PROPERTY COUNCIL of Australia

PROSPERITY | JOBS | STRONG COMMUNITIES

Submission to the QUT Property Law Review - *Issues Paper on procedural issues under the Body Corporate and Community Management Act 1997*

22 February 2016

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Contents

1. Introduction

The Property Council welcomes the opportunity to provide further assistance to the independent property law review being undertaken by the Commercial and Property Law Research Centre of the Queensland University of Technology (QUT).

Since the former Government engaged QUT to undertake the independent review in August 2013, the Property Council has provided responses to:

1. Issues Paper 1: Seller Disclosure in Queensland (Feb 2014)
2. Issues Paper 2: Lot entitlements under the Body Corporate and Community Management Act 1997 (Feb 2014)
3. Options Paper: Body corporate governance issues: By-laws, debt recovery and scheme termination (Dec 2014)

In relation to the procedural issues under the *Body Corporate and Community Management Act 1997* explored in this paper, the Property Council's principal interest is the establishment of a reasonable and balanced consent threshold for the termination of a strata scheme.

This submission focuses on Section 3.6 of the issues paper, which relates to strata scheme resolutions and the requirements for resolution without dissent. Beyond this section, the Property Council supports measures proposed within the issues paper which simplify strata laws, ease the regulatory burden of compliance and achieve fairness for all parties involved in body corporate schemes.

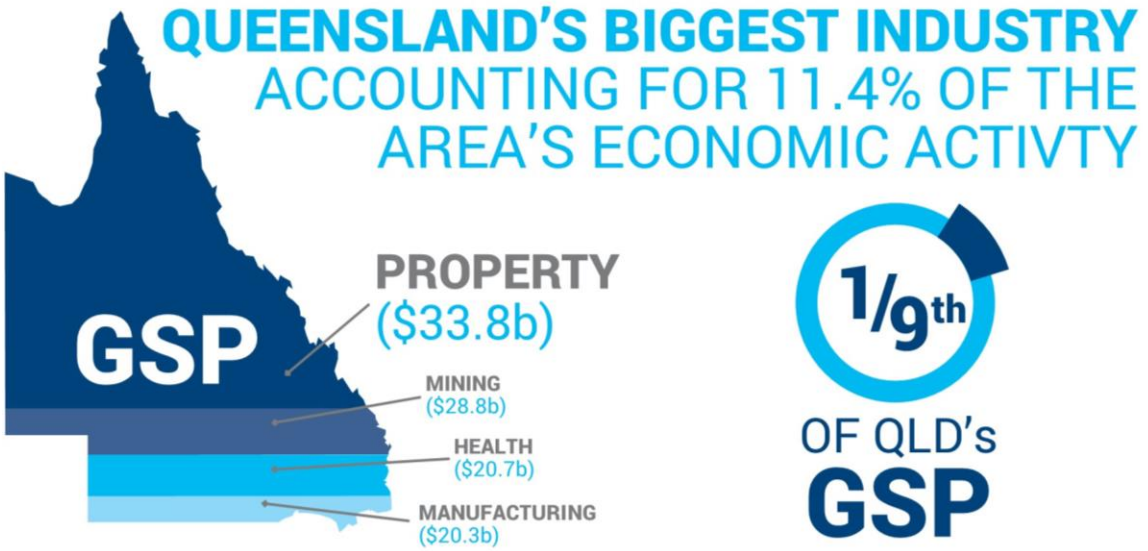
The Property Council supports a reduction in the level of lot owner support needed to terminate a body corporate scheme. The current Queensland model requires a resolution without dissent. This allows a single vote against a sale or redevelopment proposal to stop it proceeding, regardless of the proposal's merits. The need to achieve a unanimous decision from all lot holders to terminate a scheme places significant financial and safety risks on lot owners and is not compatible with a fair and equitable legislative framework.

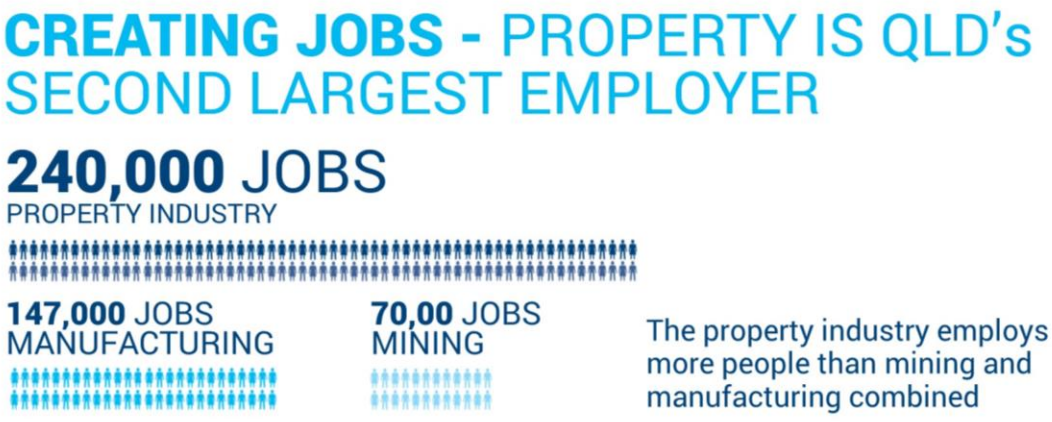
Since the release of the property law review's previous discussion paper the NSW Government has proceeded with strata law reform. Legislation has now passed the NSW Parliament which will enable the termination and renewal of a strata scheme with a 75 per cent majority from July this year.

The Western Australian Government has also announced their intention to proceed with strata title legislative reform in 2016. These reforms will include the introduction of a new consent threshold for the termination of a strata scheme. Strata schemes greater than four lots will require a 75 per cent majority of owners. Termination of schemes less than four lots will be able to be passed by a simple majority of owners.

It is imperative that Queensland keeps pace with the strata reform occurring in other jurisdictions. Through the adoption of 21st century property laws, Queensland stands to significantly benefit from the economic opportunity of reactivating our older building stock. For this reason, the Property Council **recommends the adoption of a 75 per cent majority threshold** for the termination of strata title schemes in Queensland.

2. Property industry's contribution to the Queensland economy

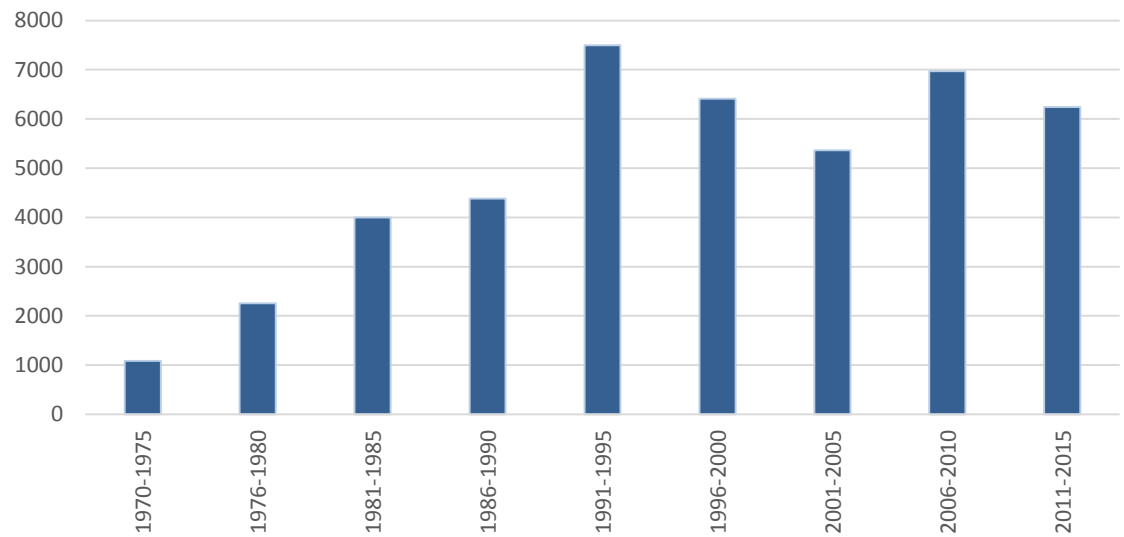




3. The current challenge

The *Body Corporate and Community Management Act 1997* has not kept pace with the evolving challenge of maintaining and improving Queensland's diverse multi-owned property asset class. This challenge will become more acute over the next decade as the number of schemes reaching the end of their economic life increases significantly.

Number of Queensland Schemes registered by five year period[1]



Economic life of a building

Buildings which reach the end of their economic life not only pose a significant financial liability to owners, but also have potential safety risks. It is the experience of industry that upgrading buildings to contemporary standards of safety can be prohibitively expensive and in many cases can be technically impossible. The requirement for unanimous support to terminate a strata scheme has resulted in many buildings across Queensland remaining locked into a deteriorating state.

The inability for these ageing buildings to be redeveloped into new revitalised assets has a negative impact, not only on individual lot holders who are tied to a rapidly depreciating asset, but the community as a whole. The redevelopment of these buildings is a crucial factor to increasing the density of our urban areas and accommodating future population growth.

Lack of practical alternative

The only current alternate option to terminate a community title scheme without unanimous support is through a District Court order. Industry experience has found that this option is cost and time prohibitive. The fact that there has only been one scheme

[1] *Griffith University, Strata Title Scheme Termination Report - Property Council of Australia, 2016*

terminated by an order of the District Court since the inception of the Act is testament to the difficulty of this avenue.

Lot owners looking to terminate a strata scheme are reluctant to 'test the water' of a District Court order, as there remains no judicial guidance on what a court may take into account in considering the just and equitable termination of a scheme.

Despite the difficulty in achieving an outcome through this avenue, the Property Council supports the retention of the District Court order option within the legislation. In the event that a building has reached the end of its economic life and the required support to terminate the strata scheme cannot be achieved, the option for independent consideration through a District Court order should be maintained as a last resort.

Real life impacts of the current thresholds

Three case studies illustrating the downfalls of the current legislative arrangements have been provided as an appendix to this submission. These examples have been taken from research undertaken for the Property Council by Griffith University (*Griffith University, Strata Title Scheme Termination Report - Property Council of Australia, 2016*).

- **Case Study 1: Paringa Lodge** provides an example of a fifty year old building on a site zoned for significantly higher density which is being held back from redevelopment by a minority of owners.

- **Case study 2: The Surfcomber** outlines a situation where a single dissenting owner held up the redevelopment of a building which had reached the end of its economic life.

- **Case Study 3: Nobby's Outlook** demonstrates how District Court orders to terminate a community title scheme on just and equitable terms is not considered a realistic option.

4. The balanced solution

The Property Council supports the position presented in the issues paper (s.3.6.1.1) that the clear will of the majority should be able to direct the decisions of a strata community.

The requirement for a resolution without dissent to terminate a strata scheme was designed with the intent of protecting individual property rights. However, when the will of an overwhelming majority within a strata community can be continually thwarted by an individual owner, the unanimity requirement erodes rather than enshrines owners' property rights.

Replacing the legislative requirement to achieve a resolution without dissent to terminate a strata scheme with a more balanced threshold would create more equitable results and significantly better outcomes for the community.

75 per cent termination threshold

The Property Council supports the adoption of a 75 per cent termination threshold as the most reasonable balance between protecting owners' rights and representing the will of the majority.

Reform of the *Body Corporate and Community Management Act 1997* to introduce a 75 per cent termination threshold would bring Queensland property laws into alignment with international best practice.

Recent reforms in NSW, and proposed reforms in WA, have accepted the 75 per cent threshold as the optimal level to ensure the clear will of the majority dictates strata scheme decisions.

As seen in the table on the following page, Australian states' requirement for unanimous consent is significantly more onerous than the requirements of comparable overseas jurisdictions.

Termination thresholds in other comparable jurisdictions[2]

100%
Australian States *(except NSW and some exceptions in NT)*

95%
Northern Territory *(if building is 15-20 years and more than 10 units)*

90%
Hong Kong *(with some discretion to reduce to 80%)*
Singapore *(for buildings less than 10 years old)*
Northern Territory *(if building between 20-30 years and 10 units or more)*

80%
United Kingdom
United States *(most states except Texas)*
Singapore
Northern Territory *(if buildings over 30 years and 10 units or more)*
Japan

75%
New South Wales
New Zealand
Western Australia *(proposed)*

Existing safeguards

Under the current Queensland legislation, there is a responsibility for bodies corporate to act reasonably in their activities. There is also an existing mechanism for any person to challenge the reasonableness of a decision taken by their body corporate. This system provides an appropriate safeguard to protect minority interest.

In an instance where over 75 per cent of a strata community has agreed to terminate a scheme, legitimate grounds for minority appeal should only relate to a question of law or the reasonableness of the decision. Therefore, it would not be appropriate to introduce new grounds for appeal, or additional legislative protections as part of this proposed reform.

[2] *Griffith University, Strata Title Scheme Termination Report - Property Council of Australia, 2016*

5. Conclusion

The Property Council would like to thank the Government for the opportunity to provide comment on the property law review Issues Paper on procedural issues under the *Body Corporate and Community Management Act 1997*.

If you have any further questions about the Property Council or the detail included in this submission, please contact Chris Mountford on 07 3225 3000, or cmountford@propertycouncil.com.au.

Yours sincerely

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Strata Termination Case Studies

1. Paringa Lodge

Paringa Lodge, CTS 114, is one of the earliest community titles schemes registered in Queensland. The eight unit complex, registered as a building units plan in 1966, is situated on land now zoned High Density Residential. The site can be redeveloped to a significantly higher density, in line with government density objectives.

A developer acquired five out of the eight units within the complex. The three remaining owners have had sale contracts presented to them by the developer but have not yet accepted the offers made.

In anticipation of future agreement from all owners to redevelop the site, the developer sought the agreement of the body corporate in 2003 to lodge a development application. As the developer is the majority owner, the ordinary resolution passed – five votes to three – and a development application was lodged at no cost to the body corporate.

A dissenting owner took the matter to the Queensland Body Corporate and Community Management Commissioner to argue that a body corporate cannot authorise the lodgement of a development application in expectation of the developer securing the rights to redevelop a site. This application was dismissed, with the Adjudicator determining that a development application could be lodged. However, the Adjudicator noted that:

> *"providing that the applicant does not vote in favour of the required motion (or sign any contract, allow another to vote on his behalf, or do anything else to allow the motion to pass), then only the Courts can terminate the scheme but only after he (and any other dissenters) have had an opportunity to put a contrary view to the Court."*[3]

Paringa Lodge remains standing today, a fifty year old eight-unit complex on a site zoned for high density. This outcome stymies the objectives of government to accommodate growth through urban infill development. In the face of growing demand for housing and infrastructure, the locked potential of sites like Paringa Lodge represent a real cost to the broader community.

Should one or two of the remaining three owners decide to take an offer from the developer to sell their units, the scheme will still be unable to be wound up due to a dissenting vote - unless the body corporate can obtain an unprecedented District Court order. This outcome does not align with the principle outlined in the *Discussion Paper* that the clear will of the majority should be able to direct the decisions of a strata community.[4]

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[3] Paringa Lodge [2003] QBCCMCmr 489 (1 May 2003)
[4] Case Study selected from: *Griffith University, Strata Title Scheme Termination Report - Property Council of Australia, 2016*

2. The Surfcomber

The Surfcomber was a five lot scheme located at the southern end of the Gold Coast, adjacent to parklands and the Rainbow Bay beach. The aging apartment building reached the end of its economic life in 2003 and required significant investment to bring the building up to code and standard.

A developer purchased four of the five lots in the complex over a two year period between 2012 and 2014 with a view to redeveloping the site into a higher density apartment block. The last remaining lot owner sought a significant price from the developer to allow them to complete a site amalgamation.

During this period the Gold Coast City Council issued show cause notices regarding the state of the building, creating added impetus for the redevelopment.

Press coverage from the period indicates that the remaining owner sought $1.8 million for the unit, but was only offered $550,000 from the developer, after the unit was valued at the significantly lower rate of $275,000. The owner went on to market the property himself with the following advertisement.

> *Property Description:*
>
> *Rare opportunity to buy the keystone lot in a beach-front site zoned for high-rise on the Gold Coast's iconic Rainbow Bay. The buyer's ultimate sale to a developer would create a three-block contiguous parcel. Offered $950,000 in 2007.*
>
> *A developer owns four of the five lots in the Surfcomber – the site's primary "front and centre" block at 158 Marine Parade. I own the fifth lot, which I bought 22 years ago as my retirement fund. Buildings on either side of the Surfcomber have been demolished.*
>
> *The Surfcomber is empty and barricaded. The adjoining four blocks of land total 2559 sq m. About 80 per cent of the overall site is under one title. The Town Plan permits 10 storeys, which should accommodate more than 50 two-bedroom apartments.*
>
> *The vendor is flexible and happy to discuss special terms to reach agreement. This is a once-in-a-life-time opportunity to buy into one of Australia's best beaches. The last Rainbow Bay high-rise in Marine Parade was constructed some 30 years ago.*

The lot was eventually sold to the developer after a prolonged period at a premium of approximately 276% above the valuation outlined and 151% above the price obtained by the other lot owners.

The site is now vacant with the developer having obtained demolition approval in November 2014. A development application for 19 apartments over 10 levels was lodged in May 2015 with approval obtained in November 2015.

Under current arrangements a single lot holder is empowered to delay the redevelopment of any building, irrespective of the state of disrepair, in order to extract a potentially higher purchase price for their lot. In the example of the Surfcomber, despite the Council issuing show cause notices regarding the state of the building and the developer offering a significantly more generous price for the unit than other owners received, one owner was able to hold up the redevelopment for further financial gain. This represents the potential for a significant safety risk to building occupants and the broader community.[5]

[5] Case Study selected from: *Griffith University, Strata Title Scheme Termination Report - Property Council of Australia, 2016*

3. Nobby's Outlook

Nobby's Outlook, opened in 1966, is a complex of fully self-contained townhouse-style apartments on the Gold Coast. The body corporate explored options to redevelop the site after determining that the cost of repairing and upgrading existing assets would total $3.8 million, far exceeding the existing funds of the Body Corporate.

A development proposal in January 2010 did not proceed due to a failure to secure unanimous support of the lot owners. The proponent of the development outlined that they would not re-engage in negotiations unless the scheme had first been terminated.

The Body Corporate sought a District Court order to terminate the community title scheme based on their perception of just and equitable terms.[6] The Judge referred the matter to mediation after indicating concern that the owners did not understand the implications of terminating the scheme if the developer failed to purchase the land. A private resolution with the opposing lot owner was then achieved.

A significant concerns remains, in that there is no judicial guidance on what a court may take into account in considering the just and equitable termination of a scheme.

The non-consenting lot owner in the case of Nobby's Outlook was not against the termination of the scheme but rather was concerned with some of the conditions of the consent orders. In this instance, a resolution was achieved. However, the current requirement for unanimous consent can trap owners into a potentially deteriorating financial position at the whim of any one owner.

Where owners cannot afford to pay the upgrades required to a building to keep it maintained to an acceptable standard of presentation and occupation, there needs to be an equitable exit strategy from that building.

The Court's referral of the Nobby's Outlook case back to mediation rather than making a determination on the issues demonstrates reluctance on the part of the Court to utilise the provisions for the benefit of the majority of owners. This reinforces the industry's perception that District Court orders are a cost and time prohibitive option with little likelihood of success.[7]

[6] Body Corporate for Nobbys Outlook v Lawes [2013] QDC 301
[7] Case Study selected from: *Griffith University, Strata Title Scheme Termination Report - Property Council of Australia, 2016*