006).

⁵⁰⁷ Lindén (discussions 15 November 2006).

⁵⁰⁸ Skoglund (discussions 15 November 2006).

⁵⁰⁹ Sjöblom (discussions 15 November 2006).

⁵¹⁰ Lewenhaupt (2006).

property units. The most extensive co-operation concerned pipes and technical facilities with both joint facilities and easements. This type existed for almost all the studied 3D properties. It was concluded that joint facilities were not so extensively used, which was explained by the fact that property owners are reluctant to participate in joint facilities and are afraid of emerging disputes. Another reason was that the general rules of rights between neighbours (*grannelagsrätt*) should be sufficient for these needs. For the management of joint facilities, part owner management was preferred to association management, due to the fact that many of the facilities concern only two owners. The easement form was mainly used when there was a need only for the single 3D property unit. An example of such a need is emergency exits.⁵¹¹

4.6 Insurance

The insurance industry did not find it necessary to regulate insurance issues in the 3D property legislation, but left it to be decided along with the insurance premiums. According to the experience of a cadastral surveyor, 3D properties do not seem to be considered as problematic among the insurance companies or something that requires special insurance solutions. 3D property units are insured separately like any property unit.⁵¹²

4.7 General Views Regarding the 3D Property System

A general view of experts and practitioners working with 3D property formation in Sweden seems to be that the legislation is working well, but that it has not been used to the extent anticipated. The future for this system seems to be regarded in general as positive, with definite special advantages. The possibilities for development have increased, especially for cases with large investments and difficulties to otherwise separate and specify the ownership to parts with different use. It gives opportunities to involve more interested parties. Specific opportunities can be found in densely built areas where the land has a high value. A cadastral surveyor finds it likely that the interest for 3D property formation will increase during the coming years, and spread from the cities to the suburbs, to be used for shopping centres, etc.⁵¹³

The Stockholm County Surveyors' informal 3D property networking group is in general pleased with the legislation and that the guidance on how to

⁵¹¹ Lewenhaupt (2006), pp. 8, 11, 31-33, 42, 45, 55-57.

⁵¹² Sjöblom (discussions 15 November 2006).

⁵¹³ Ibid.

interpret and carry out the legislation is given in the government bill and report. The Act regulates in what situations 3D property formation is to be used.⁵¹⁴ It is even regarded that the system works better than what was expected beforehand, despite the fact that complicated constructions and activities are involved.⁵¹⁵ Only some specific issues are mentioned as problematic and in need of some changes.⁵¹⁶

A surveyor from a Swedish building company, with the experience from several 3D property cases in which he has been involved, cannot point to any specific problems that he has experienced with it, or any specific changes he thinks should be made to the legislation. In his opinion, 3D property formation will be more common in the future than it has been during the first years that it has been in use, due to the fact that the building activities are increasing in the cities with more complex and complicated constructions, where different functions need to be separated.⁵¹⁷

4.8 Some Problem Areas

If there are any specific areas within Swedish 3D property formation in which problems or difficult issues will emerge remains to be seen. This property form is still new and will have to be more established with more 3D properties formed before any real conclusions can be drawn. The material to draw conclusions from is still too sparse. The Swedish National Land Survey made a follow-up after the first year when 24 cadastral procedures involving 3D property were finished. The National Land Survey is also planning to make a more thorough evaluation to investigate how the legislation is working in practice, by looking at the 3D property units already formed, and to look closer on some specific issues that are considered the most interesting or problematic.⁵¹⁸

As already discussed above, one of the issues that has created the most difficulties, discussions and different opinions concerns the co-operation and rights between property units and what form of rights and management that are the most suitable, for example the choice between joint facility and easement.⁵¹⁹ Other matters that have been mentioned as problematic from the side of cadastral surveyors in Stockholm County concern rights for facilities, such as elevators, stairs and pipes. Since these are not fixtures to the property, but fixtures to the building, the ownership cannot be transferred to another

⁵¹⁴ Sjöblom (discussions 15 November 2006).

⁵¹⁵ Kågedal (discussions 15 November 2006).

⁵¹⁶ Sjöblom (discussions 15 November 2006).

⁵¹⁷ Hedlund (phone call 18 August 2006).

⁵¹⁸ Sjödin (email 18 May 2006).

⁵¹⁹ Ibid.

property unit, which would be useful for such facilities.⁵²⁰ Another issue concerns how to work out the detailed development plan when 3D property units are included in the plan, where more instructions are supposed to be given, but these remain yet to be done.⁵²¹

An issue discussed in Sweden has also been fire protection between different 3D property units within the same building complex. The question is whether it is enough to allow the same protection standard as normally within a building belonging to the same property unit, or whether there should be an enhanced requirement for protection as is prescribed between separate buildings.

No amendments to the legislation are planned yet concerning the above-mentioned problematic areas, or any direct changes of the rules for application, but discussions are made continuously concerning possible changes and supplements in the future.⁵²²

⁵²⁰ Sjöblom (discussions 15 November 2006).

⁵²¹ Kågedal (discussions 15 November 2006).

⁵²² Sjödin (email 18 May 2006).

5. The Condominium Case: Germany

5.1 Background

German law belongs to the Germanic legal family, which is closely related to the Romanistic legal family.⁵²³ It is included in the Civil law family, also called the Romano-Germanic family.⁵²⁴ Germany is a federation consisting of 16 federal states (*Bundesländer*). Each state has its own parliament with certain legislative rights, but the important legislation is the same, or similar, for the entire country.⁵²⁵ Certain laws are thus valid nationally and others the states themselves have enacted for their individual state. The laws of the states have to be consistent with the laws valid for the entire country.⁵²⁶

Ownership to land is regulated in the Act *das Bürgerliches Gesetzbuch*,⁵²⁷ the Civil Code introduced in 1900. Real property regulation, generally speaking, is uniform for the entire country.⁵²⁸ As a main rule, only two-dimensional property formation is possible. There is a principle stating that there cannot be different ownership for parts of a property unit, the exception being *Wohnungseigentum*, which can be translated as condominium.⁵²⁹ This form of ownership is thus a deviation from the main rule, through the development of a co-ownership right, with the *Wohnungseigentum* forming a specific right where the co-owners accept a reduction of the co-ownership in favour of a separate ownership right to a specific apartment.⁵³⁰

⁵²³ Zweigert and Kötz (1987), p. 138.

⁵²⁴ David and Brierley (1985).

⁵²⁵ Bogdan (1993), p. 187.

⁵²⁶ Gerremo (1998), pp. 16-18.

⁵²⁷ *Bürgerliches Gesetzbuch (Civil Code)*.

⁵²⁸ Hertel and Wicke (2006), p. 4.

⁵²⁹ Gerremo (1998), pp. 16-18.

⁵³⁰ Utredningen om tredimensionellt fastighetsutnyttjande (1994), p. 32.

5.2 Development of the Condominium Legislation

Table 5.1. Development of the Condominium (*Wohnungseigentum*) Legislation.

Year	
Up to 1900	<i>Stockwerksseigentum</i>
1900	<i>Bürgerliches Gesetzbuch</i> (Civil Code)
1951	<i>Wohnungseigentumsgesetz</i> (Condominium Act)
1973	Amendment of the <i>Wohnungseigentumsgesetz</i> , especially concerning management questions
1989	Reunion of Germany with the introduction of <i>Wohnungseigentum</i> also in the Eastern parts
1990	Amendment of the <i>Wohnungseigentumsgesetz</i> , introducing the payment procedure (<i>Mahnverfahren</i>)
2000	Court decision on majority votes (“shaky-resolutions”)
2005	Court decision on the legal capacity of the <i>Wohnungseigentum</i> community
2007	Amendment of the <i>Wohnungseigentumsgesetz</i> , including changes to the dispute settlement procedure

It was possible in medieval Germany to acquire individual ownership to storeys of buildings mainly for residential purposes under such names as *Stockwerks-eigentum*, *Geschofseigentum*, *Herbergsrecht*, *Kellerrecht*, *Hausbodenrecht* and *Eigentum an Gelassen*.⁵³¹ Separate rooms could also be acquired for business premises, such as shops and taverns.⁵³² In the 19th century, the right to condominium ownership was rejected due to its incompatibility with the principles of Roman law. According to the main accession principle (*Akzessionsprinzip*), or “*superficies solo cedit*”, the land and building are legally regarded as one unit, and for those reasons a building could not be subdivided into separate floors or parts into the hands of several different owners. Other solutions were used to overcome this

⁵³¹ Merle (1979), p. 16.

⁵³² van der Merwe (2004), p. 7.

obstacle, such as constructing common property for the separate parts, and through that distributing the use of the building parts, or granting rights of superficies limited in space, or granting easements.⁵³³

An early form of condominium in Germany was the *Stockwerkseigentum*, a kind of undeveloped and primitive form of apartment ownership.⁵³⁴ It was common before 1900,⁵³⁵ prior to the introduction of the *Bürgerliches Gesetzbuch* (the Civil Code), which according to the principles of Roman law did not allow the creation of such ownership.⁵³⁶ It was possible with this form to own separate storeys of a high-rise building, where the owner of the top floor also usually owned the roof, while the owner of the ground floor also owned the land on which the building was erected.⁵³⁷ It was possible not only to own individual parts of the building, but also separate spaces, even spreading to a neighbouring house.⁵³⁸ No common property usually existed, and the apartment owners themselves had to take care of management and administration, without any association or other central body to arrange these matters. The owners also took care of the maintenance on the outside of their own apartments. Neither was there any clear demarcation of rights and duties of the owners and no mechanism existed for settling the many disputes that emerged. Disputes between the owners in fact were so numerous that such houses were called houses of dissent (*Streithäuser*).⁵³⁹ Even though according to the *Bürgerliches Gesetzbuch* it is now not permissible to form new property units of this type, any *Stockwerkseigentum* formed before the introduction of this law still is allowed to exist.⁵⁴⁰ The main problems with the *Stockwerkseigentum* concerned the insufficient delimitations of the apartments as well as the insufficient regulation of the legal relationship between the owners, but these problems were later avoided with the new condominium form (*Wohnungseigentum*), which was also more adapted to the existing legal system.⁵⁴¹

When the Civil Code (*das Bürgerliches Gesetzbuch*) was introduced, the discussion about apartment ownership continued. The reintroduction of the condominium form was supported as it was considered to be less expensive and easier to finance than regular home ownership, and by that it would be possible for more people to acquire such property, the housing shortage would decrease and the building activities of the society would be stimulated. There were, however, disadvantages as well, such as the possibility of disputes, the

⁵³³ Merle (1979), pp. 17-18.

⁵³⁴ van der Merwe (1994), p. 4.

⁵³⁵ Hertel and Wicke (2006), p. 8.

⁵³⁶ Leyser (1958), p. 34.

⁵³⁷ van der Merwe (1994), p. 4.

⁵³⁸ Weitnauer (2005), p. 28.

⁵³⁹ van der Merwe (1994), p. 4.

⁵⁴⁰ Moeroch (1996), p. 57.

⁵⁴¹ Weitnauer (1995), p. 691.

management costs, the difficulties to get loans, the breach of the accession principle, etc. Several proposals to introduce condominium ownership were made.⁵⁴²

After the introduction of the *Bürgerliches Gesetzbuch*, apartment ownership was discussed again in the 1920's due to the scarcity of housing after the First World War. The Introductory Law to the Civil Code contained a reservation by which state legislation could create a type of condominium user right where the building was owned in common and a separate right of use was given to each owner, but this reservation was not used until 1950, since it was not popular in practice.⁵⁴³ After the Second World War, the issue was again taken up for further discussion as to resolving the question of rebuilding the destroyed houses. It was, however, difficult to find a solution that could work within the legal system.⁵⁴⁴ The disputes that had been so frequent in the *Stockwerkeigentum* houses were a great disadvantage, as well as the lesser possibilities of obtaining loans. Those in favour of the condominium form believed that the advantages would be greater, such as the possibility of home ownership and the accumulation of private capital.⁵⁴⁵

During the Second World War, about 2.25 million apartments were destroyed or severely damaged.⁵⁴⁶ That together with more than ten million immigrants⁵⁴⁷ coming to the country created a great demand for housing, with a shortage of about five million apartments,⁵⁴⁸ and the traditional housing forms proved to be insufficient for meeting this need.⁵⁴⁹ There was a need to introduce a new form to make it possible to own a flat in a multi-family house, which led to the introduction of the *Wohnungseigentumsgesetz*.⁵⁵⁰ The new law proposal was an attempt to fill the need for a legal institution that would give apartment users a property right to use their apartments that could be disposed of and inherited.⁵⁵¹

Serving as a basis for the *Wohnungseigentumsgesetz* (Condominium Act) was the bill "*Gesetz über das Eigentum an Wohnungen und gewerblichen Räumen*" ("Act on ownership of apartments and commercial spaces") presented in 1949. This proposal was a significant step forward and a starting point for the *Wohnungseigentumsgesetz*. It was to a large extent based on Roman law, placing the individual ownership of units (*Sondereigentum*) in the foreground with the

⁵⁴² Merle (1979), pp. 36-37.

⁵⁴³ Leyser (1958), pp. 35-36.

⁵⁴⁴ Weitnauer (2005), p. 31.

⁵⁴⁵ Haring (1976), p. 33.

⁵⁴⁶ Seuß (2001b), p. 1.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ Gesetzentwurf des Bundesrates, Drucksache 75/51.

⁵⁵⁰ Seuß (1993), p. 1.

⁵⁵¹ Weitnauer (2005), pp. 32-33.

common property (*Miteigentum*) as an attachment, which was against the accession principle (*Akzessionsprinzip*) and therefore caused some difficulties. The processing of this bill was slow and met opposition. It was more positively greeted when the legal construction of the *Wohnungseigentum* was changed to be based on a share in the common property of land and building, and by that, could be fitted into the regulation of the Civil Code. When this fundamental legal structure was decided, the further details could fairly easily be solved.⁵⁵² During the drafting work for the new condominium legislation, the legislators used experiences from other European countries with similar legislation and could with the help of this experience create a comprehensive legislation that would stand the test without many amendments during subsequent years.⁵⁵³ Because of all the preparations, the law proposal could be presented before the end of 1950 after an unusual and speedy process.⁵⁵⁴ A bill for the Act on *Wohnungseigentum* and *Dauervohnrecht* was issued in 1950 and could be passed in the beginning of 1951 with only some minor changes. This Act concerning condominiums in Germany is the Law on Apartment Ownership and Long-term Residential Rights⁵⁵⁵ (*Gesetz über das Wohnungseigentum und das Dauervohnrecht*) (*Wohnungseigentumsgesetz* for short).⁵⁵⁶ The *Wohnungseigentumsgesetz* is meant to supplement *das Bürgerliches Gesetzbuch* and is subordinated to the rules in this Act.⁵⁵⁷

The purpose of the introduction of the *Wohnungseigentumsgesetz* was not to replace the already existing housing forms, only to add a new possibility.⁵⁵⁸ The main purposes were to stimulate the reconstruction of the cities destroyed in the war, by putting in more private capital, showing new ways to efficiently build up the city centres by amalgamating smaller property units to larger, to make it possible for people to acquire a share in apartment property and to support the property formation, which was a goal of social policy character.⁵⁵⁹ The *Wohnungseigentum* was mainly intended as a form of ownership for less wealthy people.⁵⁶⁰ A major goal with the *Wohnungseigentum* form was to avoid the large tenancy apartment blocks, where people may feel alienated, and instead give people their own property with attachment to the land. However, this opportunity was intended to be possible not only for apartments, but also for commercial use through the *Teileigentum*.⁵⁶¹

⁵⁵² Weitnauer (2001), p. 127.

⁵⁵³ Haring (1976), p. 34.

⁵⁵⁴ Weitnauer (2005), p. 33.

⁵⁵⁵ van der Merwe (2004), p. 8.

⁵⁵⁶ *Wohnungseigentumsgesetz (Condominium Act)*.

⁵⁵⁷ Gerremo (1998), pp. 47-48.

⁵⁵⁸ Weitnauer (1995), p. 684.

⁵⁵⁹ Weitnauer (2005), pp. 33-34.

⁵⁶⁰ Wolfsteiner (1992), p. 9.

⁵⁶¹ Weitnauer (1995), pp. 689-691.

The creators of the *Wohnungseigentum* legislation thought, in regard of rebuilding the cities after the war, that it would not be possible to compensate former landowners with the same land area as before. It would also be easier for property owners to cooperate in the reconstruction and to pool their financial capacity. The planning authorities of the cities were positive about the possibilities that the new property form would bring. The planning architects also found it easier to plan a building area disregarding property boundaries, and better solutions by this could be reached. The costs for common facilities could be shared. Constructing types of buildings that were common with retail space on the ground floor and apartments on the upper floors was made easier. The *Wohnungseigentum* form was considered useful, not only for the reconstruction of destroyed buildings, but also for building new housing areas, where the residents could own their own homes and at the same time share the land and necessary common facilities while decreasing construction costs.⁵⁶²

With the new Act, the creators hoped that the willingness for investments would be great, but the initial phase was slow and by 1968, only 380 000 *Wohnungseigentum* apartments were built.⁵⁶³ The first years after the introduction of the *Wohnungseigentumsgesetz* can be regarded as a kind of introductory phase, when this new form was treated with some caution and restraint, but after the end of the 1950's, it started to spread rapidly, faster in the southern parts of the country.⁵⁶⁴ One reason for that the *Wohnungseigentum* form was not so widely used until the 1970's, for example, was the problems with obtaining financing for properties not including any ground.⁵⁶⁵ Many people were sceptic towards this new form of housing, but the popularity grew during the 1970's and the 1980's.⁵⁶⁶ It is estimated that around 2.35 million *Wohnungseigentum* apartments were created during the period of 1953-1988. An important factor was that the financial institutions were finally prepared to give loans with separate apartments as security.⁵⁶⁷ It was also introduced in East Germany after the reunification of Germany in 1990, and helped finance the renovation of buildings necessary in that part of the country.⁵⁶⁸

Since the Act was introduced, rather minor changes have been made throughout the years.⁵⁶⁹ The legal regulations of the *Wohnungseigentumsgesetz* concerning the relationship between the owners and the management of the common property appear to have withstood the test of time. During the first fifty years, it was amended only twelve times. There were larger changes twice,

⁵⁶² Weitnauer (1995), pp. 681-683.

⁵⁶³ Seuß (2001b), p. 1.

⁵⁶⁴ Weitnauer (2005), p. 63.

⁵⁶⁵ Schröder (interview 14 April 2005).

⁵⁶⁶ Gerremo (1998), pp. 47-48.

⁵⁶⁷ Weitnauer (2005), p. 63.

⁵⁶⁸ Seuß (1993), p. 18.

⁵⁶⁹ Gerremo (1998), p. 49.

with a 1973 amendment by which the rights of owners towards the manager were specified, and the character of the manager and the time period of the management were decided, and a 1990 amendment by which a payment procedure (*Mahnverfahren*) was introduced. Apart from this, there have only been minor changes with necessary adjustments.⁵⁷⁰ When the first renewal of the *Wohnungseigentumsgesetz* was made only after twenty years,⁵⁷¹ it was concluded that the *Wohnungseigentum* had become an established part of the German legal system and that the Act had filled its purposes in the sense that it had created incentives for building and by that, had eased the housing shortage, especially in the cities. The basic concept has remained, but some new problems have also emerged.⁵⁷² Proposals for statutory amendments were regarded by some as unsuccessful and unnecessary, and that any arising problems should rather be resolved through practice and by the courts.⁵⁷³

The 1973 amendment mainly concerned the condominium owner's position towards the manager. There were also changes regarding more technical questions.⁵⁷⁴ One change was that *Wohnungseigentum* and *Teileigentum* no longer could be created in such a form that *Sondereigentum* (individual property) was connected to *Miteigentum* (common property) in several property units. Another amendment concerned garage places, which were only to be considered partitioned (*abgeschlossen*) when the extension of their areas was permanently marked. The period for the appointment of a manager was also limited to five years. The amendments in general were positively received, but there was some criticism, mainly concerning the *Sondereigentum* for parking places and the extension of the certification duty for the acquisition of *Sondereigentum*. The fact that no consideration had been taken as to the needs for amendments as known from practical experience, the legal scholarship and case law, especially regarding the problems connected with the new form of large building complexes with thousands of owners that was not expected when the legislation was introduced, was also criticized.⁵⁷⁵

A discussion about making additional amendments to the *Wohnungseigentumsgesetz* was initiated by Bayern in 1977.⁵⁷⁶ The purpose was to further improve the legal status of *Wohnungseigentum* owners.⁵⁷⁷ The *Wohnungseigentum* form had developed to the extent that the communities (*Wohnungseigentümergeinschaften*) had become larger and larger, with more than a thousand units,

⁵⁷⁰ Seuß (2001b), p. 1.

⁵⁷¹ Gerremo (1998), p. 49.

⁵⁷² Begründung Bundestagsdrucksache VII/62.

⁵⁷³ Evangelisches Siedlungswerk in Deutschland (1981), p. 5.

⁵⁷⁴ Seuß (1993), p. 7.

⁵⁷⁵ Haring (1976), pp. 36-38.

⁵⁷⁶ Bärmann, Pick and Merle (2003), p. 61.

⁵⁷⁷ Merle (1979), p. 196.

resulting in management problems.⁵⁷⁸ The wish to make changes concerned the restriction of the size of apartment communities (*Wohnungseigentumsgemeinschaften*) to 100 shares. Changing the agreement (*Vereinbarung*) of the lot owners should be made easier by abandoning the principle of unanimity (*Einstimmigkeitsprinzip*). It was also suggested that common funds should belong to the community (*Gemeinschaft*). There were several discussions concerning amendments, but these initiatives did not give any results.⁵⁷⁹

The Ministry of Building conducted a survey in 1989 on how satisfied *Wohnungseigentum* owners, practitioners and other experts working with such questions were, what types of disputes occurred in such buildings and how common they were, and from this the intention was to estimate the need for amendments to the *Wohnungseigentum* legislation. In general, the experts regarded that the *Wohnungseigentumsgesetz* was proven successful, but they had some suggestions for amendments, although this did not give rise to any urgent need to change the legislation.⁵⁸⁰ The survey concluded that the legislation had worked excellently during the time it has been in use, as well as the court procedures, even though the surrounding conditions had changed, for example concerning the fact that neither the building owners model, nor any renting of *Wohnungseigentum* apartments, yet existed. Regarding the need for amendments to the *Wohnungseigentum* legislation, the experts in general agreed that the *Wohnungseigentumsgesetz* is a good law, which should keep its basic structure. The experts were of the opinion that all the suggestions for amendments of the legislation have both positive and negative aspects, for example strengthening the rights of *Wohnungseigentum* owners also might lead to weaker rights for the community. Examples of suggested amendments included the collection of outstanding monthly payments (*Hausgeld*), problems with the acquisition of *Wohnungseigentum*, the rights of the manager (*Verwalter*), maintenance and repair of the common property and changes in the by-laws (*Gemeinschaftsordnung*) and the partition plan (*Teilungserklärung*).⁵⁸¹

During the 1989 survey, the future of the *Wohnungseigentum* was discussed. The *Wohnungseigentum* form remained very popular among individuals. The experts concluded that they did not in the future see very large buildings with even more than a thousand units. Even though such are possible to manage, the problems become very large when they arise. What would be more suitable rather is to create *Wohnungseigentum* that are flexible and respond to the rebuilding demands in the cities.⁵⁸²

⁵⁷⁸ Gesetzentwurf des Bundesrates 08.03.1977, Drucksache 8/161.

⁵⁷⁹ Bärmann, Pick and Merle (2003), p. 61.

⁵⁸⁰ Schneider (1989).

⁵⁸¹ Bundesminister für Raumordnung, Bauwesen und Städtebau (1989), pp. 17, 113.

⁵⁸² Ibid. at pp. 136-137.

East Germany did not have any legislation of the *Wohnungseigentum* type, since private ownership of such property was not allowed.⁵⁸³ When Germany was reunified in 1990, the *Wohnungseigentumsgesetz* without any specific measures could also be enforced in the new German states. However, to make the legislation be used in actuality, some obstacles remained. It was expected that the system would develop in the same positive way in the new states as it previously had in the West German states.⁵⁸⁴

The partition (*Abgeschlossenheit*) principle had to be facilitated when the new federal states (*Bundesländer*) were to be incorporated in the *Wohnungseigentum* system after the reunification of Germany. It was decided in 1992 that apartments and other spaces in existing buildings in the sense of section 3 (2) of the *Wohnungseigentumsgesetz* could also be partitioned in themselves, even if the partition walls and ceilings do not fulfil the requirements that are made in the building law (*Bauordnungsrecht*) of the respective state (*Bundesland*). This was decided by the Supreme Court, and by that a controversial question was decided at the highest level. The Federal Administrative Court (*Bundesverwaltungsgericht*) had previously been against this and had been of the opinion that the partition proceedings (*Abgeschlossenheit*) would place demands concerning partition walls and ceilings, especially concerning protection against fire, noise and heat. After this decision was issued, claims for granting partition (*Abgeschlossenheit*) suddenly rose substantially.⁵⁸⁵

Additional amendments have been made to the *Wohnungseigentumsgesetz* since the beginning of the 1990's. These amendments concern proceedings, increases in real value (*Gegenstandswerte*), rules for the payment procedures (*Mahnverfahren*), special rules for the newly formed German states (*Bundesländer*) concerning the partition requirement (*Abgeschlossenheit*), etc. An important decision from 2000 (see below) regarding majority votes led to a discussion about the need for changes. This did not lead to any urgent need for amendments, but rather a decision to await further development.⁵⁸⁶ Whether a change of the *Wohnungseigentumsgesetz* would be necessary has constantly been discussed, especially after the decision on the majority vote in 2000. However, this is considered necessary only when the problems cannot be solved judicially or by legal doctrine or legal practice.⁵⁸⁷

In order to make decisions within a *Wohnungseigentum* scheme, a combination of majority vote and unanimous agreement is used.⁵⁸⁸ The dominant view in both the courts and the legal literature to date has been that a decision by the owners concerning matters that should be regulated by a

⁵⁸³ Weitnauer (2005), p. 34.

⁵⁸⁴ Weitnauer (1995), p. V.

⁵⁸⁵ Bärmann, Pick and Merle (2003), p. 63.

⁵⁸⁶ Ibid. at pp. 62-63.

⁵⁸⁷ Seuß (2001b), p. 1.

⁵⁸⁸ Häublein (interview 19 April 2005).

unanimous agreement is valid when the assigned period had run out according to section 23 of the *Wohnungseigentumsgesetz*.⁵⁸⁹ The Supreme Federal Court (*Bundesgerichtshof*) ruled in September 2000 that a majority vote of the owners' association (*Wohnungseigentümergeinschaft*) is void and by that changed the practice. Such resolutions, for example, were made to change the cost allocation basis (*Kostenverteilungsschlüssel*), and the shares for each apartment in the by-laws (*Gemeinschaftsordnung*).⁵⁹⁰ They could also be used to give exclusive use of some area of the common property to only one owner. Certainly, such resolutions were up to this point only possible if unanimous, meaning that approval was needed from all owners, but there had been an understanding that a majority vote is also valid when no other owner has challenged it within a month. These resolutions were called "shaky-resolutions" (*Zitterbeschlüsse*), referring to the situation that the owners had to "wait shaking" until they knew whether the resolution would become binding or not.⁵⁹¹ It was common to use these instead of making an agreement. This had been a much-debated issue of *Wohnungseigentum* law.⁵⁹² This decision brought with it some resulting problems within almost all areas of the *Wohnungseigentum* law.⁵⁹³ The result of this judgement was that it would no longer be possible in larger apartment complexes to make unanimous resolutions for changes in the by-laws (*Gemeinschaftsordnung*).⁵⁹⁴ It also led to other important decisions within the same line of ideas, which probably would not have been possible without this pioneering decision.⁵⁹⁵ Opinions were expressed by the housing industry that this judgement was an indication of the need to fundamentally amend the *Wohnungseigentumsgesetz*, because of the uncertainty that would emerge regarding whether past resolutions made by the owners' associations (*Wohnungseigentümergeinschaften*) are valid. It was also suggested that there should be support in the legislation for the possibility to change or cancel unanimous resolutions or measures for cost allocation basis by majority vote.⁵⁹⁶ Some experts were of the opinion that this decision raised more questions than it solved and that the legal uncertainty following that decision created new problems for *Wohnungseigentum* owners and managers (*Verwalter*).⁵⁹⁷

⁵⁸⁹ Häublein (2001), p. 2.

⁵⁹⁰ Verband der Wohnungswirtschaft fordert Reform des Wohnungseigentumsgesetzes (2000).

⁵⁹¹ Häublein (interview 19 April 2005).

⁵⁹² Merle (2000b), p. 493.

⁵⁹³ Weitnauer (2005), p. VI.

⁵⁹⁴ Verband der Wohnungswirtschaft fordert Reform des Wohnungseigentumsgesetzes (2000).

⁵⁹⁵ Weitnauer (2005), p. VI.

⁵⁹⁶ Verband der Wohnungswirtschaft fordert Reform des Wohnungseigentumsgesetzes (2000).

⁵⁹⁷ Bielefeld (2003), p. VI.

When the *Wohnungseigentumsgesetz* celebrated its 50 years of existence in 2001, a number of symposiums and discussions took place. A symposium on unsolved issues in the *Wohnungseigentum* law discussed more scientific aspects for the first time since the introduction of this Act.⁵⁹⁸ Another important catalyst for discussions, as mentioned, was the legally very important decision from 2000 about the validity of majority votes.⁵⁹⁹

A bill was presented in 2004 proposing the abolishment of the partition requirement (*Abgeschlossenheitsbescheinigung*).⁶⁰⁰ The motives for that proposal were to deregulate the federal state building order and to decrease the bureaucracy, and by that decrease the workload of the building authorities. However, the Federal Government had objections to this proposal from the Federal Council, mainly concerning the need to clarify the situation for ownership and use within a building to avoid disputes, and that details regarding what parts of the building are *Sondereigentum* or common property be examined by an independent party, such as the building authority.⁶⁰¹ The bill was rejected by the Parliament in consideration of ensuring the legal rights of the individual.⁶⁰²

Another important ruling made by the Federal Supreme Court (*Bundesgerichtshof*) in June 2005 concerned the legal capacity (*Teilrechtsfähigkeit*) of the *Wohnungseigentum* community (*Gemeinschaft*). By this ruling it was concluded that the owners' association has legal capacity in questions concerning the management of the common property. By this, it can act as a legal person and become a holder of rights and duties, which facilitates court procedures.⁶⁰³ The liability lies with the owners' association, which means that the condominium owners can be included in the liability only when they are also personally bound.⁶⁰⁴

A reform of the *Wohnungseigentumsgesetz* has now been made. It was induced by the discussion on the legal procedures and the general need for adaptation of the Act that followed the decision from 2000 about the majority vote. The Federal Government presented in 2004 an experts' bill (*Referentenentwurf*) for the amendment of the *Wohnungseigentumsgesetz* and other Acts. The purpose of the amendments was to facilitate the volition formation (*Willungsbildung*), to improve the possibilities to get information about the owners' decisions, to harmonize the court procedure by extending the regulations for the civil procedure also to be applicable to the procedure in *Wohnungseigentum* matters, as

⁵⁹⁸ Wendel (2001), p. 200.

⁵⁹⁹ Weitnauer (2005), p. 66.

⁶⁰⁰ Gesetzentwurf des Bundesrates 24.06.2004, Drucksache 15/3423.

⁶⁰¹ Ibid. at pp. 1, 8.

⁶⁰² Beschlussempfehlung und Bericht des Ausschusses für Verkehr, Bau- und Wohnungswesen, Deutscher Bundestag 03.12.2004, p. 3.

⁶⁰³ Impuls Immobilien-Verwaltung (2005).

⁶⁰⁴ Bundesgerichtshof 02.06.2005, V ZB 32/05.

well as to strengthen the position of the owners against financial institutes within the sale under execution (*Zwangsversteigerung*).⁶⁰⁵ The proposal for amendments was discussed by a group of legal experts and practitioners in the beginning of 2005. The general opinion was that the proposal raised more questions than it solved. In particular, the suggested transfer of the dispute resolution procedures (*Streitverfahren*) in *Wohnungseigentum* matters to the civil legal procedure (*Zivilprozessordnung*) was criticized.⁶⁰⁶ As a result of the strong critique by many experts of this bill, a new bill was presented in 2005 containing some improvements of the original proposal. Further consideration of the shortcomings of the previous proposals was made in the new bill from 2006, but still without the experts being fully satisfied.⁶⁰⁷

The main purpose of the new proposal for amendments to the *Wohnungseigentumsgesetz*, apart from the changes caused by the changed legal procedure for the majority votes (*Zitterbeschlüsse*), was a need for harmonization. An example of this is the harmonization of the legal proceedings in *Wohnungseigentum* matters to the proceedings in other matters of dispute in civil law. This means that the special dispute resolution process (*Streitverfahren in der freiwilligen Gerichtsbarkeit*) would be replaced by the civil law procedure.⁶⁰⁸

The bill was presented by the Federal Government in March 2006.⁶⁰⁹ The reaction from the experts was supportive regarding the main purposes with this bill, but some specific proposed regulations were criticized and a need for partly considerable changes was expressed.⁶¹⁰ Regarded as positive was the strengthening of the interests and self-government of the apartment owners, but as negative was the proposal for changing the dispute settlement procedure from the special procedure of the *freiwillige Gerichtsbarkeit* to the civil law procedure (*Zivilprozessordnung*), which was regarded as limiting the flexibility that is needed in *Wohnungseigentum* matters to create an amicable settlement between the parties.⁶¹¹

The amendments to the *Wohnungseigentumsgesetz* became effective on 1 July 2007.⁶¹² By these changes, the management of *Eigentumswohnungen* is to be facilitated and the legal relations between the owners' association, owners and creditors of the association regulated in a clearer way. According to the decision of the Federal Supreme Court (*Bundesgerichtshof*) in 2005, it is now clear that the owners' association has legal capacity, and this decision has been taken into

⁶⁰⁵ Stiller (2005), p. 3.

⁶⁰⁶ Expertengespräch zur Reform des Wohnungseigentumsgesetzes (2005), p. 131.

⁶⁰⁷ Bub (2006), pp. 1-2.

⁶⁰⁸ Lüke (2005), pp. 153-154.

⁶⁰⁹ Gesetzentwurf der Bundesregierung 09.03.2006, Drucksache 16/887.

⁶¹⁰ Deutscher Bundestag (2006) Reform des Wohnungseigentumsgesetz stößt grundsätzlich auf Zustimmung.

⁶¹¹ Ibid.

⁶¹² Gesetz zur Änderung des Wohnungseigentumsgesetzes und anderer Gesetze, Artikel 4.

account in these statutory amendments and given rise to further clarifications in practice. The volition formation (*Willungsbildung*) within the association was also facilitated by extended possibilities for majority decisions, where the requirement for unanimous decisions has been changed in certain matters, such as for the distribution of management costs. The possibilities for information about decisions made by the owners' association are improved through a compilation of such decisions kept by the manager (*Verwalter*). The changes concerning the dispute resolution procedures will also be carried out, by which the legal procedures for *Wohnungseigentum* matters will be the same as for other civil law disputes, by replacing the special dispute resolution process (*Streitverfahren in der freiwilligen Gerichtsbarkeit*) by the civil law procedure (*Zivilprozessordnung*).⁶¹³

The number of *Wohnungseigentum* apartments has increased, and between 1968 and 1987, it increased almost five times.⁶¹⁴ Today there are more than five million *Wohnungseigentum* apartments in Germany.⁶¹⁵ This equals 11% of all apartments and 19% of the owned residential property.⁶¹⁶ More than half of all newly built apartments in multi-family houses are established as *Wohnungseigentum*.⁶¹⁷ More than half of them are let, while the owners themselves use the rest. In the old West German states, most of the apartments are let.⁶¹⁸ The *Eigentumswohnung* is sometimes used as a security for old age. This is both a source for conflict within such buildings, and a sign that the reality has moved further away from the idea of the creators of the Act in 1951, when self-utilization today is not the rule, but rather renting is.⁶¹⁹

The *Wohnungseigentumsgesetz* has contributed a lot to the development of the housing market and the provision of housing.⁶²⁰ Even though the *Wohnungseigentumsgesetz* was originally intended for providing living space, nowadays other forms have grown in importance, such as large building complexes, as well as hotel and holiday facilities.⁶²¹ The development of the *Wohnungseigentum* form has led to new types of building complexes, which originally were not intended for such use, being constructed. *Wohnungseigentum* is often combined with *Teileigentum* into larger building complexes with both apartments and shops. It is now common with *Wohnungseigentum* at a number of several hundreds of apartments within the same building block. There are even cases with more than a thousand apartment units. Another possibility is to use the

⁶¹³ Bundesministerium der Justiz, Deutschland (2007).

⁶¹⁴ Bärmann, Pick and Merle (2003), pp. 28-29.

⁶¹⁵ Bielefeld (2006), p. 1.

⁶¹⁶ Hertel and Wicke (2006), p. 6.

⁶¹⁷ Bielefeld (1995), p. V.

⁶¹⁸ Hertel and Wicke (2006), p. 6.

⁶¹⁹ Bärmann, Pick and Merle (2003), pp. 28-29.

⁶²⁰ Bielefeld (2001), p. 1.

⁶²¹ Demharter (2002), p. 70.

Wohnungseigentum form for single-family houses, when a large number of houses are built on a property unit that is difficult to subdivide into single units, and where common facilities can be arranged.⁶²²

The many court proceedings in *Wohnungseigentum* matters have a great influence on the legal practice. The courts in their interpretation are dependent on the relationship between theory and practice that also in its turn contributes to intensifying this relationship. An example of this is the important decision on majority vote from 2000. Theory, case law and management practice have in combination created a regulatory environment that promotes a favourable development.⁶²³ Generally speaking, the main part of the development of the *Wohnungseigentum* system has come from court decisions, in particular the courts of appeal (*Obergerichten*), and especially the court in Bayern. The number of such court decisions is very large.⁶²⁴

5.3 The Condominium (*Wohnungseigentum*)

The *Wohnungseigentum* is regulated in the *Wohnungseigentumsgesetz* from 1951. It has its legal framework in the *Bürgerliches Gesetzbuch*, which regulates the *Eigentumswohnung*, especially in matters concerning purchase and mortgage, if nothing otherwise is stated in the *Wohnungseigentumsgesetz*.⁶²⁵

With a *Wohnungseigentum* or condominium, it is possible for several people to own a part of a building for accommodation or some other purpose. This ownership to a certain flat in the building is connected with joint ownership of the common property within this property unit. It is possible to form such condominiums both in newly built houses and in former tenancy buildings.⁶²⁶ It is possible for the holder of the apartment ownership right to mortgage it without the consent of the other owners in the building. If all owners consent, the entire land may also be encumbered, especially with easements granting the right to use the land as a whole, such as easement of access, or to land charges and other interests in land.⁶²⁷

The difference between the concepts “*Wohnungseigentum*” and “*Eigentumswohnung*” is that by *Eigentumswohnung* is meant the actual object, while the *Wohnungseigentum* according to the definition in the *Wohnungseigentumsgesetz* is the individually owned apartment or sectional property (*Sondereigentum*) which is

⁶²² Weitnauer (1995), pp. 686-687.

⁶²³ Seuß (2001a), p. 1.

⁶²⁴ Demharter (2002), p. 72.

⁶²⁵ Zierl (1995), p. 14.

⁶²⁶ Gerremo (1998), p. 47.

⁶²⁷ Hertel and Wicke (2006), p. 8.

connected with a share in the common property (*Miteigentum*), i.e. the legal content of the property rights for this object.⁶²⁸

According to the accession principle (*Akzessionsprinzip*) of the civil code, a building, or a part of it, cannot be the subject of rights of its own, but always belongs to the property unit and the land within it. The main rule is thus that land and building form a legal unit, but with certain exceptions. A subdivision of a building by horizontal lines is not a feature that is in compliance with German law. However, separate ownership of an apartment cannot be considered as an inappropriate mistake in the legislation. For the *Wohnungseigentum*, the principle was broken with the possibility to allow separate property for parts of a building. A key reason to allow the ownership of individual property (*Sondereigentum*) is that legislation on *Wohnungseigentum* emanates from the common property, the *Miteigentum*, and not the separate *Sondereigentum*. The *Wohnungseigentum* is regarded as a specially developed *Miteigentum* and the *Sondereigentum* to apartments etc. is only allowed in connection with the common property. In principle, the *Wohnungseigentumsgesetz* assumes that the land and building are a unit, and thinks of the *Wohnungseigentum* not as a totally separated right to a building part. The share in the common property is connected with a certain right to a specific part of the building, limiting the total *Miteigentum*, and this connection cannot be dissolved.⁶²⁹ *Miteigentum* shares without *Sondereigentum* thus cannot exist, since to every such share *Sondereigentum* always has to be connected.⁶³⁰

There are both condominiums for housing, *Wohnungseigentum*, and for other purposes, *Teileigentum*, such as for offices and commercial business. The same rules apply for both these forms of condominium.⁶³¹ *Sondereigentum* is the part of a property that the condominium holders own by themselves. Within this they can include their own accommodation, office, shop or some other purpose that is allowed.⁶³² This area has to be separated from the other parts of the building.⁶³³ The reason for this is that since it is private property, it must be clear what belongs to whom.⁶³⁴ The rest of the property not included in the *Sondereigentum* is common property, *Miteigentum*, which contains the parts of the building that all owners are dependent on, such as the ground, the stairs and the elevator.⁶³⁵ In the common property are also included land and ground, as well as everything not included in any *Sondereigentum*. The share of each owner in the common property is just an accounted share and not an actual part of the

⁶²⁸ Bielefeld (2003), pp. 1-2.

⁶²⁹ Weitnauer (2005), pp. 35-40.

⁶³⁰ Weitnauer (1982), p. 28.

⁶³¹ *Wohnungseigentumsgesetz (Condominium Act)*, s. 1.

⁶³² Weitnauer (1995), p. 692.

⁶³³ *Wohnungseigentumsgesetz (Condominium Act)*, s. 3.

⁶³⁴ Weitnauer (1995), p. 692.

⁶³⁵ Gerremo (1998), pp. 50-51.

Miteigentum. The *Sondereigentum*, however, is an actual physical part of the building, with space and the building parts belonging to it. Certain installations may also belong to some *Sondereigentum*. In practice, contractual agreements are made between the owners to decide exactly what is included in the *Sondereigentum* and the *Miteigentum*.⁶³⁶ The *Sondereigentum* and the *Miteigentum* are closely connected with each other into one unit, which also means that the owners are jointly connected with each other with regard to the common property, as well as the *Sondereigentum*. The owners are entitled to jointly use the common property according to their shares.⁶³⁷

The legal definition of the *Wohnungseigentum* can be found in section 1(2) of the *Wohnungseigentumsgesetz*. This definition shows the dualism between the common property (*Gemeinschaftseigentum*) and the private property (*Sondereigentum*). It is, however, contradicted in section 3(1) of the same Act, where the common property (*Miteigentum*) within a property can be limited through an agreement between the owners, so that for each lot owner private property (*Sondereigentum*) in a specific area of the building will be granted.⁶³⁸ Even though the German *Wohnungseigentum* system belongs to the dualistic condominium ownership and not the monistic condominium user right, it is still the co-ownership that is regarded as the primary ownership. What makes it belong to the former category is that it is the apartment itself that is being owned.⁶³⁹

Wohnungseigentum is a comprehensive term for the parts of this institution, including the *Sondereigentum* and the *Miteigentum*. It is a matter of dispute, which one of these elements has priority. The content of the *Wohnungseigentum*, except from a part of the *Miteigentum*, is the *Sondereigentum* to an apartment (*Wohnung*). However, what is meant by the concept of *Wohnung* is not defined anywhere.⁶⁴⁰

Wohnungseigentum as a concept is put together by three elements, the common property (*Miteigentum*), the private property (*Sondereigentum*) and the community (*Gemeinschaft*). These elements are all legally necessary, and not possible to exclude or dissolve.⁶⁴¹ Two of them, the *Sondereigentum* and the *Miteigentum*, come from property law and one from the law of obligations, namely the participation, through the common property justified, in the share community (*Bruchteilsgemeinschaft*). These elements are connected with each other in such a way that even if each of them can be changed individually, none can be omitted. The *Miteigentum* is a necessary base and becomes *Wohnungseigentum* only through separation of *Sondereigentum*. The *Sondereigentum* is connected with the share in the *Miteigentum* and it is not possible to take over just the share in the *Miteigentum* without the *Sondereigentum*. The obligation law connection for the

⁶³⁶ Weitnauer (1995), p. 692.

⁶³⁷ Ott (2001), p. 12.

⁶³⁸ Bärmann, Pick and Merle (2003), pp. 29-30.

⁶³⁹ Bejrum, Julstad and Victorin (2000), pp. 41-42.

⁶⁴⁰ Bärmann, Pick and Merle (2003), pp. 75-76.

⁶⁴¹ *Ibid.* at p. 31.

lot owner through the owners' community (*Wohnungseigentümergeinschaft*) is supported by the law and may not be excluded. This theory by Weitnauer differs from the theory by Bärmann in the sense that these three elements are not regarded as a joint unit, of which the three elements are all a part.⁶⁴² The third component, the membership right (*Mitgliedschaftsrecht*), is considered as being an important part of the *Wohnungseigentum*, even though it is not explicitly regulated in law. By this right is meant the personal right of joint character that the owner has in the *Wohnungseigentum*. Included in this is that the *Wohnungseigentum* is connected with a number of social norms within the community.⁶⁴³

There are different meanings of the nature of the *Wohnungseigentum* and its threefold unity. Stated in the *Wohnungseigentumsgesetz* is that *Wohnungseigentum* is *Sondereigentum* in connection with a share in the *Miteigentum*. It is real property that has emerged through the connection of two common forms of ownership. To this is added the third component, the community relationship between the owners. All these components already existed in the Civil Code, but were combined in a new way in the *Wohnungseigentumsgesetz* without losing their nature. The connection, however, is not an amalgamation into a new legal institution. There are two different theories regarding the connection of these elements. According to the *Miteigentum* theory, the *Miteigentum* is the main component and the *Sondereigentum* just an attachment to it, while the *Sondereigentum* theory on the contrary claims that the *Sondereigentum* is the important object. There is no clear indication in the Act which of these theories is more correct, but the *Miteigentum* theory is the predominant one. Dogmatically, it is possible to consider that the *Miteigentum* is the primary object, since the law says that the *Miteigentum* on a property unit can be reduced by the creation of *Sondereigentum*.⁶⁴⁴ It is, however, of minor importance in practice.⁶⁴⁵

There are also other opinions concerning what the threefold aspect of the *Wohnungseigentum* really comprises. One is that it is not possible to speak about a threefold unity, but rather about a homogenous legal relation that is put together by two main elements, which are the *Sondereigentum* and the through the Act and agreement formed community relationship (*Gemeinschaftsverhältnis*). The share in the *Miteigentum* is then only a registering factor and a help for distribution. However, the community (*Gemeinschaft*) is not created by agreement by the owners, but rather has power by law.⁶⁴⁶

The difference between *Wohnungseigentum* and *Teileigentum* is that the *Teileigentum* is intended for rooms in a building for purposes other than

⁶⁴² Weitnauer (2005), p. 40.

⁶⁴³ Merle (1979), p. 142.

⁶⁴⁴ Bärmann, Pick and Merle (2003), pp. 75-76.

⁶⁴⁵ Blackert (1999), pp. 18-21.

⁶⁴⁶ Bärmann, Pick and Merle (2003), p. 32.

accommodation. The difference lies in the building aspect, not in the actual use. It still must be within a partitioned (*abgeschlossen*) space.⁶⁴⁷ The purposes that the *Teileigentum* are used for primarily are for industry/business, for example shops, offices, consulting-rooms for doctors, dentists or lawyers, workshops, storage space, warehouses and garages.⁶⁴⁸ It is not permissible to use *Wohnungseigentum* for commercial purposes, but only for living purposes and possibly other purposes not interfering with housing. It can, however, be decided in the partition plan (*Teilungserklärung*)/by-laws (*Gemeinschaftsordnung*) that certain units may be used for commercial purposes.⁶⁴⁹

It is possible to have both *Wohnungseigentum* and *Teileigentum* within the same building. *Wohnungseigentum* and *Teileigentum* can be arranged in any type of building, even in one- or two-family houses, as well as in large apartment blocks and warehouses. Since the *Miteigentum* is one of the most important elements of the *Wohnungs-* and *Teileigentum*, at least two rights that are *Wohnungseigentum* or *Teileigentum* must exist within one building. To decide how many buildings and properties can be included in one *Wohnungseigentum* community, it is necessary to look at how much they have in common regarding facilities between the inhabitants of different buildings. If the buildings have facilities such as garden, yard, laundry facilities, etc. in common, large communities are still avoided if easements or usufructs are allowed. The formation of the community thus should not depend on the number of lot owners, but rather on the common parts and facilities, above all the ground and property, as well as the necessity of common property.⁶⁵⁰

The lot owners may use their individual sectional property (*Sondereigentum*) as they please, especially for housing purposes, and exclude others. However, since in this type of housing several lot owners live together under the same roof, it is necessary in some ways to restrict this right. Each owner must maintain and repair the building parts within their *Sondereigentum* so that there is no inconvenience for the common property or other owners' *Sondereigentum*. Neither may they use their *Sondereigentum* so that another owner is put to inconvenience. The owners are also required to allow others to enter upon their *Sondereigentum* to maintain and repair the common property.⁶⁵¹

As mentioned, it is not possible to create as *Sondereigentum* a part of the property unit that is not structurally delimited.⁶⁵² However, by agreement of the lot owners, the use of common property can be set as exclusive for a lot owner or a group of owners, called special right of use (*Sondernutzungsrecht*).⁶⁵³ When

⁶⁴⁷ Riesenberger (1996), p. 71.

⁶⁴⁸ Bärmann, Pick and Merle (2003), p. 80.

⁶⁴⁹ Riesenberger (1996), p. 71.

⁶⁵⁰ Bärmann, Pick and Merle (2003), p. 81.

⁶⁵¹ Riesenberger (1996), p. 104.

⁶⁵² Holzer and Kramer (2004), p. 341.

⁶⁵³ Riesenberger (1996), pp. 116-117.

creating the *Wohnungseigentumsgesetz*, an important aim was to let the owners themselves decide in a number of matters concerning the relationship between them, and by this it was made possible to let them make agreements as long as they do not conflict with mandatory statutory regulations. This was the foundation for the possibility to create *Sondernutzungsrecht*.⁶⁵⁴ All other *Wohnungseigentum* owners by this are excluded from their legal right to use this part of the common property.⁶⁵⁵ This kind of right can be granted both on private and common property and means that this part may only be used by this particular usufructuary, excluding all others.⁶⁵⁶ The *Sondernutzungsrecht* is particularly useful for garden areas and terraces, since these cannot be *Sondereigentum* due to the fact that they are not partitioned (*abgeschlossen*) and not overbuilt with anything. Gardens and terraces otherwise usually belong to the common property. If the other *Wohnungseigentum* owners are to be excluded from areas with a right similar to the *Sondereigentum*,⁶⁵⁷ special arrangements such as *Sondernutzungsrecht* have to be used.⁶⁵⁸ These rights can be also used for parking areas, basement areas,⁶⁵⁹ a part of the garden area, a part of a ground floor terrace, or a part of the façade for putting up advertisement on a large area. It is not possible to grant an isolated *Sondernutzungsrecht* for a third outsider part.⁶⁶⁰ A decision to create a *Sondernutzungsrecht* can be made only by a unanimous agreement, unless the owners have agreed through an opening clause (*Öffnungsklausel*) according to section 10 of the *Wohnungseigentumsgesetz* that such decisions can be made by majority vote.⁶⁶¹

5.4 Subdivision

Wohnungseigentum can be created in two different ways. The first case is where the property unit is already co-owned. It then is possible for the co-owners to contractually decide on the creation of apartments or offices. In the second case, where a property unit has one owner, this owner can subdivide the buildings within the property unit into *Sondereigentum* units and thereby create *Wohnungseigentum*. The building will be subdivided into *Miteigentum* shares, which are connected with *Sondereigentum* units. The *Wohnungseigentum* must be registered

⁶⁵⁴ Ott (2001), p. 13.

⁶⁵⁵ Holzer and Kramer (2004), p. 341.

⁶⁵⁶ *Wohnungseigentumsgesetz (Condominium Act)*, s. 15.

⁶⁵⁷ Huff (1990), pp. 380-381.

⁶⁵⁸ Ott (2001), p. 13.

⁶⁵⁹ Gerremo (1998), pp. 59-61.

⁶⁶⁰ Riesenberger (1996), pp. 116-117.

⁶⁶¹ Ott (2001), p. 13.

in the real property register, where each *Wohnungseigentum* will be registered separately on its own individual sheet.⁶⁶²

In order to be able to register, an application from at least one of the owners must be made. The subdivision plan (*Aufteilungsplan*) must clearly show what parts are *Sondereigentum* and what parts are *Miteigentum*. The partition certificate (*Abgeschlossenheitsbescheinigung*) from the authorities must be added to the partition plan (*Teilungsplan*). The rules that regulate the relationship between the owners by their agreement may only be checked if they are apparently void.⁶⁶³

A formation of a condominium can only be made at the initiative of the property owner. It is most common to create the condominiums within a block of flats, but it is also possible to make them from terraced houses. The private property, *Sondereigentum*, is considered a non-independent unit and must have a share in the common property.⁶⁶⁴ When a builder is planning to construct a building and sell apartments in it, the land must first be divided into property units for the apartments. The builder will usually start selling the apartments before the registration of the partition is made, and the contracts will refer to the partition plan (*Teilungserklärung*) in order to describe the sale object sufficiently.⁶⁶⁵ If there are several owners of an undivided property unit, the subdivision is made by an agreement between these co-owners,⁶⁶⁶ the *Teilungsvereinbarung*.⁶⁶⁷ Payments are made in instalments according to the progress of the building.⁶⁶⁸ When forming these condominiums, the *Teilungserklärung*, a partition plan,⁶⁶⁹ must be registered in the real property register. The purpose of this document is to define all the private units, the *Sondereigentum*, and delimit them from the common property.⁶⁷⁰ The *Teilungserklärung* holds information regarding the conditions for the *Sondereigentum*, the *Miteigentum*, the *Sondernutzungsrecht*, etc. It also states what insurance exists for the *Wohnungseigentum* building.⁶⁷¹ The general function of the apartment house for residence or commercial purposes is determined in the plan. All apartments and common parts must be described precisely. Included in the documents are a plan of the apartments, a building specification and the by-laws for the condominium.⁶⁷² It

⁶⁶² Holzer and Kramer (2004), pp. 333-336.

⁶⁶³ Ibid. at pp. 337-339.

⁶⁶⁴ Gerremo (1998), pp. 52-55.

⁶⁶⁵ Hertel and Wicke (2006), p. 27.

⁶⁶⁶ Riesenberger (1996), p. 121.

⁶⁶⁷ Ibid.

⁶⁶⁸ Hertel and Wicke (2006), p. 27.

⁶⁶⁹ Ibid.

⁶⁷⁰ Gerremo (1998), pp. 52-55.

⁶⁷¹ Grundbuchamt Schöneberg (interview 22 April 2005).

⁶⁷² Hertel and Wicke (2006), p. 27.

is also possible to subdivide an already existing condominium into several parts. The other condominium owners have to give their consent to this.⁶⁷³

It is possible for 10-20 buildings to be located on one land plot. A reason for this is that it can be easier and cheaper for the developer, since it costs money to subdivide the land further, and rights such as easements can be avoided. One problem with this is that the *Wohnungseigentumsgesetz* is not really structured for schemes containing more than one building. Once such a *Wohnungseigentum* scheme is created, it is difficult to change it later, since a unanimous resolution is needed to change shares, etc. Only one owners' association is created for the whole scheme, but it is possible to introduce several sub-associations.⁶⁷⁴

The rights of a property unit are registered in the property register (*Grundbuch*). It contains information about the object and the contents of the individual property (*Sondereigentum*). The register is divided into the cover sheet (*Deckblatt*), the real property register (*Bestandsverzeichnis*) and part I. In this part, the present owner and the registration basis (*Eintragungsgrundlage*) are included. In part II the restrictions, such as easements, are shown. There is also a part III, where the mortgages and debts are registered. To the register is also added the *Teilungserklärung*/by-laws (*Gemeinschaftsordnung*) and the subdivision plans (*Aufteilungspläne*). When a property unit is subdivided by the sole owner, or by the co-owners (*Miteigentümer*) through the partition plan (*Teilungserklärung*) and the partition agreement (*Teilungsvereinbarung*) respectively, a separate property register sheet will be added for each sectional property (*Sondereigentum*) by the property register authority.⁶⁷⁵ Included in the submitted documents must also be a certificate of partition (*Abschlussbescheinigung*) from the building authority, showing that the requirements for partition have been fulfilled. The property register authority (*Grundbuchamt*) checks that all required documents are in order and after that they can be registered.⁶⁷⁶

The subdivision plan (*Aufteilungsplan*) consists of a building drawing/plan signed by the building authority. On this plan is shown the subdivision of the building, as well as the size and position of the building parts with sectional property (*Sondereigentum*) and common property.⁶⁷⁷ It shows all the floors of the building, how each apartment is divided into rooms, as well as cross sections of the building. Each room of the apartment that is a part of the *Sondereigentum* has to be marked with the number for the *Sondereigentum* belonging to one specific apartment. If an area is not marked with any number, it is regarded as

⁶⁷³ Gerremo (1998), pp. 52-55.

⁶⁷⁴ Häublein (interview 19 April 2005).

⁶⁷⁵ Riesenberger (1996), pp. 22, 72, 152.

⁶⁷⁶ Grundbuchamt Schöneberg (interview 22 April 2005).

⁶⁷⁷ Riesenberger (1996), p. 22.

belonging to the *Miteigentum*. In the *Teileigentum* the share for each unit in the *Miteigentum* and the *Sondereigentum* associated with this share are noted.⁶⁷⁸

If the apartment building should be completely destroyed, the apartment ownership rights still continue to exist.⁶⁷⁹ The owners can agree to apply for a closure of the condominium ownership register, in the case of which the condominium rights are extinguished and the owners get a co-ownership right in the land with the buildings.⁶⁸⁰ The majority of owners can decide to reconstruct the building, unless more than half of it is destroyed and the damage is not covered by insurance, in such a case a single apartment owner may demand to dissolve the community.⁶⁸¹ It has, however, been contested whether the condominium ownership terminates, when the building is completely destroyed or when reconstruction cannot be agreed upon automatically, and, if it still really continues to exist, whether it then has changed to a form of ordinary co-ownership.⁶⁸²

When rebuilding, a reconstruction of the old design of the *Wohnungseigentum* facility before the destruction is made. There is always a statutory duty to rebuild when the damages are covered by insurance or in other cases, such as by damage compensations against a third party or damage by the public. In other cases, there is a requirement for reconstruction only when the building is destroyed by no more than half of its value, considering the common property without consideration made to the ground value. If there is greater destruction than this and the damages are not covered by insurance or claims against a third person, it is not compulsory to reconstruct, if not all lot owners vote for. If this is not accomplished, any owner may request a disintegration of the owners' community (*Wohnungseigentümergeinschaft*).⁶⁸³

5.5 Boundaries

Sondereigentum is the private property for the owners within their condominiums. It consists of the space that must be separated from other owners' property and the common property, and adherent parts in these spaces. It is possible for condominium owners to make an agreement that a part of the building that is private should be made common, but vice-versa is not possible.⁶⁸⁴ The exact

⁶⁷⁸ Grundbuchamt Schöneberg (interview 22 April 2005).

⁶⁷⁹ Hertel and Wicke (2006), p. 8.

⁶⁸⁰ van der Merwe (1994), pp. 126-127.

⁶⁸¹ Hertel and Wicke (2006), p. 8.

⁶⁸² van der Merwe (1994), p. 126.

⁶⁸³ Riesenberger (1996), p. 142.

⁶⁸⁴ *Wohnungseigentumsgesetz (Condominium Act)*, s. 5.

delimitation of the private property must be marked in the subdivision plan (*Aufteilungsplan*).⁶⁸⁵

There is no description of the boundaries of the apartment in the *Wohnungseigentumsgesetz*, although the apartments must be isolated from each other and the common property by structural elements, such as walls, floors and ceilings. However, these elements cannot be a part of the apartment itself, meaning that the boundary is located more to the surface of these structures than to the centre of them.⁶⁸⁶

Sondereigentum is only allowed when the apartments or other spaces are partitioned (*abgeschlossen*), which means that technically independent functioning units must be formed.⁶⁸⁷ The purpose with this is to make sure that the areas of *Sondereigentum* and *Miteigentum* are clearly separated from each other.⁶⁸⁸ The apartments must be completely partitioned from other apartments and spaces and have their own access and certain facilities. This partition must be made by walls and ceilings according to the rules of the building authorities.⁶⁸⁹ For an apartment, this means that it must be possible to lead a household within it, and there must be at least a kitchen or kitchenette, a toilet, and a bath or shower. For both *Wohnungseigentum* and *Teileigentum*, there must be walls, floors and ceilings that separate it from other sectional property (*Sondereigentum*) and common spaces.⁶⁹⁰ It must also have an entrance that can be locked.⁶⁹¹ An exception from the requirement for separation is parking spaces, where it is sufficient that the parking space is marked in a permanent way,⁶⁹² although they must be located within a building.⁶⁹³ As mentioned, before the property register authority (*Grundbuchamt*) creates a register sheet for a *Wohnungseigentum*, a confirmation from the building authorities showing the partition (*Abgeschlossenheit*) must be presented.⁶⁹⁴

5.6 Common Property

Everything that is not private property or property for a third party is common property for all condominium owners (*Miteigentum*).⁶⁹⁵ The common property is

⁶⁸⁵ Gerremo (1998), pp. 59-61.

⁶⁸⁶ van der Merwe (2004), p. 9.

⁶⁸⁷ Riesenberger (1996), p. 13.

⁶⁸⁸ Holzer and Kramer (2004), p. 335.

⁶⁸⁹ Trautmann (2000), pp. 315-316.

⁶⁹⁰ Riesenberger (1996), p. 13.

⁶⁹¹ Holzer and Kramer (2004), p. 335.

⁶⁹² *Wohnungseigentumsgesetz* (*Condominium Act*), s. 3.

⁶⁹³ Holzer and Kramer (2004), pp. 335-336.

⁶⁹⁴ Riesenberger (1996), p. 13.

⁶⁹⁵ *Wohnungseigentumsgesetz* (*Condominium Act*), s. 1.

exclusively defined as everything that is not expressly declared as sectional property (*Sondereigentum*).⁶⁹⁶ In case of doubt, it is always common property. The partition plan (*Teilungserklärung*) usually explicitly declares what parts of the building belong to the common property.⁶⁹⁷ The statute also in broad terms lists what parts of the condominium scheme are common property.⁶⁹⁸ There are, however, cases where this division between *Sondereigentum* and common property is not so easy to make and is not clearly regulated in the partition plan (*Teilungserklärung*).⁶⁹⁹ Examples of common such objects that have caused disputes are balconies and fittings.⁷⁰⁰ Although the division into what is *Sondereigentum* and what is *Miteigentum* is partly prescribed by law, it is to a certain extent up to the owner to decide. When this division has initially been decided by the owner, it is very difficult to change later, since that requires the approval of all residents.⁷⁰¹ If the lot owners agree, it is possible to declare parts of the sectional property (*Sondereigentum*) as common property, but not the other way around.⁷⁰²

The *Sondereigentum* is the property that belongs to one specific apartment or other specific areas.⁷⁰³ The apartment may consist of several parts that do not necessarily have to be situated on the same floor of the building. Included in the apartment may also be such elements as balconies, cellars and garages.⁷⁰⁴ All parts of the buildings in these areas belong to it, which can be changed, removed or added without any other right being limited by this or the exterior design of the building being changed.⁷⁰⁵ *Sondereigentum* consists of floor coverings, wallpapers, storage space that belongs to an apartment, the humus layer of a roof terrace and basement rooms belonging to an apartment, on the condition that these parts are located within the *Sondereigentum* space.⁷⁰⁶ In the *Sondereigentum* is also included the inner plaster, the inner paint, sanitary facilities, tiles, inner paint of windows and door to the apartment, non-bearing inner walls, inner doors, as well as supply pipes from the fork to the main line, if not supplying only one apartment. The building parts that belong to the *Sondereigentum* are thus of quite little value.⁷⁰⁷

⁶⁹⁶ Riesenberger (1996), pp. 62-63.

⁶⁹⁷ Becker, Kümmel and Ott (2003), p. 9.

⁶⁹⁸ van der Merwe (1994), p. 51.

⁶⁹⁹ Riesenberger (1996), pp. 62-63.

⁷⁰⁰ Klaßen and Eiermann (1999), pp. 30-31.

⁷⁰¹ Grundbuchamt Schöneberg (interview 22 April 2005).

⁷⁰² Riesenberger (1996), pp. 62-63.

⁷⁰³ Ibid. at p. 116.

⁷⁰⁴ van der Merwe (2004), pp. 9-10.

⁷⁰⁵ Riesenberger (1996), p. 116.

⁷⁰⁶ Klaßen and Eiermann (1999), pp. 30-31.

⁷⁰⁷ Riesenberger (1996), p. 116.

Belonging to the common property is the main construction of the building, also within the apartment. All parts that are necessary for the existence and stability of the building are included, even when they are located in areas belonging to the *Sondereigentum*.⁷⁰⁸ Included in the common property are building foundations and facing, the partition walls out to the stairs, supporting inner walls, ceilings and floors, isolation, roof and outer walls.⁷⁰⁹ Also included are, for example, the walls and ceilings that separate a *Wohnungseigentum* from other *Sondereigentum* or from common property, the doors to the apartments except for the painting on the inside, bearing walls even within a *Sondereigentum* area, all building parts that serve for the protection from heat, moist, and fire, and most parts that are intended for protection from noise.⁷¹⁰ Thus in general, the supporting walls for the building are *Miteigentum*, while the walls between the separate rooms of the apartment are *Sondereigentum*.⁷¹¹ A special type of *Miteigentum* or co-ownership exists for the non-bearing boundary walls between different apartment owners.⁷¹² Included in the common property are also balcony and terrace isolation including the floor above, all exterior façades, all building parts that belong to the roof construction, balcony corbels and exterior walls of the necessary height, exterior painting and partition walls of balconies, the floor within the apartments, if they serve as protection from noise, all exterior parts of the windows including the window frames, and the whole pane if isolation windows, otherwise only the exterior panes.⁷¹³ Although windows and outer doors are included in the common property, it is possible to make an agreement that the cost responsibility is to be transferred to a private owner, since these objects normally are considered as *Sondereigentum*. Also included are the main pipes for water, sewage, electricity, heating, gas and telephone,⁷¹⁴ and the heating facility including the heating room if just one sectional title community (*Wohnungseigentümergeinschaft*) is supplied with heating power, as well as all pipes and cables that serve only one apartment until it forks from the main line.⁷¹⁵ The law states that the areas that are meant for common use, such as stairs, elevators, laundry room, room for bicycles, etc., are common property.⁷¹⁶ To common property always belongs the vacant land within the property unit.⁷¹⁷

⁷⁰⁸ Riesenberger (1996), pp. 62-63, 116.

⁷⁰⁹ Gerremo (1998), pp. 59-61.

⁷¹⁰ Riesenberger (1996), pp. 62-63.

⁷¹¹ Grundbuchamt Schöneberg (interview 22 April 2005).

⁷¹² van der Merwe (1994), p. 55.

⁷¹³ Riesenberger (1996), pp. 62-63.

⁷¹⁴ Gerremo (1998), pp. 59-61.

⁷¹⁵ Riesenberger (1996), pp. 62-63.

⁷¹⁶ Becker, Kümmel and Ott (2003), p. 8.

⁷¹⁷ Klaßen and Eiermann (1999), pp. 30-31.

The condominium holders own a share of the common property together with their *Sondereigentum*.⁷¹⁸ The size of this share is decided when the condominiums are formed, or later through an agreement, and is stipulated in the partition plan (*Teilungserklärung*)/partition agreement (*Teilungsvereinbarung*).⁷¹⁹ It does not have to be proportionate to the size of the owned private property, the *Sondereigentum*.⁷²⁰ The statute leaves it to the developer or the apartment owners to decide the quota and the base for it.⁷²¹ It thus is not compulsory to fix the shares by square meter of area, but other ways are also possible.⁷²² They usually are based on the value relation between the apartments, relating to the market value of the condominium right, including both the value of the apartment unit and the share in the common property.⁷²³ It is possible to take into consideration the benefit of the apartment concerning common property, such as an elevator.⁷²⁴ Changes of these shares later on will be made only if the share stands in a completely unreasonable relation to the value of the *Sondereigentum*.⁷²⁵ Any changes in quota require unanimous agreement among the owners. If the value of the apartment later on changes, this will not change its quota.⁷²⁶ The shares decide the share of the costs of the common property that are to be paid regarding use and decision-making at the owners' meeting (*Eigentümerversammlung*). The shares of the *Miteigentum* are often agreed on in the by-laws (*Gemeinschaftsordnung*), deciding also the voting rights, and not per person as it is stated in the Act.⁷²⁷

The condominium owners together have the responsibility to pay the costs for maintenance, management and upkeep of the common property in accordance with their respective participatory shares.⁷²⁸ Elevators belong to the common property, and because of this all lot owners must pay for these by their share in the common property (*Miteigentum*), by the cost allocation basis (*Kostenverteilungsschlüssel*) given by law or agreed on. Even the apartments on the ground floor must pay. When an owners' community (*Wohnungseigentümergeinschaft*) consists of several houses and there is an elevator in only one of the houses, all lot owners have to pay for the costs for the elevator, unless otherwise agreed upon in the by-laws (*Gemeinschaftsordnung*).⁷²⁹

⁷¹⁸ *Wohnungseigentumsgesetz (Condominium Act)*, s. 1.

⁷¹⁹ Riesenberger (1996), p. 99.

⁷²⁰ Gerremo (1998), pp. 59-61.

⁷²¹ van der Merwe (1994), p. 59.

⁷²² Riesenberger (1996), p. 99.

⁷²³ van der Merwe (1994), p. 63.

⁷²⁴ Utredningen om tredimensionellt fastighetsutnyttjande (1994), p. 34.

⁷²⁵ Riesenberger (1996), p. 99.

⁷²⁶ van der Merwe (1994), p. 69.

⁷²⁷ Riesenberger (1996), p. 99.

⁷²⁸ *Wohnungseigentumsgesetz (Condominium Act)*, s. 16.

⁷²⁹ Riesenberger (1996), p. 90.

The condominium owners are obliged to take care of and use their private property so that they do not disturb other owners.⁷³⁰ This includes paying the maintenance costs for their private property and payment obligation, if they should look after their *Sondereigentum* in such a negligent manner that it would cause damage to the common property. The common property must also not be used in a way that disturbs others. It is possible for other people to have access to the private property in order to make repairs on the common property.⁷³¹

Mehrhausanlage

Wohnungseigentum arrangements are not just limited to one building, but often comprise several buildings on one property unit, a *Mehrhausanlage*. Both multi-family buildings and one-family houses can be included.⁷³² The owners are usually only interested in the use and maintenance of *Sondereigentum* and common property in the building where their own apartments are situated, not other buildings. However, it is not possible to make any delimitation between the different areas of the buildings, or to create any sub-associations for separate buildings, spaces or functions. Such consideration of separate interests can only be made in the management. The owner of a *Wohnungseigentum* apartment has shares in the common property of all buildings that are included in the community.⁷³³ All owners are entitled to the entire property unit, including the common property, regardless of in what building it is located. It is, however, generally accepted that common facilities existing in each building may be used only by the owners within the respective buildings.⁷³⁴ There are also some other exceptions to the rule that all owners may use all common property, for example concerning non-bearing walls between two apartments or common facilities that serve only a few owners. In practice, some special solutions are used for such matters.⁷³⁵

The owners can also by agreement decide to regulate the use of the common property. As mentioned, special user rights (*Sondernutzungsrecht*) may be created, for example, by agreement or by the partition plan (*Teilungserklärung*). With this type of right, one or several owners may be granted the right to exclusively use parts of the common property, excluding the other owners from those parts. The right to use a building and the surrounding area may be given exclusively to the owners within that specific building. The

⁷³⁰ *Wohnungseigentumsgesetz (Condominium Act)*, s. 14.

⁷³¹ Gerremo (1998), p. 63.

⁷³² Merle (2005), p. 165.

⁷³³ Schmidt (2005), pp. 58-61.

⁷³⁴ Merle (2005), pp. 165-166.

⁷³⁵ Schmidt (2005), pp. 58-61.

Sondernutzungsrecht, however, has no consequences for who should carry the costs.⁷³⁶

The main rule is that the common property should be managed jointly by all owners within a *Wohnungseigentum* complex. The costs have to be carried by all owners according to their shares, regardless of whether they use the facilities or not and if they are located in just one of the buildings. Because of this, it is appropriate to regulate such costs in larger multi-building complexes in order to avoid the occurrence of disputes. The costs for common property belonging to just one building may be separated in order to be carried by only the apartment owners in that specific building if used only by them. Only these owners will also be allowed to decide on the management and repair of this property. It might, however, be difficult to determine these costs and separate them from other costs.⁷³⁷

For matters concerning only a specific part of the *Wohnungseigentum* complex, the voting right is limited among the owners, a “block voting right” (*Blockstimmrecht*). Matters concerning the management of such parts may also be decided only by the parties involved in a meeting, where the other owners have no right to participate.⁷³⁸

It is not possible to have a separate manager for each building, since they belong to the same property unit and legally form one community. However, trustees (*Verwaltungsbeirat*) (see below) can be created separately for each building. In larger multi-building complexes, where one building generates substantial costs, it might be appropriate for the support of the manager to create trustees for each building with clearly separated areas of responsibility.⁷³⁹

5.7 By-laws

Management of the *Wohnungseigentum* was considered so important that the regulations concerning it were allotted its own section in the *Wohnungseigentumsgesetz*.⁷⁴⁰ Some rules for co-operation between the condominium owners are stated in the law, but it is necessary to have common regulation and by-laws in addition.⁷⁴¹ Since not every detail in the relationship between apartment owners is fully regulated by law, the owners can make separate agreements concerning their internal relations.⁷⁴² Unless something otherwise is stated in the law, the

⁷³⁶ Merle (2005), p. 166.

⁷³⁷ Ibid. at pp. 169-170.

⁷³⁸ Ibid. at pp. 166-167.

⁷³⁹ Ibid. at p. 172.

⁷⁴⁰ Gesetzentwurf des Bundesrates, Drucksache 75/51.

⁷⁴¹ Gerremo (1998), pp. 64-66.

⁷⁴² Utredningen om tredimensionellt fastighetsutnyttjande (1994), p. 33.

owners are free to agree together on rules other than those in the law.⁷⁴³ Generally, these rules are drawn up when the condominiums are formed, but they can later be changed. There are rules both for private and common property, which are stated in joint by-laws, *Gemeinschaftsordnung*, and building by-laws or house rules, *Hausordnung*. The joint by-laws have rules about more detailed issues and contain agreements supplementing or differing from the law itself. Matters that may be included in such by-laws are, for instance, insurance requirements or that the condominium owners themselves must pay for the replacement of broken windows within the apartment, despite its being common property.⁷⁴⁴ The building by-laws, or house rules, concern more the general well-being within the building, such as pets, noise levels, etc. If the condominium owners are displeased with the behaviour of another owner, that person can be forced to sell the apartment.⁷⁴⁵ The by-laws may also provide regulations on the distribution of shared costs that deviates from the prescribed distribution according to the percentage of the ownership share. Such distributions can be, for example, per square meter or per capita.⁷⁴⁶

Since only a few provisions in the *Wohnungseigentumsgesetz* are mandatory law restricting the freedom of contract,⁷⁴⁷ most of the regulations can through agreements between the lot owners be supplemented and further regulated. To be valid against future owners, they must be registered in the property register for the specific sectional property (*Sondereigentum*), so that the successors can find out about the contents.⁷⁴⁸ The *Gemeinschaftsordnung* is thus binding for any new members of the owners' association (*Wohnungseigentümergeinschaft*), for example a new owner of the apartment, when it is registered in the property register.⁷⁴⁹ It is valid against current owners already prior to registration.⁷⁵⁰ In some specific cases, it is even sufficient with a majority decision at the meeting of the co-owners, without any registration in the land register.⁷⁵¹ Most owners' associations (*Wohnungseigentümergeinschaften*) have such agreements. These by-laws (*Gemeinschaftsordnung*) can contain quite extensive restrictions on the use of the sectional property (*Sondereigentum*). A formal change of the by-laws (*Gemeinschaftsordnung*) is only possible through a supplement to which all owners must agree.⁷⁵²

⁷⁴³ *Wohnungseigentumsgesetz* (Condominium Act), s. 10.

⁷⁴⁴ Gerremo (1998), pp. 64-66.

⁷⁴⁵ *Wohnungseigentumsgesetz* (Condominium Act), s. 18.

⁷⁴⁶ Hertel and Wicke (2006), p. 8.

⁷⁴⁷ Ibid.

⁷⁴⁸ Ibid.

⁷⁴⁹ Regionale Immobilien Verlagsgesellschaft (2005).

⁷⁵⁰ Häublein (interview 19 April 2005).

⁷⁵¹ Hertel and Wicke (2006), p. 8.

⁷⁵² Riesenberger (1996), pp. 63-64.

In larger apartment communities (*Wohnungseigentümergeinschaften*), it is always necessary to set up building by-laws, or house rules, (*Hausordnung*) and also in smaller ones when there are disputes concerning the common life in the building. Often the house rules (*Hausordnung*) are already a part of the joint by-laws (*Gemeinschaftsordnung*). The manager is by the *Wohnungseigentumsgesetz* to take care of the realization of the *Hausordnung*.⁷⁵³ The law does not give any specific instructions on what the contents of the *Hausordnung* should be, but this is left to the owners to decide.⁷⁵⁴ A reason for this is that the *Wohnungseigentum* objects differ so much in their character that it would be impossible to set rules that would be suitable for all these types.⁷⁵⁵ The *Hausordnung* may not contain any major restrictions of the use of the sectional property (*Sondereigentum*) or common property, and may for instance not prohibit keeping animals or playing music. However, keeping animals may be prohibited in the *Gemeinschaftsordnung* by agreement between the lot owners.⁷⁵⁶

5.8 The Owners' Associations

The owners' community (*Wohnungseigentümergeinschaft*) is a legally special type of co-operative society (*Bruchteilsgemeinschaft*), but not a legal person, which means that it is not possible for the association as such to bring a legal action against a party, but only the separate owners.⁷⁵⁷ The final administrative powers rest with the condominium owners themselves.⁷⁵⁸ The size of the association varies, and it is possible to have an association with only two *Wohnungseigentum* apartments. In such cases, a decision to create *Wohnungseigentum* can be made, if, for example, common facilities exist. Small schemes are common, for example, in rural areas.⁷⁵⁹ All condominium owners are members of the association.⁷⁶⁰ Apart from in the *Wohnungseigentumsgesetz*, the owners' community (*Wohnungseigentümergeinschaft*) is regulated by agreements, especially the partition plan (*Teilungserklärung*) and the by-laws (*Gemeinschaftsordnung*), as well as the different resolutions. The organs of the community (*Wohnungseigentümergeinschaft*) are the owners' association (*Eigentümerversammlung*), the manager (*Verwalter*) and the management board (*Verwaltungsbeirat*).⁷⁶¹ The management of a condominium

⁷⁵³ Riesenberger (1996), pp. 79-80.

⁷⁵⁴ Keuter (2002), p. 206.

⁷⁵⁵ Ibid.

⁷⁵⁶ Riesenberger (1996), pp. 79-80.

⁷⁵⁷ Ibid. at p. 147.

⁷⁵⁸ van der Merwe (1994), p. 143.

⁷⁵⁹ Häublein (interview 19 April 2005).

⁷⁶⁰ Gerremo (1998), p. 67.

⁷⁶¹ Riesenberger (1996), p. 147.

building can be taken care of by these organs.⁷⁶² The managers are selected to take care of all management proceedings and the council assists the managers with their tasks. The owners will decide upon the management issues jointly, but there is no requirement of forming an association for the management, neither to have a manager or a council. Other methods can be used, but the association management is, however, still the predominant method.⁷⁶³

The owners' association (*Eigentümerversammlung*) is the most important body for the management of the common property and the intentions of the lot owners. The decision-making of this body is made through majority decisions. Another task of the association (*Eigentümerversammlung*) is to convey information between the lot owners and the manager (*Verwalter*).⁷⁶⁴ Important tasks of the association are adopting house rules, proper maintenance and repair of the common property, insuring the common property, establishing a proper reserve fund and drawing up the annual budget.⁷⁶⁵ The association must meet at least once per year in the ordinary owners' meeting, where it will decide on the budget for the coming year and the accounting for the previous year. The association constitutes a quorum when more than half of the owners, according to shares in the common property (*Miteigentum*), are present or represented. If nothing else is decided, it is the manager who is the chair of the meeting. Every lot owner has only one vote, regardless of how many apartments or shares in the common property (*Miteigentum*) the person has got. The voting rights can, however, be distributed differently by an agreement in the by-laws (*Gemeinschaftsordnung*), even in that way so that one owner has got the majority of votes.⁷⁶⁶

If there are several independent houses within one apartment scheme (*Eigentumswohnanlage*), this is a multi-building scheme (*Mehrhauswohnanlage*), as mentioned above. If that the maintenance and restoration for each house is to be paid only by the inhabitants of the respective house is not regulated in the partition plan (*Teilungserklärung*)/by-laws (*Gemeinschaftsordnung*), all owners will have to pay for all costs for all buildings, and are by this also allowed to take part in the decisions for those houses. When it comes to matters for the common management that only concern one house, it is possible that only the lot owners in this particular house can be allowed to vote. Regarding such common facilities that all houses have, for instance, laundry and bike rooms, there will be management where only the inhabitants of each house may use its own facilities. Decisions concerning the use of these facilities will then only be allowed for the lot owners in the respective house.⁷⁶⁷

⁷⁶² *Wohnungseigentumsgesetz (Condominium Act)*, ss. 20-29.

⁷⁶³ Gerremo (1998), p. 67.

⁷⁶⁴ Riesenberger (1996), pp. 41-42, 91.

⁷⁶⁵ *Wohnungseigentumsgesetz (Condominium Act)*, s. 21.

⁷⁶⁶ Riesenberger (1996), pp. 41-42, 91.

⁷⁶⁷ *Ibid.* at pp. 96-97.

5.9 Managing Agent

The management of the individual sectional property (*Sondereigentum*) is by the owners themselves. The management of the common property is taken care of by a manager (*Wohnungseigentumsverwalter*). However, the owners' association (*Eigentümersammlung*) makes the main decisions by majority vote and gives orders to the manager. There is also a mediator between the manager and the owners' association, the trustee (*Verwaltungsbeirat*).⁷⁶⁸

Both natural and legal persons can act as manager (*Verwalter*), but there may only be one person as manager, not for example a couple or a company.⁷⁶⁹ A manager does not need any specific qualifications. The trustees (*Verwaltungsbeirat*) make a pre-selection of manager and the lowest fee is usually an important factor when making this choice.⁷⁷⁰ The manager according to the *Wohnungseigentumsgesetz* may not be appointed for more than five years. The same manager can be appointed again, but at the earliest one year before the expiration of the prior period of appointment.⁷⁷¹ Although the manager is selected only for five years, it is common to keep the already existing manager for a longer period. If there is a smaller *Wohnungseigentum* scheme, a manager is not needed. The owners will then by resolution choose an owner to enter into contracts. It is, however, still possible to hire a manager if the owners themselves are not qualified to carry out such duties.⁷⁷²

The contract that exists between the manager and the lot owners is a contract of agency (*Geschäftsbesorgungsvertrag*). The managers have assumed certain duties and are to carry them out properly and professionally. They are liable to pay damages if they should cause any harm to the lot owners by acting negligently. The profession of *Wohnungseigentum* manager is not protected by law and can thus be carried out by anyone even without proper knowledge. For larger *Wohnungseigentum* establishments, the managers should have insurance for property damage (*Vermögensschadenhaftpflichtversicherung*).⁷⁷³

According to the *Wohnungseigentumsgesetz*, the manager has a number of duties and powers that cannot be restricted by agreement. These duties include carrying out the decisions of the lot owners and caring for the execution of the house rules (*Hausordnung*), to take action to maintain and repair the common property, in urgent matters to take the necessary actions to maintain the common property, to administer common funds, to demand payment for costs, debts and mortgage interest when it comes to common matters of the lot owners, to take care of and accept all payments and duties that are connected

⁷⁶⁸ Riesenberger (1996), p. 11.

⁷⁶⁹ Ibid. at pp. 134-135.

⁷⁷⁰ Häublein (interview 19 April 2005).

⁷⁷¹ Riesenberger (1996), pp. 134-135.

⁷⁷² Häublein (interview 19 April 2005).

⁷⁷³ Riesenberger (1996), p. 76.

with the running management of the common property, and to accept declarations of intentions and service of process if directed to all lot owners, among other duties.⁷⁷⁴

The lot owners can set up a management council (*Verwaltungsbeirat*) by majority decision, which normally consists of three people, but by agreement another number can be accepted. The trustees (*Verwaltungsbeirat*) have the task to support the managers in their duties and the management. It has no real power,⁷⁷⁵ and no far-reaching rights or duties, and it does not relieve the managers of their responsibility for the management. Almost every condominium community (*Wohnungseigentümergeinschaft*) also has a caretaker (*Hausmeister*). The caretaker is hired by the community (*Wohnungseigentümergeinschaft*), represented by the manager. The caretaker contract is a work contract, and gives instructions of the duties through regulations.⁷⁷⁶

5.10 The Settlement of Disputes

From the 1989 survey by the Ministry of Building regarding how satisfied *Wohnungseigentum* owners are and what the main sources of disputes are, a number of such areas of disputes were mentioned. These included disputes arising from cases where owners do not follow the house rules (*Hausordnung*), where there are disagreements about the use of the common facilities, conflicts about the distribution of costs for certain services, problems with the manager (*Verwalter*) or caretakers (*Hausmeister*), or disputes among the owners themselves concerning matters such as maintenance of common property, structural changes without permission and commercial use of the apartments. It was noted that the problems generally are fewer in buildings with owners with higher incomes and greater the more apartments there are in a building. If a building contains former council housing, there are also more disputes. Other problems were also mentioned by the experts participating in this survey, such as obscurities from the partition plan (*Teilungserklärung*), lack of information, difficulties connected with people renting *Wohnungseigentum* apartments, and problems when changing by-laws (*Gemeinschaftsordnungen*) and partition plans (*Teilungserklärungen*).⁷⁷⁷

If certain owners have violated the rules of the condominium scheme, the statute gives the other owners the right by majority vote to decide that these owners will have to alienate their apartments, if the violation of their obligations is so serious that the other owners cannot be expected to continue

⁷⁷⁴ Riesenberger (1996), pp. 136-137.

⁷⁷⁵ Häublein (interview 19 April 2005).

⁷⁷⁶ Riesenberger (1996), pp. 77-78, 138-139.

⁷⁷⁷ Bundesminister für Raumordnung, Bauwesen und Städtebau (1989), pp. 14-15, 92-93.

living with them in the same community, for example if there are serious breaches of the statutory obligations or if they have seriously fallen behind with their payments. After a court order, the apartment is sold at a public auction.⁷⁷⁸

The court of first instance for *Wohnungseigentum* matters is always the District court (*Amtsgericht*), the municipal court of the district where the building is situated,⁷⁷⁹ which is competent for the property unit on which the *Wohnungseigentum* facility is established. Court for administrative appeal (*Beschwerdegericht*) for *Wohnungseigentum* matters is the County court (*Landgericht*), which is superior to the District court (*Amtsgericht*). Court for legal appeal (*Rechtsbeschwerdegericht*) is the Superior County court (*Oberlandesgericht*). Supreme County court (*Oberste Landesgericht*) in Berlin is the *Kammergericht*. To the *Wohnungseigentum* court cases belong disputes such as concerning the rights and duties of the community of the owners and the manager, for the management of the common property, for application for an emergency manager (*Notverwalter*), as well as for the validity of decisions.⁷⁸⁰

A special trial procedure exists for disputes concerning *Wohnungseigentum*. This procedure is not a civil process, but rather a special dispute procedure (*Streitverfahren*) in non-contentious matters⁷⁸¹ (*freiwillige Gerichtsbarkeit*).⁷⁸² However, with the changes to the *Wohnungseigentumsgesetz* that are made by the amendments that became effective in July 2007, this special procedure is replaced by regular civil law proceedings (*Zivilprozessordnung*).⁷⁸³ Disputes that can be settled with the special procedure concern the rights and obligations between the condominium owners, and regarding the management of the common property, the powers of the manager, the appointment of a manager, or to challenge the validity of the decisions of the owners' association.⁷⁸⁴ In this type of process, differing from the normal civil process, the principle of authority determination (*Grundsatz der Amtsermittlung*) applies, where the judges must see to it that the participants put forward claims that are proper and meaningful/appropriate, and that they explain themselves in a complete and comprehensive way. The judges are to analyse the matter in the way that they may not only consider what the participants have put forward as in a civil case. The dispute procedures may be carried out in all instances without representation by a lawyer.⁷⁸⁵ In the procedure, the judge is to negotiate with the parties to reach a friendly settlement. In cases where the matter is not governed by the statute, the agreed conditions or a resolution of the general

⁷⁷⁸ *Wohnungseigentumsgesetz* (*Condominium Act*), ss. 18-19.

⁷⁷⁹ van der Merwe (1994), p. 166.

⁷⁸⁰ Riesenberger (1996), pp. 148-149.

⁷⁸¹ van der Merwe (1994), p. 106.

⁷⁸² Riesenberger (1996), p. 148.

⁷⁸³ Bundesministerium der Justiz, Deutschland (2007).

⁷⁸⁴ van der Merwe (1994), p. 166.

⁷⁸⁵ Riesenberger (1996), p. 148.

meeting, the judge is to use discretion to reach a reasonable decision, which has to be made so that it can be enforced, done in accordance with the ordinary rules of civil procedure. It lies in the discretion of the judge to decide which of the participants is to pay for the court costs and whether some additional costs are to be distributed.⁷⁸⁶

The reason for introducing this special dispute resolution procedure (*freiwillige Gerichtsbarkeit*) was that it was considered more flexible and informal, as well as simple and quick, to be able to avoid or quickly settle disputes between the *Wohnungseigentum* owners. The procedure, compared with a civil law procedure, saves both time and money for the state. The introduction of a special procedure for these matters could be motivated by the fact that such disputes are a special type of disputes between neighbours, and not the type that occurs for example between tenants or landlord and tenant. Several people are usually involved compared with a civil law procedure, which typically concerns only two people.⁷⁸⁷ The referral of *Wohnungseigentum* matters to a special procedure has proven to be successful. The amount of disputes is not considered to be large, especially when considering the number of apartments, the close connection between the owners, as well as the complexity of many problems, including the different dogmatic views. It has eased the burden on the courts of appeal for minor disputes.⁷⁸⁸

Administrative appeal can be made either to the District court (*Amtsgericht*) or the County court (*Landgericht*), and legal appeals to the District court (*Amtsgericht*), the County court (*Landgericht*) and the Court for legal appeals (*Rechtsbeschwerdegericht*).⁷⁸⁹

An arbitration court for *Wohnungseigentum* (*das Deutsche Ständige Schiedsgericht für Wohnungseigentum*) was established in 1997.⁷⁹⁰ It was felt that *Wohnungseigentum* disputes would be particularly suitable for this type of procedure.⁷⁹¹ This court is to resolve disputes in *Wohnungseigentum* matters between residents, as well as between residents and manager.⁷⁹² It can be used only when the parties themselves have agreed on this instance, when there is an agreement in the form of an arbitration clause.⁷⁹³ The interest in using this possibility is increasing and many *Wohnungseigentum* communities (*Gemeinschaften*) have made agreements on taking their disputes to the arbitration court. This relieves the pressure on the public courts. This process is also shorter, with only one instance compared with up to three in public court cases and with lower costs.

⁷⁸⁶ van der Merwe (1994), p. 166.

⁷⁸⁷ Lüke (2005), pp. 154-156.

⁷⁸⁸ Weitnauer (2005), pp. 63-64.

⁷⁸⁹ Riesenberger (1996), p. 152.

⁷⁹⁰ Merle (2000a), p. 193.

⁷⁹¹ Seuß (2002), p. 494.

⁷⁹² Merle (2000a), p. 193.

⁷⁹³ Seuß (2002), p. 494.

Another large advantage is the special competence of the arbitrator.⁷⁹⁴ The parties may also appreciate the fact that the process is not public.⁷⁹⁵

The arbitration court seemed particularly suitable for the former East German states. The reason for this was that some difficulties emerged there when the *Wohnungseigentum* form was introduced after the reunification when a privatisation of many apartments was carried out. After a decade, not many court procedures concerning disputes among *Wohnungseigentum* owners had yet taken place, but they are expected to increase. Because of this, many associations have included arbitration clauses in their by-laws (*Gemeinschaftsordnungen*) with the purpose of solving all future disputes in this way.⁷⁹⁶

5.11 Insurance

The Act provides, as compulsory insurance for *Wohnungseigentum*, fire insurance (*Feuerversicherung*) for the common property for the value of a new building, as well as insurance for the lot owners of the house and ownership duty (*Haus- und Grundbesitzerhaftpflicht*), so that their property does not cause danger to others. The House and land owner liability insurance (*Haus- und Grundbesitzerhaftpflichtversicherung*) covers liability for the lot owners, including the manager and others bound by duty, such as the caretaker (*Hausmeister*).⁷⁹⁷ This normal management is not compulsory to perform, but has to be done if one of the condominium owners demands it, or if it is stated in the regulations for the building, which it normally is. There are no other rules stating that the owners must have insurance for their private property. Included in the fire insurance is damage from fire and other damage caused by it, such as damage from fire smoke and water. Banks usually require insurance for common property and liability to grant the necessary loans. Private personal property within the apartment is not included in the fire insurance, but usually added through the by-laws of the building. If not, the condominium owners are responsible for obtaining insurance for their private property and by that also deciding what the insurance should cover.⁷⁹⁸ The individual lot owners will have to insure this by themselves in household goods insurance (*Hausratversicherung*).⁷⁹⁹

Other insurance can also be obtained for the *Eigentumswohnung* depending on the specific case, if it is possible by majority decision to take out additional insurances through the community (*Gemeinschaft*), or to incorporate *Sonder-eigentum* in common insurance. Storm and water pipe damage insurance (*Sturm-*

⁷⁹⁴ Merle (2000a), p. 193.

⁷⁹⁵ Busse (1994), p. 25.

⁷⁹⁶ Seuß (2002), pp. 492-493.

⁷⁹⁷ Riesenberger (1996), pp. 80, 132-134.

⁷⁹⁸ Gerremo (1998), pp. 72-73.

⁷⁹⁹ Riesenberger (1996), pp. 132-134.

und Leitungswasserschadenversicherung) is a voluntary insurance that is not compulsory by law. There is also storm damage insurance (*Sturmschadenversicherung*), building glass insurance (*Gebäudeglasversicherung*), water damage liability insurance (*Gewässerschaden-Haftpflichtversicherung*), or a combined accommodation building insurance (*Verbundene Wohngebäudeversicherung*). Property value liability insurance (*Vermögenschadens-Haftpflichtversicherung*) is intended for the manager, and covers the damages to the owners' community (*Wohnungseigentümergeinschaft*) in connection with the fulfilment of the manager duties.⁸⁰⁰ Usually an entire package of different insurance for the building, such as for fire, water, etc. is taken out, as well as liability insurance for damages caused by objects within the building, for example an oil tank.⁸⁰¹

5.12 General Views Regarding the Condominium System

The German *Wohnungseigentum* system has withstood the test of time and little criticism has been given during the years. The importance of this institute is still great.⁸⁰² The *Wohnungseigentumsgesetz* has shown a liberal design as well as flexibility.⁸⁰³ When used in practice, the *Wohnungseigentumsgesetz* has proven to be functional.⁸⁰⁴ During the 1989 expert discussions about the *Wohnungseigentum* system in Germany, it was reported that the *Eigentumswohnung* sometimes is regarded as second-class property, due to the disputes between the owners that could seriously impair satisfaction.⁸⁰⁵ The prejudice has been that the *Wohnungseigentum* has been a source of disputes between owners, but even so the number of such apartments has been increasing.⁸⁰⁶ Today this is not really doubted by anyone. It seems like many of the problems that occur when ownership of parts of a building is allowed, such as delimitation of the apartments, rules for use and organisation of management and repair, have been solved in the law as well as by the courts.⁸⁰⁷ After fifty years of use, it was concluded that the *Wohnungseigentumsgesetz* is a good law, since it is liberal and with the development of its regulations forms a well-balanced set of rules concerning its reasons, use, management and legal procedures. It is considered having a sufficient and useful regulatory environment for all the different needs.⁸⁰⁸

⁸⁰⁰ Riesenberger (1996), pp. 132-134.

⁸⁰¹ Häublein (interview 19 April 2005).

⁸⁰² Bärmann, Pick and Merle (2003), p. 27.

⁸⁰³ Bärmann (1982), p. 33.

⁸⁰⁴ Bowitz (1999), pp. 2-3.

⁸⁰⁵ Schneider (1989).

⁸⁰⁶ Bärmann, Pick and Merle (2003), p. 28.

⁸⁰⁷ Bowitz (1999), pp. 2-3.

⁸⁰⁸ Seuß (2001b), p. 1.

In its basic regulations, the *Wohnungseigentumsgesetz* has also withstood the test. Any imperfections surfacing are not due to the Act, but rather to changed conditions in society and legal views.⁸⁰⁹ The legal institution of *Wohnungseigentum* was integrated with ease into the existing system of civil law, despite some concerns. One of the reasons for the positive development of this institution is the possibility for people with lower incomes to obtain ownership to their dwellings and receive a safe investment.⁸¹⁰ Hardly any changes have been made to the Act and it has been very successful, which is underlined by the fact that four million *Wohnungseigentum* units have been created during the first fifty years of its existence.⁸¹¹

During the discussions that were held in connection with the 1989 survey that the Ministry of Building conducted, the opinion of one of the authorities in the field was that no immediate amendment of the *Wohnungseigentumsgesetz* was necessary, but if so, then a fundamental reform should be made.⁸¹² In general, the experts were sceptical of any amendment to the Act, because they were afraid that new difficulties might then emerge, but some problems existed that would make such amendments meaningful.⁸¹³ At present, experts find that there is still an urgent need for adjustments and modernisation due to changed economical, technical and social conditions, as well as some fundamentally important rulings of the Federal Supreme Court. Up to the present amendments of the *Wohnungseigentumsgesetz*, apart from the only more comprehensive amendment in 1973, there have been proposals for changes that have been rejected due to differing opinions of experts, legal actors, practitioners and representatives of the *Wohnungseigentum* owners.⁸¹⁴

It is not easy to get oriented in the Act on *Wohnungseigentum*. There are in *Wohnungseigentumsgesetz* about only 50 sections that concern the actual *Wohnungseigentum*.⁸¹⁵ The brief statutes that the *Wohnungseigentum* consists of can be preferable, but at the same time it makes it necessary to rely on the case law.⁸¹⁶ It is necessary to look at quite a large number of court decisions, papers and other literature on this theme, which is only partly published in legal standard journals.⁸¹⁷ As a consequence, legislators will make adjustments to the legislation only when the *Bundesgerichtshof* (Supreme Federal Court) cannot do so. People are not bound by previous decisions in the *Bundesgerichtshof*, although they

⁸⁰⁹ Bielefeld (2001), p. 1.

⁸¹⁰ Busse (1994), p. 23.

⁸¹¹ Wendel (2001), p. 200.

⁸¹² Bundesminister für Raumordnung, Bauwesen und Städtebau (1989), pp. 114, 116.

⁸¹³ Ibid.

⁸¹⁴ Bielefeld (2006), p. 1.

⁸¹⁵ Köhler and Bassenge (2004), p. V.

⁸¹⁶ Häublein (interview 19 April 2005).

⁸¹⁷ Köhler and Bassenge (2004), p. V.

are normally followed.⁸¹⁸ There is also a need for special knowledge in the area to be able to fully comprehend the matter. It is therefore difficult to get a clear view of the legal development of the *Wohnungseigentum*.⁸¹⁹

It can be noticed that even though the *Wohnungseigentum* system has been a success and is well developed during the years it has been in use, there are still in recent years many disputes and problems that have to be solved in court.⁸²⁰ The majority of the condominium owners are content with their accommodations. The disputes among the owners have their cause not so much in the actual statutory regulations, but rather in using them in an improper way, or interpreting the regulations in the wrong way.⁸²¹ The disputes have not only concerned everyday issues between the residents, but also other questions of a more fundamental nature, where the court has come to other conclusions than during past years. The fact that the *Wohnungseigentumsgesetz* has the character of a framework law gives more scope for individual agreements, which may be different from the statutory regulations and by that more unclear and a matter for interpretation.⁸²²

5.13 Some Problem Areas

There seems to be quite a small number of problems concerning the *Wohnungseigentumsgesetz* that appear in practice. However, among these can be mentioned constructional changes, delimitations between *Sondereigentum* and *Miteigentum*, possibilities to change the partition plan (*Teilungserklärung*), dismissal of managers, the intended use of the *Wohnungseigentum* or *Teileigentum*, matters concerning special user rights (*Sondernutzungsrecht*), charges and encumbrances, heating cost accounting and proper management.⁸²³ In a report from the Federal Government (*Bundesregierung*), a number of problems that have emerged during the decades of use of the *Wohnungseigentumsgesetz* were mentioned, such as the creation of owners' associations, conditions within the community, management by the owners, the manager and the trustees (*Verwaltungsbeirat*).⁸²⁴

It is possible to create condominiums on property units where there still is no building, provided that it is possible to show that the building will really be constructed. If the construction does not take place, the purchase will be cancelled, but it is not clear what will happen to the condominiums, if they will still exist or not. There are no specific rules concerning this problem. It may

⁸¹⁸ Häublein (interview 19 April 2005).

⁸¹⁹ Köhler and Bassenge (2004), p. V.

⁸²⁰ Bielefeld (1995), p. V.

⁸²¹ Bielefeld (2001), p. 1.

⁸²² Bielefeld (1995), p. V.

⁸²³ Sauren (2002), p. VI.

⁸²⁴ Pick (1997), p. 47.

also happen that a condominium is registered by mistake, even if it does not fulfil the requirements of separation from other units. This mainly happens when the registration is made before the condominiums are built, based only on the subdivision plan (*Aufteilungsplan*), which has to be submitted for registration, showing the subdivision of the building into condominium units. Because of this kind of mistake, some condominiums might not be separated in the way needed and intended.⁸²⁵

There have been disagreements between the German states regarding what demands are to be placed on the partition requirement (*Abgeschlossenheit*) existing for the individual units (*Sondereigentum*). Previously it was regarded as necessary that the walls and ceilings that separate the private units should meet the requirements for fire and heat protection, as well as noise protection. When Germany was reunited, the condominiums in former East Germany were excepted from these demands, in order to be able to form condominiums despite the lower building standard existing there. The result from this disagreement was that in all states, the condominiums are now regarded as fulfilling the separation requirement, even though they do not meet the fire and noise protection standards.⁸²⁶

Many rules exist that regulate the relationship between the different condominium owners within a building. It is not recommended to have properties with too many condominiums, as in former East Germany, where there could be up to a hundred condominium units within one property. There are often disagreements when it comes to design, management and use of common property, as well as private property within the building. The reason for this is partly that the system of rules and the association operations are regarded as being complicated. The property rights for the owners are reduced, both concerning private and common property. The recommendation is to form not more than about ten condominiums within one property. Within smaller properties, however, the rules might not be clear and comprehensive enough, such as they must be in large buildings to avoid all problems that can occur with so many owners together.⁸²⁷

A complication concerning insurance can arise, for example, where certain condominium apartments have been provided with unusually expensive fixtures resulting in a higher insurance premium. This extra cost in those cases can be separated from the total management cost and be paid only by the owners of those specific condominiums.⁸²⁸

A problem area of a more practical nature is pets, which often causes disputes. For example, it is possible by a majority decision to prohibit keeping dogs within a *Wohnungseigentum* building. Another issue for constant conflicts is

⁸²⁵ Gerremo (1998), pp. 54, 58.

⁸²⁶ Ibid. at pp. 51-52.

⁸²⁷ Ibid. at p. 94.

⁸²⁸ Ibid. at p. 73.

how to use common areas such as halls, basement and laundry rooms. The residents, for instance, in general are not allowed to keep any objects within the common areas. Another frequent source of dispute is the issue of barbecuing on balconies and terraces. It is necessary to have clear rules for this in the house rules (*Hausordnung*) to avoid such disputes. A decision about generally prohibiting barbecuing is allowed.⁸²⁹

One of the areas expected to cause more problems in the future is management and maintenance.⁸³⁰ As the legislation has been in use for a long time, there is now a need for buildings to be extensively repaired and modernized.⁸³¹ However, such questions have politically been of secondary importance.⁸³² This puts high demands on the manager of the building and raises questions and problems, such as how to plan and pay for these measurements and who should be responsible for it.⁸³³ Conflicts are thus expected to emerge when the *Wohnungseigentum* buildings become older and the need for renovation and modernisation increases.⁸³⁴ The amendments to the *Wohnungseigentumsgesetz* that will be introduced in July 2007 are, however, intended to facilitate the management and the capacity for the owners' association to act in such matters, for example by no longer requiring a unanimous decision for maintenance and modernisation measures.⁸³⁵

⁸²⁹ Klaßen and Eiermann (1999), p. 100.

⁸³⁰ Bundesminister für Raumordnung, Bauwesen und Städtebau (1989), p. 117.

⁸³¹ Evangelisches Siedlungswerk in Deutschland (1981), pp. 7-8.

⁸³² Bielefeld (1981), p. 77.

⁸³³ Evangelisches Siedlungswerk in Deutschland (1981), pp. 7-8.

⁸³⁴ Bundesminister für Raumordnung, Bauwesen und Städtebau (1989), p. 117.

⁸³⁵ Bundesministerium der Justiz, Deutschland (2007).

6. The Combined Case: Australia

6.1 Overview of Australia

6.1.1 Background

English Common Law was brought to Australia in the beginning of the nineteenth century. All Australian colonies gradually were given the right to elect a local legislature, beginning with New South Wales. A need emerged to federate these colonies, and the Commonwealth of Australia Constitution Act was adopted in 1900. Under this constitution, Australia is a federal state consisting of New South Wales, Victoria, Queensland, Tasmania, South Australia and Western Australia. Each of the states has its own constitution, government and Parliament, with competence in areas such as private and commercial law. This means that six different legal systems exist in the country, along with the federally administered territories, where federal law applies. In the principal areas of private, commercial and procedural law, however, the legal systems are very similar. English Common law has had and still has great influence on the legislation. The member states have often adopted English models and statutes to their legislation, but have also developed their own original solutions.⁸³⁶

The court system is separated into courts for the different states and Commonwealth courts. In each state, there are lower courts that deal with minor disputes, and the highest court of the state, the Supreme Court. The state Supreme Court acts both as a court of appeal and as a court of first instance in important civil and criminal matters. Normally, the hearings in that court are before one judge, and from this judge an appeal is given to a bench of three judges in the same court. The Commonwealth courts, on the other hand, do not act as full courts of first instance, but as superior courts. The most important of these superior courts is the High Court of Australia, which hears appeals from the judgments of the Supreme Courts of the states, as well as deals with constitutional disputes.⁸³⁷

Australia has adopted the features of English Common law, where a property is not held with absolute ownership. Instead there is relativity of title, where different people can have rights within the same property, with freehold being the most important form of ownership. Rights to properties can consist of either estates or interests. The estate is the right to use and control land and

⁸³⁶ Zweigert and Kötz (1987), pp. 229-230.

⁸³⁷ Zweigert and Kötz (1998), p. 222.

it has its equivalent in ownership. The estate is limited in time, either to a certain time or for a lifetime. Freehold estate has a permanent duration, whereas leasehold estate is limited to a certain amount of time. The interests are rights to use a property belonging to someone else, such as easements. Title is the term used to define the primary right to property.⁸³⁸ Land which is granted on any tenure to certain persons and their heirs creates an estate in fee simple (absolute). This is the largest freehold estate and in practice without limit of time.⁸³⁹ To have an estate in fee simple gives in practice the same rights as having full ownership of land.⁸⁴⁰

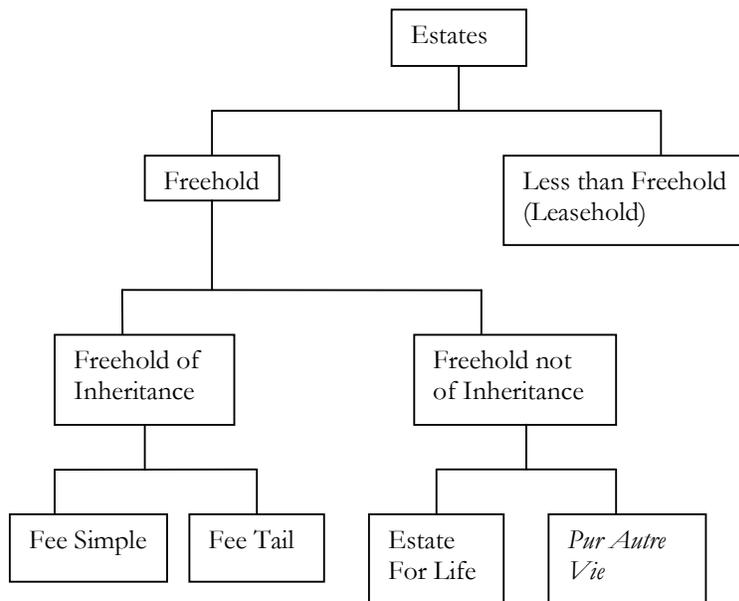


Figure 6.1. Classification of Estates.⁸⁴¹

The ownership of land that for any reason is still unalienated is said to vest or be vested in the Crown and is usually referred to as Crown land. Most land is now held by subjects, and the only area where the Sovereign retains absolute ownership, apart from those lands not yet alienated, is in parts such as the foreshore and other tidal waters. The Crown owns all land, whether or not it is

⁸³⁸ Lundblad (2002), p. 17.

⁸³⁹ Surveyors Board, Victoria (1994), pp. 87, 90.

⁸⁴⁰ Butt (1988), p. 35.

⁸⁴¹ Howarth (1994), p. 6.

granted to a subject upon condition or otherwise, a concept introduced into Australia with English law. Each State has a department responsible for Crown land administration with an extensive land tenure section dealing with all kinds of Crown grants of land or interests in land that are not freehold.⁸⁴²

It is also possible for either the Crown or a subject to create conditional fees simple or fees simple determinable, in addition to the more common estates for life or for a term of years. The interests for a term of years are known as leases, or estates of leasehold, which probably is the most common example of interests in land, and the most common commercial relationship between individuals.⁸⁴³

There are three types of title to land, namely the old system title, the Torrens title and the Crown land title. The old system title was in use before the Torrens title was introduced. Now most land parcels in Australia are held under the Torrens title, or title under the Real Property Act.⁸⁴⁴ It is the dominating system and has been adopted by all states in Australia. Crown land title is the creation of a number of statutes and is mainly concerned with country properties. It is land that due to different Acts from the 1860's belongs to the state, but it only comprises a minor part of all land.⁸⁴⁵ All land in New South Wales granted before 1863, when the Torrens title system was introduced, is held under old system title, but since it is possible to convert it into Torrens title, this has also been done for some land.⁸⁴⁶

The Torrens system is Australia's own system of title registration to prove title to land. In this system, property in land can normally be proved by the production of a Certificate of Title issued by a State Government and backed by the authority, financial and otherwise, of the State. The title gives security of tenure by means of a State guaranteed title, but the Torrens system does not guarantee the boundaries, which must be fixed by surveyors.⁸⁴⁷

The Torrens system was introduced as a reform to reduce the shortcomings of the Old system. The main problem with the Old system was that every time a title of land was dealt with in some way, it was necessary to investigate this title back in time, which caused both costs and delays for the owners to prove their ownership with these documents. With the Torrens system more independent titles were introduced, creating a system regarded as more reliable. When a property is conveyed, a surrender of the land to the Crown takes place, followed by a re-grant of the property by the Crown to the purchaser. All previous documents back in time concerning a property are replaced by only one document proving title to the land, on which all

⁸⁴² Surveyors Board, Victoria (1994), pp. 87, 90.

⁸⁴³ Ibid. at p. 91.

⁸⁴⁴ Butt (1988), p. 448.

⁸⁴⁵ SOU 1996:87, pp. 112-113.

⁸⁴⁶ Butt (1988), p. 448.

⁸⁴⁷ Surveyors Board, Victoria (1994), pp. 96, 99.

transactions are recorded. This document is registered and works as a certificate of title. In this system, the state guarantees all transfer of land through registration. The Real Property Act implemented this reform for all land granted by the Crown after this, and with a possibility to be used also for land granted before.⁸⁴⁸

The term “title” is primarily used to denote ownership, but also to denote the different acts and events to prove ownership. In the old system, ownership to land was derived through a series of instruments and events going back many years. These instruments and events can be referred to as the title to the land, and title deed means the document that gives evidence of the ownership to land. In the Torrens system, on the other hand, there is only one title deed for a land parcel, which is the folio of the Torrens title register for that parcel that gives evidence of ownership.⁸⁴⁹ The state guarantees all transfer of land, and the transfer goes in theory through the state that by registering the transfer guarantees the new owner’s title.⁸⁵⁰

Land is not restricted to the surface of the earth, but also extends above and below the surface. As a legal concept, land is an area of three-dimensional space with the position identified by natural or imaginary points located by reference to the surface of the earth. Traditionally, the rights of the landowner extend to the heavens above and to the centre of the earth below. There are, however, different opinions regarding how literally this should be taken. Intrusion into the airspace above another owner’s land is trespass, but this has been decided only for relatively low heights. The same type of discussion is valid for the subsurface land. It can also be discussed whether or not the owner of the land surface also owns the airspace above, or only has possession of it. One view is that this owner also owns the fixed contents of the airspace and has the exclusive right of filling the airspace with contents. Another view is that the owner owns the airspace within the limits of the area of ordinary use, which is surrounding and attendant upon the surface and any erections on it. It is also possible to subdivide land horizontally into separate strata, where one person can own the surface and the land below to a certain depth, and another owning the land below that. One person can, for example, also own the surface and the ground floor of a building, with someone else being in possession of the upper floor of the same building.⁸⁵¹

⁸⁴⁸ Butt (1988), pp. 490-491.

⁸⁴⁹ Ibid. at p. 449.

⁸⁵⁰ SOU 1996:87, pp. 112-113.

⁸⁵¹ Butt (1988), pp. 9-16.

6.1.2 Strata

It has always been possible within Common law, even before the introduction of the strata title system, to subdivide land into horizontal strata, for instance by separating the upper storey of a building from the rest of the property. This opportunity, however, was not widely used, because of uncertainty of title to the stratum if the building should be demolished, and also because of the problems connected with the upper stories relying on physical support from the stories beneath. To make the system more secure, the Conveyancing (Strata Titles) Act was issued in 1961 in New South Wales, where a separate Torrens title could be given for individual parts of a building. These parts were called lots and were shown in a strata plan where the position of these lots within the building was marked. When such a plan was registered, a certificate of title was issued for every lot and could be dealt with as any property unit.⁸⁵²

Before the system with strata title was introduced in the beginning of the 1960's, there were certain other forms in use for securing space within a building. These are not so widely used anymore, since strata title is considered more secure and convenient. *Tenancy in common* is where more than one party holds title as tenants in common in undivided shares of the land where the building is erected. By this, they also have a share in the building, usually proportionate to the value of their respective flat. This means, however, that a person has no right to own a certain part of the building. It is then necessary to make agreements about the right to exclusively occupy a part of the building. To solve different management and other issues between these owners some regulations are needed, for instance concerning the right to use common areas, such as stairways and paths, or the use of common services, such as water and electricity. By the tenancy in common system, it is also possible to let people lease their respective area of the building. Another possibility before the strata title law was the home unit company. By this, the land and building were owned by a company and by being a shareholder, one could get a company title and by this, get a right to occupy a certain part of the building. By the articles of association, management matters were also regulated, such as the right to use common areas and maintenance. One of the problems with the home unit companies was that the directors could refuse to register transfer of shares or to give consent to lease a part of the building.⁸⁵³ The old system with company title is still used for cases where it is impossible to obtain a strata title, often for commercial application.⁸⁵⁴ In such cases there is title for the land in the name of the company, usually with shares issued for use of parts of the building.⁸⁵⁵ The company may in accordance with the articles of association, and with

⁸⁵² Butt (1988), pp. 547-548.

⁸⁵³ Ibid. at pp. 548-550.

⁸⁵⁴ Allen and Linker (interview 14 May 2003).

⁸⁵⁵ Allen (email 17 April 2007).

appropriate backing from the shareholders, wind up the company and apply for strata subdivision.⁸⁵⁶

When it comes to 3D determination of properties and strata, Australia has for long been a leading nation within this area. The first Act about strata title was the 1960 Victorian Transfer of Land (Stratum Estates) Act, followed by the 1961 New South Wales Conveyancing (Strata Titles) Act.⁸⁵⁷ The New South Wales Act used existing laws and procedures for subdivision of land and adjusted them to fit the circumstances of subdivision of buildings.⁸⁵⁸

Around 13% of private dwellings in Australia in 2001 were apartments, but the percentage has doubled over the last 40 years, and almost one-third of all dwellings constructed during 2000-2001 were apartments. It was estimated that one-third of the 173 000 new dwellings to be built to the end of 2003 would be under strata title.⁸⁵⁹

⁸⁵⁶ Allen (email 17 April 2007).

⁸⁵⁷ SOU 1996:87, pp. 112-113.

⁸⁵⁸ A Look at Strata Title in New South Wales from 1961 to Date, p. 2.

⁸⁵⁹ Office of Fair Trading, NSW Government (2003a), p. 3.

6.2 New South Wales, Australia

6.2.1 Background

New South Wales is the most populated state in Australia. It is also the most industrialised state. Its capital is Sydney, which is the oldest and biggest city in the entire country. The state is divided into 141 counties, which are further subdivided into 7515 parishes. The purpose of the division into counties and parishes is administrative. The parishes are also subdivided into separate areas called portions/parcels. A parcel of land is defined by measurements as a lot or Crown land and can be three-dimensionally delimited.⁸⁶⁰

6.2.2 Development of the Strata Legislation

The strata legislation has developed in New South Wales over a period of many years. Below is a compilation of Acts and Regulations that have been part of this development and that are further described below. The name of the Act and the year of its introduction are given. The Acts and Regulations currently in force are marked with an “x”.

⁸⁶⁰ Lundblad (2002), pp. 10-11.

Table 6.1. *Development of Strata Legislation in New South Wales.*

In force	Act/Regulation	Year
	Conveyancing (Strata Titles) Act	1961
	Strata Titles Act	1974
	Strata Titles (Leasehold) Act	1986
×	Community Land Development Act	1989
×	Community Land Management Act	1989
×	Strata Schemes (Freehold Development) Act	1997
×	Strata Schemes (Leasehold Development) Act	1997
	Strata Schemes Management Act	1997
×	Strata Schemes Management Act	2004
×	Strata Schemes (Freehold Development) Regulation	2002
×	Strata Schemes (Leasehold Development) Regulation	2002
×	Strata Schemes Management Regulation	2005

The Constitution does not give the Commonwealth Parliament any specific power to legislate with respect to land or real property, but the Commonwealth legislation has great influence on law relating to land. The origin of the Australian law is English law, but during time a wide divergence has developed between the land law of New South Wales and the land law of England due to different trends in statutory law. The amendments to the English statutes were not always adopted in New South Wales, and a number of local statutes, adapting real property law to local conditions, were introduced. With the Real Property Act in 1862, the Torrens system of land ownership was introduced into New South Wales and revolutionised the process of land transactions. The Conveyancing Act was passed in 1919, which was a comprehensive property law statute. The divergence between English law and the legislation of New

South Wales was increased further by the new statutes reforming English land law that were not adopted in New South Wales.⁸⁶¹

In Australia, and particularly in New South Wales, the popularity of apartment ownership grew during the 1950s, following the trend in England. A number of apartment ownership schemes were then implemented, usually based on leases, proprietary companies and joint ownership. These could, however, not fulfil the growing demands for residential and commercial accommodation with an apartment title that could represent good security for housing and small business financiers.⁸⁶² The leases were not very attractive to lessees or to mortgagors, usually with large premiums, containing covenants requiring the lessee to pay parts of rates, insurance, etc., and to maintain certain standards of behaviour. For the Home-Unit Companies, the courts did not recognise the shareholder as an owner of such an apartment, and thus they were not allowed to borrow on the security of shares in such companies. A problem with the Tenancies in Common system was that the occupational rights only to certain parts of the building were based on agreements, which could not be protected by registration.⁸⁶³ To solve these problems, the Conveyancing (Strata Titles) Act was introduced in 1961 to facilitate the subdivision of land into strata and the disposition of titles.⁸⁶⁴ The strata title system was introduced as a better solution than the co-operative company title system that existed and which was not working properly. This concept introduced a new kind of thinking, with the title defined by a plan and by legislative description.⁸⁶⁵ When introduced, it was declared to be the first of its kind in the world, but if looking at condominium legislation in European countries, it appears that it may have borrowed heavily from them. After being introduced in New South Wales, all other Australian jurisdictions adopted the strata titles system, as did other countries such as Canada, Singapore, Malaysia, Fiji and the Philippines, following the way of New South Wales.⁸⁶⁶

In the ten years following, nearly 100 000 strata titles were issued. With this, a number of problems became apparent, particularly concerning title, management and disputes, but these were matters anticipated with such novel legislation. The government evaluated the views and complaints of the public, industry and community organisations concerning the strata title system, with the objective of introducing new and more comprehensive strata title legislation. The principal concern were the rules of internal management of strata schemes and the enforcement of those rules. This resulted in the introduction of the 1973 Strata Titles Act, with significant amendments by the

⁸⁶¹ Butt (1988), pp. 4-5.

⁸⁶² Bugden, Allen and CCH Conveyancing Law (1997), [1-100].

⁸⁶³ A Look at Strata Title in New South Wales from 1961 to Date, pp. 1-2.

⁸⁶⁴ Bugden, Allen and CCH Conveyancing Law (1997), [1-100].

⁸⁶⁵ Allen and Linker (interview 14 May 2003).

⁸⁶⁶ Bugden, Allen and CCH Conveyancing Law (1997), [1-100].

1974 Strata Titles (Amendment) Act, where the purpose was to apply the provisions of the 1973 Act to strata schemes that already existed. Strata Titles Regulations were also issued in 1974.⁸⁶⁷ Both the Act and the Regulations were amended many times during the following years, during which the sophistication and complexity of strata developments evolved,⁸⁶⁸ and were kept under constant review because of their complexity. This review was made by the Strata Titles Act Review Committee during the period of 1976-1987.⁸⁶⁹ In the following years, the legislation provided for further strata development concepts, such as staged development, leasehold development and part strata.⁸⁷⁰

The legislation that introduced the strata title system in 1961 was very simple and contained just 29 sections in total. In the first published commentary to the law, the essential features of the Act were described in only four pages. Today the original legislation with the 1961 Conveyancing (Strata Titles) Act can seem naïve because of its attempt to legislate simply and extremely concisely a revolutionary new system. With experience, serious faults with the legislation were found. Since then, this legislation has become more complex and lengthy and further amendments followed in rapid succession. The 1973 Strata Titles Act that superseded the original 1961 Act was more elaborate, and contained 160 sections. The Act was later further supplemented by leasehold strata legislation and community titles. The entire strata package was also subdivided into separate development and management bundles.⁸⁷¹

Strata Titles Act

The 1961 Conveyancing (Strata Titles) Act had created a great deal of unnecessary and undesirable financial and personal problems resulting from its provisions. However, when the bill for that Act was introduced, the legislators pointed out that the legislation was truly pioneering and that there had been no similar enactment as far as they knew in any nation in the world, so considerable problems could thus be expected. It was also predicted already then that it would become necessary to amend the Act when those problems were discovered with use. As mentioned in the bill for the 1973 Act, the extent and complexity of the problems had become larger than was expected from the start.⁸⁷²

⁸⁶⁷ Ibid. at [1-100, 1-150].

⁸⁶⁸ Department of Fair Trading, NSW Government (2001), p. 2.

⁸⁶⁹ Bugden, Allen and CCH Conveyancing Law (1997), [1-100, 1-150].

⁸⁷⁰ Department of Fair Trading, NSW Government (2001), p. 3.

⁸⁷¹ Allen (1999), p. V.

⁸⁷² New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (26 September 1973), p. 1321.

When the strata legislation originally was drafted, the intended object for it was a smaller standard three or four storey block of flats, but quite soon new forms appeared, such as high-rise residential schemes, townhouses, villas, two-lot schemes, commercial, industrial and retirement village developments.⁸⁷³

When the 1973 Strata Titles Act was introduced, it was considered to be a difficult piece of legislation. It had been prepared by locating the areas of deficiency in the 1961 Act, considering the thousands of letters with complaints, criticisms and suggestions, and then finding remedies to the shortcomings in the Act and solutions to include in the new legislation. There had shortly before been a full revision of the 1900 Real Property Act with a comprehensive review of the 1919 Conveyancing Act. After revising that foundation of legislation, it was time to prepare a new legislation for the benefit and protection of the strata titles.⁸⁷⁴ The most extensive changes were made concerning management, since these sections had been made too simple from the beginning, lacking details regarding how the body corporate should carry out the administration. This 1973 Act was then amended several times through the years to make improvements to the Act or to adjust to changes in associated Acts.⁸⁷⁵

In the new Act, the concept of legislation from the 1961 Act to enable Torrens title to issue for parts of buildings was preserved with various refinements. Included in the new Act were provisions dealing with the form and content of a strata plan and of a plan illustrating a re-subdivision of an existing strata lot, as well as machinery for the subdivision of a lot and common property, the conversion of a lot into common property, the conversion of common property into a lot, and the consolidation of two or more existing strata lots. It also provided for the situation arising upon the demolition of a structural feature whereby a boundary of a strata lot has already been defined, and also for the case when a new structural feature is erected upon the boundary of an existing lot. It was intended to enable easements and restrictions to be created simply and inexpensively in the same way as for conventional subdivision of land. In addition, several other major changes were made.⁸⁷⁶

The possibility for a developer to use staged development was introduced by the provisions relating to subdivisions of lots and common property, conversion of lots and conversion of common property. The purpose of the staged development was to allow a developer to build part of the designed

⁸⁷³ New South Wales, *Parliamentary Debates*, Legislative Assembly (30 October 2002), p. 6179.

⁸⁷⁴ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (26 September 1973), p. 1313.

⁸⁷⁵ A Look at Strata Title in New South Wales from 1961 to Date, pp. 6-8.

⁸⁷⁶ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (26 September 1973), pp. 1313-1314.

structure, and to finance construction of the remaining parts by sale of units in the constructed part of the building or buildings.⁸⁷⁷

One innovation for common property was a provision requiring the issue of a certificate of title for common property. In the 1961 Act, no certificate of title issued for common property, but the interest of the proprietors in the common property was evidenced by the certificate of title for the strata lot of which they are proprietors. That system resulted in administrative difficulties. With the changes, the certificate of title for common property was to be issued in the name of the body corporate (now the owners corporation) and the common property itself was to be held by the body corporate as agent for the proprietors of strata lots in the particular scheme.⁸⁷⁸

An important change was made to adjust the title boundaries of existing strata lots, which were previously located to the centre of floors, walls and ceilings, to instead let the title boundaries run along the inner surfaces of floors, walls and ceilings. A water pipe running through the floor could then be part of the common property with the body corporate being responsible for it.⁸⁷⁹

It was generally agreed that the most difficult area in administering a strata scheme was the enforcement of rights and liabilities of the proprietors and other persons involved. To make this easier, a method of settling disputes was introduced intended to be both cheap and practical. The system contained two tribunals, the Strata Titles Commissioner and the Strata Titles Board. The Strata Titles Board was intended to solve disputes of a more far-reaching effect that were more suitable for consideration by a judicial tribunal. The decisions of the commissioner could be appealed to the board. If dealing with a question of law, the decision of the board could be appealed to the Supreme Court.⁸⁸⁰

Another problem that was addressed was double insurance. The unit owners had to make a contribution to the body corporate for the premium to provide insurance for the entire block of units against destruction by fire, storm and so on, but also on their own lots to protect the interest of the mortgagees. This could be seen as unfair that certain owners had to pay two lots of insurance on one building, especially when they could collect only once. Although some provisions were made to deal with the problem, it was not considered enough by the opposition, who wanted it referred for consideration to an expert committee.⁸⁸¹

The changes introduced with the 1973 Strata Titles Act were not enough, however, and as a consequence a Strata Titles (Amendment) Bill came already in 1974 to make improvements to the 1973 Strata Titles Act. The bill contained

⁸⁷⁷ Ibid. at p. 1314.

⁸⁷⁸ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (26 September 1973), pp. 1314-1315.

⁸⁷⁹ Ibid. at p. 1320.

⁸⁸⁰ Ibid. at pp. 1318-1319.

⁸⁸¹ Ibid. at p. 1336.

six major clauses that were to become sections. The bill was seen as the second leg of the legislation introduced in 1973. The opposition again thought that even further amendments would be needed and that this demonstrated that these complex questions were not initially fully dealt, not even after the amendments.⁸⁸²

By this amendment Act several changes were made to resolve additional problems. One potential problem with the existing Act that was pointed out concerned the change of the boundaries from being in the centre of the wall, floor and ceiling to the inner surface. Since it meant that what was beyond the surfaces would be common property, it would result in that even if someone wants to drill a hole in the floor to install a laundry machine or to hang a picture by driving a nail into the wall, this would lead to trespass on common property and cause disputes. Disputes could also arise over drainpipes in the floors of home units. The maintenance of the drains previously was the responsibility of the home unit owner, but now it passed on to the body corporate to become a burden of all unit owners in that block.⁸⁸³

An amendment was made concerning insurance, requiring each body corporate to insure its strata building with an approved insurer by an insurance policy which would bind the insurer to replace the building in case of destruction, or repair it in case of damages with a replacement building or part of building in a condition as new. These provisions were drafted after a series of meetings between departmental officers and representatives of the insurance industry. However, the insurers were not pleased with this, because if bearing the full cost of replacing a destroyed strata building, they could suffer great financial loss due to spiralling costs and delays. The amendment enabled a policy with specification of a number of factors, such as the estimated cost of the new building as at the date of the contract of insurance, the estimated cost of removing debris from the parcel, the estimated fees payable to architects and other professional agents and the estimated amount of which these costs may vary during a year after the date of insurance contract. The double insurance premium would also benefit the insurance companies by being paid more in premiums.⁸⁸⁴

Strata Titles (Leasehold) Act

A 1986 Strata Titles (Leasehold) Act was introduced, effective 1989. It came from a need to enable strata title projects to be undertaken in respect of land or

⁸⁸² New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (26 March 1974), pp. 1883, 1888, 1890.

⁸⁸³ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (26 March 1974), pp. 1898-1899.

⁸⁸⁴ *Ibid.* at pp. 1887-1888, 1905.

airspace leased from the Crown, a statutory body or a local council. An example of where this was needed was for the plans of redevelopment of Darling Harbour in Sydney with consolidation of a large area of land that was to be vested in the Darling Harbour Authority, developed by the private sector and disposed of by the authority by long-term leases. This Act has also been amended many times, mainly because it was drafted in the same terms as the Freehold Act and the Government has had the wish to keep these similarities when making amendments.⁸⁸⁵

Community Titles Legislation

There is also a package of legislation known as the community titles legislation, which includes the 1989 Community Land Development Act, the 1989 Community Land Management Act, the 1989 Strata Titles (Community Land) Amendment Act and the 1989 Miscellaneous Acts (Community Land) Amendment Act. These Acts have their origin in a working party established by the New South Wales Department of Planning and Environment that was formed in 1984 to investigate cluster housing and theme development. It was concluded that the Strata Titles Act was inappropriate for cluster type subdivisions and recommended that new legislation should be created for cluster and theme developments, such as resorts, retirement villages and rural hamlets.⁸⁸⁶

Strata Schemes (Freehold Development) Act

Despite all amendments to the Strata Titles Act, problem areas still remained. The procedures for calling and correctly conducting meetings were so complex that they were frequently breached in practice. The statutory scheme of staged development had been utilised very little and needed to be substantially revised. The existing legislation had, however, on the whole been very successful with many thousands of strata schemes created, and preferred over the previous solutions such as company title.⁸⁸⁷

In 1994 further amendments to the Strata Titles Act were considered necessary. The Review Committee was re-established with the plan to re-write the Act in plain English and with appropriate changes that were found to be needed from the experience gained during the preceding four or five years. It was decided to replace the 1973 Strata Titles Act with a new Act. The Act was renamed the Strata Schemes (Freehold Development) Act and the Strata Titles

⁸⁸⁵ Bugden, Allen and CCH Conveyancing Law (1997), [1-160].

⁸⁸⁶ Ibid. at [1-170].

⁸⁸⁷ Moses, Tzannes and Skapinker (1989), p. 5.

(Leasehold) Act was renamed the Strata Schemes (Leasehold Development) Act. The management and dispute aspects of strata schemes in both the mentioned Acts were repealed and re-enacted in a new plain English act called the 1996 Strata Schemes Management Act. These new Acts became effective in 1997.⁸⁸⁸

With the new Acts some important terms were changed. The *Consumer, Trader and Tenancy Tribunal* replaced the *Strata Titles Board*, the *Director-General* replaced the *Strata Titles Commissioner*, *owner* replaced *proprietor*, *executive committee* replaced *council*, and the *owners corporation* replaced the *body corporate*. Some new terms also came into existence, such as *Adjudicator*, *Interested person*, *Registrar*, *Deputy Registrar*, *Leasehold strata scheme*, *Freehold strata scheme*, *Developer* and *Retirement village*.⁸⁸⁹

Large high-rise and mixed-use projects became common in the 1980's and 1990's, much larger and more complex than earlier developments. Some developments were undertaken in stages, which led to the introduction of staged development facilities in the legislation. The number of smaller buildings increased when Sydney began to consolidate. In outer city areas larger communities were developed, facilitated by community titles. Resort and serviced apartments also appeared and strata title hotel projects became more common.⁸⁹⁰

Strata Schemes Management Act

Even though the concept of private ownership of individual lots in a multi-level building started already in 1961 with the Conveyancing (Strata Titles) Act, it was not until 1974 when the Strata Titles Act came into use that the important issues of management and dispute resolution were addressed. The 1973 Strata Titles Act was introduced primarily with the aim of providing for the development and administration of residential strata schemes. In the years that followed, a variety of strata schemes came into existence including commercial, mixed use, industrial retirement village and residential flat complexes, and not all strata developments were of a multi-level nature as originally anticipated, including now also single level townhouse and villa developments. During the years that followed, many amendments were made to the Strata Titles Act to take into account the rapidly changing types of developments and management of more and more sophisticated schemes. As a result of the review made by the Strata Titles Act Review Committee in the early 1990's, the new Strata Schemes Management Act came in 1996.⁸⁹¹ The main objectives of this Act are to clarify

⁸⁸⁸ Bugden, Allen and CCH Conveyancing Law (2002), [1-180].

⁸⁸⁹ Bugden, Allen and CCH Conveyancing Law (2002), [1-190].

⁸⁹⁰ Bugden, Allen and CCH Conveyancing Law (1997), [1-620].

⁸⁹¹ Department of Fair Trading, NSW Government (2000), p. 8.

responsibilities, to achieve procedural certainty, accessible dispute resolution as well as consumer protection.⁸⁹² The principal Act is the 1996 Strata Schemes Management Act, to which is added the 1996 Strata Schemes Management (Miscellaneous Amendments) Act, with the latter 1996 Act making significant amendments to the 1973 Strata Titles Act, such as changing the name of the Act to the Strata Schemes (Freehold Development) Act and in the similar way for the Strata Titles (Leasehold) Act.⁸⁹³

A task of the Review Committee was to review management and dispute provisions of the 1973 Strata Titles Act. In a report, the Committee pointed out a number of problems and recommended solutions. The main problems were the difficulty in identifying the respective responsibilities of proprietor and body corporate relating to common property, the lack of mediation and the inadequacy of provision of information to the public about the Act, the lack of sharpness in remedies when by-laws are breached, inadequacies in the ability of bodies corporate to recover arrears of levies, the lack of flexibility in by-laws for new strata schemes, problems in obtaining a quorum and in the existing provisions relating to proxies, and the lack of provision for payment of councillors. Further problems were the existing system whereby a Strata Titles Board outside Sydney were constituted by a Local Court magistrate, the ability of the body corporate to delegate its functions, to whom delegation should be allowed and what restrictions should be imposed, and supervision of strata managing agents.⁸⁹⁴

The process leading to the Strata Schemes Management Act was quite extensive, and many parties were consulted. The Strata Titles Act Review Committee took part in the development of the Act. In this committee were included representatives from relevant interest groups, such as property and home unit owners, tenants, the real estate industry, strata managing agents, the legal profession, the retirement village industry and resident groups. There were about 45 000 strata schemes housing around a million people in 1996, and strata title was expected to also be used more in respect of smaller parcels of land.⁸⁹⁵

In 1995 major reforms were announced by the Minister for Fair Trading, which covered broad matters with some of them described more in detail, such as a tenfold increase of maximum fines for breaches of by-laws, less onerous provisions for small strata schemes, a limit on payments to voluntary body corporate office bearers, and clarification of management arrangements for strata title retirement villas.⁸⁹⁶

⁸⁹² Department of Fair Trading, NSW Government (2001), p. 16.

⁸⁹³ Cahill (1997), p. 6.

⁸⁹⁴ Ibid. at pp. 2-3.

⁸⁹⁵ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), p. 5915.

⁸⁹⁶ Cahill (1997), p. 3.

When the changes leading to the introduction of the Strata Schemes Management Act in 1996 came, this was considered to be the most important initiative for management and operation of strata schemes in New South Wales in more than 20 years. Even though the 1973 Act had been amended many times, there were still many shortcomings in the laws. With the new management law, the many changes in the development of strata buildings that had happened during the two decades passing were taken into account. From the beginning, strata schemes were limited to traditional blocks of flats in city and regional locations, but had developed to include buildings used for a wide range of purposes, such as commercial and office buildings, industrial complexes, shopping centres, mixed-use developments and retirement villages. There were also villas and two-lot strata schemes where strata titles were used. When the original Act was introduced, such a development was not anticipated.⁸⁹⁷

The new 1996 Strata Schemes Management Act only dealt with management and dispute issues, and thus the subdivision and registration provisions remained in the 1973 Act, which was renamed the Strata Schemes (Freehold Development) Act. The Strata Schemes Management Act was intended to cover both conventional and leasehold strata schemes. The Act brought substantial refinements to many of the key areas in administering the strata schemes and took into account the varying nature of developed schemes. Some of these significant changes were more appropriate dispute resolution processes with an emphasis on mediation, mechanisms to deal with disputes between adjoining strata schemes, a more flexible range of by-laws for the differing types of strata developments, and more direct means of enforcing by-laws by owners corporations. Further changes included streamlined meeting procedures and changes to quorum and proxy provisions, special provisions for two-lot schemes, new information mediation and education functions for the Strata Schemes Commissioner, and increased responsibilities for owners corporations in financial, building maintenance and insurance matters.⁸⁹⁸ Some major changes in this Act were the ability given to owners corporations the right to decide not to repair common property and to charge a proprietor with higher levies if the use of a lot would change the insurance premium for the building.⁸⁹⁹

One major feature of the Act was its plain English style and the attempt to make a user-friendly act, easy to understand for people running their own buildings. Simpler terms were introduced to replace the old legalistic language, for instance to replace *body corporate* with *owners corporation*. Another change in terminology was to replace *council* with *executive committee*. *Strata Titles*

⁸⁹⁷ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), p. 5915.

⁸⁹⁸ Department of Fair Trading, NSW Government (2000), p. 9.

⁸⁹⁹ Ilkin (1997), p. 50.

Commissioner was changed to *Strata Schemes Commissioner*, which now has been replaced with the *Director-General*, and the *Strata Titles Board* was changed to *Strata Schemes Board*, now being the *Tribunal*.⁹⁰⁰ The title of the Act, the Strata Schemes Management Act, was also intended to show that the purpose was to deal with management and administration of strata schemes rather than with development and subdivision issues. Those issues previously were included in the second half of the 1973 Strata Titles Act. The separation of these issues was intended to reduce confusion among the public regarding who is administering the laws concerning the different aspects of strata title schemes. As a result of this, the remaining parts of the Strata Titles Act changed names to the Strata Titles (Freehold Development) Act. The management and disputes provisions for strata leasehold schemes were now also combined with those for ordinary strata schemes into the same law, since there was no need to use separate laws for these two scheme types.⁹⁰¹

The subdivision and registration aspects of strata schemes are provided for under the Strata Schemes (Freehold Development) Act and the Strata Schemes (Leasehold Development) Act, but once registration is complete, the ongoing administration, management and dispute resolution issues are provided for under the Strata Schemes Management Act. While the Freehold Act applies to schemes developed on land owned by the owners corporation, which is the majority of the schemes, the Leasehold Act applies to schemes developed on land leased from Government authorities. Private parties can also lease land for strata⁹⁰². In the Act, the obligations and responsibilities with the strata scheme have been transferred to the owners corporation, including the day-to-day administration of the scheme. There are compulsory requirements for care of common property, meetings, committees and office-bearers, financial planning and reporting, record keeping and insurance. Provision is also made for a variety of matters that are optional, such as dispute resolution, introduction of refinement of by-laws applying to the scheme, and the use of auditors and employment of managing agents to carry out functions on behalf of the owners corporation.⁹⁰³

The objective of the Strata Schemes Management Act is to provide a framework for the efficient operation and administration of strata developments by the persons who live in, operate businesses in or own lots in the scheme. Since strata schemes usually contain a high concentration of people in a single building or complex, the emphasis has been placed on mechanisms to avoid disputes from arising, and on the resolution of disputes. Since the individual lot owners in a scheme share the common property and would be

⁹⁰⁰ Ibid.

⁹⁰¹ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), pp. 5915-5916.

⁹⁰² Deal (email 8 March 2007).

⁹⁰³ Department of Fair Trading, NSW Government (2000), p. 9.

affected by a neglect of responsibilities normally accepted by a property owner, the legislation has an aim to ensure that the interests of the majority in a strata scheme are not compromised by the activities or neglect of the minority. If the owners corporation fails to act in the interest of the collective body, it would mean severe personal and financial impact on the occupants of a large strata scheme.⁹⁰⁴

The responsibility for strata title matters was divided between two Government Departments. Development and subdivision matters were to be the responsibility of the Department that has responsibility for the Land and Property Information Division. Management matters were previously looked after by the Department of Housing, but now by the Office of Fair Trading under the Department of Commerce. This shift from the Department of Housing to the Department of Commerce suggests that the Government regarded that strata scheme management is best dealt with as a consumer protection matter rather than an accommodation matter. That reflects to some extent the increasing diversity of strata schemes, now not only used for blocks of flats, but also for commercial, industrial or retirement village development.⁹⁰⁵

The Department of Fair Trading began to review the Strata Schemes Management Act, as part of the New South Wales Government commitment under National Competition Policy to review all its legislation that restricts competition by December 2000. Since the 1996 Strata Schemes Management Act was identified as potentially restricting competition, it was set down for a review. The review was also to examine other concerns of interest arising since the Act came. Since the Strata Management Act was considered as such a major overhaul of the previous legislation, it was appropriate to consider if any shortcomings had emerged and if refinement of the legislation would be necessary to make it more efficient and equitable.⁹⁰⁶ A number of significant changes to the Strata Schemes Management Act were passed in 2002 as well as some changes to the Strata Schemes Management Regulations. These changes concerned mainly caretaker arrangements, proxy voting, priority voting rights of mortgagees, and fees paid to owners corporations for information.⁹⁰⁷ It was also concluded that there was practically no support for a totally deregulated regime, where strata owners corporations operate their schemes as they want. The view of the community supported the regulation of the management of strata schemes. Other legislative amendments arising from the report were postponed to a later stage.⁹⁰⁸

Some recent changes have been introduced with the Strata Schemes Management Act 2004. These changes to the Strata Schemes Management Act,

⁹⁰⁴ Department of Fair Trading, NSW Government (2000), p. 11.

⁹⁰⁵ Cahill (1997), p. 5.

⁹⁰⁶ Department of Fair Trading, NSW Government (2000), p. 3.

⁹⁰⁷ Office of Fair Trading NSW Government (2003b).

⁹⁰⁸ Office of Fair Trading, NSW Government (2003a), p. 5.

the Strata Schemes Management Regulation and other related laws came into effect in the beginning of 2005.⁹⁰⁹ The matters leading to these changes were raised in an issues paper from 2003 produced by the New South Wales Government with the purpose of stimulating public discussion on some significant strata schemes issues, especially for high-rise schemes.⁹¹⁰ Extensive public consultation and a thorough examination of the strata legislation preceded these amendments.⁹¹¹ There were concerns regarding, for instance, the quality of buildings, arrangements for large modern strata schemes and for the deterioration of older strata buildings and the difficulties with terminating schemes.⁹¹² One reason for the need of changes was the larger size of strata schemes that have come into existence recently, with examples of 700-lot high rise complexes, with more people living in the schemes than in entire towns, and with an annual budget of millions of Australian dollars.⁹¹³ The changes were mainly concerning the functions of the owners corporation, special requirements for the management of large strata schemes and other matters relating to the management of strata schemes,⁹¹⁴ for instance increased sinking fund obligations, the powers of executive committees, mediation of disputes, alteration of common property and fire safety inspections.⁹¹⁵

Even after the 2004 amendments, some matters were regarded as in need of further analysis. These matters included a revised process for the termination of schemes, issues concerning the design and quality of strata building construction, fire safety measures, separate category of manager for large schemes, modernisation of by-laws, uncertainties over defining common property, sinking fund issues, number of persons allowed to occupy residential strata units, proxy votes, community scheme issues and access to strata buildings by emergency services.⁹¹⁶

The new Strata Schemes Management Regulation 2005 came into force in 2006. These changes had been postponed several times due to the legislative reforms in the strata management area. The new regulations were to take into account the recent changes of the relevant Acts and to provide for new initiatives concerning accounting and financial records, as well as new model by-laws.⁹¹⁷

⁹⁰⁹ Office of Fair Trading, NSW Government (2006), p. 6.

⁹¹⁰ Office of Fair Trading, NSW Government (2003a), p. 3.

⁹¹¹ Office of Fair Trading, NSW Government (2006), p. 6.

⁹¹² Office of Fair Trading, NSW Government (2003a), p. 3.

⁹¹³ New South Wales, *Parliamentary Debates*, Legislative Council (10 March 2004), p. 6966.

⁹¹⁴ *Strata Schemes Management Amendment Act 2004* (NSW).

⁹¹⁵ Office of Fair Trading, NSW Government (2006), p. 6.

⁹¹⁶ New South Wales Government (2004) *Strata schemes in 2004 – the further issues*, pp. 3, 6.

⁹¹⁷ Office of Fair Trading, NSW Government (2005), pp. 2-3.

6.2.3 The Strata System

The 3D property system in New South Wales is based on the two concepts, strata titles and stratum. “Strata” is the plural form of “stratum”, which means layer. It is the concept of layer upon layer with lots stacked on top of each other.⁹¹⁸ The “title” in strata title is the ownership or the measures taken needed to prove the ownership. Stratum is a horizontally subdivided property, which could be located both on the ground and in the air, with no need for connection with a building. It is the result of subdivision of airspace. In a stratum plan, height and depth are restricted and the boundaries of the stratum are related to height datum, and not to any building structure.⁹¹⁹ If the stratum contains a building, this building can be further subdivided into strata titles. A strata title is a right to possession of one of the separate lots into which a building can be subdivided. There must be a building to be able to make a strata plan with subdivision into strata title units.⁹²⁰ One major reason to subdivide a stratum into separate strata title units for resident and office purpose is to create security for bank mortgages. A stratum comprises larger units than just apartments and can be used for instance for tunnels and to create different layers. Different parts of a stratum can be located on different levels, but it must consist of one whole layer and not separate apartments.⁹²¹ The stratum has also simpler rules concerning by-laws, insurance and owners corporation than the strata title.⁹²²

A more general term used for 3D property is “cubic space”. Cubic space is three-dimensional air space.⁹²³ It can be defined as the space or volume of land occupied within the three-dimensional boundaries of a title to land, which includes all lots in strata schemes as well as some lots in deposited plans. The long definition of the Strata Schemes (Freehold Development) Act says that the purpose of the Act is to facilitate the subdivision of land into cubic spaces, but the Act does not specifically define the term cubic space.⁹²⁴ The word strata is used in specific terms, but when speaking about subdivision, the word cubic space is used for the actual space created. The cubic space of a strata lot is defined by planes referenced to structural features so as to create a three-dimensional geometric figure, but it does not include structural cubic space,⁹²⁵ unless otherwise is stated on the plan.⁹²⁶ From the beginning, the Strata Titles

⁹¹⁸ Land and Property Information, NSW Government (2003b), [1.5.7].

⁹¹⁹ Skapinker (interview 7 May 2003).

⁹²⁰ Deal (interview 13 May 2003).

⁹²¹ Skapinker (interview 7 May 2003).

⁹²² SOU 1996:87, pp. 112-113, 118.

⁹²³ Deal (interview 13 May 2003).

⁹²⁴ Land and Property Information, NSW Government (2003b), [1.5.1].

⁹²⁵ Ibid.

⁹²⁶ Deal (email 8 March 2007).

Act was intended for conventional multi-storey buildings, but now it is applicable to any created cubic space with boundaries defined by floors, walls and ceilings or other parts of a building.⁹²⁷

Every lot is also cubic space.⁹²⁸ A lot can comprise one or more of cubic spaces,⁹²⁹ such as for instance the cubic space for the apartment and the cubic space occupied by its garage. The apartment itself can also have two or more cubic space components. The cubic space does not have to be strictly cubic. It also includes space that is contained in any three-dimensional geometric figure that is not a cube, such as space under a driveway ramp in a car park. If there is some structural cubic space contained within the cubic space that comprises a lot or part of it, this structural cubic space is in general not part of the lot, but is common property.⁹³⁰ Structural cubic space consists of pipes, ducts etc. that are not for the exclusive use of one lot,⁹³¹ and columns, poles, etc., even in the lots. It is common property regardless of location.⁹³² Any vertical structural member such as a column, pole, etc.⁹³³ holding up the structures, except for a wall, is included, but not shown on the plan.⁹³⁴ The surveyor may by endorsement on the strata plan make the structural cubic space part of a lot.⁹³⁵

The strata title system, as well as the community title system, has two main features. The first is the system of title to lots, which allows people to own, for strata titles to own a part of a building with supportive rights over other parts of the building, or for community titles to own a parcel or lot of land. The second feature is the system of organisation dealing with the interaction of a group of people who are dependent on each other regarding the financing and decision-making of the strata or community scheme.⁹³⁶

Strata title involves the subdivision of a building, and the parcel of land on which it is situated, into lots and common property in a strata plan. This plan defines the boundaries of the lots with reference to the floors, walls and ceilings of a building. It does not define common property, which is everything within the original parcel of land that is not comprised in the lots. The lots are cubic spaces that can be on, above or below the surface of the ground. The boundary of a lot is the internal surface of the floors, walls and ceilings enclosing the lot, unless the strata plan indicates otherwise, see further below. Where part of the

⁹²⁷ A Look at Strata Title in New South Wales from 1961 to Date, pp. 11-12.

⁹²⁸ Deal (interview 13 May 2003).

⁹²⁹ Deal (email 8 March 2007).

⁹³⁰ Bugden, Allen and CCH Conveyancing Law (2002), [2-260].

⁹³¹ Deal (email 8 March 2007).

⁹³² Deal (interview 13 May 2003).

⁹³³ Deal (email 8 March 2007).

⁹³⁴ Deal (interview 13 May 2003).

⁹³⁵ Bugden, Allen and CCH Conveyancing Law (2002), [2-260].

⁹³⁶ Ibid. at [1-200].

lot is not enclosed, the strata plan will identify the position of the boundary with reference to the building.⁹³⁷

To create community titles, a subdivision of a parcel of land is made into lots and community property. Either a community plan or a neighbourhood plan can be used for this. A precinct plan can also be involved, if the development is large and needs to be undertaken in a number of stages. It is used after that a community plan effects an initial subdivision and before a neighbourhood plan is used. The boundaries are defined in the same way as for lots in conventional land subdivisions, with the exception that the common property is actually defined and shown on the plan as a lot, and named after the type of plan, for instance community property. Community title lots can also be subdivided by a strata plan.⁹³⁸

6.2.4 Subdivision

Over the years, more and more options for methods of subdivision have been introduced, giving greater flexibility. Included in these options are conventional subdivision, strata subdivision, community scheme subdivision, stratum subdivision, staged strata subdivision, leasehold strata subdivision and part strata subdivision.⁹³⁹

Conventional subdivision refers to the division of land into two or more further lots, where the lots are defined by bearings and distances taken from permanent or reference marks fixed in the ground. Such a lot extends upwards to heaven and downwards to the centre of the earth.⁹⁴⁰

Strata subdivision is used to enable separate titles to be issued for lots within a building. With the strata plan the lots are created, usually along with common property. The lots are not defined by bearings and distances, but by reference to a building, which means that the building must have been at least substantially completed before a strata plan can be made. A strata plan follows the Strata Schemes (Freehold Development) Act and does not require subdivision approval under the Local Government Act such as for conventional subdivision. Because of this, the minimum lot size requirements in that Act do not apply to strata lots. The strata plans, however, must still get council approval, as well as development consent under the Environmental Planning and Assessment Act as is needed for conventional subdivision.⁹⁴¹

Community scheme subdivision combines elements of strata and conventional subdivision and enables shared property to be incorporated into a

⁹³⁷ Bugden, Allen and CCH Conveyancing Law (2002), [1-210].

⁹³⁸ Ibid.

⁹³⁹ Hughes (1996), p. 9.

⁹⁴⁰ Ibid.

⁹⁴¹ Ibid. at p. 10.

land subdivision. The lots within a community plan are defined by bearings and distances, rather than by reference to a building. The community plan requires council approval under both the Local Government Act and the Environmental Planning and Assessment Act. A community development lot can be subdivided by a precinct plan, a neighbourhood plan, or a strata plan, working as a master plan for larger and more complex developments. The community scheme subdivision is land subdivision rather than cubic space subdivision, but there is provision for shared property, a management statement is registered with the plan with by-laws for control and maintenance, a tiered management system can be established, and there is provision for staged development.⁹⁴²

Stratum subdivision is achieved when registering a conventional deposited plan, but with the lots limited in height and/or depth. Within the stratum plan, the lots are defined by reference to the Australian Height Datum and they define a parcel of land by volume. Stratum lots are created where vertical subdivision is not practical and can be used for subdivision of a building for separate sale or development, underground tunnels, leasing of airspace above roads for overhead walkways, subdivision of air space above railway stations for commercial development, etc.⁹⁴³

Staged strata subdivision is used to subdivide strata developments intended to be constructed and sold in a number of stages. A strata development contract must be registered with the initial strata plan with details about the proposed development. When the staged development is completed, there is only one owners corporation for control and management of the scheme. It is also possible to use vertical staged development.⁹⁴⁴

Leasehold strata subdivision is possible by the Strata Schemes (Leasehold Development) Act and is used for strata subdivision of land that is leased by the Crown, a statutory body or local council. Private persons can also lease land for strata.⁹⁴⁵ The purpose is to enable development of land without completely alienating public land by sale. The plan is similar to the strata plan under the Strata Schemes (Freehold Development) Act. When the plan is registered, leases are lodged for all lots within the scheme from the public authority to the developer, and for common property from the public authority to the owners corporation. All leases must have a common expiry date and terms for renewal. Certificates of title will be created for leasehold interests in the lots and the common property. The leasehold strata plan can also be registered only for part of a building.⁹⁴⁶

⁹⁴² Hughes (1996), pp. 10-12.

⁹⁴³ Ibid. at p. 12.

⁹⁴⁴ Ibid. at pp. 12-13.

⁹⁴⁵ Deal (email 8 March 2007).

⁹⁴⁶ Hughes (1996), pp. 13-14.

Part strata subdivision can be used when a building contains a mixture of types of use that make the interests of some of the occupants incompatible. A strata plan can then be registered for only a part of the building. With this, more than one strata scheme can exist within one building and separate areas where the occupants have different interests. For issues concerning the whole building, a strata management statement is formed and lodged as part of the plan, binding all occupants of the building. A stratum plan must first be created that divides the building into separate stratum lots. This plan is a deposited plan and not a strata plan, which means that the provisions of the Strata Schemes (Freehold Development) Act regarding part strata development are not invoked. These separate components of the building thus created can then be further subdivided by a strata plan or remain not subdivided for separate occupation or disposition. When the stratum lots have been defined, a strata plan can be registered, with a strata management statement that must accompany the plan.⁹⁴⁷

Since there are many methods of subdivision available, consideration must be made regarding choosing the method most suited to a particular development. Often it is obvious what method to use. To create allotments for construction of separate dwelling houses that are to comply with the minimum lot size requirements from the council, a conventional plan of subdivision is the most appropriate. To subdivide air space, it is necessary to use a stratum plan. To create more than one strata scheme within one building, a part strata subdivision must be chosen. There are, however, developments that could be suitable for subdivision by either a community or a strata plan.⁹⁴⁸

There are several different factors to consider when deciding what type of strata to be chosen. One factor is cash flow, where staged strata will allow earlier completion of sales in one tower. Considering simplicity, a strata scheme, for instance, with 200 residential apartments can be too intimidating for a purchase, and is often broken up in stages. Mixed use is another factor, because if there are different requirements and demand on service of a building, it is better to subdivide by part strata. If marketing considerations demand that various communal facilities, such as tennis courts, should be provided within a scheme, and the economy of the project requires providing this after initial settlements, staged strata would be the most suitable option. If dedication of a communal facility should be made, such as car parks to local councils or other government bodies, which require that they take title free from structures of strata title, then part strata will probably be used.⁹⁴⁹

The type of subdivision used is finally decided by the developer in conjunction with the developer's lawyer, surveyor, marketing consultants and, for more complex developments, the engineer, builder and architect. It is

⁹⁴⁷ Hughes (1996), pp. 14-15.

⁹⁴⁸ Ibid. at pp. 15-16.

⁹⁴⁹ Moses, Tzannes and Skapinker (1989), [6805].

common for development projects with strata title to be sold “off the plan” before the construction of building is completed or has started.⁹⁵⁰

6.2.5 Boundaries

Strata boundaries

The underlying principles used to determine boundaries of a lot are relatively straightforward, but the legislative provisions supporting them are more complex, and the applications of these provisions can lead to uncertainties or anomalies when determining lot boundaries.⁹⁵¹

Until the 1973 Act, there was no separate title for common property and the boundaries between lots were located to the centre line of walls, floor and ceiling.⁹⁵² In the 1961 Strata Titles Act, determination of boundaries was made in the following way. If nothing else was stipulated in the strata plan, the common boundary of a lot with another lot or common property was the centre of the floor, wall or ceiling. This rule applied only if the strata plan did not stipulate another position of the boundary, and only if the wall, floor or ceiling separated one lot from another or from common property, so walls within the same lot were therefore not included. The boundaries could all follow the centre line of floors, walls and ceilings, or some following the centre line and others specifically defined in the strata plan, or all could be specifically defined in the strata plan.⁹⁵³ This way of defining boundaries was changed, mainly because of problems concerning maintenance.⁹⁵⁴ The then existing boundaries that in general were located to the centre of floors, walls, or ceilings were changed by transitional provisions of the new Act to be the inner surface of those structures.⁹⁵⁵ Special transitional provisions are now used to determine the position of the boundaries in strata plans registered under the 1961 Act.⁹⁵⁶

With the current rules, boundaries in a strata scheme must always be determined with reference to a permanent structural feature shown on the plan.⁹⁵⁷ On the floor plan, the base lines are shown for each lot. The boundaries are defined by the building or construction itself. The vertical boundaries can be defined in two ways. If there is no special endorsement on the plan, and the base of a wall corresponds with a base line, then the vertical

⁹⁵⁰ Moses, Tzannes and Skapinker (1989), [6800].

⁹⁵¹ Allen (1999), [203].

⁹⁵² Deal (interview 13 May 2003).

⁹⁵³ Bugden, Allen and CCH Conveyancing Law (1998), [4-060, 4-070].

⁹⁵⁴ Deal (interview 13 May 2003).

⁹⁵⁵ Bugden, Allen and CCH Conveyancing Law (1998), [4-060, 4-070].

⁹⁵⁶ Bugden, Allen and CCH Conveyancing Law (2002), [1-210].

⁹⁵⁷ Deal (email 8 March 2007).

boundary will be the internal surface of that wall. The vertical boundaries may also be specially described in the plan by survey endorsement, such as that the boundary is the centre line of the wall. This type of boundary must also be related to the position of floors, walls and ceilings.⁹⁵⁸ Walls within the boundaries of the lot, however, for instance the walls inside of a flat that separate rooms, belong fully to that lot and not to the common property.⁹⁵⁹ The horizontal boundaries can also be described in two ways. If there is no special endorsement on the plan, and any floor or ceiling joins a vertical boundary, the horizontal boundary will be the upper surface of that floor and the under surface of that ceiling. The horizontal boundaries can also be specially described in the plan by survey endorsement, for example that the height of the terrace part of lot 1 is limited to 2.5 meters above surface of the ground floor slab of that lot. This must also relate to floors, walls or ceilings of the building. The boundaries are usually determined by the first case, i.e. the inner surface.⁹⁶⁰ The developer can sometimes prefer to define the boundary in the centre line instead of inner surface, but the Lands Office in general is not in favour of such a solution.⁹⁶¹ Another reason to choose this solution is that property amalgamations or works are proposed that would otherwise affect common property.⁹⁶² In some cases the boundary can be set by reference to a wall, floor or ceiling, defined as the centre of a wall between two lots, if the purpose is to decide upon matters of repair only concerning these two lots and not the common property.⁹⁶³ If there are just two strata lots in a scheme with no common property, the boundary is normally located to the centre, since in this case is considered better that the property owners take care of their own half of the wall.⁹⁶⁴

Some difficulties arise when applying these definitions of boundaries in certain cases. One such difficulty, at least in theory, is that as a consequence of the boundary following the inner surface of the wall, permission is needed to hang something on the wall by a nail.⁹⁶⁵ The responsibility for repair and maintenance of windows and doors in walls between lots and other areas must often be determined. At first it must be determined whether they are part of the lot or of the common property.⁹⁶⁶ In most cases, a wall, floor or ceiling separating one lot from another lot, or from common property, is common

⁹⁵⁸ Bugden, Allen and CCH Conveyancing Law (1998), [4-050].

⁹⁵⁹ Butt (2001), p. 705.

⁹⁶⁰ Bugden, Allen and CCH Conveyancing Law (1998), [4-050].

⁹⁶¹ Wallis (interview 12 May 2003).

⁹⁶² Allen (1999), [203].

⁹⁶³ Butt (2001), p. 706.

⁹⁶⁴ Wallis (interview 12 May 2003).

⁹⁶⁵ Deal (interview 13 May 2003).

⁹⁶⁶ Bugden, Allen and CCH Conveyancing Law (1998), [4-050].

property.⁹⁶⁷ A wall is defined as including a door, window or other structure dividing a lot from common property or from another lot, but this definition does not include all cases, such as walls between a lot and a balcony or a courtyard. Considering the outcome of some court cases and the attempt in the legislation to give walls, floors, ceilings and cubic space the widest possible meaning, a court window and doors would be considered as part of the wall.⁹⁶⁸ In old plans, the balcony doors were not common property, but in new plans they are.⁹⁶⁹

The vertical boundary from the inside of a lot will be the internal surface of the wall, and from the inside of a balcony or courtyard area it will be the external surface of that wall, leaving everything between those surfaces to be outside the lot and therefore common property.⁹⁷⁰ Limitations on height or depth of a lot are commonly used to define balcony, courtyard or other open space parts of a lot.⁹⁷¹ Usually there are structures such as a railing or parapet enclosing balconies. The question is then if these structures are part of the lot or the common property, and who should be responsible for maintenance and repairs. They should at least be regarded as a wall, being contained in the definition as other structure dividing a lot from common property or from another lot. Since the boundary line can be traced up the internal surface of the wall from the base line and a prolongation of the original line until it intersects a horizontal boundary, the substance of the wall including railing or parapet is considered as common property.⁹⁷² The cubic air space within a balcony usually belongs to the lot, but the railing is common property.⁹⁷³

Encroachments of part of the building that is common property over adjoining public places are allowed, provided that the Council approves of them and they do not endanger public safety or interfere with the amenities of the neighbourhood. Encroachments of part of the building that is common property over adjoining private land are allowed,⁹⁷⁴ provided that necessary easements are created to cover these encroachments and registered before the plan.⁹⁷⁵

Since the boundaries within a strata plan are defined by the building structure, it is not possible to subdivide before the building has been constructed, but if this is done before the final construction has been finished, the developer must build in accordance with the boundaries thus obtained

⁹⁶⁷ Allen (1999), [203].

⁹⁶⁸ Bugden, Allen and CCH Conveyancing Law (1998), [4-050].

⁹⁶⁹ Deal (interview 13 May 2003).

⁹⁷⁰ Bugden, Allen and CCH Conveyancing Law (1998), [4-050].

⁹⁷¹ Allen (1999), [203].

⁹⁷² Bugden, Allen and CCH Conveyancing Law (1998), [4-050].

⁹⁷³ Deal (interview 13 May 2003).

⁹⁷⁴ Deal (email 8 March 2007).

⁹⁷⁵ A Look at Strata Title in New South Wales from 1961 to Date, pp. 12-13.

through subdivision, although it is generally not checked afterwards that the boundaries are located exactly in the right position.⁹⁷⁶

If the boundary is a wall, it is shown on the plan as a whole line. Minor steps in the boundaries are not shown in detail,⁹⁷⁷ such as where there are alterations for windows, etc. Each floor is shown, but usually not as cross-sections, since there can be quite complicated structures, because of different levels, etc. One of the most common problems is that the boundaries are not shown properly in the plan, and because of that disputes arise regarding what belongs to a private lot and what belongs to the common property.⁹⁷⁸

Common errors related to boundaries, where strata plans contain discrepancies between existing structures and those shown on the plan, can be divided into some different categories:

- Structures, such as stairs and walls, which exist fully or partially within the cubic space of a lot, are not shown or referred to on either the floor plan or the location plan.
- There is no structural feature existing that coincides with the thick line shown on the plan.
- The shape of a building or wall is shown incorrectly.
- Encroachment over street alignment, such as awning, is not shown on the plan, not certified in the Surveyors Certificate and not accepted by council in the Strata Certificate.
- Encroachment over adjoining private land is not shown on the plan and there is no easement on place to permit the encroachment.
- Inappropriate or ambiguous stratum statements are resulting in cubic space of lots, extending into other lots or common property, or not accurately defining the stratum limit of the lot.
- The courtyard below high balconies or verandas is not identified as a part of respective lot.
- A structural feature on a lot boundary is not shown or referred to on the plan.

If the plans were more accurate and the lot boundaries more clearly defined, many inquiries would not have to be made, and in that way save expenditures of the resources of the Land and Property Information.⁹⁷⁹

⁹⁷⁶ Wallis (interview 12 May 2003).

⁹⁷⁷ Deal (email 8 March 2007).

⁹⁷⁸ Wallis (interview 12 May 2003).

⁹⁷⁹ Land and Property Information, NSW Government (2003c).

Stratum Boundaries

Since a stratum is not defined according to a building structure, there are different rules for how to determine the boundaries. For a stratum, the developer usually makes the decision regarding where the boundary should be located, which could, for instance, be one metre above a building. Since the walls are not common property for a stratum as they often are for strata title, and instead are privately owned, the boundary between two stratum units is usually located to the centre of the wall.⁹⁸⁰ In the horizontal level, the boundary between stratum units is usually placed in the middle of the concrete slab.⁹⁸¹ The fact that the walls are privately owned and not common property has the consequence that the façade of a building lies within the separate private lots, and maintenance etc. concerning it will be regulated in agreements in order to keep a uniform standard and to be able to manage it in a joint way.⁹⁸²

6.2.6 Easements

Easements can be created by registration of a strata plan, a strata plan of subdivision, or a deposited plan.⁹⁸³ When a strata plan is registered, easements may also be created for such rights as the right of way over a lot and for telecommunication.⁹⁸⁴ To the plan should be added a statement of intention to create an easement. The site must be illustrated and sufficient information shown on the location or floor plan to define the site of the easement and its relationship to the parcel or lot boundaries. If a building encroaches over land other than a public place, an easement must be created over that encroachment prior to, or when registering the plan.⁹⁸⁵

The Location Plan shows the site, nature and origin of existing easements, affecting a part of a parcel. The site can be defined as the approximate position of the easement where the pipe, tunnel, wire or similar is located underground or within or beneath an existing building. The easement can be intended for many different purposes, for example the right of way or easement for electricity purposes. The Floor Plan can show sufficient information to define the site of an existing easement that is located within a building if the enjoyment of the easement would rely on that the position is shown.⁹⁸⁶

⁹⁸⁰ Wallis (interview 12 May 2003).

⁹⁸¹ Deal (interview 13 May 2003).

⁹⁸² Wallis (interview 12 May 2003).

⁹⁸³ Land and Property Information, NSW Government (2003b), [15.2, 15.5].

⁹⁸⁴ Skapinker (interview 7 May 2003).

⁹⁸⁵ Land and Property Information, NSW Government (2003b), [15.2, 15.5].

⁹⁸⁶ *Ibid.* at [15.1].

Already the 1961 Strata Titles Act provided that the strata lots automatically had the right to have their units supported by the rest of the building and the common property, as well as rights for passages of services such as water and electricity to the units, through other lots and common property.⁹⁸⁷ When a part strata plan is registered creating a stratum parcel, easements for subjacent and lateral support and shelter are implied by Section 8AA of the Strata Schemes (Freehold Development) Act. These are cross-easements benefiting and burdening each stratum lot. The Registrar-General must record their existence on the register. Such an easement entitles the owner of the dominant tenement to enter the servient tenement to replace, renew or install such support or shelter. The easement exists until the strata scheme is terminated or the easement is somehow otherwise extinguished. Rights and obligations imposed by the easement are also set out in the Act, and might be varied by the “Section 88B” instrument.⁹⁸⁸ The Section 88B instrument refers to Section 88B of the Conveyancing Act, and is an instrument prepared to accompany a plan that creates an easement, restriction or positive covenant, or a deposited plan that releases an easement.⁹⁸⁹ It identifies the easements to be created or released, and gives rights and obligations, if necessary.⁹⁹⁰ A positive covenant may be an obligation to maintain, and a restrictive covenant may be, for example, that parking is not allowed in a certain place.⁹⁹¹

To simplify the creation of easements, there are provisions in the Strata Schemes (Freehold Development) Act for statutory easements, “short form” easements, where the terms are stated in law. These easements are regulated in schedule 8B of the Conveyancing Act.⁹⁹² They are certain standard easements that can be added to a plan just by mentioning the short name of the easement, since it is a statutory term, and it will contain the detailed meaning mentioned in schedule 8B.⁹⁹³ Such easements may be adopted if required and if the sites of the easements are defined by the strata plan. These easements are for the right of vehicular access, right of personal access and easements for a specified service.⁹⁹⁴

When there are two buildings placed on top of each other in a strata scheme, there are automatic statutory easements for support.⁹⁹⁵ For non-strata lots that share a common wall,⁹⁹⁶ there are easements assuring that walls are

⁹⁸⁷ A Look at Strata Title in New South Wales from 1961 to Date, p. 4.

⁹⁸⁸ Moses, Tzannes and Skapinker (1989), [6840].

⁹⁸⁹ Land and Property Information, NSW Government (2003b), [15.8.1].

⁹⁹⁰ Ibid.

⁹⁹¹ Deal (interview 13 May 2003).

⁹⁹² Hughes (1996), p. 15.

⁹⁹³ *Conveyancing Act 1919* (NSW), s. 88A.

⁹⁹⁴ Hughes (1996), p. 15.

⁹⁹⁵ Allen and Linker (interview 14 May 2003).

⁹⁹⁶ Deal (email 8 March 2007).

guaranteed the support of the adjoining part of the wall belonging to another property. This type of easement is called cross-easements for party walls and is created when the plan is registered. This is valid only when the boundary of a lot in the plan is shown as passing longitudinally through the whole or any part of a wall and this wall is described in the plan as a party wall. The benefit of the easement is appurtenant to each lot in the plan consisting of or including a part of the wall, and each such lot is also subject to the burden of the easement. The easement entitles each person having the benefit of the easement to the continued existence of each portion of the wall that is necessary for the support of the building within that lot.⁹⁹⁷

Other areas for which easements can be used are elevators in stratum buildings. For elevators in high-rise buildings there can be boundaries separating parts of the elevator with a shared wall. The elevators shafts are then in different ownership and easements are used for access and use.⁹⁹⁸

If an easement is needed for a service line to one lot over another lot, it can be made into common property to avoid easements.⁹⁹⁹ The pipes, etc. are often placed in common property in the walls, and then no easement is needed for them. The location of these pipes is not marked on any plans. If the exact location of such service pipes is not clearly known, it leads to problems such as damages to the pipes from drilling in the walls. The responsibility for the pipes up to the property boundary lies on the water companies, etc., and they have their own maps to show the location.¹⁰⁰⁰

6.2.7 Strata Schemes

In New South Wales, there were more than 65 000 strata schemes in 2003, with an average of ten new schemes registered each work day. The size of the scheme can vary from just two lots up to those with 700 lots, with the average scheme consisting of ten lots. There are more than 700 000 individual strata lots.¹⁰⁰¹ Half of all schemes have five lots or less,¹⁰⁰² and only 1-2% have several hundreds of lots. Over 80% of all strata schemes are residential, and then there are much smaller proportions for commercial, mixed use, industrial, retirement village and hotel purposes.¹⁰⁰³

The strata schemes have changed over the years. When the strata management laws were drafted in the beginning of the 1970's, the typical strata scheme

⁹⁹⁷ *Conveyancing Act 1919* (NSW), s. 88BB.

⁹⁹⁸ Allen and Linker (interview 14 May 2003).

⁹⁹⁹ Deal (interview 13 May 2003).

¹⁰⁰⁰ Wallis (interview 12 May 2003).

¹⁰⁰¹ Office of Fair Trading, NSW Government (2003a), p. 4.

¹⁰⁰² Deal (email 8 March 2007).

¹⁰⁰³ Department of Fair Trading, NSW Government (2000), p. 8.

was a building with two or three storeys and a total of six or eight apartments. At that time it was hard to anticipate the size and type of the modern developments of today, where there can be twenty floors or more, several separate towers and hundreds of individual units, or varying types of schemes, such as commercial and industrial strata complexes and town-house, villa or retirement villages. The legislation has been adapted through the years to keep pace with emerging strata types such as staged development, part-strata buildings and strata developments on leasehold land, where the management responsibilities are much more complex than in the schemes from the 1970's.¹⁰⁰⁴ Some inner city strata schemes are similar to self-contained communities, with a mixture of resident owners, investors, tenants, business operators, strata managing agents, letting agents and caretakers. More people may live in certain strata schemes than in entire towns.¹⁰⁰⁵

A strata scheme is a development of land to allow multiple occupancy and ownership of individual units or other parts of a parcel by separate individuals or companies. When a strata scheme is created, an issue of titles under the strata scheme legislation is made. A strata lot is the land occupied by the owners, and a scheme involves occupation of more than one such lot in buildings on one parcel of land. Apart from strata lots, the scheme also usually comprises common property, such as hallway, garden area, driveway, recreational area and structural walls, which is held by an owners corporation. The strata lots do not have to be adjoining, but can consist of for instance separate cabins.¹⁰⁰⁶

Strata schemes are used to issue individual ownership titles to persons or companies when there is more than one occupant of a parcel of land. There may be one or more buildings erected on such a parcel. The strata scheme is often used for such development types as multi-storeyed developments with apartment blocks, commercial buildings, shopping complexes or a combination of these, villa homes, industrial complexes, shopping complexes and holiday resort accommodation.¹⁰⁰⁷

Leasehold of strata is also possible. An example of strata leasehold is government-owned land by the waterfront where the government will let the developers develop the site rather than sell the land. It can in such a case grant a 99-year lease. A freehold development can also use leasehold, if it wants to hold on to the site and be more flexible. This means that after a certain amount of years, the particular site can be used for some other purpose. Such solutions are more frequently made for commercial use than residential.¹⁰⁰⁸

¹⁰⁰⁴ Office of Fair Trading, NSW Government (2003a), pp. 13-14.

¹⁰⁰⁵ New South Wales, *Parliamentary Debates*, Legislative Council (10 March 2004), p. 6966.

¹⁰⁰⁶ Land and Property Information, NSW Government (2003b), [1.1].

¹⁰⁰⁷ *Ibid.* at [1.2].

¹⁰⁰⁸ Panagakis and Musgrave (interview 13 May 2003).

When a developer is planning a project, a project manager and lawyers are usually hired to assist. First a development approval is needed, which can take a lot of time to obtain, and in this part of the process the lawyer usually is involved. The surveyors discuss the project with engineers and others, and this process will in a simple case take a couple of years. After the initial preparation of documents, the construction work will proceed and when the construction is ready, the surveyor will take part again in some remaining work.¹⁰⁰⁹ The strata plan has three components, which are a sheet with council approval, surveyor's certificate, land, address, by-laws, unit entitlement, signature, etc., a location plan, which shows block of land and building, and a floor plan, which defines the strata lots.¹⁰¹⁰

The initial period in a strata scheme begins when the strata scheme is registered¹⁰¹¹. All the lots are then owned by the developer. This period ends when a sufficient number of lots have been sold, such that at least one-third of the unit entitlements for the scheme are no longer controlled by the developer. During this initial period, the developer has the effective control of the owners corporation. To prevent that the control will be exercised in such a way that it leads to negative effects for the minority owners in the scheme, there are certain actions that the owners corporation is not allowed to take during this period, except for with the consent of the strata schemes board, such as, for example, registration of a strata plan of subdivision.¹⁰¹²

When a strata scheme is formed, new titles are created for the new properties in the scheme and for the common property. Garages can either form a separate lot or be included in a strata lot. If included, they will follow the lot when this is sold. If the garages are separate, a clause can be introduced stating that it is only allowed to sell them to the owner of another lot in the strata scheme. It is common for a scheme to consist of just two lots, due to the rule that if a piece of land is too small, no regular land subdivision is allowed within a particular land lot, but strata schemes are possible to create on such land. It is, however, questioned whether the council really should allow such schemes with just two houses.¹⁰¹³

There are also certain lots called utility lots, which are intended for storage or accommodation of vehicles or goods and not for housing. The use of such a lot is restricted to a proprietor of another lot within the strata scheme.¹⁰¹⁴

For the building divided into strata title units there must be a strata plan with certain contents. It is possible for the strata plan to comprise only one layer, without any lot superimposed upon another lot, except for the cases

¹⁰⁰⁹ Panagakis and Musgrave (interview 13 May 2003).

¹⁰¹⁰ Deal (interview 13 May 2003).

¹⁰¹¹ Deal (email 8 March 2007).

¹⁰¹² Land and Property Information, NSW Government (2001b), p. 2.

¹⁰¹³ Deal (interview 13 May 2003).

¹⁰¹⁴ Butt (2001), p. 706.

when no part of the land is to be common property, which is quite rare. After that, the strata plan is made and registered, and it is possible to make changes in it, with further subdivision of lots or with consolidation of several lots into one lot. The location plan shows where the land is situated, the location of buildings on this land and if there are any lots that are not within buildings.¹⁰¹⁵ At the registration of the plan, the strata scheme is also formed, which means the subdivision into strata and the rights and duties connected with it.¹⁰¹⁶ Within the strata plan there must be a schedule of unit entitlement for each lot, determining voting rights and proportion of levies. The unit entitlement does not have to reflect the value of each lot in comparison with the other lots, but it can be re-allocated if it has been unreasonably distributed regarding the values at that time. The floor plan shows the location of the lots on each floor in the building.¹⁰¹⁷

To cancel a strata scheme, a unanimous decision is needed. When a building is destroyed, the title collapses to all owners. The insurance pays for the rebuilding, which will take place if everyone agrees.¹⁰¹⁸ If the building containing strata should be damaged or destroyed, the Supreme Court of New South Wales can decide that the strata scheme should be changed or expire.¹⁰¹⁹

All strata schemes are treated equally under the Strata Schemes Management Act regardless of size, type or purpose, but with some minor variations. There are certain exceptions for schemes with only two lots. For such a scheme there is no need to elect an executive committee, and both of the lot owners automatically become members of the executive committee. When these buildings are unattached, where there is no other building on common property and the owners agree, it is not compulsory for the owners corporation to take out building insurance or to establish a sinking fund.¹⁰²⁰

The strata schemes can be of different types and vary a lot in their features. One example of a large strata scheme in Sydney consists of 670 apartments. The building complex was built in stages and the retail section in the lower part of the building belonged to a separate scheme. There were two strata schemes with strata management statements and an umbrella committee. The management was handled by a professional strata manager. For a while there were problems with maintenance in this scheme, since the owners corporation went bankrupt and as a result the complex was not maintained properly. Easements were created for the use of elevators and for services over the commercial part, as well as implied easements for support. Service pipes were located in the common property and are common property even if located

¹⁰¹⁵ Butt (2001), pp. 705, 723.

¹⁰¹⁶ SOU 1996:87, p. 116.

¹⁰¹⁷ Butt (2001), pp. 705, 723.

¹⁰¹⁸ Allen and Linker (interview 14 May 2003).

¹⁰¹⁹ SOU 1996:87, pp. 116-117.

¹⁰²⁰ Office of Fair Trading, NSW Government (2003a), p. 13.

within the cubic space of a lot. Another rather special example of a strata scheme was formed by a pontoon in the water, with separate lots in the water for the boat places. The air space around is common property. The timber jetty is the “building” that is needed to make a strata scheme. Separate by-laws have been issued to regulate the different management issues in the scheme. Sydney Harbour has got the title to this scheme and is leasing out the area.¹⁰²¹

Termination of Strata Schemes

When the first strata laws came in 1961, many of the buildings had already existed for decades when they were converted from a company title or freehold title to strata title. It is estimated that many strata buildings, especially in Sydney, are already 70 to 100 years old, and some of them are even coming to the end of their useful life. Even for newer buildings there might be unit owners hoping to benefit from demolition of a building and replacement by more contemporary buildings. Because of this, an easier way to terminate strata schemes has been requested.¹⁰²²

Before 1993, a strata scheme could only be terminated by order of the Supreme Court. The reason for this was that the termination can extinguish valuable interests in land, and the Supreme Court would then be best placed to deal with the competing interests involved. An application to the Supreme Court, however, may be costly and cause delay in the redevelopment of a scheme, but since many of the applications were uncontested matters where a single developer had acquired all the lots in a strata scheme for the purpose of redevelopment and no dispute existed, the opinion was that it should be sufficient for the Registrar General to approve an application for termination as part of lodgement of further subdivision plans. Such an application would be both cheaper and quicker.¹⁰²³

The Strata Schemes (Freehold Development) Act provides two methods by which the strata scheme can be terminated. It can either be made by the Registrar-General following the lodgement of an application signed by each proprietor of a lot, registered lessee and registered mortgagee, or by order of the Supreme Court following an application by a lot owner in the scheme, a mortgagee of a lot, or the owners corporation. Now most applications for termination of a strata scheme are made to the Registrar General. An application to the Supreme Court is made in cases where there is a dispute between the lot owners, mortgagees or lessees regarding the termination, if the

¹⁰²¹ Deal (interview 13 May 2003).

¹⁰²² Office of Fair Trading, NSW Government (2003a), p. 18.

¹⁰²³ Ibid. at p. 19.

strata scheme is part of a staged development, or if the Registrar General has refused to make an order terminating the scheme.¹⁰²⁴

When an order of terminating a strata scheme is registered, the strata scheme is terminated and the owners corporation dissolved. The titles for the lots and common property in the scheme are cancelled, and new titles are usually created for the parcel or parcels that existed before the strata scheme was created. If the lots in the strata scheme are held under more than one owner, the new title or titles will usually issue in the name of all owners as tenants in common in shares in accordance with the unit entitlement of the former lots.¹⁰²⁵

Concern has been expressed regarding whether there should be a simpler method of achieving a termination of a strata scheme, when it is obvious that it would be in the best interest of both the individual lot owners and the community at large if the building was demolished, due to age or state of repair. Since a unanimous decision of the owners is needed for a termination of the scheme, this may cause unnecessary hindrance if one person refuses to give consent. However, this need for agreement by all lot owners before the termination of a strata scheme is not unique for New South Wales, but exists in all Australian states, to protect from a situation where owners could lose their homes in an apartment block, if the other owners vote for a termination. In this matter there are questions of fundamental individual rights competing with the benefits of the majority to consider, along with other aspects. However, if the situation emerges where an owner unreasonably objects to the termination of a scheme, there is an option to make an application to the Supreme Court by one or more of the majority owners, and the Supreme Court would then make a decision on the merits of the case. Possible solutions have been suggested to come to terms with these problems, such as introducing the Singapore model, where the required vote depends on the age of the building, or introducing a unanimous vote at the meeting of the owners corporation, or requiring a special resolution where it is enough if no more than 25% of the lot owners vote against.¹⁰²⁶

Large schemes

Since the first strata management laws came, all schemes had been subject to the same rules, regardless of size and type of scheme. Running of large high-rise building schemes is, however, very different from running the average scheme, a fact that was issued in the changes introduced with the Strata Schemes Management Act 2004. The purpose of introducing special provisions for these

¹⁰²⁴ Office of Fair Trading, NSW Government (2003a), p. 19.

¹⁰²⁵ Land and Property Information, NSW Government (2003b), [26.4, 26.5].

¹⁰²⁶ Office of Fair Trading, NSW Government (2003a), pp. 20-21.

schemes was to provide flexibility for the administrative requirements, a smoother management process and to recognise the needed level of accountability.¹⁰²⁷

A large scheme is defined as a scheme with more than 100 lots, where parking and utility lots are not counted. Less than five percent of the strata schemes in New South Wales are such large schemes, even though many of the recent developments are that type of scheme, especially in the inner-city areas.¹⁰²⁸

There are special provisions applying to large schemes, such as that the financial accounts must be audited each year, identification of expected amounts to be spent on individual items must be identified, as well as personal notice of executive committee meetings.¹⁰²⁹

6.2.8 Common Property

In the first Act about strata, the 1961 Conveyancing (Strata Titles) Act, common property was defined as what remained of the land and building after that the separate lots had been deducted. With the title of a property unit followed a share in the common property, proportional to the unit entitlement.¹⁰³⁰

Common property is usually created upon registration of a strata plan and is exclusively defined, i.e. comprising so much of the original parcel of land as is not included in the lots, being the undefined residue of the original parcel.¹⁰³¹ The boundaries of the common property are contiguous with the boundaries of any adjoining strata lots. That means that all parts of the building structure and cubic space that are not included within the boundaries of a strata lot are common property.¹⁰³² All structural cubic space is common property, unless the registered strata plan shows that it forms part of a lot.¹⁰³³ It may comprise such parts of a building that are not specifically defined as common property in a strata scheme plan, but that is required to maintain the structural strength of the buildings, such as columns, piers or footings. In the common property is thus included any part of a building that is not included in a current strata lot, such as walls, floors and ceilings, and within the building is also included common passageways, stairs, landings, ducting, ceiling cavity, under floor

¹⁰²⁷ New South Wales, *Parliamentary Debates*, Legislative Council (10 March 2004), p. 6966.

¹⁰²⁸ *Ibid.*

¹⁰²⁹ Office of Fair Trading, NSW Government (2005), pp. 3, 18.

¹⁰³⁰ A Look at Strata Title in New South Wales from 1961 to Date, p. 3.

¹⁰³¹ Bugden, Allen and CCH Conveyancing Law (2002), [1-240].

¹⁰³² Land and Property Information, NSW Government (2003b), [3.1, 3.4].

¹⁰³³ Office of Fair Trading, NSW Government (2005), p. 19.

footings space, etc.¹⁰³⁴ Windows and doors are included in the wall and becomes common property when the plan is registered.¹⁰³⁵ Outside of the building the common property includes the area occupied by the air space above and the land below the building, as well as all land outside a building, excluding the land occupied by a strata lot or part of such a lot not within a building, for example a car space, development lot or courtyard.¹⁰³⁶ Common facilities and infrastructure are usually comprised in the common property, such as stairs, elevators, grounds and swimming pool.¹⁰³⁷

The common property also includes any pipes, wires, cables or ducts for the use and enjoyment of more than one strata lot in the same strata scheme and any structure used to house such pipes, wires, cables or ducts that are in buildings or part of a parcel that is not a building.¹⁰³⁸ The following items are included in the common property: floor including a ramp or stairway, wall including doors, windows or other structures within the wall, ceramic tiles originally attached to a common property surface, pipes in the common property or servicing more than one lot, electrical wiring in the common property or servicing more than one lot, parquet and floor boards originally installed, vermiculite ceilings, plaster ceilings and cornices, magnesite finish on the floor, balcony doors and the slab dividing two storeys of the same lot, or one storey from an open space roof area or garden areas of a lot.¹⁰³⁹ All such structural cubic space is common property, even if it is located within the cubic space of a strata lot. It can include any common service lines and fittings running through a courtyard, even if not shown on the floor plan or location plan.¹⁰⁴⁰

Ownership of common property is vested in the owners corporation, holding it on behalf of the owners as tenants in common, in shares proportional to their lot entitlements.¹⁰⁴¹ The owners corporation is thus responsible for all matters concerning management and control of the common property.¹⁰⁴² Within the strata scheme it is not always clear what areas in a building that are common property. This uncertainty regarding what is the responsibility of the owners corporation to maintain and repair and what is the responsibility of the lot owner causes constant disputes. Common property and private property are often determined by specific notations on the individual strata plans, but the question has been raised concerning whether some further

¹⁰³⁴ Land and Property Information, NSW Government (2003b), [1.5.14, 3.1].

¹⁰³⁵ Deal (interview 13 May 2003).

¹⁰³⁶ Land and Property Information, NSW Government (2003b), [3.1].

¹⁰³⁷ Bugden, Allen and CCH Conveyancing Law (2002), [1-240].

¹⁰³⁸ Land and Property Information, NSW Government (2003b), [1.5.14].

¹⁰³⁹ Office of Fair Trading, NSW Government (2005), p. 19.

¹⁰⁴⁰ Land and Property Information, NSW Government (2003b), [1.5.14].

¹⁰⁴¹ Bugden, Allen and CCH Conveyancing Law (2002), [1-240].

¹⁰⁴² Land and Property Information, NSW Government (2003b), [3.2].

matters should be specifically listed in the legislation regarding what is common property or private property. This could save the cost and time from disputes over these matters. It is suggested that such items, which could be stated as not being common property, should be the “floating floors”, which are thin wooden floors installed over existing concrete, ceramic or particle board sheet flooring, any structural addition made by a lot owner without the necessary approval of the owners corporation, fences around town-houses, window awning and screens, as well as screen doors.¹⁰⁴³

The statute provides for the conversion of apartments into common property and inclusion of parts of the common property into an apartment. To achieve this it is necessary to get approval from the local council and to register certificates of title for each new apartment along with plans of subdivision or consolidation, or notice of conversion and building alteration plans.¹⁰⁴⁴

For community title, the equivalent to common property is community property, precinct property or neighbourhood property, held by the association. The proprietor may in this case be also another association or a strata corporation. The common property is defined as a lot in the plan. Just like the different layers of associations, there are also layers of common property, consisting of community property, precinct property under that, and then neighbourhood property on the level below. All the proprietors in a community scheme have rights to use the community property, including proprietors in lower schemes. The same relation exists for the precinct scheme. The neighbourhood property can be used by the proprietors in that scheme and the common property by the owners in that strata scheme. However, a proprietor may only use association property in a scheme on which their scheme is based, i.e. a scheme above theirs in the hierarchy, but not property of another scheme at the same level or a lower level other than their own, unless there is an easement allowing that. However, there can be by-laws regulating the property, giving other rights of use or privileges.¹⁰⁴⁵

If a strata scheme contains common property, a title will be created for it upon registration of the strata plan. If the scheme does not create common property, a title is still created with a statement that there is no common property. Strata schemes without common property exist, but they are limited. Such a scheme is created when the cubic space of the strata lots comprises the whole of the parcel. It can be achieved by starting with a base plan comprising one or more stratum lots. The whole of the building living area must be within a strata lot. All cubic space outside a building must also be within the cubic space of a strata lot. There must be no structural cubic space, since this is considered as common property. The strata lots must encompass the entire limits of the stratum parcel. There must also be statements regarding the status

¹⁰⁴³ Office of Fair Trading, NSW Government (2003a), p. 22.

¹⁰⁴⁴ van der Merwe (1994), pp. 88-89.

¹⁰⁴⁵ Bugden, Allen and CCH Conveyancing Law (2002), [1-240].

of the walls and the absence of any structural cubic space. If it will be necessary, easements must be created to ensure access without common property, ensure supply of services without structural cubic space, and ensure the support of the building within the strata lot.¹⁰⁴⁶

If there are only stratum parcels there is no common property.¹⁰⁴⁷ There can however be shared facilities, such as walkway, fire door, landscaping details, etc. The façade is also shared, where each owner has a separate part.¹⁰⁴⁸

6.2.9 By-laws

All strata schemes have by-laws to regulate the common property and how the lots may be used. When a community plan, precinct plan or neighbourhood plan is registered within a community scheme, the community (precinct, neighbourhood) management statement that accompanies the plan must also include by-laws for the schemes that they regulate, dealing with different kind of matters that can be very detailed. These by-laws are often rules that regulate the day-to-day living, but can also restrict occupancy of lots, how association property may be used, or allowing an owner exclusive rights of use or special privileges over some or all of the common property in the strata scheme.¹⁰⁴⁹ Any such exclusive right or privilege for an owner must come from by-laws registered with the plan, or be created before settlement. In a community scheme, the by-laws can be created in favour of lots or other owners corporations and strata corporations.¹⁰⁵⁰ If the by-laws in a strata scheme that is part of a community scheme should be inconsistent with the community management statement, the management statement prevails.¹⁰⁵¹

The by-laws are binding not only for the owners corporation, but also for all owners, mortgagees, covenant chargees, lessees and occupants in possession of a lot.¹⁰⁵² A shortcoming with the 1961 Act was that it was not clear whether the lessees of lots were bound by the by-laws or not. The present Act, however, regulates that the lessees are bound by these by an implied covenant,¹⁰⁵³ though a visitor of the building is not obliged to follow them.¹⁰⁵⁴

One major change that was introduced with the new 1996 Strata Schemes Management Act was to give more flexibility in using the by-laws and to adopt

¹⁰⁴⁶ Land and Property Information, NSW Government (2003b), [3.3, 3.7].

¹⁰⁴⁷ Deal (interview 13 May 2003).

¹⁰⁴⁸ Allen and Linker (interview 14 May 2003).

¹⁰⁴⁹ Bugden, Allen and CCH Conveyancing Law (2002), [1-250].

¹⁰⁵⁰ Allen (1999), [203, 204].

¹⁰⁵¹ Land and Property Information, NSW Government (2003b), [19.3].

¹⁰⁵² *Strata Schemes Management Act 1996* (NSW), s. 44.

¹⁰⁵³ *Strata Schemes Management Act 1996* (NSW), s. 44.

¹⁰⁵⁴ Arnrud and Larson (2001), pp. 31-33.

by-laws that are more appropriate for the individual strata scheme. Previously, the body corporate (now the owners corporation) often just accepted the by-laws in the legislation, without considering the use for their specific scheme. The by-laws given there were often suitable for residential units, but not for commercial developments, office blocks and retirement villages.¹⁰⁵⁵ Registration of a strata plan resulted in the automatic making of a standard set of 29 by-laws, which applied to the strata scheme regardless of the nature of the scheme.¹⁰⁵⁶ Of these standard by-laws, 11 were compulsory and 18 were not. The compulsory by-laws dealt with such things as the functions of office bearers and council meetings.¹⁰⁵⁷

When the Strata Schemes Management Act and some amendments to the Strata Schemes Development Acts were introduced, the developer then could determine the by-laws that are to apply to the strata scheme by lodging for registration with the strata plan the developer's own by-laws.¹⁰⁵⁸ Alternatively the developer may adopt¹⁰⁵⁹ one of the six sets of model by-laws that are contained in Schedule 1 of the 1997 Strata Schemes Management Regulation, the previously non-compulsory by-laws from before 1997, along with an extra by-law.¹⁰⁶⁰ The compulsory standard by-laws from before 1997 were now included within the body of the Act, and not in a separate schedule, to stress their importance and the fact that they cannot be changed.¹⁰⁶¹ The appropriate set of by-laws is selected by notation on the strata plan, depending on the type of scheme. The model by-laws are for residential, retirement village, industrial, hotel or resort, commercial or retail, and mixed use schemes, and they relate to the special aspects of the particular scheme. For some model by-laws it is required to further choose one of the forms of by-laws regulating the same matter, such as the keeping of animals.¹⁰⁶² There was still made room for further refinement of the by-laws when a strata scheme wants to make variation of the models.¹⁰⁶³ There can be a set of by-laws prepared especially for the strata scheme, or both by-laws made up of some of the model by-laws and some prepared especially for the strata scheme. In the Strata Schemes Management Act are listed some matters that by-laws might deal with, but with

¹⁰⁵⁵ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), pp. 5921-5922.

¹⁰⁵⁶ Allen (1999), [204].

¹⁰⁵⁷ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), pp. 5921-5922.

¹⁰⁵⁸ Allen (1999), [204].

¹⁰⁵⁹ Deal (email 8 March 2007).

¹⁰⁶⁰ Allen (1999), [204].

¹⁰⁶¹ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), pp. 5921-5922.

¹⁰⁶² Allen (1999), [204].

¹⁰⁶³ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), pp. 5921-5922.

some exceptions, the matters within the legislation for which by-laws can be created are not limited.¹⁰⁶⁴

The by-laws might cover very detailed matters. Examples of matters that may be regulated in the by-laws are noise, vehicles on common property, obstruction of common property, damage to common property, behaviour of owners, occupants and invitees, depositing rubbish on common property, drying laundry, cleaning windows, storage of dangerous substances, moving furniture through common property, floor coverings, garbage disposal, keeping animals, appearance of lot, notice-board, notification of changes in the use of lots, curtains, hot water systems, gas appliances, use of car parking spaces, leasing manager, structural support in the building, strata management statement and easements.¹⁰⁶⁵

6.2.10 The Owners Corporation

The owners corporation is a separate legal entity made up of all owners of the strata lots in a particular strata scheme. It is the representative body for and on behalf of the owners. Its duties are to control, manage and administer the common property in the scheme.¹⁰⁶⁶ The provisions of the Act determine its powers, authorities, duties and functions.¹⁰⁶⁷

Included in the general duties of the owners corporation are the duty to maintain and repair the common property, to repair normal damage and structural defects, as well as to repair and replace fixtures, to keep minutes of meetings and to keep proper accounts. The owners corporation must also set up an administrative fund and a sinking fund into which levies are paid. The purpose of the administrative fund is to meet generally the recurrent expenses of the strata scheme, and the sinking fund is to provide for long-term maintenance, such as painting.¹⁰⁶⁸ The owners corporation also has the duty to insure the buildings in the strata scheme, as well as some other specific insurance. General meetings are held every year.¹⁰⁶⁹

When a strata plan is registered, an owners corporation is automatically constituted. An association is also automatically constituted when a community plan, a precinct plan or a neighbourhood plan is registered. If a lot in a community plan or a precinct plan is the subject of its own association, a tiered association structure exists and the owner is the association for that lot for membership purposes of the higher-level association. The name of the

¹⁰⁶⁴ Allen (1999), [204].

¹⁰⁶⁵ *By-Laws for No. 1 Sergeants Lane, St Leonards (Midrise)* (1999).

¹⁰⁶⁶ Land and Property Information, NSW Government (2003b), [17.1].

¹⁰⁶⁷ Bugden, Allen and CCH Conveyancing Law (2002), [1-220].

¹⁰⁶⁸ Moses (2001), p. 22.

¹⁰⁶⁹ Butt (2001), p. 707.

association depends on type of plan and can be Community Association, Precinct Association or Neighbourhood Association. If certain development lots within a community plan or a precinct plan are subdivided by means of a strata plan, the owners corporation is called a strata corporation and is regulated by the Strata Schemes Management Act. Since community titles schemes are restricted to freehold title land, a leasehold strata scheme cannot be part of such a scheme.¹⁰⁷⁰

Since the owners corporation carries out its responsibilities on behalf of all lot owners, there is a burden to conduct the affairs in the interest of the individual lot owners. There is a risk that the administration of a strata scheme by the owners corporation does not correspond with the expectations of the lot owners, and the owners corporation must thus keep a proper balance between effective administration and personal desires of individual lot owners and occupants. To minimise such risks, the Act provides certain provisions, such as mandatory insurance.¹⁰⁷¹

The owners corporation has the power to enter any part of the land comprising the lots and the common property in the strata scheme to carry out certain work. This right can be used, for instance, when the owner of a lot neglects to carry out work on the lot that is required and the owners corporation needs to take care of it, or to carry out work that the owners corporation is required to do. If carrying out this work will cause damages, the owners will be liable for those damages. The Strata Schemes Management Act requires the owners corporation to repair and maintain only common property, and not lots within the strata scheme, which is the responsibility of the proprietor of the lot, with some exceptions such as carrying out fire precaution work demanded by the local council.¹⁰⁷²

For each strata lot there is a unit entitlement that shows the proportional interest for each lot owner as a tenant in common in the common property. It is used to determine such matters as the proportion of levies to be paid by each lot to the owners corporation, the value of a vote in a poll at the owners corporation's meetings, as well as the shares to be allocated when a strata scheme is terminated.¹⁰⁷³ Even if there is no common property, the lot owners must be part of an owners corporation and unit entitlement has to be decided for each lot.¹⁰⁷⁴ Information about the unit entitlement is kept in the strata roll, along with some other necessary information about the lot owners, insurance, etc.¹⁰⁷⁵

¹⁰⁷⁰ Bugden, Allen and CCH Conveyancing Law (2002), [1-220].

¹⁰⁷¹ Department of Fair Trading, NSW Government (2000), pp. 11-12.

¹⁰⁷² Butt (2001), pp. 709-710.

¹⁰⁷³ Land and Property Information, NSW Government (2003b), [16].

¹⁰⁷⁴ SOU 1996:87, p. 114.

¹⁰⁷⁵ Butt (2001), pp. 710-711.

The developer decides the unit entitlement for the apartments. A schedule describing it must be shown on the strata plan. It has to be approved by an expert outside agency and the Registrar-General may adjust the schedule upon registration. The statute does not require that the unit entitlement reflects the value of each lot in relation to the total value of all lots, but the Registrar-General usually has this as a main criterion when approving the schedule of unit entitlement.¹⁰⁷⁶

The owners corporation also has the power to raise levies from the members to cover the costs for administration, including repair and maintenance costs.¹⁰⁷⁷ There are two different types of levies, one administrative fund for expenses covering the day-to-day responsibilities of the owners corporation, and one sinking fund for periodical outgoings of a more substantial nature, such as repainting common property. These levies are based on the unit entitlement.¹⁰⁷⁸

To carry out the functions of the owners corporation of controlling and administering the common property or association property, an executive committee or a management agent is used for assistance.¹⁰⁷⁹ Since the owners corporation in practice cannot have meetings for every decision about practical matters, the legislation provides for the election by the owners corporation of an executive committee. This committee can make decisions on behalf of the owners corporation and carry out those decisions. There is, however, some limitation in its powers. The owners corporation can restrict the executive committee from acting in relation to matters on a particular subject. The executive committee cannot take action on behalf of the owners corporation in relation to matters which require a special resolution or a unanimous resolution, or that is to be decided by a general meeting. The owners corporation also keeps its own powers in relation to all matters and can pre-empt the decision of the executive committee on a particular matter, if doing so before the decision is taken.¹⁰⁸⁰

Regardless of the size of the owners corporation, certain features must be fulfilled. There must be an executive committee, with a minimum of two and a maximum of nine members. It must elect office bearers, including a chairperson, a secretary and a treasurer. Meetings must be conducted under the same mechanism, with notification of meeting times, use of proxy votes, etc. The owners corporation must estimate budgets and fix required levy contributions from individual lot owners annually. It may also engage a strata

¹⁰⁷⁶ van der Merwe (1994), p. 60.

¹⁰⁷⁷ Bugden, Allen and CCH Conveyancing Law (2002), [1-220].

¹⁰⁷⁸ Butt (2001), p. 710.

¹⁰⁷⁹ Bugden, Allen and CCH Conveyancing Law (2002), [1-220].

¹⁰⁸⁰ Moses (2001), p. 23.

managing agent to carry out some or all of the owners corporation's responsibilities under delegation.¹⁰⁸¹

The administrative responsibilities of the owners corporation were changed with the introduction of the Strata Schemes Management Act, to reflect the important role the owners corporation has to administer the strata scheme on behalf of the owners. The responsibilities increased for management of the finances of the owners corporation, providing for future expenditure and insurance matters. Meeting procedures and administrative duties were also modernised and streamlined. Regarding the finances, it was made clearer that the sinking fund is for future expenditure of a capital nature, and the administrative fund to meet recurrent day-to-day expenses. The requirement to establish an additional account for special levies was removed and instead put in the administrative fund to avoid unnecessary duplication of accounting records.¹⁰⁸²

6.2.11 Strata Managing Agent

Professional managers can be used to take care of the management of a strata scheme, which is the duty of the owners corporation.¹⁰⁸³ The legislation enables the owners corporation to delegate some or most of its powers to a strata manager, who must be licensed.¹⁰⁸⁴ It is estimated that at least half of all strata schemes are managed by strata managing agents.¹⁰⁸⁵ These agents often take care of the financial part and meetings. It is also possible to have facilities managers that take care of such practical work as mowing the lawns.¹⁰⁸⁶ There are, however, some powers of the owners corporation that cannot be delegated, such as the right to delegate itself, matters which are required to be decided by the owners corporation and the right to determine maintenance and administration levies.¹⁰⁸⁷ A reason to appoint a professional manager to take care of the management is that the main Acts that regulate the strata schemes today, the Strata Schemes (Freehold Development) Act and the Strata Schemes Management Act, are long and complicated and often difficult for the public to understand.¹⁰⁸⁸

¹⁰⁸¹ Office of Fair Trading, NSW Government (2003a), p. 14.

¹⁰⁸² New South *Wales, Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), p. 5918.

¹⁰⁸³ Skapinker (interview 7 May 2003).

¹⁰⁸⁴ Moses (2001), p. 23.

¹⁰⁸⁵ Department of Fair Trading, NSW Government (2000), p. 8.

¹⁰⁸⁶ Skapinker (interview 7 May 2003).

¹⁰⁸⁷ Moses (2001), p. 24.

¹⁰⁸⁸ Butt (interview 2 May 2003).

The strata managing agent assists the owners corporation in administering the common property, especially the clerical and accounting work. The agents of the owners corporation are in a fiduciary relationship to it. Since they handle the funds of the owners corporation, they must be licensed, and the funds are covered by a fidelity scheme. They can also be delegated certain powers, authorities, duties and functions of the owners corporation, allowing certain decisions to be made without the need for holding a meeting, and this places the agent in a special relationship with the owners corporation.¹⁰⁸⁹

A strata managing agent can also be delegated the function of the secretary and treasurer for the owners corporation. The agent then performs their duties, and the secretary and treasurer assume a supervisory role. The secretary and treasurer should, however, insist on being informed about developments and action taken within their responsibility areas. If they choose to, they are also still able to exercise their powers.¹⁰⁹⁰

The management structure in the Strata Schemes Management Act is more suited to suburban residential blocks, rather than the city tower buildings where issues are more complex financially and administratively. Professional management arrangements in particular are causing unease among lot owners in large strata schemes, and a fear that the managing agents lack the necessary financial and corporate expertise to administer large strata schemes with hundreds of lots.¹⁰⁹¹ The annual operating budget of such schemes may be millions of Australian dollars.¹⁰⁹² The question is raised concerning the need of introducing a new tier of management professionals for these large schemes. Such professionals could be administrators with accounting and legal expertise, financial controllers with more responsibilities than a treasurer, or a board of directors where there could be more members than in the executive committee. To make improvements within this area, some requirements were introduced with the Strata Schemes Management Amendment Act 2004.¹⁰⁹³ Those changes included the provision that the decision of the owners corporation always prevails if there should be a disagreement between the owners corporation and the executive committee. The owners corporation also needs to give its approval if the functions of a strata managing agent are to be transferred to another person. There are a number of functions that only may be delegated to a member of the executive committee or a strata managing agent, for instance the levying of contributions and having custody of money paid to the owners corporation.¹⁰⁹⁴

¹⁰⁸⁹ Bugden, Allen and CCH Conveyancing Law (2002), [1-270].

¹⁰⁹⁰ Ibid. at [2-220].

¹⁰⁹¹ Office of Fair Trading, NSW Government (2003a), pp. 14-15.

¹⁰⁹² New South Wales, *Parliamentary Debates*, Legislative Council (10 March 2004), p. 6966.

¹⁰⁹³ Office of Fair Trading, NSW Government (2003a), pp. 14-15.

¹⁰⁹⁴ *Strata Schemes Management Amendment Act 2004* (NSW).

A suggestion for improvement of the management structure has been made, where the kind of management modules that existed in the Queensland legislation would be introduced. The proposal contains four different modules for different developments. For each of these modules there is a different set of rules concerning some main management areas, such as committees, general meeting, proxies, managers and service contractors, financial management and administrative matters. The Standard Module is used for residential apartment or town house schemes where most residents are owners or occupants. The Accommodation Module is mainly proposed for residential complexes of a services apartment, hotel or resort type, and is intended for short-term occupancies and situations where the majority of owners are investors, and which is less regulated. There is also a Commercial Module for developments constructed as business complexes, with fewer restrictions. Finally, the Small Scheme Module is intended for the use of any scheme with six lots or less, and is the least regulated to allow more self-management and informal administrative arrangements.¹⁰⁹⁵

6.2.12 Building Manager

Uncertainties have existed regarding whether an owners corporation can delegate its functions in connection with cleaning, caretaking, administering, repairing and maintaining the common property to someone other than a licensed strata managing agent, such as a building manager, and whether a building manager can be appointed during the initial period, as well as uncertainties concerning the length of building management agreements. These problems were to some extent dealt with in the Strata Schemes Management Amendment Act 2002, where the new legislation dealt with issues involving caretakers and caretaker contracts. Caretakers were included in a new category of persons who can assist the owners corporation in carrying out its functions of managing, controlling, maintaining and repairing common property.¹⁰⁹⁶

It is common for owners corporations or associations under community scheme arrangements to appoint building or ground caretakers or managers and to enter into longer term arrangements for the maintenance of development sites and building systems that are becoming more and more complex.¹⁰⁹⁷ A caretaker is defined in the Strata Schemes Management Amendment Act 2002 as a person who is entitled to exclusive possession of a lot or common property and assists in exercising any one or more of certain functions of the owners corporation for the strata scheme concerned, such as managing common property, controlling the use of common property by

¹⁰⁹⁵ Office of Fair Trading, NSW Government (2003a), pp. 14-15.

¹⁰⁹⁶ Russell (2003), pp. 5-6.

¹⁰⁹⁷ Allen (1999), [706, 707].

persons other than the owners and occupants of lots, as well as maintaining and repairing common property. A person can be both a caretaker and an on-site residential property manager. A person is not a caretaker if those functions are exercised only on a voluntary or casual basis, or as a member of the executive committee. The delegated functions cannot include the secretarial and administrative functions of an owners corporation, which can be delegated only to a licensed strata managing agent.¹⁰⁹⁸ The building manager or caretaker function is traditionally not performed by the licensed strata or community scheme manager.¹⁰⁹⁹

Issues to consider when hiring a building manager are, for instance, the manager's control over certain parts of the common property and the extent and quality of common property area cleaning and maintenance. Also such things as the special privileges of the building manager to use common property are of interest, as well as the cost to the owners corporation under the building manager contract, which typically forms one of the most significant items in the budget of the owners corporation or the association.¹¹⁰⁰

The management rights are sometimes sold by the developer to the manager or caretaker. An on-site caretaker is also often expected by owners in luxury developments, to coordinate activities and provide such services as security systems. A service contract between the owners corporation or association and the building caretaker or manager can often be of ten years duration or more, with options for renewal. Special privileges for the building manager to use common property to the exclusion of others can also be included. In the by-laws for the scheme can be found special by-laws for the purpose of appointing a building manager or caretaker.¹¹⁰¹

A caretaker contract that has been entered into during the initial period will not extend beyond the first annual general meeting of the owners corporation. Neither may a caretaker contract be transferred to another person without the consent of the owners corporation. This is only valid for new contracts and will not affect the already existing ones, with the exception of the new dispute resolution provisions. According to these, an owners corporation may apply to the Consumer Trader and Tenancy Tribunal for an order relating to unsatisfactory performance by the caretaker of its obligations under the caretaker contract, unfairness of charges and harsh, oppressive, unconscionable and unreasonable contracts. These applications may not be made by the individual lot owners, only by the owners corporation.¹¹⁰²

¹⁰⁹⁸ Russell (2003), pp. 6-7.

¹⁰⁹⁹ Allen (1999), [708].

¹¹⁰⁰ Ibid. at [707].

¹¹⁰¹ Ibid. at [706, 707].

¹¹⁰² Russell (2003), pp. 5-6.

6.2.13 Stratum Lots

Stratum lot/parcel means that the land is subdivided into horizontal strata with a traditional title and not registered by the Strata Schemes (Freehold Development) Act.¹¹⁰³ A stratum lot is a parcel that is restricted in height or depth or both, by reference to Australian Height Datum or some other datum that is approved by the Surveyor General. Such lots are created by stratum subdivision, which is a division of land where at least one boundary between the lots in the subdivision is defined by a plane that is not vertical, which means horizontal or inclined planes, limiting the stratum in height or depth or both.¹¹⁰⁴ Such boundaries create lots on top of each other.¹¹⁰⁵ It is possible to subdivide land above or below the surface of the ground with reference to standard height datum, which can occur with or without a building on the land.¹¹⁰⁶ A stratum may also be unlimited in height or in depth.¹¹⁰⁷ With this kind of division into property units, there is no need for the strata to be built, so it is therefore possible to create air property units with no connection with a building. There is thus no necessity for a physical boundary between two stratum units, since it is possible to subdivide just a volume in air space. The horizontal boundaries are instead defined with reference to a datum point.¹¹⁰⁸

There are two different ways of granting a stratum, either as stratum of freehold land, which means that the ownership of this space will be valid for all times, or as stratum of leasehold land, when the space is granted for 99 to 125 years and thereafter has to be returned to the original owner. The latter system is often used for land when it is important to keep control of the land use, such as in city centres.¹¹⁰⁹

Stratum is often used to subdivide one part of a building from another part of that building, for instance to separate a shopping centre at the ground level in a building from the top section with a residential home unit tower.¹¹¹⁰ It makes it possible to subdivide a building into stratum lots to enable more than one strata scheme within the same building.¹¹¹¹ It is also commonly used for redevelopment of old buildings and for infrastructure,¹¹¹² as well as for certain

¹¹⁰³ SOU 1996:87, pp. 118-119.

¹¹⁰⁴ Land and Property Information, NSW Government (1998), p. 1.

¹¹⁰⁵ Land and Property Information, NSW Government (2003b), [Glossary].

¹¹⁰⁶ Bugden, Allen and CCH Conveyancing Law (2002), [1-310].

¹¹⁰⁷ Land and Property Information, NSW Government (1998), p. 5.

¹¹⁰⁸ SOU 1996:87, pp. 118-119.

¹¹⁰⁹ Nylander and Rinman (2001), p. 33.

¹¹¹⁰ Bugden, Allen and CCH Conveyancing Law (2002), [1-310].

¹¹¹¹ Land and Property Information, NSW Government (1998), p. 2.

¹¹¹² Allen and Linker (interview 14 May 2003).

complex building structures, such as underground railway stations and air space above railway stations.¹¹¹³

This traditional property division is sometimes preferred over the strata division for reasons such as wanting to avoid compulsory requirements that follow from the Strata Schemes (Freehold Development) Act, such as the compulsory insurance of the building and workers within the building, to have an owner's corporation and certain by-laws, as well as to omit common property, which is complicated to achieve with a strata division.¹¹¹⁴ Strata title is sometimes used for retail purposes, but this can create problems with conflicts and lack of proper maintenance,¹¹¹⁵ and because of this, stratum is more often used for this purpose.¹¹¹⁶

The type of lot is called a stratum lot, which often consists of an airspace lot. Such a lot can be subdivided by a strata plan both by the Strata Scheme (Freehold Development) Act and the Strata Scheme (Leasehold Development) Act. The parcel of land on which the strata scheme is based is called the stratum parcel. It usually has common property and always an owners corporation associated with it. If, for instance, there are two stratum lots, one for commercial and one for residential purposes, the home unit component can be subdivided into lots and common property with a strata plan. These subdivisions are regulated by a strata management statement, functioning as a statutory contract between the owner of the commercial stratum lot and the owners corporation for the home unit lot. It regulates ownership, use, maintenance of components and services in the building that both parts depend upon, such as stairs, sprinkler system and fire safety system.¹¹¹⁷ If there is no strata scheme, but only stratum lots within a building, a building management statement, which is a form of contract regulated by law and which the owner, lessee, occupant or mortgagee of each stratum component in the building must comply with, will regulate management and organisational matters between the stratum owners in the building.¹¹¹⁸

A stratum lot does not have to be contiguous, which means that one lot can contain the upper floors of a building as well as some basement levels. The aim of part strata subdivision, where parts of a building are divided by strata title into lots while other parts of the building are not included in any strata scheme but are separately owned, is to separate interests that are not similar, so the stratum plan is attempted to dividing the building with as little need for co-existence as possible. As an example of this, a building can have an elevator that only goes to the top floors of this building. A stratum lot can thus contain

¹¹¹³ SOU 1996:87, pp. 118-119.

¹¹¹⁴ Ibid.

¹¹¹⁵ Bugden, Allen and CCH Conveyancing Law (2002), [1-310].

¹¹¹⁶ Allen and Linker (interview 14 May 2003).

¹¹¹⁷ Bugden, Allen and CCH Conveyancing Law (2002), [1-310].

¹¹¹⁸ *World Square Building Management Statement* (2002).

some upper floors, some basement floors and an elevator running through the whole building. It can also include the ducts and cables needed to service the lot. Such a stratum plan tries to convey three-dimensional concepts by way of a two-dimensional plan, as a consequence leading to difficulties in understanding how it works. Although the stratum lot may cover separate areas of the site of the building, it must be wholly within the perimeter of the site of the building. A part strata development can therefore not comprise a section of one building and a section of another building.¹¹¹⁹

Shared facilities are the facilities, services, machinery, equipment, insurances and other things in a stratum building that are of use or benefit to two or more stratum lots, or which are located on the land of one owner but used by another owner. These facilities may include objects such as a plant and equipment, pipes, wires, cables and ducts not exclusively servicing a stratum lot owner's part of the building, rooms or areas in which shared facilities are located, car park, loading dock, and façade of the building.¹¹²⁰ They may also be fire protection services, hydraulic services, gas supply, air conditioning, electrical services, security equipment, swimming pool and gymnasium areas, lobby area, waste area and storm water system.¹¹²¹ In the building management statement may be specified which owners and other persons that are entitled to use and enjoy a shared facility. If no restriction is made, the facility is available for use and enjoyment by each owner and occupant.¹¹²²

Even though the shared facilities belong to a stratum, the building management statement may give access to these facilities for other stratum lot owners and the building management committee to do things required by the statement or allowed under an easement if notice is given to the owner, or without notice in case of an emergency. The committee may for instance be given the permission to do things to the building with respect to the shared facilities that should have been done by an owner but was not done properly.¹¹²³

Maintenance, repair, operation, cleaning and replacement of the facilities are included in the costs for the shared facilities, and the responsibility for this lies on the building management committee. These functions may be appointed and contracted. The costs for the use of the facilities are calculated for each owner and shared between them according to different principles, such as number of car spaces per stratum, actual use of water, relative proportion of the replacement cost of the building for insurance, area served for electricity, proportion of façade enclosing each lot, total number of residential units in the

¹¹¹⁹ Hughes (1996), pp. 14-15.

¹¹²⁰ *World Square Building Management Statement* (2002).

¹¹²¹ *Strata Management Statement for No. 1 Sergeants Lane, St. Leonards* (1999).

¹¹²² *World Square Building Management Statement* (2002).

¹¹²³ *Ibid.*

stratum lot,¹¹²⁴ estimated proportion of the use and benefit of the shared facility by each owner,¹¹²⁵ relative area of each stratum lot, relative value of each stratum lot,¹¹²⁶ or the costs can be distributed evenly between the owners. If new shared facilities are created, or the existing ones are changed, replaced or extended, then if new costs are identified, or the use is changed, the committee may be allowed by unanimous resolution to add shared costs or to change the division of the costs.¹¹²⁷

Since common property does not exist between stratum units, the shared facilities, for example elevators, have to belong to the stratum of a lot. Easements are created to give access to these shared facilities. This means that compared with a strata title scheme, more easements and covenants are used.¹¹²⁸ There are easements for services that affect the whole building, and implied easements for support and shelter.¹¹²⁹ A problem with that is that when selling a stratum, the buyer will not automatically be inserted as a partner in the contract. Insurance is another problem for stratum units, and such questions have to be handled in management agreements. A form for this, which however is not compulsory, is the building management statement provided in the Conveyancing Act, which deals with shared facilities, disputes and implied easements.¹¹³⁰

A building management committee is usually formed to operate and manage the building on behalf of the owners, in which each owner is a member. Every member appoints a representative to attend and vote for the member at meetings. A unanimous resolution of the owners entitled to vote is usually needed for the committee to make decisions. To help the committee perform its functions, it may appoint various persons to assist. Such persons may be a strata manager to assist in the operation and management of the building and to perform secretarial and financial functions, or a facilities manager, or it may be various service providers that the committee enters into contract with for the operation, maintenance, repair and replacement of shared facilities.¹¹³¹

¹¹²⁴ *Strata Management Statement for No. 1 Sergeants Lane, St. Leonards* (1999).

¹¹²⁵ *Ibid.*

¹¹²⁶ *Ibid.*

¹¹²⁷ *World Square Building Management Statement* (2002).

¹¹²⁸ Skapinker (interview 7 May 2003).

¹¹²⁹ Deal (interview 13 May 2003).

¹¹³⁰ Skapinker (interview 7 May 2003).

¹¹³¹ *World Square Building Management Statement* (2002).

6.2.14 Part Strata

When the strata title system had been in use for a while, the complexity of developments increased, and with that, the need for other types of subdivision. At the end of the 1970's and during the 1980's, mixed-use strata schemes became more common.¹¹³² In mixed-use developments, there was a need for parts of a building to be divided by strata title into lots and for other parts of the building not to be lots in a strata scheme but separately owned.¹¹³³ Different use components in a strata scheme building, such as for residential and retail, had to be contained within the same strata scheme. This restriction led to frequent disputes between owners and occupants, mainly due to differences in interests between these different categories.¹¹³⁴ It became necessary to introduce a way to be able to register a strata plan for a part of a building and providing for arrangements between the owners corporation for the strata scheme and owners of the other parts of the building. Amendments to allow this were included in the Strata Schemes (Freehold Development) Act in 1992. Prior to these amendments, there had been no formal way of registering a strata plan in a building with separate areas owned by different owners, and only ordinary contracts for providing for matters such as insurance and upkeep of common areas were possible. With the introduction of strata titles for part of a building, easements were also provided for support affecting and appurtenant to the lots and common property thus created, in order to maintain the integrity of the building. A strata management statement was also required for the building to be registered, governing the rights between the strata scheme and the owners of the rest of the building. It is registered in the Land Titles Office and implies covenants by the parties, with the same effect as a deed, binding the owners corporation and owners, mortgagees in possession, lessees, etc.¹¹³⁵ A part building strata scheme can also be part of a community scheme.¹¹³⁶

Part strata is used generally in mixed use developments where there is a residential strata scheme to apportion costs more fairly, or in situations where one building contains two distinct areas. In a single building there may also be parts of the building that are appropriate for strata scheme, and other parts that are not so suitable for this, or cases with a second strata plan that is separate from the first strata plan.¹¹³⁷ A part building strata scheme can, for example, be a shopping centre with a podium above and two unit towers rising from the podium. The building is subdivided by a stratum plan into three lots, one for

¹¹³² Allen (1999), [209].

¹¹³³ Moses (2001), p. 13.

¹¹³⁴ Allen (1999), [209].

¹¹³⁵ Moses (2001), p. 13.

¹¹³⁶ Bugden, Allen and CCH Conveyancing Law (2001), [3-110].

¹¹³⁷ Moses, Tzannes and Skapinker (1989), [6815].

the shopping centre and one each for the two home unit towers. All common elements and services within the building are regulated by a strata management statement, but there is no single owners corporation structure over those three lots. The stratum lots for the home unit towers are then subdivided by a strata plan for each, into lots and common property with an owners corporation for each of the two stratum lots. Each of these strata schemes is a part building strata scheme. Insurance of the building must be obtained by the owners corporation for each strata scheme for part of a building, and any other person in whom an estate in fee simple in part of the building is vested that is not included in a stratum parcel.¹¹³⁸

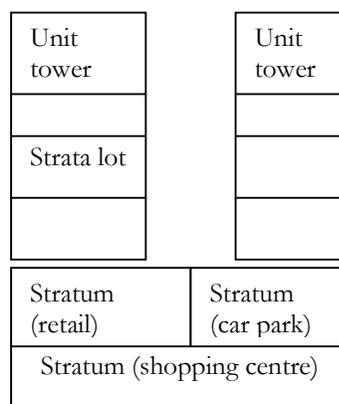


Figure 6.2. Example of the Organization of a Part Strata Scheme.

With the Strata Schemes Legislation Amendment Act 2001, a possibility was introduced to add a building to an already existing part strata scheme. The legislation for part-strata schemes was working well when just one building was involved, but for larger developments problems occurred, such as a development consisting of a podium with a residential tower and an office tower built on top of it. The podium may contain car parking for each tower and some retail shops. Each tower with associated podium car parking is a separate strata scheme and the shops are situated outside of each strata scheme. The intention is that the development should be managed as a part strata scheme by a building management committee, so that the different components of the development, which are the two strata schemes and the shops, can share facilities and expenses, such as air-conditioning plant and equipment. With the old rules, the office tower could not be a component of the strata scheme for

¹¹³⁸ Bugden, Allen and CCH Conveyancing Law (2002), [7-330].

the podium and the residential tower, if this office tower was built at a later stage. A result of this was that the development could not be managed as a whole, and facilities and expenses could not be shared. The restriction that a building could not be added to an already existing part-strata scheme was introduced because the Strata Schemes (Freehold Development) Act only contemplated part-strata schemes in normal stand-alone buildings. It did not expect that part-strata developments might include a podium and towers, where the second or subsequent towers are built after the podium and first tower.¹¹³⁹

Another restriction that was removed in 2001 was that it was not possible to have a staged strata scheme (see further below) as a component of a part-strata development. If the first stage of a staged strata development comprised a block of residential units, the second stage could not comprise a block with residential units and shops, where the shops were not to be part of the strata scheme. The change in the Act provided more flexibility when incorporating both part-strata and staged strata in one development.¹¹⁴⁰ It means that part strata provisions can be used to stage a development by creating stratum lots and registering a strata plan on each of these lots.¹¹⁴¹ A strata development contract is also required to show that the staged strata scheme to which it relates will be part of the part-strata development, and that a strata management statement will govern the relationship between the strata and non-strata components of the development. The strata development contract must not be inconsistent with the strata management statement, and if so, the strata management statement prevails.¹¹⁴²

When a building has been subdivided into two or more stratum lots, one or more of these lots may be further subdivided by a strata plan. The boundaries of each strata scheme must correspond with the boundaries of the stratum lot.¹¹⁴³ The boundary is often located to the centre of walls, ceiling and floor, but if there are services in the floor, then the boundary may be pushed in either direction. The owner of the top stratum usually owns the air space above the top of the building.¹¹⁴⁴ The result will be ownership of the building divided between at least two owners, namely the owners corporation for a stratum parcel subdivided by strata plan and the owner of the residual lots comprising the land and building outside the stratum parcel.¹¹⁴⁵

When a strata plan for part of a building is registered, reciprocal implied easements for subjacent and lateral support and shelter are created between the parts of the building. The burden and benefit of these easements attach to the

¹¹³⁹ Land and Property Information, NSW Government (2001b), p. 1.

¹¹⁴⁰ *Ibid.* at pp. 1-2.

¹¹⁴¹ Moses, Tzannes and Skapinker (1989), [6815].

¹¹⁴² Land and Property Information, NSW Government (2001b), pp. 1-2.

¹¹⁴³ Bugden, Allen and CCH Conveyancing Law (2001), [3-110].

¹¹⁴⁴ Panagakis and Musgrave (interview 13 May 2003).

¹¹⁴⁵ Bugden, Allen and CCH Conveyancing Law (2001), [3-110].

relevant lots or common property containing those parts of the building. The Registrar-General must record the existence of these easements in the register.¹¹⁴⁶ There is no need, however, to show the implied easements on the plan, since they are implied by law.¹¹⁴⁷ It is therefore not necessary to identify the site of such easements on a strata scheme plan, unlike the requirement for other easements.¹¹⁴⁸ In the Strata Schemes (Freehold Development) Act, there are also comprehensive easement terms for personal access, vehicular access and services to be created by short form endorsement, which can be invoked as short form easements. There are also provisions in the Act dealing with apportionment of costs between the parties to certain easements.¹¹⁴⁹

The agreements between the owners are bound to the land, not the owner. The management statement gives the right to use shared facilities, such as elevators, and easements are not used in such cases. The management statement also regulates the costs for shared services and shared facilities.¹¹⁵⁰

If the developments are not that large, usually one owners corporation per building is preferred, even if there are different purposes within the same building. The reason for this is that it facilitates such matters as renovations of common property.¹¹⁵¹ However, if a part strata scheme is introduced later, there will be a different owners corporation for it, for instance a separate retail owners corporation. The strata management statement will then coordinate the different owners corporations.¹¹⁵²

It is not uncommon in larger developments for a developer to appoint a building manager or caretaker by agreement immediately after registration of the strata plan. This was not regulated heavily by law until recently, which resulted in many agreements procured for terms up to, and more than ten years. Such appointments were met with resistance by buyers who believed that they through the building management fees are paying for the commercial benefit, which the developer has derived in selling the building management rights for a lot of money. With the introduction of the Strata Schemes Management Amendment Act 2002, such agreements have, however, been strictly regulated.¹¹⁵³

¹¹⁴⁶ Bugden, Allen and CCH Conveyancing Law (2001), [3-110, 130].

¹¹⁴⁷ Panagakis and Musgrave (interview 13 May 2003).

¹¹⁴⁸ Land and Property Information, NSW Government (2003b), [23.3].

¹¹⁴⁹ Bugden, Allen and CCH Conveyancing Law (2001), [3-110, 130].

¹¹⁵⁰ Panagakis and Musgrave (interview 13 May 2003).

¹¹⁵¹ Lundblad (2002), pp. 60-61.

¹¹⁵² Skapinker (interview 7 May 2003).

¹¹⁵³ Panagakis (2003), pp. 17-18.

6.2.15 Strata Management Statement

When registering a strata scheme for part of a building, a strata management statement must be registered on the titles of the strata and non-strata parts of the building. This is a document that sets out a method for the building to be managed and maintained as a whole between the strata scheme and the non-strata part.¹¹⁵⁴ It can also be used as a contract between two strata schemes within the same building, such as one strata scheme for residences and one strata scheme for shops.¹¹⁵⁵ The purpose of it is to present a management plan to avoid the management problems that easily arise from separate ownership within a building, and to provide for efficient administration, similar as is done for community titles.¹¹⁵⁶ This strata management statement binds all owners, owners corporations, occupants and mortgagees in possession within the building it regulates.¹¹⁵⁷ It will also bind any subsequent owner of a part of the building.¹¹⁵⁸

The strata management statement consists of a set of provisions, plans and other particulars for regulation of a wide range of management and operational aspects of a stratum parcel connected with an entire building. The developer or owner must prepare the strata management statement, and it is to contain provisions dealing with management, such as the establishment and conduct of a building management committee, dispute resolution, amendment of the strata management statement and service of notices.¹¹⁵⁹ The statement can also contain issues such as an architectural and landscape code that regulates the appearance of the building, provisions creating and regulating shared facilities or areas, shared facilities cost apportionment arrangements, access, services or other rights in the building for the owners within that building, or for owners or occupants outside the strata scheme, to be entitled to within the particular scheme.¹¹⁶⁰ Other provisions may also be inserted and it can be quite flexible. Insurance issues are not dealt with in the strata management statement, since they are already regulated in the Act.¹¹⁶¹

A reform from 2001 affecting part-strata development introduced the possibility to include a new strata scheme in an existing strata management statement. Since there is no need for two strata management statements to apply for one building, the change in the Act was made to remove the

¹¹⁵⁴ Land and Property Information, NSW Government (2001a), p. 1.

¹¹⁵⁵ New South Wales, *Parliamentary Debates*, Legislative Council (11 October 2005), p. 18286.

¹¹⁵⁶ Bugden, Allen and CCH Conveyancing Law (2001), [3-110-120].

¹¹⁵⁷ Allen (1999), [209].

¹¹⁵⁸ Land and Property Information, NSW Government (2001a), p. 1.

¹¹⁵⁹ Bugden, Allen and CCH Conveyancing Law (2001), [3-110-120].

¹¹⁶⁰ Allen (1999), [209].

¹¹⁶¹ Bugden, Allen and CCH Conveyancing Law (2001), [3-110-120].

requirement for a strata management statement to accompany a strata plan for part of a building, where a strata management statement has already been registered. For example, if there is a building where the top floors are residential and the bottom floors commercial, and with the residential floors made as a part-strata scheme and the commercial floors being outside of the strata scheme, then a strata management statement is registered along with the strata plan that subdivides the residential floors into strata lots and common property. If some time later the owner of the commercial floors decides to create a strata scheme also for the commercial part of the building, under the previous rules they would have had to register a separate strata management statement for this part, along with the strata plan that creates the commercial strata scheme.¹¹⁶²

6.2.16 Building Management Statement

While there is a strata management statement for a building with a strata scheme, previously there was no similar way of agreement between different owners within a building without strata schemes. The Conveyancing Amendment (Building Management Statements) Act was introduced in 2001 with the aim of taking the existing method and applying it to buildings where different parts of the building are owned by different persons, but without any of them being strata schemes. Before this 2001 Act was introduced, agreements between the owners were commonly used regarding the management of the building and the sharing of expenses. Such agreements did not, however, bind any subsequent owners of a part of the building.¹¹⁶³ With the present rules, a building without any registered strata plan can be regulated by a building management statement, agreement or easements.¹¹⁶⁴

The building management statement is a set of rules that regulates the management and operation of a building where the building is subdivided by a plan of subdivision containing stratum lots.¹¹⁶⁵ These new provisions mirror the provisions of the strata legislation regarding registration of strata management statements. The requirements are the same as for the strata management statement, such as that the owners must insure the building under a joint building damage policy, compulsory matters must be dealt with such as building management committee and dispute resolution, it can deal with any matter concerning management of the building, and that implied easements for

¹¹⁶² Land and Property Information, NSW Government (2001b), p. 2.

¹¹⁶³ Land and Property Information, NSW Government (2001a), p. 1.

¹¹⁶⁴ Allen (email 17 April 2007).

¹¹⁶⁵ *World Square Building Management Statement* (2002).

support and shelter are created on registration of the building management statement.¹¹⁶⁶

When a registration of a subdivision plan is made containing non-strata lots that are defined so as to coincide with different parts of the building, the building management statement will be registered on the titles for the different parts of the building.¹¹⁶⁷ It is a statutory document attached to the title regardless of who the owner is.¹¹⁶⁸ It sets out a method for managing the building as a whole entity, binding any subsequent owner of a part of the building. The statement will operate as a deed binding each person who owns part of the building, both at the time of registration and in the future. It also binds other parties with a registered interest on the titles for the building, such as mortgagees, chargees and lessees.¹¹⁶⁹

A building management statement that is to be registered must be signed by the registered owner of each part of the building, as well as by each registered mortgagee, chargee or lessee. If any amendments to the statement are made, they must also be signed by the same persons. When the statement is registered, it operates as a deed between the owners, mortgagees and lessees of any part of the building. It is deemed to include covenants by which all those persons jointly and individually agree to carry out their obligations under the statement, and to permit the other parties to carry out their own obligations. The statement ceases to bind a person when that person no longer has a registered interest in the building that is subject to the statement.¹¹⁷⁰

Some compulsory matters must be provided for in the building management statement, to a large extent similar to those in a strata management statement. The first is the establishment and composition of a building management committee and its office bearers and their functions. In the statement, a method must also be set out for resolving disputes between the parties, which may involve mediation or arbitration, or both.¹¹⁷¹ An expert is then used to resolve the disputes. Common problems concern costs. A building manager is also usually appointed to take care of the day-to-day management of the building.¹¹⁷² It must also be made clear in the statement in what manner notices and other documents may be served on the committee. The last matters, which the statement must address, are provisions dealing with insurance for the building.¹¹⁷³

¹¹⁶⁶ Moses, Tzannes and Skapinker (2001), [6890, 6895].

¹¹⁶⁷ Land and Property Information, NSW Government (2001a), p. 1.

¹¹⁶⁸ Allen and Linker (interview 14 May 2003).

¹¹⁶⁹ Land and Property Information, NSW Government (2001a), p. 1.

¹¹⁷⁰ *Ibid.* at p. 3.

¹¹⁷¹ *Ibid.* at p. 2.

¹¹⁷² Panagakis and Musgrave (interview 13 May 2003).

¹¹⁷³ Land and Property Information, NSW Government (2001a), p. 2.

The statement apart from the compulsory matters can also deal with other matters that are considered to be of relevance in the management of the building, such as the location, control, management, use and maintenance of any part of the building, or its site, that is a means of access, meetings of the building management committee, safety and security measures, the appointment of a managing agent, the control of noise levels, control of trading activities, service contracts and an architectural code to preserve the appearance of the building.¹¹⁷⁴ A list of shared facilities is also included. How much detail the agreement includes depends on the complexity of the cooperation between the stratum lots.¹¹⁷⁵

When a statement is registered for a building, mutual easements for support and shelter arise between those parts of the building for which the easements are relevant. Certain standard terms will be implied for easements for vehicular access, personal access or for a specified service that exists between different parts of the building, as is the situation for buildings that are partly subject to a strata scheme. The easements will be implied unless an easement provides otherwise. By describing the easement in a certain way, it creates certain standard terms and conditions for it.¹¹⁷⁶

The original management statement will be changed through use, with the changes made according to situation. Problems can occur, for instance, when there are new owners and when certain owners want to subdivide their part further. A special resolution is needed to make a decision and if the issue in question does not affect a person, then provision can be made where that person has no vote. If someone should object to certain changes, the matter may go to arbitration.¹¹⁷⁷

When a building management statement exists for a building, certain owners might want to strata subdivide their parts of the building. When a part strata scheme is thus created, a strata management statement must also be registered. With this strata management statement comes a method for managing a building between the strata and non-strata parts. If there already is a building management statement for the building governing the relationship between the various parts of the building, that building management statement will cease to have effect and be replaced by the strata management statement.¹¹⁷⁸

¹¹⁷⁴ Land and Property Information, NSW Government (2001a), p. 2.

¹¹⁷⁵ Skapinker (interview 7 May 2003).

¹¹⁷⁶ Land and Property Information, NSW Government (2001a), p. 3.

¹¹⁷⁷ Allen and Linker (interview 14 May 2003).

¹¹⁷⁸ Land and Property Information, NSW Government (2001a), pp. 3-4.

6.2.17 Building Management Committee

When a strata management statement is registered, a building management committee is formed. Owners corporations for strata schemes within the complex and owners of any parts of the building outside the strata schemes are members of the committee.¹¹⁷⁹ An owners corporation must appoint a natural person by special resolution to be represented on the building management committee.¹¹⁸⁰ The responsibilities of the building management committee are stated in the strata management statement.¹¹⁸¹ The committee must, for example, meet at least once a year.¹¹⁸² Just as for the strata management statement, a building management committee is also formed on the registration of the building management statement. Every owner of a part of the building or its site must be a member of such a committee.¹¹⁸³

The building management committee will manage the building as a single entity and will be comprised of representatives of the owners of the various parts of the building. It will normally provide for a secretary and often other office bearers as well, such as a treasurer. The functions of the committee and its office bearers will be set out in the statement, relating to activities necessary to manage and maintain the building.¹¹⁸⁴

There can also be a building council for a whole area of stratum, with representatives from every building management committee for each stratum. This council takes care of larger questions for the whole area, such as insurance, security and exterior maintenance. It also handles costs concerning the whole area, such as taxes.¹¹⁸⁵

¹¹⁷⁹ Land and Property Information, NSW Government (2003b), [23.4].

¹¹⁸⁰ Bugden, Allen and CCH Conveyancing Law (2001), [3-125].

¹¹⁸¹ Land and Property Information, NSW Government (2003b), [23.4].

¹¹⁸² Bugden, Allen and CCH Conveyancing Law (2001), [3-125].

¹¹⁸³ Moses, Tzannes and Skapinker (1989), [6895].

¹¹⁸⁴ Land and Property Information, NSW Government (2001a), p. 2.

¹¹⁸⁵ Nylander and Rinman (2001), p. 39.

The organisation around the building management committee can be illustrated as below:

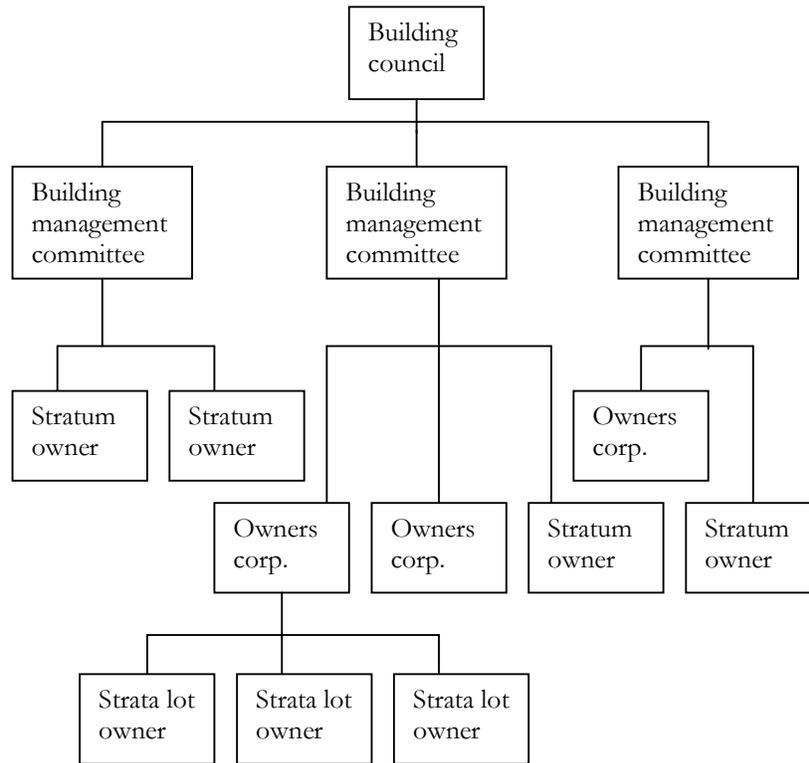


Figure 6.3. Organization of Management within a Building Complex.

6.2.18 Management Types

We can thus see the following management types, and agreements regulating these types, depending on the type of 3D property forms involved:

Building Management Statement:

Stratum
Stratum

Strata Management Statement:

Strata scheme (owners corporation)
Stratum

Owners Corporation (by-laws):

Strata scheme

Figure 6.4. Forms of Management Agreements.

6.2.19 Staged Strata Development

Staged strata development was possible, but difficult, to use already under the 1961 Conveyancing (Strata Titles) Act. However, because of lack of demand and experience, it was not very common to use them before the 1973 Strata Titles Act. The new 1973 Act was supposed to enable a developer to undertake staged development. This proved, however, to be even more difficult to carry out than under the old Act, mainly because of the introduced initial period and the need for a body corporate approval before subsequent stage plans could be approved by the local council. The demand for this type of development increased, and so did the professional experience. Work began for a special statutory system for staged development of strata schemes, to remove the risk and complexity for developers and to provide some basic protection for the

purchaser. It was introduced by the 1985 Strata Titles (Development Schemes) Amendment Act, which was even more complex than the old system.¹¹⁸⁶ Since this new system was inflexible and limited, it was later replaced by the 1993 Strata Titles (Staged Development) Amendment Act.¹¹⁸⁷

Ever since the community schemes legislation was introduced in 1989, the staged strata scheme provisions for staged developments are less used. This legislation, however, is still appropriate and even necessary for some staged developments, especially for those involving the staging of single or linked building structures. The staged development provisions are included in the Strata Schemes (Freehold Development) Act, as well as in the Strata Schemes (Leasehold Development) Act.¹¹⁸⁸

Staged development describes the practice where a development project is built in a number of stages, in preference to the entire project being built simultaneously.¹¹⁸⁹ The strata plan is registered when the first stage is complete and the later stages are created by horizontal and vertical extensions of the original building, or by additional buildings, coming within the one strata scheme at later points in time.¹¹⁹⁰ Particularly suitable for this are projects involving multiple freestanding buildings, but it can also be applied to a single structure, horizontal or high-rise. It also applies to large land subdivisions where the subdivided blocks are to be released gradually onto the market. An example of this could be a development involving three detached home unit buildings to be built in three stages, which will have common use of recreational facilities comprising a tennis court, swimming pool and playground. This can be made in two ways, either by a staged land/strata subdivision which results in three separate owners corporations with reciprocal rights over the recreational facilities, and which is not such a suitable system as the second option, a staged strata subdivision which results in a single owners corporation and recreational facilities which are common property and available for use by all unit proprietors, which is more flexible and easily managed.¹¹⁹¹

The reasons for why a strata development often is done in stages can be that the developer is not quite sure of the construction of the rest of the development, or how it should be carried out.¹¹⁹² The provisions are intended to give the developer the right to complete development without interference from a buyer, in exchange for full disclosure of the development proposals for second and later stages of the development, with some protections for the

¹¹⁸⁶ Bugden (1986), pp. 1-2.

¹¹⁸⁷ Lundblad (2002), p. 61.

¹¹⁸⁸ Allen (1999), [210].

¹¹⁸⁹ Bugden (1986), pp. 3-4.

¹¹⁹⁰ Moses, Tzannes and Skapinker (1989), [6845].

¹¹⁹¹ Bugden (1986), pp. 3-4.

¹¹⁹² Skapinker (interview 7 May 2003).

buyers based on that disclosure.¹¹⁹³ The benefits with staged strata development includes town planning and economic factors, such as higher ratio of units to site area, best use of the site where more difficult areas can be devoted to recreational facilities and better areas for construction, as well as easier to finance in stages. Profits from sales in stage one can also be used to finance subsequent stages, large savings in interest can be achieved, expensive infrastructure can be delayed, and units can be released onto the market gradually to meet the demand at the time.¹¹⁹⁴

It is also possible to make vertical staging of a building, such as subdividing of a site when underground car parking and street level shops have been constructed, and the air space above the shops has been defined in the strata plan as a development lot. A tower can then later be constructed upon the existing podium (but within the boundary of the development lot),¹¹⁹⁵ and when the tower has been completed, a strata plan of subdivision can be registered, resulting in that one strata scheme will exist over the whole building.¹¹⁹⁶

A strata development contract must be registered with a strata plan, which creates a staged strata scheme. It must be carefully drafted to enable the developer to develop the strata parcel in stages as intended by the development consent affecting the land.¹¹⁹⁷ The Local Council may only grant development permit if the lots intended for future development are shown in the strata plan as development lots and a strata development contract has been submitted. This contract allows and forces the developer to fulfil the development in the way prescribed in the contract. The contract includes one part with each stage, described either as a warranted development or an authorised proposal, and one part with a concept plan.¹¹⁹⁸ The development statement describes the land involved in the project, the location of new apartments, a timetable for the development of the different stages, a schedule for the adaptation of the unit entitlement between new and existing apartments, etc.¹¹⁹⁹

6.2.20 Selling “Off the Plan”

It is a common practice to sell lots before a building development is ready. For these sales “off the plan,” the complete plan must be shown, and the lot is

¹¹⁹³ Allen (1999), [210].

¹¹⁹⁴ Bugden (1986), pp. 4-5.

¹¹⁹⁵ Panagakis (email 15 April 2007).

¹¹⁹⁶ Hughes (1996), p. 20.

¹¹⁹⁷ Moses, Tzannes and Skapinker (1989), [6850].

¹¹⁹⁸ Lundblad (2002), p. 62.

¹¹⁹⁹ van der Merwe (1994), p. 100.

bought based on what is mentioned there. The contract is then settled when registration is made.¹²⁰⁰

The requirements for what the seller must attach to a contract for sale are prescribed in the 2000 Conveyancing (Sale of Land) Regulation, including a title search for the property, the deposited plan for the property, registered dealings creating easements, restrictions on use or positive covenants affecting or benefiting the property, a certificate issued according to the 1979 Environmental Planning and Assessment Act, the sewer diagram issued by Sydney Water. If the property forms part of a strata or a part building strata scheme, it must also include copies of the management statement, by-laws, development contract, deposited or strata plan or both, and the common property title search. There are no additional legislative requirements for “off the plan” contracts.¹²⁰¹ However, the disclosed material may not provide the material a buyer needs to make a full and proper assessment of the property. Further disclosure is therefore usually required.¹²⁰²

If certain common property facilities or shared facilities are intended to be restricted to a group of owners, this must be disclosed and provided for in the contract, for instance when an installed air-conditioning system is of use for particular owners of lots in the scheme. The by-laws can be used as a mechanism for granting exclusive use rights to owners of lots, who will have exclusive use of various parts of the air-conditioning system and a special privilege to connect to the system. If parts of the system are shared by a group of owners, then the exclusive rights over those parts must be reflected as a joint right. If this is provided for, the associated costs can be apportioned on a more equitable basis between the owners who are granted exclusive use rights. This is to avoid the developer being faced by displeased buyers who are required to contribute towards the costs of the air-conditioning system through their levies when they do not even enjoy the benefits of the system. The same applies to the use of shared facilities in a part building strata scheme created according to the strata management statement, where the use of certain shared facilities, such as a swimming pool, may be restricted to only residential components in the scheme. The costs incurred by the building management committee in maintaining the pool would then be levied on the owners corporation for the residential component, or to several such components in proportions specified in the strata management statement.¹²⁰³

An example of selling “off the plan” is a development of a resort hotel complex and the sale of resort apartments “off the plan.” On the lower levels of the building, there can be a club building and on the upper levels 200 resort hotel apartments, with associated facilities, such as a swimming pool and

¹²⁰⁰ Skapinker (interview 7 May 2003).

¹²⁰¹ Panagakis (2003), p. 2.

¹²⁰² Panagakis (email 15 April 2007).

¹²⁰³ Panagakis (2003), p. 10.

conference rooms. The best method to subdivide such a complex depends on a number of matters, such as the timing of construction of the two buildings, the manner in which the two buildings will relate to each other, and the number and type of shared services between the two buildings. There are two ways of doing this in this example; either register a strata plan for the whole building with the club and each apartment as separate lots in the strata scheme, or to take advantage of part strata legislation and register a strata plan for the apartments only, with the club contained on its own separate title. The last alternative would be the best in this case, made by registering a conventional plan of subdivision for the site, when the building is constructed, into two stratum lots, and to register a strata plan for the stratum lot containing the apartments. The relationship between the club building and the strata scheme would in that case be governed by a strata management statement, which must be registered with the strata plan and is binding on the owner of the club building, the owners corporation, and any owner, lessee, occupant or mortgagee in possession of a lot in the strata scheme or in possession of the club building. This is a working document between the club and the owners corporation, which governs the relationship between the club owner and the owners corporation, covering such matters as insurance, shared services and common facilities. Such a development will also have a management agreement where expert commercial management advice is provided to the proprietors by a building manager, compared with matters going to statutory compliance, dealt with by a strata managing agent.¹²⁰⁴

6.2.21 Leasehold Strata Schemes

Leasehold strata schemes are created by virtue of the provisions of the 1986 Strata Schemes (Leasehold Development) Act. This 1986 Act allows strata subdivision of land in a manner similar to that provided by the 1973 Strata Schemes (Freehold Development) Act, but of land that is or will be leased from an owner. Before the 1999 Strata Schemes (Leasehold Development) Amendment Act was introduced, a leasehold strata scheme could only be created over land owned by the Crown, a statutory body or a local council. With the 1999 Amendment Act, this restriction was removed, so that a leasehold strata scheme may be created over land owned by anyone. A strata plan must be submitted, and there will be individual leases of each lot and the common property. Each of these leases must have a common expiry date. When the strata plan and associated leases are registered, separate titles will be issued for the leasehold interest in each lot and the common property, which can later be transferred to purchasers of the leasehold interests in the lots.¹²⁰⁵

¹²⁰⁴ Russell (1999), pp. 31-37.

¹²⁰⁵ Land and Property Information, NSW Government (1999), p. 1.

A lessee of a strata lot is a member of the owners corporation of the leasehold strata scheme and has similar rights and obligations as a proprietor of a lot in a freehold strata scheme. Further leases of lots may be granted during the term of the leasehold scheme to replace terminated leases or to satisfy rights of renewal with further lease of common property. When the leases of the lots and the lease of the common property expire or otherwise end, the leasehold strata scheme concerned is terminated. The lessees will then be paid compensation for improvements, if agreed to in the leases. The Act also provides for a leasehold strata scheme to be converted to a freehold scheme if a resolution of the owners corporation so decides, and the lessor of the scheme agrees. Protection is afforded to any lessee who declines to participate in the conversion. The lessees of lots will by the conversion become proprietors of the lots as in the Strata Schemes (Freehold Development) Act.¹²⁰⁶

6.2.22 Community Scheme

The community scheme has its origin in the research that the Land Titles Office undertook in the 1980's, where the need for a form of subdivision was investigated, which would allow private ownership of land combined with communal ownership of facilities in situations when strata subdivision was not appropriate to use. The concept of communal ownership of facilities was not new, and the search for a legally reliable and workable mechanism to implement communal ownership had been going on for a longer period of time. Joint ownership had been used in the forms of company title, tenancies in common, leasehold, restrictive covenants and licence arrangements, however, most of those forms were too complicated or too uncertain. The value of developments with jointly owned facilities was lower since lending authorities in particular viewed the mechanisms unfavourably. To avoid these problems, many developers used subdivision under the Strata Titles Act. However, this kind of subdivision also presented some problems, such as that the building has to be constructed before the subdivision can take place.¹²⁰⁷

The community titles legislation was introduced to fill the vacuum between conventional subdivision and strata subdivision, which previously were the only possible methods of subdividing land. The effect of the legislation is to enable common property to be created within conventional subdivisions. The concept of shared use of common facilities was extended to subdivisions, which might consist of just vacant blocks of land. It also provides for the development of planned communities of any type where the use of some of the land is shared.¹²⁰⁸ Community scheme was introduced to be able to have mixed use

¹²⁰⁶ Land and Property Information, NSW Government (1999), pp. 1-2.

¹²⁰⁷ Lamb (1994), p. 2.

¹²⁰⁸ Land Titles Office, NSW Government (1992), p. 1.

within the same development, and to give maximum flexibility, but the need for this has decreased with the possibility of using part strata.¹²⁰⁹

To fill the need for a simple and legally certain mechanism for communal ownership of facilities, the Community Land Development Act and the Community Land Management Act were introduced in 1989, with consequential changes to the Strata Titles Act among other Acts. The two laws have separate functions. The Community Land Development Act deals with requirements, plan registration, changes to the subdivision and dealings with the lots, while the Community Land Management Act deals with management and financial issues in the running of community schemes.¹²¹⁰ New South Wales was the first state in Australia to introduce a separate legislation for this type of subdivision.¹²¹¹

The community scheme system started as a type of rural strata scheme, with open lots with buildings such as sheds. People wanted to be able to have shared facilities in these areas, but not in combination with superimposed lots.¹²¹² With the community scheme subdivision, a new form of subdivision was added to the existing ones. With conventional horizontal subdivision, a lot can be divided into other horizontal lots, defined by bearings and measurements, and with strata subdivision under the Strata Titles Act, a building can be divided into cubic airspace and common property by reference to the location of buildings. Alongside these, stratum subdivision also existed, where land can be subdivided vertically by reference to Australian Height Datum levels to form airspace lots or lots under ground. Community scheme subdivision uses features from both conventional and strata subdivision to provide a form with horizontal subdivision of land into smaller lots, which came from conventional subdivision, and communal property owned by a specially formed corporation with all lot owners as members, which came from the Strata Titles Act.¹²¹³

Even though the concept of community scheme was introduced many years after the strata system, it has become more and more accepted.¹²¹⁴ The community schemes legislation is presently popular with developers for several reasons. It facilitates staged development involving land subdivision and building subdivision. It permits a wider range in the style of developments that are not easily achieved by conventional subdivisions involving public roads and traditional service arrangements. It has also established stable and efficient mechanisms for common ownership of facilities, private roads and services. It provides for centralised management of the completed development, based on

¹²⁰⁹ Skapinker (interview 7 May 2003).

¹²¹⁰ Lamb (1994), p. 3.

¹²¹¹ Hughes (interview 14 May 2003).

¹²¹² Ibid.

¹²¹³ Lamb (1994), pp. 3-4.

¹²¹⁴ Panagakis and Musgrave (interview 13 May 2003).

well-established principles under the strata titles legislation. Another factor is that it permits theme developments and the use of architectural and landscape controls to preserve the design of the development, as well as contains tools to allow for fair apportionment of costs among the owners.¹²¹⁵

The community scheme can be used for development of planned communities of any type where the use of some of the land is shared. It can make possible the development of non-stage schemes or of schemes comprising several stages over an unlimited time frame. The projects may vary in size from small groups of houses clustered around common open space, to large communities with shared roadways and facilities based on such themes as commercial, sporting, recreational or agricultural features. Just as for strata legislation, common areas within a development will be owned and managed by an owners corporation called an association, which comprises all lot owners. The association property is the common areas, and will be owned by the association as agent for its members in shares proportional to the unit entitlement of each member, which is based on site values and will determine voting rights and contributions to maintenance levels. The legislation also provides flexibility in the management and administrative arrangements operating within a scheme. The flexibility is achieved by a multi-tiered management concept and a management statement for each scheme, which sets out the rules and procedures that relates to the administration of the scheme.¹²¹⁶

The owner in a community scheme can be an individual, family or company. The land occupied by an owner is called a community lot, and can be owned under fee simple or by lease. In a community scheme, there are at least two development or neighbourhood lots subdividing the existing parcel of land, and it comprises community lots and association property. The association property can consist of access ways, garden areas, driveways, recreational areas, etc. and is held and controlled by the community association. The developer can create a theme of development for the association to maintain. The scheme can be developed in stages, which is achieved through the system of tiered subdivision. Typical types of developments where community schemes are used are villa homes, town houses and terrace houses, without lots being superimposed, mixed-use multi-storied developments that include blocks of flats, commercial premises and shopping complexes in the same building, industrial complexes, rural share farming with individual residences and a common agricultural area, and holiday resort type of accommodation, such as caravan parks with individual sites and shared amenities and recreational area.¹²¹⁷ It is also often used for such developments as retirement villages and golf courses.¹²¹⁸

¹²¹⁵ Allen (1999), [301].

¹²¹⁶ Land Titles Office, NSW Government (1992), p. 1.

¹²¹⁷ Land and Property Information, NSW Government (2003a), [1.1].

¹²¹⁸ Panagakis and Musgrave (interview 13 May 2003).

The community scheme cannot primarily be a stratum plan that creates lots in height and depth. There may, however, be circumstances when some or all lots in a scheme will have to be limited as to stratum, for example if a development is erected on contaminated land and the sub-soil thus has to remain in ownership of the company, so that all surface lots must be limited in depth. Another example of this is a scheme constructed above a public road or railway, and thus has to be limited in depth. There might also be a part strata development within a community scheme, which makes it necessary to create a stratum development lot that is limited in height and depth. When the part of a building and its site are subdivided by a strata plan and the remainder of the building and the site is community association property, a management statement is not required. The matters that relate to the joint use of the building are instead dealt with in the community management statement. Any other strata plan that subdivides an existing stratum lot within a community scheme must, however, be accompanied by a strata management statement.¹²¹⁹

The Tiered System

Community schemes can consist of a community plan, precinct plan and neighbourhood plan. The neighbourhood plan can be replaced by a strata plan, which can be used when subdividing a building on either a community development lot or a precinct development lot. Each time a community, precinct or neighbourhood scheme subdivision is registered, it leads to lots and association property being created and an association being formed for that particular scheme. The lots in the community scheme subdivision are the result of the horizontal division of an existing lot into new lots that are defined by means of bearings and distances. The developer can choose between selling the lots directly as vacant land, constructing buildings on the lot and sell building and land together, selling the lot as a development lot, which can be further subdivided by a subsidiary scheme, or constructing buildings on a lot, subdivide it by strata subdivision and sell the units. The association lot will also be a lot in the subdivision and is given a lot number, which always is “Lot 1”.¹²²⁰

¹²¹⁹ Land and Property Information, NSW Government (2003a), [7.7, 7.7.1].

¹²²⁰ Ibid. at [1.1.1].

Bugden and Allen use the following picture to illustrate a tiered association structure:¹²²¹

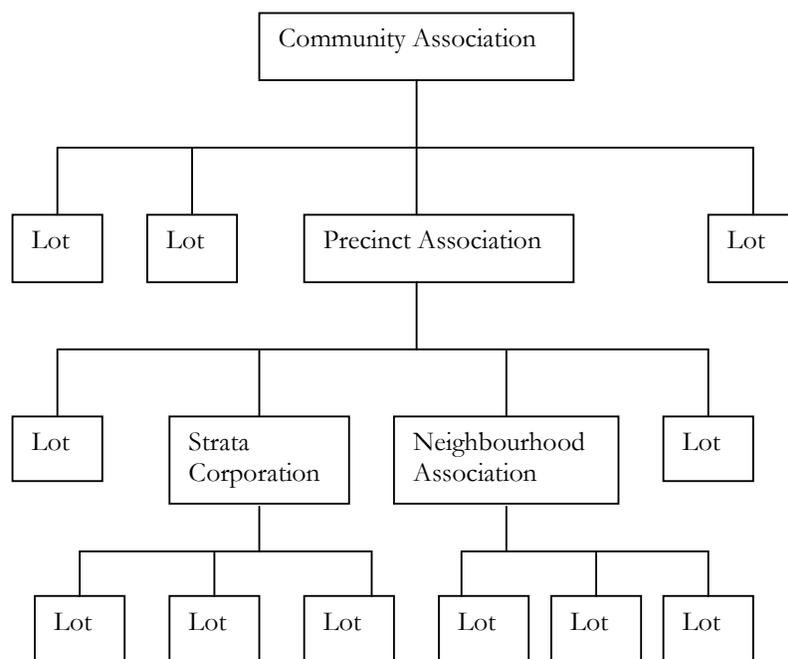


Figure 6.5. Tiered Association Structure.¹²²²

Once a community plan has been registered, there is no possibility of adding land to the plan. The reason for this restriction is that a community scheme usually is a larger scale development, which is constructed in stages, sometimes during several years. Purchasers buying into the scheme need some kind of certainty regarding the extent of the scheme, to avoid that a lot owner would have to contribute to maintenance of community property that was not within the scheme when the lot was purchased, or sharing facilities with more lots than expected. To a single-stage neighbourhood plan additional land can, however, be added.¹²²³

The roads within a scheme often become an issue in the sense that residents in the area are of the opinion that the council should be responsible

¹²²¹ Bugden, Allen and CCH Conveyancing Law (2002), [1-220].

¹²²² Ibid. at vol 1.

¹²²³ Land and Property Information, NSW Government (2003a), [4.2.1].

for paying for roads. These roads usually are of a lesser standard or size.¹²²⁴ In new community, precinct and neighbourhood plans and subsequent subdivisions in those plans, public roads and reserves can be dedicated.¹²²⁵ If the council, for instance, will need a lot for a public road, it will have to be dedicated to the council as a public road, and the council may not have to pay anything to obtain it, which is a reason why the council can be in favour of a community scheme.¹²²⁶ Existing association property cannot, however, be dedicated in stand-alone neighbourhood schemes. With the dedication, the council takes control and is given the responsibility for maintenance as for any other public road. The road will be connected to the existing public road network.¹²²⁷ It will not be part of the community association or part of the scheme, but is nevertheless still a lot registered within the plan.¹²²⁸ Open space that is dedicated as a public reserve will be maintained by the council and must be accessible by anyone, not just by residents within the scheme.¹²²⁹

The community plan is used when a large staged development with a multi-tiered management structure is created. It subdivides the original parcel of land to create lots for further development. These development lots can be further subdivided by subsidiary schemes as each stage is completed, but can also be used in a single-tiered scheme instead of a neighbourhood plan. The community association will take care of the first and highest tier of management and will exercise umbrella control over the development as a whole.¹²³⁰

The precinct plan is needed only when the scheme is developed in stages and when a three-tiered management structure is desired. It can be used in large mixed-use developments, where the management of areas with different use is intended, and where there is a mixture of densities. The precinct plan subdivides the community development lot to create precinct property and lots for further development. A precinct association will take care of the management of the precinct property. A precinct plan will, however, not be necessary in most developments, since sufficient flexibility can be obtained by using the community plan structure with subsidiary neighbourhood or strata plans, and would just add complexity to the development.¹²³¹ In practice, the precinct scheme is therefore hardly ever used.¹²³²

¹²²⁴ Hughes (interview 14 May 2003).

¹²²⁵ Land and Property Information, NSW Government (2003a), [7.6].

¹²²⁶ Panagakis and Musgrave (interview 13 May 2003).

¹²²⁷ Land and Property Information, NSW Government (2003a), [7.6].

¹²²⁸ Panagakis and Musgrave (interview 13 May 2003).

¹²²⁹ Land and Property Information, NSW Government (2003a), [7.6].

¹²³⁰ *Ibid.* at [5.1].

¹²³¹ *Ibid.* at [5.2].

¹²³² Panagakis and Musgrave (interview 13 May 2003).

The neighbourhood plan is the most widely used of the available plans for a community scheme and can be used in both tiered and non-tiered schemes. In a tiered scheme, the neighbourhood plan subdivides a community or precinct development to create neighbourhood property and lots for separate use or occupation. The neighbourhood association deals with the management of the neighbourhood property in the plan. The neighbourhood plan can also be used for stand-alone subdivisions, such as to create medium density neighbourhoods in urban areas where each lot will contain an attached or unattached dwelling. The shared neighbourhood property can contain, for instance, a tennis court, swimming pool or meeting hall. It can also be used in a rural area to create additional lots for homes sites around shared property. The shared property in this case can be used for a farm, such as a vineyard, or other theme activities. Since this type only is a one-level management structure, it can never be subdivided by a strata plan.¹²³³

A strata scheme can also be incorporated within a staged community plan scheme development to replace the neighbourhood plan in the tiered structure. The provisions of the Strata Schemes (Freehold Development) Act apply to the strata scheme. The owners corporation will take care of the management of this tier.¹²³⁴

In general, the form of subdivision that is used in a neighbourhood plan is the subdivision of land and not buildings, since the method of defining boundaries in a neighbourhood plan is the same as the methods used for conventional Torrens title subdivision.¹²³⁵ Unlike for a part strata building, the community scheme buildings are in most cases not structurally linked.¹²³⁶ This does not, however, prevent subdivision of land for villas or town houses that share common walls, integrated roof systems, storm water drainage or such arrangements. They can also be subdivided by a strata plan. The main difference between these two is that a strata subdivision results in that the boundary structures of the property remain common property, and structures erected on a lot in a community plan not being association property but forming part of, or being attachments to, the lot and owned by the lot owner. The boundaries of the lots, including association property, are not determined by reference to structures, but by conventional Torrens title methods of survey.¹²³⁷ In a neighbourhood scheme, the boundary is located to the centre of the wall, with the walls never being shared facilities. There are also party-wall easements for support.¹²³⁸ It is uncommon for neighbourhood plans for limitations of lot boundaries by height or depth. An additional difference

¹²³³ Land and Property Information, NSW Government (2003a), [5.3, 5.4].

¹²³⁴ *Ibid.* at [5.4].

¹²³⁵ Allen (1999), [402, 405].

¹²³⁶ Panagakis and Musgrave (interview 13 May 2003).

¹²³⁷ Allen (1999), [402, 405].

¹²³⁸ Hughes (interview 14 May 2003).

between a neighbourhood plan and a strata subdivision plan is that in a neighbourhood plan, the association property is not what remains of the parcel after the lots are defined, but is the land designated as Lot 1.¹²³⁹ The surveyor can list that included in the common property, but it is not always certain what common property is.¹²⁴⁰

All community, precinct and neighbourhood plans must contain certain plan components. The Location Diagram shows the overall layout of the scheme without survey details. The Detail Plan gives survey detail on each lot other than the association property lot and the Association Property Plan gives survey detail on the Community, Precinct or Neighbourhood Lot 1. In the Schedule of Unit Entitlements, there is a tabling of the proportional interest of each lot in the association within the scheme. Each plan must also be accompanied by a Management Statement, which may include sheets defining any proposed access ways and statutory easements. The plan may also be accompanied by a Development Contract that can include Concept Plans.¹²⁴¹

Development Contract

It is possible to register a development contract along with community, precinct and neighbourhood plans. The purpose is to balance the need for flexibility with the need to provide a mechanism for disclosures to be made in respect of a scheme. Such a contract is optional during the community and precinct stages, but necessary for a neighbourhood plan, both in non-stage and staged developments. If a development contract is used, it is a binding agreement between the developer and all subsequent lot owners within the stage mentioned in the contract. The contract must include such matters as a description of the land to be developed, amenities to be provided, basic architectural design and landscaping, the theme on which the scheme is based, a pictorial description in form of a concept plan that describes the anticipated appearance of the scheme when completed, and details regarding building zone, means of access, etc. Other matters may also be included. To be able to amend the development contract, consent is needed from all lot owners within the particular stage, as well as council approval.¹²⁴²

¹²³⁹ Allen (1999), [402, 405].

¹²⁴⁰ Hughes (interview 14 May 2003).

¹²⁴¹ Land and Property Information, NSW Government (2003a), [6.1].

¹²⁴² Land Titles Office, NSW Government (1992), pp. 6-7.

Staged Development

It is common for large projects to subdivide a development site by a community plan and then subdivide some or all of the community development lots created on registration of the community plan by a strata plan or neighbourhood plan. This process is used for staged development that involves mixed uses, such as residential and retail. Each development stage corresponds to a subdivision stage such that each new group of homes, apartments or other structures are subdivided by a separate strata plan or neighbourhood plan. A community development lot with just a single stage can be subdivided by a community plan of subdivision that creates new community development lots. A total three-level subdivision is possible, with initial subdivision of land by a community plan, which can be further subdivided by precinct plans, and finally they can be subdivided by a strata plan, a neighbourhood plan or just sold without further subdivision. All three levels are used only in the largest and most complex schemes, particularly those requiring segregation in precincts for different land uses, and as mentioned, the precinct level is very seldom used at all.¹²⁴³

Factors that determine what type of subdivision will be chosen include the number and nature of different land uses that are intended in the development. It is generally preferable to separate different uses, such as retail and residential, into different ownership, management and operational entities. If a strata scheme contains a mixture of residential and retail uses, there might be management difficulties and disputes. The contents of management statements and by-laws should also be considered. For two-tiered subdivision schemes, regulatory by-laws can apply on the whole site, included in a community management statement, or on individual second-tier schemes, included in subsidiary body management statements or by-laws, or there can be a combination of these. The use of multiple strata or neighbourhood plans that are created for each stage may result in many management bodies in the scheme, which can reduce efficiency and increase insurance, management and other costs.¹²⁴⁴

Management Association

The structure of management for a community scheme is related to the subdivision pattern proposed for the land in that scheme. If land is subdivided by a neighbourhood plan, it will result in a single-level management structure, with the neighbourhood association as management body for that scheme. If the land instead is subdivided initially by a community plan and the

¹²⁴³ Allen (1999), [303].

¹²⁴⁴ Ibid. at [302, 304].

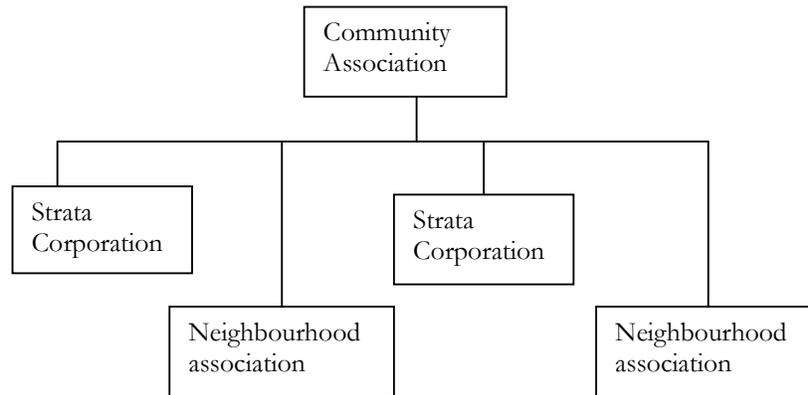
development lots in that community plan are further subdivided by neighbourhood plans and strata plans, it will result in a two-tier management structure, with the community association as primary or umbrella association for development and the neighbourhood association or a strata corporation becomes a member of the community association.¹²⁴⁵ The management structure for a neighbourhood scheme is very similar to the management structure for a strata scheme, and the community association works in a similar way as an owners corporation.¹²⁴⁶ The community association will be responsible for the management and the administration of the community property that is created by the community plan. The neighbourhood associations and strata corporations will be responsible for management and administration of their respective neighbourhood property or common property, and as subsidiary bodies they are subordinate to the community association. The by-laws contained in the management statements or registered with their strata plans will also be subordinate to the by-laws contained in the community management statement. The owner of a lot in a strata scheme or neighbourhood scheme becomes a member of that neighbourhood association or strata corporation. Each strata corporation or neighbourhood association is represented at general meetings of the community association by a nominee.¹²⁴⁷

¹²⁴⁵ Allen (1999), [305, 307].

¹²⁴⁶ Deal (interview 13 May 2003).

¹²⁴⁷ Allen (1999), [305, 307].

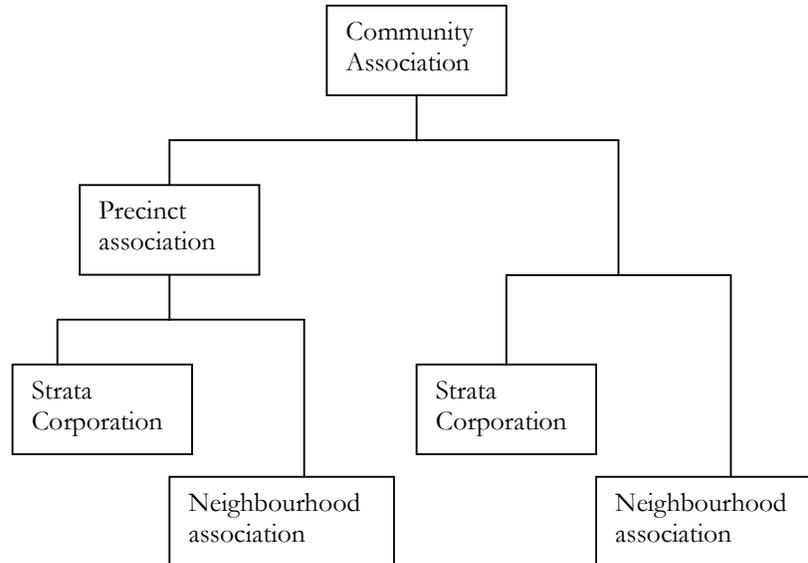
A two-tiered management structure can look like the example below, with the community association being the first tier and neighbourhood associations and strata corporations being in the second tier:



*Figure 6.6. A Two-tiered Management Structure.*¹²⁴⁸

¹²⁴⁸ Allen (1999), [306].

The management structure can also be three-tiered, illustrated by the following example:



*Figure 6.7. A Three-tiered Management Structure.*¹²⁴⁹

Community associations, neighbourhood associations and strata corporations must levy their members for all the costs associated with their operations and management, and the maintenance of the common or association property and personal property. The levies for each subsidiary neighbourhood association and strata corporation are all the costs that the association will have for performing its functions and duties under the legislation and in accordance with its management statements or by-laws, and in addition to that, the proportion of costs for the community association that the particular neighbourhood association or strata corporation has to pay. Those costs are determined by the unit entitlement for each former development lot and each lot in the subsidiary scheme. The liability to pay costs in these proportions can be affected by restricted use or exclusive use by-laws for common or association property in the relevant scheme, or costs that an association or strata corporation may be liable to pay under a restricted use or exclusive use by-law under which the association or strata corporation has restricted use or exclusive use of the

¹²⁴⁹ Land Titles Office, NSW Government (1992), p. 4.

common or association property in another association or strata corporation.¹²⁵⁰

Association property or common property contained in subsidiary schemes cannot be used by owners or occupants of sibling subsidiary schemes, although they are part of the same community scheme, with the exception of if a right of use is conferred by restricted use or exclusive use by-law or easement. Nor have they any obligation to contribute to the cost of such facilities. Owners and occupants might, on the other hand, also become liable to contribute to costs of the community association managing and administering common areas or facilities in which they have no interest.¹²⁵¹

It is the responsibility of the association to take care of the management and insurance of buildings and structures on the association property, but some of its functions may be delegated to a managing agent that the association can appoint. These community managing agents are regulated in a similar way as strata managing agents.¹²⁵² Each association or strata corporation can appoint its own managing agent, depending on the terms of the management statement and by-laws for each scheme and the preferences of the owners of each scheme. The contents of the management statements and by-laws may streamline the management process in a two-tiered scheme, such as making the community association the responsible entity for the exercise of most functions in the scheme, but the management and operational costs for such a development are significant.¹²⁵³

Disputes are resolved through a tribunal, such as for strata schemes, and there is also a strata community advisory service, with a low fee for application and without a lawyer being necessary.¹²⁵⁴

Management Statements

A management statement is a set of by-laws, plans and other particulars for regulating a wide range of management and operational aspects of the community, precinct or neighbourhood scheme.¹²⁵⁵ Such a statement must be lodged with all community, precinct and neighbourhood plans. It must be signed by the developer and approved by the consent authority.¹²⁵⁶ The management statement can regulate a much wider range of matters than those

¹²⁵⁰ Allen (1999), [308].

¹²⁵¹ Ibid. at [305].

¹²⁵² Land Titles Office, NSW Government (1992), p. 5.

¹²⁵³ Allen (1999), [307].

¹²⁵⁴ Hughes (interview 14 May 2003).

¹²⁵⁵ Allen (1999), [407, 505].

¹²⁵⁶ Land and Property Information, NSW Government (2003a), [8.1, 8.2].

that can be dealt with in strata by-laws.¹²⁵⁷ There are no standard model by-laws as with strata schemes because of the diversity of the different community developments and the lack of sufficient common issues. There are some areas listed in the Community Development Act to be covered in the statement, but the terms of the by-laws are determined by the developer.¹²⁵⁸ The statement deals with matters such as location, control, management, use and maintenance of any access ways and association property including special facilities, matters relating to internal fencing, storage and collection of garbage, maintenance of services, insurance, and provisions relating to the executive committee, to voting at their meetings, and keeping records of their proceedings. It is also possible to include other matters in the statement, such as details relating to control or preservation of the theme of the development, architectural and landscaping guidelines, restricted property details, safety and security matters, details about agreements entered into for the purposes of services or recreational facilities, noise level control, hanging laundry, keeping pets, and other matters. There are also some matters, mainly concerning different restrictions, which are not allowed to be included in the management statement.¹²⁵⁹

When the management statement is registered with the plan, it binds the participants in the scheme, i.e. the community association, each subsidiary body within the scheme and each person who is a proprietor, lessee, occupant or mortgagee in possession of a lot within the scheme. The original management statement determines the overall nature and format of the development, but the community association can amend the by-laws to suit its needs at any time after the association has been established. In multi-tiered schemes, there are separate management statements for each community, precinct and neighbourhood scheme, but the management statement that is registered with the community plan provides the by-laws that govern the running of the overall community. If there is any inconsistency between this statement and the management statements or by-laws of subsidiary schemes, the community management statement is to prevail.¹²⁶⁰

The by-laws that concern the essence of the development deal with the theme, which for instance can be a retirement village or holiday cabins, but they also can simply set a building standard to be followed for the area. In connection with this, the architectural or landscaping styles that are permitted can be specified, and that certain association property can be used only for a specific purpose.¹²⁶¹

¹²⁵⁷ Allen (1999), [407, 505].

¹²⁵⁸ Land and Property Information, NSW Government (2003a), [8.1, 8.2].

¹²⁵⁹ Allen (1999), [407, 505].

¹²⁶⁰ Land and Property Information, NSW Government (2003a), [8.1, 8.2].

¹²⁶¹ *Ibid.* at [8.3.1].

The by-laws can also concern restricted property, which is part association property within a community, precinct or neighbourhood scheme that is restricted to the use of proprietors or associations within the scheme. This may be used, for example, for a large scheme with two swimming pools, where half of the proprietors are given restricted use rights to one pool and the other half are given rights to the other. The benefited proprietors can be required to maintain the facility or to pay an additional fee for its upkeep. This is the only way in which the relative contribution that each proprietor pays as levy for association expenses according to unit entitlement can be varied. It can also be used to give the developer, as the proprietor of a development lot, continued access to the site to be able to finish the construction. Another way to use the restricted property by-laws is to pass the care and maintenance of the association property of subsidiary schemes up to the community association. In many community schemes, the majority of the facilities will be part of the community association property, but all subsidiary schemes must also have their own association property. To ensure a consistent maintenance standard and to keep costs down, it can be more efficient to let the community association take care of the management of the entire association property within a community scheme. This is done by letting the association property of a subsidiary scheme be restricted to the use of the community scheme, and the use is thus expanded to all members of the community.¹²⁶²

Another matter that is to be regulated through the management statement is services. Different services within a scheme may be either the responsibility of the service authority or the association, depending on the agreement between the developer and the service authorities. In the management statement, it must be clearly indicated who is to be responsible for repair and maintenance, and the obligations and responsibilities connected with that.¹²⁶³

Details must be set out about insurance to be taken out by the association for the community property, along with special requirements. There are some types of compulsory insurance that must be maintained by the association with an approved insurer. One example of this is insurance for damage to any buildings or structures on association property caused by fire, lightning, explosion or prescribed risks, unless the association is exempted from this obligation by the Consumer, Trader and Tenancy Tribunal, as well as insurance for damage to property and in respect of death or bodily injury, also occurring on an access way. There must be worker's compensation insurance, and insurance against damages for which the association could become liable because of work done by a voluntary worker or against the accidental injury or death of such a worker. Insurance is also needed against other risks for which the association may become jointly liable, as well as against the possibility of the members becoming jointly liable under a claim arising out of any other event

¹²⁶² Land and Property Information, NSW Government (2003a), [8.3.2].

¹²⁶³ *Ibid.* at [8.3.3].

against which the association decides by special resolution to insure. Buildings on lots in neighbourhood schemes are not association property and thus the responsibility of the owner of that lot, which means that the proprietor must take out adequate insurance to cover damage to that building.¹²⁶⁴

A management statement can be amended by a request by the association or by an order of the Residential Tribunal or an Order of Court. It can be amended in relation to the control, management, administration or use of lots or association property. If the amendment concerns a by-law that controls the essence or theme of the scheme, or has been put in place by an order of the Residential Tribunal, a unanimous resolution is needed, and in other cases a special resolution. After that the amendment has been passed at a meeting of the association, it must be lodged for registration within two months, or it will not be valid.¹²⁶⁵

Easements

In a community scheme, the service lines often run through the development lots or access ways within the association property, which makes an easement necessary to enable the service line to remain in the ground and to allow for entry to maintain the line. To provide for essential services within a scheme, the developer may create easements, which can be done in two different ways. The easement can be created pursuant to Section 88B of the Conveyancing Act. This type of easement can be created also for things other than services and is identified in the plan, with the terms of the easement in the accompanying instrument as for other deposited plans. The other type of easement is pursuant to Section 36 of the Community Land Development Act. These statutory easements can be created across development lots, which may later be subdivided by precinct, neighbourhood, or strata plans, and the statutory rights will then affect the new lots. They can be created by reference in a by-law included in a management statement for community, precinct and neighbourhood plans, but not for strata plans. Included in the definition of services is the supply of water, gas, electricity, artificially heated or cooled air, heating oil, sewage, drainage and transmissions by radio, television and telephone. Included in the statutory rights are the rights to provide and install the service, to maintain and repair, and to enter the land for those purposes. It is only the public service authorities that have the benefit of the statutory easements, not any private service providers. It does not apply to a community or neighbourhood association that arranged to provide such services as security

¹²⁶⁴ Land and Property Information, NSW Government (2003a), [8.3.3].

¹²⁶⁵ *Ibid.* at [16].

systems or air conditioning to the lots, where alternative arrangements must be made to secure rights of entry for maintenance.¹²⁶⁶

Community versus Strata Subdivision

It can be difficult to decide when to use strata subdivision and when it is more suitable to use community subdivision. Often the nature of the development will decide what kind of subdivision is the best solution. Strata and not community subdivision must be used for subdivision of a building into lots, where the common property comprises mainly land above or below a lot, and for subdivision of land into lots limited wholly or partly in height or depth. One difference lies in the nature of the plans. Since the strata plan is a cubic space subdivision, a purchaser of a lot will buy the cubic space inside the lot to the depth of the paint of the walls and the underside of the floor coverings. The owners corporation will own the building and be responsible for maintenance, repairs and insurance on the structure. A community plan is a plan of survey, and the purchaser acquires the soil and not cubic space. Since everything fixed to the soil becomes part of the lot, the dwelling or structure erected on the lot will be owned by the proprietor and not the association, and the responsibility for repairs, maintenance and insurance will lie on the proprietor.¹²⁶⁷

Other differences between strata and community subdivision are that a strata plan, unlike the community plan, does not have to comply with the minimum lot sizes in the Local Government Act,¹²⁶⁸ and there are also other ways in which the two plans are treated differently.¹²⁶⁹

A community development can be particularly attractive to use in a large scheme with several separate strata blocks or a mixed-use development, because of the opportunity available with the multi-tiered system of plan registration, where it is possible to separate management of a scheme between more than one owners corporation. The community association will be responsible for matters concerning the overall scheme, such as community access ways and community facilities, such as a swimming pool, and on the meetings of this association there will be representatives from each of the subsidiary schemes. Each individual strata owners corporation will take care of issues concerning that particular strata scheme. It is common to separate high-rise and freestanding villa dwellings in a mixed density development into strata

¹²⁶⁶ Land and Property Information, NSW Government (2003a), [8.5, 8.5.1].

¹²⁶⁷ Hughes (1996), pp. 16-17.

¹²⁶⁸ Ibid. at p. 17.

¹²⁶⁹ One example is that Sydney Water previously required a separate connection for each lot if a community plan was used to subdivide two dual occupancy lots, but with the strata plan a joint connection was acceptable, but now they have changed their policy in this matter.

and neighbourhood schemes, so that the owners of villa units do not have to contribute to maintenance of the high-rise building. The community plan is useful to define and link one entire mixed-use development scheme together. A subsidiary scheme can be registered to subdivide different uses within the overall development, which is a way to minimise conflicts between the interests of owners of different types of lot, such as residential and commercial. In a multi-tiered management structure, however, it is necessary to keep the number of subsidiary schemes as low as possible, as too many schemes within one development will duplicate the work required to manage a scheme and impose additional costs upon lot owners.¹²⁷⁰

The form of subdivision adopted by the developer is often based on the type of improvements intended for the property. For freestanding houses, villas or townhouses, it is common with conventional or a community scheme subdivision. For apartments, duplexes, or any other multi-storey form of development, strata subdivision is often used. If the Registrar General thinks that a strata plan would be more appropriate, the Land Titles Office may refuse to accept a community scheme subdivision plan. The land subdivision that is the equivalent to strata subdivision is subdivision of land by a neighbourhood plan under the Community Development Act. The developer can propose to use a community plan instead of a neighbourhood plan, if the wish is to preserve the potential of subdividing the lots created by different plans, such as a strata plan to subdivide a building proposed for one of the development lots. The most common case, when community development lots are sold without the intention to further subdivide, are developments that contain mostly traditional house and land packages with a small number of apartments in one or two blocks. To designate the house lots as community development lots rather than neighbourhood lots avoids the creation of multiple management bodies for those lots, but can cause an imbalance in the management structure.¹²⁷¹

Future Possibilities

Leanne Hughes, who participated in the creation of the community scheme legislation, finds it possible that New South Wales will head into one subdivision law, even though the current legislation is flexible and working well at the moment, but that the systems are quite complex. Changes that could be suggested for the future include the introduction of one management body instead of several, even though a separate strata scheme would be better. The tiered structure is working well during the development phase, and has become more streamlined. Another change that would be useful is to be able to add

¹²⁷⁰ Hughes (1996), pp. 20-21.

¹²⁷¹ Allen (1999), [302].

land to a scheme, which is not allowed now, and also to sell off land, which is possible for a neighbourhood scheme, but only if it is not part of a community. A subsidiary scheme would benefit from not being compelled to having common property. A simple stand-alone neighbourhood scheme without connection to a community scheme should also be given the possibility to join such a scheme later on, according to her suggestions.¹²⁷²

6.2.23 Other Types of Schemes

A type of development that has emerged in recent years is the time-share scheme. These schemes allow the purchase of time-based rights in land or in relation to land, usually in connection with holiday resorts. This can be used to purchase a right to occupy a specific apartment in a holiday resort for a certain number of weeks per year. Most of the schemes are based on title and give the purchaser an interest in the realty of the resort, either as tenant in common with all other purchasers or as tenant in common in a particular lot. Land and buildings are usually first leased to a management company for a long term, and the purchasers of the fractional interests become members of the company. Their rights to use and occupy the parts are regulated by the company's articles of association. There is also a mechanism for appointing a management committee to run the resort.¹²⁷³

There are different types of schemes that are not based on title. One of these types is a company-based scheme, where the land and buildings are owned by a company and the purchaser buys shares in this company. There is also the unit trust scheme, where the resort is held by trustees on trust for the use and enjoyment of the purchasers. Another scheme is based on the issue of redeemable preference shares, where the holding of such shares confers the right to occupy an apartment for a certain interval. The last type of scheme involves the grant of a contractual licence to occupy an apartment for a specified time. The two last types are sometimes referred to as rights to use schemes.¹²⁷⁴

Usually, purchasers of time-share interests prefer title-based schemes, since they provide a certificate of title to an interest in land, even though it certifies only a small fractional interest in a parcel of land that is subject to a long-term lease to a resort company. The purchaser's rights of use and occupation derive rather from the company's articles of association and therefore are contractual rather than proprietary.¹²⁷⁵

¹²⁷² Hughes (interview 14 May 2003).

¹²⁷³ Butt (2001), pp. 728-729.

¹²⁷⁴ Ibid. at p. 729.

¹²⁷⁵ Ibid. at p. 730.

If the time-sharing scheme is intended to operate for a period of at least three years and gives the participant the right to use, occupy or possess property to which the scheme relates for two or more periods, it is a managed investment scheme under the Corporation Law.¹²⁷⁶ The 1998 Managed Investments Act amended the Corporations Law, and have features such as that investors contribute money to acquire rights to benefits produced by the scheme, any of the contributions are pooled, or used in a common enterprise to produce financial benefits or benefits consisting of rights or interests in property for the people that hold interests in the scheme, and the investors do not have the day-to-day control over the operation of the scheme.¹²⁷⁷

A strata arrangement that is a managed investment is called a serviced strata scheme. There is likely to be a serviced strata scheme where an investor in a strata unit has a right or an understanding to a return that depends on interdependency between owners, pooling of income and dependency of the serviced strata arrangement.¹²⁷⁸

Serviced apartment schemes are strata or community schemes that are purpose built, or contain some facilities, for holiday or short stay lettings for tourism or other purposes. The serviced strata arrangements include strata, community and such title schemes that involve owners of strata units that are making their units available to a person for use as part of a serviced apartment, hotel, motel, or resort complex. The apartments, villas or other types of accommodation are sold on the basis that the buyer leases the property to a serviced apartment operator or hotel operator, or enters into a management agreement with an operator. Use of the serviced apartment, in conjunction with others in the scheme, is part of the business of operating a serviced apartment, resort or apartments hotel. The operator buys property, or acquires rights to use common or association property, in the operation of the serviced apartment business. The operator entering into an agreement with the owners corporation or association for the site will have certain rights, including the day-to-day control of the common or association property. The arrangement details vary significantly between schemes.¹²⁷⁹

A management rights agreement is a common form of serviced strata scheme. Those kinds of arrangements have been more common in Queensland, but are not uncommon in New South Wales. Under a management rights arrangement, the owners corporation enters into an agreement with an on-site manager under which the manager is paid a salary to assist the owners corporation in carrying out its duties of maintaining and repairing the common property. The agreement allows the on-site manager to conduct a letting service from the building, and each owner of an apartment who wants to let it out

¹²⁷⁶ Butt (2001), p. 730.

¹²⁷⁷ Russell (2003), pp. 7-8.

¹²⁷⁸ Ibid. at pp. 8-9.

¹²⁷⁹ Allen (1999), p. 82.

enters into an agreement with the on-site manager who carries out those activities for a fee by way of commission. The on-site manager can also provide other services to the owner, such as cleaning and hiring equipment.¹²⁸⁰

Retirement village is a development type that has increased in demand during recent years, regulated by the 1999 Retirement Villages Act. Residents may acquire interests in such villages by different methods. Residents can purchase a licence from the village owner, by which they are entitled to occupy an apartment in the village and to use the facilities there. This usually only gives a contractual right against the owner, and not an interest in the village property. There is both an up-front licence fee, as well as periodic payments for services rendered to the residents. It is also possible for a resident to take a lease of an apartment or unit in the retirement village for a fixed term, which gives the resident a leasehold interest in the village property and an exclusive right to occupy the apartment for the duration of the lease. For this type there is an up-front purchase price for the lease, reflecting the individual accommodation costs and share of the facilities, as well as a periodic fee for services. This purchase price is usually paid to a trustee, who is appointed by the manager. Another possibility is for the resident to buy shares in a home unit company that owns the village property. The resident can also purchase the freehold title to a unit in a subdivision registered under the strata title or community title legislation. The owners corporation acts as agent for the residents and enters into a management agreement with a village manager to provide services to the residents.¹²⁸¹

The retirement village is managed by an operator that must also insure the village and maintain the village capital items. For these services, the operator takes out charges from the residents. The residents may also establish their own residents committee. Disputes between operator and residents can be referred to the Residential Tribunal or in certain circumstances taken to the Supreme Court. A resident that finds the village contract to be unfair can apply to the Fair Trading Tribunal.¹²⁸²

6.2.24 Mixed-use Developments

A strata title development is not limited to a multi-storey building containing residential home units. It has been the most common form of strata title development, with buildings ranging from three-storey houses to high-rise towers. The range of strata title developments is now more diverse, with townhouses, villa homes, freestanding homes, retail, offices, warehouses, industrial uses and broad acre planned community projects. The legislation for

¹²⁸⁰ Russell (2003), pp. 9-10.

¹²⁸¹ Butt (2001), pp. 730-731.

¹²⁸² Ibid. at pp. 732-733.

broad acre projects has, however, virtually ceased since the community schemes legislation was introduced. Many modern urban projects involve mixed uses with combinations of residential, retail, serviced apartments and offices.¹²⁸³

Large scale mixed developments with single strata schemes have become less frequent when subdivision of parts of buildings was permitted in 1992. That amendment to the legislation increased the diversity of uses in buildings that now can contain one or more strata schemes and components of the building not forming part of a strata scheme. There are several structured title arrangements such as strata title, strata leasehold title, part building strata and community titles that were created to enable the development of more complex, diverse and mixed use projects. These title forms and management arrangements reflect the complexity and diversity of the developments.¹²⁸⁴

There are different types of developments that involve a mixture of the available forms of title and their various applications, such as strata schemes forming part of a community scheme, part building strata schemes in a community scheme, a development containing a freehold strata scheme and a leasehold strata scheme, or a statutory staged strata scheme forming part of a community scheme. In such complex developments, it is important to be aware of several matters, such as what types of use are permitted within the development, what common property areas and facilities will be available, and the restrictions of use of those areas or facilities, with different payment obligations for use, maintenance and insurance. Different use rights are often created under by-laws, restricting specified common property areas or facilities to particular owners or groups of owners, such as associations and owners corporations in strata schemes within community schemes. Other matters to consider are what services are available to the property and method of payment, to see whether the property will be within a staged strata scheme, whether the property will be freehold or leasehold strata title, if the property will be in a strata scheme for the entire building or part thereof, and whether the strata scheme will form part of a community or precinct scheme.¹²⁸⁵

If there is a strata plan for mixed use, the owners have different interests and objectives, and mixing them together often leads to conflicts. The value of the retail and commercial components can also be adversely affected, because investors and institutional owners often prefer not to own property under an owners corporation structure.¹²⁸⁶

Stratum subdivision of a whole site and building is made so that each area is defined as a separate lot. Some of these lots can be airspace lots and others can have different parts of them located throughout the building. The subdivision pattern in such a development is often complex due to the location

¹²⁸³ Allen (1999), [201].

¹²⁸⁴ Ibid.

¹²⁸⁵ Ibid. at [202].

¹²⁸⁶ Bugden, Allen and CCH Conveyancing Law (2002), [3-060].

of facilities like services, access, car parking and equipment relating to a particular component of the building, but not located in close proximity. The subdivision is virtually the same as any ordinary land subdivision, except for that the lots normally have complex shapes and are oriented in height and depth.¹²⁸⁷

The owners of the lots in a stratum subdivision, including the owners corporation, will have common interests and responsibilities arising from shared facilities and services within the building, such as fire stairs, driveways, sprinkler and fire alarm systems, ventilation, loading dock, rubbish areas, etc. The insurance arrangements must also be coordinated. These questions are dealt with in the strata management statement, which is to be registered at the Land Titles Office when the first strata plan is registered for the building.¹²⁸⁸

The mixed used development structure can be illustrated in the following way, according to Gary F. Bugden:¹²⁸⁹

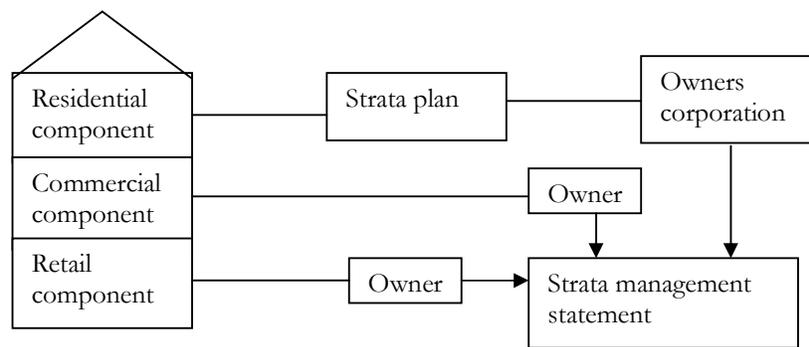


Figure 6.8. Mixed-use Development Structure.¹²⁹⁰

¹²⁸⁷ Bugden, Allen and CCH Conveyancing Law (2002), [3-060].

¹²⁸⁸ Ibid.

¹²⁸⁹ Ibid. at vol 1.

¹²⁹⁰ Ibid. at vol 1.

For mixed-use community title, Gary F. Bugden shows the following structure:¹²⁹¹

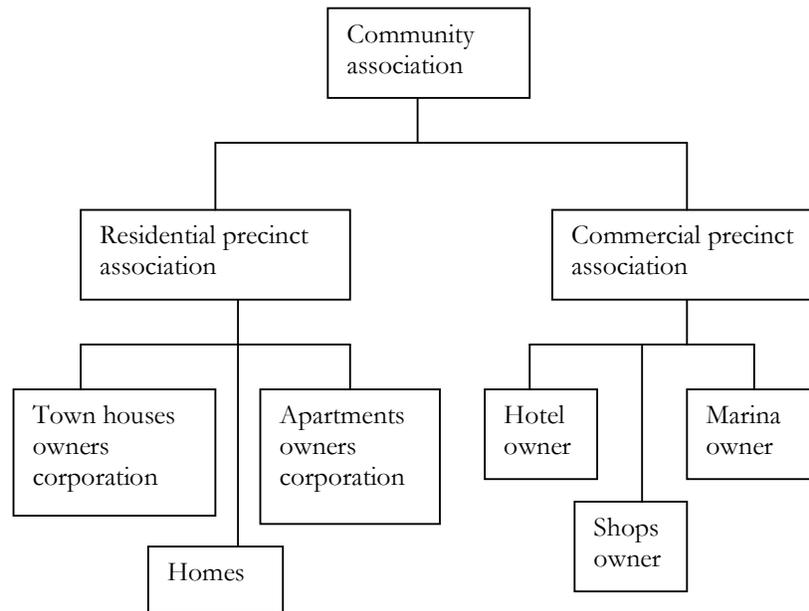


Figure 6.9. *Mixed-use Community Title Structure.*¹²⁹²

6.2.25 Settlement of Disputes

Strata Schemes

Disputes are more likely to occur in communal living than in conventional housing. The statutes of New South Wales have extensive provisions for the settlement of disputes between owners, and between owners and the owners corporation.¹²⁹³ In the Strata Schemes Management Act and the Community Land Management Act, there are specialised dispute resolution processes to deal with such disputes. These processes are relatively informal and inexpensive, intended as an alternative to remedies available in the Supreme

¹²⁹¹ Bugden, Allen and CCH Conveyancing Law (2002), vol 1.

¹²⁹² Ibid.

¹²⁹³ van der Merwe (1994), p. 167.

Court.¹²⁹⁴ The applicant pays an administration fee. It is possible to apply for mediation, apply for order to adjudicator or apply for penalty order to resolve the dispute.¹²⁹⁵ In certain circumstances, such as regarding title to land and when the alternate process does not provide an appropriate remedy, a dispute, however, can be litigated directly in the Supreme Court. Some disputes are determined by the Consumer, Trader and Tenancy Tribunal, and others by an Adjudicator.¹²⁹⁶ The Registrar who receives the application will decide where the matter should be referred. The Adjudicator can decide to refer the matter to the Tribunal if the matter involves such legal complexity importance, possible frequency of like applications or for other good reasons.¹²⁹⁷ A decision of an Adjudicator can be appealed to the Tribunal and from the Tribunal to the Supreme Court. There is also a Director-General of the Office of Fair Trading, which has the role of dispute prevention and preliminary mediation, mainly by providing information. The Director-General can also investigate breaches of the Act, initiate prosecutions and other action, as well as investigate and report on matters referred by the Minister.¹²⁹⁸

When the first Conveyancing (Strata Titles) Act came in 1961, no special dispute resolution was addressed within this Act.¹²⁹⁹ The only legal solution to settle disputes between proprietors or between proprietors and the body corporate was to apply to the Supreme Court.¹³⁰⁰ Major changes in dispute resolution within strata schemes were introduced with the 1996 Strata Schemes Management Act. Under the 1973 legislation, persons with an interest in a strata lot and the owners corporation itself could apply directly to the Strata Titles Commissioner for an order against a person, body corporate or organisation in certain circumstances.¹³⁰¹ Some of those orders were within the jurisdiction of the Commissioner and others had to be referred to a Magistrate sitting as a Strata Titles Board. There was also an automatic right of appeal from the Commissioner to the Board.¹³⁰² The changes in the new 1996 Act were a way to encourage the resolution of disagreements before they develop into major disputes. To accomplish that, a requirement was introduced for a mediation attempt before an application for a formal order can be handled. Mediation would provide an opportunity for problems to be worked out at an early stage. The majority of matters reaching formal adjudication would be the

¹²⁹⁴ Bugden, Allen and CCH Conveyancing Law (2002), [1-290, 1-300].

¹²⁹⁵ Flanagan (interview 5 May 2003).

¹²⁹⁶ Bugden, Allen and CCH Conveyancing Law (2002), [1-290, 1-300].

¹²⁹⁷ Moses (2001), p. 28.

¹²⁹⁸ Bugden, Allen and CCH Conveyancing Law (2002), [1-290, 1-300].

¹²⁹⁹ Butt (interview 2 May 2003).

¹³⁰⁰ Butt (2001), p. 717.

¹³⁰¹ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), pp. 5916-5917.

¹³⁰² Moses (2001), p. 26.

responsibility of an adjudicator, separate from the officers carrying out the commissioner's role under delegation, to avoid any possible conflict of interest. Another improvement in connection with this was to give the Strata Schemes Board the power to impose fines for breaches of its own orders or the orders of the adjudicators, which earlier was done by the Local Court. Removing the strata titles disputes from the already heavy Local Court lists in regional and country areas was a great improvement.¹³⁰³

According to the Strata Schemes Management Act, mediation must be attempted before an order can be sought from a Strata Schemes Adjudicator or the Consumer, Trader and Tenancy Tribunal. The Consumer, Trader and Tenancy Tribunal since 1999 has exercised the functions of the Strata Schemes Board. Mediators can be found at the Office of Fair Trading. Disputes suitable for mediation are matters such as alterations to common property, repairs to walls, noise problems, keeping pets, validity of meetings and insurance matters.¹³⁰⁴ The most common types of disputes brought to the Strata Schemes and Mediations Services concern by-laws, management and what the professional manager is doing, self-managed schemes, repairs and maintenance, and levies that are considered unreasonable. Mediation is an informal process, where a neutral mediator assists those who are involved in a dispute to achieve their own settlement. The process often takes two to three weeks.¹³⁰⁵ The mediator does not make the decision, but helps those involved to find their own solutions. The settlement rate is generally around 75%. The settlement that is reached during the mediation is binding for all parties involved. In certain circumstances, the settlement can be made into an enforceable order by an Adjudicator. If no settlement is reached, one side can instead apply for an order by an Adjudicator or the Tribunal.¹³⁰⁶

When an owner or occupant has breached a by-law, the owners corporation can issue a Notice that requires the person to comply with the by-laws. If this is not complied with, the owners corporation can ask the Consumer, Trader and Tenancy Tribunal to impose a penalty. The Adjudicator can rule on similar matters as for the mediation process, such as repairs to ceilings, alterations to common property and noisy residents. An application to an Adjudicator is dealt with in the office and the decision is made in writing.¹³⁰⁷ The process often takes six to ten weeks.¹³⁰⁸ The decision can be appealed to the Consumer, Trader and Tenancy Tribunal. The Tribunal can also rule on disputes concerning change of unit entitlements and authorisation of certain

¹³⁰³ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), pp. 5916-5917.

¹³⁰⁴ Office of Fair Trading, NSW Government (2003d).

¹³⁰⁵ Flanagan (interview 5 May 2003).

¹³⁰⁶ Office of Fair Trading, NSW Government (2003d).

¹³⁰⁷ Office of Fair Trading, NSW Government (2003c).

¹³⁰⁸ Flanagan (interview 5 May 2003).

acts in the initial period.¹³⁰⁹ The Tribunal has thus both original and appellate jurisdiction.¹³¹⁰ The preliminary process is the same as for the Adjudicator, but there is an open hearing before the Tribunal, which is similar to a court, but less formal. The decision by the Tribunal can be appealed to the Supreme Court, but only as to a question of law, not a question of fact.¹³¹¹ The case law of New South Wales has shown that the Supreme Court generally is reluctant to interfere and will leave the parties to pursue their appropriate remedies under the statute.¹³¹²

The mediation process for disputes between individual strata residents, and between neighbouring strata schemes, was one of the most important reforms of the Strata Schemes Management Act, and has proved to work very successfully. It has led to a decrease in formal dispute applications to the Strata Schemes Adjudicators and the Consumer, Trader and Tenancy Tribunal. The new measures allowing owners corporations to serve a notice to comply with a by-law without using the costly adjudication process have also been successful.¹³¹³

The mediation process is not only regarded as a great success since its introduction, with a high success rate, but is also admired by other states in Australia. Some improvements were introduced with the 2004 Strata Schemes Management Act. Among these were to widen the discretion of the Registrar of the Consumer, Trader and Tenancy Tribunal to waive the need for mediation to add flexibility to the system. The intention is to ensure that the Registrar can send the disputing parties directly to adjudication in cases where mediation would obviously be fruitless or counter-productive. Certain types of disputes, such as the variation of unit entitlements, appointment of managing agents and Interim orders,¹³¹⁴ are specifically listed as being exempt from the mediation requirement. There has also been a weakness in the mediation mechanism regarding getting the parties to keep the agreement, and to avoid such cases where an agreement has been reached at the mediation and where later on the parties have changed their minds, leading to formal adjudication, there is now a possibility of a ratification order by the Strata Schemes Adjudicator when the parties have come to a mediated settlement. This makes the settlement binding. To avoid making the mediation process too stringent, the ratification is only possible if the parties agree to it.¹³¹⁵

¹³⁰⁹ Office of Fair Trading, NSW Government (2003c).

¹³¹⁰ van der Merwe (1994), p. 168.

¹³¹¹ Office of Fair Trading, NSW Government (2003c).

¹³¹² van der Merwe (1994), p. 168.

¹³¹³ Department of Fair Trading, NSW Government (2002), p. 1.

¹³¹⁴ Office of Fair Trading, NSW Government (2005), p. 24.

¹³¹⁵ New South Wales, *Parliamentary Debates*, Legislative Council (10 March 2004), p. 6966.

Stratum Lots

Buildings subdivided into stratum lots are often controlled by way of a building management statement/agreement, which is usually administered by a building committee.¹³¹⁶ Disputes in stratum buildings might occur concerning, for instance, the building committee unreasonably refusing to consent to an application to amend the building management statement, the committee failing to comply with the provisions of the statement about meetings, about resolution of the committee, or about easements. How these disputes are to be solved is regulated in the building management statement. Usually, an attempt is made to negotiate or mediate. The dispute may also be referred to an independent expert for determination of the dispute, which is final and binding on the parties without appeal. Costs for the expert are to be paid by the owners. Other forms of dispute solution may also be stipulated in the building management statement.¹³¹⁷

6.2.26 Insurance

Insurance is a very important management aspect, since strata lots are major investments. There are strict insurance requirements in the Strata Schemes Management Act with substantial penalties if not complied with, and office bearers and strata managing agents risk substantial personal liability if the insurance is not adequate.¹³¹⁸

All Australian strata title legislation has required the owners corporations and bodies corporate to insure their buildings, and in most cases also to effect certain other types of insurance, such as public liability insurance. The purpose of that requirement is to protect the lot owners and the financiers. The financiers were also given additional security by special mortgagee protection cover.¹³¹⁹ It was stated already in the 1961 Act that it was necessary for the owners corporation to insure the building to its replacement value and it should also collect premiums from the unit owners proportionate to their respective unit entitlement.¹³²⁰ The insurance issues have been refined over time, but the basic requirements are still the same. In particular, the 1973 Strata Titles Act expanded and strengthened the insurance requirements.¹³²¹ With the 1996 Strata Schemes Management Act, a number of extra areas where insurance will be required to be contemplated by the owners corporation were introduced,

¹³¹⁶ Allen (email 17 April 2007).

¹³¹⁷ *World Square Building Management Statement* (2002).

¹³¹⁸ Bugden, Allen and CCH Conveyancing Law (1998), [11-850].

¹³¹⁹ *Ibid.* at [11-855].

¹³²⁰ A Look at Strata Title in New South Wales from 1961 to Date, p. 4.

¹³²¹ Bugden, Allen and CCH Conveyancing Law (1998), [11-855].

although it is not required to take out this insurance. An example of such insurance is insurance against fraud by its officers.¹³²²

A problem sometimes found in strata schemes was the effect that the use of one lot had on the building insurance premiums for the body corporate. There were cases in mixed-use schemes when one lot was used for commercial purposes with an added insurance risk, such as a shop where cooking is carried out. The insurance risk from that shop could lead to a much higher premium than normal, yet the owner of a residential lot would have to contribute an unreasonable share of the cost. With the Strata Schemes Management Act in 1996, ways were introduced for the parties to agree on a more equitable share of the insurance premium costs in such circumstances. For the case that an owner would unreasonably refuse consent to a variation of respective contributions for the insurance premium, the adjudicator was given the power to vary the levies payable.¹³²³

Owners Corporation Insurance

If a strata scheme relates to the whole of a building, the owners corporation must insure the building in its own name. A damage policy must be kept with an approved insurer. Other requirements apply when a strata scheme only relates to part of the building. The building must be insured for its value indicated by the last valuation obtained. If these requirements are not complied with, a penalty will be assessed. Exception from the insurance obligations can only be given to owners corporation for a strata scheme comprising two lots, if the owners corporation so decides by unanimous resolution, the buildings on the two lots are detached and no building or part of building in the strata scheme is outside the lots. The lot owners may then arrange their own insurance.¹³²⁴

¹³²² Moses (2001), p. 22.

¹³²³ New South Wales, *Parliamentary Debates*, Legislative Council and Legislative Assembly (13 November 1996), p. 5918.

¹³²⁴ Bugden, Allen and CCH Conveyancing Law (1998), [11-880].

The insurances for owners corporations to take out are the following:¹³²⁵

1. Compulsory insurance:
 - a) Building
 - b) Workers compensation
 - c) Public liability
 - d) Matters which owners corporation determines by special resolution
 - e) Voluntary workers
 - f) Other as prescribed by regulation
2. Optional insurance:
 - a) Property in which the owners corporation has insurable interest
 - b) Office bearers
 - damage to property
 - bodily injury or death
 - misappropriation of funds

The lot owners may also take out insurance:¹³²⁶

- a) A two lot strata scheme where the buildings are physically detached, if the owners corporation has determined by unanimous resolution that the owners corporation will not effect the insurance
- b) Insurance of a mortgaged lot
 - the owner insures the lot for an amount equal to the sum secured by the mortgage of the lot
 - any payment under the policy is paid to the mortgagee

The building and all improvements added to it must be insured to the full replacement value. The insurance sum must be sufficient to cover rebuilding or replacement into a condition as new. When a building is destroyed totally or partially, it must be rebuilt to the same condition as it was when being new. Additional costs that are associated with replacement must also be covered, including demolition and removal of debris, fees for architects, engineers and consultants and other associated or incidental costs.¹³²⁷

The building that the owners corporation must insure includes owner's improvements and owner's fixtures forming part of the building, other than paint, wallpaper and temporary wall, floor and ceiling coverings, a building consisting entirely of common property, and anything prescribed by the

¹³²⁵ Russell (2003), p. 4.

¹³²⁶ Ibid.

¹³²⁷ Bugden (1997), pp. 1-4.

regulations as forming part of the building for the purposes of the definition. The building does not, however, include fixtures that can be removed by a lessee or sub-lessee when the tenancy expires, and anything prescribed by the regulations as not forming part of a building for the purposes of the definition. Owner's improvement can be, for instance, cement rendering to internal walls of the lot, and an owner's fixture can be a permanent built-in cupboard.¹³²⁸ Included are also items such as carpets in common areas, hot water systems, light fittings, toilet bowls, sinks, shower screens, cupboards, internal doors, stoves, common air conditioning systems and intercom systems.¹³²⁹ A building consisting entirely of common property may be a detached cabana or amenities block beside a swimming pool. The case of "anything prescribed by the regulations" was added to keep the legislation flexible. A lessee's fixture may be for example an air conditioning unit.¹³³⁰

A damage policy is a contract of insurance for a building that provides for certain matters in case the building should be destroyed or damaged by fire, lightning, explosion or similar. To this minimum requirement may be added coverage for earthquake, floods, etc. If the building is destroyed or damaged, there must be enough insurance coverage to rebuild it with a similar one or repair it with every part in a condition no worse than the condition of the part as new. It must also cover the payment of expenses incurred in the removal of debris and remuneration of architects and other people needed for rebuilding or repair. This means that the coverage must be sufficient to cover all costs to restore the building to its original as new condition. There is also a possibility in the Strata Schemes Management Act to limit the liability of the insurer to a specified amount, provided that it is not less than calculated in accordance with the Regulations. Most damage policies are limited in this way. This calculation must be based on a professional valuation.¹³³¹

The sum for which the building is insured should be based on an insurance valuation.¹³³² This valuation must be made by a person with prescribed qualifications.¹³³³ In New South Wales, there is a requirement for a new valuation at least every five years, but it is recommended to do this more often in order to obtain a more accurate value.¹³³⁴ In practice, the valuation is carried out more often.¹³³⁵ To the valuation sum should be added an allowance for alternate accommodation or loss of rent, if not already included in the

¹³²⁸ Bugden, Allen and CCH Conveyancing Law (1998), [11-880].

¹³²⁹ Office of Fair Trading, NSW Government (2005), p. 16.

¹³³⁰ Bugden, Allen and CCH Conveyancing Law (1998), [11-880].

¹³³¹ *Ibid.* at [11-890].

¹³³² Bugden (1997), pp. 1-4.

¹³³³ Bugden, Allen and CCH Conveyancing Law (1998), [11-900].

¹³³⁴ Bugden (1997), pp. 1-4.

¹³³⁵ Bugden, Allen and CCH Conveyancing Law (1998), [11-900].

valuation. Cost increases should be taken into account, if the same valuation is used in subsequent years.¹³³⁶

An owners corporation must also take out insurance for workers compensation, regardless of whether it directly employs labour, because of the necessity in some circumstances to cover independent contractors. The owners corporation must also take out property, death and injury insurance for which it could become liable in damages, public liability insurance. This covers protection not only for members of the public, but also for owners and occupants of lots. The coverage must be taken out with an approved insurer. Even though the public liability policy is intended to protect the owners corporation, it may not protect the owners individually or jointly. For this, the owners corporation must take out insurance against the possibility of the owners becoming jointly liable by reason of a claim arising in respect of any other occurrence against which the owners corporation decides to insure, but only if this has been done in accordance with a special resolution. A voluntary workers insurance will also be necessary against any damages for which the owners corporation could become liable due to any work made by a person in the building or common property without fee or reward. An owners corporation can also take out Discretionary property insurance for any property that it is not required to insure, and in which it has an insurable interest, such as common property contents insurance. Other insurances may be Office bearers insurance for directors and officers carrying out duties for the owners corporation, and Misappropriation insurance in respect of the misappropriation of money or other property of the owners corporation. Some insurers have a special composite policy for the various insurance covers that an owners corporation needs, often designed specifically for strata and community title.¹³³⁷

The individual owners also have the right to take out their own insurance and this does not affect the amount payable to an owners corporation. An owner can take out a Mortgagee insurance in respect of damage to the lot in a sum equal to the amount secured at by mortgages and any covenant charge affecting the lot. It is voluntary, but often required by a mortgagee. The coverage is restricted to damage to the lot, and not to the common property. There is also Contents insurance for the owner or occupant of a lot to insure the contents of the lot. It covers the contents not covered by the owners corporation's insurance, such as removable fixtures and wallpaper. Some insurance companies offer complementary damage policies to ensure that there is no gap in the coverage between the one for the owners corporation and the one for the owner. It is also necessary for the owner to have Public liability insurance, covering any liability arising as an incidence of lot ownership, not covered by the owners corporation's insurance. Some insurance companies offer also for owners composite policies, designed in accordance with those for

¹³³⁶ Bugden (1997), pp. 1-4.

¹³³⁷ Bugden, Allen and CCH Conveyancing Law (2002), [11-950-990].

the owners corporation. It is not clear whether a lot owner can enter into a contract of insurance for the whole building or the common property. However, there must be an insurable interest in the subject matter of the insurance.¹³³⁸

One matter in the Act that has been discussed is the provision allowing mortgagees to require separate insurance for the amount of their mortgage over a strata title lot. This “double insurance” originally was introduced because the mortgagees did not want to lend on strata title properties, since they were relying on the owners corporation to have taken out insurance on the building. Because of this, the double insurance was allowed by legislation. This form is still available and used by some private mortgagees, but the financial institutions are now sufficiently sophisticated to consider it satisfactory to rely on the insurance that the owners corporation obtains, and further security for lenders is also provided by the law requirements of up-to-date valuations every five years.¹³³⁹

Strata managing agents that manage owners corporations are expected to take out professional indemnity insurance to protect themselves against liability arising out of performance of their duties, however not compulsory.¹³⁴⁰

Part Building Strata Schemes

Although most strata schemes are based on the whole of a building, there are a few buildings comprising one or more strata schemes that are based on only part of the building, a part building strata scheme. An example of this is a building that comprises a shopping centre with a podium above and two home unit towers rising from it. The building is subdivided by a stratum plan into three lots. The common elements and services within the building are regulated by a strata management statement, but there is no general owners corporation acting together for all these three lots. Lot 2 and lot 3 are subdivided separately by a strata plan into lots and common property with a separate owners corporation for each of these two lots. Each of the strata schemes is a part building strata scheme. The owners corporation for each strata scheme and other persons having a fee simple estate in the building must insure the building and keep it insured under a damage policy. In the example mentioned, the owners corporation for lot 2 and the one for lot 3 together with the owner of the shopping centre must arrange this insurance.¹³⁴¹ If buildings are structurally

¹³³⁸ Bugden, Allen and CCH Conveyancing Law (1998), [12-020-040, 12-075].

¹³³⁹ Moses (2001), p. 22.

¹³⁴⁰ Bugden, Allen and CCH Conveyancing Law (1998), [12-070].

¹³⁴¹ Ibid. at [11-895].

connected, then all buildings are classified as one, with the same insurance for the whole complex.¹³⁴²

The building in such a case must be insured under a policy in joint names for the building value from the last valuation. The insurance premium is apportioned among the owners corporation and the other person in proportion to the replacement value of their respective parts of the building. If they cannot agree on this proportion, they can ask an adjudicator to determine it for them. If anyone should fail to comply with the insurance requirement, another person who has the same obligation can apply to an adjudicator for an order, or take out a damage policy in their joint names and then recover the other proportion as a debt.¹³⁴³

For a stratum building, the insurance will often be simple with one policy for one building and only one premium, but there can be separate liability insurance.¹³⁴⁴ According to Schedule 8A of the Conveyancing Act, the committee must take out a damage policy for the building, which is a contract for insurance providing in the event of the building being destroyed or damaged. This policy is supposed to provide for rebuilding or replacement of the building if it is destructed. The rebuilt or replacement building is to be no less extensive than the original building and in a condition no worse than it was when new. The same applies if only a part of the building is damaged. The insurance must also cover payment of expenses incurred in the removal of debris and for the remuneration of architects and other persons needed for the rebuilding or repair. The liability of the insurer may also be limited to a specified amount estimated to cover the costs for the factors mentioned above.¹³⁴⁵ The building management statement may also stipulate that a valuation of the building must be made at certain intervals. The owners pay their own share of the insurance premium.¹³⁴⁶ The percentage of what should be paid is based on value.¹³⁴⁷ The statement may stipulate that an owner must not do anything to increase the premium for the building insurance, or if the other members give their consent, to pay the resulting additional insurance premium.¹³⁴⁸

Other insurances that the committee must take out, according to Schedule 8A of the Conveyancing Act, are for such occurrences against which the committee is required by law to insure, such as insurance required by the 1987 Workers Compensation Act as well as the 1998 Workplace Injury Management and Workers Compensation Act. Insurance is also needed in respect of damage

¹³⁴² Panagakis and Musgrave (13 May 2003).

¹³⁴³ Bugden, Allen and CCH Conveyancing Law (1998), [11-895].

¹³⁴⁴ Allen and Linker (interview 14 May 2003).

¹³⁴⁵ *Conveyancing Act 1919* (NSW), schedule 8A.

¹³⁴⁶ *World Square Building Management Statement* (2002).

¹³⁴⁷ Allen and Linker (interview 14 May 2003).

¹³⁴⁸ *World Square Building Management Statement* (2002).

to property, death or bodily injury for which the committee could become liable in damages, and in case of owners becoming jointly liable by reason of a claim arising in respect of any other occurrence against which the committee decides to insure, as well as against damage for which the committee could become liable by reason that a person without fee or reward acting on behalf of the committee does work in the building or on its site.¹³⁴⁹

6.2.27 General Views Regarding the New South Wales system

In general, New South Wales is considered to have a good and flexible system, according to the opinion of interviewed experts and practitioners.

Even though the strata legislation is working well, it is still a complex law.¹³⁵⁰ The changes of the law that have been made are considered good, and now not many problems remain.¹³⁵¹ The system for subdivision is considered to be fairly simple, but there are more difficulties concerning management, with maintenance and stratum for high-rise buildings.¹³⁵² It was regarded as a good step in the development to separate the development side from the management side, with separate acts. The introduction of part strata has contributed to making the system more flexible.¹³⁵³ The new system with building management statements also proved to be working well.¹³⁵⁴ Initially, no special dispute resolution existed, but the introduction of this in the legislation made this issue easier to deal with.¹³⁵⁵

There still are problems remaining where change is required. For example, the community scheme system is considered to be somewhat confusing. An emerging problem is the obligations of assisting people. There is also a need to find out what remedies there exist if parties breach the by-laws.¹³⁵⁶

¹³⁴⁹ *Conveyancing Act 1919* (NSW), schedule 8A.

¹³⁵⁰ Skapinker (interview 7 May 2003).

¹³⁵¹ Panagakis and Musgrave (interview 13 May 2003).

¹³⁵² Allen and Linker (interview 14 May 2003).

¹³⁵³ Skapinker (interview 7 May 2003).

¹³⁵⁴ Allen and Linker (interview 14 May 2003).

¹³⁵⁵ Skapinker (interview 7 May 2003).

¹³⁵⁶ *Ibid.*

6.3 Victoria, Australia

6.3.1 Background

Victoria's title registration system is about 150 years old. The law consists of the common law, equity and statutes. The statutes also include regulations, by-laws and the local municipality law. The English common law is a basis for the legal system, modified by English, Australian and Victorian statutes. The common law consists of four main components, which are feudal land tenure, custom, legislation and case law.¹³⁵⁷

It has always been common in Victoria to grant land, mainly for rural purposes, on specific conditions and only for terms of years of varying lengths. This has led to large areas of land being brought under the control of a State Land Department, which led to the creation of registries of interests of all kinds in what has come to be known as Crown land. Most people today distinguish between freehold land and Crown leaseholds, which is not a valid distinction in a strict legal sense, but a practice that is very useful. Land that has been granted by the Crown in fee simple is freehold land and its registry is managed by the Registrar of Titles or the Registrar-General.¹³⁵⁸ This is opposed to Crown leaseholds, which remain with the jurisdiction of the Department of Sustainability and Environment.¹³⁵⁹ No matter how long the leasehold, its reversion always belongs to the Crown, while in freehold land the Crown owns only the notional ownership without any reversion.¹³⁶⁰

Victoria is now affected by the direct operation of very few Imperial and even fewer New South Wales Acts, and since the establishment of the various State legislatures, and later the Commonwealth, almost the whole field of domestic law is covered by local statutes. The Commonwealth is a federal union of the States of Australia. In some areas, the States have given some powers, such as defence, customs, post and telegraph, to the Commonwealth, and in these areas the Commonwealth statutes are used. Where a Commonwealth law and a State law are in conflict, the Commonwealth law will prevail.¹³⁶¹

There are some main forms of land tenure in Victoria. Estates of Freehold include fee simple, life estate, estate tail and conditional and determinable estates in fee. The estate in fee simple comes from Crown grants. Life estates last for life only and then pass to another by remainder. The entailed estate is now virtually extinct and no further such estates may be created. Conditional and determinable estates are rare and cause problems. Crown land can be, for

¹³⁵⁷ Surveyors Board, Victoria (1994), p. 83.

¹³⁵⁸ *Ibid.* at p. 91.

¹³⁵⁹ Department of Sustainability and Environment, Victoria Government (2003).

¹³⁶⁰ Surveyors Board, Victoria (1994), p. 91.

¹³⁶¹ *Ibid.* at pp. 92-93.

example, National Parks and Reserves, or land held under lease or licence for various purposes. There is also unoccupied Crown land. Alienation of this land can be made in fee simple, leasehold tenure or under licence.¹³⁶²

The ownership of land extends so far in each direction upwards or downwards vertically as the owners are able to bring and retain under their effective control. There are, however, some reservations to this, namely that any land first alienated from the Crown from 1892 forward is only to be alienated to a prescribed depth, which is usually fifty feet. Beyond that depth, the land remains the property of the Crown.¹³⁶³

The legal system in Victoria is the common law model, based on Roman law, where a property would reach indefinitely down into the ground and upwards into the sky. In the 17th century, however, the king decided that airspace could be subdivided as an upper room. However, banks would not let this be used as security. In the 1930's, apartments became more common. A company share scheme was developed, similar to condominiums, with title vested in a company where people acquired a share that gave an exclusive right to an apartment. After the Second World War, banks would not accept such shares as security for a loan. Nor was it possible to sell a share without the consent of the other shareholders in the private company.¹³⁶⁴

6.3.2 Development of the Strata Legislation

The strata legislation has developed in Victoria during a long period of time. Below is a compilation of Acts and Regulations that have been part of this development and that are further described below. The name of the Act and the year of its introduction are given. The Acts and Regulations currently in force are marked with an “x”.

¹³⁶² Surveyors Board, Victoria (1994), pp. 100-104.

¹³⁶³ *Ibid.* at pp. 94-95.

¹³⁶⁴ Raff (interview 29 April 2003).

Table 6.2. *Development of the Strata Legislation in Victoria.*

In force	Act/Regulation	Year
×	Transfer of Land Act	1958
	Transfer of Land (Stratum Estates) Act	1960
	Strata Titles Act	1967
	Cluster Titles Act	1974
×	Subdivision Act	1988
	Subdivision (Body Corporate) Regulations	1989
×	Subdivision (Body Corporate) Regulations	2001

The legislative changes that have occurred during the years concerning the strata legislation culminated in the 1988 Subdivision Act. The development of multiple ownership of land and buildings shows how the legal system is adjusted to meet the needs of the community for housing in apartments and units, and the wishes of developers, owners, mortgagees and planners to meet that demand. The development of subdividing titles into horizontal ownership has become more and more sophisticated, but there was more than one method of subdivision available until the Subdivision Act came to replace what could be seen as a maze of legislation. Before this, the developer was regulated by the 1958 Local Government Act for conventional subdivision of land, the Companies Act for a company share scheme apartment, the 1958 Transfer of Land Act and the Companies Act for a stratum title apartment, the 1967 Strata Titles Act for a strata title unit, and the 1974 Cluster Titles Act for a cluster lot.¹³⁶⁵

Subdivision of buildings was not possible until the middle of the 1950's. A company registered under the Companies Act at that time was used to create separate ownership of apartments. To achieve this, several ways were available. The main way was to use groups of shares, and the ownership of these gave the right to occupy an apartment and to use the common property. A formal lease was also sometimes used in order to not have to rely on the contract relationship between the shareholders and the company. By introducing the

¹³⁶⁵ Albert (1991), p. 1.

Landlord and Tenant Act, this was further reinforced. The problem with this system was with financing the purchase of an apartment.¹³⁶⁶

Company Share Scheme

The first form of using home unit or apartment development was the company share scheme, which was not a subdivision of land. A company was the registered proprietor of the land and owner of the building constructed on the land. The shareholding in the company entitled the shareholder to occupancy rights in a specified part of the building. In some cases, the shareholder entered into a lease with the company, but this was not always required. The Articles of Association set out the duties and obligations of the shareholder, including the obligation to contribute to the operational expenses, maintenance and repair of the building. Other agreements to determine obligations between shareholders and the company or between the shareholders themselves could also exist, as well as for administration and conduct of the development as a whole. Since this was not subdivision of land, no approvals were required from planning authorities and the Titles Office was not involved. The main disadvantages with this system were the difficulties in obtaining financing, the Corporations Law (previously the Companies Act) applied to the company requiring compliance with all the company regulations, and the ability for an alteration to the Memorandum and Articles of Association by a special resolution.¹³⁶⁷

Stratum Title

The need for housing increased after the Second World War, and the demand for apartment type accommodation led to the creation of stratum title. It developed first within the existing framework of legislation in the beginning of the 1950's. By the end of the decade, the number of stratum titles had grown so much that it was recognised by legislation through the 1960 Transfer of Land (Stratum Estates) Act, in which sections were added to the 1958 Transfer of Land Act.¹³⁶⁸

A practising solicitor came up with a solution to introduce the scheme known as stratum titles. For this, he used a service company incorporated under the Companies Act. An amendment was made to the Local Government Act in 1965, allowing subdivision of a building into apartments and areas intended for common use by the apartment occupants. The Transfer of Land Act was also amended in 1959 to allow entitlement of easements in the

¹³⁶⁶ Surveyors Board, Victoria (1994), p. 231.

¹³⁶⁷ Albert (1991), p. 1.

¹³⁶⁸ Ibid. at pp. 1-2.

subdivision of a building to give the apartment owners the appropriate rights over other apartments and other parts of the property. Also included in this Act is the relationship between title to stratum estate and shares in the service company, along with rules affecting shares in the service company and registration of a service agreement. This was needed to fix contributions by shareholders for maintenance of the Service Company as well as buildings and surroundings.¹³⁶⁹

Stratum titles are registered under the 1958 Transfer of Land Act. The stratum subdivision is a building subdivision, where the building is subdivided into lots or units, and a service company owns the common land (residual land) around the units, such as driveways, stairwells and gardens. This residual land is shown as an additional lot on the subdivision plan.¹³⁷⁰ The lot with residual land is transferred to a service company, which is formed for that purpose. A lot on the stratum subdivision plan is the airspace occupied by the apartment within the building. In the register, the lot is defined three-dimensionally in space. When a lot is sold, an agreement is made that the purchaser of the apartment should be issued a specified group of shares in the service company.¹³⁷¹ The lot owners have a certificate of title to their lot together with shares in the service company. There is a service agreement between the apartment owners and the service company, which regulates rights, obligations and duties of the lot owners and payment regarding the general expenses of the building, such as repairs and maintenance of the common land. This agreement also enables easements of passageway over the residual land and for common services to run through each apartment. There is also a regulation of insurance requirements.¹³⁷² The insurance system contained a common insurance for the whole building, which the service company administered. There was, however, uncertainty about this insurance scheme.¹³⁷³ It can be seen as that the service company as the owner of the residual land allows the apartment owners the right to use the land so that they can access their apartments and have normal services provided to them. The service company is required to provide common services, maintenance, repair and insurance. However, it does not include a body corporate as in the Subdivision Act. There are usually restrictive covenants regarding how the owners may use the apartment. Garages and car spaces may be leased or licensed to the apartment owners or granted as rights in accordance with association of the service company.¹³⁷⁴

The main disadvantages with this system were that a company had to be involved, the requirements of the Corporations Law applied, and there was

¹³⁶⁹ Surveyors Board, Victoria (1994), p. 231.

¹³⁷⁰ Albert (1991), pp. 1-2.

¹³⁷¹ Surveyors Board, Victoria (1994), pp. 231-232.

¹³⁷² Ingpen (1999), pp. 82-86.

¹³⁷³ Raff (interview 29 April 2003).

¹³⁷⁴ Ingpen (1999), pp. 82-86.

difficulty in obtaining financing.¹³⁷⁵ There was also an increase in the documentation and an increase in the costs associated with the service agreement and charge, an increase in titles leading to difficulties in locating the title for the common land, and there were stamp duty problems connected with charge and transfer of shares on a purchase.¹³⁷⁶ Something that complicated the plans of subdivision that were prepared for the selling of stratum title was that the buildings had to be located very precisely in detail in both the horizontal and vertical levels. Level determination was made relative to the local datum for levels. The extensive information needed for this required expensive surveys, examinations and preparations.¹³⁷⁷

Stratum titles over time have been converted according to the new Acts. Under the 1967 Strata Titles Act, stratum schemes were often converted to strata plans, and now a cancellation of the building subdivisions must be made under the Transfer of Land Act, followed by a registration of a plan of subdivision under the 1988 Subdivision Act. Stratum subdivisions are still today widely spread throughout the state of Victoria, and in 1994, around 7 500 stratum schemes still existed, which means that the surveyor must still be able to handle this type.¹³⁷⁸

Strata Title

When the Strata Titles Act was introduced, own-your-own home units had become very popular, and the pressure for redevelopment of valuable land in the inner suburbs of Melbourne had resulted in the construction of multi-storied buildings. People also envisioned in the future that the commercial community would also like to own their premises instead of just leasing them. This development created, however, a number of problems. The existing legal principles were not made to deal with transfer of land regarding strata subdivision units. Amendments were made to the Transfer of Land Act in 1960 to come to terms with these problems, but not satisfactorily. Another problem concerned the administration of a complex of units. Good methods for dealing with matters of common concern needed to exist, such as insurance for damage, maintenance of the buildings including stairways, etc., and dealing with the different interests of the people living in such a building. This was not provided within the then existing system. A result of these problems was that this type of unit could not be sold and bought so easily, causing difficulties with obtaining loans with a strata unit as security. About two-thirds of that kind of

¹³⁷⁵ Albert (1991), pp. 1-2.

¹³⁷⁶ Albert (1991), pp. 1-2.

¹³⁷⁷ Surveyors Board, Victoria (1994), pp. 231-232.

¹³⁷⁸ *Ibid.*

property were bought for cash. The people who could buy such units were those who had first sold larger homes.¹³⁷⁹

The general views were that this Act was to be a modern piece of legislation designed primarily to cover deficiencies in the law relating to strata titles. It came about from the trend of selling large properties and purchasing villa units or apartments with strata titles. The parts in the Transfer of Land Act that were changed in 1960 to meet the new needs were incorporated in the Strata Titles Act when relating to strata titles. The New South Wales Conveyancing Strata Titles Act was used as a basis for the new Act, since home units had existed there some time before and they had faced the same problems. This enactment was not copied in detail, but the provisions that could add something to the Victorian Act were followed. However, the legislation for New South Wales did not provide for villa units such as the one for Victoria did.¹³⁸⁰

Before the Strata Titles Act was introduced in 1967, the legislation had difficulties dealing with the creation of common property, service companies, vertical subdivision of lots and pre-selling. The 1967 Strata Titles Act introduced regulation of strata subdivision and made provision for the vertical subdivision of buildings, creation of a body corporate to manage common property, lot entitlement and lot liability, and special provisions for implied easements for matters such as support and services.¹³⁸¹ This made the service companies unnecessary.¹³⁸² However, the Act was unsatisfactory in dealing with the staging of subdivisions and pre-selling prior to the construction of the units. Since the Act was created to subdivide a building into strata, it required a building to be constructed and each unit to have an upper and lower boundary.¹³⁸³

Since the stratum system was so complex, a simpler system was created by the Strata Titles Act. A strata subdivision was introduced as a subdivision of land into two or more units, with or without common property. It was in effect a building subdivision.¹³⁸⁴ Instead of forming an air pocket, the building was constructed first and then the boundaries related to the building.¹³⁸⁵ A strata plan was prepared by a surveyor, sealed by council and registered at the Office of Titles. Separate certificate of titles for the lots for residence and for the parking lots were created respectively,¹³⁸⁶ but not for the common property. When the plan was registered, a body corporate was formed, with functions

¹³⁷⁹ Victoria, Parliamentary Debates (session 1966-67, vol 286), pp. 3272, 3553.

¹³⁸⁰ Victoria, Parliamentary Debates (session 1966-67, vol 286), pp. 3551-3554.

¹³⁸¹ Strong (1997), p. 5.

¹³⁸² Surveyors Board, Victoria (1994), p. 232.

¹³⁸³ Strong (1997), p. 5.

¹³⁸⁴ Albert (1991), p. 2.

¹³⁸⁵ Raff (interview 29 April 2003).

¹³⁸⁶ *Ibid.*

similar to the service company in a stratum development,¹³⁸⁷ such as the responsibility for maintenance and insurance.¹³⁸⁸ The body corporate was governed by the Strata Titles Act and not the Corporations Law. By-laws in this Act regulated rights, powers, duties and liabilities of the body corporate and its members.¹³⁸⁹ A problem was that only one standard book of rules existed for all apartments, which contained regulations about such matters as keeping pets, etc, but these rules could be amended.¹³⁹⁰ All unit owners were automatically members of the body corporate and proprietors of the common property as tenants in common in shares calculated in accordance with the unit entitlement endorsed on the registered plan.¹³⁹¹ No special tribunal existed for interference of property rights, so in order to solve such disputes the parties involved had to sue in court.¹³⁹²

One purpose of the Act was to provide a separate procedure for approval by municipal councils of plans of strata subdivision. With the new procedure, all strata subdivision plans were dealt with by municipal councils. The Act would also provide a new and additional scheme for obtaining titles to use on plans of strata subdivision and for administration of the subdivided parcels. It also provided a method for converting existing schemes to the new system. The purpose was to make the new system the only one used from that time forward, but the existing methods were still in practice.¹³⁹³ The new Act was considered successful within its limited field.¹³⁹⁴

The original concept of the Strata Titles Act was to subdivide buildings into strata, the various different levels of residential occupancy of the building. It expanded over the years to include brick pairs with surrounding common land, detached or attached villa units with common land, non-residential units, such as commercial or industrial units, and made it possible to have in one development residential units as well as units for commercial or professional purposes.¹³⁹⁵

With the new law, the service charges that were the duties of a service company would now be the responsibilities of a body corporate and no longer under the Companies Act. There had previously been problems with rules for the relationship between the owners of such a building, but these were to be overcome by the new legislation. There was also a large amount of detailed survey information previously needed for strata subdivisions, which no longer

¹³⁸⁷ Albert (1991), p. 2.

¹³⁸⁸ Raff (interview 29 April 2003).

¹³⁸⁹ Albert (1991), p. 2.

¹³⁹⁰ Raff (interview 29 April 2003).

¹³⁹¹ Albert (1991), p. 2.

¹³⁹² Raff (interview 29 April 2003).

¹³⁹³ Victoria, Parliamentary Debates (session 1966-67, vol 286), pp. 3273-3274.

¹³⁹⁴ Surveyors Board, Victoria (1994), p. 232.

¹³⁹⁵ *Ibid.*

would be necessary. A datum line was used to produce exact measurements on the plan of subdivision, with large costs connected with producing such a plan, but with the new system, a simplified method was intended to be used with an ordinary measurement of scale to determine common boundaries of the subdivision. The rules and regulations for governing strata titles would also be simpler, with easier conveyancing work needed.¹³⁹⁶

There were also discussions regarding insurance in the preparations preceding the Act. Insurers were said to prefer to devise their own protective formula and have it inserted into their own policies. This could be seen as double insurance between the owner of the flat and owners of a common property. The first intention was to introduce it as a clause in the Act, but in another opinion it was considered more suitable to leave such matters to those directly concerned to work out between them, the insurers and their clients. The clause made it obligatory for the body corporate to insure the whole property, but the individual owner was not precluded from also insuring. In such case, there could be situations in which the body corporate omitted to insure, resulting in a time lapse without any insurance coverage at all. This clause, however, was not agreed to. A right remained for members of the body corporate to take out their own insurance and for the body corporate to take out a master policy for the entire block of units.¹³⁹⁷

Cluster Title

The introduction of the concept of cluster housing was proposed by the Building and Development Advisory Committee (BADAC) in 1972. The Cluster Committee recommended that amendments should be made to the Strata Titles Act to facilitate a more flexible siting of houses and to allow for land-only subdivision of cluster titles. A revision of the rigid standards applying to site requirements for residential subdivision was needed.¹³⁹⁸

The task of the Cluster Titles Committee was to work out the cluster concept. It was believed that good guidelines were produced for this; however, the legislation following from the report of the Committee did not match up to those aspirations and proved to be generally unacceptable to the community.¹³⁹⁹ The Cluster Titles Act attempted to resolve the problem of staging and the progressive creation of common property, as well as to provide for pre-selling and to overcome constraints created by the rigid Uniform Building Regulations, which applied to site requirements and the sharing of facilities.¹⁴⁰⁰ The Act

¹³⁹⁶ Victoria, Parliamentary Debates (session 1966-67, vol 286), pp. 3552-3553.

¹³⁹⁷ Ibid. at pp. 3557-3558.

¹³⁹⁸ Surveyors Board, Victoria (1994), p. 232.3.

¹³⁹⁹ Institution of Surveyors (1984), p. 47.

¹⁴⁰⁰ Strong (1997), pp. 5-6.

promised future subdivisions that preserved special site features, such as trees or streams, and the provision of special interest developments, such as tennis courts or stables and horse tracks, but these expectations were not fulfilled.¹⁴⁰¹ One major objection to the Cluster Titles Legislation as it first appeared was the need to show all easements on the plan, and therefore this provision was removed.¹⁴⁰²

The Cluster Titles Act was introduced in 1974 and provided for a subdivision of land, where a plan of subdivision was prepared and completed by the surveyor together with a Scheme of Development, which stated the requirements or restrictions on the proposed buildings on the lots. The plan was certified by council and registered at the Office of Titles with an individual title issued for each lot. A body corporate came into existence when the plan was registered and worked in the same way as one under the Strata Titles Act, and the by-laws and provisions for common property in this Act were also applicable to the cluster titles. The main difference from strata was that the developer could carry out development in stages and sell the lots as vacant land, leaving the purchaser to construct dwellings on the lots.¹⁴⁰³

All subdivisions previously covered by the Strata Titles Act, except the subdivision of multi-storey buildings, were supposed to be carried out under the Cluster Titles Act. This was later changed to the practice that the subdividers were given the option of using either the Cluster Titles Act or the Strata Titles Act. The Act was intended to allow more flexibility and a lessening of some requirements, but instead, more conservative policies were suggested by the municipalities, requiring even lower densities and higher standards than before. The whole cluster concept seemed to be in danger of failing due to the application of this new legislation to a situation that was already operating very efficiently. The true application of cluster applied to larger and newer areas, but it was forced onto the building industry which was just coming out of a deep economic recession.¹⁴⁰⁴ For example, it was often used for village areas.¹⁴⁰⁵

The Strata Titles Act was more acceptable to developers than the Cluster Titles Act because they were familiar with it, and it was considered simpler, especially regarding the appropriation of easements for services through the units and common property. Sales of units could also commence at any time, even “off the plan,” while sales of cluster title lots could only commence after approval of the plan at the Land Titles Office. In addition, the strata subdivisions were generally not circulated to servicing authorities and would therefore be sealed more quickly with less cost, such as headworks levies, which usually applied to cluster subdivisions. These issues were further amended in

¹⁴⁰¹ Albert (1991), pp. 2-3.

¹⁴⁰² Institution of Surveyors (1984), p. 116.

¹⁴⁰³ Albert (1991), pp. 2-3.

¹⁴⁰⁴ Surveyors Board, Victoria (1994), pp. 232.3-232.4.

¹⁴⁰⁵ Tulloch (interview 16 April 2003).

the Cluster Titles Act. The problem of delineating and recording the location of services installed in common property was overcome by giving the councils the power to require as constructed plans of service works. The municipal engineer was given discretion regarding whether or not the plan was to be circulated to authorities. The amendments also allowed the pre-selling of cluster lots where a building is erected or intended to be erected on the lot.¹⁴⁰⁶

Even though several amendments were made, the Cluster Titles Act was not widely used. It was regarded as a failure, with only around 2000 cluster plans approved,¹⁴⁰⁷ many of these quite small.¹⁴⁰⁸ The Act was too cumbersome and did not resolve such issues as zealous planning requirements by Councils, schemes of development and staging, provision for implied easements other than in common property areas, the combination of multi-and single storey developments, and pre-selling of building units unless the building was under construction.¹⁴⁰⁹ A task force was appointed to investigate the possibility of consolidating all legislation related to land subdivision into what eventually became the Subdivision Act. With that Act, the Strata Titles Act and the Cluster Titles Act were repealed, but plans registered pursuant to those Acts still retain their validity. When the cluster concept was included in the legislation, it did not achieve wide acceptance, and although there were some cluster applications still in various stages of the approval process at the time of the introduction of the Subdivision Act, they were not pursued, although applications for cluster subdivision approval can be sought under the Subdivision Act.¹⁴¹⁰

The Subdivision Act

The work with the new 1988 Subdivision Act went on for a long period of time, a total of twelve years.¹⁴¹¹ A Building and Development Approvals Committee, BADAC, was established in 1975 to advise on some questions, such as increasing efficiency in dealing with building and development applications, rationalisation of responsibilities of authorities, and any other matter relevant to the processing of building and development approvals.¹⁴¹² The BADAC committee was made up of representatives of industry, local government and planning bodies with the objective of undertaking a major review of the approval process for all forms of development. The Committee operated over a two-year span and brought forward recommendations resulting

¹⁴⁰⁶ Surveyors Board, Victoria (1994), p. 232.4.

¹⁴⁰⁷ Strong (1997), pp. 5-6.

¹⁴⁰⁸ Surveyors Board, Victoria (1994), pp. 232.4-232.5.

¹⁴⁰⁹ Strong (1997), pp. 5-6.

¹⁴¹⁰ Surveyors Board, Victoria (1994), pp. 232.4-232.5.

¹⁴¹¹ Victoria, Parliamentary Debates (Autumn session 1988, vol 390), p. 834.

¹⁴¹² Institution of Surveyors (1984), pp. 4-6.

in the Building Control Act with regulations, the Planning and Building Act and the Subdivision Act.¹⁴¹³ A report was produced in two parts, the first one on building controls and the second one on planning and subdivision controls. In the recommendations given in the BADAC Report on Planning and Subdivision Controls, many related to subdivision matters. The main issue was that there should be a simplified approval procedure and a consolidation of legislation concerning subdivision.¹⁴¹⁴ The BADAC Committee considered whether there should be an amalgamation of all subdivision processes into a single Subdivision Act and a positive interface with the planning process. The intention was also to introduce procedures directed towards minimising approval times and coordinating elements of the approval process.¹⁴¹⁵ It was, however, regarded as difficult to put together all subdivision matters into one single law. It was made clear in the Report of the Subdivision Task Force that a new Subdivision Control should be unified with Planning Controls.¹⁴¹⁶

The subdivision system before the Subdivision Act was regarded as complex, costly and time consuming. The BADAC Report therefore recommended a complete overall review of the system. Two main objectives were to be achieved. One was to provide for a system that gives approval to the subdivision of land at the earliest possible opportunity and with a minimum of expense. The other one was to evolve a system combining the subdivision approval process with the planning approval process. For this purpose, the subdivision of land was to be based around a development plan. It should not be necessary to submit plans of subdivision to planning authorities for permits to subdivide or for endorsements. Planning Schemes should identify where land could be subdivided and ground rules to apply to those subdivisions. It should therefore only be necessary to apply for subdivision with one development plan and application. In the system used so far, the plan was practically the same as that in use for more than 80 years, calling for a modernisation.¹⁴¹⁷

The Minister for Local Government approved the appointment of a specialist Task Force in relation to the recommendation of BADAC for the consolidation of legislation pertaining to the subdivision of land. The Task Force was to prepare draft instructions to be submitted to the Minister for Local Government and the Minister for Planning. The Task Force was of the opinion that there should be a single Subdivision Act covering the three types of subdivision up until then provided for under the Local Government Act, the Strata Titles Act and the Cluster Title Act. Two types of titles should be provided for, one of them ground level, which is the subdivision of land and

¹⁴¹³ Surveyors Board, Victoria (1994), pp. 151-152.

¹⁴¹⁴ Institution of Surveyors (1984), pp. 4-6.

¹⁴¹⁵ Surveyors Board, Victoria (1994), p. 152.

¹⁴¹⁶ Institution of Surveyors (1984), pp. 4-6.

¹⁴¹⁷ *Ibid.* at p. 13.

which also can include the subdivision of a building, always providing a title in fee simple. That type of subdivision might also include common property with a body corporate, which is either limited or unlimited. The other type, air space, was the subdivision of a multi-level building to create titles on top of each other. For titles with this kind of interdependence, common property would always exist, with an unlimited body corporate (see further below).¹⁴¹⁸

The work to modernise the subdivision legislation and to create a new Act was carried on for several years. The Victoria Division of the Institution of Surveyors held a public seminar in 1984 presenting proposals for a new Subdivision Act. The existing Subdivision Provisions were regarded as restrictive and long overdue for revision. Substantial parts of the Local Government Act had been modernised for this purpose. The Local Government was to be given a greater power of competence, more general and less restrictive powers. It was remarked that subdivision of land is not an isolated process and because of this cannot be separated from other aspects of development.¹⁴¹⁹

When the Subdivision Act started operating in 1989, it repealed the subdivision provisions of the 1958 Local Government Act, the 1967 Strata Titles Act and the 1974 Cluster Titles Act, and consolidated these previous Acts. The introduction of the Subdivision Act had the following effects on the existing subdivision types. The existing company share schemes continue and can still be created, but the disadvantages remain. The existing stratum titles also continue, with a separate lot for the common property and the service company, but a developer may not be able to obtain the required planning permit for this. If common property is shown as such on the plan, a body corporate will automatically exist and a service company will then not be required. Existing stratum titles may be converted under the Transfer of Land Act from building subdivisions to a plan of subdivision under the Subdivision Act. Existing plans for Strata Titles continue, but the bodies corporate must comply with the Subdivision Act and the 1989 Subdivision (Body Corporate) Regulations. No new such units will now be created. The plans for cluster titles are also unaffected, but the bodies corporate must also here comply with the Subdivision Act and the Subdivision (Body Corporate) Regulations.¹⁴²⁰

The relevant Acts now in force became the Subdivision Act and the Planning and Environment Act.¹⁴²¹ To achieve a plan where different types of subdivision are combined, such as conventional lots, subdivision of buildings, cluster-type lots and public open space, before the Subdivision Act it was necessary to get approval under the Local Government Act, the Strata Titles Act and the Cluster Titles Act, and sometimes also under the Town and

¹⁴¹⁸ Victoria Subdivision of Land Task Force (1983), pp. 2-6.

¹⁴¹⁹ Institution of Surveyors (1984), pp. 3-4.

¹⁴²⁰ Albert (1991), p. 3.

¹⁴²¹ Strong (1997), p. 5.

Country Planning Act.¹⁴²² From 1991 there has been a single system of subdivision covering subdivision of land, buildings and airspace. A plan of subdivision is prepared by a surveyor, certified by Council and lodged at the Office of Titles. A title will be issued for each lot and for common property, if any. Since the 1991 Subdivision (Miscellaneous Amendments) Act, the title to the common property will not be issued and those already issued may be recalled by the Registrar of Titles. If there is common property, a body corporate automatically comes into existence on registration of the plan and is governed by the 1989 Subdivision (Body Corporate) Regulations.¹⁴²³

With the repeal of the Strata Titles Act and its incorporation in the Subdivision Act, the regulations and requirements for bodies corporate were not included in the Act, but contained in the regulations.¹⁴²⁴ Regulations associated to the Subdivision Act include the Subdivision (Procedures) Regulations and the Subdivision (Body Corporate) Regulations. The Procedures were designed for the development industry with developers, surveyors, Councils and authorities, and the Body Corporate Regulations were designed for body corporate residents and their managing agents. With this, the development industry was given greater flexibility to create more innovative development without being tied to the strict rules of the previous legislation. Mixed development was possible using partial, multiple and tiered bodies corporate. Simple development, such as dual occupancies on a corner site, could avoid the use of a body corporate totally. Government and planning agencies had a vested interest in making body corporate living more attractive, consistent with higher density living and their urban consolidation objectives. An opportunity in two and three unit developments to avoid the need for a body corporate completely was also introduced. The emphasis was transferred from establishing a body corporate whenever a particular act was used, because the Strata and Cluster Titles Acts were often used to achieve lot sizes below the sizes contained in the Building Regulations, to establishing a body corporate only when one was necessary because common property existed. A change of the legal philosophy was also made, with greater emphasis placed on subordinate legislation.¹⁴²⁵

The objectives of the Subdivision Act were to introduce a uniform process for subdivision approvals which are part of the planning system, a uniform style of title for property in Victoria, a system that is sufficiently flexible to allow for changes to be implemented from time to time, a system which has the municipal council as the central body responsible for the co-ordination of planning, building, traffic and drainage control, and a simplified Act which can more readily be understood by interested users and laymen, such as developers

¹⁴²² Victoria, Parliamentary Debates (Autumn session 1988, vol 390), p. 582.

¹⁴²³ Albert (1991), p. 3.

¹⁴²⁴ Victoria, Parliamentary Debates (Autumn session 1988, vol 390), p. 835.

¹⁴²⁵ Easton (1993), pp. 2.1, 2.2.

and members of the bodies corporate.¹⁴²⁶ It was regarded as the most advanced subdivision measure in Australia and a model for other states.¹⁴²⁷ The approval process was intended to become more straightforward and flexible, including all administrative processes from approval in principle to registration and issue of titles. The purpose was to create increased certainty through clear processes, a single form of title in all cases of subdivision, and describing all division of land, buildings and airspace as subdivision.¹⁴²⁸ Consolidation of all major discretions in the planning approval phase should be obtained, as well as flexibility for the developer to structure the subdivision to suit market demands, flexibility and variety in the operation of the body corporate while preserving the advances made in the Strata Titles Act. The Act was intended to apply to the subdivision or consolidation of land, buildings, creation, variation or removal of easements, and also the compulsory acquisition of land by authorities, or persons acting as authorities, in the development of land.¹⁴²⁹

The Subdivision Act was allow complete flexibility, such as lots of more than one part, more than one and different types of body corporate, subdivision without a building, no upper and lower limits, and mixture of building and non-building subdivisions. There were also some additional benefits for the developers, including a Planning Permit as a consent to subdivide, lots being saleable at any time, minimisation of Stamp Duty, subdivision of existing buildings without councils being able to demand upgrading of the building to current standards, public open space contributions payable only if creating additional separately disposable parcels, cancellation of restrictive easements made easier, and simplified staging process. The purchaser, however, will have to consider such things as that the sale of lots can take place prior to completion or even commencement of construction, that the final construction may differ from the design plans, and that lots may consist of several components, including designated car parking and storage areas.¹⁴³⁰

What was considered as the most radical changes to the subdivision process that were proposed was removing subdivision from the Local Government Act, abolishing strata and cluster legislation, giving municipalities greater power, allowing pre-selling of land, simplifying easement dealings, regulating bodies corporate, removing the option of having subdivisions sealed with a council requirement, invoking time limits on all sealed plans and increasing opportunities for appeals.¹⁴³¹

¹⁴²⁶ Surveyors Board, Victoria (1994), pp. 152-153, 232.6.

¹⁴²⁷ Victoria, Parliamentary Debates (Autumn session 1988, vol 390), pp. 581-582.

¹⁴²⁸ Victoria, Parliamentary Debates (Autumn session 1988, vol 390), pp. 581-582.

¹⁴²⁹ Surveyors Board, Victoria (1994), pp. 152-153, 232.6.

¹⁴³⁰ Strong (1997), pp. 6-7.

¹⁴³¹ Institution of Surveyors (1984), registration form ii, p. 7.

Under the old system, the subdivision process had revolved around the title plan, but in the new system, the subdivisions should centre on the development plan. The development plan must be prepared by and certified by a Surveyor authorized under the Land Surveyors Act. This plan was supposed to minimise the investigation time of referral authorities, speed up the approval time and cost less to produce. It would also be more flexible to change or modify allotment layout and to vary the size of stage boundaries to suit market conditions. It should also assist marketing of land by assuring that unnecessary surplus easements do not encumber property restricting the location of houses, garages and carports. Another improvement was the ability to halt construction part way through a stage.¹⁴³² If the subdivision should be developed in stages and the subdivision contains common property, the permit or approved plan must show the full extent of the subdivision, and the schedule of lot entitlement and liability must cover all the lots.¹⁴³³

The creation or removal of easements was also made easier, where just an application to the council for certification of a plan is needed. This was intended to resolve the difficulties with the variety of approaches from the Transfer of Land Act and other legislation that are lengthy and where unanimous agreement was not possible.¹⁴³⁴ Before the Subdivision Act, the ordinary ways of creating easements were to grant them expressly by instrument or acquire them by prescription as the result of long use. It had become more common for legislative provisions to enable quasi-easements to be created for the benefit of statutory authorities, even though the rights created do not exist for the benefit of any particular land of the authority. Regarding subdivision, there were two statutory schemes providing for the creation of implied easements. Section 98 of the Transfer of Land Act provided for the creation of implied easements over land specifically set apart for the relevant plan of subdivision. Those resulting easements were for the benefit of proprietors of lots and not for public utilities. Public utilities could lay pipes or exercise other rights in relation to the sites of easements created in this way, but only if independent statutory provisions authorise them to do so. Another form of implied easements was provided for by section 12 of the Strata Titles Act, which caused implied easements to be created on the registration of a plan of Strata Subdivision without the need for the lands that are to be subject to them to be expressly set aside. The type of easement that is needed depends on the problem to be overcome. For instance, the drainage of a lot on a plan of subdivision would be liable to require both an easement entitling the proprietor of the lot to send wastewater along a suitable drain through the parcel that is subdivided, and legislative authority for a public utility to construct and maintain a drain to be used for that purpose. The act of consolidation should

¹⁴³² Institution of Surveyors (1984), pp. 14-16.

¹⁴³³ Victoria, Parliamentary Debates (Autumn session 1988, vol 390), pp. 583-584.

¹⁴³⁴ *Ibid.*

not create a need for new easements, although a proposed new use of the parcel prompting consolidation might require new easements.¹⁴³⁵

Easements created on land subdivisions by virtue of section 98 of the Transfer of Land Act are for the benefit of the owners of the other lots in the title. Authorities may lay pipes and services within these easements (and often outside them), but they have to rely on powers under other legislation to do so. For reserves, on the other hand, the land itself vests in the authority and the owners of the land in the plan have no right even to step on that land and no right to use the reserve for services except as provided or granted by the authority. Reserves, however, are rarely provided on a plan. There was a need to make the removal, variation and creation of easements processes simpler and to give them a simpler forum than the Supreme Court for removal and variation of restrictive covenants and easements. No other easements than pre-existing ones appeared on strata plans, and section 12 provided for the necessary easements to be implied. Up-to-date plans should be made of the location of all services to be kept by the Local Council.¹⁴³⁶

Not everyone was convinced of the benefits of the proposal that common property should be owned by the body corporate. Common ownership had worked well in Victoria. A reason for why this change was suggested was that New South Wales had introduced such a solution. It was also proposed that cheap inquisitorial arbitration should be made available to solve problems arising from this type of communal living. In addition, the report recommended that unlimited bodies corporate should be created in some cases and limited ones in others. This was inspired by the modification to the Strata Titles Act that was made in relation to cluster subdivision.¹⁴³⁷ It also amended the Sale of Land Act to allow for pre-selling of lots subject to conditions to protect both consumers and developers.¹⁴³⁸ This had previously been generally resisted by Local Government on the basis that the purchasers should know what they are buying. Pre-selling involves the sale of lots on a plan of subdivision after the municipal approval has been obtained, but before the plan of subdivision has been registered in the Titles Office.¹⁴³⁹ By such sales “off the plan”, a contract of sale for a lot on a plan of subdivision may be entered into as soon as the land being sold can be identified. Pre-selling is used for both building and land subdivisions, and a contract can be entered into at any stage of construction.¹⁴⁴⁰ The consumer protection measures in the Sale of Land Act provide for the amount of a deposit, the holding of deposits in trust until settlement, provision of disclosure statements, provision for amended plans,

¹⁴³⁵ Institution of Surveyors (1984), pp. 107-108.

¹⁴³⁶ Institution of Surveyors (1984), p. 116.

¹⁴³⁷ Ibid. at pp. 81, 105, 118-119.

¹⁴³⁸ Strong (1997), p. 6.

¹⁴³⁹ Institution of Surveyors (1984), pp. 81, 105, 118-119.

¹⁴⁴⁰ Dean (email 12 July 2007).

and limitation of the time a contract remains on foot for a period of 18 months unless otherwise agreed.¹⁴⁴¹

The insurance question had so far been a particular weakness of the strata system. The changes introduced with the new Act were considered as the first ones to have a real chance of working and being accepted by insurers and the insured. For block insurance, it was recommended that a policy should be non-avoidable on account of breach, but that an insurer should be indemnified to the value of a unit in relation to which a breach of the policy occurs. A solution to problems occurring from this would be to involve resort to a common-pool in instances of breach. By this the risk would be spread at the cost of a surcharge on premiums.¹⁴⁴² Other changes were that the Sale of Land Act should be amended to ensure that purchasers are made aware of insurance requirements and that an insurance policy is in force in accordance with the regulations.¹⁴⁴³

The land subdivision policies and practices that have undergone changes over the years can be said to have culminated in the major reformation and consolidation of practices that took place by introducing the Subdivision Act.¹⁴⁴⁴ The Subdivision Act did not change the basic model, but included the 3D strata in the general rules for normal two-dimensional subdivision forms. Included was also the cluster title, which was in 2D with small residencies in close proximity and villa unit developments.¹⁴⁴⁵ The feedback and responses to the new proposals were positive from those persons and organisations that had been consulted.¹⁴⁴⁶ It facilitated the work of surveyors and architects.¹⁴⁴⁷ Even though the Act was much welcomed from many sides, it was also considered as too all-embracing and going further than necessary, especially in the treatment of easements, covenants and vesting orders. These were not considered to be a part of the subdivision process, since many private easements also exist between landowners, which caused amendments. Another criticism was that the owners of stratum titles were left inadequately protected.¹⁴⁴⁸ There was also an adverse reaction from the legal profession to the Subdivision Act. Since the Subdivision Act facilitated means of strata titling new and existing buildings, including the ability to purchase “off the plan,” it has also led to an increase in inner-city development in the Melbourne environs.¹⁴⁴⁹

¹⁴⁴¹ Strong (1997), p. 6.

¹⁴⁴² Institution of Surveyors (1984), pp. 110, 120.

¹⁴⁴³ Victoria, Parliamentary Debates (Autumn session 1988, vol 390), pp. 583-584.

¹⁴⁴⁴ Surveyors Board, Victoria (1994), pp. 225-227.

¹⁴⁴⁵ Raff (interview 29 April 2003).

¹⁴⁴⁶ Institution of Surveyors (1984), registration form ii, p. 7.

¹⁴⁴⁷ Raff (interview 29 April 2003).

¹⁴⁴⁸ Victoria, Parliamentary Debates (Autumn session 1988, vol 390), pp. 831-833.

¹⁴⁴⁹ McGrath (1993), p. 1.2.

The Body Corporate Regulations Review Committee made a review of the Subdivision (Body Corporate) Regulations in 1996 to make a draft of amendment to the regulations. In their report they made some suggestions for future changes that result in a radical rewriting of the regulations. One suggestion was to introduce special procedures for larger bodies corporate controlling vast sums and for commercial and industrial bodies corporate. Differential entitlement and liability providing more flexibility for bodies corporate to nominate the source of and intent of funds were also mentioned. Removal of the requirement for unanimous resolution for some or all actions under the Subdivision Act was also suggested, and further, introduction of a special purpose body corporate commission and/or a dispute mechanism. The new Subdivision (Body Corporate) Regulations were introduced in 2001, replacing the 1989 ones.¹⁴⁵⁰

The new regulations seem to be very similar to the old ones, but they have had a significant impact on how the bodies corporate operate. There were also some smaller changes, such as that a “managing agent” is called a “manager”. A body corporate could no longer operate a business. If a member of a body corporate has been served with a notice and failed to comply with it, the body corporate is allowed to carry out maintenance and repairs on such a lot, without a special regulation needed for that. Previously, public liability insurance was only needed for common property in a multi-storey development, but now it is needed for all common property. It also clarified what additional insurance could be taken out. With the change, it refers to insurance relating to the performance of its functions. Regulations that a body corporate may by a special resolution require their members to arrange their own insurance, if the body corporate insurance is not compulsory, were also introduced. However, this rule applies to very few cases, since there are very few plans of subdivision that have a body corporate without common property. It is also very difficult to achieve the unanimous resolution of the body corporate that is required for this. It must also be recorded with the rules of the body corporate at the Land Registry. In the new Subdivision (Body Corporate) Regulations, the six standard rules must be included in any rules made. If professional managers are being used for the body corporate, they must have indemnity insurance for themselves, and the level of this was raised. The possibility of delegating powers and functions of the body corporate became more restrictive. Any delegation must be in writing and sub-delegation was prohibited. Despite all the changes introduced with the new Subdivision (Body Corporate) Regulations compared with other states, the opinion was that Victoria has a need for more enforcement of the regulations and body corporate rules, dispute resolution and the regulation of managers.¹⁴⁵¹

¹⁴⁵⁰ Body Corporate Regulations Review Committee, Victoria (1996), p. iii.

¹⁴⁵¹ Libbis (2001), pp. 60-63.

A review was started in 2003 concerning the effectiveness and efficiency of the Subdivision Act relating to the creation and operation of bodies corporate. Some important issues were pointed out in a Future Directions Paper. The task was to identify the changing nature and roles of bodies corporate in Victoria, especially regarding the varying nature and size of subdivisions creating bodies corporate, and the growth in the number of multi-storey subdivisions. The existing legislation, the Subdivision Act and the Subdivision (Body Corporate) Regulations, was to be examined with particular regard to the need to provide for the secure and prudent management of body corporate funds, and the need to minimise disputes and to provide appropriate dispute resolution mechanisms.¹⁴⁵² In the end of 2005, an exposure draft of the new legislation was released along with the final report.¹⁴⁵³ The final report made proposals based on the foregoing consultation process and recommended a new legislative regime for bodies corporate.¹⁴⁵⁴ In this process the major issues concerning bodies corporate were identified, among which was a need for better access to dispute resolution, clearer rights and duties of the body corporate and its members, as well as sufficient powers and flexibility for the body corporate to operate in an effective way.¹⁴⁵⁵ Among the goals were to identify the changing nature and role of the body corporate, to examine the effectiveness and efficiency of the existing Acts regulating body corporate questions and to make recommendations on the need for amendments of these Acts. One of the proposals given was that a new legislation should be developed to provide for a more modern regulation of the management of the body corporate.¹⁴⁵⁶

When the now existing regulatory structure was established in 1988, the majority of bodies corporate were under five lots and generally self-managed. The regulatory framework was designed to enable the operation and management of the body corporate to be determined by the members. If the members could not agree, legal advice and contractual arrangements would have to be sufficient to clarify rights and obligations, since the legislation did not provide such solutions. Due to the growth, diversity and complexity of bodies corporate, a need has emerged to change the regulatory framework and to strengthen communities in a context of increased higher density living.¹⁴⁵⁷

The proposals for a new regulatory scheme for bodies corporate included providing an expert body for corporate information, education and advice services, improving communication between members and minimising disputes within bodies corporate, providing a low cost and quick expert resolution service to resolve disputes relating to breaches of rules and other day-to-day

¹⁴⁵² Consumer Affairs Victoria (2004), pp. iii-iv.

¹⁴⁵³ Victoria, *Parliamentary Debates*, Legislative Council, 12 September 2006, p. 3291.

¹⁴⁵⁴ Consumer Affairs Victoria (2006b), pp. i, 1, 4.

¹⁴⁵⁵ Victoria, *Parliamentary Debates*, Legislative Council, 12 September 2006, p. 3291.

¹⁴⁵⁶ Consumer Affairs Victoria (2006b), pp. i, 1, 4.

¹⁴⁵⁷ Consumer Affairs Victoria (2004), p. 1.

operations of the body corporate, improving financial management and reporting, and setting out options to protect body corporate funds. Other suggestions were enabling long term maintenance planning of the common property, improving the operation of committees, proposing options to improve professional standards for professional body corporate managers, proposing options to promote greater and wider disclosure requirements for developers for “off the plan” sales, and providing options for consideration to improve the general operations of the body corporate regulatory framework.¹⁴⁵⁸

An Owners Corporation bill was passed by Parliament in September 2006 and will become the Owners Corporation Act, which will come into force by the end of 2007.¹⁴⁵⁹ It will include parts of the 2001 Subdivision (Body Corporate) Regulations as well as parts of the 1988 Subdivision Act.¹⁴⁶⁰ The purpose of the long time span until the Act comes into force is to let people adapt to the new requirements and avoid difficulties during the transition phase.¹⁴⁶¹ Even though the Law Institute of Victoria welcomed the bill, it regarded it in need of some revision, for example concerning the division of dispute resolution provisions between Acts, the onerous obligations on the bodies corporate and that the nomination of one body corporate to undertake the administrative tasks of all bodies corporate when multiple bodies corporate exist is not facilitated.¹⁴⁶² As critique from the opposition party was mentioned that the Act is too complex, prescriptive and onerous, especially for small owners corporations.¹⁴⁶³

The introduction of a new Owners Corporation Bill was justified by the development of the bodies corporate that had taken place since the passing of the 1988 Subdivision Act. While at that time in Victoria there existed around 35 000 bodies corporate, of which most were small suburban apartment blocks with two to six units, there are now more than 65 000 bodies corporate with more than 480 000 lots. The average size of bodies corporate is growing. Bodies corporate with less than five lots correspond to around 30 percent of all bodies corporate, but those with more than 100 lots correspond to 25 percent of all lots in Victoria. The legislation was thus adapted to a smaller size of body corporate, with regulations intended to suit all types. The quite small regulatory framework was intended to encourage informal dispute resolution. Nowadays, however, the variety and complexity of bodies corporate is much larger, with high-rise apartment buildings, a mix of use for residential, commercial and industrial purposes, as well as new types such as office blocks, hotels,

¹⁴⁵⁸ Consumer Affairs Victoria (2004), p. v.

¹⁴⁵⁹ Institute of Body Corporate Managers (Victoria) (2006).

¹⁴⁶⁰ Consumer Affairs Victoria (2006a), p. 1.

¹⁴⁶¹ Institute of Body Corporate Managers (Victoria) (2006).

¹⁴⁶² Law Institute of Victoria (2006), p. 3.

¹⁴⁶³ Institute of Body Corporate Managers (Victoria) (2006).

retirement villages and farms, which means that the existing regulatory regime is no longer appropriate.¹⁴⁶⁴

The new Owners Corporation Act has the purpose of making sure that the legislation is up-to-date concerning the changing size and nature of bodies corporate, especially when it comes to the increasing number of multi-storey high rise apartment buildings. Some important changes will be introduced with this new Act. The “body corporate” will instead be called the “owners corporation” to adapt it to the terminology in other Australian states and to clarify that the body actually represents the lot owners. The Act clarifies the powers of the committee, establishing that it can do all things that the owners corporation can do by ordinary resolution. Owners corporation will be required under the new Act to keep records of activities and undertakings and free of charge make them available for inspection, so that people buying property can access information, such as financial statements and body corporate rules. One very important change is a new system for dispute resolution outside of taking matters to court or to neighbourhood dispute settlement. There will be a differentiation in the requirements for small and large owners corporations when it comes to preparing financial statements, maintenance plans and getting five-year valuations of common property for insurance purposes. There are also new regulations about meetings, limitations on the role of the developer in the owners corporation, and the appointment and supervision of managers.¹⁴⁶⁵

There has been a call for introducing community titles legislation, such as existing in other states, for instance in New South Wales. This comes from a need for greater flexibility in the structure and functioning of bodies corporate in new forms of urban development, such as larger single tower apartments often incorporating commercial and retail elements, groupings of high-rise apartments with a mix of commercial and retail components, and mixed use subdivisions where a significant amount of open space and facilities are owned in common and managed by the body corporate. To introduce community titles as a possibility for this, where each member owns a dwelling on a lot and a separate interest in the community owner’s association that holds title to the common areas, would provide for compulsory public access to parts of the common property and reduce the need to create additional bodies corporate.¹⁴⁶⁶

¹⁴⁶⁴ Victoria, *Parliamentary Debates*, Legislative Council, 12 September 2006, pp. 3290-3291.

¹⁴⁶⁵ Consumer Affairs Victoria (2006a), pp. 1-3.

¹⁴⁶⁶ Consumer Affairs Victoria (2004), p. 29.

6.3.3 Subdivision

Subdivision covers any division of land, buildings or airspace into two or more lots, also including re-subdivision. These parts are called lots, reserves or common property.¹⁴⁶⁷ A lot is a specific unit of land, building or airspace on a plan of subdivision of land that can be separately owned.¹⁴⁶⁸ Such regulations therefore cover many administration aspects, including standards of plans, fees, time limits and body corporate rules. Developers can combine different types of subdivision, where within one subdivision plan may be included conventional lots as well as subdivision of buildings, creation of cluster-type lots and creation of public open space. In any of the parts can be included common property and management of this by a body corporate.¹⁴⁶⁹ The body corporate is a separate legal entity, and the creation of it enables a form of property ownership where each individual member holds title to a specific lot and an undivided interest as tenant in common with other lot owners in the common property, including exterior walls, structural components, grounds, amenities, driveways and infrastructure.¹⁴⁷⁰ Staged development is also allowed.¹⁴⁷¹

¹⁴⁶⁷ Victoria, *Parliamentary Debates*, (Autumn session 1988, vol 390), p. 582.

¹⁴⁶⁸ Consumer Affairs Victoria (2004), p. 1.

¹⁴⁶⁹ Victoria, *Parliamentary Debates*, (Autumn session 1988, vol 390), p. 582.

¹⁴⁷⁰ Consumer Affairs Victoria (2004), p. 1.

¹⁴⁷¹ Victoria, *Parliamentary Debates*, (Autumn session 1988, vol 390), p. 582.

Simon Libbis describes the subdivision types possible under the Subdivision Act as this:¹⁴⁷²

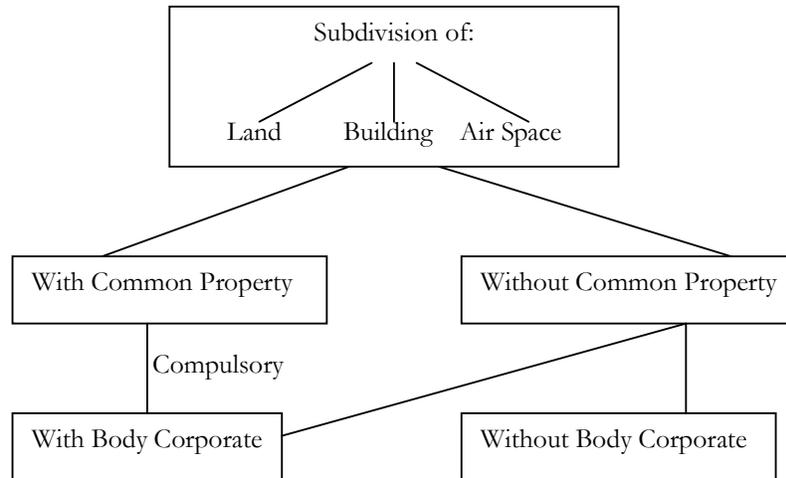


Figure 6.10. Types of Subdivision under the Subdivision Act.¹⁴⁷³

Subdivision is regulated in the 1988 Subdivision Act, which was formed to amalgamate different aspects of local government, land transfer, cluster and strata legislation. The purpose of this 1988 Act is to set out the procedure for the subdivision and consolidation of land, including buildings and airspace, and for the creation, variation or removal of easements or restrictions, and to regulate the management of and dealings with common property and the constitution and operation of bodies corporate. It divides the subdivision approval process into two conceptual levels, the permit under the planning legislation, and the procedural level to be dealt with under the Subdivision Act. The supplementary Subdivision (Body Corporate) Regulations contain the regulations connected with this Act.¹⁴⁷⁴

The Subdivision Act makes no distinction between 2D and 3D properties, i.e. conventional subdivision and strata. With the new Subdivision Act, everything is dealt with within the same plan.¹⁴⁷⁵ Since 3D property is regarded as any other property, it does not need a specific denomination. The plan will state that the property is a stratum title area, for instance, a tunnel. The underground, however, is not marked on the plans, and because of this its

¹⁴⁷² Libbis (1996), app. 1:1.7.

¹⁴⁷³ Libbis (1996).

¹⁴⁷⁴ Surveyors Board, Victoria (1994), pp. 151-152.

¹⁴⁷⁵ Battle (interview 16 April 2003).

location has to be found from other sources. During the last decade, it has become more common to use this type of 3D property, which is considered to make better use of the land.¹⁴⁷⁶

A plan of subdivision in strata differs from a conventional plan of subdivision in the sense that the strata plan defines the boundaries of lots by reference to levels so that such a unit has upper, lower and side boundaries, i.e. a three-dimensional definition.¹⁴⁷⁷ Offices, for instance, can take up an entire floor or be split up further into units.¹⁴⁷⁸ Accessory lots could be created on a plan of subdivision under the 1967 Strata Titles Act and the 1974 Cluster Titles Act. Normally, these were car parking spaces and could not be dealt with except in conjunction with the main unit. The Subdivision Act does not make any provision for accessory lots, but preserves the status of existing ones in strata and cluster plans.¹⁴⁷⁹ Under this 1988 Act, car parks can be shown as a part lot.¹⁴⁸⁰ They do not have separate numbers, but are shown as part of a lot. The whole lot is the unit and the garage, and can only be dealt with together.¹⁴⁸¹ Such part lots were not allowed under the Strata Titles Act, so a tunnel was used to connect a car space to an apartment. Alternatively, the car parking spaces can be separately titled, but are generally restricted by a planning agreement, implying that only owners of apartments can purchase car parking lots.¹⁴⁸²

That called stratum in the old system is the strata of today. Strata is really the plural form of the word stratum. Even though these terms are obsolete and not necessary, strata title is often still used for 3D lots within a building for instance, in order to make it easier to understand what kind of properties are being referenced. For multilevel subdivision, it is still being referred to as the strata plan.¹⁴⁸³

Stratum of Crown land is a part of Crown land that consists of a space of any shape below, on or above the surface of the land, or partly below and partly above the surface of the land, all the dimensions of which are limited. A sale or alienation in fee simple of Crown land in strata, or lease of strata of Crown land can be granted without being limited to a particular stratum of Crown land. It may not be granted unless provisions have been made for any necessary rights of support of the stratum or other land, or building on those lands. A provision must also be made for rights for the passage or provision of services, including such things as drainage, sewage, supply of water or electricity, to or through the

¹⁴⁷⁶ Tulloch (interview 16 April 2003).

¹⁴⁷⁷ Surveyors Board, Victoria (1994), p. 232.1.

¹⁴⁷⁸ Yates (interview 30 April 2003).

¹⁴⁷⁹ Libbis (1995), p. 425.

¹⁴⁸⁰ Dean (email 12 July 2007).

¹⁴⁸¹ Libbis (1995), p. 425.

¹⁴⁸² Dean (email 12 July 2007).

¹⁴⁸³ Tulloch (interview 16 April 2003).

stratum, where those rights are necessary for the reasonable enjoyment of the stratum or other land.¹⁴⁸⁴

A body corporate must be established where common property is proposed in a subdivision. There may be more than one body corporate within a subdivision that has effect over different parts of the subdivision under different conditions. This allows winding up the bodies corporate, including cases where all the common property is sold or dispersed to the lot owners. It is also possible to have a body corporate without common property in the subdivision to control management or future use of the subdivision.¹⁴⁸⁵

If a building that is subdivided into properties should be destroyed, the units still exist,¹⁴⁸⁶ but the body corporate is dissolved and its worth divided between the owners. The body corporate in such a case decides whether the building should be reconstructed or not. If reconstructed, the building must be constructed according to the old building structure boundaries.¹⁴⁸⁷ Since this situation occurs very rarely, there is little experience of it.¹⁴⁸⁸

6.3.4 Subdivision Plans

The subdivision process consists of four main stages, namely obtaining a planning permit, a certified plan of subdivision, a statement of compliance, and titles to the new lots. The planning permit is a legal document allowing a certain use or development to proceed on a specified parcel of land. Such a permit may be subject to varying conditions, such as time limits and conditions imposed by the council and referral authorities.¹⁴⁸⁹ The planning process for subdivision of land starts with the preparation of a plan of subdivision by the developer's consultants and submission to the relevant Council with an application for a planning permit to subdivide the property as suggested by the plan.¹⁴⁹⁰ A surveyor is involved in the preparation process of the plan.¹⁴⁹¹ The application for a permit must be accompanied by certain documents, including a site and context description and a design response.¹⁴⁹² It sometimes is required that the application is sent by the responsible authority to the relevant servicing authorities for their input and consent, such as the State Electricity Commission, the Gas and Fuel Corporation, the Water authority and other

¹⁴⁸⁴ *Land Act 1958* (Vic), ss. 3, 134A, 339A.

¹⁴⁸⁵ Victoria, *Parliamentary Debates* (Autumn session 1988, vol 390), p. 583.

¹⁴⁸⁶ Tulloch (interview 16 April 2003).

¹⁴⁸⁷ Tyrrell (interview 17 April 2003).

¹⁴⁸⁸ Tulloch (interview 16 April 2003).

¹⁴⁸⁹ Dean (email 12 July 2007).

¹⁴⁹⁰ Victoria, *Parliamentary Debates* (Autumn session 1988, vol 390), pp. 582-583.

¹⁴⁹¹ Tulloch (interview 16 April 2003).

¹⁴⁹² Dean (email 12 July 2007).

servicing and statutory agencies.¹⁴⁹³ If the application is successful, the plan of subdivision is effectively approved in principle, both under the Planning and Environment Act and the municipality's planning scheme.¹⁴⁹⁴

The system of referrals to authorities, when planning permits are sought, can be further grouped into classes of applications. Either a planning permit will be required, or the planning scheme will allow subdivisions without a need for a permit. Planning permit applications must be referred to servicing authorities. The Councils, through and with advice from referral authorities, can specify conditions in the permit. This can be in the form of agreements with the referral authorities for supply of such things as water and electricity, or they can require the construction of works, such as roads or drains, and the provision of open space.¹⁴⁹⁵

When approval for subdivision has been granted by the council, preparation should be made by the owner of the formal, certified plan and detailed engineering plans to be approved by council or referral authority.¹⁴⁹⁶ If the certification application is not submitted at the same time as the planning permit application, the certification must be referred to the referral authorities.¹⁴⁹⁷ A note is also required from Licensed Survey for compliance of boundaries and works, the responsibility of a private surveyor.¹⁴⁹⁸ If the plan of subdivision complies with the conditions in the Subdivision Act, the council must certify the plan. This certification in many cases can be carried out concurrently with the planning application. Variations and minor alterations to plans submitted for certification are permitted. Upon certification, the applicant receives a certified copy of the plan.¹⁴⁹⁹ The Certified plan is valid for five years, during which time minor alterations can be made. No works may then start until the plan has been certified.¹⁵⁰⁰ If the development is not finished within the five years, a reapplication must be made.¹⁵⁰¹ Refusal to approve a plan can be appealed to the Administrative Appeals Tribunal.¹⁵⁰²

When the applicant has provided all the prescribed information and has satisfied all the requirements of the planning permit and the Subdivision Act, the responsible authority must issue a statement of compliance.¹⁵⁰³ All conditions in the planning permit or scheme must be complied with and the

¹⁴⁹³ Victoria, *Parliamentary Debates* (Autumn session 1988, vol 390), pp. 582-583.

¹⁴⁹⁴ Dean (email 12 July 2007).

¹⁴⁹⁵ Surveyors Board, Victoria (1994), pp. 232.6-232.8.

¹⁴⁹⁶ Victoria, *Parliamentary Debates* (Autumn session 1988, vol 390), pp. 582-583.

¹⁴⁹⁷ Dean (email 12 July 2007).

¹⁴⁹⁸ Department of Sustainability and Environment, Victoria Government (2004).

¹⁴⁹⁹ Dean (email 12 July 2007).

¹⁵⁰⁰ Victoria, *Parliamentary Debates* (Autumn session 1988, vol 390), pp. 582-583.

¹⁵⁰¹ Yates (interview 30 April 2003).

¹⁵⁰² Victoria, *Parliamentary Debates* (Autumn session 1988, vol 390), pp. 582-583.

¹⁵⁰³ Dean (email 12 July 2007).

required works completed before the council can issue a statement of compliance to the applicant indicating that all conditions in the permit have been complied with. When there is a staged subdivision, each stage will require a separate statement, dealing specifically with the works for that stage.¹⁵⁰⁴

When the certified plan and statement of compliance have been issued, the plan can be submitted to Land Registry, which issues new titles for each lot on the plan of subdivision. Normally, a licensed surveyor will receive these documents from council and forward them to the client along with a report. The client then lodges the documents at Land Registry. The Registrar notifies the council of the registration of the plan, and the council notifies the authorities for which easements have been created.¹⁵⁰⁵ Upon registration, lands as roads or reserves are vested in the council or body named, and any road vested in the council becomes a public highway. Easements, including implied easements, or rights to take water, and any amendments to previous registered plans become effective as shown on the registered plan. The Registrar must create a folio of the register for each lot or reserve, and make any necessary amendments to plans that require amendments.¹⁵⁰⁶

Some new features were introduced by the 1987 Planning and Environment Act, such as a single planning scheme for an area, where only one planning scheme can apply to a single piece of land. Previously, several different planning schemes could apply simultaneously to the same parcel of land, which caused confusion. There are three sections in each scheme with local government requirements, as well as policies and requirements of State and regional agencies. The local council is given the responsibility for the day-to-day administration of the scheme including dealing with permit applications.¹⁵⁰⁷

Since the early subdivision legislation, updates have been needed for multi-purpose properties, numerous ownership categories and management issues. Subdivision is not only made for traditional blocks of flats, but also for commercial and office buildings, industrial complexes, shopping centres, mixed use developments, villas and townhouses, retirement villages, hotels and resorts, air space, future waterways, etc. Each such type has specific and individual requirements in the preparation of the plan, the representation of boundaries and their relationship to one another, not only in two dimensions but also vertically. To clearly define the boundaries, the plan may include vertical diagrams and enlargements.¹⁵⁰⁸

For the construction of a new building, it generally is necessary to obtain a development permit, a subdivision permit and a building permit. A

¹⁵⁰⁴ Ibid.

¹⁵⁰⁵ Ibid.

¹⁵⁰⁶ Surveyors Board, Victoria (1994), pp. 232.6-232.9.

¹⁵⁰⁷ Surveyors Board, Victoria (1994), p. 216.

¹⁵⁰⁸ Strong (1997), p. 4.

development is often made in stages, and to accord with the construction, the plan of subdivision can also be staged where the staged plans will be submitted for planning permit and certification to Council separately. It is possible to register just a separate stage. Following registration of two or more plans, the staged subdivision plans will be compiled into one plan. The compiled plan will either be prepared by the surveyor responsible for the staged plans, or will be prepared by Land Registry.¹⁵⁰⁹

Within the plan lots, reserves, roads and easements may be created.¹⁵¹⁰ A legal authority can be responsible for reserves and roads, or they can be vested into private individuals, and for public roads they will be vested in the authorities.¹⁵¹¹ Public open space is land in the development that can be used for recreational purposes. Depending on the type of subdivision and the Council's policy, up to 5% of such open space has to be included in the plan, or a monetary payment of up to 5% of the site value can be paid to Council.¹⁵¹² The plans must show easements and other rights. These easements may consist of existing and new easements and should show the purpose and any land in whose favour the easement applies. There may also be implied rights for facilities such as way and drainage, but they do not apply where an easement is specified in favour of a public authority, council or person.¹⁵¹³

Bodies corporate or limited bodies corporate can be created on a plan, and any plan showing common property must create one or more bodies corporate. Limited bodies corporate allow different uses for certain common property. There is a provision for proposed rules for the body corporate, which becomes effective on the registration of the plan, which must specify details of lot entitlements and lot liability. With the registration of a plan containing common property, each body corporate is incorporated, the owners of specified lots become the first owners of the body corporate, common property vests shares to owners in proportion to their lot entitlements, the Registrar creates folios of the register for common property in the name of the body corporate as nominees for the owners, but must not produce a certificate of title for those folios, and the Registrar may require submission of and cancellation of any existing title for any common property. Shares in the common property can only be dealt with as part of dealing with a member's lot. Any dealing with a member's lot affects the owner's share in the common property, even though it is not specified. Any dealing with the common property will appear on the folio for the common property and not on the lots.¹⁵¹⁴

¹⁵⁰⁹ Dean (email 12 July 2007).

¹⁵¹⁰ Battle (interview 16 April 2003).

¹⁵¹¹ Ibid.

¹⁵¹² Dean (email 12 July 2007).

¹⁵¹³ Surveyors Board, Victoria (1994), p. 232.8.

¹⁵¹⁴ Surveyors Board, Victoria (1994), pp. 232.9-232.10.

6.3.5 Boundaries

The lots in a subdivision are defined by their boundaries. These lots can consist of land, airspace, buildings or a combination of those. If a boundary is not identified correctly, this may lead to problems in property transactions as well as other negative consequences. Land is usually owned together with the airspace above it, without an upper limit. This space can be subdivided as land, mostly as the subdivision of a multi-storey development, but not necessarily. According to the 1989 Subdivision (Procedures) Regulations, a plan of subdivision must contain a diagram showing these types of lots.¹⁵¹⁵

According to the Subdivision (Procedures) Regulations, boundaries can be shown on a plan by reference to a building. This kind of boundary must be shown with a hatched line. For traditional land subdivision, the boundaries are shown by a continuous line. Since it is not prescribed by law where the boundary is located, it must be specified in the plan. The boundaries of a building must be more specifically defined than for subdivisions of land or airspace, since the walls, floors and ceilings have a thickness that cannot be included in the boundary as a whole. The boundary can be located to the interior walls, floor and ceiling, the exterior face of a part of the building, or in some other chosen location. Different boundaries can be defined differently within a plan, for instance the median of the walls form the boundaries between lots, and the walls of the building are defined as the external face, i.e. the outside of the walls. If there should be a discrepancy between the boundaries shown on the plan and the actual location given by the building, the building boundaries are valid.¹⁵¹⁶

Common property can be created in plans both for subdivision of land, airspace and buildings. The common property is not always set out on the plan, but just defined as all the land on the plan except the lots. To ascertain that included in the common property, the boundaries must be accurately defined. One example of a problem that may occur is when common property is defined as the land on the plan except the lots, which could be, for example, a driveway. If the upper storey of the building has balconies extending out over the driveway, being outside the line defining the lots, they become common property and have to be leased from the body corporate.¹⁵¹⁷

In some buildings, the service pipes are located in ducts, which are not always shown on the plan.¹⁵¹⁸ These ducts can be created as common property by notation on the face sheet of the plan of subdivision.¹⁵¹⁹ Easements according to section 12(2) in the Subdivision Act are implied and not shown on

¹⁵¹⁵ Libbis (1995), p. 417.

¹⁵¹⁶ *Subdivision (Procedures) Regulations 2000* (Vic), s. 11.

¹⁵¹⁷ Libbis (1995), p. 417.

¹⁵¹⁸ Yates (interview 30 April 2003).

¹⁵¹⁹ Dean (email 12 July 2007).

the plans in the diagrams. Because of this, where there are easements is not always known.¹⁵²⁰ These implied easements will only exist for services which existed when the plan of subdivision was registered. Services added later may not necessarily be covered by such easements, unless an additional encumbrance is created.¹⁵²¹

If there is a party wall between two units without any servicing in it, then the boundary is usually located to the centre of the wall, for instance for a brick wall between two row houses. Party wall easements are then created for mutual support, so that the parties cannot tear down their own halves of the wall.¹⁵²²

Before the introduction of the new Subdivision (Body Corporate) Regulations, the boundary between a lot unit and the common property was usually defined as the median, being an invisible line in the wall or window of the unit. This definition led to many misunderstandings and misinterpretation for both occupants and bodies corporate. The situation has much improved with new plans of subdivision defining the boundary of the common property with an owner's lot. This boundary is often shown as the inner surface of the unit, which means that the owner is responsible only for the inner cubic space and interior surfaces of the unit, and the body corporate has clear responsibility for everything beyond this. This makes it easier to decide who is responsible for matters such as preventing water entry and repairing rotten windows. There are also provisions for the cost of repairs that are substantially for the benefit of an owner or a group of owners to be paid by them, for instance for a rear courtyard window of a villa unit that does not adjoin common property.¹⁵²³ Other options for the boundary are the median or external face of walls. The developer, body corporate manager and surveyor work together to make the decision about where the boundary should be located.¹⁵²⁴

For multi-storey strata developments under the Strata Titles Act,¹⁵²⁵ the general rule is that the boundary for a structure such as a wall, fence, floor or ceiling is the median of the structure, unless the plan provides otherwise, so that foundations and roofs and the outside half of exterior walls lie within common property.¹⁵²⁶ In multi-storey buildings with apartments, a median boundary, for example, is located between the first and the second floor.¹⁵²⁷ The general rule for Strata Titles Act plans¹⁵²⁸ is that for single level or villa unit strata developments, the lower boundary is likely to be one metre below the

¹⁵²⁰ Yates (interview 30 April 2003).

¹⁵²¹ Dean (email 12 July 2007).

¹⁵²² Hunter (interview 29 April 2003).

¹⁵²³ McGrath (1993), p. 1.9.

¹⁵²⁴ Dean (email 12 July 2007).

¹⁵²⁵ Ibid.

¹⁵²⁶ Clements (1996), pp. 2.6-2.7.

¹⁵²⁷ Hunter (interview 29 April 2003).

¹⁵²⁸ Dean (email 12 July 2007).

ground level and the upper boundary sufficiently far into airspace to include the roof of the unit. There is no such presumption for plans registered under the Subdivision Act. It is necessary to examine the boundary locations on the plan, and to show cross sections on plans and to indicate any upper and lower limits of lots. The legend must indicate whether the boundaries defined by buildings are located at the interior face, median or exterior face of walls, ceilings and floors.¹⁵²⁹

The regulations with the Strata Titles Act provided for buildings to be surveyed only to the degree of accuracy necessary to plot the plan to scale on a relatively small sheet. Thick lines could be used without dimensions to represent building lines, and heights and depths could be related to the site boundary or floors and ceilings without the need to quote levels. The survey and plan production was often much simpler than in stratum subdivision, but there were difficulties in the narrative style legend in many of the larger strata subdivisions, which arose when describing matters such as split levels, overlapping units, sloping sites, etc. Another problem was that since a lot could not consist of more than one piece, the practice of linking remote parts of a lot by an underground tunnel was introduced. Such a tunnel and other boundaries are not defined by walls or buildings required dimensions. These complications often led to various requisitions from the Land Titles Office. Many non-specialists also had problems with interpreting the plan and understanding the intention of the surveyor. There was inflexibility in the requirements for the presentation of plans, which led to problems with re-development of strata units.¹⁵³⁰

Since many plans under the Strata Titles Act did not adequately define boundaries, this caused problems when trying to ascertain that included in the common property. Some clarification to this is provided in the Body Corporate Regulations, such as that a thick line without measurements is a boundary defined by some structure, such as a wall or a fence, a broken line with measurements is a boundary on the land, and the boundary between lots, or lots and common property, is the centre of what separates them unless the plan specifies otherwise.¹⁵³¹

However, now there must be a notation on the plan which unambiguously defines the location of all boundaries defined by buildings, such as inside face, outside face, median, etc. There is no set method of describing the location of boundaries. The location is dependent on circumstances and the preferences of the surveyor and client. There are, however, some typical notations that are commonly used, for instance for the location of boundaries defined by buildings, where the median for boundaries is marked "M", the exterior face for boundaries marked "E" and interior face for all other boundaries.

¹⁵²⁹ Clements (1996), pp. 2.6-2.7.

¹⁵³⁰ Surveyors Board, Victoria (1994), p. 139.

¹⁵³¹ Libbis (1995), p. 425.

Boundaries defined by buildings are marked by thick continuous lines and lie along the median of walls, floors and ceilings.¹⁵³²

Cross-sections must be shown on the plan when any parts of lots, common property, roads or reserves are located above or below each other. These cross-sections are to show upper and lower limits of parcels, on which storey or level the parcels are situated, stairs, balconies or other features where appropriate, broken lines where boundaries are a projection of boundaries defined by buildings, vinculum across broken lines which are not parcel boundaries, site boundaries, and identification of storeys and site levels. Selection of what type of side view to be chosen is dependent on both circumstances and personal preferences. There must be sections, elevations or diagrams to fully define overlaps in three dimensions.¹⁵³³

Boundaries for a property can be defined by either the national coordinate systems or follow the existing building or road, etc. A national coordinate system was created in 1971. Before this, there were local systems within the different states.¹⁵³⁴ There are coordinates for title boundaries, but not for physical buildings.¹⁵³⁵ Since the boundaries in a building are defined according to the structure, a building is always needed before the boundaries can be set.¹⁵³⁶ The building is constructed, and then the plan is prepared in accordance with the as-built structure.¹⁵³⁷ The boundaries follow the building structure exactly, around balconies, antennas, etc.¹⁵³⁸

6.3.6 Easements

Specified implied easements for support and protection in favour of allotments in a building subdivision were introduced into the Transfer of Land Act to facilitate the subdivision of buildings and were the basis of the earlier type of stratum subdivision. Now section 12(2) in the Subdivision Act provides for a more comprehensive group of implied easements to operate in the subdivision of buildings.¹⁵³⁹ The implied easements are those given by law and not specified in the plan.¹⁵⁴⁰ Sub-section 12(2) of the Subdivision Act provides for implied easements over all the land on a plan of subdivision of a building, the part of a subdivision that subdivides a building, any land affected by a body corporate,

¹⁵³² Land Registry, Victoria.

¹⁵³³ Ibid.

¹⁵³⁴ Tulloch (interview 16 April 2003).

¹⁵³⁵ Battle (interview 16 April 2003).

¹⁵³⁶ Hunter (interview 29 April 2003).

¹⁵³⁷ Dean (email 12 July 2007).

¹⁵³⁸ Tulloch (interview 16 April 2003).

¹⁵³⁹ Surveyors Board, Victoria (1994), p. 139.

¹⁵⁴⁰ Tulloch (interview 16 April 2003).

and any land on a plan if the plan specifies that the sub-section applies to the land. In particular cases, a plan can make variations to implied easements.¹⁵⁴¹ According to the Act, certain features such as easements will be automatically created and thus do not have to be created by the surveyor.¹⁵⁴² These features are all easements and rights necessary to provide support, shelter or protection, passage or provision of water, sewage, drainage, gas, electricity, garbage, air or any other service, including for instance telephone, or for right of way, access to and use of lights for windows, doors or other openings, or for maintenance of overhanging eaves.¹⁵⁴³ The creation is made automatically upon registration. The details for these easements do not have to be specified. For easements needed that are not included in these implied easements, the place has to be mentioned and their purpose also specified and what will be included. For main pipes under a building, for instance, easements have to be created as this kind of pipe is not included in the implied ones.¹⁵⁴⁴ Since it is not clear where these implied easements might be located and that they simply exist automatically, authorities tend to dislike this feature. However, there have been court cases where implied easements have caused great negative effect, for instance, on the garden of a neighbour, and then other solutions have been reached.¹⁵⁴⁵

The easements needed that are not implied are expressed easements. They have to be specifically expressed and specified for a certain purpose and they are written on the subdivision plan. This can be compared with the implied easements that do not have to be marked on the plans and where it is not possible to determine where they are located, causing problems for the referral authorities.¹⁵⁴⁶ The Subdivision Act permits specification of easements in favour of some or all lots in the plan, land outside the plan and public statutory bodies, and the creation, removal and variation of easements or restrictions if a planning scheme or permit so authorizes.¹⁵⁴⁷

Easements are created if needed for sewage, electricity, water and gas. The referral authorities decide as to easements for sewage and water. Easements are also needed for access over the land from the building to a substation to collect sewage and such. Implied easements are always created over the common property, prescribed by law. If there is no body corporate, then there are also no implied easements. However, according to 12(2) of the Subdivision Act, there are implied easements even without a body corporate, if created within a

¹⁵⁴¹ Surveyors Board, Victoria (1994), p. 149.

¹⁵⁴² Tulloch (interview 16 April 2003).

¹⁵⁴³ *Subdivision Act 1988* (Vic), s. 12(2).

¹⁵⁴⁴ Tulloch (interview 16 April 2003).

¹⁵⁴⁵ Battle (interview 16 April 2003).

¹⁵⁴⁶ *Ibid.*

¹⁵⁴⁷ Surveyors Board, Victoria (1994), p. 153.

plan, but not for land. There are party wall easements for support and a support easement is part of the implied easement.¹⁵⁴⁸

6.3.7 Common Property

Common property is the land within a subdivision in strata, which is neither a main unit nor an accessory unit. All unit owners have a share in use and maintenance of the common property in proportion to their unit entitlement and unit liability, which is set out on the plan of subdivision.¹⁵⁴⁹ The extent of the common property depends on the size of the subdivision plan. In high-rise buildings, the common property may consist of the entire building, while in small bodies corporate, it may, for example, be only a driveway and letter-box.¹⁵⁵⁰

The land (ground) surrounding a building and belonging to the property may be common property, as well as the land underneath the building structure and the air above it,¹⁵⁵¹ but there are many different options for this under the Subdivision Act.¹⁵⁵² The most common solution is to include the main building structure in the common property, but it is possible to decide differently.¹⁵⁵³ In such a case, there is an implied right of support from the wall.¹⁵⁵⁴ The common facilities are formed as common property,¹⁵⁵⁵ and devices such as fans and heating units will usually belong to it.¹⁵⁵⁶ The façade is often included in the common property, but this is not compulsory and the best solution for each case is chosen. If the façade should be private property included in the units, there could be problems with different maintenance standards between the different parts.¹⁵⁵⁷ Since objects such as windowsills, damaged roofs, eaves and gutters can sometimes be part of a lot and other times common property, disputes often occur regarding who is liable for the repairs.¹⁵⁵⁸

The client and the body corporate manager usually decide what should be common property. There is, however, also a service authority requirement regarding what must be included in the common property. Power authorities

¹⁵⁴⁸ Yates (interview 30 April 2003).

¹⁵⁴⁹ Surveyors Board, Victoria (1994), p. 232.1.

¹⁵⁵⁰ Consumer Affairs Victoria (2004), p. 16.

¹⁵⁵¹ Tulloch (interview 16 April 2003).

¹⁵⁵² Dean (email 12 July 2007).

¹⁵⁵³ Battle (interview 16 April 2003).

¹⁵⁵⁴ Tyrrell (interview 17 April 2003).

¹⁵⁵⁵ Tulloch (interview 16 April 2003).

¹⁵⁵⁶ Battle (interview 16 April 2003).

¹⁵⁵⁷ Tulloch (interview 16 April 2003).

¹⁵⁵⁸ Libbis (1995), p. 418.

must also give their consent. The electricity authority often does not approve of implied easements.¹⁵⁵⁹

If there is common property, the extent of it must be fully defined by notation or diagram, and a separate title must be issued for each numbered common property, as each is a separate parcel.¹⁵⁶⁰ In the Subdivision (Body Corporate) Regulations, a set of standard rules is given for the use of common property and lots that apply to all bodies corporate. Other rules may be made in addition to the standard rules.¹⁵⁶¹

Shares

Every lot that is affected by a body corporate must have both a lot entitlement and lot liability.¹⁵⁶² In the body corporate schedule, the liability and entitlement of each lot that is a member is shown.¹⁵⁶³ Shares are often based on area or on value of a unit. The solution of basing it on value can create problems, since people tend to disagree about this. A standard ratio is often used.¹⁵⁶⁴ The proportion of lot liability is the share of body corporate expenses that a lot bears, and entitlement is the share of ownership of the common property. There is no restriction on how a sub-divider allocates liability or entitlement on a plan, however, it should be reasonable. It is also not necessary for lot entitlement and liability to be equal. A lot owner cannot be required to contribute more to body corporate expenses than the proportion of the lot liability, unless certain works provide greater benefit for some lots. There might be unequal relations, particularly in mixed-use subdivisions where the use of some lots results in greater expenses for the body corporate for such things as insurance.¹⁵⁶⁵ If new parts are added to an already existing building, it is not always necessary to recalculate the shares.¹⁵⁶⁶ When a body corporate is dissolved, the lots and common property become a single lot and vest in the lot owners as tenants in common in proportion to the lot entitlements. Lots of different value could then have the same lot entitlement, which is often the result of lots being sold before there is a building on them. If the lot entitlement does not reflect the value of the lots, then there can be an unjust result on the winding up of the body corporate.¹⁵⁶⁷

¹⁵⁵⁹ Tyrrell (interview 17 April 2003).

¹⁵⁶⁰ Land Registry, Victoria.

¹⁵⁶¹ *Subdivision (Body Corporate) Regulations 2001* (Vic), Form 1, s. 220.

¹⁵⁶² Land Registry, Victoria.

¹⁵⁶³ Libbis (1996), pp. 1.4-1.5, 4.4.

¹⁵⁶⁴ Tyrrell (interview 17 April 2003).

¹⁵⁶⁵ Libbis (1996), pp. 1.4-1.5, 4.4.

¹⁵⁶⁶ Battle (interview 16 April 2003).

¹⁵⁶⁷ Libbis (1996), pp. 1.4-1.5, 4.4.

How the lot liability and entitlement is allocated has consequences not only for the determination of shares of expenses to be paid by each lot, but can also determine voting rights at meetings of the body corporate. Some developers, who are retaining land affected by the body corporate, set up the lot entitlement in such a way that they can achieve a 75% majority based on lot entitlement, which gives them virtual control over the body corporate.¹⁵⁶⁸

For the lot liability and entitlement to be changed, a unanimous resolution is required.¹⁵⁶⁹ When the body corporate makes changes to the lot entitlement, it must consider the value of the lot and the proportion that this value has to the total value of the lots affected by the body corporate. When changes are made to the lot liability, the body corporate must have regard to the amount that would be just and equitable for the owner of the lot to contribute towards the administrative and general expenses of the body corporate.¹⁵⁷⁰ When allocating the entitlement and liability on a plan, however, there is no guarantee that the value will be taken into account.¹⁵⁷¹

6.3.8 Rules

In the Subdivision (Body Corporate) Regulations, there is a standard set of six rules for bodies corporate. These rules regulating the actions of the body corporate were previously called by-laws. They are in general sufficient for the average one and two bedroom developments in blocks of three to twelve, but for larger multi-storey developments, there must be more specific rules dealing with issues as the use of facilities, such as elevators, air-conditioning systems, swimming pools and gymnasiums.¹⁵⁷² The standard rules in the Subdivision (Body Corporate) Regulations apply unless a body corporate by special resolution makes special rules, which may include any or all of the standard rules.¹⁵⁷³ The standard rules are often not appropriate, since there is a wide variety of a use for bodies corporate.¹⁵⁷⁴ If additional rules apply, they must be supplied, as an entry in the Body Corporate schedule with the Plan of Subdivision, as sheets of the plan, or as documents in support of the plan. The notation must in that case state that special rules apply.¹⁵⁷⁵ The new rules must be considered by 75% of the members. Included in the special rules may be regulations about such matters as the use of parking spaces, exterior alterations

¹⁵⁶⁸ Libbis (1993), p. 4.4.

¹⁵⁶⁹ Libbis (1996), pp. 1.4-1.5.

¹⁵⁷⁰ *Subdivision Act 1988* (Vic), s. 33.

¹⁵⁷¹ Libbis (1993), p. 4.4.

¹⁵⁷² McGrath (1993), pp. 1.4-1.8.

¹⁵⁷³ Clements (1996), pp. 2.3-2.5.

¹⁵⁷⁴ Libbis (1993), p. 4.3.

¹⁵⁷⁵ Land Registry, Victoria.

and where to deposit rubbish and hang laundry.¹⁵⁷⁶ The sub-divider is also allowed to lodge rules with the plan. The standard rules then do not apply and the proposed rules will form part of the plan. If the rules are changed by the body corporate, the Titles Office must be notified.¹⁵⁷⁷

A body corporate has a broad rule making power and can make rules covering both lots and common property. The members must obey the special rules and ensure that their tenants also do so. However, the rules cannot be inconsistent with the Act or regulations. Special rules are usually essential for larger multi-storey or mixed-use developments for effective operation of the body corporate. Each limited body corporate can have its own set of rules concerning the common property for which it is responsible. Examples of useful rules are no erection of buildings or structures within the lot boundaries without the consent of the body corporate, no external alterations to a lot without the consent of the body corporate, and keeping the floors of lots carpeted or sufficiently covered to prevent intrusion of noise into adjoining lots.¹⁵⁷⁸

When the plan of subdivision has been registered, the rules may only be changed by special resolution, which is with 75% majority, often difficult to achieve. This obstacle is sometimes avoided by a sub-divider passing a resolution immediately after the plan is registered while the sub-divider still controls the body corporate. This can be avoided by lodging proposed rules with the plan, which then on registration of the plan become the rules of the body corporate. If the rules are included as part of the plan, the problem in relation to changing the rules after registration is overcome. To achieve this, it is necessary to write in the plan that standard rules do not apply, and then let the proposed rules accompany the plan.¹⁵⁷⁹

The rules concerning the powers, obligations and administration of the body corporate can be supplemented, amended or repealed only by unanimous resolution of the members. Some rules are more like house-rules concerning management of the body corporate, concerned with particular instances of the community code of living within the development, such as ownership of animals, colours of external surfaces, etc. Those kinds of rules can be amended or repealed by a majority of the members.¹⁵⁸⁰

¹⁵⁷⁶ McGrath (1993), pp. 1.5-1.8.

¹⁵⁷⁷ Libbis (1996), p. 1.4.

¹⁵⁷⁸ Clements (1996), pp. 2.3-2.5.

¹⁵⁷⁹ Libbis (1993), pp. 4.3-4.4.

¹⁵⁸⁰ Surveyors Board, Victoria (1994), p. 232.1.

6.3.9 The Body Corporate

Bodies corporate were formed by the proclamation of the 1967 Strata Titles Act, which has subsequently been repealed and replaced by the Subdivision Act, and for which most of the day-to-day management of bodies corporate is covered by a set of regulations. These regulations have been under review in many instances.¹⁵⁸¹

A statutory body corporate automatically comes into existence upon registration of the plan at the Land Titles Office. The members of the body corporate are the registered proprietors of the units at any particular time. The body corporate is responsible for the upkeep and maintenance of the common property, the insurance of buildings and the general administration of the units.¹⁵⁸² It provides a mechanism to make it easier for owners of common property to make management decisions. Without the connected regulatory framework, the owners as tenants in common would need a unanimous agreement for every action. The regulatory framework established under the 1988 Subdivision Act provides the mechanism for setting up, managing and operating the legal entity of the body corporate.¹⁵⁸³

In Victoria there are presently approximately 65 000 bodies corporate,¹⁵⁸⁴ and there is a recent increase in higher density living. Around 2000 new bodies corporate are created each year in Victoria. Between 2001 and 2003 there was an average rate of 6.9 lots per body corporate. There are many different situations when a body corporate can be created, for example for two lot residential units, apartments, high-rise office blocks, industrial land and complexes, hotels, retirement villages, holiday apartments, complex mixed retail and residential units, shopping centres, markets, car parks, farms and vineyards.¹⁵⁸⁵

Before the Subdivision Act, there was no difficulty determining whether a body corporate would be created by a plan of subdivision. All strata and cluster plans created a body corporate, and other subdivisions did not. The Subdivision Act introduced the flexibility that a body corporate could be created on any plan of subdivision. The only type where it must be created is where there is common property. More than one body corporate can be created on a plan. It is also possible to have a body corporate where there is no common property. Unlike strata and cluster plans, it is not necessary for the owners of all lots to be members of the body corporate. If there is more than one body corporate, it

¹⁵⁸¹ McGrath (1993), p. 1.3.

¹⁵⁸² Surveyors Board, Victoria (1994), p. 232.1.

¹⁵⁸³ Consumer Affairs Victoria (2004), p. 1.

¹⁵⁸⁴ Consumer Affairs Victoria (2006a), p. 1.

¹⁵⁸⁵ Consumer Affairs Victoria (2004), pp. 2-3.

may also happen that common property created on a plan will not be under the control of a body corporate on the same plan.¹⁵⁸⁶

When a plan containing a body corporate is altered, there are some issues to consider, such as the disposition of common property, the acquisition of land to be included in common property, the acquisition to, or removal from, land affected by a body corporate, the consolidation or re-subdivision of lots, the creation, variation or removal of easements, and the dissolution of bodies corporate or the creation of new bodies corporate, provided that no lot is affected by more than one unlimited body corporate. These factors apply equally to bodies corporate originally created in strata or cluster subdivisions.¹⁵⁸⁷

There are extensive regulations under the Subdivision Act, which cover plans, powers and duties, standards, time limits, insurance requirements for bodies corporate, the standard of survey markings, and the powers and duties of the Registrar and fees.¹⁵⁸⁸ These functions, for example, are to repair and maintain the common property, fixtures and services related to it, to manage and administer the common property, and to take out premiums on insurance.¹⁵⁸⁹ These also cover the requirements, powers, fees and duties of the council and referring authorities.¹⁵⁹⁰ However, many disputes arise just because it is not clear who is responsible for maintenance and repair.¹⁵⁹¹

There are certain actions that are possible for a body corporate to take if there is a unanimous resolution of the members. It may dispose of all or part of any common property or other land purchased or obtained by it, purchase or otherwise obtain land for inclusion in or to become common property or a lot, alter boundaries, increase or reduce the number of lots affected by the body corporate, as well as create new lots or new common property. It can also create and name a body corporate, dissolve itself if it owns no land and has no common property, or if it disposes of all its common property and all the land it owns, merge with another body corporate under certain circumstances, create, vary or remove any easement or restriction, consolidate into a single lot all land affected by the body corporate under some conditions, and create, alter or extinguish lot entitlement. There is also power to amend or cancel a scheme of development under the Cluster Titles Act or to create roads or reserves.¹⁵⁹²

The owner of a lot affected by the body corporate can also consolidate, subdivide or alter the lot, provided that the common property boundaries are not changed, or the entitlement or liability of the lots is not changed. If the

¹⁵⁸⁶ Libbis (1996), pp. 1.1-1.3.

¹⁵⁸⁷ Surveyors Board, Victoria (1994), p. 154.

¹⁵⁸⁸ Ibid. at p. 232.13.

¹⁵⁸⁹ *Subdivision (Body Corporate) Regulations 2001* (Vic), s. 201.

¹⁵⁹⁰ Surveyors Board, Victoria (1994), p. 232.13.

¹⁵⁹¹ McGrath (1993), p. 1.3.

¹⁵⁹² Surveyors Board, Victoria (1994), pp. 232.10-232.11.

owner proceeds in this manner, a plan showing the changes to be made to the registered plan must be submitted for certification and registration. A body corporate, member, mortgagee or administrator may make an application to the County Court to wind up the body corporate. A court then can order the winding up of a body corporate, and make directions, vary or modify the order. Any subsequent dissolution, amendments and cancellations require, however, the Registrar to notify the council of such happenings.¹⁵⁹³

Multiple Bodies Corporate

The Subdivision Act introduced more flexible solutions concerning bodies corporate. In a plan of subdivision, there may be one or more bodies corporate with or without common property. There may be lots that are not members of any body corporate on the plan, and lots that are members of an unlimited body corporate, and in addition of one or more limited bodies corporate. Such a plan may also have ownership of common property vested in an unlimited body corporate with the right to use the common property that is available only to members of a limited body corporate.¹⁵⁹⁴ A limited body corporate is a subsidiary body corporate, but it can exist without an unlimited body corporate. It is used when multiple bodies corporate are created by one plan, and they cannot have control of all common property, but lot owners may be members of more than one body corporate.¹⁵⁹⁵

The option that a plan can create more than one body corporate is useful when lot owners of a plan use different parts of common property, for instance in a multi-storey building where the occupants of the ground floor are not using the elevator. There may, for example, be one limited body corporate responsible for the elevator, of which the owners on the ground floor would not be members. There would also be an unlimited body corporate responsible for the rest of the building, in which all lot owners are members. Using different bodies corporate is a way of avoiding disputes resulting from members being required to contribute to body corporate expenses for which they obtain no benefit.¹⁵⁹⁶ This changing nature and size of subdivisions, especially when it comes to the growth in multi-storey and multi-tower subdivisions, has brought into focus the ambiguities and deficiencies of the Subdivision Act and Regulation in relation to multiple bodies corporate on a plan.¹⁵⁹⁷

¹⁵⁹³ Ibid.

¹⁵⁹⁴ Ibid. at p. 154.

¹⁵⁹⁵ Libbis (1996), p. 1.3.

¹⁵⁹⁶ Libbis (1996), pp. 1.1-1.3.

¹⁵⁹⁷ Consumer Affairs Victoria (2004), p. 30.

There are, however, some restrictions for creating multiple bodies corporate within a plan of subdivision. Since a body corporate does not have to affect all lots within a plan, there is no reason why there could not be more than one unlimited body corporate created within a plan, provided that no lot is affected by more than one of them. If more than one body corporate should be created within a plan, it must be checked that no lot is affected by more than one unlimited body corporate. This must also be considered when bodies corporate are merged.¹⁵⁹⁸

The unlimited body corporate deals with the entire building, while the limited ones take care of a service, etc. The entitlement liability for upkeep etc. will decide how much each lot pays. The proportions are decided upon how much each part is worth. For instance, if there is a gymnasium on one floor, it will be partitioned out to the different properties. In the common property everyone will get a portion. There can also be separate unlimited bodies corporate, such as one just for the residential part of the building. To this is then added the limited bodies corporate. A problem with overlapping bodies corporate, however, is how to proceed with the common land. A unanimous resolution is needed for that, to which all interested parties must consent.¹⁵⁹⁹

It is also possible to merge bodies corporate when they want to share each other's facilities or have common interests. To be able to do this, a unanimous resolution of both bodies corporate must be obtained. They must also be completely separate with no land affected by both bodies corporate and must not result in a lot being affected by more than one unlimited body corporate.¹⁶⁰⁰ However, as mentioned, it is of course possible for lots to be affected by more than one body corporate if only one of them is unlimited and the rest limited.¹⁶⁰¹

6.3.10 Management

Management of bodies corporate has become even more important after the introduction of the Subdivision Act and the Subdivision (Body Corporate) Regulations.¹⁶⁰² New regulations for the management of bodies corporate were introduced by the 2001 Subdivision (Body Corporate) Regulations. They replaced the short-lived 2000 Subdivision (Body Corporate) (Interim) Regulations that in their turn had replaced the 1989 Subdivision (Body Corporate) Regulations.¹⁶⁰³ Management can be carried out by professional

¹⁵⁹⁸ Libbis (1993), pp. 4.2-4.3.

¹⁵⁹⁹ Battle (interview 16 April 2003).

¹⁶⁰⁰ Libbis (1996), p. 1.3.

¹⁶⁰¹ Libbis (1993), pp. 4.2-4.3.

¹⁶⁰² Clements (1996), p. 2.1.

¹⁶⁰³ Libbis (2001), p. 61.

managing agents or by the members themselves. The flexibility in the subdivision procedures has often resulted in complexity from a management point of view, regarding, for instance, the high-rise multi-unit nature of the development, from the lots being used for different purposes in the same development, such as residential with commercial, and from limited bodies corporate within an unlimited body corporate structure. The result of this is an increasing number of bodies corporate with large budgets requiring maintenance of sophisticated building systems, such as elevators and air-conditioning, the management of facilities, such as swimming pools and gymnasiums, the engagement of an on-site building manager and use for business purposes, such as serviced offices and apartments.¹⁶⁰⁴

The day-to-day issues concerning maintenance and management issues create the most problems.¹⁶⁰⁵ Disagreements often arise between members or between member and body corporate regarding who must pay for repairs and maintenance of common property, for which the body corporate would otherwise be responsible. The body corporate must repair and maintain the common property, all chattels, fixtures and fittings related to the common property or its enjoyment, and all apparatus, equipment and services for which an easement exists for the benefit of all land affected by the body corporate. The members must repair their lots, and any exclusive service to the lots, regardless of whether the service passes through the common property.¹⁶⁰⁶

In those developments where the largest part of the building lies within the lot boundaries, the members are responsible for most of the external repairs and maintenance. However, the body corporate must still take any action necessary to ensure that the regulations are obeyed. If a lot is not in a good state, a notice may be served on the offending member requiring the necessary repairs. The expenses of the body corporate are recoverable from the members on the basis of lot liability, but it can be difficult to decide whether repairs, maintenance or other works are wholly or substantially for the benefit of one or more but not all the lots in a development.¹⁶⁰⁷

The members of the body corporate usually meet once or twice per year at a general meeting to approve the annual expenditures and levies, or to consider particular items of importance. For most developments, unless very small, it is necessary to delegate some or all of its functions, duties and powers to an agent to make day-to-day operations work efficiently. Most functions may be delegated to a committee, secretary, managing agent or other officers.¹⁶⁰⁸

In larger developments, professional managers are often used for the body corporate, however, they are not always involved from the start. Using this type

¹⁶⁰⁴ Clements (1996), p. 2.1.

¹⁶⁰⁵ Tyrrell (interview 17 April 2003).

¹⁶⁰⁶ Clements (1996), p. 2.6.

¹⁶⁰⁷ Clements (1996), pp. 2.7-2.9.

¹⁶⁰⁸ *Ibid.* at pp. 2.11-2.12.

of managers means that there is a more limited influence by the residents.¹⁶⁰⁹ The body corporate manager should be engaged early in the development process, and is to work together with the developer, planner, architect, surveyor and solicitor. The selection of such a manager should reflect the particular expertise that a manager should have in the type of development that is made.¹⁶¹⁰ A professional managing agent will receive a fee for services. The managers must take out professional indemnity insurance to meet claims for negligence, as well as fidelity guarantee insurance.¹⁶¹¹ There has been a substantial increase in professional body corporate managers. Professional management skills have developed and become more sophisticated as new types of developments have emerged, some with multiple bodies corporate, created to handle a combination of apartments, commercial outlets and the substantial facilities and amenities attached to this.¹⁶¹²

6.3.11 The Settlement of Disputes

There are not many court cases, but issues that arise concerning the management of bodies corporate that are potential areas for litigation, for instance, are the extent of the rulemaking power of the body corporate, repair and maintenance of the common property, the potential for claims against the body corporate by a person injured on common property due to a failure to repair and maintain common property, and whether the body corporate is entitled to recover the costs of repairs, maintenance or other works on common property from a particular member who substantially benefits from it. Other issues are disputes between contending groups of members over the running of the body corporate, the appointment of an administrator if a body corporate is not operating efficiently, enforcement of the standard of special rules following persistent breach by members, such as excessive noise or parking vehicles illegally on common property, and recovery of unpaid body corporate levies and charges.¹⁶¹³

Previously, problems between members of a body corporate ended up before the Supreme Court, which involved high costs. A case of such a type could be that by-laws controlling the use of the common property were too restrictive. One of the key issues surrounding problems in bodies corporate is the rights of tenants in common. A member's occupancy can only be controlled by a set of rules. Beginning 1990, the Magistrates Court Act came into force

¹⁶⁰⁹ Tyrrell (interview 17 April 2003).

¹⁶¹⁰ Sanders (1997), p. 2.

¹⁶¹¹ Clements (1996), pp. 2.11-2.12.

¹⁶¹² Sanders (1997), p. 2.

¹⁶¹³ Clements (1996), p. 2.2.

and from that point it became possible to take these kind of issues to that forum for adjudication and resolution.¹⁶¹⁴

The Subdivision Act provides that disputes between members of a body corporate are civil disputes and that the parties can apply to the Magistrates' Court for an order, or they have to be resolved in civil court. There is no special tribunal for this type of issues.¹⁶¹⁵ The regulatory framework does not provide for any additional dispute resolution over and above that generally available for other neighbourhood disputes. Members of the public that wish to resolve a body corporate dispute may obtain information from Consumer Affairs Victoria and seek assistance from a community legal service, the Dispute Settlement Centre of Victoria or the Magistrates' Court. Some limited disputes may be heard at the Victorian Civil and Administrative Tribunal, which has the jurisdiction to resolve disputes regarding residential tenancies, planning and structural building defects disputes. The Magistrates' Court is the jurisdiction to resolve debt recovery and fencing disputes. It is not clear what parts of government that provide assistance on body corporate issues, and while assistance can be sought from some non-governmental organisations, it is only the Magistrates' Court that provides enforceable decisions.¹⁶¹⁶

The Dispute Settlement Centre Victoria provides free mediation services to assist parties to identify issues in a neutral and mutual way for a structured discussion to resolve the dispute. The most frequent issues are related to maintenance and repairs of common property, followed by concerns about the body corporate managers and fees, as well as generally unsociable behaviour. The disputes to the Magistrates' Court that concern the body corporate have increased substantially recently, at a rate greater than the growth in the numbers of bodies corporate. The majority of these disputes concern rights and obligations and debt recovery.¹⁶¹⁷

The Magistrates' Court may refer the dispute to the County Court due to the importance or complexity of the case. Other cases may involve alteration of the plan or damage to buildings, or the payment of insurance money under any policy taken out by a body corporate. A body corporate or someone with an interest in the land can by application seek the appointment of an administrator by the County or Supreme Court. The Court is not to issue an order regarding the alteration of the plan unless it is satisfied that certain conditions have been met. There are also provisions for the payment of an administrator's costs and for the issue of an order authorising the Registrar to dispense with the delivery of a certificate of title or instrument. An owner, applicant, council or a referral authority may refer a dispute to the Administrative Appeals Tribunal for a determination, with some exceptions. The County Court can order that the

¹⁶¹⁴ McGrath (1993), pp. 1.4-1.7.

¹⁶¹⁵ Tyrrell (interview 17 April 2003).

¹⁶¹⁶ Consumer Affairs Victoria (2004), pp. 7-11.

¹⁶¹⁷ Consumer Affairs Victoria (2004), pp. 7-8.

registration of a certified plan be stopped if there have been breaches, or failure to disclose facts, etc. In cases of land acquisitions by public authorities, the dispute must be referred to the Minister, whose decision takes the place of the council or referral authority. If a council refuses or fails to certify a plan, an appeal can be made to the Administrative Appeals Tribunal. The same applies to a referral authority, but also includes requirements for certain works to be done. Other grounds are that a council or referral authority requires alterations to a plan or requires an applicant to enter into certain agreements.¹⁶¹⁸

The existing dispute settlement system is regarded as too difficult.¹⁶¹⁹ The present dispute resolution mechanisms cause some frustration and an improvement has been requested. The shortcomings include that some issues cannot be dealt with by the free mediation service provided by the Dispute Settlement Centre of Victoria, due to legislative requirements that cannot be varied, such as allocation of lot liability. The main reason for disputes is often lack of information and conflicting advice. Mediation is not regarded as adequate by some experts, since it does not offer any options or solutions, and is not enforceable. The dispute resolution provided by the Magistrates' Court is considered too expensive, daunting and with uncertain outcomes. The legal costs often become disproportionate to the nature of the dispute, as the body corporate must be represented by a solicitor. A low cost, flexible and comprehensive alternative dispute resolution model has been called for, facilitating communications and empowering members of the body corporate to resolve most issues without an application to a Tribunal or Court.¹⁶²⁰

Suggestions have been made to adopt the dispute models of New South Wales, Queensland, Tasmania or Western Australia. A recent proposal suggests that the Subdivision Act provides body corporate members with a 4-tiered dispute resolution process, in part reflecting the successful provisions of the Strata Property Act in British Columbia, Canada. The first of these tiers would be an internal process requiring members to talk about the issue and resolve it themselves. The second tier suggests an expert body corporate trained conciliator to assist the parties to resolve the issues. In the third tier an expert body corporate person or body would be able to determine day-to-day issues that need to be resolved quickly, such as rules and meeting procedures. The fourth tier would have an expert Court or Tribunal to resolve more complex technical and legal issues. The aim of this model is to provide a flexible low cost model that empowers members and builds relationships within the body corporate. The idea is that some issues are best and most efficiently handled by the body corporate members themselves, and the Government dispute resolution services are only to be used if an attempt to resolve the dispute

¹⁶¹⁸ Surveyors Board, Victoria (1994), p. 232.13.

¹⁶¹⁹ Tyrrell (interview 17 April 2003).

¹⁶²⁰ Consumer Affairs Victoria (2004), pp. 10-12.

through the body corporate internal process has been formally recorded.¹⁶²¹ The new system for settlement of disputes that will be introduced in 2007, however, includes three tiers, where the first consists of an internal dispute resolution process within the owners corporations, the second is to contact Consumer Affairs Victoria, which can conciliate or mediate between the parties, and as the third tier there is the Victorian Civil and Administrative Tribunal, which can resolve disputes and make binding determinations.¹⁶²²

6.3.12 Staged Subdivisions

A staged subdivision is the procedure of carrying out a subdivision in a number of parts or stages. The purpose is to give flexibility to the sub-divider. It allows creation of additional lots on subsequent stages, creation of bodies corporate and lot liability, creation, variation or removal of easements and covenants as well as setting aside additional roads and reserves. In each stage, the plan can be changed by adding to the membership of a body corporate, adding common property, changing lot entitlement and lot liability, and affecting it by easements and covenants. Earlier plans can be amended in any way necessary, given some limitations, and this can be done without obtaining the consent of the owners of lots in earlier stages.¹⁶²³

It is possible to produce a plan of subdivision that specifies certain lots as the first stage and provides single or multiple lots for subsequent subdivision. One single planning permit, obtained at the beginning of the process, controls the entire operation. Staged development also gives flexibility to allow changes to be made to take account of consumer demands, etc. Several matters by this can be handled by developer without the need for the unanimous consent of the body corporate. Matters that can be changed include altering the lot dimensions to suit client demands, changing the location of lots and reserves, re-routing the path of an easement, and recalculating lot entitlements and liabilities. It is also possible to defer the payment of open space contributions to a later stage.¹⁶²⁴

If a planning scheme or permit authorises a staged subdivision, a master plan specifying the lot numbers in the first stage, and in addition a second or a subsequent stage, must contain, like the first, the prescribed information. The second stage can create additional lots, or alter lots on that stage, create bodies corporate, lot entitlement, etc. It can also create, vary or remove easements or restrictions over the land in that stage. It can amend the master plan or plan of an earlier stage by adding to the membership of a body corporate, or to the

¹⁶²¹ Consumer Affairs Victoria (2004), p. 12.

¹⁶²² Consumer Affairs Victoria (2006a), pp. 1-3.

¹⁶²³ Libbis (1996), p. 1.6.

¹⁶²⁴ Surveyors Board, Victoria (1994), p. 155.

existing common property, or change lot liability. It can also amend the master plan to show lands as land benefited by an easement or restriction created over the second and subsequent stage. A plan for the second or subsequent stage may be submitted for certification and lodged by the owner of all the land in that stage or the applicant for the master plan. The Registrar is required to record the prescribed information and make any necessary amendments to the earlier stage or subsequent stage. Subsequent stages may require providing a lot number. When the plan is registered, any requirements made in the statement of compliance for the master plan cease to apply to land in the newly registered plan.¹⁶²⁵

6.3.13 Insurance

How a development affected by a body corporate should be insured has become a much-debated question. The body corporate formerly was required to take out insurance if there are lots above or below other lots, or if there is common property above or below lots, or if there are buildings on common property affected by the body corporate. This requirement proved too extensive, since it covered many smaller single storey developments registered under the Strata Titles Act, where the only common property is ground beneath the lot or airspace above the lots. The required insurance is reinstatement and replacement insurance and public liability insurance.¹⁶²⁶ The public liability insurance is intended for situations when the body corporate would have to pay compensation for any bodily injury, death or illness of a person, or for any damage to or loss of property, which happened in connection with common property or a lot. The reinstatement and replacement insurance is needed if damage to property should occur, to cover the cost to replace, repair or rebuild the property and other costs needed in connection with that.¹⁶²⁷ If those insurances are not required to be taken out by the body corporate, the members can decide by special resolution to do so, or to take out insurance in their own names.¹⁶²⁸

The former Subdivision (Body Corporate) Regulations required a body corporate to take out reinstatement and public liability insurance for all the buildings on common property and for all lots and common property in a multi-storey development, which meant that for a large number of developments the body corporate was not required to take out public liability insurance on common property. The new regulations, however, require a body corporate to have public liability insurance for all common property. A body

¹⁶²⁵ Ibid. at pp. 232.12-232.13.

¹⁶²⁶ Clements (1996), p. 2.13.

¹⁶²⁷ *Subdivision (Body Corporate) Regulations 2001* (Vic), ss. 213-214.

¹⁶²⁸ Clements (1996), p. 2.13.

corporate can also by special resolution decide to take out additional insurance, relating to the performance of its functions. The former regulations allowed a body corporate by special resolution to require members to arrange their own insurance, if body corporate insurance was not compulsory.¹⁶²⁹ There is an equivalent in the new regulations, where the body corporate may decide to take out additional insurance for other purposes as well. If there is no common property, insurance is not required, and the body corporate can decide that its members must arrange their own insurance. Nor is insurance needed if another body corporate has insured that particular land.¹⁶³⁰ Any application for this rule seems hard to find, because it can only appear where there is no common property, which is rare, and a unanimous resolution of the body corporate is required, which is difficult to achieve. It must then be recorded with the rules of the body corporate, and has no effect until the Land Registry is notified.¹⁶³¹

The intent of the regulations was to make insurance compulsory in the name of the body corporate only for multi-storey developments. Even when it is not compulsory, members have experienced difficulties in obtaining coverage from insurance companies for their share of the reinstatement insurance and public liability insurance for common property. The insurance industry, among others, argues that all insurances for a development affected by a body corporate should be in the name of the body corporate. This is, however, regarded impractical regarding the diversity of developments that can be affected by a created body corporate. There are developments consisting of few units with little common property and others affected by a body corporate where there is no common property, but the body corporate is created to be responsible for maintaining sewage and other services to the affected lots. It then can be considered unreasonable for all insurances to be in the name of the body corporate. Because of this, the intention is to ensure that all developments have appropriate coverage for reinstatement and replacement insurance and public liability, but it can be achieved by one policy in the name of the body corporate, a mix of policies where some are in the name of the body corporate and others in the names of members, or by members' policies alone. The regulations leave it to the parties to negotiate with insurance companies about particular terms and conditions.¹⁶³²

The insurance section has been one of the most controversial and confusing parts of the Subdivision (Body Corporate) Regulations. This is particularly the case when compared with the Strata Titles Act, which made all body corporate insurance for both the buildings and public liability compulsory, except for when all members by unanimous resolution determined otherwise. The Subdivision (Body Corporate) Regulations changed this, since the intention

¹⁶²⁹ Libbis (2001), pp. 61-62.

¹⁶³⁰ *Subdivision (Body Corporate) Regulations 2001* (Vic), ss. 215-217.

¹⁶³¹ Libbis (2001), pp. 61-62.

¹⁶³² Clements (1996), pp. 2.13-2.14.

of the regulations when it comes to insurances was to simplify and specify minimum insurance requirements, considering the flexibility regarding developments that the Subdivision Act allows, but it has not been the case. The Subdivision Act states that a body corporate has an insurable interest in the lots and common property affected by it. There are general duties of the body corporate in the regulations to take out, maintain and pay premiums on insurance required by any Act or the regulations, or as it may deem expedient.¹⁶³³

The intention is that the insurance is to be compulsory for the body corporate to arrange, but for multilevel or multi-storey subdivisions it is not necessarily the case, if the regulation is interpreted to the broadest form. The insurance requirements for a body corporate of a multi-storey subdivision are more straightforward than for single storey subdivisions, where considerable confusion exists. To clarify the requirements for insurance concerning such subdivisions, it is necessary to refer to the legend of a Strata Subdivision or Plan of Subdivision and determine the upper and lower boundaries of such subdivision, and then establishing if there is any common property above or below such boundaries. If there is air space above and land below the lots that are common property, the insurance is compulsory for the body corporate to take out, even if the subdivision is not of a multi-storey type. It is, however, very uncommon for Strata Subdivisions where common property is not defined as being above or below any lots, reserves or other lots. However, the situation is changing, since due to the flexibility of the Subdivision Act, more non-conventional strata developments are completed. The intention should not have been from the legislators' side that such a complex procedure should be made to determine the requirements for insurance, and the average self managed body corporate would not carry out such a procedure.¹⁶³⁴

If the members decide by special resolution that one or more insurances will not be taken out in the name of the body corporate, the Registrar of Titles must be notified of this as a special rule of the body corporate. For this to be valid, the members must be able to take out necessary insurances in their own names covering any insurable common property against public liability and insurable common property on a reinstatement and replacement basis, where lots are located above or below insurable common property or other lots. The insurance companies determine whether the effect will be that less insurance is taken out in the name of the body corporate. Many may not be prepared to indemnify members under policies covering only their share of liability in respect of the common property.¹⁶³⁵

Even if there might not be many cases where insurance is not required of the body corporate, it is more practical and considerably cheaper for a body

¹⁶³³ Helwig (1993), p. 3.1.

¹⁶³⁴ Ibid. at pp. 3.2-3.4.

¹⁶³⁵ Clements (1996), pp. 2.14-2.15.

corporate to collectively insure. The body corporate can also obtain a much more comprehensive policy coverage that it otherwise would not have access to, due to the availability of specialised body corporate products in the market, designed specifically for their requirements.¹⁶³⁶

If a lot is mortgaged, the mortgagee cannot require the owners to include their share in the common property in the insurance coverage, unless the mortgagee's interest in the lot is noted on the policy of the body corporate, and unless the sum insured for the lot and share is less than the sum owing under the mortgage, and the extra insurance is for the amount of the difference. In the case of damage or loss to an owner who has a lot affected by the policy of the body corporate, there is provision for the insurer to pay the owner for either re-instatement, or a sum up to the insured value.¹⁶³⁷

It is required in the Sale of Land Act that when a lot that is affected by a body corporate is sold and insurance required by the regulations, a vendor or developer must take out insurance in the name of the body corporate from registration of the plan to the first annual general meeting of the body corporate that is held within six months of the registration of the plan. The purchaser of a lot may cancel the contract if the required insurance has not been taken out.¹⁶³⁸ Many bodies corporate do not have public liability insurance for common property, since this was not always compulsory under the former regulations, but under the new regulations it is, and because of that, contracts for the sale lots sold without this type of insurance will be voidable by the purchaser. In such a case, it is important to ensure that the appropriate body corporate insurance is in place before the contract is signed.¹⁶³⁹

One problem has been that developers have cancelled the insurance, leaving it up to the body corporate to insure, perhaps without informing the body corporate or any of the owners that they are uninsured. For developments involving mixtures of commercial, industrial and residential use, the particular use of a high-risk lot can lead to an increased premium for the whole development, and there is no provision in the Act or Regulations to overcome such inequities.¹⁶⁴⁰

The majority of the existing Strata Subdivisions and Plans of Subdivision are self-managed or unstructured bodies corporate, and often not even aware of the existence, requirements or implications of the legislation, especially regarding the insurance section of the Subdivision (Body Corporate) Regulations. Many bodies corporate and members are particularly confused regarding their obligations when receiving conflicting advice. A lack of publicity regarding the requirements of the legislation and a lack of available advisory

¹⁶³⁶ Helwig (1993), p. 3.1.

¹⁶³⁷ Surveyors Board, Victoria (1994), p. 232.10.

¹⁶³⁸ Helwig (1993), p. 3.4.

¹⁶³⁹ Libbis (2001), p. 62.

¹⁶⁴⁰ Brotchie (1996), p. 3.7.

services to assist in resolving disputes are obvious problems for bodies corporate. It has been considered that the Victorian legislation in this respect is poorly drafted and has complicated the procedures, not following the insurance requirements and body corporate advisory departments available in other states in Australia. However, changes are and have been made to simplify and adapt to the varying forms of subdivision developed under the Subdivision Act.¹⁶⁴¹

In the review of the Subdivision Act that is currently underway concerning bodies corporate, there is a call for more flexibility in the minimum insurance requirements due to the broad range of subdivisions. There is a need for a more practical mechanism for bodies corporate to take out additional insurance, which currently requires a special resolution. The provision, which requires public liability insurance on common property constituting airspace or sub-ground areas, is regarded to be without purpose and proposed to be abolished. Another problem concerns the fact that occupants of some lots increase the overall insurance premium paid by all body corporate members, such as, for example, a take-away food retailer in a mixed-use subdivision that has a higher insurance risk and because of this an increased insurance premium. The body corporate fees, including insurance, are based on lot liability, but there is a need for a more flexible approach to determine payment of insurance premiums between members. The opinion is also that both commercial and residential properties are under-insured, resulting in inadequate funds being available to reinstate or replace the property. Reinstatement and replacement insurance of buildings to their full value has therefore been called for, and with a qualified person to carry out the valuation of the building once per five years. There is also a concern that the insurance policies offered do not meet the requirements of the regulations, leading to bodies corporate not having appropriate insurance coverage.¹⁶⁴²

6.3.14 General Views Regarding the Victoria system

The Subdivision Act with its equality between 2D and 3D properties has evolved through changes, but the former types of properties still exist. It is a system regarded to be flexible, good and working well in practice.¹⁶⁴³ The Subdivision Act is considered to be easier than the previous Strata Titles Act, which could be somewhat cumbersome to use.¹⁶⁴⁴ During the last decade, it has become more common to form 3D properties, since these are regarded to make better use of the land.¹⁶⁴⁵ Despite the continuous changes of the

¹⁶⁴¹ Helwig (1993), pp. 3.6-3.7.

¹⁶⁴² Consumer Affairs Victoria (2004), p. 31.

¹⁶⁴³ Tulloch (interview 16 April 2003).

¹⁶⁴⁴ Yates (interview 30 April 2003).

¹⁶⁴⁵ Tulloch (interview 16 April 2003).

legislation, they have not been very frequent considering their long period of existence.¹⁶⁴⁶

Practitioners seem to think that the change that was made when introducing the Subdivision Act, and the amalgamation of the former Acts, was for the best, and it has facilitated the implementation of the legislation in not having to use a separate set of laws for 3D or strata properties. For instance, the cluster system was regarded as somewhat of a failure.

A developer working with strata developments regards the acts regulating 3D properties to be good in general. He believes that it is the parties rather than the Acts that create the problems. The Subdivision Act made the entire process simpler, and the new system is flexible, for instance with many bodies corporate being able to be created for specific reasons. The old cluster system prevented pre-selling, while the new system facilitates it, which can be regarded as positive. There are, however, some failures. For instance, the dispute resolution system is not working so well. More uniform ways of presenting plans should also be introduced, since many of the plans that are created now are substandard.¹⁶⁴⁷

¹⁶⁴⁶ Battle (interview 16 April 2003).

¹⁶⁴⁷ Tyrrell (interview 17 April 2003).

6.4 Problem Areas in Both States

In New South Wales, the new Act succeeding the first 1961 Conveyancing (Strata Titles) Act was the 1973 Strata Titles Act. By this change, the shortcomings and problems stemming from the former Act were considered and new solutions introduced.¹⁶⁴⁸ New laws have been introduced to meet changes in development and use, such as the Community Titles legislation and legislation allowing part strata. One problem has been that the Strata Titles Act was originally intended to be used with the subdivision of multi-storey buildings, and that the lots should be used for the same purpose, mostly housing. This was, however, not suitable for the new purposes for which the law was used. The compulsory by-laws were sometimes regarded as unnecessary and a hindrance. The rules about common property and unit entitlement were also not suitable, because every lot received an equal share in all types of common property, even if there were several different purposes within the same building.¹⁶⁴⁹ This may concern, for example, the use of elevators or garbage areas.¹⁶⁵⁰

One problem connected with the 1961 Act was also that the strata lots should be defined by reference to floors, walls and ceilings, and that the boundary between two lots should be in the centre of the floor, wall or ceiling, but it was difficult to locate this centre. It was also difficult to define the common property, for example where there were balconies. Because of this, some changes were made with the 1973 Act that followed, where the lots were defined by the inner face of the floors, walls and ceilings. All the structural cubic space, such as external floors, walls and ceilings, became common property. By this change, most of the problems concerning the maintenance of the common property were solved.¹⁶⁵¹

Common property was defined in the 1973 Act as the building parts inside or outside a building that are not included in lots. It was not clear, though, whether structural cubic space such as pillars or other parts supporting walls as well as facilities providing services, such as pipes, wire, cables and ducts, a well as the space enclosing those items were included. Because of this, a definition was added to the 1973 Act, stating that these mentioned items were in fact common property. It was, however, still not clear whether such service items running outside a building were included in the common property or if it would be necessary to create easements for those. These rules were changed in 1986 so that the mentioned services would also be common property, although only valid for plans made after this date.¹⁶⁵²

¹⁶⁴⁸ A Look at Strata Title in New South Wales from 1961 to Date, pp. 7-8.

¹⁶⁴⁹ SOU 1996:87, p. 119.

¹⁶⁵⁰ Allen (email 17 April 2007).

¹⁶⁵¹ A Look at Strata Title in New South Wales from 1961 to Date, pp. 5-6.

¹⁶⁵² Ibid. at p. 12.

A problem needing to be addressed for a building subdivided into different stratum units is when certain common facilities should be private property and when they should be common. Some surveyors in Australia have suggested that “active facilities” using energy, such as elevators, should be private property and used by others through easements, while the passive facilities, such as sprinkler systems for extinguishing fires, should be common property.¹⁶⁵³

There are still uncertainties in the New South Wales strata title system regarding what is really included in the common property. The definition in the Act only states that common property is what is not comprised in any lot. Structural cubic space defines the parts of a lot in the strata plan that are intended to provide a function or support service to the lot and for which the owners corporation has the responsibility for maintenance and repair. Since these support services are not shown on the location plan, disputes often arise. Among the items that often are difficult to determine whether they are included in the common property or not are waterproof membranes, gas and water pipes in common walls, false ceilings, wallpaper, air conditioning units and trees and fences in townhouse and villa schemes.¹⁶⁵⁴

With the 1961 New South Wales Act, common property did not have its own title, but was included in the title for each lot. This created problems since transactions concerning common property could not be registered on a title unless all titles were called in, and this could be difficult. An attempt to solve this problem was to register all transactions with common property on the strata plan, but this did not work in many cases. Because of this, the 1973 Act stated that a separate title should be issued for the common property. The owners corporation was in that way given the power to hold title for the common property as agent.¹⁶⁵⁵

A problem with the management provisions in the 1961 Act was that there were no details regarding how the owners corporation should administer these rules. Under this Act, it also was not possible to use professional managing agents, if not appointed by the court. The existing rules were simple and did not contain any details on how administration could be conducted. There was also lack of good methods for dispute resolution. This issue was solved in the new Act with the introduction of a Strata Titles Commissioner and a Strata Titles Board. It also made possible allowing strata managing agents do work for the owner’s corporation.¹⁶⁵⁶

Insurance has been a problem, mainly concerning what is and what is not included. Since the owners corporation is obliged to insure all property fixed to the wall, even if it belongs to the owner of the lot, one property owner can

¹⁶⁵³ SOU 1996:87, p. 123.

¹⁶⁵⁴ NSW Government (2004) *Strata schemes in 2004 – the further issues*, pp. 28-30.

¹⁶⁵⁵ A Look at Strata Title in New South Wales from 1961 to Date, p. 6.

¹⁶⁵⁶ Ibid. at pp. 4-8.

cause other owners costs by providing the building with expensive property.¹⁶⁵⁷ It can seem unfair that the owners corporation has to insure the fixtures added by the lot owners themselves, but since these fixtures will be a part of the building, it seems practical; it does not add so much to the insurance premium, and it is the only way for these improvements to be registered in the strata plan.¹⁶⁵⁸

The owners themselves sometimes might have to use their private means to pay the debts of the owners corporation, if its funds are depleted. There is not sufficient protection for lot owners as to this in the Act. To avoid this problem, the Parliament of New South Wales decided that every owners corporation must have a minimum insurance of five million Australian dollars.¹⁶⁵⁹ All lot owners are jointly and individually liable to contribute to the debts of the strata company (equal to owner's corporation) and because of that, the individual owners in Western Australia, to compare, may take out insurance coverage in the name of the strata company if it has been neglected, and also to obtain insurance coverage for common property on their own behalf to obtain full indemnity for loss.¹⁶⁶⁰

Western Australia has also experienced problems with strata companies as to fulfilling insurance obligations where the occupants are from high-risk categories, especially in commercial or industrial development. These strata companies might be refused insurance coverage, or get it only at a high premium. To avoid this problem, suggestions have been to change the legislation in a way so that the strata company does not break its insurance obligation if it has tried hard enough and is still being refused. The strata company might also require the owner of any high-risk lot to install appropriate firewalls to give fire isolation to the lots next to it, or to meet some other requirements. The owner might be told to stop its business until these requirements are met. If any owners are high-risk users of their lots, or have made improvements to fixtures in the lot to such an extent that the premium for the insurance has been increased, then the strata company should be allowed to cover this increase by taking out an additional levy from the lot owners.¹⁶⁶¹ As mentioned, Victoria has also experienced problems with matters such as insurance and settlement of disputes.

¹⁶⁵⁷ SOU 1996:87, p. 123.

¹⁶⁵⁸ Arnrud and Larson (2001), p. 37.

¹⁶⁵⁹ Ibid. at p. 27.

¹⁶⁶⁰ Department of Land Administration, Western Australia Government (1993), p. 59.

¹⁶⁶¹ Ibid. at p. 58.

7. Analysis and Conclusions

7.1 Introduction

The following chapter presents a summary of the most important findings of my study, as well as conclusions drawn from this, and ends with some suggestions for further research. The summary is not intended as a complete recapitulation of the entire contents of the thesis, but rather points out the most important and interesting aspects, adding some information and reflections to them. It also contains brief information on 3D property systems in some other countries not described in the previous parts of the thesis. This information is relevant here as further examples and comparisons in the discussion about the studied systems.

Three-dimensional division of property rights has become quite common around the world during the second part of the 20th century. This development to a large extent is based on changes in society, with increased complexity, and the need for new forms of ownership and land use to which this has led. These new forms in their turn have placed greater demands on ways to manage the properties and regulate the relations between 3D properties that are closely connected within a building complex. Some countries have experience of this that extends over decades, such as Australia, while other has just introduced this possibility into their legislation, which is the case in Sweden. The objectives of this thesis have been to present an overview of some types of 3D property rights that exist around the world, and by a closer study of examples of the main types, show how the general key factors are dealt with, and the possible problems connected with these, in order to provide information that might be useful especially for countries in the process of developing their own systems for 3D property rights.

Even though a limited number of countries have been studied more thoroughly, the type of comparative study that has been made here has not aimed at explaining the differences between these systems. There are several difficulties connected with comparative law, the most important of which were discussed above. The differences between the 3D property types and the different legal families on which the studied legal systems are based have also made it more difficult to make a comparison. To facilitate the selection of general factors of importance, the attempt has been instead to use a functional approach rather than focusing on statutory regulations.

The key factors discussed below are in the main based on and organised in accordance with the disposition in chapter 3 on the general characteristics of

3D property, as well as in the description of the studied systems in chapters 4-6.

7.2 3D Property Rights

7.2.1 Forms of 3D Property Rights

The forms of 3D property rights can vary when it comes to ownership, delimitation, that included in the common property and how the management should be carried out. The ownership can range from membership in an association or stockholder in a company, or owning a share in common property with the right to use an apartment, to having full ownership of an independent 3D property unit. Condominium means ownership of single apartments, while the independent 3D properties are larger units, or units not delimited by a specific building.

At the first international workshop on 3D Cadastres, the common features internationally for 3D properties were pointed out. The conclusion was that despite the fact that each country has its own specific laws, this should not lead to the development of a separate system for every country. It was mentioned that there are some specific problems that many countries with 3D property systems can relate to, and it is therefore important to look at the general common aspects.¹⁶⁶²

The condominium system is usually well defined and has many similarities in the different countries. It consists of two components, both of which are necessary for its constitution, namely the ownership to a part of a building and a system of organisation to deal with the interaction between the owners that are dependent on each other within the same scheme. It is also seen as a threefold unity, with the individually owned unit, a share in the common property and the membership in the owners' association as the three parts. This threefold unity that the German *Wohnungseigentum* system is said to consist of can also be found in the Danish system for apartment ownership. Connected with it are many specific problems that must be dealt with in the same way in all countries.¹⁶⁶³

In the Australian states included in this study, there are two main types of 3D property, namely the stratum of the independent 3D property type, and the strata title of the condominium type. The Swedish 3D property (*3D-fastighet*) is of the independent 3D property type, with a requirement for larger units than just a single apartment, but with certain features from the condominium type, such as the existence of common property and management associations. The

¹⁶⁶² *Registration of Properties in Strata* (2002).

¹⁶⁶³ Blok (1982), p. 25.

Swedish type, unlike the Australian stratum or the air-space parcel in British Columbia, is limited to constructions such as buildings, tunnels, etc. It is, however, very similar in other respects, with similar fields of application. Germany has its *Wohnungseigentum* of the condominium type, but no independent 3D property type. This is also the case in many other European countries. In general, it is possible to say that the condominium type is more common throughout the world than the independent 3D property type.

Even though the independent 3D property and the condominium are different types of 3D property rights, and even though they each have different features, I have not always kept these forms clearly separated in this work, since they are closely interrelated and in Australia they are parts of the same system, often also combined within the same building. Victoria has even integrated them into the same legal Act.

The common law system with Torrens title provides thus for both 2D and 3D subdivision within one common legal framework, which leads to simplicity in implementation. Australia has a long history of 3D property use, and thus a great experience of it. Through the years, a number of changes in the legislation have been necessary to carry out, minor changes as well as more thorough reforms. A reason for the need for the many amendments to the law during the years is that the society has developed, along with different development and building types. It is difficult to estimate whether the number of changes is unexpectedly large compared with other countries and systems, but since Australia with New South Wales leading the development has been pioneering within this area, it is only natural that they made the mistakes that others could avoid. The fact that many countries have used the New South Wales 3D strata legislation as a model for their own 3D property legislation, sometimes even using the wording of the original Acts, is a contributing factor to the smoother introduction and running of their legislation. For example, the 3D property system in British Columbia has many similarities with the New South Wales system. Both are provided within common law, and the provisions of the statutes regarding 3D properties in British Columbia are to a great extent based on the New South Wales Acts. The development seems also to have gone in a similar direction. Management issues can be mentioned as an important factor for both. However, even though the New South Wales strata title was the first such legislation to be introduced, it seems like it has been influenced and borrowed heavily from European countries and the condominium legislation there.

Germany belongs to civil law and like many other European countries focuses on apartment ownership. The German condominium system has also been a source of inspiration for other countries. They developed their system quite early, not just the *Wohnungseigentum*, but also its forerunner, the *Stockwerkeigentum*. In the Swedish parliament, for instance, there was a proposal already in

1958 to introduce apartment ownership based on the German *Wohnungseigentum* model.¹⁶⁶⁴

Even though the 3D property system in Sweden seems to be working well, it is still too early to say how the system will develop, since the 3D property legislation was so recently introduced.

The systems for 3D property use have developed with time, and new parts such as regulations on management have been added when the need has emerged with new phenomena and difficulties in society and the lack of solutions to them. Even though the legislation has developed and improved, the complexity has increased. In New South Wales, the different Acts and subdivision types concerning strata have been described as a maze of legislation. In Victoria, the opinion is more that the maze of legislation existed before the legislation was simplified and the Subdivision Act was introduced in 1988 as a unifying Act for both 2D and 3D properties.

It is possible for a country or legal system to have several forms of 3D property rights, as we can see for example in New South Wales or British Columbia in Canada. These forms can be combined, where an independent 3D property unit can be subdivided into condominium units, such as the stratum unit in New South Wales can consist of several strata title units. All forms, stratum, strata title and community title, etc., are interconnected, using the same features and interacting with each other. The relationship between them is both complex and flexible. Several countries that have the condominium form also have other types of property rights for apartments, such as indirect ownership similar to tenant-ownership, or tenancy. Such countries are, for example, Denmark and Norway.¹⁶⁶⁵ There is thus both a need and room for several forms of rights to occupy an apartment¹⁶⁶⁶ or other volumes of space.

A main difference between the independent 3D property type and the condominium type is the level of cooperation between the property units. The relationship between independent 3D property units can be compared with the relationship between traditional property units on the ground, where general rules for neighbour relations apply, or agreements are made. For the condominium type, the relationship between the property units are more interdependent and sharing, the freedom of action is more limited for the owners and a certain legal framework is needed to regulate the co-ownership relations.¹⁶⁶⁷

Even though there may seem to be a large difference between the two condominium forms, condominium ownership and condominium user right, they have a very similar construction, and the actual disposition right to the apartment in practice does not differ much between these two types. For the

¹⁶⁶⁴ Brattström (1999), p. 31.

¹⁶⁶⁵ Ibid. at p. 143.

¹⁶⁶⁶ Ibid. at p. 143.

¹⁶⁶⁷ Sandberg (2001), p. 204.

condominium user right, the owners' disposition right to the apartment they occupy comes very close to actual ownership right to the apartment, since they have an exclusive right to use it. The tenant-ownership type also includes more or less the same type of disposition right as the condominium types, and the same applies to the right to use common areas.¹⁶⁶⁸ There are many similarities between condominium and tenant-ownership, apart from the ownership type, for example regarding what measures may be taken with the interior of the apartment, disposition, common property, association membership, etc.

There is not much written about the independent 3D property type, especially in European literature, which can be explained by the fact that this type seems to be quite rare in Europe. Sweden introduced this form as one of few countries in Europe, and therefore, when making the initial preliminary study, the legislators had to look at other countries, such as Australia and Canada, for inspiration. In general, this type of 3D property right is not that common internationally as the condominium type, which exists in many places, especially in Europe. There are of course also variants of these main types and similar ones, closer to the user right form.

The independent 3D property type can be seen as just a regular 2D property in most aspects, only delimited horizontally as well. This approach exists in the Swedish legislation, as well as in New South Wales and Victoria, where there is no separate act for the 3D property or stratum unit, it is simply included in the Acts for traditional 2D property units. Victoria had separate Acts for 2D and 3D property, but they were merged into one Subdivision Act. The difference between these Australian Acts is that strata title units still are regulated in separate acts in New South Wales, while they are treated as regular property units in the Victorian legislation.

The strata title system in New South Wales is quite well described in the literature, while it is more difficult to find examples there of stratum. A reason for that is probably that the stratum subdivision is more similar to the conventional 2D subdivision of properties, and does not at all to the same extent have the need for regulation of the relationship between properties and property owners, as well as management issues, as for the strata title scheme with its subdivision into smaller units with common property and often connected with housing living conditions, and relations between neighbours. It may seem, however, that the stratum instrument is not used to the extent that would be possible.

The forms of 3D property rights existing in a country are constantly developing. Several of the studied countries have had some other form of such rights before they introduced their 3D property or condominium legislation. Such types initially were often indirect forms of ownership, with some type of co-operative as a common feature. From this, it has developed towards either

¹⁶⁶⁸ Brattström (1999), pp. 73-75, 92.

the condominium form or the independent 3D property, or a combination of these. In New South Wales, for example, the company title system developed into strata title, while former Soviet countries during the privatisation process seem to have moved from co-operative housing associations to apartment ownership. This development in forms of 3D property rights corresponds to a great extent with developments and changes in society, and the new forms required.

Another development that can be perceived is that more mixes of existing forms are created, filling new types of needs in society, and creating more flexibility. A change that was introduced in the Danish legislation for apartment ownership is that several types of housing may be mixed within the same building. For example, it is possible to have condominiums within the top floor of a rental property.¹⁶⁶⁹ Several apartments can then constitute one condominium,¹⁶⁷⁰ making a separation between larger units with the same type of housing, such as ownership and tenancy, within the same building, and by this approaching the independent 3D property type and the usual purpose for this form, namely to separate different types of use into different property units. With these different types of housing within the same building, it might also be necessary to have separate associations for them, with additional administrative costs as a result.¹⁶⁷¹

7.2.2 Choice of 3D Property Form

It is not always clear what form of 3D property rights, given certain criteria, would be better to use for a specific purpose. Sometimes several solutions can be a possible. It is possible, however, to mention a few guidelines in this matter. These guidelines are, to a large extent, based on those presented by Sandberg.¹⁶⁷²

Since the condominium form has the need for more cooperation than the independent 3D property form, it is more suitable for buildings that require a large degree of cooperation, due to the fact that it offers settled rules to handle the cooperative relations that do not have to be created from scratch. The advantage with the condominium model thus is that it provides a ready-made list of rules for cooperation, where some can be amended and some not. The options of when to use the condominium model are becoming more various and flexible, and in the Anglo-Saxon world with countries such as the United

¹⁶⁶⁹ Mikkelsen and Foldager Andersen (2006), p. 21.

¹⁶⁷⁰ Ibid.

¹⁶⁷¹ Ibid. at p. 23.

¹⁶⁷² Sandberg (2003).

States, Canada and Australia, the concept of “spaces” or “units” has to a great extent replaced the concept of “apartments”, “offices” or “cells”.¹⁶⁷³

The cooperative condominium model is useful for all types of built-up or utilized land spaces, when they are divided into sub-units and have a need for a measure of cooperation. It is suitable both for high-rise buildings and for subsurface construction, such as parking, shelters, stores and service facilities. Condominiums are also suitable for buildings constructed linearly across the surface, to divide up the use of natural physical spaces or such spaces combined with built-up units into for example marinas, or to regulate adjacent bare and undeveloped land parcels, also called “bare strata title”. There is, however, a disadvantage with the condominium laws, namely that the cooperation rules are basically intended for a house, or group of houses, for residence or commercial purposes, with many units dispersed among many others, and not for the emerging new types of mega-structures. In large complexes there can also be a need for only a few units, with a more independent relationship, where the independent 3D property model would be more suitable. The cooperation rules within the condominium restrict the ability for efficient management within a large complex. The independent 3D property model in such a case would enable the owners to more freely delineate the boundaries between the property units as well as the relationship between them.¹⁶⁷⁴

Even though lease and easement are common forms for giving rights to space above or subsurface, they are often not appropriate alternatives for the creation of an independent 3D property ownership unit. Although lease has many advantages for lessors that do not want to relinquish the ownership of their assets, it does not always serve their interests. The lease model can make things unnecessary difficult for both parties, and not constitute the most adequate form for their interests. The same can also be the matter regarding the easement form. This is for example a common form around the world to create subsurface passages for transportation, piping, etc. Since the easement only gives use rights, it is not suitable when the purpose is to take possession of the unit. The framework of the easement is often too narrow. Furthermore, the boundaries of the lease or easement title are subject to the boundaries of the two-dimensional land parcel.¹⁶⁷⁵ However, lease is often used successfully in Australia, and easement is a form that might be considered more suitable than the independent 3D property form, and thus is appropriate to use in certain cases, such as e.g. in Sweden, where the 3D property form according to the legislation only may be used if other alternatives are not found more suitable.

In New South Wales, where there are a number of different methods of subdivision, it does not always seem easy to know which one of these forms to use. The choice of subdivision method will be made to best serve the ongoing

¹⁶⁷³ Sandberg (2003), pp. 143-144.

¹⁶⁷⁴ Ibid. at pp. 143-145.

¹⁶⁷⁵ Ibid. at pp. 148-149.

management. The community scheme is a form that was introduced in New South Wales to fill the gap between conventional and strata properties, and to obtain new possibilities to create common property within regular schemes. It is a combination of strata and conventional subdivision, with shared property incorporated in land subdivision. It is land subdivision rather than subdivision of cubic space, but it contains elements such as shared property, management statement with by-laws, a tiered management system, etc. An advantage with the community scheme type is that it allows larger areas to be developed in stages and also to be further subdivided into smaller units, forming sublevels. The need for it decreased, however, with the flexibility introduced with the part strata form.

7.3 System Comparisons

There are more or less similarities between the systems in different countries, depending on legal family, time of introduction, etc. The difficulties with making comparative studies are, as has been pointed out, manifold, which makes a comparison of 3D property types and connecting legislation complicated. It has thus been easier to compare functions and select areas of importance, than to make comparisons between direct regulations and 3D property forms, but since such a comparative study has not been the aim with this study, it has been enough to try to get a general view of the studied systems and what main areas that have been problematic or critical. The fact that all chosen studied countries belong to the Western legal culture has facilitated the work.

Generally, it is possible to observe that the first-generation statutes for apartment ownership that were introduced in many countries were quite basic and did not deal with all conceivable problems. Because of the problems and inadequacy of these first Acts, more sophisticated second-generation statutes were generally introduced after some years to regulate the more practical aspects. For example, the American first-generation condominium statutes had their primary concentration on apartment ownership in single high-rise buildings and were not comprehensive enough to provide enough regulation for this type of housing. The main problems and shortcomings concerned consumer protection and developer flexibility, with lack of regulation for staged condominium developments. The second-generation statutes still lacked detailed regulation for matters such as termination of the condominium scheme, expropriation and insurance.¹⁶⁷⁶ When looking at New South Wales, it can be concluded that although the first strata Act came in 1961, there were no

¹⁶⁷⁶ van der Merwe (1994), pp. 7-9.

management or dispute provisions in place until the Strata Titles Act was introduced in 1974.

Many countries have based their condominium legislation, or other 3D property legislation, on statutes in other countries, namely often those who are close in culture or that belong to the same legal family. When the model countries have amended their legislation due to changes in society, the followers have also supplemented their existing statutes by more recent ones, to match these changes. The model countries have in their turn also got new ideas and impact from the countries that they themselves have influenced.

The condominium Acts are detailed to different extent in the countries where they exist. For example, the German Act is detailed in comparison with the similar Belgian and Danish Acts that are not very comprehensive.¹⁶⁷⁷ The Danish Act is brief and solves many questions through legal use instead of by regulation.¹⁶⁷⁸ This seems also to be the case with the Swedish 3D property legislation, where not so much is regulated by the Acts, but instead left up to the cadastral authority etc. to decide on. The statutes of New South Wales contain very detailed provisions in most matters concerning 3D property rights.

Obviously, the 3D property systems in New South Wales and Victoria have similarities, belonging to the same country, but also several differences. From the interviews carried out during my visit to Australia, the general view that appeared was that the systems are good and flexible, but some remaining problems and need for change were also mentioned. The New South Wales legislation has been called a jungle in its complexity, and is seen as more complex than the Victorian correspondent, since Victoria simplified their legislation and added the rules for 3D properties to the legislation concerning conventional 2D properties, but can also be seen as more flexible due to the various development types introduced, for example part strata. Management and maintenance are still seen as areas with some difficulties in New South Wales, despite the separation of these questions into a separate Act, bringing greater focus to the matter. New South Wales has a great advantage in their dispute resolution system, which Victoria lacks and where the disputes instead have to go through the costly and time-consuming court process, even though steps have now been taken there towards a system similar to the one in New South Wales. The community title system in New South Wales is considered somewhat confusing and in need of a change to meet modern development types. Since developments and schemes are gradually becoming larger and more complex, the need for professional assistance from the outside has increased, and the obligations of such people are an emerging problem. Victoria has an advantage with the possibility of creating many bodies corporate within the same development, in this way creating flexibility. There are also improvements to be made concerning the creation of plans and how to present them. It seems

¹⁶⁷⁷ Blok (1982), pp. 25-27.

¹⁶⁷⁸ *Ibid.* at p. 28.

that Victoria with the new amendments to their legislation that are about to be introduced will come closer to the New South Wales regulations.

Table 7.1. Some Differences between the 3D Property Systems in New South Wales and Victoria.

	New South Wales	Victoria
Legislation	Complexity, flexibility	Integration of 2D property and 3D property
Settlement of disputes	Simplified system	Court process
Terminology for owners' association	Owners corporation	Body corporate
Owners' association	Separate owners corporations, tiered structure	Multiple bodies corporate

Taking British Columbia in Canada and New South Wales in Australia as examples, their systems for 3D property formation are very similar. Many of these similarities can be related to the fact that both of their legal systems originate from English law. Both of their Strata Titles Acts were instituted in the 1960's. British Columbia has also used New South Wales as somewhat of a model for their legislation on 3D property rights. Despite the similarities, there are, however, some differences that can be pointed out.

Although the same basic concepts exist, there are differences in terminology. For instance, the owners corporation in New South Wales is called a "strata corporation" in British Columbia, while the "executive committee" in New South Wales, formerly called "council", is called a "strata council" in British Columbia. These terms have, however, been changed within the respective state as well through time, and are just names for similar features. In both states the independent 3D property type exists, which can be subdivided into strata lots, which are called strata title in New South Wales and condominium in British Columbia. The differences between these two forms are that the Canadian air-space parcel must be created within an existing conventional parcel,¹⁶⁷⁹ while in Australia forms exist that are not limited to specific property boundaries on the ground. One difference concerns the

¹⁶⁷⁹ Gerremo and Hansson (1998), pp. 88-89.

boundaries that separate the private units from each other and from the common property. In New South Wales these boundaries were earlier located to the centre of the walls, but it was later changed to the general rule that the boundaries are situated in the surface of walls, floor and ceiling. In British Columbia, the boundaries between two units are in general still located in the centre of the walls.¹⁶⁸⁰ When it comes to insurance, in both countries the owners' association must insure the building, including the fixtures added to the strata lots, but in British Columbia these fixtures must only be included if they were made by the owner developer as part of the original construction on the strata lot, not if they were installed later.¹⁶⁸¹ There are also, of course, other differences than the above mentioned, both in general structures and on a more detailed level, but the basic structures are still similar and are working well in both of these states.

Table 7.2. Some Similarities and Differences between the 3D Property Systems in New South Wales and British Columbia.

	New South Wales	British Columbia
Legal system	Originating from English law	Originating from English law
Origin of strata title	Strata Titles Act since the 1960's	Strata Titles Act since the 1960's
Terminology for owners' association	Owners corporation	Strata corporation
Terminology for managing committee	Executive committee	Strata council
Location of air-space parcel	Not limited to boundaries on the ground	Must be created within existing parcel
Boundaries between apartment units	Usually in surface of separating construction	Centre of separating construction

¹⁶⁸⁰ Gerremo and Hansson (1998), pp. 93-94.

¹⁶⁸¹ SBC 1998, Chap. 43, *Strata Property Act*, s. 149.

7.4 Key Factors and Problems

Development and changes have occurred in all studied countries where the system has been in use for a long time. There have been frequent changes of terms, names for concepts and Act names. Several changes have occurred even during the time I have been working with this thesis, which has made it difficult to keep up with the latest regulation.

When studying the different condominium systems, it is possible to notice that the elements that the UN has listed as important features in their guidelines on condominium ownership¹⁶⁸² seem to be present in these systems and the legislation regulating them. Since apartment ownership involves certain necessary features, such as common property, management, etc., solutions for these must be arranged in some way, regardless of the form of ownership. The necessary or important elements for condominiums, such as by-laws, strata manager, owners' association, funds, insurance, etc. thus actually exist in the studied countries.

The structure, principles and rules for 3D property rights, especially for apartment ownership, are basically similar for different countries and systems, but the practical problems that emerge are usually solved in specific ways for each country, by court decisions and by amending the legislation. The problems appear, however, to be the same.¹⁶⁸³ It is also possible to say that when ownership of apartments is involved, the management aspect becomes even more important and the grounds for disputes increase.

As an example of how key problems appear, the first strata legislation in New South Wales was very simple, apparently too simple, and the main problems emerging from it concerned issues such as title, management and dispute resolution. Many problems and mistakes were found when it started to come in use. The main problem area was management, which had not been regulated sufficiently. Since this first short and simple Act, it has been amended and added to make it longer, fuller and more complex. The management part has come to be considered so important that it was separated from the Strata Titles Act to form an Act of its own, regulating only these questions. This happened, however, as late as in 1996. Other things have gradually been added, such as a dispute resolution system that was intended to be both inexpensive and practical. Insurance was also an issue that had to undergo changes, after discussions concerning unfairness, double premiums, etc. Several reforms were thus needed to obtain a working legislation. We can see that still after more than thirty years of use problems existed that demanded changes.

New problems outside of the mentioned areas are also emerging along with the development. For example, deterioration of older buildings has

¹⁶⁸² UN/ECE (2002).

¹⁶⁸³ van der Merwe (1994), p. 15.

become a problem. The problem regarding what will happen with the 3D property units if the building is torn down or not constructed at all is treated differently in different countries, and sometimes there are even no clear rules for this at all, as the case has been in Germany.

7.4.1 Boundaries

When property units are in such close connection as within the same building, sharing walls, ceiling and floor, the question where to locate the boundary between these properties will be of importance. There are several possible ways of dealing with this. When New South Wales in Australia made their first 3D property legislation, the legislation stated that the boundary was located in the centre of the walls between the separate units. The rule to place the common boundary in the centre of these structures led, however, to certain problems, such as how to locate the centre of wall, floor or ceiling. The problem was also related to defining the common property, and where the common property would end, for example for lots containing balconies outside the building. Such problems led to major disputes about such issues as water penetration.¹⁶⁸⁴ Due to these problems, the rule was later changed so that in general, the boundaries are located in the surface of walls, floors and ceilings, and what is beyond this is common property, i.e. all structural cubic space. It is, however, possible to decide something else and let the boundary be the centre of the wall. This means that there is an uncertainty in New South Wales regarding how to really estimate the boundaries, and there are still problems connected with it. The situation can also be as in Germany, where there are rules about how the private 3D property units must be separated from each other in a clear way. In the Swedish legislation, it is up to the cadastral authority to decide where to locate the boundaries, which puts requirements for good technical knowledge on the cadastral surveyor and might lead to uncertainty. From that aspect, it might seem easier to have clear rules about this in the law, minimising the risk for problems and misunderstandings.

Depending on the solution chosen for the location of the boundary, the condominium unit will either contain physical substance or be a piece of enclosed airspace. Both advantages and disadvantages can be found in the solution of drawing the boundary between the apartments in the centre of the wall. There will not be any uncertainties for the owners regarding the possibility to drive nails into the wall, to build a niche, etc., but on the other hand they will have the responsibility to maintain and repair the wall, which might be costly. There is, however, a possibility that bearing walls still can be considered as common property and thus subjective to collective responsibility for repair. In

¹⁶⁸⁴ A Look at Strata Title in New South Wales from 1961 to Date, pp. 5-6.

the German statute, this dilemma has been avoided by refraining from expressing any specific provisions concerning the boundaries of the units. By providing that all structural parts of the building should be common property, this implies that driving nails into the wall, etc. is allowed as long as the structural parts of the building construction are not affected.¹⁶⁸⁵ It appears, in general, that it is quite common for condominium boundaries to be located in the surface of walls, floor and ceiling.

7.4.2 Common Property

The contents of the common property can be defined either inclusively by specifically listing all objects included, or exclusively by letting it include everything that is not part of the individual properties. Common property, for example, may be the parts of the building not included in the strata lots. There have been problems concerning what should be included in the common property. For example, it previously in New South Wales was not clear whether pillars, supporting walls, service pipes and space enclosing it were included in the common property or not. Because of this, it was defined in the law that the building support structure and services through pipes and wires actually are included. This was later changed to also comprise services running outside a building. In New South Wales, it is also possible to create strata schemes without any common property, but it is not common and requires other solutions with easements, etc.

The common areas can be treated differently when it comes to ownership and management. A common way is to let all the common facilities be owned jointly and be managed by an association. This is the case especially for condominium. Some facilities can also be designated common property and others be owned privately, with access for others through easements. A common solution for apartment ownership seems to be that all load-bearing constructions of the building, ground and main pipes are common property and jointly owned, while the surface layers within each apartment, as well as fork pipes, serving the respective apartment, from the main pipes belong to the individual apartments. For resident buildings, it is common to let everything that is not included in the private apartments to be common property, jointly owned and managed by all apartment owners. This is a way of guaranteeing that management is taken care of properly. The housing costs for maintenance etc. are normally paid by each owner in proportion to the size of the apartments, but other grounds for distribution are also possible, such as payment by value etc.

¹⁶⁸⁵ van der Merwe (2004), p. 25.

For stratum units, there is no common property, but certain shared facilities that have to be included in a property unit and where access is given through easements. A common solution is to try to separate facilities and functions as much as possible, for instance with separate elevators leading to each stratum. For part strata or stratum subdivision, the aim is to separate different interests, so the stratum plan will try to divide the building with as little co-existence as possible. The same is usually done when forming Swedish 3D properties. Most often the cadastral authority will try to separate facilities such as elevators, heating systems, pipes, etc., to avoid having to include these in common property. Such a separation is easier to achieve when constructing with the purpose of forming separate 3D property units, rather than when subdividing within an already existing building.

If 3D property formation is made within a building that already exists, it is more difficult to solve the issues with utilities, ventilation system and so on, because they are common for all parts of the building, but when planning for different property units within a building already when constructing it, this kind of systems could, as mentioned, be separated already from the start, not having to be joint at all. This will place high demands on documentation of the building techniques. It is also expensive to move objects and facilities afterwards within an existing building, for example if each unit should have its own ventilation system.

7.4.3 Co-operation between Property Units

Vertical relations between property units are more complex than horizontal ones. These units cannot be separated and the upper levels are dependant on support from the levels below. The underground is dependent on the upper levels for upward outlet, ventilation, drainage and passage purposes.¹⁶⁸⁶ When several properties are in such close connection within the same building complex, it is also important that there are clear rules about rights between neighbours to get access for maintenance, repairing and building work. Australian law states that there are certain standard easements existing automatically, such as support for the lots from the building structures around and services like water supply, drainage, sewage, electricity, etc. Shelter is also provided through easements. The upper floor of a stratum, for instance, is secured by easements through the underlying stratum. Included in these easements is right for passage to repair and services. The supporting parts of the building shell can be protected from demolition by a demolition permit in a detailed plan, or by making it a joint facility or granting easements.¹⁶⁸⁷

¹⁶⁸⁶ Sandberg (2001), p. 203.

¹⁶⁸⁷ SOU 1996:87, p. 186.

Two different solutions for handling co-operation between the property units within a building regarding the common facilities is either to let the owners of the 3D units own them jointly or to let them be private property with access for others through easements. A joint facility is suitable when the properties are equal in size, value and function, but if the relationship between them is more uneven and one of the constructions is the dominant one, then private properties with access by easements would be more suitable.¹⁶⁸⁸ Easements are less favourable than joint facilities in the sense that they do not regulate obligations and costs.¹⁶⁸⁹ As a consequence of the different requirements for common property, there are often more easements used for stratum units than for strata title schemes, since no common property usually exists between them. One opinion concerning stratum buildings that has been expressed is that the properties using energy, “active facilities,” such as elevators, should be privately owned and used by others through easements, while passive facilities, not using energy, such as sprinkler systems, should be common property.¹⁶⁹⁰ Except for the alternatives easement or joint facility, it can be possible to form a separate property unit for the common areas, some kind of “staircase property”.¹⁶⁹¹ The alternatives can also be combined.

Even in Sweden, where not many problems have occurred with the newly introduced 3D property legislation, it can be noted that one of the issues that has caused the most difficulties and discussions is the choice of co-operation form and management of common facilities for the 3D property units. In Sweden, many 3D property owners are unwilling to take part in joint facilities together with other property owners. This has been the case for commercial managers above all, which risk being involved in joint facilities together with properties for housing. An example of this is that a great possibility connected with 3D property legislation, before the introduction of the legislation, was expected to be to add building constructions for residential purposes on the roof of existing buildings. This possibility, however, has not been realised to such great extent, for instance due to negative expectations of cooperating with housing associations in joint facilities, etc. This fear seems to mainly be based on preconceived notions. This system is working well, for example, in Australia.

When 3D properties are formed, accessibility to these properties from the ground level is necessary to obtain in some way. This can be solved legally in different ways. The building shell in walls, ceilings and floors between these 3D property units, stairs, elevators, ventilation systems, utility systems, etc. can be included in one of the properties or be included in the common property, joint for the properties affected by it. It can be questioned whether it is better to have one large joint facility for all properties within a building, or whether it

¹⁶⁸⁸ SOU 1996:87, pp. 166-168.

¹⁶⁸⁹ Wiström (2002), p. 5.

¹⁶⁹⁰ SOU 1996:87, p. 123.

¹⁶⁹¹ Brattström (1999).

should be divided into smaller areas. If all parties within a building should be involved, this could lead to a somewhat unclear situation. If only two property units are supposed to cooperate, the easiest solution might be to include the load-bearing structures in each property unit and to secure access to necessary spaces for entering and leaving the building by easements. It is also possible, even with just a few property owners involved, to create a joint facility of the parts on which the property units are jointly dependent.¹⁶⁹²

7.4.4 Management

The third element, the *Gemeinschaft*, mentioned as being included in the German *Wohnungseigentum* system, shows that not only the tangible assets and the division into property units are important, but also the relationship between the owners and their responsibility for, and participation in, the common parts.

The fact that management questions are important can be illustrated by the example of apartment ownership in Lithuania, where a review was made concerning legislation and enforcement related to mortgage finance and housing associations.¹⁶⁹³ In the recommendations, management was pointed out as a key factor. The experts were of the opinion that when the owners all agree, the form of management is not that important, but to reduce the risk of disputes, especially concerning the duty to pay for maintenance and operation of the property, it is necessary to co-ordinate and clarify the management provisions, and to provide for such solutions the legislation should be amended. It was also pointed out that due to the fact that it is customary that apartment owners take care of the insurance, leaving the common property not covered by insurance, it is necessary to clarify the responsibility of a housing association or administrator to arrange insurance for the parts of the property that are not covered by individual insurance.¹⁶⁹⁴

It is also clear that management is a crucial factor, and something that needs to be dealt with from many aspects, when studying the example of the early form of apartment ownership in Germany, the *Stockwerkseigentum*. The degree of individualism that existed there, with no common property, no association or formal body to take care of the management, and with everyone taking care of their own maintenance, resulting in various standards both on the inside and the outside of the building, and with no form of dispute settling, all leading to endless disputes and numerous problems. The disputes were so severe that this form of ownership was even eventually prohibited. A similar form also existed in Scotland, with the same kind of limitations and problems,

¹⁶⁹² Julstad and Ericsson (2001), p. 186.

¹⁶⁹³ Lilleholt et al. (2002).

¹⁶⁹⁴ Ibid. at pp. 20, 61, 64.

lack of maintenance, for example regarding cleaning the stairs.¹⁶⁹⁵ These were arrangements that had to be developed later, when it was realised how important they were for proper functioning of the building. When looking at the German *Wohnungseigentum* legislation of today, however, it seems like the statutory regulations concerning the relationship between the owners and the management of the common property have stood the test of time.

The most common case is that there is some form of owners' association that takes care of the management of the common parts within a condominium scheme. One exception from this is Norway, where the owners together make the decisions about management, etc., but when there are many apartments, with difficulties getting many owners to agree, it is still possible to appoint some kind of management board. If the areas are large or complicated, a professional manager could be appointed to take care of it. It is also necessary to have clear rules for the management, and these can either be compulsory and included directly in the law, which is often made for important procedural rules, or be decided by the associations themselves through by-laws, which can regulate more detailed issues, such as how to maintain order in the building. When all owners take part in the management through the association, it may be easier for them to be aware of the costs and what needs to be done, but for large associations it may be too complicated to manage this on their own in a good way. In such a case, it is more convenient to let a professional manager take care of it. Clear rules must be established for all associations, because of the problems and disagreements that otherwise could and have appeared. In the studied states in Australia, there were from the beginning problems with how to manage the common property. To make this clearer there is now a council taking care of the day-to-day maintenance.

During recent years changes have occurred in New South Wales, resulting in larger strata schemes etc., which has started investigations about strata managing agents and similar functions. Some inner-city strata schemes have reached such dimensions that they are similar to self-contained communities, including a mixture of resident owners, tenants, investors, business operators, strata managing agents, letting agents and caretakers. With the development sites and building systems becoming more and more complex, a need for professional managers is emerging to be able to handle all matters within a scheme.

It is important not to make the condominium associations too extensive, such as the case was in Germany, because of the management complications. In larger schemes and developments, it is quite common and useful to have the management taken care of on different levels for different parts of the development and for different types of facilities. These management levels exist within different forms, where for example the management levels within part

¹⁶⁹⁵ van der Merwe (1994), p. 5.

strata can be compared with the tiered management system for community titles. In New South Wales, for example, it is possible to subdivide areas and associations into sub-associations for different parts, but in Germany, on the other hand, where there is a *Wohnungseigentum* facility consisting of several buildings, it is not possible to subdivide the association into parts for the separate buildings. If there are many management levels, such as in community schemes, where the use of multiple strata or neighbourhood plans that are created for each stage can result in many management bodies within a scheme, it may lead to a reduced efficiency and an increase in costs for management, insurance, etc.

For the condominium type, there is, as mentioned, usually an association taking care of the common property, but there are also other alternatives. Taking Lithuania as an example, there are different possibilities available, including a housing association, but an agreement on joint activity may also be set up among the owners to regulate their relations on contractual basis, and where neither association nor agreement exist, the municipal authorities will appoint an administrator of the common property, where the administrative costs will be paid by the condominium owners according to their respective shares in the common property. It is sometimes also the case that management is carried out by the owners without any particular form of arrangement.¹⁶⁹⁶

It is also common to have a manager for condominium schemes, which is sometimes compulsory and sometimes appointed voluntarily, such as in the Nordic countries. Often a professional manager is chosen to perform this task. In countries outside the Nordic countries, the executive board often has a smaller role. If the number of owners is quite small, a manager is unnecessary, and part-owner management will be more efficient.

The extent of the association statutes, or by-laws, may vary from including no more than what is stated in the law to very detailed rules about keeping pets, hanging laundry, etc. The by-laws in New South Wales have become more flexible and more adapted to the different types of developments that exist now, compared with the development types of just residential buildings that dominated from the beginning. For the independent 3D property type, and not condominiums, there is no possibility to establish such regulations for keeping the order within the building, so if this is necessary to obtain, it has to be arranged through agreements.

The strata schemes of today are very different from those existing in the beginning of the 1970's when the strata management legislation was drafted, being more complex and with different types of interested parties, which leads to greater demands and responsibilities. From the beginning in New South Wales, management was not paid much attention, but during use of the new strata legislation, it was soon discovered that more extensive rules were needed

¹⁶⁹⁶ Lilleholt et al. (2002), pp. 32, 61.

for this. The biggest changes in the 1973 Strata Titles Act compared with the original 1961 Act were made concerning management, since these sections had been too simple. There were not enough details regarding how the body corporate should carry out the administration. Any strata schemes management was thus not introduced until the 1973 Strata Titles Act. Management of strata schemes became so complex that a separate Act, the 1996 Strata Schemes Management Act, was created to regulate these matters, including dispute issues, separately from questions concerning development and title. The legislation for management, however, is still complex, and due to this, which makes the legislation difficult to understand for people in general, professional managers are often needed.

No matter what form or type of 3D property there is; strata title, part strata or stratum, there must always be some kind of agreement regulating the common facilities and the relationship between the owners, when there are several parts in different ownership being in such close connection, depending on each other. In New South Wales, there are agreements introduced to handle matters concerning management issues between the different property owners. When comparing the different types of agreement, such as the Strata Management Statement and the Building Management Statement and their contents, they appear to be very similar, regulating the same type of issues.

7.4.5 The Settlement of Disputes

Since 3D property formation often results in people living close together within the same building, but on their own property units, the question regarding how to solve disputes has become very important. That the relationships between different owners within the building is an important and difficult question to resolve can be illustrated by the fact that the committee developing the first strata title legislation in New South Wales found it much easier to solve the issue of providing conclusive titles for different parts of a building than to formulate a code for living in close communities, i.e. it is difficult to find ways of getting neighbours to live together without any disputes occurring.¹⁶⁹⁷ It seems to be quite common that such disputes have to be taken to court, just like other types of disputes concerning ownership, etc. Some countries have, however, introduced an easier and cheaper type of dispute resolution system, often involving a first step of mediation.

In Australia there have been problems with how to settle disputes. To make this clearer, New South Wales introduced both a commissioner and a board for settling of disputes. The introduction of the mediation process was one of the most important reforms coming with the Strata Schemes

¹⁶⁹⁷ A Look at Strata Title in New South Wales from 1961 to Date, p. 2.

Management Act. Victoria has now understood that some kind of special procedure is needed for this and is making changes that will bring it closer to the New South Wales system. Already in a report from 1984 it was suggested that a cheap inquisitional arbitration should be available to solve problems from the communal living, but a method for it has not been suggested until now.

Perhaps one of the reasons for why the systems of New South Wales and Germany seem to be functioning so well is their procedures for settlement of disputes. Both of them have successfully introduced special mechanisms for settlement of disputes within condominium schemes and do not have to rely on traditional court procedures for this. By offering a less expensive and quicker way to settle these types of disputes, they are making the entire management of condominium schemes easier.

However, it is interesting to see that in Germany, according to the new amendments of the *Wohnungseigentum* legislation that are now introduced, the intention is to change from the special dispute settlement procedure (*freiwillige Gerichtbarkeit*) to a process according to the civil law procedure, just in the opposite direction to what other countries are doing, for example Victoria, where a procedure similar to the one in New South Wales, as mentioned, is about to be introduced. This part of the German proposal has, however, been criticized.

7.4.6 Insurance

Since with 3D property formation so many owners and different activities can be gathered within one building, it is really important to have clear rules about insurance and to regulate the relations between the different forms of insurance, such as what should be included in the insurance for the building, for the private units as well as for the common property, and who should be responsible for it. Problems that have been experienced regarding what should be included in the insurance, for example, are whether the windows on the ground floor on commercial buildings should be included in the insurance of the owners corporation or if the shop insurance should cover it. It is also important to define where the boundary should be between the home insurance and the property insurance. A common solution is that the apartment owners are responsible for insuring their own apartments, while the association will arrange the insurance for the remaining common parts of the building. In many countries, the management association must insure the building to its replacement value. This must include the improvements and fixtures added by the lot owners, even if they are situated within the lots. In both Australia and Germany, there have been complications with apartment owners adding expensive fixtures to their property, increasing the premium of the building insurance. To solve this, rules have been introduced to let the apartment

owners themselves pay for this extra cost. If there are occupants of high-risk categories, such as industry, there might be problems as to obtaining any insurance at all for the building. In Australia there is a possibility for the individual owners to arrange insurance themselves for their individual lots, if the management association has not arranged the insurance that is needed. The insurance system has also been revised in Australia due to various problems.

7.5 Conclusions

3D property rights have been studied in this thesis and the findings presented have contributed to the establishment and systematization of knowledge within this field. This was done by studying such systems in certain different countries with particular focus on management questions.

Chapter 2 showed that a clear definition of 3D property is difficult to achieve, but in order to let such a definition comprise all forms of 3D property, it is necessary to keep it as wide and general as possible. For more specific definitions, each country or area has to provide its own legal definition adapted to its legislation and specific legal system. 3D property has been defined in this work as real property that is legally delimited both vertically and horizontally.

A classification of the main forms of 3D property rights into specific types has been presented in this thesis. There are many different ways of classifying and making a division into categories of 3D property rights. There are also many different terms that are or may be used for these forms. One way to make this subdivision has been chosen here, based on what seems to be reasonable, logical and with regard to a general opinion formed from the literature survey on what categories and terms others have used. Where common denominations were found, these were mentioned as alternatives. I have tried to be consistent throughout this thesis with respect to terms chosen, but when describing the studied legislation, the terms stated there have in most cases been used. This is not claimed to be the most accurate division or the best terminology, but to give a general structure and something to relate to in the description of the findings of my studies, one division was chosen to facilitate for the reader.

The two main forms presented are the independent 3D property and the condominium, and these forms can be further subdivided. From the overview in the second chapter of the international 3D property use, it is possible to notice that 3D property rights can be found all over the world, especially the condominium type.

Despite the differences existing between the types of 3D property rights, there are very similar rules within the various types of housing, such as for condominiums, limited company apartments, apartments owned by housing associations, etc. Generally speaking, it is regarding the type of ownership that we find the greatest differences. These similarities in rules, especially for

apartment ownership, show that there are certain functions and rules for management, association, etc., needed when several people live together within the same building, regardless of type. Management is often taken care of in the same way, and there is most often an association, executive board, division between private and common property, etc.

While condominiums and the interaction between them are regulated quite well and in detail by law, the relation between the independent 3D property units in many cases is more open for the parties to decide, with little formal cooperation and coordination, and regulated mostly through agreements. Facilities are preferably kept in private ownership to avoid common property and the need for joint management.

It has been possible to discern here a number of key factors related to 3D property rights that are common for most forms and systems. The key factors and particular problems in the development and use of the 3D property rights systems in the studied countries that were found to a large extent correspond with those that could be expected in advance and that can be found from theories concerning important and critical issues in 3D property formation. The same issues can be found in the discussions around 3D property formation when it was about to be introduced into Swedish legislation. They can also be said to be somewhat different and more particular than issues relating to traditional property formation. When studying these key factors in the selected countries, some specific problems connected with the factors have been possible to discern, which can be found in the table below.

Table 7.3. Key Factors and Problems.

Key factor	Problems
Boundaries	Location of boundary: centre/surface Private/joint responsibility for structural parts
Common property	Unclear definitions – what is included
Co-operation between property units	Choice of co-operation form: easement/joint facility Areas included/parties involved
Management	Unclear responsibilities Insufficient and unclear regulations Large, complex developments – need for professional managers
Settlement of disputes	Choice of resolution method: court procedure is expensive, time-consuming
Insurance	What should be included Responsibility: private/joint

As we can see from the design principles for common institutions worked out by Elinor Ostrom,¹⁶⁹⁸ management aspects are very important when dealing with individuals sharing the same resources. Several of her principles can be noted as problem areas in the legislation from the studied countries. The first principle concerning clearly defined boundaries has been of great importance especially for 3D properties. We can see this, for instance, from the changes in the legislation in New South Wales, where the rules concerning where to locate the boundaries between the 3D units were changed due to difficulties with delimitation and who were to take the responsibility for certain parts of a building. Boundaries to separate different areas and strata schemes are also of importance, for example within a community scheme with nested associations. Another principle that has been exposed to change is the one concerning conflict-resolution mechanisms. Where New South Wales has introduced a simple system for solving disputes, where a mediator tries to get the parties to agree, Victoria still has to go through the costly and time-consuming court procedures, but is heading towards a change, introducing a system similar to the

¹⁶⁹⁸ Ostrom (1990).

one existing in New South Wales. Nested enterprises are also a factor that has been developed for the Australian states. The community schemes in New South Wales have their tiered management structures with different levels of associations and separate rules for the different areas, and a similar idea is reflected in the Victorian system of multiple bodies corporate in a plan of subdivision with limited and unlimited associations for different parts of a scheme.

It has been possible to discern differences in how detailed and flexible the legislation is concerning the 3D property system in a specific country, and to what extent regulations are being made. Some countries have chosen to regulate in detail in the legislation, while others leave the same things up to by-laws or agreements, or to be decided in the property formation process, depending on the type of legislative technique chosen, legal traditions in that country, and what legal family it belongs to. It is difficult to say which solution would be the best, but it is possible to assume that a disadvantage with a less detailed legislation is that it could lead to a greater extent of uncertainty for the owners, especially regarding management of common property. The Act regulating condominium ownership in Germany is more of a framework law, where many issues can be decided in agreements and many questions are decided in court and through interpretation. The Swedish rules about 3D property have not only been incorporated in the legislation for traditional properties, but are also not very detailed, and much is left to the cadastral authority to decide in the property formation process. The studied Australian systems, especially in New South Wales, on the other hand, are regulated quite in detail. The Act on strata titles in New South Wales, after its extensive amendments, is even considered as being the most detailed statute on apartment ownership in the world.¹⁶⁹⁹ It is difficult to say whether the degree of details in the legislation and complexity within their systems, as well as the more different forms that are to work together, are connected with how the system has developed, what problems that have occurred and what amendments that have been made, but considering that the German condominium legislation has been amended much less than the Australian Acts, even though they have been in use approximately the same amount of time, it might be possible to discover a tendency of having to make more changes when the legislation is detailed rather when it is not. The tendency that the more detailed and complex the 3D property legislation, the more changes and amendments have to be made can be illustrated by the example of the Florida condominium legislation. It has the most extensive condominium legislation in the United States, and during 1991 there were made 161 amendments to it, of which several were changed again the following year before they even had become effective.¹⁷⁰⁰ However, since this conclusion is drawn based on only

¹⁶⁹⁹ van der Merwe (1994), p. 9.

¹⁷⁰⁰ American Bar Association (1995), Chap. 2.

two cases and that there are other factors influencing the result, it might be more of a coincidence that this tendency was found. Despite the potential problems that a detailed system could entail, the system in New South Wales is nevertheless flexible, where the various forms that are offered can be combined in numerous ways.

Another factor might be, for example, how well the 3D property legislation fits into the general property legislation and the legal traditions of the country. For the case of Swedish 3D property legislation, no need for amendments has so far emerged. Since the Swedish 3D property legislation was based on the already existing institutes of real property law, for example by using joint facilities or easements for co-operation between the property units and to get access to the common parts of a building, it could be made quite uncomplicated.¹⁷⁰¹ The Swedish legislation seems to be well functioning and well suited for its purpose, and the suggestions for changes concern only minor issues. It is difficult to say whether this has to do with that the legislation has existed for a short while only and that not enough 3D properties have been formed to be able to discover any real general problems yet, or whether it is due to that the legislation was well-suited already from the beginning, fitting well into existing property legislation. It will, however, be interesting to follow the development of the Swedish legislation and see to what extent problems will occur.

Further reasons can be mentioned for the tendency that the studied Australian systems in general seem to have had more problems and had to make more amendments to their 3D property system than Germany. The fact that the system has been in force for a long time, and the society thus have had time to change more within this time, is difficult to select as a cause, since Germany also has had their system for an approximately equally long time. It seems also that the German *Wohnungseigentum* system to a large extent has been developed by the courts rather than by major statutory amendments or expert opinions. In several of the systems, however, it is evident that changes in society have played a large role in the needs for amendments. Many of the Acts were originally intended for small simple residential buildings, which today have changed into large complexes with hundreds of units in several buildings and with different demands for common facilities, or new type of infrastructure facilities, retirement homes or other forms that could not be expected when the Acts were introduced. Since Australia was somewhat of a pioneer within the field, it might happen that they had to suffer from all “teething problems” themselves, while other countries, for example Sweden, that have based their systems on the Australian ones, could learn from them and try to avoid the same problems. Perhaps it might be a coincidence as well. Trying to bring these issues into light in this thesis might also be a way to help countries that intend

¹⁷⁰¹ Lilleholt et al. (2002), p. 31.

to introduce a system for 3D property ownership to avoid these problems when developing their legislation.

It is fair to say that in general, rules for condominiums in different countries seem to be working well, and with a few exceptions without any greater need for statutory amendments. This is the case for countries such as Germany and Denmark. A reason for this might be that it is a well-tried concept. The need for amendments seems to be coming more from adjustments to changes in society and practical conditions, rather than that the regulations within the legislation that are not working well. With these factors in mind, it can be recommended to countries that want to introduce a similar system to take a look at legislation in countries that already have such a system, especially within the same legal family or legal system. A reason for that the German *Wohnungseigentum* legislation has stood the test of time so well with few amendments might be that it upon its creation gathered much experience from the condominium legislation of other countries. However, Germany has also with its long and successful experience served as somewhat of a model for other countries regarding the condominium form. This can be compared with New South Wales, which with its strata title Act was pioneering when it comes to the independent 3D property form and its combination with the condominium form, and that other countries in turn have used as a model for their legislation.

During the years of 3D property rights use, the systems have developed with new forms, such as part strata and staged strata development. To a great extent, it will depend on the needs of society and the development forms emerging. The legislation in a country of course reflects the society it regulates, and changes in it are natural and inevitable. It will be interesting to follow in the future what steps that will be taken, what new strata forms that will be introduced, and in what direction the legislation will be heading. In Australia, for instance, New South Wales might follow the example of Victoria and unify the different subdivision types into one, or increase the complexity even further. There is, however, a risk with the latter solution, since people in general might have difficulties understanding the legislation and how it works, and as a consequence not be able to use their rights fully, or create more disputes. Victoria is now making changes that match the system in New South Wales, for instance concerning disputes and insurance. Even though there are already many similarities between the states, it is fair to believe that if the legislators now start to look even more at other states and how they have done, it is only natural that the different systems will be brought closer to each other with more resemblances and common features, where those features that were found the most useful and working from each system are adopted. In general, the need for professional managers and others will increase, and with it the costs and lack of control for the owners. In this process, the management side

seems particularly difficult and needs to be regulated carefully. It is, as discussed, also important that the legislators keep up with changes in society.

It can be noted that even though a country has had a system for 3D property rights for a long time, such as New South Wales and has made such refinements of the system, regarded as a model for other countries, it still needs to make amendments concerning important matters, such as by-laws, defining common property, fire safety, etc. The changes that are being made are also specifically made in areas that we can see are essential for 3D property, such as changes to the dispute resolution provisions, introducing new mediation requirements, provision of a range of by-laws to fit the various types of strata developments, new insurance and financial management obligations, to mention but a few changes that were recently introduced in New South Wales with the Strata Schemes Development Act.

Problems and difficult features in the legislation can never be completely avoided, but if the basic system is good and flexible enough to be improved through the inevitable changes and developments of the society, it is possible to keep the system running at a good level. The mentioned problems have been resolved differently in different countries, where changes have been made also within the legislation from one period to another, when the existing Acts have proved to be insufficient. Legislation should not be seen as something rigid and inflexible, but must change with new conditions and changing times. When a country is planning to introduce a 3D property system, it is wise to utilize the experience of other countries, learn from their mistakes, adopt the best features from each system, and then adapt it to its own legislation and conditions. To learn from the experience of systems in other countries is a good way of avoiding the same problems. It is, however, important to take into account the differences in 3D property types available, differences in legal systems, as well as in culture, nature conditions and historical development. It is my hope that this thesis has made a contribution to the understanding of these matters, and a foundation for an inventory of key factors to consider for a country that is about to create its own system for 3D property rights.

7.6 Future Research

When studying the literature within the field of 3D property rights, it is apparent that the most attention is given to the condominium form. For the independent 3D property form, it is much more difficult to find any specific studies that have been made. This fact brings the conclusion that more research should be devoted to the independent 3D property form. It could be useful to further clarify the differences between this type and the traditional 2D property, and how these systems may co-exist.

It would also be interesting to make a more thorough study of systems in countries other than those selected in this work, especially from other legal systems than the systems included in Western law. For instance, a study on the condominium systems in South America would be of interest, as well as for the countries in Eastern Europe that are now developing their ownership rights for real property, and where especially the management issue seems to be a neglected factor.

Another study that could be of interest would be to look at countries that have imported their 3D property systems from countries and in that process more or less transferred the actual Acts regulating these matters. Questions to consider would be how the legislation in those countries have been adapted to the conditions in the specific country, to what extent the practical experience of the model countries has been used, and whether the same problems have been experienced or could be avoided.

A matter already briefly discussed, but could be worth investigating further, are management questions related to large investments. In countries where the 3D property system has existed for a long time, many of the buildings are in a condition where extensive renovations will be needed. What form of management is most suitable for such cases, and what differences are entailed, could be studied further.

References

The reference list below is subdivided into different categories. The “literature” section contains books, articles, etc. It is followed by “legal documents”, consisting of Acts, Regulations and other legal documents, such as bills, etc., divided into separate sections for each country. The category “other documents” contains more informal documents not included in the literature section, such as booklets and information bulletins. The “internet documents” also form a separate section, followed by “personal communication”, listing people with whom I have been in contact either personally by interviewing them or by email. For sources that are written in another language than English, this has been indicated.

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