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LAW·COMMISSION  
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*Preliminary Paper 35*

SHARED OWNERSHIP  
OF LAND

*A discussion paper*

*The Law Commission welcomes your comments on this paper  
and seeks your response to the questions raised.*

These should be forwarded to:  
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by 31 March 1999

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## Preface

IN THIS DISCUSSION PAPER the Law Commission examines the three methods currently employed in New Zealand to enable the grant of ownership or something like ownership to parts of a single allotment. They are:

- the use of flat and office owning companies,
- the cross-lease system, and
- the Unit Titles Act.

Received opinion is that cross-leases represent a time-bomb waiting to explode, that the enactment of the Unit Titles Act 1972 brought to an end the *raison d'être* of flat and office owning companies, and that the Unit Titles Act itself is badly in need of review.

The Commission puts forward various proposals for reform, some more tentatively than others, and invites informed comment. The issues are not without difficulty, and the Commission needs all the help it can get.

The Commission is responsible for the contents of this paper but we should acknowledge the expert help we have received from:

JP Greenwood	Chapman Tripp Sheffield Young, Wellington
TA Jones	Glaister Ennor, Auckland
DW McMorland	Barrister, Auckland
GJ Shanahan	Rudd Watts and Stone, Auckland
R Thomas	Barrister, Auckland
JE Toomey	University of Canterbury

The Registrar-General of Land has been kept informed of our deliberations.

The proposed sections have been drafted by V Wilson, formerly of the Parliamentary Counsel Office and now an associate in the Wellington office of Simpson Grierson.

Submissions or comments on this paper should be sent to Commissioner DF Dugdale, Law Commission, PO Box 2590, DX SP23534, Wellington, by 31 March 1999 (phone (04) 473 3453; fax (04) 471 0959, email com@lawcom.govt.nz).

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# 1

## Introduction

- 1 **T**HE NOT ENTIRELY PRECISE TERM “shared ownership” employed in the title to this paper is intended to refer to the various methods by which proprietary or quasi-proprietary rights to defined parts of a single allotment of land can be held by different persons. In New Zealand legislators were slow to respond to public demand for two particular types of land holding. One was the separate ownership of horizontally sub-divided parts of a building of more than one storey. The other was the concentration of a number of dwellings (detached or not) on a single lot in preference to a requirement that every separately owned home should be surrounded by its own curtilage of 32 to 40 perches. One of the concerns of this paper is the legacy of the ingenious schemes devised by conveyancers to fill the void resulting from the absence of appropriate statutory provision to satisfy such market demands.
- 2 An early solution was the flat or office owning company in which the “owner” of each part of a building in fact owned a parcel of shares which carried with it the benefit of a lease or licence entitling exclusive occupancy of such part. This device was recognised by the Companies Amendment Act 1964 which among other things permitted the registration of such licences under the Land Transfer Act 1952. There was a hiccup when in *Jenkins v Harbour View Courts Limited* [1966] NZLR 1 the Court of Appeal ruled that leases or licences granted under such an arrangement were void as constituting a return of capital. To avoid the inconvenience of this result there was hastily enacted the Companies Amendment Act (No 2) 1965. The provisions first enacted as Part I of the Companies Amendment Act 1964 have been substantially re-enacted as Part VIIA of the Land Transfer Act 1952.
- 3 The reason for the existence of flat and office owning companies effectively ceased with the enactment of the Unit Titles Act 1972. There seems no good reason to disturb flat and office owning companies already in existence. Some people owning flats by this particular method are attracted by the power that the constitution of a company can confer to give other flat-owners absolute control as to who is to be permitted to buy or lease flats. Flat-holders are in this way able to exclude a new occupant whom they regard as unsuitable. But we think that no more such schemes should be created. There exists already machinery in the Unit Titles Act 1972 Part IV for the voluntary conversion of company lease schemes to unit title schemes.
- 4 The Municipal Corporations Amendment Act 1958 s 3(2) and the Land Sub-division in Counties Amendment Act 1958 s 2(2) provided that a lease of part of a building was not a subdivision of land. It was in reliance on this change in the law that the cross-lease system of “owning” flats was devised. Each flat-holder owns a lease (usually for 999 years) of a unit together with an undivided interest as tenant in common in equal shares with the other flat-holders of the reversion to all the leases on the lot.

- 5 The passing of time brought refinements to the scheme. District Land Registrars are prepared to issue a composite certificate of title including both the leasehold interest and the undivided share in the reversion. The practice has evolved of each lessee being granted an area from the use of which the other lessees are excluded by a restrictive covenant. The effect of the Municipal Corporations Amendment Act 1971 s 35 and the Counties Amendment Act 1971 s 37 was to enable cross-leases of separate buildings on the same lot. Among other things this has greatly facilitated the spread of “infill” housing, that is to say the erection and disposition of new detached residences built on parts (usually the former back gardens) of residential lots.
  - 6 Despite these improvements the cross-lease scheme is (for reasons particularised in chapter 2) ineradicably flawed. In the Commission’s view the policy objective should be the replacement of cross-leases either by subdivisions or by unit titles.
  - 7 Under the Unit Titles Act 1972 a statutory code was established enabling ownership in the strict sense of strata estates in flats and business premises. Common property (driveways, stairwells and the like) is held by proprietors in shares defined as later discussed (see paras 27–30). There is a body corporate in which all the proprietors are the corporators with obligations that include the payment of rates and other outgoings, the maintenance of common property, and the levying of proprietors to procure the funds necessary for these purposes. In the view of this Commission this scheme, admirable though it is, needs refining.
  - 8 We are persuaded that there now exists in New Zealand sufficient demand to justify legislative provision for more complex community developments. Such developments could then occupy substantial areas of land divided into various neighbourhoods and precincts and with unit entitlement being coupled with the right to the shared enjoyment of various sophisticated amenities. Currently in New Zealand for such developments it is necessary to establish an elaborate structure involving restrictive covenants, specially incorporated entities to operate amenities and other complications. This paper makes no provision for such matters; they are mentioned only to make it clear that they have not been overlooked. The Commission is working on a set of proposals to deal with these issues which will be included in a further discussion paper planned for publication in 1999.
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## 2 Cross-leases

### *The problems*

- 9 **T**HE BASIC PROBLEM WITH THE CROSS-LEASE SYSTEM is perhaps public lack of awareness that there are problems. Most unit holders, it may be suspected, think of themselves as owning their units plus so much of the surrounding land as they may occupy to the exclusion of other unit holders (whether such exclusion rests on courtesy or custom or the rather sounder basis of a restrictive covenant). They may have been told by the kindly real estate agent on whose recommendation they bound themselves to their purchase that they would be “as good as” owners. But of course they are in fact neither owners nor as good as owners. To date the number of occasions on which differences resulting from this have led to litigation is not great. Common sense suggests, however, that with the passing of time and as buildings age or uses permitted in particular neighbourhoods change, the essentially unsatisfactory nature of this form of tenure will become more and more apparent. (The sorts of problems that can arise are strongly exemplified by the unreported case of *Hopper Nominees Ltd v White and Dryden*, discussed by DW McMorland in (1997) 7 BCB 276.)
- 10 Under the cross-lease scheme the rights of the unit holder depend not on settled legal rules but on the terms of the particular lease. One important difference between a lease and a freehold title is that a lease is susceptible of termination by re-entry for breach. The terms will have been settled by the developer (who may be happy to take the money and run), and often in practice are found to be unsuitable or inept. The purchaser further down the line is unable to negotiate with the vendor for a variation of terms because this would necessitate the agreement of the other co-owners; the purchaser must take the lease or leave it. Not infrequently the cross-lease method will have been used in situations (usually a large number of units) where it is excessively cumbrous for the circumstances. Many covenants in cross-leases are drafted as personal covenants and do not pass the test at common law of “touching and concerning the land”. The consequence is that they do not run with the land so as to bind successors. Clauses conferring power of attorney are an example.
- 11 The lease is of only the original building site. Unless a new flat plan has been deposited and new leases registered a unit-holder has no lease of any addition – horizontal or vertical. When the holder comes to sell, the existence of such additions is a defect in title. This can only be remedied by the expensive process of cancelling the lease and replacing it by a lease that includes the addition. A lack of general awareness that this is the legal position leads quite innocent vendors into trouble.
- 12 The position where the underlying title is itself leasehold is even more hazardous. Each unit holder is liable to the head lessor for all the rent due under the headlease. The lease of the unit has to be for a shorter term than the headlease and replaced on expiry of the headlease.

- 13 The physical or economic life of a unit is likely to be shorter than 999 years. Different buildings on the same lot may have different life expectancies. This will invariably be so where a new “infill” house is built on the same lot as an existing older dwelling. There is no machinery for resolving differences as to whether or not a cross-lease scheme should be terminated, this being often the only sensible solution if one unit has reached the end of its economic life; a single unit holder would be able to prevent this.
- 14 The origin of the cross-lease system was as a means of exploiting a loophole in the rules restricting subdivision of land. It is not surprising that the use of legal machinery designed for one purpose causes problems when used for a different purpose. Whatever the social or resource management objectives that were intended to be achieved by a prohibition on subdivisions, they have been frustrated. There is no physical difference, and therefore no genuine difference from a town planning point of view between cross-leasing and a straightforward subdivision. So the sensible course is to substitute for cross-leases either subdivision or, if that is inappropriate (for example, in the case of flats in a building of more than one storey) unit titles. There is no reason why territorial local authorities should not exact precisely the same requirements whether the tenure is freehold or cross-lease. Many of them already do so and all of them should be encouraged to do so. In the view of the Commission cross-leases should be phased out and replaced by subdivision or unit title. In para 25 we propose provisions under which, in certain circumstances, a body corporate can be dispensed with. In the case of a unit title scheme this should make conversion to unit titles in those circumstances more acceptable. Whereas in the case of company leases it is in the Commission’s view sufficient to forbid the creation of new schemes, in the case of cross-leases the Commission believes that there should also be a positive programme of conversion, either to subdivision or to a unit title scheme.

#### *The mechanics of phasing out*

- 15 What is needed is provision for (a) the voluntary conversion of cross-lease schemes to sub-divisions; (b) the prohibition of new cross-lease or company lease schemes; and (c) the mandatory conversion of cross-lease schemes to unit title schemes or sub-divisions. (Part IV of the Unit Titles Act 1972 already contains machinery for the voluntary conversion of company lease and cross-lease schemes to unit title schemes.) How can phasing out be achieved? Obviously it is desirable to avoid a situation in which pensioner unit holders are suddenly landed with the survey and legal costs necessary to convert their form of tenure. We propose that objective (c) be achieved indirectly, by a prohibition after 10 years of the registration of any dealing affecting a cross-lease. (The view has been expressed that a shorter period, say 5 years, would be preferable, and we invite comment on that point.) The legislation must make it clear that territorial local authorities are not to have the right to thwart either voluntary or mandatory conversion by the subdivisional requirements of the Resource Management Act 1991. This would include any requirement for the upgrading of affected buildings of the sort contemplated by the Resource Management Act 1991 s 224(f). It seems inappropriate for a physical upgrading of a building to be required where no change in use or effective ownership is contemplated but merely a tidying up of the method of tenure. There needs to be a machinery for the resolution of disputes among unit holders either as to whether



there is to be a voluntary conversion or the terms of such conversion. The possibility of differences, in particular in older style developments where exclusive occupancy areas are not formally defined, should not be underrated.

- 16 From the point of view of parties likely to be affected by the financial imposition of converting a lease, it seems to us that this approach is workable. Unless the parties choose to act sooner, in most cases conversion costs need not be incurred until after 10 years, and even then only on the occasion of the registration of a dealing by any of the unit holders in the scheme. One possibility we considered was to avoid the cost of survey definition by permitting the issue of titles “limited as to parcels”, that is with their dimensions not guaranteed. The better view is probably that there is no point in postponing the need to incur survey costs in this way, but comment on the point is invited. The proposed *section 121S(3)* makes the provision of a survey plan discretionary but commentators may consider that if the “limited as to parcels” proposal is rejected there should be a simple requirement of a survey plan in every case without introduction of any element of discretion.
- 17 An appropriate way to prohibit new cross-lease or company lease schemes would be to insert in Part X of the Resource Management Act 1991 the following *section 218A*:

**218A Prohibition on subdivision by way of cross-lease or company lease**

- (1) No person may subdivide land by granting a cross-lease or company lease in respect of any part of an allotment.
- (2) Despite section 224, no survey plan may be deposited under the *Land Transfer Act 1952* or with the Registrar of Deeds for the purposes of section 11(1)(a) if the survey plan is to enable the grant of a cross-lease or company lease.
- (3) Despite section 226, no District Land Registrar may issue a certificate of title for any land that is shown as a separate allotment on a survey plan (being a certificate issued to give effect to the subdivision shown on that survey plan) if the survey plan is to enable the grant of a cross-lease or company lease.
- (4) For the purposes of this section, the terms **cross-lease** and **company lease** include a memorandum of cross-lease or company lease in renewal or in substitution for a cross-lease or company lease.
- (5) This section comes into force 3 months after the commencement of this Act.

- 18 We recommend the insertion into the *Land Transfer Act 1952* of a new *Part VIII B* containing the following terms:

**121P Meaning of cross-lease**

For the purposes of this Part, **cross-lease** means a lease of a building or part of a building on, or to be erected on, any land

- (a) that is granted by the registered proprietor of the land; and
- (b) that is held by a person who is a registered proprietor of an estate or interest in an undivided share in the land.

**121Q Prohibition on dealing with cross-leases**

- (1) No Registrar may register an instrument purporting to transfer or otherwise deal with any estate or interest in land if that land is subject to a cross-lease.
- (2) Subsection (1) does not apply to a transmission.
- (3) This section comes into force 10 years after the commencement of this Act.

**121S Voluntary conversion of cross-leases**

- (1) On the application of every registered proprietor of land that is subject to a cross-lease and every other person having a registered interest in that land, the Registrar may cancel all certificates of title for that land and issue new certificates of title that effect a subdivision of that land, as defined in section 218(1) of the *Resource Management Act 1991*, into the parts specified in the application and survey plan (if required under subsection (3)).
- (2) Every application must relate to the whole of the allotment.
- (3) In addition to the application, the Registrar may require the deposit of a survey plan.
- (4) Section 224 of the *Resource Management Act 1991* does not apply to the survey plan.
- (5) No Registrar may refuse to grant an application simply because the territorial authority has not granted a subdivision consent in respect of the allotment.

**121T Consent for conversion**

- (1) If a person's consent is required for an application under section 121S, and that person is dead or cannot be found or refuses to consent or does not consent within a reasonable time, or if for any reason it is impracticable to obtain the consent of that person, the Court, on the application of any applicant under that section, may if it thinks fit consent on behalf of that person to the application.
- (2) In any case where the Court consents, it may, by the same or any subsequent order, require any person having the custody or control of any certificate of title or instrument to produce it to the Registrar or authorise the Registrar to dispense with the production of it.

- 19 It will be necessary to specify which court is intended, and comment is requested on whether jurisdiction should vest in the High Court, the District Court, or both.

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### 3

## Unit titles

### *Physical dimensions of units*

20 THE TERM *UNIT* is defined in s 2 of the Unit Titles Act 1972 to mean the following:

**unit**, in relation to any land, means part of the land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation and partly in another or others, all the dimensions of which are limited, and that is designed for separate ownership:

On the basis of this definition the unit could be:

- a polyhedron of space defined without reference to any building;
- a polyhedron of space forming part of a building;
- a polyhedron of space which includes the whole or part of a building.

Although the definition in s 2 is capable on its own of being construed as simply referring to a polyhedron of space, it is not seriously argued that this is its effect because other provisions preclude that construction by, in effect, requiring the existence of a building before a unit plan is deposited. The issue on which different territorial local authorities and District Land Registrars are said to hold different views, however, is as to whether the boundaries of the polyhedron must coincide with physically ascertainable parts of a building or whether it is possible to include air space within the boundaries of a unit. The latter is by far the more convenient view because such a definition of a unit enables the unit holder to prevent encroachment into air space that would lead to interference with privacy or views. Further, in this way provision can be made for horizontal or vertical extensions to a unit holder's building or part of a building without encountering the sorts of problems referred to in para 11 in the context of cross-leases. The Commission's view as a matter of policy is that the statute should be amended to put it beyond doubt that the latter is the correct interpretation of the term *unit*. (The fullest and best account of these matters is by John O'Regan in the New Zealand Law Society 1994 seminar booklet, *Cross-leases and Unit Titles: Problems and Solutions*.)

21 The Survey Regulations 1972 (SR 1972/264) R41(7) have plainly been drafted on the assumption that the boundaries of units would be the boundaries of physical structures. There are provisions clearly designed not to preclude the inclusion of chunks of air space in units but rather to preclude the depositing of plans before buildings have reached a particular stage of completion. They are the Unit Titles Act 1972 ss 5 and 5A and Resource Management Act 1991 s 224. It may be argued that the definition of *principal unit* in Unit Titles Act 1972 s 2 predicates the existence of a building.

- 22 We recommend that to put an end to uncertainty there be inserted in the Unit Titles Act 1971 the following new *section 5B*:

**5B Units including open space**

- (1) Subject to subsection (2), nothing in the *Unit Titles Act 1972* or the *Resource Management Act 1991* prevents the deposit of a unit plan where a unit shown on the plan includes open space.
  - (2) The unit plan must show, in relation to the unit, any building that is erected, or proposed to be erected, on the land.
- 23 Alternative views on which we would invite comments are that the statute should be altered to enable:
- principal units unrelated to buildings – so allowing unit titles for parking spaces, caravan sites, market stall sites or playing fields; or
  - accessory units unrelated to buildings – so allowing, for example, gardens at a distance from the principal unit to be accessory units.

*The need for a body corporate*

- 24 The requirement for body corporates typically operates efficiently and well in the case of commercial premises and of residential premises that consist of a large number of units or are owned by commercially sophisticated persons; in other cases body corporates are frequently little understood and their existence ignored. This neglect can lead to problems when, for example, a unit holder wishes to sell and a s 36 certificate is requisitioned. In the view of the Commission, it would do no violence to the scheme of the statute to dispense with a body corporate in the case of very simple schemes. Eligible schemes can be defined as those with no common property other than driveways or party walls (thus only single storey projects would be included). An appropriate measure would be the addition of new *sections 12A* and *12B* in the following terms:

**12A Body corporate not required in certain cases**

- (1) Section 12 does not apply if
  - (a) the common property comprised in the unit plan is of a kind referred to in section 12B; and
  - (b) the registered proprietors of the land to which the unit plan relates
    - (i) before the deposit of the unit plan, elect to dispense with the requirement for a body corporate; or
    - (ii) after the deposit of the unit plan, elect to dissolve the body corporate.
- (2) If an election is made under subsection (1)
  - (a) the registered proprietors of the land to which the unit plan relates are the proprietors of all the units in the unit plan, and all other assets of the body corporate, as tenants in common in shares proportional to the unit entitlement in respect of their respective units; and
  - (b) sections 13, 16, 17, 36, 37, 40 to 43, 50, 51, and 54 do not apply; and
  - (c) sections 14, 15, 19, 20, 23, 26, 28, 32 to 34A, 38, and 44 to 49 apply with the necessary modifications, as if references in those sections to the body corporate were references to the registered proprietors.
- (3) No election under subsection (1) has effect until the registered proprietors have lodged a notification of the election with the Registrar and the Registrar has entered on the supplementary record sheet an appropriate memorial relating to the election.

- (4) Before the Registrar enters a memorial on the supplementary record sheet under subsection (3), the Registrar must be satisfied that the election has been duly made and that the body corporate has no liabilities.
- (5) If the Registrar enters a memorial on the supplementary record sheet relating to the election, the body corporate is to be treated as having been dissolved on the date the Registrar enters that memorial.

**12B Meaning of common property for purposes of section 12A**

- (1) For the purposes of section 12A, **common property** means:
  - (a) the common property shown on the unit plan which consists entirely of a driveway or party wall or both; and
  - (b) the common property that is not shown on the unit plan which:
    - (i) consists of airspace; or
    - (ii) is below ground; or
    - (iii) is common property by virtue of regulation 41(6) of the *Survey Regulations 1972*.

- (2) For the purposes of subsection (1):

**driveway** means that part of the common property where the proprietors, and their servants, tenants, agents, licensees, and invitees at all times by day and night are permitted to go or pass with or without vehicles, machinery, and implements of any kind;

**party wall** means a wall that separates 2 or more units.

25 It should be noted that there is no provision for revivifying the body corporate after it has ceased to exist. We should also note the argument against our proposal, namely that to destroy the decision-making machinery without replacing it leaves an unjustifiable vacuum. Submissions are sought, but our immediate response is that the developments eligible to elect to operate without bodies corporate will by definition be so small and simple that the compliance costs of providing a body corporate are largely wasted and any alternative machinery is unnecessary.

26 An alternative approach to the proposed *section 12(A)(4)* would be simply to provide for the applicant to produce the appropriate resolution with a statutory declaration verifying that it was duly agreed to and that the body corporate has no liabilities. This would have the advantage of making it clear that the Registrar is not obliged to look behind the *ex facie* position

*Unit entitlement*

27 Under s 6 the statute provides for the assignment to every principal unit a unit entitlement on the basis of the unit's value in relation to the other units. This entitlement is the basis of various determinations set out in s 6(3) and includes the ownership of common property in s 9; the apportioning of levies among unit holders in s 15(2)(c); the apportionment of entitlement if a plan is cancelled in s 45(7); and voting rights in cl 27 of Schedule 2.

28 This in the Commission's view is excessively inflexible. Relative values may change during the life of the building. A view from a particular unit, for example, may be built out. There may be zoning changes which allow ground floor units to be used as shops or upper levels to be used as serviced residential apartments or a hotel. Under the proposals referred to in para 22 a building, where it

comprises only part of a unit, may be extended horizontally or vertically. The usefulness of various services to different owners may not be reflected in a value-based apportionment (for example, the usefulness of a lift to a ground floor owner). While in practice we would expect an acceptable entitlement to continue to be hitched to value there is no reason why entitlement should not be initially fixed on any basis that the developer thought to be marketable, and be alterable in the way that rules in the Schedule 2 are altered by way of an addition to those rules.

- 29 We recommend the substitution of the following new *sections* 6(1) and 6(2):
- (1) For the purpose of determining the matters specified in subsection (3), before the unit plan is deposited a unit entitlement must be assigned to every principal unit and every accessory unit.
  - (2) No change may be made in the unit entitlement of any unit after the unit plan is deposited unless:
    - (a) section 19(5)(d) or section 44(3) applies; or
    - (b) the body corporate agrees, by unanimous resolution, to add new rules to those set out in Schedule 2 that fix or state the manner in which the body corporate must fix the unit entitlement.

- 30 The Unit Titles Act will need the following corresponding changes:

Amend s 37 by inserting *subsection* (5A):

- (5A) Subsection (5) does not apply if rules are added, as referred to in section 6(2)(b), that fix or state the manner in which the body corporate must fix the unit entitlement.

Amend s 44(2)(d) by omitting the words:

“which apportionment shall be determined by a registered valuer within the meaning of the *Valuers Act 1948*, subject to payment to the valuer of such fee as he may fix.”

Amend s 44 by substituting *subsections* (3) and (3A):

- (3) Where a redevelopment involves the inclusion in a unit of part of the common property or the erection of one or more units on the common property, the unit entitlements of all units that will be on the land to which the plan of redevelopment relates must be reassessed, and a new unit entitlement must be assigned to every such unit at the date on which the reassessment is made.
- (3A) Despite subsection (3), a reassessment may be made as at the date the current unit entitlements were made if the development is of a relatively minor nature.

Insert new *section* 45A:

**45A Proprietors may agree on different basis for determining shares in estates**

- (1) If all the proprietors apply under section 45 to the Registrar to cancel the unit plan, sections 45(5)(a) and 45(5)(b) do not apply if all those proprietors determined, by unanimous resolution, before the cancellation of the unit plan to vest the estates referred to in section 45(5) on a different basis from that relating to their unit entitlements as referred to in section 9.
- (2) If subsection (1) applies, on the cancellation of the unit plan
  - (a) the estates referred to in sections 45(5)(a) and 45(5)(b) vest in the persons who were the proprietors of the units immediately before the cancellation of the unit plan on the basis determined by those proprietors; and
  - (b) the estate referred to in section 45(5)(b) merges with the estate referred to in paragraph (a).

- (3) To avoid any doubt, the proprietors may, under section 45(7), determine by unanimous resolution, before the cancellation of the unit plan, that all property and money of the body corporate be distributed on a different basis from that relating to their unit entitlements.

Amend s 47 by adding a new *subsection (5)*:

- (5) Section 45A applies when an application is made to the Registrar under this section.

### *Insurance*

- 31 Section 15(1)(b) imposes on bodies corporate an obligation to insure all buildings and other improvements. It is not necessary or appropriate that this obligation should apply to stand-alone buildings contained in a unit space. We recommend amending s 15 by inserting *subsection (2A)*

- (2A) Despite subsection (1)(b), the body corporate is not required to insure and keep insured any building on the land that is a stand-alone building contained in a unit space.

### *Dealings in common property*

- 32 Subsections 18(1) and 19(2) require the deposit of a new unit plan if common property is transferred or acquired. This is unnecessarily cumbersome in the case of, for example, a boundary adjustment. The sections should be modified to allow a dispensing power to the District Land Registrar in appropriate cases as follows:

Amend s 18 by adding *subsections (6) and (7)*:

- (6) A transfer need not be accompanied by a new unit plan under subsection (1) if, because of the nature of the common property being transferred, the Registrar is of the view that a new unit plan is not required.
- (7) If subsection (6) applies, subsections (3) to (5) apply, with the necessary modifications, as if the reference to a new unit plan was a reference to a unit plan.

Amend s 19 by adding *subsections (7) and (8)*:

- (7) A transfer need not be accompanied by a new unit plan under subsection (3) if, because of the nature of the land or unit being transferred, the Registrar is of the view that a new unit plan is not required.
- (8) If subsection (7) applies, subsections (3) to (5) apply, with the necessary modifications, as if the reference to a new unit plan was a reference to a unit plan.

### *Recovery from defaulters*

- 33 There are practical difficulties for body corporates in recovering levies from unit holders who do not pay what is due from them. There is of course a clear right to sue but to do so is all too often uneconomic. If the unit holder does not pay that unit holder's share of a levy then to meet its outgoings the body corporate has to borrow the money. Except for the interest provision in s 34A, there is at present no machinery for casting the cost of this on to the unit holder. As it stands, the only section under the Act imposing any sanction other than interest on the defaulting unit holder is the provision in cl 28 of Schedule 2 depriving such a unit holder of voting rights. (Even here a unit holder cannot be excluded

from voting when unanimous resolution is required.) This deprivation is not usually much in the way of an incentive to payment where a unit holder is sufficiently thick-skinned not to pay what is owing. The Commission has considered three solutions to this problem.

- 34 The first is to ensure that at least the body corporate will be paid if a dealing is registered against a particular unit. The way to do this is to require production to the District Land Registrar of a s 36 certificate on registration of any dealing and to empower the body corporate to withhold such certificate if there are arrears. It may be noted that the South African Sectional Title Act s 15B(3)(a)(i)(aa) is a comparable provision. It has been held that the effective preference this confers on the body corporate can be fitted conceptually into the statutory scheme of distribution among creditors of an insolvent as a cost of realisation: *Nel No v Body Corporate of the Seaways Building* (1995) (1) SA 130. Appropriate provisions to effect this are the following:

**16A Certificate of proprietor's liability to be produced to Registrar**

No Registrar may enter a memorial on a certificate of title issued under this Act if

- (a) the memorial relates to a mortgage, charge, transfer, or other dealing affecting the title; and
- (b) a certificate under section 36 was not included with that mortgage, charge, transfer, or other dealing when the instrument was presented for registration.

Amend s 36 by adding *subsection (2)*:

- (2) The body corporate may refuse to provide a certificate under subsection (1) in respect of a proprietor if there are moneys due from that proprietor to the body corporate and those moneys are unpaid.

- 35 The second is to make first mortgagees liable for levies by analogy with the Rating Powers Act 1988 s 139. To achieve this we recommend a new *section 15A* be inserted into the Unit Titles Act:

**15A Recovery of contributions from first mortgagee**

- (1) If a proprietor defaults in the payment of a contribution levied under section 15(2)(c), the body corporate may recover that amount from any person who is a first mortgagee of the unit in respect of which the amount is payable.
- (2) If a first mortgagee pays a contribution under subsection (1), the amount so paid, until it is repaid to the mortgagee, must be treated as forming part of the money secured by the mortgage and bears interest at the same rate, or, if the mortgagee so decides, is recoverable by him or her from the mortgagor or proprietor.

- 36 The Commission also gave some thought to recommending the insertion in the statute of a provision entitling the body corporate to exercise a power of sale in the event of a continuing default. An analogy might be the power in Article 12 of Table A to the Companies Act 1955 for a company to sell shares over which it had a lien. There would need to be adequate provision for notice and other safeguards comparable to the duties imposed on a mortgagee. We would be assisted by receiving comments on this particular proposal.

### *Staged developments*

- 37 Provision for staged developments was made by Part I of the Unit Titles Amendment Act 1979. Section 2 of that statute defines a "future development unit" as a unit that is proposed to be developed at a later stage. Section 9(2) provides that the registered proprietor of the stratum estate in a future development unit



is not required to contribute to the funds established by the body corporate under s 15 of the principal Act. Under s 15(5), however, the owner of a future development unit is required to share in the outgoings where the deposited unit plan relates to an estate as lessee rather than a fee simple estate. Consequently, the developer has to pay his or her share of rent but does not have to pay any share of rates or other outgoings. This seems anomalous when it is remembered that under the statute there is no time limit for completing developments and that there is no limit to the proportion of the whole property that may be represented by the future development unit. Thus, where there is a future development unit or units the people who have acquired the remaining units may find themselves having to pay the whole of the rates and outgoings other than ground rent for a very long period. This needs to be changed by the insertion of a provision (roughly comparable to s 9(5) of the 1979 Amendment Act) by providing that the owner of the future development unit must pay a share of outgoings other than rent in such proportions as may each year be fixed by agreement or failing agreement by a single arbitrator. We recommend the following:

**9A Proprietors of future development units to contribute to certain outgoings**

- (1) Despite section 9(2), the registered proprietor of a stratum estate in a future development unit must contribute an amount to a fund established by the body corporate under section 15 of the principal Act.
- (2) The amount is to be agreed between the body corporate and all registered proprietors of the future development units of the development.
- (3) If the registered proprietors and the body corporate are unable to agree on the amount, the amount must be determined by a single arbitrator in accordance with the *Arbitration Act 1996*.
- (4) In the case of a development to which Part II of the principal Act applies, the amount excludes any rent payable to the lessor.

*Body corporate rules*

38 A number of issues arise in relation to rules on which the Commission seeks comment. Section 37 and Schedules 2 and 3 provide rules: those set out in Schedule 2 may be added to, amended or repealed by unanimous resolution of the proprietors and not otherwise; those set out in Schedule 3 may be added to, amended or repealed by resolution of the body corporate at a general meeting. In s 37(5)–(6) there are limitations with the broad purpose of ensuring that the basic proprietary entitlement of unit holders is not interfered with and that body corporates stick to their knitting and do not engage in outside activities for profit. Section 42 provides that in cases requiring unanimity where unanimity has not been achieved, but a vote of 80 percent in favour has been obtained, application may be made to the court to approve the change despite the lack of unanimity. The 80 percent threshold means that unless there are at least five units a single proprietor can thwart any attempt at change, and in such cases it may be appropriate to permit the remaining unit owners to apply as if they represented 80 percent.

- 39 Issues on which expressions of opinion are invited are these:
- (a) Should the requirement of unanimity be replaced by a percentage and, if so, what percentage?
  - (b) Should the 80 percent threshold for a s 42 application be reduced and, if so, to what level?

- (c) In each case should the vote percentage required be calculated only on number or should value be taken into account as contemplated by para 27 of Schedule 2?
  - (d) Should the statute contain some guidelines for the exercise of the s 42 discretion as suggested by Jaine J in *Re Bell* (HC Wellington, 22 October 1992, M243/92)?
  - (e) If yes, would an appropriate guideline be one to the effect that the courts must be satisfied that the changes proposed will not change (so far as the objector is concerned) the essential elements of the scheme as they were when the objector contracted to acquire his or her interest?
  - (f) Should there be an express power to establish a sinking fund for deferred maintenance and replacement items?
  - (g) Should the proviso to s 37(5) be modified to make it clear that the body corporate has power to acquire adjoining land for amenity purposes and to provide amenities for which it can make charges to those using them from outside the development?
  - (h) Do the existing rules require any further additions or omissions?
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### Jointly owned access ways

40 **T**HERE ARE MANY OLDER SUBDIVISIONS where instead of access strips being apportioned among the properties they serve with each portion of the strip being subject to a right of way in favour of owners of the other portions, the method adopted has simply been for the owners of the rear lots to be co-owners of the complete access strip. If the machinery used had been that of reciprocal rights of way the rights implied by Schedule 9 of the Property Law Act 1952 would have been applicable. To get around the problem the Commission recommends enacting the following sections as *sections 126H* and *126I* of the Property Act 1952:

#### **126H Rights implied in respect of access strips**

- (1) Where an access strip comprises a driveway, or a proposed driveway, a proprietor of the access strip is entitled:
- (a) to a reasonable contribution from the other proprietors towards the cost of establishing, maintaining, upkeeping, and repairing the driveway to an appropriate standard; and
  - (b) to recover from the other proprietors the costs of repairs to the driveway caused by any wilful or negligent act, and all such costs caused by those other proprietors, their servants, contractors, permitted occupants, residents, or invitees that arise out of the use of the driveway.
- (2) For the purposes of this section:

**access strip**, in relation to a subdivision, means a separate part of the land of the subdivision that is laid off for the sole purpose of providing access from any of the allotments of the subdivision to an existing road or street;

**proprietors**, in relation to an access strip, means the registered proprietors of each allotment which the access strip serves and who own a share in the access strip.

#### **126I Jurisdiction of Court in respect of access strips**

Section 126F (other than subsections (1)(a), 1(b) and (3)) applies in respect of an access strip that comprises a driveway, or a proposed driveway, under section 126H and any references to section 126F to:

- (a) a covenant or easement or both are to be read as references to an access strip; and
  - (b) work are to be read as references to establishing, maintaining, upkeeping, or repairing the driveway, as the case may be.
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