


*Strata and Community Title in Australia  
for the 21<sup>st</sup> Century 2011 Conference*

**What are the Practical Options to  
Regulate Long Term Contracts?**

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# Synopsis of the Accompanying Paper

1. Need for changes to be targeted
2. What are the current stakeholder problems?
  - Unit owners
  - Developers
  - Caretakers/managers
  - Financiers
3. What are the options for regulation?  
21 options considered
4. Observation – Queensland has tried almost all of them
5. Protecting existing rights and obligations
6. The “practicability” tests 
7. Which options are the most practical 

# The “practicability” tests

- 1. The likelihood that the change will solve existing problems and not create new problems**
- 2. The extent to which the change impacts on –**
  - existing rights and obligations**
  - the day to day administration of the body corporate (i.e. does it add too much complexity to the law & procedures?)**
- 3. The broader impact of the change (i.e. the broader public interest)**

# The most practical options

1. A pre-approval requirement for long term contracts
2. Minimum terms and conditions imposed by statute
3. Prohibition on developers benefiting financially
4. "Contract review" rights for bodies corporate
5. Purchaser disclosure for all sale contracts
6. Encouragement of the "employment" approach
7. Prohibiting permanent occupation of units intended for short term accommodation

# Pre-approval of long term contracts

- Applies (for example) to all contracts over 2 years
- Approval by independent body (administrative or quasi-judicial)
- Approval criteria is specified, such as –
  - Building layout
  - Proposed use(s)
  - Purchaser profile
  - Management structure
  - Contract terms and conditions
  - Commerciality and general fairness
- Can be restricted to contracts in a “developer control period” or can apply to all contracts
- Usually supplemented by purchaser disclosure requirements

# Minimum terms and conditions

- Distinguish from “implied” terms and conditions
- Types of provisions that must be included are mandated – wording left to the parties
- Can be applied to all body corporate agreements
- Examples of provisions required –
  - Detailed description of services to be provided
  - Fee to be charged, which must be competitive on the open market
  - Means to monitor and assess performance
  - Termination for non-performance
  - Right to vary services or service levels
  - Prohibition on secret commissions or incentives
- Non-compliance can result in a Court order –
  - invalidating the agreement; or
  - varying the terms of the agreement
- Contracting out is prohibited



# Prohibition on Developers benefiting

- Effectively a codification of the principle in the *Arrow Asset Management case*
- Would apply to such things as –
  - Sale of management rights
  - Exclusive supply arrangements (e.g. hot water, telecommunications)
  - Discounted consulting by body corporate managers
- Disclosure would not be an option
- Would achieve similar outcomes to the US Federal *Condominium and Cooperative Abuse Relief Act of 1980* which establishes a rebuttable presumption of unconscionability

# Contract review rights

- A statutory process for bodies corporate to force review of contractual terms
- Similar to –
  - *NSW Contracts Review Act 1980*
  - *Cwh. Competition and Consumer Act 2010*
  - *Qld BCCM Act* (for letting agent contracts)
- Can be restricted to circumstances where the contract has not been freely negotiated
- Basis for the review and criteria to be applied needs to be clearly specified



# Purchaser disclosure

- **Best used in conjunction with other solutions (e.g. pre-approval of the long term contract)**
- **Should apply to all sale contracts (not just off-plan)**
- **Disclosure should be focused on key commercial terms and implications**
- **Consequences of non-disclosure should be fair (e.g. rescission rights should be restricted to worst cases)**

# The “employment” approach

- Involves use of an employee rather than a contractor
- Governing legislation needs to facilitate or encourage this approach, for example –
  - Caretaker’s apartment and facilities form part of common property
  - Body corporate to be allowed to lease a unit in its own building
  - Allowing body corporate to pay rental subsidies for Caretaker
- Allowing body corporate shareholding in a contractor company is another option

# Prohibiting permanent occupation

- **Involves imposing a restriction on units in certain types of buildings being permanently occupied**
- **“Permanent occupation” must be defined**  
(e.g. occupied by the same person(s) for more than 6 straight weeks or for more than 10 weeks in any one year)
- **Typical application would be building intended for holiday letting**
- **Can be imposed as part of the development approval process**
- **Monitoring and enforcing compliance is critical**
- **Does have implications for developers**

# Wrap-up

- **Huge range of options**
- **Queensland has tried many of them with the following consequences –**
  - **Their effectiveness is questionable because many problems still exist**
  - **The BCCM Act has become too detailed and complex**
- **Adoption of 2 or 3 of those identified today would arguably be more effective**
- **Must be accompanied by a serious “culling” of existing Act**

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**Thank You**

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