Commonhold law

Problems and potential solutions

Katharine N. Rosenberry

The **Joseph Rowntree Foundation** has supported this project as part of its programme of research and innovative development projects, which it hopes will be of value to policy makers and practitioners. The facts presented and views expressed in this report are, however, those of the author and not necessarily those of the Foundation.

Katharine Rosenberry is a professor of law at California Western School of Law in San Diego, California.

Published for the Joseph Rowntree Foundation by YPS

ISBN 1 902633 96 2

Prepared and printed by:
York Publishing Services Ltd
64 Hallfield Road
Layerthorpe
York YO31 7ZQ
Tel: 01904 430033; Fax: 01904 430868; Website: www.yps-publishing.co.uk

Contents

1 Introduction

The goals of this report are to identify many of the issues that arise in commonhold law in the United States and Australia, and to continue the dialogue about commonhold law. To the extent that English and Welsh practices are different from those in the US and Australia, the solutions to problems that are identified may need to be different. It is difficult to solve a problem, however, if one does not know a problem exists.

The laws that will be referenced in the paper include the following.

United States

1 The Uniform Common Interest Ownership Act will be referred to as UCIOA in this report.[1] UCIOA or similar acts like the Uniform Condominium Act and the Uniform Planned Community Act have been adopted in approximately 15 states in the US. Other states have adopted provisions similar to provisions in these acts.

2 The Davis-Stirling Common Interest Development Act.[2] This Act is referred to in this paper as the California Civil Code. Numerous other statutes also affect the creation and operation of commonhold law in California, primarily the Corporations Code provisions applying to non-profit mutual benefit corporations.[3]

In California, the Department of Real Estate Regulations also indirectly control the creation and operation of commonhold communities. In order to sell units, a developer must first seek approval from the California Department of Real Estate.[4] The Department will not approve the sale of a unit unless the governing documents comply with the 'reasonable arrangements' provisions of the Department's regulations. These regulations control most aspects of the operation of commonhold communities.[5] Therefore, in California, like many states, the creation and operation of commonhold communities are controlled by statutes and regulations.

Australia

1 Queensland Body Corporate and Community Management Act 1997 is referred to in this report as Queensland Statute. Queensland Body Corporate and Community Management Act Regulation 1997 is referred to as Queensland Regulations. The Regulations contain various models for the governing documents of commonhold communities. These include a Standard Module, a Small Schemes Module, an Accommodation Module and a Commercial Module. (The references in this paper are to the Standard Module.)

2 New South Wales Strata Schemes (Freehold Development) Act 1973 is referred to as NSW Strata Schemes; Strata Schemes (Freehold Development) Regulation 1973, Strata Schemes (Leasehold Development) Act 1986, Strata Schemes (Leasehold Development) Regulation 1986, Strata Schemes Management Act 1996 is referred to as NSW Strata Schemes Management Act; Strata Schemes Management Regulation

1997, Community Land Development Act 1989 is referred to in this report as NSW Community Land Development Act; Community Land Development Regulation 1990, Community Land Management Act 1989 is referred to as Community Land Management Act; and Community Land Management Regulation 1995 is referred to in this paper as NSW Community Land Management Regulation.

Strata titles are communities in which the common area is owned as tenants-in-common. Community land development schemes are similar to planned communities in the US, and the form of title is most similar to commonhold. The NSW Strata Schemes Acts, NSW Strata Titles Management Act and their accompanying regulations contain operational procedures relevant to commonhold communities. References will be made to both sets of statutes and regulations.[6]

All of the issues discussed will not be of interest to all readers. The outline is presented so that the reader can more easily find the issues that are relevant to his or her particular interests.[7]

Chapter 2 Overview

I Background
- A Four types of commonhold communities
  - 1 Condominium
  - 2 Housing co-operative (company titles scheme)
  - 3 Planned community
  - 4 Master planned community
- B Property interests in a commonhold community
- C Commonhold community law should impact the fewest laws possible
- D Most of the commonhold community law should be in regulations rather than statutes
- E Commonhold community law should address basic issues that arise in the creation of commonhold communities
- F Commonhold community law should address basic issues regarding the operation of commonhold communities

II Functions of commonhold associations
- A Governmental functions
  - 1 Hierarchy
  - 2 Rights and obligations
  - 3 Organisation operation
    - a Voting
    - b Covenant and rule enforcement
- B Business functions
  - 1 Asset and risk management
  - 2 Financial management
    - a Financial reporting
    - b General funds and reserve funds
    - c Levying and collecting service charges
    - d Borrowing money
    - e Contracting with third parties
- C Creating a sense of community

III Some other issues
- A Amending the documents after alteration or termination of the commonhold community
- B Protection of purchasers
- C Administration of commonhold communities

Chapter 3 Issues in more detail

IV Preliminary provisions

- A Title of act: commonhold communities law
- B Legislative intent
- C Construction of statute
  - 1 Severability
  - 2 Liberal construction
- D Interaction with other laws
  - 1 Taxation
  - 2 Local land development regulations and building codes
  - 3 Compulsory government purchase
  - 4 Supplemental general principles of law applicable
- E Variation of law by agreement

V Definitions
- A Commonhold community
- B Master commonhold community
- C Unit
- D Common area
- E Exclusive use common area
- F Commonhold community association
- G Development rights
- H Many other definitions

VI Creation, alteration and termination of commonhold communities
- A Creation
  - 1 Commonhold community
  - 2 Master commonhold community
  - 3 Master commonhold association
  - 4 Commonhold Community Statement
  - 5 Signatures on the Commonhold Community Statement
  - 6 Allocation of allocated interests (percentage interest in association, services charges and voting rights)
  - 7 Exclusive use common area designated in Commonhold Community Statement
  - 8 Commonhold communities on leasehold property
  - 9 Description of units
  - 10 Unit boundaries (default definition)
  - 11 Implied easements
  - 12 Construction and validity of Commonhold Community Statement and Bylaws
  - 13 Amendment of Commonhold Community Statement by owners
  - 14 Amendment of Commonhold Community Statement by court order
- B Alteration of boundaries and units
  - 1 Alteration of boundaries by developer
  - 2 Relocation of unit boundaries between units by owners
  - 3 Subdivision of units by owners
  - 4 Alteration of unit by unit owner
- C Termination
- D Merger of commonhold communities

VII Operation (governance and business functions)
- A Organisation of commonhold association
- B Powers of commonhold association
- C Powers of master association
- D Powers and liabilities of board of directors
- E Powers of original owner and transfer of original owner's rights
- F Bylaws
- G Officers of board of directors
- H Covenants and equitable servitudes
- I Meetings
- J Voting
- K Tort and contract liability
- L Maintenance obligations
- M Finances
  - 1 Obligation to levy service charges

2 Overview

I Background

A Four types of commonhold communities

There are four types of commonhold communities. England, which includes Wales in this report, is considering only two of them.

In both Australia and the US, commonhold communities can be residential, commercial or industrial. The residential commonhold properties require more consumer protection and, thus, the boards of directors in these communities usually have more limited power.

Regardless of whether a commonhold community is residential or commercial, there are four basic commonhold arrangements: condominiums, co-operatives, planned communities and master planned communities.

1 Condominium

Condominium or strata scheme – the unit owner owns a freehold interest in a unit coupled with a tenant-in-common interest in the common area, and perhaps an interest in an exclusive use common area.

2 Housing co-operative (company titles scheme)

Housing co-operative (in New South Wales, company titles scheme) – the corporation owns the entire structure, and each owner has the exclusive right to possess a portion of the building coupled with an interest in the corporation. The form of ownership is similar to a block of flats where all of the tenants have purchased their flats.

In the US, there are not many housing co-operatives outside of New York and Chicago, and these are older communities. It is rare for a developer to create housing co-operatives today because in some jurisdictions the interest in the corporation is a personal property interest.[1] Thus, it is difficult to obtain financing. Also, if one owner fails to pay their portion of the mortgage, the other owners will either have to cover the defaulting owner's debt or lose their interest in the building. A way of getting around this problem is to enact a statute that permits an owner to relieve his or her unit of any liability for the debt by paying his or her pro-rata share.

Housing co-operatives, or company titles schemes, also exist in NSW. The association that owns the building is a traditional company and the 'owners' are shareholders. This means that traditional company law governs them. One solicitor who is an expert in the field stated, 'That means they operate as a free for all'. He stated that solicitors no longer create this form of ownership. It predominately exists in housing that was built before the condominium and planned community law was enacted.[2]

3 Planned community

The unit owner owns a freehold interest in a separate area, sometimes called a unit or lot, coupled with an interest in the association. The association owns the common area. The unit owner also may own an interest in a portion of the common area that is called exclusive use common area. An exclusive use common area is a portion of the common area reserved for the use of one or more, but not all, of the owners. These areas are usually patios, balconies and parking spaces.

4 Master planned community

This is a combination of one or more of the above. This form of ownership is particularly valuable in a mixed-use building where it is desirable to have one association for the commercial property and one for the residential

property. (This discussion is more fully developed later.) Each association has its own common area and rules, and each is also subject to the rules of the master association that also generally owns common property. In this case, both the commercial and residential owners have voting rights in the master association.

As mentioned, England is considering what are called, in the US, planned communities and master planned communities. It is not considering the type of community in which the common area is owned as tenants-in-common. When I asked experts in the US and Australia the advantages of having the common area owned as tenants-in-common, they could think of none. Condominiums are created predominately for historical reasons, to gain advantages in zoning, and because the lenders are familiar with them. There is nothing inherently better in this form of ownership.

In the US, if the condominium form of ownership is adopted, it is necessary to enact a statute to guarantee that the co-owners are liable only for their pro-rata share of any liability incurred as a result of their owning the common area as tenants-in-common. Otherwise, one owner can be liable for the entire judgement against the association under the tort theory of joint and several liability.

B Property interests in a commonhold community

There are at least two, and sometimes three, property interests in a commonhold community.

1 There is an interest in freehold. This is sometimes called a 'unit'. In a planned community with detached houses, it is sometimes called a 'lot'.

2 There is also an interest in the association that owns the common area. Whether those interests are equal or based on some other formulation is discussed later in the paper.

3 There may also be an interest called an 'exclusive use common area'. These are portions of the common area that are for the use of a particular unit or units. They are usually patios attached to units or parking spaces assigned to particular units. In some communities, it is better to have these as exclusive use common area because then the association has greater control over them. It would also, of course, be possible to make them part of the unit.

California lawyers called these interests 'easements' until they discovered that easements only give the right to non-exclusive use. Because the owners do not legally have an easement and are not legally in 'possession' of these areas, it was necessary to create a new property interest – exclusive use common area. The distinction between possession, non-exclusive use and exclusive use is the type of distinction law professors care about more than practitioners. Practitioners, correctly, just want the system to work. I raise this issue, however, because we took our law of easements from England. Therefore, the same issue may exist in England. It is important that the statutes and regulations clearly identify the property interest because, among other things, it is important to know who has the responsibility for maintaining each area.

Once the commonhold community is created, both Australia and the US provide a

variety of ways in which property interests can be changed. Except in extreme situations, changes cannot be made over the objection of the owner. Circumstances under which property interests can be changed are discussed later.

C Commonhold community law should impact the fewest laws possible

Creation of commonhold community law will necessitate impacting other existing law. It is best to impact the fewest number of laws possible. For example, it is unnecessary to create a separate body of law for commonhold community insolvencies. First, not a single expert with whom I have spoken in either the US or Australia has ever heard of a single case of insolvency. Even if an association could be declared insolvent, the existing insolvency law may be sufficient to handle the situation. It is unnecessary and unwise to create new law when it is not necessary to do so.

Where commonhold community laws must interrelate with other laws, it will be important to have experts in the relevant fields carefully review the draft bill. For example, tax lawyers will need to give advice on the manner in which one's property interest in a commonhold community is determined for tax purposes. Those who are responsible for local land development decisions will need to consider the provisions dealing with the creation of commonhold communities. Company lawyers will have to determine the extent to which law needs to be modified to address the unique needs of commonhold communities.

D Most of the commonhold community law should be in regulations rather than statutes

Problems will arise as commonhold law is introduced into the market place. It is important to be able to respond to these problems quickly. Because regulations can be changed more quickly than legislation, only those things that must be included in statutes should be. The rest should be set forth in the regulations.

E Commonhold community law should address basic issues that arise in the creation of commonhold communities

Developers need flexibility in creating commonhold communities in order to respond to changing market conditions. The need for flexibility must be balanced with the owners' right to have the community remain as represented at the time of purchase.

For example, after creation, the developer may wish to annex or de-annex property from the commonhold community. Under the Uniform Common Interest Community Act (UCIOA) in the US, the developer can do this unilaterally if there is full disclosure in the initial documents and the right is exercised within a specified time.[3] Another approach is to permit annexation and de-annexation only if a specified percentage of the owners agree.

It is important to know when the project is actually created. Some jurisdictions say the commonhold community is created at the moment the documents creating the commonhold community are registered.[4] Other jurisdictions require the registration of the documents, but provide that the commonhold community is not created until at least one unit is sold.[5]

Depending on how long it takes to get approval from the local government for a development, the latter may be the better approach. If a developer discovers after getting

the approvals that there isn't a market for a commonhold community, he can then change the project to leased flats. If the commonhold community is already created, the developer may not be able to change the legal structure of the commonhold community.

F Commonhold community law should address basic issues regarding the operation of commonhold communities

Many of the operational issues may also apply to a block where tenants have exercised their right to enfranchise a block of flats. The major difference is that in a commonhold community all owners have a vote, whereas in a block some people may not have exercised their right to enfranchise and, therefore, generally do not have a vote. Thus, when considering the following, one should consider the extent to which the issues are and are not relevant in both settings.

The association of a commonhold community, acting through its board of directors, has three overlapping functions. In some respects, the board of directors acts like a governmental entity in that it enforces rules (similar to laws), maintains facilities used in common (similar to public facilities) and imposes service charges (similar to taxes).

In other respects, it is like a business that has to be concerned with asset management, financial management and risk management. It is important to note that, while the association is generally a corporation, in both the US and Australia, it is treated differently from other companies because it is different. Residential commonhold associations are especially different from traditional companies. Below are some of the differences.

1 For-profit traditional companies are in business to make a profit; commonhold associations are not. Thus, some laws that were created to govern for-profit companies may not apply to commonhold associations.

2 Traditional companies do not levy service charges on their members, and the members cannot lose their homes if the service charges are not paid. Therefore, more consumer protection is needed in residential commonhold communities than in traditional companies.

3 Volunteers generally do not run traditional companies.

4 Voting in traditional companies may not be based on a variety of measurements such as square footage or market value of real property as may be the case in commonhold communities.

5 Traditional companies can be declared insolvent whereas an asset of a commonhold association is the ability to levy service charges to pay debts, and, therefore, they cannot be declared insolvent.

6 The ownership interest in a traditional company is a personal property interest. In a commonhold association, it is an interest in real property that may be subject to a mortgage.

7 Traditional companies do not have the same control over the daily lives of their members as do residential commonhold communities.

As a result of these differences, it is very likely traditional company law will have to be modified to accommodate the unique characteristics and needs of commonhold associations.

The third role of the association is to create a sense of community. If there is a sense of community, the owners are more likely to abide by the rules of the commonhold community.

II Functions of commonhold associations

A Governmental functions

1 Hierarchy

Owners Original owner (developer)
Commonhold association
Board of directors
Committee members

2 Rights and obligations

Even though associations can act through their boards of directors, the law in both the US and Australia restricts the actions of the board. There are certain designated rights that only the owners can exercise. For example, in California, the board cannot raise service charges beyond a certain percentage without a vote of the owners.[6] Also, some statutes prohibit the board from selling association property without a vote of the owners.

The board of directors is in the role of a fiduciary. The laws from different jurisdictions handle the issue slightly differently. The developer is often held to a higher standard – that of a trustee – while he or she is in control of the board because of the inherent conflict of interest. The volunteer board members have the fiduciary duty that directors of companies generally have.

Some jurisdictions provide limited immunity for the individual volunteer directors and officers. In California, the directors are protected only if the association maintains a specified amount of insurance.[7] It is often difficult to get people to serve on boards. They are even more reluctant to do so if they can be sued individually for breach of fiduciary duty. Thus, it is necessary to limit their liability.

There is also often a statute that limits the liability of an individual owner to his or her pro-rata share. In other words, if an owner owns a hundredth interest in a 100-unit block of flats, that owner is only liable for one-hundredth of any judgement against the association.[8]

3 Organisational operation

a Voting

It is possible to assign one vote to each unit. It is also possible to assign voting rights and service charge obligations based on floor area or fair market value. For example, if one flat is four times bigger than the other flats in a building, the owner with the large flat may have a greater number of votes and be responsible for a larger share of the service charges. In the US, even if a jurisdiction states a preference for one type of voting structure, it generally permits the governing documents of a commonhold community to determine the appropriate voting structure for that community. It is important to provide a default provision in the law in the event the governing documents of a community fail to establish a voting scheme.

California permits developer 'weighted voting'. For example, for a limited period of time while the developer is trying to market the development, the developer may have three votes per unit owned rather than one.[9] Other jurisdictions expressly prohibit this practice.[10]

Proxy voting can pose a problem if one owner or a group of owners is permitted to

continue to control the association. The limitations on proxy voting are discussed later in the paper.

b Covenant and rule enforcement

Commonhold communities cannot function unless affirmative covenants can be enforced against subsequent purchasers. There must be effective, fair and inexpensive methods for enforcing the covenants.

There are both internal and external dispute resolution mechanisms in commonhold associations. The internal dispute resolution mechanisms include the manner in which the association notifies owners of violations, fines them and places liens on their freehold interest. It should be noted that not all jurisdictions permit the association to fine owners.

External dispute resolution mechanisms include mediation, informal arbitration, formal arbitration and litigation. In Australia, the government runs a dispute resolution system.[11] In the US, there is widespread use of private mediation and informal arbitration procedures that often do not involve lawyers.

B Business functions

1 Asset and risk management

The jurisdictions differ in the extent to which they control the association's ability to deal with the repair and maintenance of major components, and with capital improvements. For example, California prohibits the association from making capital improvements costing more than a specified amount without a vote of the owners.[12]

Many jurisdictions require the association to maintain a variety of insurance policies.[13] Insurance is one of the main protections for the owners. Some jurisdictions require the association to maintain property, general liability, and director and officer liability insurance. There are also usually indemnity provisions in the Commonhold Community Statement for directors and officers. Associations may need to maintain additional forms of insurance depending on the characteristics of the particular association.

2 Financial management

a Financial reporting

The requirements are likely to vary among the jurisdictions and also to vary depending on whether the commonhold community is residential, commercial, or industrial. Some require the board of directors not only to keep financial records, but also to review them on a periodic basis and reconcile bank statements.[14]

b General funds and reserve funds

Several jurisdictions, including Queensland and New South Wales, require the creation of both a general operating fund and reserve fund.[15] The jurisdictions differ in their approaches to requiring the association to adequately fund reserves. Even if there isn't a statute or regulation that requires funding reserves, however, the common law fiduciary duty does require it.

In addition, California requires periodic reserve studies.[16] These studies require the association to compare the community's estimated long-term expenditures with its reserves.

c Levying and collecting service charges

Associations can file a lien after service charges are delinquent for a specified period of time, and the property can be sold through a power of sale. Upon sale, the owner receives any proceeds remaining after the debts are paid. The

debt can include the past due service charges, the lawyer's fees and costs incurred in attempting to collect the service charge. California permits both a court sale and a private sale by an association-appointed trustee provided the sale is in accordance with the statute.[17] Others permit only a court sale.

In the US and Australia, the owners determine the service charges. These are based on a yearly budget that must be approved by the owners in some jurisdictions and by the board in others. Courts are not involved. Because the owners set their own charges, they are not in a position to argue that the service charges are unreasonable. If the owners do not like the service charges, they can recall the board or elect a new board of directors. The system would not work if owners could generally challenge the reasonableness of a service charge. If one owner does not pay a service charge, the others will have to cover the debt of the defaulting owner in order to maintain the property. Further, the legal costs of a challenge have to be paid by someone. The documents may require the losing party to pay. However, there are often costs that are not recoverable which means that the unit owners who are paying their debts on time end up paying some expenses incurred in collecting the debts of those who are not paying their service charges on time.

An owner can allege that the board has violated a particular, legally required procedure or has breached its fiduciary duty in setting service charges. Service charges, however, are rarely challenged under either theory.

d Borrowing money

In the US, if the association is not prohibited from borrowing money in the governing documents, it usually can. The market place determines whether or not a particular association will receive money. The security either can be common area, where appropriate and permitted, or the association's income stream, which would be similar to a commercial loan.

If the loan is in default and the common area is the security for the loan, the common area can be sold at a court sale. This may occur where an association owns a separate parcel of property that it has mortgaged.

If the loan is secured by the association's income stream, the bank steps into the shoes of the association and can collect the service charges to repay the loan. The bank can have a unit sold at a court sale if an owner does not pay his or her pro-rata share of the debt.

I have spoken with several lenders in the US and not one of them has heard of an association failing to pay its debt in a timely manner. Because the associations have reserves and the ability to raise service charges, they use these funds to guarantee the debt is paid on time.

e Contracting with third parties

Some jurisdictions impose limitations on the board's ability to enter into specific contracts, particularly in residential communities. For example, while the developer is in control of the association, the law often imposes restrictions on the types of contracts into which the association can enter or gives the association the ability to cancel certain contracts.

C Creating a sense of community

In order for a residential commonhold scheme to serve the best interests of the owners, it is necessary for the association to create a sense of community. This does not mean all the owners

are required to participate in the governance of the community. In the US, it is common for both husbands and wives to work. If a family has two working parents, the last thing they want to do when they get home from work is attend an association meeting or association party. On the other hand, they also do not want to live in a community where neighbour is pitted against neighbour or where property values are falling.

A sense of community is generally created through education and social events rather than through the law. However, in some cases, the law interferes with creating a sense of community. For example, in the US, if covenants are not enforced consistently then it is possible for the association to lose its right to enforce the covenants under the common law doctrine of waiver. Some boards of directors are over-zealous and believe this law requires them to send a notice of every small violation to an owner. To the extent England has the same law (and, again, the US law came from England), it is worth considering. Also, if the law requires notices to be in a very legal and formalistic format, it will interfere with the creation of a sense of community.

I once heard a lawyer advise board members to treat the owners the way they would want their mothers to be treated. This is good advice and should be kept in mind when drafting law.

III Some other issues

A Amending the documents after alteration or termination of the commonhold community

Statutes, regulations and the governing documents usually provide for amendment of the governing documents. This is essential. It is impossible for even the brightest developer to anticipate all the changes that will occur over the life of the community.

If covenants have a termination provision, problems can arise. In Los Angeles, there was a 3,000-unit condominium with covenants that were about to terminate. This would have resulted in having 3,000 tenants-in-common with no procedures for determining what to do with the streets and other facilities that they held as tenants-in-common. A statute was passed giving the owners the ability to petition the court to extend the terms of the covenants.[18]

Some jurisdictions permit a simple majority to amend particular provisions, such as pet restrictions. However, they require a super-majority to amend provisions that would alter the property interests, such as termination of the commonhold community.[19] Lenders may also require a super-majority to amend provisions that directly impact their security interest.[20]

A problem arises when it takes more than a simple majority to amend the documents. It is often difficult to get a super-majority to vote. California responded to this problem by permitting the court to amend documents if certain procedures are met.[21] Australia has some interesting voting procedures that are discussed later in the paper.

B Protection of purchasers

California requires every purchaser in a commonhold community to receive a copy of the governing documents.[22] In addition, initial purchasers receive a brochure from the State Department of Real Estate that explains the owners' rights and obligations.

The purchaser also can evaluate the community's reserve study that identifies the community's major components, their estimated

life expectancy and the level of reserves available to replace or repair them. Finally, the law requires the purchaser to be told about the insurance policies maintained by the association and whether the association is in litigation.[23]

The State requires numerous other disclosure requirements that are not part of the commonhold legislation. These are part of the real estate sales law.[24]

C Administration of commonhold communities

The extent of government involvement in the creation of commonhold communities differs among the jurisdictions. Some jurisdictions have almost no regulation other than local planning law. In California, however, a developer cannot create a residential commonhold development without gaining approval from the California Department of Real Estate.[25]

The Department closely reviews the governing documents to make sure they conform to the Department's regulations. The Department also reviews the developer's proposed initial budget to determine if the estimated service charges are sufficient to maintain the property. Developers have an incentive to initially set the service charges at a low level (this is called 'low balling') in order to sell all the homes. The owners discover only later that the service charges were set unreasonably low, and that they have to dramatically raise their service charges. This generally cannot happen in California because California reviews the developer's initial budget. Most jurisdictions, however, do not review the initial governing documents in this degree of detail.

3 Issues in more detail

The following assumptions are made in discussing the issues.

1 Commonhold communities can be commercial or residential.

2 They can consist of attached or detached units.

3 Commonhold communities can be created by new construction or by converting existing structures to this form of ownership.

4 Commonhold communities are communities in which the association owns the common area, and the owners own a freehold interest in a part of the community, an interest in the association and possibly an exclusive use common area (parking space, etc.).

5 It may be possible to modify some of the operational aspects of commonhold communities so they can apply in the leasehold setting.

Although, in Queensland, the Body Corporate and Community Management Act applies only to condominiums (where the owners own the common area as tenants-in-common), the Queensland law is included in the discussion because, in many respects, it is relevant. New South Wales has separate statutes for condominiums and planned communities in which the association owns the common area. UCIOA and California statutes apply the same law to condominiums, housing co-operatives and planned communities.

IV Preliminary provisions

A Title of act: commonhold communities law

The title of Queensland's law, NSW's law, the US UCIOA and California law all have the concept of common ownership or community in their titles.[1] The terms 'common' and 'community' are included because it is important that the concept of shared interest and shared responsibility be obvious from the title.

B Legislative intent

Not all of the various statutes provide legislative intent. In the US, legislative intent assists the court in interpreting statutes. Legislative intent is sometimes included when there is a concern that a statute will be challenged in court.

Some goals listed in statutes in Queensland law include the following:

a to balance the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes

b to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes

c to provide a legislative framework accommodating future trends in community titling

d to ensure that bodies corporate for community titles schemes (associations) have control of the common property and body corporate assets they are

responsible for managing on behalf of owners of lots included in the schemes

e to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes

f to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes

g to ensure accessibility to information about community titles scheme issues

h to provide an efficient and effective dispute resolution process.[2]

There may be a desire to make this section, if it is included, more consumer oriented. When discussing consumer protection, however, it is important to think about which consumers one is protecting. For example, if a roof needs to be repaired and one owner isn't paying his or her service charges, the other owners will be obligated to cover the defaulting owner's debt if they want the roof repaired. So, one needs to consider whether one is protecting the owner violating the commonhold community rules or the owner who is following them.

C Construction of statute

1 Severability

It is common in the US to have a provision in the statute that says, if the court determines that a provision of the statute is invalid, that provision is severed from the statute and the rest of the statute is valid. It might be wise to include this type of provision because the statute is untested. It is impossible to think of every law that might be affected by this legislation and, therefore, impossible to know if a court may subsequently find that a particular provision of the new law violates existing provisions of English law.

2 Liberal construction

It is customary to have a provision in the statute that says that the commonhold community laws should be liberally construed to encourage the efficient creation and operation of commonhold communities.

D Interaction with other laws

1 Taxation

Commonhold communities create a unique property taxation issue. The issue arises after the original owner has conveyed a unit (flat, house, or commercial space) in the commonhold scheme. Although the association owns the common area, the common area should not be taxed as a separate parcel of property because the value of the property is already reflected in an owner's freehold interest.

An owner owns a freehold in a separate area and a percentage interest in the common area. If the association's property is taxed and the owner's interest, which includes a percentage interest in the common area, is also taxed, the common area is taxed twice. This concept does not apply where the original owner retains the common area in his or her sole ownership for future annexation or for other development rights.

A second taxation issue arises if the service charges or reserve funds are taxed. Generally, commonhold associations do not run a business and do not make a profit. Therefore, generally, the government should not tax service charges collected or the reserve fund.

If the reserve fund makes a profit on investments, a policy decision needs to be made. The government may wish to treat the association similarly to an individual and tax the profit on investments. On the other hand, it may wish to encourage the creation of adequate reserve funds so the blocks of flats do not fall into long-term disrepair. If this is the case, the profits made on the reserve fund should not be taxed. If the association is running a business, it seems reasonable to treat the association's business profits in the same manner as other business profits.

2 Local land development regulations and building codes

Some planning statutes and building codes in the US attempt to discriminate against buildings based solely on their form of ownership. For example, statutes may require different firewalls (different construction) depending on whether the building is an apartment building (containing short-term leased flats) or a commonhold community. A provision should be included in the law that prohibits discrimination based solely on the form of ownership.

3 Compulsory government purchase

In the US, when the government or governmental agency acquires a freehold interest through a compulsory government purchase, other freehold interests are not directly impacted. In a commonhold community, they may be.

For example, one building of a two-building commonhold community may be purchased. The law must address what happens when the government purchases one or more, but not all, of the flats or houses in a commonhold community. The law should provide for an automatic recalculation of the allocated interests of all units.

'Allocated interests' include an owner's percentage interest in the commonhold community, voting rights and the obligation to pay assessments. For example, assume there are two buildings with 50 units in each building and each owner has a hundredth interest in the association and one of 100 votes. If the government forces a purchase of one of the buildings, there will only be 50 units left. Thus, the interests need to be reallocated.

4 Supplemental general principles of law applicable

It is common for statutes to provide that the general principles of law and equity apply, except to the extent they are inconsistent with the Commonhold Communities Act. Such a provision makes it clear that the existing insolvency law, company law, etc. would apply to the creation and operation of commonhold communities except to the extent that they are inconsistent with the commonhold community law.

E aViation of law by agreement

There are two ways of approaching this legislation. Statutes and regulations can provide default provisions that will control if the governing documents are silent. Alternatively, statutes and regulations can control unless they specifically permit the governing documents to deviate from the law. Either approach is workable.

Whichever approach is used should permit creativity in the creation of commonhold communities. Developers, particularly those

creating commercial commonhold communities, should be permitted flexibility so they can create a variety of communities to satisfy particular needs of the market place.

The definition of governing documents will need to be developed. The governing documents include the document that creates the commonhold community. This document could be called the Commonhold Community Statement, which is similar to the Australian name. In the US, it is called the master deed, the declaration, or the Covenants, Conditions, and Restrictions (which is a name that does not accurately describe the contents of the document). Additional governing documents include the documents that incorporate the association, that contain the operational procedures of the association and sometimes a document containing the rules created by the association.

The deed to the freehold is not part of the governing documents. It should, however, at least refer to the Commonhold Community Statement.

V Definitions

This section will be created at the end of the process but some pivotal definitions can be identified now. It is very important that any definitions ultimately presented be circulated for critical review. If the definitions are confusing or wrong, litigation will ensue.

A Commonhold community

A commonhold community is one in which an owner owns a freehold in a unit (which can be a flat, a lot, or a variety of other things), an interest in the association that owns the common area and perhaps an exclusive use common area. An exclusive use common area is one that is part of the common area but designated for the exclusive use of one or more, but not all, of the owners. The exclusive use areas are generally patios, balconies, or parking spaces.

In commonhold communities, the owners are bound by covenants that create a common scheme. These are contained in a Commonhold Community Statement that also contains other provisions that are discussed later in the paper. While it is possible to have a commonhold community that has only architectural restrictions and, therefore, no service charges, generally, commonhold communities do have to maintain common area so the owners have to pay service charges.

B Master commonhold community

A master commonhold community is one in which there are two or more commonhold communities. A master commonhold community probably needs to be created only when there is common area that is shared by the commonhold communities making up the master community.

It is possible to create a master commonhold association without creating a master commonhold community. For example, assume the lower floor of a building is commercial and is owned by one person. The four floors above the commercial floor are residential floors that are one commonhold community. It is probably advisable to permit the commercial owner and the commonhold community to create a master commonhold association to deal with maintenance and other issues that affect both interests in the building without requiring them

to create a master commonhold community.

In this case, one would not create a master commonhold community because there would not be two commonhold communities forming a master commonhold community. Instead, it would be an association consisting of one commonhold community and a commercial owner as members.

Having two voting classes can protect both the commercial and residential interests. For example, the residential commonhold community could be Class A and the commercial Class B. The governing documents could then require a majority of each class to approve a motion or they could provide some other voting structure that would prevent one entity from consistently controlling the outcome of the vote. If the voting structure were based on floor area either the residential or commercial interests, depending on the respective floor area space, would always control the outcome of a vote.

A simpler way of addressing the same maintenance issues would be to specifically give the commonhold association the authority to enter into cross covenants for maintenance and cross easements where appropriate. The statute could state that these covenants run with the land. This approach would let the entities create their own arrangements for voting structure depending on the characteristics of the particular building. This approach could be confined to commonhold communities that are contained within a mixed-use building if so desired. This approach does not require the creation of another association (the master commonhold community association) and, therefore, may be more desirable.

C Unit

The owner's freehold interest needs a name. The goal is to be as expansive as possible in defining the range of freehold interests that can exist in a commonhold community. This form of ownership should be available for blocks of flats, detached buildings, or any other form of real property. For example, in the US, parking spaces, boat slips and airspace containing mobile homes are held in this form of ownership. One developer even created a unit for a cash machine in a commonhold community. The unit was the size of the cash machine.

Developers should be given the flexibility to be creative. (Consumer protection issues are addressed elsewhere.) While the goal is to be flexible, this definition has to be compatible with definitions of real property in existing statutes.

If it is clearer, the statute could use the term 'separate interest' instead of 'unit'. This is the term used in California.[3] It reinforces the fact that a commonhold community consists of areas owned separately and areas where there is a shared interest. Also, sometimes the word 'unit' implies space within a building, and the separate interest does not have to be within a building. Whichever term is clearer should be used.

The term 'freehold' should not be used to identify the separate interest. The association generally owns the common area in freehold, and, thus, using this term to identify the owner's separate interest would be confusing.

An owner of a long-term lease of a building may wish to convert the entire building to a commonhold community, with the commonhold community terminating at the end

of the long-term lease. Commercial developers, in particular, may wish to develop property this way. If having a commonhold community on leasehold property is viable, then the definition should include leasehold property.

If there are concerns about protecting consumers in this situation, provisions can easily be added to the law to require the developer to give the consumers full disclosure of the arrangement. Consumer protection is discussed later in the paper.

D Common area

Common area, the area the association owns, is usually a default definition. In other words, statutes state that if property is not a unit it is common area.

E Exclusive use common area

Exclusive use common area is a portion of the common area allocated in the Commonhold Community Statement for the exclusive use of one or more but fewer than all of the units. In some jurisdictions, the association is permitted to allocate common area as exclusive use common areas even after the Commonhold Community Statement is registered. For example, if there are more units than parking spaces, either the Commonhold Community Statement can allocate the spaces to particular units or it can give the association the ability to assign the parking spaces on some rational basis.

Again, a policy decision needs to be made. On the one hand, having the exclusive use areas designated to particular units in the Commonhold Community Statement creates fewer arguments among the owners because there is certainty. Certainty may be desirable considering the commonhold community law will be new. On the other hand, the flexibility of assigning parking spaces may be desired.

Even if exclusive use areas are designated in the Commonhold Community Statement, the owners can change the boundaries by amending the Statement. Amendments will be discussed later.

F Commonhold community association

A commonhold community association is the association that governs the commonhold community. Some jurisdictions in the US require the association to be incorporated; others do not. In the US, individual owners in an unincorporated association can face greater liability than those in an incorporated association. In the US there is no apparent reason why one would want the commonhold community association to be unincorporated. The issue of incorporation, however, should be discussed because perhaps there are advantages of being an unincorporated association under English law that do not exist in the US.

If associations are incorporated, there are two different approaches one can use. In Australia, the traditional company law does not control commonhold associations. The commonhold statutes include the company law that applies only to commonhold companies. In the US, it is common for the company law statutes to be modified to accommodate the unique problems that occur in commonhold associations. The Australian approach is clearer and is less likely to produce unintended consequences. The US approach, however, is probably easier to draft. It is important though, if the latter approach is used, to amend the company law so that it accommodates the

unique requirements of commonhold companies.

Because modifying traditional company law may result in modifying statutes that were intended to apply only to traditional companies, it is essential that those familiar with company law review the existing company law in light of the unique characteristics of commonhold companies. Some of the differences were discussed previously and will be mentioned again later.

G Development rights

Development rights are any combination of rights reserved by the developer in the Commonhold Community Statement. These can include the right to:

1 add real estate to the community

2 withdraw real estate from a commonhold community

3 create units, common areas, or exclusive use common area within a commonhold community

4 subdivide or convert units into common area.

H Many other definitions

These are just a few of the basic definitions. Many more will need to be added as the process progresses.

VI Creation, alteration and termination of commonhold communities

A Creation

The basic content of much of the material dealing with creation, alteration and termination of commonhold communities comes from the Uniform Common Ownership Act. UCIOA provides much more flexibility than does the law of either NSW or Queensland.

1 Commonhold community

A commonhold community is generally created by registering the document I have called the Commonhold Community Statement. This document is registered in every county where a portion of the commonhold community is located because people purchasing property need to be able to have easy access to the Commonhold Community Statement.

All jurisdictions require registration of a Commonhold Community Statement in order to create a commonhold community. In California, the developer also has to convey one unit before the community is created.[4] The California law was created because occasionally a developer creates a commonhold community and then finds after construction that they are not able to market it. If they have not yet conveyed one unit they can easily change the building from a commonhold community to a rental project.

2 Master commonhold community

A master commonhold community consists of more than one commonhold community. One may wish to create a master commonhold community in the following situation. Assume there are four blocks of flats around a garden. Each block of flats has its own unique maintenance and covenant issues, but all blocks want to share the common garden. Each block could be a separate commonhold community with maintenance obligations, voting and other rights pertaining just to that block. Only those in the affected block would get to vote on issues relating to that block.

The master commonhold community would own the garden and other common area that is not contained within an individual block of flats or commonhold community. Each individual commonhold would be represented on the board of the master commonhold community. It would be necessary to register a Commonhold Community Statement delineating all of the respective rights and obligations.

3 Master commonhold association

England also should consider permitting the creation of a master association without the necessity for creating a master commonhold community. Assume there is a commercial owner on the first floor of a building and a five-storey residential commonhold community above. The residential commonhold community and commercial owner may wish to enter into an agreement that delineates the rights and obligations of each. The parties could enter into an agreement that creates the master association and delineates the respective parties' rights and obligations. The law could require the agreement to be registered.

Another option would be to permit the parties to enter into a maintenance agreement without creating a master association. The agreement would create covenants that run with the land and address the allocation of voting rights and maintenance obligations. The law could require the agreement to be registered in a manner that would make it accessible to potential purchasers and owners.

It is very possible that the Commonhold Community Statement may not mention whether the commonhold community may become part of a master association. If this is the case, a decision needs to be made whether to permit the association to join a master association when the documents are silent. As mentioned previously, it is important to require the agreement to be registered so that a prospective purchaser and owner can get a copy of the agreement that identifies the rights and obligations of the owners.

4 Commonhold Community Statement

The Commonhold Community Statement creates the commonhold community and serves as a disclosure statement for potential purchasers and owners. Therefore, it is important that it contain sufficient information for a potential purchaser to decide if he or she wishes to purchase a unit.

Below is a combination of some of the information required by various jurisdictions in the US and Australia. When deciding whether this is too much information, it might be helpful to imagine what information you would like if you were purchasing a flat or home in a commonhold community. It may not be necessary for the Commonhold Community Statement of a commercial commonhold community to contain as much information. The following list is taken predominately from Section 2-105 of UCIOA.

a A name identifying the commonhold community.

b The words 'commonhold community'.

c The name of every county in which any part of the commonhold community exists.

d A legally sufficient description of the commonhold community.

e A statement of the maximum number of units that the original owner reserves the right to create.

f A description of the boundaries of each unit created by the declaration, including the units.

g A description of any exclusive use common area and any real estate that is or must become common area.

h A description of any development right reserved by the original owner, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised.

i Any restrictions on alienation of the units, including any restrictions on leasing, on the amount for which a unit may be sold, on the amount that may be received by a unit owner on sale or casualty loss to a unit or commonhold community, or on termination of the commonhold community.

j The registration information for registered easements and licences appurtenant to or included in the commonhold community or to which any portion of the commonhold community is or may become subject by virtue of a reservation in the Commonhold Community Statement.

k Any lease the expiration or termination of which may terminate the commonhold community or reduce its size.

l The interest allocated to each unit.

m The exclusive use common area and the unit to which it is allocated.

n Any rights of the original owner to use the property for sale purposes.

q Any easement rights of the original owner.

r Covenants identifying the rights and obligations of the parties or a schedule existing in the regulations which identifies the rights and obligations of the parties which are intended to run with the land and whether those covenants have a time in which they will expire.

s A plan showing:
1 the name and a survey or general schematic map of the entire commonhold community
2 the location and dimensions of all real estate not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real estate
3 a legally sufficient description of any real estate subject to development rights, labelled to identify the rights applicable to each parcel
4 the extent of any encroachments by or upon any portion of the commonhold community
5 to the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the commonhold community
6 the approximate location and dimensions of any vertical and

horizontal unit boundaries and the unit's identifying number

7 a legally sufficient description of any real estate in which the unit owners will only own an estate for years, labelled as 'leasehold real estate'

8 the distance between non-contiguous parcels of real estate comprising the commonhold community

9 the approximate location and dimensions of any porches, decks, balconies, garages, or patios allocated as exclusive use common areas and a narrative description of other exclusive use common areas.

t Unless the Commonhold Community Statement provides otherwise, the horizontal boundaries of part of a unit located outside a building have the same elevation as the horizontal boundaries of the inside part and need not be depicted.

u To the extent that this section requires the same information to exist in the plan and other provisions of this section, the information need not be duplicated.

v The Commonhold Community Statement may also contain any other matters the owners deem appropriate.

As mentioned, this document serves a couple of purposes. In addition to establishing the commonhold community and the description of property interests, it serves as a disclosure document. An owner should be able to read this document and understand his or her ownership interest and the covenants.

The term 'plan' is not intended to mean the actual building plans used for the construction of a project. The plan constitutes a boundary survey of each unit. To the extent the plans contain the above information, it should not be duplicated in narrative form unless the plan cannot be easily understood.

Obviously, this information needs to be reviewed by chartered surveyors and others to determine if the list is too exhaustive, if it does not include enough information, and if it is consistent with English practice. In particular, the surveyors should determine if these requirements are too onerous for the conversion of existing buildings to commonhold. Even in existing buildings, however, it is essential for the owners to know the boundaries of their freehold interest and the boundaries of the property that the association owns.

Although the above information is a lot of information, there may be an advantage in having the section be clear and err on the side of inclusion. On the other hand, a balance needs to be struck between inclusion and excessive verbiage.

The Commonhold Community Statement must identify the rights of the original owner to add or subtract units. There are ways of limiting this right that should be discussed. For example, the statute or regulations could state that the right terminates after a specified period of time or after a certain number of units have been sold.

The problem of timing arises when a developer decides to build a 100-unit community in ten phases. Assume, after he or she sells ten units, the economy declines and there is no market for additional units. The developer will choose to wait until there is a market for the units before continuing with the other 90 units. How long should he or she be

permitted to wait? At what point do the original ten unit owners have a right to know whether they will be part of a ten-unit community or 100-unit community?

In the US, the Commonhold Community Statement generally contains covenants that identify the rights and obligations of the owners. In Queensland, the statement generally includes provisions contained in one of the schedules which are in the statute.[5] The schedules identify the rights and obligations of the owners. The developer, however, can deviate from these schedules to create covenants better suited to a particular community. NSW has a different approach, but it also has schedules containing model covenants.[6]

Even though in New South Wales the covenants are in the regulations, they are repeated in the Commonhold Community Statement and documents. Therefore, the documents prepared in connection with a sale look similar in the US and NSW in that both are extensive.

5 Signatures on the Commonhold Community Statement

Someone has to sign the Commonhold Community Statement. If the commonhold community is created by new construction or by conversion of an existing building that is owned by one entity, a representative of that entity is the person who would sign the Commonhold Community Statement.

Even if all owners have to sign the original Commonhold Community Statement, it is probably not desirable to require all to sign amendments unless land is added or subtracted from the commonhold community. For example, if the owners decide to amend the covenants in a Commonhold Community Statement through appropriate amendment procedures, a designated officer of the commonhold association should be able to sign the amendment to the Commonhold Community Statement.

This approach is particularly important in a large commonhold community. Locating all the owners, especially absentee owners, and getting them all to sign on the same document has posed a significant problem in the US. Getting appropriate signatures posed such a problem in California that the legislature enacted a law that requires only the signature of the president or the person designated in the Commonhold Statement for signing amendments.[7]

In addition to the original owner or owners, others with an interest in the property may be required to sign. For example, the landlord should probably be required to sign if the commonhold community is created on leased land. Mortgagees and those with encumbrances or other charges probably also should sign. The difficulty in obtaining signatures should be weighed against the advantage of having everyone with an interest know what is being created.

In addition to the Commonhold Community Statement, other documents control procedures such as the bylaws of the association and rules created by the association. These are discussed later.

6 Allocation of allocated interests (percentage interest in association, services charges and voting)

The Commonhold Community Statement must allocate to each unit a fraction or percentage of the common expenses of the association and a portion of the votes in the association. It needs to state the formulas used to establish the

allocations of interests and the interests used when units are added or subtracted from the commonhold community.

The Commonhold Community Statement may provide that different allocations of votes can be made to the units on particular matters. For example, if a matter disproportionately affects some units, the Commonhold Community Statement may give those owners a greater percentage of votes on that matter.

The law needs to specifically address the allocation of interests and require the formula to be included in the Commonhold Community Statement. This prevents disputes and eliminates lawsuits. Those who have lived with this law have learned the hard way the importance of having these issues clear.

Class voting may be particularly desirable in a mixed-use commonhold community. There may be certain kinds of issues upon which the residential or commercial unit ownership should have a special voice. To prevent abuse of class voting by the original owner, the law should allow class voting only with respect to specified issues that directly affect the designated class and only insofar as necessary to protect valid interests of the designated class.

A situation in which class voting may be desirable is one in which there are 50 units but only 30 have parking spaces assigned to them. Perhaps those owning the parking spaces should be the only ones permitted to vote on issues relating to the parking spaces.

Also, assume there is a single commonhold community consisting of both a block of flats with common vertical boundaries (no unit above another unit) and high-rise buildings. The owners in the block with vertical boundaries might properly constitute a separate class for purposes of voting on expenditures affecting only their block, but not be permitted to vote by class on rules for the use of facilities used only by the high-rise building.

In some jurisdictions, the developers are permitted to create a separate class for themselves while they sell out their interests. In other jurisdictions, this is not permitted. Where it is not permitted, however, other methods are used to give the developer control during the initial phases of the commonhold, which are called development rights and are discussed elsewhere in this paper. Consumer protections also exist.

7 Exclusive use common area designated in Commonhold Community Statement

The Commonhold Community Statement must specify that the association has the power to assign exclusive use common areas (such as parking spaces) or it must designate a unit or units to which each exclusive use common area is allocated. If an exclusive use common area is allocated in the Commonhold Community Statement to a particular unit, it should not be altered without the owner's consent and without registering an amendment to the Commonhold Community Statement.

Exclusive use common areas are technically 'owned' by the association. The unit owner, however, may have the obligation to maintain the exclusive use common area. The Commonhold Community Statement or law should provide that an owner may not convey their exclusive use common area without conveying the unit.

The statutes and regulations should make clear whether the exclusive use common area, such as parking spaces, can be assigned after the

registration of the Commonhold Community Statement. The law could require all exclusive use areas to be identified in the Commonhold Community Statement, or it could state that subsequent allocation is permissible unless the Statement provides otherwise.

8 Commonhold communities on leasehold property

This section discusses a situation where the entire commonhold property is located on land that is leased. For example, a developer may own a 99-year lease on property. If the law permits the creation of commonhold communities on leased property it should require additional protections for the owners.

The law should require the lessor to sign the Commonhold Community Statement creating the community. The signature ensures that the lessor has consented to the creation of a commonhold community. If, because of the age of some of the leases in England, it is not possible to find the original lessor, some provision needs to be made to let the court or other appropriate body act on behalf of the inaccessible landlord.

It may or may not be necessary to require the lease to be registered. The owners, however, should have access to a copy of the lease.

If the law permits the commonhold community to be created on property held under a long-term lease, the law should require the Commonhold Community Statement to contain the following information. This information appears in 2-106(a) of UCIOA.

a The registration data for the lease or a statement of where the complete lease may be inspected.

b The date on which the lease is scheduled to expire.

c A legally sufficient description of the real estate subject to the lease.

d Any right of the unit owners to acquire the reversion and the manner in which those rights may be exercised, or a statement that they do not have those rights.

e Any right of the unit owners to remove any improvements within a reasonable time after the expiration or termination of the lease, or a statement that they do not have those rights.

f Any rights of the units owners to renew the lease and the conditions of any renewal, or a statement that they do not have those rights.

If the commonhold community is on leased property, then the law should also state that the lessor may not terminate the leasehold interest of a unit owner who makes timely payment of his or her share of the rent or service charges, whichever is appropriate. Unit owners should not share collective obligations to the lessor. Thus, if the association defaults in the payment of the rent owing to a lessor, the lessor should not be able to terminate the continued use of the common areas by those unit owners who pay their pro-rata share.

The law should also provide that acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the interests unless all the interests of the units are acquired. In other words, all owners should be sublessees with the same rights.

Although all owners are sublessees under long-term leases in this commonhold arrangement, their rights are different from those that exist in many present long-term leases. In the case of commonhold sublessees, all have a vote and all are controlled by the same covenants. The landlord has no control in the community.

9 Description of units

The law should provide that a description of a unit which is set forth in a registered Commonhold Community Statement and which identifies the unit by number is a legally sufficient description of the unit and all the rights and obligations appurtenant to the unit. The purpose is to prevent the description of a unit in a deed, lease, mortgage, or any other instrument from being subject to challenge for failure to meet any common law or other requirements.

10 Unit boundaries (default definition)

It is important to know precisely what is and is not included within the definition of a unit for purposes of maintenance. For example, if the association has the obligation to maintain the common area, and the unit owner has to maintain their separate area (freehold), it is important to know whether things like awnings, heating ducts, electrical outlets, floors, windows, etc. are part of the separate area or part of the common area. It is also important to define the exclusive use common area. The law should provide a default provision that applies when these issues are not adequately addressed in the Commonhold Community Statement.

11 Implied easements

The law should imply easements for subjacent and lateral support where appropriate and of course these should be enforceable against subsequent purchasers. Further, to the extent that any unit encroaches on any other unit or common area, the law should create an implied easement for encroachment. These implied easements are important because the actual physical boundaries may differ somewhat from the boundaries shown on the plans.

12 Construction and validity of Commonhold Community Statement and Bylaws

The law should provide that provisions of the Commonhold Community Statement and Bylaws are severable; that when the Commonhold Community Statement and Bylaws are in conflict, the Commonhold Community Statement controls; and that the Rule against Perpetuities does not apply to interests created by the Commonhold Community Statement. These issues have been the subject of litigation in the US. Courts have been asked to determine if the Rule against Perpetuities applies to the right of first refusal to purchase a unit which some associations have. The law also could provide that title is not rendered unmarketable by reason of insubstantial failure of the Commonhold Community Statement to comply with the Commonhold Communities Act.

13 Amendment of Commonhold Community Statement by owners

The right to amend the Commonhold Community Statement raises several policy issues.

a Different voting schemes

The manner in which abstentions are counted affects the likelihood that an amendment will pass. If one requires a vote without dissent, then

an abstention, in effect, is an affirmative vote. In other words, if someone doesn't dissent, the amendment passes. The burden is on those who wish to dissent to act. On the other hand, if an amendment requires a 100 per cent affirmative vote of the owners, then an abstention counts as a negative vote, and the amendment does not pass.

Another possibility is to require an affirmative vote of a quorum. It is much easier to pass an amendment if all that is required is a vote of a quorum, which is generally much lower than 100 per cent of the owners.

In large projects or ones with absentee owners, it is often very difficult to get people to vote. In the US, it is sometimes impossible to amend the Commonhold Community Statement if that Statement requires a super-majority, such as 75 per cent, to amend it. It is important to be able to amend the Statement both because conditions change over time and because the original documents may have been poorly drafted. One option is for the law to provide that an amendment is valid unless 25 per cent vote against it.

Because it is difficult to get some owners to vote, whenever a super-majority vote is required of all the owners, rather than of a quorum, it may be preferable to require a vote without dissent. Perhaps it should depend on the extent to which the outcome of the vote affects the owners' property interest.

Perhaps the percentage required to amend the Commonhold Community Statement should be different depending on the issue. For example, should the percentage required to prohibit a particular use of a unit be greater than the percentage required to change a provision that has less impact on the owners?

Queensland has an interesting voting system.[8] It has three different voting requirements depending on the magnitude of the issue being addressed. If the owners' property rights are being affected significantly, the Commonhold Community Statement or law may require a super-majority. These resolutions may require a vote without dissent. For example, amending the Commonhold Community Statement requires a resolution without dissent to change the name of the scheme, adjust the allocated interests, or adopt an architectural and landscape code.

If property rights are being affected to a lesser degree only, a special resolution may be required. A special resolution is passed if the following are satisfied:

1 The votes counted for the motion are more than the votes counted against.

2 The number of votes counted against is not more than 25 per cent of the votes in the community.

3 The total of the allocated interests is not more than 25 per cent of the total of all allocated interests for all lots in the scheme.[9]

Even lesser changes require an ordinary resolution that passes if the votes counted in favour of the resolution are greater than the votes against the resolution.

b Who should sign the amendment?

It is important not to require all the unit owners to sign the amendment. It is extremely difficult to get all to sign one document, and one holdout can prevent the amendment from being effective.

c Giving mortgagees and other holders of security interests the right to vote on amendments

In the US, mortgagees and other holders of security interests are sometimes given the right to vote on amendments to the governing documents. A major problem arises when their affirmative vote is required because the lenders often don't have a department or person to deal with this issue. The result is that they don't respond at all, which means that the document can't be amended. Lawyers in the US have begun to change the governing documents to provide that, if a lender doesn't vote within a specified period of time, such as 30 days, the lender loses its right to object. This process could be set forth in the law.

14 Amendment of Commonhold Community Statement by court order

When the California legislature held hearings on commonhold communities, it discovered that some communities had poorly drafted documents and were unable to amend their Commonhold Community Statement. This posed a serious problem because these Statements set service charges at such a low rate that the community could not generate enough money to repair the structures. Therefore, the legislature enacted a statute permitting the court to amend the documents under exceptional circumstances.[10]

I am not aware of any other jurisdiction having a similar provision, but it is a good one. It provides a safety valve.

B Alteration of boundaries and units

1 Alteration of boundaries by developer

Because market conditions can change between the time the developer creates the community and the time they market it, it is important to permit the developer flexibility. On the other hand, those who purchase units in the community have a right to some certainty.

The right to add or subtract units or land to a community is sometimes called development rights. In the US, development rights are often closely co-ordinated with financing for the community. A construction loan might provide that, as soon as units or land are added in a phased project, the mortgage becomes a mortgage on the entire project.

Assuming developers are given the right to add or subtract real estate from the community, the law needs to provide a method for automatic reallocation of the interests of the owners. For example, if a community contains ten flats and ten more are added, the original owners now have a one-twentieth interest rather than a one-tenth interest.

The developer might also be given the right to subdivide units. This may be particularly desirable in a commercial commonhold community. For example, the developer of a five-storey office building commonhold community may have people committed to purchase the bottom three floors at the time of the filing of the Commonhold Community Statement but lack purchasers for the upper two floors. In such a circumstance, the original owner could designate the upper two floors as a unit, reserving to themselves the right to subdivide or convert that unit into additional units, common areas, or a combination of units and common areas as needed to suit the requirements of the ultimate purchaser.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the developer could then exercise the development

right to subdivide his or her two-floor unit into two or more units. He or she may also wish to reserve a portion of the divided floor as a corridor that will constitute common area. In that case, he or she would reallocate the allocated interests among the units.

In order to protect purchasers, it is essential that all development rights are fully disclosed in the Commonhold Community Statement and, when real estate is added or subtracted, the developers or owners should be required to amend the Commonhold Community Statement. It is also important to set a limit on the amount of time in which the developer, or their successors, may exercise those rights. The owners have a right to certainty at some point.

2 Relocation of unit boundaries between units by owners

It is desirable to give unit owners the ability to change boundaries and reallocate interests between their units. This right can be subject to the approval of the board of directors to make sure the alteration will not cause any structural or aesthetic problems.

If alteration is permitted, the board should register an amendment to the Commonhold Community Statement reflecting the alteration and the reallocation of the interests of the affected owners. The amendment should be executed by the affected unit owners and contain words sufficient to convey any interests that are being conveyed.

It also may be desirable to permit an owner to alter boundaries by incorporating common area. For example, one owner may have a small portion of common area to which only he or she has practical access. The other owners may decide they would like to sell him or her this common area and make him or her responsible for maintaining it. Altering the rights in the common area, however, should be permitted only if a super-majority of all of the owners agree to the amendment.

The law could provide that the above is permitted only if the Commonhold Community Statement specifically permits alteration of boundaries by fewer than all the owners or it may provide that alteration is permitted pursuant to statute or regulations unless the Commonhold Community Statement specifically prohibits it. If alteration is permitted, the process should not be so cumbersome as to make it impossible to occur.

3 Subdivision of units by owners

It may also be desirable to permit subdivision of units by owners. Whether this is desirable will depend on the project. Any subdivision would have to be consistent with the overall scheme.

In most residential communities, it would not be desirable to permit subdivision because subdivision results in an increase in density and additional use of common facilities. Therefore, if subdivision is permitted, it may be desirable for the law to provide that subdivision is permitted only if the Commonhold Community Statement expressly permits it.

If units are subdivided, it will be necessary to register an amendment to the Commonhold Community Statement. The amendment should include new plans and satisfy all the requirements for identifying the new units.

If subdivision is permitted, thought must also be given to reallocating the interests. Perhaps the percentage interest of a unit that is subdivided would be a fraction of the original interests of that unit. For example, if there are ten units and one owner subdivides unit 10, the interests for units 10 and 11 would each be half

of the previous interest of unit 10 (one-twentieth).

4 Alteration of unit by unit owner

It is important to give an owner the ability to make improvements or alterations in their unit provided the alteration does not affect the structural integrity of the building. For example, an owner should be able to drive a nail into the wall, which could be common area, to hang a picture because that nail does not affect the structural integrity of the building. An owner who owns two units should be able to create a doorway between the two units provided the structural integrity of the building is not affected and an owner should be able to remove a partition between two units. Removing a partition does not create one unit, however. To merge two units into one would require the owner to comply with the provisions relating to altering unit boundaries.

The alterations should not conflict with specific provisions in Commonhold Community Statements. They also should not affect the appearance of the community without the permission of the association.

C Termination

It is important to have a provision that permits termination of the commonhold community with less than 100 per cent approval by the owners in order to address extraordinary circumstances. It is usually impossible to get 100 per cent approval depending on the size of the project and one holdout should not be able to affect the economic interests of the other owners.

In Los Angeles, California, after the 1994 earthquake, some commonhold communities were destroyed to the point where it was not economically reasonable to rebuild them. The cost would have been prohibitive and there was not adequate insurance. Because California does not have a law permitting 80 per cent to terminate the commonhold community, as do some jurisdictions, some of the commonhold communities could not be terminated and sold to the highest bidder.[11] Consequently, the owners had to walk away from their units and default on their loans.

Assuming termination is permitted by fewer than 100 per cent of the owners, safeguards need to exist. First, the percentage required to terminate should be a super-majority, for example 80 per cent. The agreement should be executed in the same manner as a conveyance and be registered. The association also should be terminated.

Provisions should be made for permitting the association to sell the property. The proceeds should be distributed in the same proportion as the allocated interests.

If deemed desirable, the law could provide different rules for termination of commonhold communities with attached units and those with detached homes. It may not be necessary to force owners of detached homes to sell their homes without their consent. Perhaps the Commonhold Community Statement could be terminated and the association could sell the common area, but the owners of viable free-standing houses could keep their homes. In distributing the proceeds of the sale, the association would have to take into account the value of the various interests.

D Merger of commonhold communities

The law should make it possible for two or more commonhold communities to merge into a

single new community. This may be desirable when two adjacent buildings, each of which is a commonhold community, have common area that would more logically be part of one community.

In the alternative, commonhold communities could form a master commonhold community with each community retaining responsibility for some common area but sharing responsibility for joint common area. Again, flexibility is desirable because it is impossible to predict all the situations that will arise in the future in either the residential or commercial setting.

Merger is treated as a termination of the previous commonhold communities and the creation of a new commonhold community. It is therefore necessary to register a termination agreement and a new Commonhold Community Statement for the new commonhold community.

VII Operation (governance and business functions)

This section, which deals with the operation of commonhold communities, can be approached in a variety of ways. In Queensland and New South Wales, statutes expressly state that company law does not apply to commonhold communities. Instead, provisions that would normally be contained in company law are contained in the commonhold statutes and regulations. In the US, the law dealing with commonhold community operations is generally in commonhold statutes, separate company law statutes and sometimes in a variety of other statutes.

On the one hand, the US approach is confusing to owners and lawyers who don't specialise in the field. It is difficult to locate all the relevant statutes. On the other hand, the approach does not necessitate duplicating the company law that is relevant to both commonhold associations and traditional companies. If, however, the US approach is used, it is very important that the provisions of existing company law that apply to commonhold communities be appropriate for commonhold communities. The modified company law must take into account the different characteristics of, and functions performed by, commonhold associations. These were discussed earlier in the paper, but are repeated here.

1 For-profit traditional companies are in business to make a profit; commonhold associations are not. Therefore, some aspects of company law that was created to deal with for-profit companies may not be relevant. With rare exceptions, the not-for-profit company law governs associations in the US.

2 Traditional companies do not levy service charges on their members and the members cannot lose their homes if the service charges are not paid. Therefore, more consumer protection is needed in residential commonhold communities than in traditional companies.

3 Volunteer home-owners generally do not run traditional companies.

4 Voting in traditional companies may not be based on a variety of measurements such as square footage or market value of real property as may be the case in commonhold communities.

5 Traditional companies can be declared insolvent whereas an asset of a commonhold association is the ability to levy service charges to pay debts and, therefore, cannot be declared insolvent.

6 The ownership interest in a traditional company is a personal property interest. In a commonhold association it is an interest in real property that may be subject to a mortgage.

7 Traditional companies do not have the same control over the daily lives of their members as do residential commonhold communities.

It is also important that provisions added to the company law that are applicable only to commonhold associations clearly state that they apply only to commonhold associations.

A Organisation of commonhold association

All jurisdictions require an association to be created. The law should provide that the association must be organised no later than the date the first unit is conveyed. The existence of the association (with its structure) clarifies the relationship between the developer and other unit owners. Creating an association at this early stage also makes it easier for the developer to involve unit owners in the governance of the commonhold community during the initial period when the original owner controls the association.

The law must also require the owners to be members of the association. A voluntary association will not work. Owners will not choose to pay service charges if given the choice.

A decision needs to be made whether to require associations to be incorporated. Incorporation is generally preferable because liability is limited.

B Powers of commonhold association

There may be advantages to listing the powers of the association just to make it clear that the commonhold has specified powers, unless the Commonhold Community Statement provides otherwise. This approach probably will be necessary if England decides to permit commonhold associations to be unincorporated. An alternative is to say that the association has all the powers of a traditional company 'except' certain powers that don't apply to commonhold associations, such as the power to issue shares in the company.

Regardless of the approach used, the developer, initially, and owners, ultimately, should have the ability to restrict the powers of the association in the Commonhold Community Statement. It may not be appropriate for some associations to have the full range of powers. For example, in some communities, it may be desirable to prohibit the association from conveying the common area except on termination of the commonhold community.

In order to protect owners, the law should provide that developers may not insert provisions in the Commonhold Community Statement that give them an unfair advantage in dealing with the owners or association.

Below are some of the powers that should be considered. Some of these may not presently exist in English company law. For example, the association is given the power to levy service charges and register Notices of Violation of

Covenants. Therefore, the list should be carefully compared to existing law.

Section 3-102 of UCIOA lists most of the following powers (some of which have been slightly altered). Unless the Commonhold Community Statement provides otherwise, the association should have the power to do the following.

1 Adopt and amend the governing documents.

2 Adopt budgets, manage the finances of the association and levy service charges for common expenses.

3 Hire and fire employees and independent contractors.

4 Institute, defend, or intervene in alternative dispute resolution proceedings, litigation, or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the commonhold community.

5 Make contracts and incur liabilities.

6 Regulate the use, maintenance, repair, replacement and modification of common areas, and make improvements to the common areas.

7 Acquire, hold, encumber and convey in its own name any right, title, or interest to real estate or personal property.

8 Grant easements, leases, licences, and concessions through or over the common area.

9 Impose and receive any payments, fees, or charges for the use, rental, or operation of the common areas, other than exclusive use common area.

10 Impose charges for late payment of service charges and, after notice and an opportunity to be heard, levy reasonable fines for violations of the Commonhold Community Statement, Bylaws, or rules of the association.

11 Impose reasonable charges for the preparation and registration of amendments to the Commonhold Community Statement, preparation of documents in connection with the transfer of a unit, statements of unpaid service charges, or other documents prepared pursuant to provisions of the law or the Commonhold Community Statement.

12 Provide for the indemnification of its officers and board of directors, and maintain directors' and officers' liability insurance.

13 Assign its right to future income, including the right to receive service charges.

14 Register against a unit owner's property a Notice of Violation of Covenant when an owner violates a provision of the Statement, provided the owner has been given notice of the violation, an opportunity to be heard and a reasonable opportunity to cure the violation if it is possible to cure it.

15 Exercise any other powers conferred by the Commonhold Community Statement or Bylaws.

16 Exercise all other power that may be exercised in England (and Wales) by legal entities of the same type as the association.

In the US, tenants on short-term leases sometimes cause problems because they do not have the same interest in the community that the owners do. (Residential long-term leases are uncommon.) Without a specific statutory grant of authority, the association may have trouble enforcing the covenants against the short-term lessee. Trying to enforce the covenants through an absentee owner is often difficult. Therefore, the law should give the association the following power to deal with short-term lessees.

If a tenant of a unit owner violates the governing documents in addition to exercising any of its powers against the unit owner, the association may:

1 'After giving the tenant and the unit owner notice and an opportunity to be heard, levy reasonable fines against the tenant for the violation, and

2 Enforce any other rights against the tenant for the violation that the unit owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.'[12]

The law could also provide that the terms of the governing documents are incorporated into any lease. It should not, however, permit the association to enforce provisions of the lease that are not directly related to the governing documents and law applying to commonhold communities.

C Powers of master association

The law can use one of two approaches in defining the powers of the master association. It can either provide that the master association has only the powers listed in the Master Commonhold Community Statement, or it can provide that the master association has the same powers of the association unless the Master Commonhold Community Statement restricts its powers. If it is decided that a commonhold community may form a master association with a person, such as a commercial owner, the law needs to expressly state that it may.

Because there may be confusion about the operation of the master association, one should consider whether the same rules regarding notice, voting, quorums, etc., which are discussed later, should apply to the master association. Applying some rules will avoid confusion but may unnecessarily restrict the usefulness of the master association. It may be desirable to permit owners flexibility in determining how the master association will operate.

D Powers and liabilities of board of directors

Except as provided in the legislation, the Commonhold Community Statement, or the Bylaws, the board of directors should have the power to act on behalf of the association. The board members appointed by the developer or original owner should be required to exercise the degree of care and loyalty required of a trustee, and the other directors should be required to exercise ordinary care. The board members that the developer appoints should be

held to a higher standard because there is a potential for conflicts of interest between the developer and the other owners while the developer is in control of the association.

It is sometimes difficult to get owners to volunteer to serve on the board. It is even more difficult if they are subject to individual liability for their actions. Therefore, some jurisdictions give volunteer board members limited immunity. If the board members act in good faith within the scope of their duties, and the association maintains the insurance required by statute (discussed later), the board members may not be sued individually. This same rationale may or may not apply in a commercial setting.

The law should provide for a gradual transfer of power from the developer to the owners. In the initial phases of a project, the developer needs more control so that he or she can maintain property values and sell the units. However, volunteers also need to be on the board in order to learn how to run a board.

UCIOA Section 3-103 provides that, not later than 60 days after the conveyance of 25 per cent of the units, owners (other than the developer) must elect not fewer than 25 per cent of the members of the board. After 50 per cent of the units are sold, the owners can elect up to 49 per cent and, when 75 per cent of the units are sold, the developer loses control of the association.

Some jurisdictions also place a time limitation on the developer's control. For example, if 75 per cent of the units have not been sold within two years, the developer loses control of the association. The timing of transfer and percentage of units sold can vary. The important point is to require a gradual transfer of control. The need for a gradual transfer of control may not exist in a commercial commonhold community.

One should also consider what powers the board should not have. For example, the board should not have the power to terminate the commonhold community.

While the board is under the control of the developer, there should be restrictions on the type of contracts the developer is permitted to enter into on behalf of the association. In the US, some developers, while in control of the association, enter into long-term contracts on behalf of the association that are beneficial to the developer but detrimental to the association. For example, in Florida, developers who were in control of the association executed long-term recreational leases that were advantageous to the developers. The Florida legislature outlawed this practice. When the owners acquire control of the association, they have the power to cancel certain of these contracts.

On the other hand, a statutorily sanctioned right of cancellation should not be applicable to all contracts or leases which a developer may enter into in the course of developing a project. If the association can cancel all contracts, reputable companies may be reluctant to enter into contracts with the association when it appears the developer is about to turn over control. Thus, one should consider giving the owners the power to terminate, within a specified period of time after transfer of control, any contract or lease previously entered into by the developer. The owners also should have the power to terminate immediately any contract which was not entered into in good faith or which was unconscionable to the unit owners.

E Powers of original owner and transfer of original owner's rights

As mentioned previously, developers need flexibility in creating projects in order to respond to changing market conditions. UCIOA specifically gives developers the following rights to:

1 complete improvements indicated on the plans registered with the Commonhold Community Statement

2 maintain sales offices, signs, etc. on the premises for a specified period of time

3 use easements through the common areas for the purpose of making improvements within the common area or within real estate added to the community

4 make the community subject to a master association

5 merge communities

6 appoint or remove any office of the association or master association or any board member during any period of the developer's control

7 add or subtract real estate.[13]

The main protection for potential purchasers is giving the purchasers the ability to know what they are buying before they purchase. Therefore, all of the rights the developer reserves should be clearly set forth in the Commonhold Community Statement.

On occasion, developers transfer their interest. They sometimes do this before construction and sometimes after. There has been confusion (and litigation) regarding the rights and obligations of the original developer and his or her successor after transfer.

While most statutes do not address these issues, UCIOA does. The general scheme of the Act is to impose upon a developer continuing liability for actions and omissions undertaken during the period that he or she is in control of the community and to relieve him or her of liability for actions of their successor. Similarly, the Act absolves a non-affiliated transferee of responsibility for the promises, acts, or omissions of a developer over which the successor had no control.[14]

The Act requires all transfers to be registered in order to be effective. This makes it possible for the owners to know about the transfer. It is also important to register the transfer in order to determine the duration of the period of the developer's control.

F Bylaws

Statutes and regulations often state what must be contained in the bylaws. This section should be compared with existing company law and those provisions that are permitted and required in The Articles and Memorandum.

1 'The number of members of the board of directors and the titles of the officers of the association.

2 Election by the board of directors of a president, treasurer, secretary, and any other officers of the association that are specified in the bylaws.

3 The qualifications, powers, duties, terms of office of board members, the manner of electing and removing board members and officers, and the method for filling vacancies on the board.

4 Which, if any, of its powers the board of directors or officers may delegate to other persons or to a managing agent.

5 Which of its officers may prepare, execute, certify, and record amendments to the Commonhold Community Statement on behalf of the association.

6 A method for amending the bylaws.'[15]

G Officers of board of directors

The New South Wales statute provides that the members of the board must, at the first meeting after they assume office, appoint a president, secretary and treasurer. The provision permits one person to be appointed to more than one office. The officers of the board are the officers of the association.[16]

H Covenants and equitable servitudes

The law must provide that both affirmative and negative covenants in the Commonhold Community Statement are enforceable as equitable servitudes and run with the land. Commonhold will not work if affirmative covenants do not run with the land. If the law provides that only those affirmative covenants appearing in the Commonhold Community Statement run with the land, other law regarding affirmative covenants will not be changed.

The law also should provide that the association or unit owner may enforce the covenants by any lawful means. Some means include registering a lien for failure to pay service charges or fines, imposing a fine and registering a Notice of Violation of a Covenant.

Obviously, an owner's remedy against another owner for violating a covenant may be different from the association's remedy. It would be the association that would file a lien for failure to pay service charges. In the US, liens for unpaid service charges are generally enforced in the same manner as mortgages that are in default. Therefore, it may be unnecessary to duplicate existing lien law. Liens are discussed in more detail later in the paper.

The law should require the association to give the owner notice and an opportunity to be heard before the association may impose a fine for violation of a covenant other than a service charge and before it files a Notice of Violation of a Covenant.

I Meetings

Below are some issues that need to be addressed regarding meetings. If existing law doesn't address them, it needs to be supplemented.

It is important to identify when the first meeting of the company must be held. The first meeting should be held within the first six months after the association is created. The developer needs to think of the association as an independent entity. Thereafter, the law should require at least annual meetings. There also should be provisions for special meetings which the president, a majority of the board, or unit owners having a specified percentage of the votes in the association may call.

There should be provisions requiring the board to give notice of meetings and there should be quorum provisions for association meetings. The quorum provisions should not be onerous because it is often difficult for associations to get members to attend meetings. Therefore, some statutes provide quorums as low as 20 per cent. Others require a slightly higher quorum at the first meeting and, if a

quorum isn't obtained, then a lower quorum at a second meeting.

The association should be required to keep minutes of the meeting. The statute should specify the length of time they must be kept.

J Voting

The following issues should be addressed. First, as mentioned previously, the allocation of votes must be identified in the Commonhold Community Statement.

Second, it is important to state what happens when a unit is owned by more than one owner. One possibility is to state that, if one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all of the votes allocated to that unit. Another possibility is to say that one of several owners may cast all the votes allocated to that unit unless any other owner of the interest objects. If there is an objection, then the unit does not have a vote to cast. It would be too confusing to permit a unit to split up its allocated interests among the several owners.

Some Commonhold Community Statements provide that short-term lessees can vote on specified matters. If this is the case, then the law should provide that only the lessee and not the owner may vote on that specified issue. It is important to avoid having both the owner of the unit and the lessee think they are entitled to cast the vote.

There has been some discussion about restricting the length of leases in residential commonhold communities. The length of the lease may determine whether a developer would want lessees to have a vote on specified matters. I am not aware of any commonhold statements in the US that prohibit long-term leasing, however long-term residential leases are very uncommon in the US.

Another issue that needs to be addressed is proxy voting. It is not desirable to have an owner, or a group of owners, be able to control the association by obtaining 50 per cent of the proxies.

In Queensland, the Standard Module limits the number of proxies one person can hold.[17] If a community contains fewer than 20 lots, a person may hold only one proxy. If it contains more than 20 lots, a person cannot hold proxies from persons greater in number than 5 per cent of the flats. Another possibility is to legislate that the association may not exercise proxy votes.

If the association owns a unit, its right to vote can also be restricted. For example, UCIOA prohibits the association from voting even if it owns a unit.[18]

As mentioned previously, it is often difficult to get owners to vote. Therefore, it is important to distinguish between requiring a percentage of all the owners to vote in favour of a proposition and requiring a percentage of a quorum of those attending a meeting.

It is also important to determine whether the voting scheme counts an abstention as an affirmative or negative vote. In other words, does the vote require a vote without dissent which results in abstentions in essence being considered 'yes' votes, or a traditional vote where those not voting are in essence considered 'no' votes? The higher the percentage required to pass a particular proposition, the more voting without dissent should be considered.

K Tort and contract liability

In order to protect the owners, it is important for the law to provide that any action in tort or contract arising out of acts or omissions of the association must be brought against the association and not against the individual unit owners. By not allowing the unit owners to be named, each is responsible only for the portion of the judgement that represents their allocated share. This eliminates joint and several liability, a situation where one unit owner can be liable for the entire judgement. The law should also provide that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he or she is a member or officer of the association.

In the early stages of a project, the developer is in control of the association. Their actions may produce either tort or contract liability for the association. It is unfair to make the unit owners pay these obligations when they had no control over them. Therefore, the law should provide that a unit owner has a right to recover from the developer any losses suffered by the association or unit owner based on tort or breach of contract while the developer was in control of the association.

L Maintenance obligations

Perhaps the law should specifically state that the association has an obligation to maintain the common area in accordance with the provisions of the Commonhold Community Statement and the Commonhold Communities Act. Maintaining the common area is implied in the fiduciary duty the association owes to the owners, but it might be valuable to make it clear. The extent to which the association has to maintain the exclusive use common area generally will be provided in the Commonhold Community Statement, but a default provision should exist in case the statement does not.

M Finances

In order to have the resources to maintain and govern the commonhold community, it is essential for the association to have the ability to levy service charges and collect them. There are two types of service charges. Periodic or general service charges cover general expenses and fund the reserve. Special service charges are assessed to address a specific problem. For example, if an association has to face an unanticipated emergency or wishes to make capital expenditure, the board may assess a special service charge.

California limits the board's ability to raise general service charges.[19] The board can increase service charges by only 20 per cent over the previous year's budget with certain exceptions. If they wish to raise the service charges by more than 20 per cent they need the approval of a majority of a quorum at a meeting called for this purpose.

This provision is unusual and was the result of compromise. A problem existed because some Commonhold Community Statements dictated the amount of service charges the association could levy. These service charges were not sufficient to adequately maintain the premises. Therefore, the legislature said that these provisions were void and, regardless of the provisions in the Commonhold Community Statement, the board could raise service charges by 20 per cent without a vote of the owners.

Special service charges have a similar requirement. The board may not levy special service charges in excess of a specified amount

without a vote of the owners. The association should be required to prepare an annual budget that provides for both general operating expenses and funding reserves, and service charges should be based on this budget.

In California, associations that have a budget in excess of an amount specified in the statute must have a reserve study done every three years.[20] The reserve study gives the owners an idea of the amount of money they should set aside in a reserve fund to satisfy the long-term maintenance, repair and capital replacement obligations, such as repairing a roof.

Whether the law requires reserves to be funded and at what level is a policy question. In newly constructed projects, it should be possible to require reserves to be funded to the full amount. If there are older buildings in the commonhold community that have not been adequately maintained, requiring full funding of reserves may create an unreasonable hardship for the owners.

1 Obligation to levy service charges

Perhaps the law should expressly provide that the association is obligated to levy service charges sufficient to adequately maintain the common area and any other area it is obligated to maintain. Again, the common law fiduciary duty requires the association to maintain the common area, and the only way it is likely to do that is by levying service charges, but it might be advisable to have a specific provision so stating. This may prevent boards from setting service charges too low to adequately maintain the premises.

Under the existing English law, tenants can challenge the reasonableness of service charges under certain circumstances. In commonhold communities, the owner, not the landlord, determines service charges. Because it is the owners who are determining the amount of service charges, an owner should not have the ability to challenge service charges on the grounds of unreasonableness. In the US and Australia owners rarely charge themselves an unreasonable amount because they are not trying to make a profit.

In commonhold communities, if an owner does not like the service charges the board is setting, the owner can mount a recall election or elect a new board. An owner can challenge service charges only if the board exceeds the scope of its authority or breaches its fiduciary duty in setting the rate. This form of challenge rarely occurs in the US.

2 Levying service charges

In the initial stages of the project, the developer will own the units. Perhaps the law should provide that the developer may pay all common expenses until the association levies the first service charge. The developer may find it advantageous, particularly in the early stages of project development, to pay all of the expenses of the common interest community themselves to avoid billing the costs of each unit separately and crediting payment to each unit.

When the original owner is in control of the development, it is important that the law require them to create an adequate reserve for future expenditures. Sometimes, developers set the service charges artificially low in order to sell units. Once the unit owners gain control of the association, they discover there is not sufficient money for long-term maintenance, repair and replacement of the major building components.

As mentioned, in California the California State Department of Real Estate reviews the developer's initial budget for residential commonhold communities to guarantee the service charges are adequate to cover the anticipated expenses. If the Department determines that the initial budget is not adequate, then the developer may not sell any units. This level of review is not common in the US, but it is effective.

When the first service charge is levied, the law should provide that common expenses must be assessed against all the units in accordance with the allocations set forth in the Commonhold Community Statement. Any past due service charge or instalment should bear interest at a reasonable rate set forth in the law.

The law should permit the Commonhold Community Statement to provide that a service charge associated with maintenance of an exclusive use common area or any common area that clearly benefits one owner more than others can be levied against the owner receiving the benefit.

Provision should be made for reallocation of service charges when the number of units change, for example, after a government forced purchase, expiration of certain leases, exercise of development rights and subdivision of units.

3 Liens for service charges

Service charges are usually assessed annually but due in instalments. A statute can state that a lien is imposed at the moment the annual service charge is levied (which is similar to the way property taxes are treated in the US). It can also provide that the lien is imposed at the time the Commonhold Community Statement is registered.

In some jurisdictions, in order to ensure prompt and efficient enforcement of the association's lien for unpaid service charges, liens for unpaid service charges have statutory priority over most other liens. Priority is given because service charges are used to maintain property values that benefit all holders of security interests in the community. Therefore, some jurisdictions in the US provide that the association's lien has priority for up to six months of delinquent assessments against even previously recorded liens.[21]

Lenders are given greater protection than under existing English leasehold law. If the lender wishes, it can create an escrow for service charges when the loan is made to protect against having to pay six months unpaid service charges. More importantly, however, the lender does not need to be concerned about forfeiture and losing the security interest.

Units may be part of both a commonhold community and master commonhold community. In that case, the master association might assess the units for the general maintenance expenses of the master association and the individual commonhold association would levy service charges for the expenses of the individual association. In such a situation, the law could provide that the unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

In some jurisdictions in the US, in the absence of a contrary law, the association would have to ask the court to sell the property rather than sue the owner in the small claims court for the unpaid service charge. If this is the situation in England, the law should permit the

association to recover the funds or exercise the power of sale. It is important for the association to be able to easily sue for failure to pay a small service charge even if a lien has been registered. This is because a power of sale is a drastic, albeit necessary, remedy.

It may not be necessary to create new lien law to apply to association liens. It is necessary, however, to review existing law to see if there are any aspects that may need to be modified.

4 Other liens

Assume someone is injured on the commonhold property and sues the association. The law should make a judgement lien a direct lien against each individual unit, but allow the individual unit owner to discharge the lien by payment of their pro-rata share of the judgement. The ability to remove the lien by paying a pro-rata share will be valuable to a unit owner who is in the process of selling his or her unit or securing a mortgage on it. Except in those situations in which the association has given a mortgage secured by the common areas, one should not be able to assert a lien against common areas.

5 Additional financial controls on residential commonhold associations

It may be advisable to consider placing additional controls on residential commonhold communities. For example, the law in some jurisdictions requires that the association accounts be kept in the association's name rather than in the managing agent's general accounts. The law can also require an officer of the board to sign cheques in excess of a specified amount or when funds are withdrawn from reserves. This guarantees that the board knows when the property manager is making substantial withdrawals from association accounts.

The law could also require the association to periodically review the association's bank statements and records. Again, this will encourage the early discovery of theft or mishandling of association funds by those with whom the association has contracted such as accountants and property managers.

Various levels of financial reviews also could be required. If the association collects service charges over a specified amount per year, an audit could be required.

N Record keeping

It is important for associations to keep records so that they can disclose information to potential purchasers and creditors. In the US, associations prepare budgets, reports comparing budget to actual expenditures, balance sheets, income and expense statements, statements of delinquent accounts, statements of uncollected sums owing to the association, statements of debts owing by the association, etc. The financial records required depend on the accounting method used. For example, if the accounting method does not show which accounts are delinquent, then a separate report showing these debts must be prepared.

An association should be required to make the records reasonably accessible to any unit owner. It may not be necessary to distribute the records to all the owners, but the association should be required to provide relevant records at the owner's request.

O Disclosures on sales (relation to record keeping)

In the US, sellers are generally required to disclose specific matters to the potential buyer.

States vary in their requirements, but below are some of the disclosures required. The association should be obligated to keep any records necessary to assist the owner in complying with disclosure requirements.

It may not be reasonable to require all of the following disclosures. In deciding which to include, it might help if you imagine that you are purchasing a commonhold unit and think about what information you would like to receive. The following list is a combination of some of the disclosures required in various jurisdictions. Most of it, however, appears in Section 4-109 of UCIOA.

1 A copy of the governing documents.

2 A certificate containing the following information:
   - a a statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit held by the association
   - b a statement setting forth the amount of any periodic service charge or special service charge currently due and payable
   - c a statement of any other fees payable by the owner of the unit being sold
   - d a statement of any capital expenditures approved by the association for the current and succeeding fiscal years
   - e a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects
   - f the most recent regularly prepared balance sheet and income and expense statement of the association
   - g the current operating budget of the association
   - h a statement of any unsatisfied judgements against the association and the status of any pending lawsuits in which the association is a defendant
   - i a statement describing insurance coverage
   - j a statement as to whether the board has given or received written notice that any existing uses, occupancies, alterations, or improvements in or to the unit or the exclusive use common areas violate any provision of the Commonhold Community Statement
   - k a statement as to whether the board has received written notice from a governmental agency of any violation of law affecting the community, such as a violation of a building code, that has not been cured
   - l a statement of the remaining term of any leasehold estate affecting the community and the provisions governing any extension or renewal, and
   - m a statement describing any pending sale of encumbrance of the common area.

The association should have an obligation to provide a certificate containing the information necessary to enable the owner to comply with the disclosures. The law should provide that a unit owner is not liable for any information provided by the association and the owner is

not liable for any service charge in excess of the amount set forth in the certificate.

The association should have an obligation to provide this information within a specified time, such as ten days. It should be permitted to charge a reasonable fee for preparation of the material.

P Insurance

Insurance is crucial for commonhold communities. It is required in both the US and Australia.[22] UCIOA has very detailed insurance provisions discussing the type and amount of insurance required, the rights of owners and those with security interests in the event of destruction, subrogation, as well as many other issues. Only a few are discussed.

UCIOA requires the association to maintain property insurance on the common areas in an amount that is 80 per cent of the actual cash value of the insured property at the time of purchase and at each renewal date. It also requires liability insurance covering all occurrences commonly insured against for death, bodily injury and property damage arising out of use, ownership, or maintenance of the common area. Most associations also maintain Director and Officer Liability Insurance to compensate for injuries caused by the board's mismanagement.

The insurance requirement (80 per cent of the actual cash value) is a minimum requirement. Typically, the documents of many commonhold communities require insurance in an amount equal to 100 per cent of the replacement cost of the insured property.

It may be wise to require insurance only to the extent reasonably feasible in case a particular type of policy is not available at a reasonable price. If insurance is not available, however, it should be. This is the main vehicle for protecting owners against loss.

In Queensland, the insurance provisions in the Standard Module begin by defining certain terms. For example, a 'building' is defined to include 'improvements and fixtures, but not including carpet, forming part of the building or a temporary wall, floor and ceiling coverings, or fixtures removable by a lessee or tenant at the end of a lease or tenancy.' The word 'damage' is also defined.[23]

The important point is not exactly how building or damage is defined, but that these terms are, in fact, defined. It is necessary to know precisely what the association must insure. The Uniform Act also addresses these problems.

The Standard Module requires that the association insure, to full replacement value, the common property and the assets of the association. The policy must cover, to the greatest practicable extent, damage and costs incidental to the reinstatement or replacement of insured buildings, including the cost of taking away debris, and the fees of architects and other professional advisers. The association must provide for the reinstatement of property to its condition when new.[24] As mentioned, this is often the practice in the US. If this insurance cannot be provided, then the association can apply to the Commissioner for permission to deviate from the requirement.

The Standard Module also requires the association to maintain public risk insurance to compensate for death, illness and bodily injury, and damage to property in the amount of at least $10 million for a single event; and at least $10 million in a single period of insurance.[25]

The Module goes on to address the same issues raised in UCIOA regarding termination when the community is essentially destroyed and the manner in which insurance proceeds are distributed.

Thus, although the detail is different between the various statutes, the issues raised are very similar. New South Wales also has insurance requirements and, again, the issues are similar.[26]

VIII Miscellaneous provisions

A Lender disclosures

In a number of instances, for example, when there is a sale of the common area or termination of the commonhold community, a lender's security may be dramatically affected by acts of the association. Therefore, it is common in the US for lenders to require protections in the governing documents.

Lenders may require the Commonhold Community Statement to provide that all or a specified percentage of the lenders who hold security interests, or who have extended credit to the association, approve specified actions of the association before those actions are effective. For example, they may require that amendments affecting the security interest are only effective if specified lenders approve the amendment.

UCIOA provides three limitations on the rights of lenders. Lenders should not be able to control the general administrative affairs of the association or litigation proceedings in which the association is involved. They also should not control the receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding. If a lender's interest is affected by litigation or an alternative dispute proceeding, the lender should not have a right to control the association's actions, but should be able to intervene as a party.[27]

As mentioned previously, where lender approval is required for amendment of the Commonhold Community Statement, procedural problems arise. Often the lender hasn't designated someone to give approval. Therefore, while the law may provide that lenders have the right to approve amendments that affect their security interests, it is best also to have the law provide that failure to reply within a specified period, such as 30 days, constitutes approval.

B Exempting communities from the law

UCIOA permits commercial developers to exempt themselves from the Act, but, if they exempt themselves, they do not receive the advantages under the Act, such as development rights. If they choose to be bound, they are still exempt from certain consumer protection provisions.

The Uniform Act also exempts (with some exceptions) residential communities of no more than 12 units.[28] A smaller number may be desirable for England. For example, in Queensland, the average size of a community is ten units. If the US standard were applied to Queensland, the law would not apply to the average community.

In California, no residential projects are exempt. However, commercial communities are exempt from certain consumer protection provisions.

C Other provisions included in the acts of at least one other jurisdiction

1 Regulation of managing agents

There are a variety of models for regulating managing agents. Generally, the greater the amount of regulation, the greater the expense to the government. Because a portion of costs are generally passed through to the owners, greater regulation is also often more expensive for the owners. On the other hand, more regulation often gives owners greater certainty that their managing agent is knowledgeable. A balance needs to be struck between protection and costs.

One model is licensing. The government can require all managers to be licensed. A licence is obtained if the managing agent passes a test that evaluates the specific knowledge required to manage a commonhold community. If all managers must be regulated and all owners must hire managers, then the costs to a small block of flats will be unreasonably high.

Also, if a managing agent must have a licence to practise, there must be a system for removal of that licence when the agent has engaged in misconduct. Taking away the right to practise one's profession is a serious matter. The process through which the managing agent's behaviour is evaluated is likely to be costly.

Another possibility is credentialing. Under this scheme, the state or some other entity determines the standard that commonhold managing agents must meet. Then any organisation that can demonstrate to the government that its courses and tests meet the standard can give the credential.

For example, in the US, it is possible to obtain a credential if one takes a course covering the unique information needed by a commonhold association manager and passes a standardised test. The Community Associations Institute is one organisation that awards credentials because it has an independently evaluated standardised test and recognised educational courses. In order to maintain the credential, the commonhold managing agent must satisfy continuing education requirements. This system is less costly for the government and owners, and does not require creating another bureaucracy.

Credentialing can be market driven. For example, the government may decide not to require a credential, but permit a managing agent who has met the standard to advertise that they have one.

In the US, a significant portion of the small communities are self-managed. If the community is a bit larger it may have an on-site manager.[29] The larger communities generally hire a professional manager with a credential. Thus, the market place determines whether the association will hire a manager with a credential. These people are usually more skilled but are also more expensive.

In the US, while some of the skills for a residential managing agent and residential commonhold association managing agents are similar, others are not. Both manage physical assets, supervise maintenance activities, and prepare budgets and financial reports. Traditional managing agents often market and lease property and collect rent which commonhold association managing agents generally do not.

Commonhold association managing agents are responsible for managing a company, not merely the association property. In addition to being responsible for the physical assets and

supervising contractors, community association managers also advise volunteer boards in administrative, operational and financial matters. They enforce restrictive covenants and decisions made by the boards. They organise community events and generally promote a sense of community. Therefore, if education is required as a condition of licensing or credentialing, it should be related directly to the skills needed for managing a commonhold association.

The skills needed to manage management companies (resident-owned buildings) should be identified. They may already have been identified by the Royal Institute of Chartered Surveyors and the Association of Residential Managing Agents. The skills needed may be very similar to the skills needed by commonhold association managers. If so, agents managing both types of properties need not be treated differently.

The US has found that no form of licensing or credentialing prevents theft or misdealing. Controls such as those mentioned in the discussion of 'other financial controls' above help prevent misdealing.

2 ***Dispute resolution processes***

If commonhold community law is adopted, it will not mark the end of disputes among neighbours. If the US and Australian experiences are any indication, it will greatly reduce them but not eliminate them.

The type of disputes that arise in a commonhold community setting are slightly different than in a long-term lease setting because service charges are rarely the subject of dispute. Disputes centre on an individual owner's refusal to follow the covenants, for example, by failing to keep the exclusive use area in a presentable condition, having excessively noisy children or pets, or parking in someone else's parking space. These are the human problems that also exist in traditional neighbourhoods.

Both Queensland and New South Wales have a state-run dispute resolution process.[30] They receive high praise from the professionals who are involved in commonhold community associations.

An alternative to a State-run programme is private dispute resolution systems. In the US, because going to court is expensive and takes a long time, private dispute resolution is flourishing. In California, for example, before an owner or association can pursue a lawsuit, the law requires the person or entity to offer the other party a form of alternative dispute resolution.[31] If the offer is rejected, the court looks upon the party rejecting the alternative dispute resolution process unfavourably in arriving at its decision. The law does not, however, mandate a particular form of dispute resolution.

Depending on the magnitude of the problem, dispute resolution takes a variety of forms. If the stakes are high, the parties may have a three-judge panel of arbitrators, follow the rules of evidence and have lawyers present the case. If the parties want a less expensive and less formal way to solve their problem, they may hire a mediator and split the costs. If they can't resolve their problem with a mediator, they may hire an attorney to informally hear their matter and make a decision. Other procedures are evolving in the market place.

The important thing is not to assume one process is best for all disputes. The parties

should be permitted flexibility to choose a process that is appropriate for the magnitude of the dispute. Therefore, while one may wish to require alternative dispute resolution, it is unwise to require the parties to participate in a particular type of alternative dispute resolution.

3 Governmental administration of commonhold communities

There are different models of administration to choose from. The model with the least review is one in which a government agency merely reviews the governing documents to make sure they comply with the statute. The agency does not comment on the viability of the commonhold community. For example, the agency does not attempt to evaluate whether the service charges are sufficient to adequately maintain the building.

A second level of review is done in California. Before a developer is permitted to sell a unit, they must receive approval from the California Department of Real Estate. The Department reviews the governing documents to make sure they do not contain provisions that are unreasonably detrimental to the future owners and to make sure the budget is adequate. 'Reasonable provisions' are included in the Department's Regulations so a developer knows what must be included in the documents in order to receive approval. The Department also reviews the developer's initial budget to make sure the service charges are adequate. This level of review is unusual in the US.

The higher the level of review, the more expensive the process is. However, the higher the level of review, the greater the protection for consumers.

Continuing the dialogue

As mentioned, the goal of this paper is to contribute to the dialogue regarding commonhold law. While these issues may be exhausting, they are not exhaustive. Other issues will arise as the dialogue about commonhold law continues.

Notes

Chapter 1

1 National Conference of Commissioners on Uniform State Laws, 1994.

2 This statute will not be referred to by title in the footnotes. It appears at California Civil Code §§1350–1376. The Civil Code is published by West Publishing Company (St Paul, Minnesota) and Deering publishing company (Bancroft-Whitney Company, San Francisco, California). Both are updated yearly. References to the Act will be by code section.

3 California Corporations Code §§7110–8910 (Deerings, 1994, Supp. 2000).

4 California Subdivided Lands Act, California Business and Professions Code §§11000–11200.

5 10 California Code of Regulations §§2792.15–2792.29.

6 The strata schemes acts will be referred to as NSW SSA and the regulations as NSW SSA Regulations. The Strata Schemes Management Act will be referred to as NSW SSMA and the regulations will be NSW SSMA Regulations. The Community Land Development Act will be referred to as NSW CLD Regulations and the regulations as CLD Regulations. The Community Land Management Act will be referred to as NSW CLMA and the regulations as NSW CLMA Regulations.

7 If the reader is interested in a particular law, one of the following references will be of assistance. Ros Janes, *The Body Corporate Management Act for Everybody* (Queensland law) (Teys McMahon, 1998). This book is easily understood by both lawyers and non-lawyers, and is an excellent reference on Queensland law. The author is a specialist in the Queensland commonhold law. Gary Bugden, *Queensland Community Schemes Law and Practice* (CCH Australia Ltd, 1999) and Gary Bugden, *New South Wales Strata and Community Titles Law* (CCH, 1999) are predominately for lawyers and include case law. *The Uniform Common Interest Ownership Act* (National Conference of Commissioners on Uniform State Laws, 1994) has a significant amount of explanatory material after each section and provides an excellent discussion of the policy reasons for particular provisions. Curtis Sproul and Katharine Rosenberry, *Advising California Condominium and Homeowner Associations* (Continuing Education of the Bar, 2000) provides a discussion of the statutes and case law.

Chapter 2

1 Fewer than 5 per cent of community associations (condominiums, planned communities and co-operatives) are co-operatives. Approximately 30 per cent are condominiums and approximately 65 per cent are planned communities. Clifford Treese, *Community Associations Fact Book* (Community Associations Institute, 1999, p. 19).

2 Francesco Andreone specialises in commonhold law and is a partner in the law firm of Blessington, Judd in Sydney, Australia.

3 UCIOA §§2-105(8), 2-110 and 2-122.

4 UCIOA §2-101.

5 California Civil Code §1352.

6 California Civil Code §1366(b).

7 California Civil Code §1365.7.

8 California Civil Code §1365.9.

9 10 California Code of Regulations §2792.18.

10 UCIOA §2-107(b).

11 NSW SSMA §§123–210, NSW CLMA §§62–87 and Queensland Statute §§182–269.

12 California Civil Code §366(b).

13 NSW SSMA §§81–95, NSW CLMA §§39–44, and Queensland Statute §§147–150 and Queensland Regulations (Standard Module) §§126–137.

14 California Civil Code §1365.5(a).

15 UCIOA §3-113, NSW SSMA §69 and Queensland Regulation (Standard Module) §100.

16 California Civil Code §1365.5(e).

17 California Civil Code §1367(e).

18 California Civil Code §1357.

19 UCIOA §2-118.

20 California Civil Code §1356(e)(3).

21 California Civil Code §1356.

22 California Civil Code §1368.

23 California Civil Code §1368.

24 California Civil Code §§1102–1102.15.

25 California Subdivided Lands Act, California Business and Professions Code §§11000–11200.

Chapter 3

1 In the US, commonhold associations are referred to as 'community associations' and, in Australia, they are referred to as 'community titles'. The California statute is called the Common Interest Development Act, the Uniform Act is called the Uniform Common Interest Ownership Act, Queensland Statute is called Body Corporate Community Management Act, the New South Wales statute which regulates planned communities is called the Community Land Development Act.

2 Queensland Statute §5.

3 California Civil Code §1350(l).

4 California Civil Code §1352.

5 Queensland Statute §§130–143 and Schedule 2.

6 NSW SSMA, Schedule 1.

7 California Civil Code Section 1355(a).

8 Queensland Statute §§97–101(1).

9 Queensland Statute §98(1).

10 California Civil Code §1356.

11 UCIOA §2-118 is a termination provision and the comments following the section provide a good explanation of the provision.

12 UCIOA §3-102(d).

13 UCIOA §1-103(14) and Comment 15 and UCIOA §2-115.

14 UCIOA §3-104 and Comment 2.

15 UCIOA §3-106.

16 NSW SSMA §18.

17 Queensland Regulations (Standard Module) §72(4).

18 UCIOA §3-110(d).

19 California Civil Code §1366(b).

20 California Civil Code §1365.5(e).

21 UCIOA §3-116.

22 UCIOA §3-113, Queensland Statute §§147–150, Queensland Regulations (Standard Module) §§126–137, NSW SSMA §§81–95 and NSW CLMA §§39–44.

23 Queensland Regulations (Standard Module) §126.

24 Queensland Regulations (Standard Module) §§127, 128 and 129.

25 Queensland Regulations (Standard Module) §136.

26 NSW SSMA §§81–95, NSW CLMA §§39–44.

27 UCIOA §2-119.

28 UCIOA §§1-203 and 1-205.

29 Twenty-seven per cent of the associations in the US use volunteer management, 26 per cent use onsite staff, 42 per cent use a management company and 5 per cent use a combination of the above. Clifford Treese, *Community Association Factbook* (Community Associations Institute, 1999, p. 12).

30 Queensland Statute §§182–269, NSW SSMA §§123–224 and NSW CLMA §§62–87.

31 California Civil Code §1354.