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**The University of New South Wales**

**Faculty of Law  
Continuing Legal Education**

**Property Law: Strata & Community Titles**



# **Structuring Mixed Use Projects**

*A Guide to Structuring Mixed  
Use Projects*

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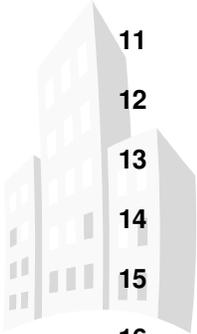
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# Structuring Mixed Use Projects

## *A Guide to Structuring Mixed*

### *Use Projects*

**Gary Bugden**

#### **1. About the Topic**

In this paper we are concerned with the title, subdivision and management structuring of mixed use projects. These projects typically involve 3 or more uses (e.g. retail, commercial and residential) within a single building. In such a building the owners of the various components have differing concerns and objectives and these can lead to serious conflict if the project is not properly structured. The objective of the structuring process is to reduce, so far as practicable, the interaction among the owners of the various components. In turn, this reduces the risk of conflict among the various owners.

In most cases the solution involves the use of a “stratum” subdivision (also known as an “airspace” subdivision in New South Wales or a “volumetric” subdivision in Queensland). In New South Wales these subdivisions are based on the English common law principle that ownership of land extends above and below the surface of the land and there are no special laws that expressly allow this type of subdivision.

Lots created as a result of these types of subdivisions can be further subdivided by means of a strata plan. Furthermore, the subdivisions and further subdivisions by strata plan can be effected with either freehold or leasehold land. The strata component of freehold subdivisions uses the *Strata Schemes (Freehold Development) Act 1973* while the strata component of leasehold subdivisions uses the *Strata Schemes (Leasehold Development) Act 1986*. In this paper the term “**body corporate**” is used in preference to the more common term “**owners corporation**” because that development legislation uses the term body corporate. When speaking about development issues the term “**body corporate**” is technically more correct.

Because the stratum subdivision is usually the key mechanism in the structuring of mixed use projects it is important to understand them in some

detail. While the focus of this paper is mainly on the stratum subdivision, other structuring options are also considered.

## **2. Principal Legal Mechanisms**

The principal available legal mechanisms to deal with a mixed- use complex are:

- Conventional strata subdivision
- Stratum subdivision with strata management statement
- Building management statement
- Easements and covenants
- Umbrella management agreements
- Incorporated association.

In some cases a particular mechanism is used on its own, while in other cases a number of mechanisms may be combined to achieve the best solution. In particular, it is not uncommon to come across a strata management statement and an umbrella management agreement. This is because of the inability (or difficulty) of using a building management statement that sits over one or more strata management statements.

## **3. Conventional Strata Subdivision**

Legally, there is no reason why a mixed use building cannot be subdivided simply by using a strata subdivision. Indeed, in the case of very simple mixed use buildings (e.g. 3 shops at ground level with say 40 residential home units above) a simple strata subdivision is a clear option. The difficulty with this approach is that there is likely to be conflict between the shop owners and the unit owners about a range of things such as cost distribution, use of certain common property (e.g. the pool), signage, maintenance standards, etc.

Sometimes these potential problems can be dealt with by design solutions or even by a combination of design and legal solutions. A potential legal solution would involve a notional division of the common property into 3 components–

1. Common property used only by the shops
2. Common property used only by the residential home units
3. Common property used by both the shops and residential home units.

An exclusive use by-law would then be made conferring joint exclusive use (including joint maintenance responsibility) over the common property in (1) on the owners of the shops. This would ensure that the shop owners are the only ones who use the common property related solely to the shops and that they are the ones responsible for its maintenance. The contribution to maintenance costs would be determined by a formula set out in the by-law. An exclusive use by-law would also be made conferring joint exclusive use (including joint maintenance responsibility) over the common property in (2) on the owners of the residential home units. Again, the contribution to maintenance costs would be determined by a formula set out in the by-law. Similarly, this would ensure that the unit owners are the only ones who use the common property related solely to the units and that they are the ones responsible for its maintenance. The common property used by both the shops and residential home units would be dealt with in the normal way – shared use and shared maintenance responsibility.

This approach effectively requires the body corporate to have 3 divisions within its administrative and sinking funds, as well as 3 divisions to its annual budget. The expenses must be tracked for each division. Normal maintenance contributions would be imposed for the jointly used common property and separate bills would be issued to owners to cover the amounts payable under the exclusive use by-laws.

Other by-laws would need to be carefully drafted to cover any possible areas of contention (e.g. signage, use of amplified music in the shops, garbage arrangements).

#### **4. Historical Background to Stratum Subdivisions**

##### **Overseas Experience**

Under English common law, conveyances of air space probably first occurred in Scotland some 400 years ago. They typically related to such things as viaducts and maisonettes. The first modern day examples of air space subdivisions occurred in North America during the first half of the twentieth century. They were driven by the rapid urbanisation of major US cities which necessitated the redevelopment of downtown areas of land that were grossly underutilised.

Chicago is a good example. Large areas of central Chicago had been developed into huge railway and goods yards that eventually came to occupy the prime areas of the city. The land became very valuable, but so too were the railway facilities and the cost of relocating those facilities was prohibitive. The solution was to sell and develop the air space above the facilities. This quickly led to the development of layers of air space for a range of component uses.

A good example is the *John Hancock Centre* in Chicago. This is a 100 story, class A multi-use building, recognised around the world for its distinctive architecture, prestigious location and its presence on Chicago's skyline. The building is subdivided horizontally with parking at the lowest level, above which are retail areas, commercial offices, condominiums, an observatory, a restaurant and bar near the top of the building and broadcast facilities (including large antennae) on top of the building. The condominium scheme commences on the 42<sup>nd</sup> floor and includes all floors up to the 96<sup>th</sup> floor. The various components within the building are separately titled.

### **Australian Experience**

The first Australian project was the *Paradise Centre* development at Surfers Paradise. This comprised a basement car park, ground floor shopping centre with two large residential towers and an international hotel situated above the shopping centre. This type of development had never before been attempted in Australia where the individual component use areas were to be separately titled. The developer therefore procured project specific legislation from the Queensland Government at the time. This came in the form of two Acts:

- The *Registration of Plans (HSP (Nominees) Pty Ltd) Enabling Act 1980*; and
- The *Registration of Plans (Stage 2) (HSP (Nominees) Pty Ltd) Enabling Act 1984*.

The next significant Australian project was *The Conaught* development in Liverpool Street, Sydney, at the southern end of Hyde Park. The uses within this building comprised car parking, retail shops, residential apartment and the YWCA headquarters and accommodation facilities. The building had been completed and was ready for strata subdivision when it was discovered that, for technical reasons, the residential component could not be strata subdivided. The problem was resolved by subdividing the entire building (including the YWCA component) in a way that the YWCA component was initially designated as a lot and then converted to common property. The common property was then subdivided to isolate the YWCA component 'in stratum' and the body corporate then transferred that new YWCA stratum lot out of the strata scheme. This project necessitated very complex easements and an umbrella management agreement. Out of necessity, the retail shops were included as part of the residential strata scheme.

*The Conaught* development was followed by a development at Bondi Junction known as *Eastgate Gardens*. This comprised a shopping centre, public car park, private car parking and two residential home unit towers above a landscaped podium. The next was the *Eastpoint* development at Edgecliff. This was constructed over the Edgecliff railway station and the railway station was separately titled and returned to State Rail ownership.

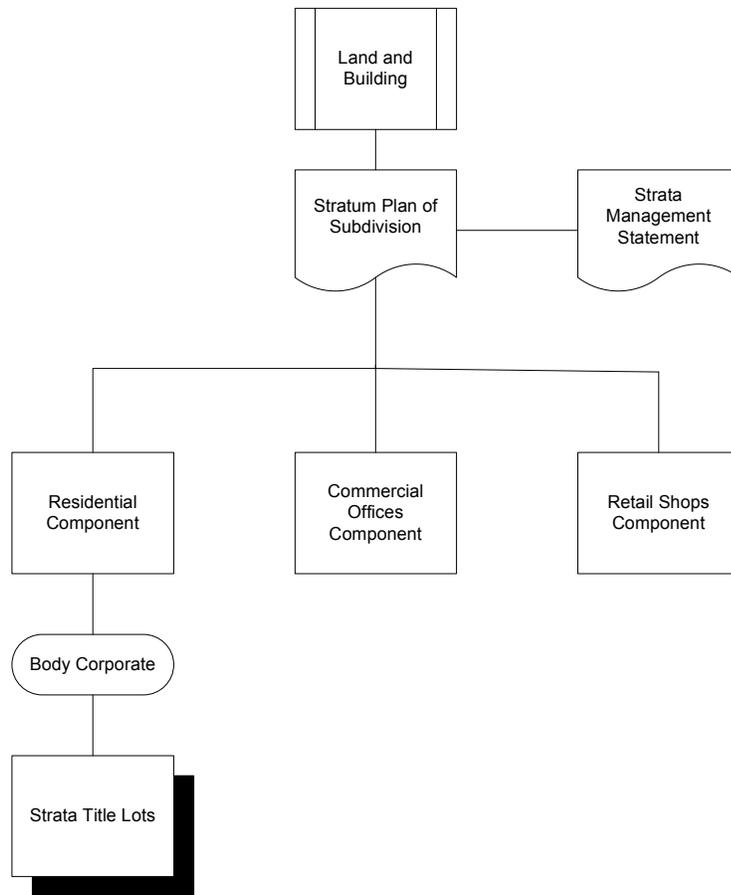
These projects were followed by a string of other projects within the Sydney metropolitan area, at a time when there was no legislation to facilitate such projects. As a consequence, the common law, combined with contractual arrangements, was relied upon to give effect to the complex arrangements among the owners of the various component use areas in the projects. The principal contractual arrangements included easements, restrictions as to use, covenants and umbrella management agreements.

The problem with these types of contractual arrangements is that the umbrella management agreements are personal and do not run with the land. Therefore, a deed of covenant to join an incoming owner to the arrangements is necessary. Although mechanisms are put in place to try to ensure that this occurs, there is always a degree of uncertainty as to whether new owners will adopt the established management arrangements.

The latest and probably the most complex of this type of development in Australia was the *King Street Wharf* development in Sydney. This involved nine tower buildings on the foreshore of Darling Harbour with a diverse mixture of uses and common basement area. It also involved a mixture of private and public uses and public roads being located above the basements. To make things even more difficult it was partly under leasehold title and partly under freehold title. This particular project had the benefit of the strata management statement mechanisms that were introduced to the strata titles legislation in 1992. However, it was so complex that a contractually based umbrella management agreement also had to be put in place to regulate the common components and equipment for the future stages of the project.

## **5. About Stratum Subdivisions**

Stratum subdivisions are similar to conventional land subdivisions in the sense that they do not result in the creation of common property or a body corporate. The main difference is that they define the boundaries of lots with reference to different levels above and below standard height datum. They are used to create lots that separately define different component use areas within a building. This allows the various areas to be separately owned without the owner being involved in a body corporate structure. However, a particular component use area (e.g. residential apartments) can be further subdivided by means of a strata plan. For all practical purposes, the body corporate in the strata scheme then becomes the owner of the subdivided lot. The following diagram illustrates a stratum subdivision with a strata management statement–



In New South Wales this type of subdivision is affected using the normal subdivision mechanisms. This is because, under New South Wales law, stratum subdivisions have always been recognised. This is in contrast with the position, say in Queensland, where stratum subdivisions were not legally recognised for freehold land. This changed in 1990 when special mechanisms were introduced to redevelop the old *Expo 88* site in Brisbane. Further changes occurred in Queensland in 1997 when volumetric subdivisions were introduced for general use across the state. In Victoria, stratum subdivisions have long been recognised and sanctioned by statute.

In New South Wales when a stratum lot is subdivided by a strata plan the lot is then known as a “stratum parcel”.

Stratum subdivisions can potentially result in day to day operational complexities for the subdivided buildings. This is because there is inevitably a range of facilities and equipment within the building that are shared by two or more of the component use areas and these need to be managed in a just and equitable way.

Well structured stratum developments usually focus heavily on design solutions to minimise shared facilities and equipment and to deal appropriately with them where they cannot be minimised. Where this has not

occurred, for good reason or because of poor structuring, then legal mechanisms have to be used to resolve potential difficulties. Design solutions are always preferable to legal solutions in these types of projects.

***Practice Pointer***

*The secret to mixed use stratum subdivisions operating smoothly for everyone involved is a well designed building with quality legal documents and carefully structured management arrangements.*

Where a subdivision involves a strata plan creating a stratum parcel then a strata management statement for the building and its site is usually lodged and registered at the same time as the subdivision plan.<sup>1</sup> In very limited circumstances the Registrar General, or the relevant Minister, can dispense with the requirement for a strata management statement. After registration, the strata management statement can be amended if –

- (a) the body corporate supports it by special resolution;
- (b) it is ordered by a Court; or
- (c) the amendment is a consequence of a revocation or modification of a development consent.<sup>2</sup>

## **6. Shared Facilities**

Shared facilities are areas, services and equipment within the building and its site that are shared by two or more of the component use areas. They include such things as access ways, stairs, elevators, water supplies, fire safety equipment, pumps, fans, etc.

Inevitably, these shared facilities are located within one of the component use areas. However, because they are used by two or more areas, there is a need to ensure that they are available for common use and properly maintained in a way that the cost of that maintenance is shared fairly by those who use them.

In practice, when these types of mixed use projects are structured, an effort is made to ensure that shared facilities are appropriately located to take account of ownership and maintenance responsibility. This also applies to other facilities within the building that are not shared. Wherever possible, they are placed within the boundaries of the component use area that uses them exclusively. In this way, management complexities can be substantially limited.

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<sup>1</sup> See section 28R of the Freehold Development Act and section 57A of the Leasehold Development Act.

<sup>2</sup> See section 28U of the Freehold Development Act and section 57D of the Leasehold Development Act.

### ***Practice Pointer***

*When planning mixed use stratum projects always ensure –*

- *Equipment used by only one component use area is located within that area*
- *Equipment used by 2 or more component use areas is, where practicable, located within one of those areas in the most accessible position.*

The shared facilities are usually set out in a schedule to the strata management statement or building management statement. Those statements usually contain provisions allowing adjustment of the list of shared facilities or adjustment of the basis for cost sharing. This means that records, particularly accounting records, must be kept in a way that facilitates these types of changes. The reason for the flexibility is the difficulty in identifying all of the shared facilities in advance of the operation of the building and uncertainties as to actual costs of operation and usage.

There can be a huge range of shared facilities which may include commonly used areas, plant and equipment and facilities. Perhaps the most comprehensive range of shared facilities can be found in the strata management statement for the *Kings Street Wharf* project at Darling Harbour. An extract from the shared facilities listing for *King Street Wharf* is attached to this paper.

## **7. Strata Management Statements**

As indicated previously, strata management statements are used where a plan being registered as a strata plan creates a stratum parcel. These statements are regulated by the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, depending upon whether the subject land is freehold or leasehold. The provisions of both Acts in respect of strata management statements are substantially the same.

A strata management statement has effect as an agreement under seal containing mutual covenants on the part of the following<sup>3</sup>:

- a body corporate for a strata scheme for part of the building;
- a proprietor, mortgagee in possession or lessee for the time being of any of the lots in such a strata scheme; and
- any other person in whom the fee simple of any part of the building or its site (being a part affected by the statement) is

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<sup>3</sup> Section 28W(1) of the Freehold Act and section 57F(1) of the Leasehold Act.

vested for the time being, or the mortgagee in possession or lessee of any such part.

The covenants are to ensure that each such person jointly and severally agrees to carry out their obligations under the strata management statement as are from time to time in force and to jointly and severally agree to permit the carrying out of those obligations.<sup>4</sup>

***Practice Pointer***

*Because occupiers may not be bound by a strata management statement consider adding a by-law requiring them to comply with the strata management statement to the extent to which its provisions relate to them.*

A strata management statement over freehold land must provide for<sup>5</sup>:

- the establishment and composition of a building management committee and its office bearers;
- the functions of those office bearers in managing the building and its site;
- the manner in which a statement may be amended;
- the settlement of disputes, or the rectification of complaints, concerning the management of the building or its site, whether by requiring reference of disputes or complaints to the Strata Titles Commissioner, or the Tribunal, or (with the consent of the person) to any other person for a recommendation or decision or otherwise; and
- the manner in which notices and other documents may be served on the committee.

Every body corporate and other land owner within the stratum subdivided complex must be members of the building management committee, unless they agree in writing not to be a member. For a body corporate to be excluded it must agree by special resolution.<sup>6</sup>

The body corporate is represented on a building management committee by a nominee. That person is appointed by, or selected in accordance with, a special resolution or by-law made by the body corporate. Similarly, the representative of any other corporation is chosen in accordance with the

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<sup>4</sup> Section 28W(2) of the Freehold Act and section 57F(2) of the Leasehold Act.

<sup>5</sup> Section 28S(2) and Schedule 1C of the Freehold Act and section 57B(2) and Schedule 2A of the Leasehold Act.

<sup>6</sup> See Schedule 1C of the Freehold Act and Schedule 2A of the Leasehold Act.

resolution of that corporation. Owners who are individuals are members of the committee in their own right.<sup>7</sup>

Normally a body corporate that is a member of a building management committee will have a by-law in place providing for the executive committee of the body corporate to appoint a representative to the building management committee. Alternatively, this process can be set up using a special resolution. It would normally be too complex to provide for the representative to be elected from time to time by the general meeting process.

***Practice Pointer***

*Always ensure that the body corporate has a by-law in place authorizing the executive committee to appoint the body corporate representative on the building management committee and to replace that representative from time to time.*

There are also a number of optional matters that can be included in a strata management statement. These include<sup>8</sup>:

- the location, control, management, use and maintenance of any part of the building or its site that is a means of access;
- the storage and collection of garbage on and from the various parts of the building;
- meetings of the building management committee;
- the keeping of records of proceedings of the committee;
- safety and security measures;
- the appointment of a managing agent;
- the control of unacceptable noise levels;
- prohibiting or regulating trading activities;
- service contracts; and
- an architectural code to preserve the appearance of the building.

The above list is not exhaustive and other matters may also be included in the strata management statement. Those other matters must not be in conflict with the terms of the various Acts regulating the strata scheme.<sup>9</sup>

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<sup>7</sup> See Schedule 1C of the Freehold Act and Schedule 2A of the Leasehold Act.

<sup>8</sup> See Schedule 1C of the Freehold Act and Schedule 2A of the Leasehold Act.

A strata management statement is taken to include a number of provisions, except to the extent that those provisions may be excluded by the statement itself. These are<sup>10</sup>:

- the building management committee must meet at least once each year;
- at least seven days notice of the meeting must be given to each person who is a member of the committee;
- notice may be given personally or by post or in any way any other notice may be given to the person under the relevant Act; and
- the decision of a majority of the members present and voting at a meeting of the committee is the decision of the committee.

In practice, most of the above implied provisions are excluded by express provisions in the strata management statement.

***Practice Pointer***

*Always ensure that the implied provisions are excluded by express provisions in the strata management statement, otherwise the implied provisions are often overlooked by managing agents.*

## **8. Building Management Statements**

Registration of a building management statement is entirely optional. The Registrar General may register a building management statement with a plan of subdivision of a building and its site. Alternatively, a building management statement may be registered after the plan is registered.<sup>11</sup> A building management statement is used when a building and its site is subdivided by means of a stratum plan, where none of the stratum lots are being further subdivided by a strata plan. Once registered, a building management statement can be amended.<sup>12</sup> Each owner of a part of the building or site is normally required to consent to amendments. An amendment does not have effect until it has been recorded by the Registrar General.

A registered building management statement, as in force from time to time, has effect as an agreement under seal containing covenants on the part of<sup>13</sup>:

<sup>9</sup> Clause 3(3) of Schedule 1C of the Freehold Act and clause 3(3) of Schedule 2A of the Leasehold Act.

<sup>10</sup> Clause 4 of Schedule 1C of the Freehold Act and clause 4 of Schedule 2A of the Leasehold Act.

<sup>11</sup> Registration is regulated by the provisions of the *Conveyancing Act 1919* (sections 196B ff).

<sup>12</sup> Section 196G of the *Conveyancing Act*.

<sup>13</sup> Section 196I(1) of the *Conveyancing Act*.

- each owner for the time being of any part of the building or its site affected by the statement; and
- any mortgagee in possession or lessee of any part of the building or its site affected by the statement.

The covenants referred to are<sup>14</sup>:

- a covenant by which those persons jointly and severally agree to carry out their obligations under the building management statement as from time to time in force; and
- a covenant by which those persons jointly and severally agree to permit the carrying out of those obligations.

A building management statement must be consistent with conditions imposed, before registration of the statement, by the development consent relating to the building, or any Act or law.<sup>15</sup>

A building management statement must provide for<sup>16</sup>:

- the establishment and composition of a building management committee and its office bearers;
- the functions of that committee and those office bearers in managing the building and its site;
- the settlement of disputes, or the rectification of complaints, concerning the management of the building or its site, whether by requiring reference of disputes or complaints to any person (with the consent of the person) for a recommendation or decision or otherwise;
- the obtaining of a damage policy for the building in accordance with certain requirements; and
- the manner in which notices and other documents may be served on the committee.

Each owner of a part of the building or its site must be a member of the building management committee. A corporation that is a member of a building management committee may be represented for the purposes of the committee by a person appointed by, or selected in accordance with, a resolution made by the corporation.<sup>17</sup> No special provision is made for the

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<sup>14</sup> Section 196I(2) of the *Conveyancing Act*.

<sup>15</sup> Section 196I(5) of the *Conveyancing Act*.

<sup>16</sup> Schedule 8A clause 2(1) of the *Conveyancing Act*.

<sup>17</sup> Schedule 8A clauses 2(2)-(4) of the *Conveyancing Act*.

participation of a strata title body corporate in a building management committee. This is because the legislation does not envisage a building management statement being used where a stratum parcel is one of the lots in the building or its site.

However, it is interesting to note that, arguably, it may be possible to use a building management statement in those circumstances despite the terms of the legislation and the lack of body corporate specific mechanisms. This assumes that the Registrar General would be prepared to register the statement. If the Registrar General were to allow such a registration it would be possible to layer a building management statement over one or more strata management statements. While this would require careful drafting of the provisions of the various statements (because of the lack of legislative provisions regulating this type of structure) it would be a particularly useful mechanism in extremely complex projects, like *King Street Wharf*. At *King Street Wharf* it potentially could have removed the need for an umbrella management agreement, which pre-dated the building management statement provisions.

A building management statement may contain a number of optional provisions which substantially mirror the optional provisions that can be included in a strata management statement. Furthermore, the same implied provisions are implied in a building management statement as are applied in a strata management statement. Again, those implied provisions can be excluded or varied by the express terms of a building management statement. In practice, most of the above implied provisions are excluded by express provisions in the building management statement.<sup>18</sup>

#### ***Practice Pointer***

*A strata management statement always means that a body corporate is associated with one of the stratum lots in the building and the strata titles legislation must be referred to, whereas in the case of a building management statement there is no body corporate associated with any of the stratum lots and the strata titles legislation has no application.*

## **9. Building Management Committees**

It will have been seen from the previous commentary that wherever there is a strata management statement or a building management statement, there must be a management committee. This committee is called a “**building management committee**” no matter which statement constitutes it. A building management committee is comprised of all owners, or their representatives, of component use parts of the building and site the subject of

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<sup>18</sup> See generally the provisions of Schedule 8A of the *Conveyancing Act*.

a stratum subdivision. It is effectively the body that makes decisions in relation to the shared facilities.

***Practice Pointer***

*A building management committee is associated with both a strata management statement and a building management statement.*

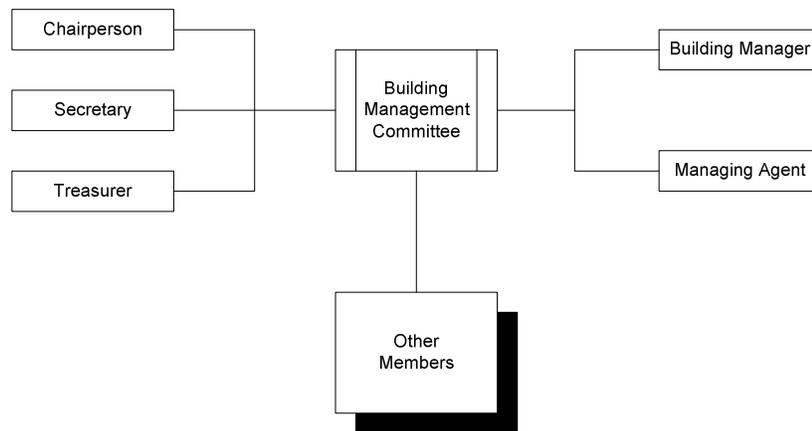
The committee is not a separate legal entity and any contracts entered into by the committee are effectively contracts entered into by the owners of the respective component use areas within the building. The committee is effectively the ‘agent’ or attorney of the owners for decision making and contracting purposes and for the purpose of implementing the terms of the relevant statement.

This arrangement can also be compared with an unincorporated association – the land owners being the members of the association and the committee being the governing body. The important thing to note is that the members will be jointly liable in contract and tort. This means that quality management and comprehensive insurance covers are most important where a building management committee is involved.

***Practice Pointer***

*Pay careful attention to the range and terms of insurances required to be affected by the building management committee and also ensure that appropriate additional insurances are included in the strata management statement or building management statement.*

The function of the building management committee is to administer the common facilities within the building and ensure that sufficient funds are raised from its members to keep those facilities in proper repair and maintenance. It is not uncommon for a building management committee to be structured very similar to a body corporate executive committee. The following illustrates a formally structured building management committee –



## 10. Strata Managing Agent

From the earlier commentary, it will have been noted that a building management committee may be empowered to appoint a managing agent to administer aspects of the strata management statement or building management statement. The managing agent is appointed in the same way as other appointments are made by the building management committee. This starts with the passing of a resolution by the committee authorising the appointment of the managing agent and entering into an appropriate management agreement.

The role of the managing agent is determined by the provisions of the agreement under which they are appointed. To some degree, their role is also determined by the extent to which the building management committee can, under the terms of the relevant statement, delegate particular functions to the managing agent. In most cases, the agent's role is restricted to a secretarial and record keeping role.

### ***Practice Pointer***

*Ensure that the powers, authorities, duties and functions of the managing agent are clearly set out in the strata management statement or building management statement.*

Not surprisingly, the preferred professional for appointment as managing agent is a strata managing agent, even where there is no strata scheme involved. The Institute of Strata Title Management provides a *Building Management Committee Agency Agreement* for use by its members. This agreement appears to be well constructed and appropriate for use with a building management committee, irrespective of whether the committee is constituted under a strata management statement or a building management statement.

Points to be noted about the ISTM form of agreement:

- The agreement is between the strata managing agent and every owner of a lot in the stratum plan (including any body corporate for a stratum parcel). If there is a change of ownership, the new owner must sign a Deed of Novation to preserve the principal/agency relationship with the whole committee.
- It assumes that the strata manager is acting as strata managing agent within the meaning of the *Property Stock and Business Agents Act 2002*. This may not always be the case (e.g. in the case of a person appointed as a managing agent under a building management statement).

- It assumes that there has to be a principal/agency relationship between the strata managing agent and the owners of the lots. This does not have to be the case. An agreement could be framed as a pure contracting agreement where no such relationship exists.
- The services in Schedules A and B should be carefully checked against what is required under the relevant strata management statement or building management statement, because the terms of the statement may not be in strict conformity with the standard form agreement. Potentially, every building may be regulated slightly differently.
- There is arguably no restriction on the term of the agreement (e.g. it could be for 10 years) or when the agreement may be entered into (e.g. the initial period restrictions do not apply). This depends on whether the person being appointed is a “strata managing agent” within the meaning of the strata titles legislation and whether the appointment is actually being made by the body corporate within the meaning of that legislation.

## **11. The Building Manager or Caretaker**

Because of the size and likely complexity of mixed use schemes involving stratum subdivisions, there is often a building manager or caretaker. Sometimes the building manager is a fully qualified and experienced facilities manager. These managers are appointed in the same way as the managing agent is appointed – using the standard contractual provisions and an appropriate agreement. However, the term of appointment of a building manager or caretaker is likely to be substantially longer than that for a managing agent. Typically, managing agents are appointed for up to three years, while building managers or caretakers can be appointed for as long as ten years. Again, the restrictions in the Strata Schemes legislation regarding the appointment of building managers or caretakers may not apply to bodies corporate or appointments by building management committees.

The building manager or caretaker usually attends to repairs and maintenance and the day to day operational issues for the building. For example, most complex mixed use buildings will have a common basement with different sections housing shared and unshared equipment, services and facilities (including separate car parking areas for the various component use areas). The building manager or caretaker will manage the operations of the basement, including things such as access, visitor parking, rubbish removal, loading docks, deliveries and workplace health and safety.

The building manager or caretaker will also be involved in the budgeting process, because they are the one who are directly concerned with the

maintenance of the shared equipment, services and facilities. They will work with the managing agent and committee to draft and finalize the budgets. They will also arrange and supervise maintenance and service contracts (such as fire safety, cooling tower cleaning, electrical and gas installations). Invoices will usually be checked and approved by them before authorization by the committee and payment by the managing agent. The managing agent will be ultimately responsible for the paper trail recording those authorizations and payments.

***Practice Pointer***

*Ensure that the strata management statement or building management statement sets out the functions of the building manager or caretaker and is clear on the things that can be delegated to them by the committee.*

## **12. Meetings of the Committee**

Meetings of a building management committee are regulated by the relevant strata management statement or building management statement. These documents are effectively the constitution of the committee and all processes and procedures are regulated by the terms of these documents. Because there is no separate legal entity involved in a building management committee, there is no general meeting or annual meeting of property owners. All meetings are meetings of the committee.

To determine questions such as the period of notice for meetings, the number of persons who constitute a quorum, the right to appoint alternates and the rules relating to voting, reference must be made to the relevant strata management statement or building management statement. However, in the absence of specific provision in those statements, there are a number of implied provisions in the relevant legislation that would need to be taken into account. In particular:

- The building management committee must meet at least once each year.
- At least seven days notice of a meeting must be given to each person who is a member of the committee.
- Notice may be given personally or by post or, in the case of a body corporate, in the way notice is normally given to a body corporate.
- The quorum for a meeting of the committee is a majority of the members.

- The decision of the majority of the members present and voting at a meeting of the committee is the decision of the committee.

Statements frequently provide for different types of majorities to decide different types of questions. For example, routine questions might be decided by simple majority while more significant issues might require a special resolution or unanimous decision. Again, it is necessary to refer to the particular statement in order to determine the rules that apply.

***Practice Pointer***

*Be careful to ensure that the strata management statement or building management statement contains extensive procedural provisions, along the lines of a constitution of an association.*

In all cases, a minute book should be required to be kept in which is recorded the minutes of all meetings of a building management committee. These minutes can be kept in much the same way as minutes of a body corporate meeting are kept.

### **13. Insurance**

A strata management statement will not normally contain provisions relating to building insurance. This is because building insurance is regulated by section 84 of the *Strata Schemes Management Act 1996*. As those provisions cannot be varied, there would be little point in including provisions in a strata management statement relating to building insurance. In some cases the strata management statement may include provisions relating to insurance other than building insurance.

In the case of a strata management statement the insurance costs are allocated to the respective stratum lots in proportion to the value of the part of the building comprised in each lot. If agreement cannot be reached an adjudicator under the strata legislation may determine the basis for sharing insurance costs.<sup>19</sup>

In the case of a building management statement, clauses 3 and 4 of Schedule 8A of the *Conveyancing Act 1919* set out the arrangements that will apply in relation to building and other insurances. Clause 3, dealing with building insurance, puts in place arrangements for a ‘damage policy’ similar to the arrangements that would apply to a building the subject of a strata management statement. Clause 4, dealing with ‘other insurance’ requires the following additional insurances to be taken out:

- Workers compensation

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<sup>19</sup> See section 84(4) and (5) of the Management Act.

- Public liability insurance
- Insurance against liability in respect of another occurrence against which the committee decides to insure
- Voluntary workers insurance.

Insurance costs are divided in the same way as for strata schemes, although there is no provision for an application to an adjudicator and disputes are dealt with under the normal dispute resolution process set out in the building management agreement.

#### **14. Record Keeping (Excluding Accounting)**

Although record keeping is a management issue, because the manager will manage in accordance with the relevant statement, it is important that the statement sets out everything that is required of management. Lawyers preparing statements are therefore concerned to ensure that appropriate management requirements are specified in the statement.

The first and obvious set of records that should be kept by a building management committee is a record (in the form of a copy) of its constituent documents. These include the various subdivision plans, the strata management statement or building management statement and easements and covenants applying to the land.

In addition, it is suggested that, subject to the terms of the relevant statement, the following records should also be kept:

- Owners register (recording the names, addresses and other contact details of the owners of the component use areas)
- Committee register (recording the names, addresses and other contact details of the representatives of the various owners)
- Contracts register (recording the key provisions of the documentation relating to the building manager, managing agent and various longer term service contractors)
- Shared facilities register (which starts with the list of shared facilities and equipment taken from the schedule of the relevant statement, these items being subject to change, in making provision for any required updating)
- Asset register (recording equipment or materials, such as spare parts, jointly owned)
- Minute book.

***Practice Pointer***

*When drafting strata management statements or building management statements, ensure that the record keeping requirements are set out in detail.*

**15. Accounting Records**

Again, accounting records are matters of management. However, when drafting a strata management statement or building management statement lawyers need to understand the accounting process that management should undertake so that they can prescribe the relevant processes and records in the statement.

A building management committee, or a managing agent on behalf of the committee, should keep the normal accounting records, such as cheque book, receipt book, bank deposit book, bank statements, cash books and journal (if necessary). If a computerized accounting system is used, then that list should be modified accordingly.

Special attention needs to be paid to the chart of accounts for the income and expenditure cash books. This chart of accounts needs to mirror the shared facilities register so that each item of shared facilities or equipment is independently tracked from a budgeting, income and expenditure point of view. The cash book should be overlaid with a cost sharing allocation ledger. This is simply a ledger account for each item in the chart of accounts showing how that item is allocated among the two or more component use areas within the building that share that item, as well as recording income and expenditure in respect of that item. This is effectively the recording of the basis on which each of those component use areas contributes to the cost of the particular item. While this is complex, it is the only fair and satisfactory way in which to allocate maintenance responsibility and collect funds to cover the cost of such maintenance. If this is not done fairly, then discontent or outright dispute will occur among the various owners.

***Practice Pointer***

*The chart of accounts must reflect the various cost sharing items on an item by item basis and both income and expenditure must be tracked on an item by item basis.*

The way in which budgets are prepared will be determined by the terms of the relevant statement. There will always be need for a maintenance fund and in some cases there may be a reserve or sinking fund. Reserve funds will often be controversial where there are commercial or retail facilities within the building. This is because values of non-residential components are usually determined with reference to a capitalisation rate. The capitalisation rate will be adversely affected if the outgoings are increased because of contributions

to a reserve fund. This is inconsistent with normal practice for commercial buildings. In the case of most commercial building owners, reserve funds are not drawn from the building's income stream to fund future renewals and replacements. Instead, those costs are met on an 'as required' basis and sometimes taken up in a corporate owner's balance sheet. This limits any adverse impact on the capitalisation rate for the building.

The timing of the budget of the building management committee needs to be set having regard to the fact that the total amount payable by a body corporate member has to flow through to the body corporate budget. It is preferable for the building management committee budget to be finalised shortly before the time for finalising the body corporate budget. In this way, the body corporate budget can reflect the actual amount required to contribute to the building management committee.

The final record that needs to be kept is an owners' levy register. This is the record of contribution levies imposed on the various owners and payments received in respect of those levies. It enables easy determination of an owner's current financial status visa vis the building management committee.

## **16. Financial Reporting**

Again, an understanding of financial reports can be useful when drafting the strata management statement or building management statement. The financial reporting for a building management committee will be determined by the way in which it conducts its accounting. If accounting is on a cash basis, then reporting will normally be by way of profit and loss (with comparison to budget) and possibly with the addition of a debtors and creditors statement at the relevant reporting date.

If accounting is done on an accruals basis, then a balance sheet will usually be completed.

For management accounting purposes the income and expenditure for each shared expenditure item in the chart of accounts will need to be separately recorded and reported. For example; if an emergency generator is shared by 3 component use areas on a one-third each basis, the income raised by way of contributions for that item should be recorded against that item, as should be the expenditure relating to that item. Any surplus or deficiency for that item for the relevant period should be carried over to the next period and taken into account when budgeting for further contributions in respect of that item.

## 17. Dispute Resolution

In the case of the strata management statement, the options for dispute resolution are<sup>20</sup>:

- reference to the Strata Titles Commissioner
- reference to the Consumer, Trader and Tenancy Tribunal
- reference to another third party by way of arbitration or expert determination
- conciliation, mediation or other form of alternate dispute resolution.

In relation to a building management statement, the options comprise all of the above, with the exception of reference to the Strata Titles Commissioner and the Consumer, Trader and Tenancy Tribunal.

It is no accident that the dispute resolution processes set up by the strata titles legislation have not been imposed on building management committees. This is because commercial property owners, particularly institutional investors, will not want disputes involving them to be determined in what is essentially a residential or consumer dispute resolution environment. Instead, such owners prefer to have their disputes dealt with by the normal processes of commercial dispute resolution. The relevant legislative provisions for both strata management statements and building management statements ensure that commercial dispute resolution processes are available for these types of situations.

### ***Practice Pointer***

*Where there are commercial components to a mixed use building you should not choose the strata dispute resolution mechanisms. Always use commercial dispute resolution processes.*

No provision is made in relation to appeals from any dispute resolution process. Clearly, if the Commissioner or Tribunal is involved in a particular dispute, then it is likely that the normal appeal processes from the decision of the Commissioner or a Tribunal will apply. This may depend upon the provisions of the relevant statement. However, in the case of other commercial dispute resolution processes, depending upon the mechanisms chosen, appeals to courts may only be permitted in very restricted circumstances.

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<sup>20</sup> See Schedule 1C clause 2(1)(d) of the Freehold Development Act and Schedule 2A clause 2(1)(d) of the Leasehold Act.

## **18. Easements and Covenants**

As identified earlier, easements and covenants are other mechanisms available to assist in the structuring of mixed use projects. Some of the things easements can be used for are –

- To allow equipment and services to be situated on lots that they do not service or service jointly with other lots;
- To allow access to plant and machinery for maintenance purposes.
- To allow ingress and egress for vehicles and pedestrians, particularly for fire escape purposes.
- To preserve light and air.

Negative covenants can be used to protect amenity or to impose use constraints in relation to commercial premises. Conditional easements and negative covenants can also be used to reinforce obligations (e.g. to become and remain a member of an association or to enter into an umbrella management agreement).

## **19. Umbrella Management Agreements**

An umbrella management agreement is used where there are a number of precincts in a large project and each precinct is regulated by its own strata management statement. Because it is probably not possible to place a building management agreement over the entire project (sitting above the strata management statement) the alternative is to have each stratum lot owner in each precinct (including any bodies corporate) to enter into an umbrella management agreement. The umbrella management agreement regulates any areas, facilities, services or equipment that are common to each of the precincts. Its contents are not dissimilar to the contents of a building management statement.

## **20. Incorporated Associations**

An incorporated association, in an appropriate case, can be used in place of an umbrella management agreement. Where this occurs, the common areas, equipment and services (“common elements”) must be either vested in the association or placed under its control and administration. Stratum lot owners (including bodies corporate) are then forced to become and remain a member of the association by means of conditional easements and/or restrictive covenants. Positive covenants can also be used if the title being used is leasehold title. With the co-operation of the local government body a public positive covenant may also be a possibility.

Once membership is established the lot owners are bound by the association's constitution which contains provisions such as:

- An obligation to maintain the common elements.
- A right to levy contributions on members to cover the costs of maintenance and administration.
- Owner's rights of use of the common elements.
- Rules regulating use of the common elements.
- Administrative provisions.

## **21. The Future**

Building management committees are not popular with strata managing agents and some unit purchasers. Indeed, some strata managing agents are very critical of their use under any circumstances. The fact is that strata management statements and building management statements are a critical mechanism to accommodate mixed use projects and, particularly, to preserve the value of the commercial components of those projects.

This dislike of building management committees by strata managing agents is probably because they are relatively unusual arrangements and special skills and attention are required to manage them. They do not readily fit into the normal strata title 'mould' or the computer systems and processes commonly used for strata title. This attitude is likely to change with time, particularly as some managers begin to specialize in this type of management.

The likelihood is that both strata management statements and building management statements are here to stay until someone can come up with a better way of dealing with mixed-use projects and, like the projects they serve, they are likely to become more rather than less complex.

**Gary Bugden**  
March 2008

# Extract from Shared Facilities Listing in the *King Street Wharf* Strata Management Statement

Sheet 76 of 90 sheets

No.	Shared Facility	Commercial Strata Scheme	Combined Retail	Xerts	Charters 1 - 6	Single Retail	Serviced Apartments	Residential Strata Scheme	Method Of dividing cost
7	Valuation Report Shared Facility	15%	14%	14%	14%	14%	14%	15%	Cost per Member distributed evenly.
8a	Airconditioning and ventilation plant and equipment Global Cost Item	29%	17%	2%	5%	5%	11%	31%	Calculation based on area served, estimate of time served and equipment rating.
8b	Airconditioning and ventilation plant and equipment Shared Facility	29%	17%	2%	5%	5%	11%	31%	Calculation based on area served, estimate of time served and equipment rating.
9a	Cleaning-loading dock Global Cost Item	10%	45%	2%	32%	1%	0%	10%	Distribution based on estimated benefit.
9b	Cleaning-garbage rooms Shared Facility	10%	45%	2%	32%	1%	0%	10%	Distribution based on estimated benefit.
10	Cleaning- public areas Global Cost Item	0%	25%	0%	75%	0%	0%	0%	Distribution based on estimated benefit.
11	Cleaning - waterfront awning / steelwork Shared Facility	50%	36%	6%	8%	0%	0%	0%	Distribution based on estimated benefit.
12a	Cleaning-other Shared Facilities and areas Global Cost Item	18%	12%	2%	3%	3%	27%	35%	Relative area of each Strata Scheme and Stratum Lot.
12b	Cleaning-other Shared Facilities and areas Shared Facility	18%	12%	2%	3%	3%	27%	35%	Relative area of each Strata Scheme and Stratum Lot.
13a	Toilet supplies Global Cost Item	0%	25%	0%	75%	0%	0%	0%	Distribution based on estimated benefit.