



## REPORT

# **Cancellation provisions under the *Unit Titles Act* and *Unit Title Schemes Act***

September 2013

This paper has been prepared for internal government discussion purposes only and any views expressed are not to be taken to represent the views of the Northern Territory Government, the Northern Territory Attorney-General and Minister for Justice or the Department of the Attorney-General and Justice.

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Legal Policy  
Department of the Attorney-General and Justice  
68 The Esplanade, Darwin NT 0800  
GPO Box 1722, DARWIN NT 0801  
Telephone: (08) 8935 7659 Facsimile: (08) 89357662  
<http://www.nt.gov.au/justice>

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## 1 INTRODUCTION

### *1.1 Background to the release of the Discussion Paper*

Issues have existed as to whether the *Unit Titles Act* and *Unit Title Schemes Act* (the Unit Titles Acts) should be amended so as to allow for a range of new options for the termination of unit plans and schemes taking into account economic opportunities and health and safety issues as well as the wishes of all of the individual owners.

For the purpose of developing proposals regarding these issues, a Discussion Paper, entitled "*Cancellation of Units Plans and Schemes under the Unit Titles Act and the Unit Title Schemes Act*", was released in November 2012. It sought comments from various stakeholders and the general public on issues identified in relation to the cancellation of unit plans and schemes under the Acts. It also sought to elicit the ways in which those issues could be resolved by providing several options for comment.

The Discussion Paper was published in November 2012 via the Department of the Attorney-General and Justice website. Additionally letters were sent to stakeholders and interested bodies informing them of the release of the Issues paper.

### *1.2 Stakeholder consultations following release of the Issues Paper*

Submissions were received from the following stakeholders:

- Carinya Redevelopment Committee (Committee established by the Body Corporate of Carinya Units located at 79 Mitchell Street, Darwin)
- Graham Jackson (unit owner)
- "Jon and Tess" (member of the public)
- PAn: the Planning Action Network, Inc (PAn)
- Real Estate Institute of the Northern Territory (REINT)
- A confidential submission from a member of the public
- Strata Community Australia NT (SCA)
- Suzanne Paech (unit owner)
- Urban Development Institute of Australia NT (UDIA)

## 2 SUMMARY OF PROPOSALS ARISING FROM THE CONSULTATION PROCESS

Following public consultation on the issues and options spelt out Parts 3 and 4 of this report, the proposal is that the *Unit Titles Act* and the *Unit Title Schemes Act* be amended as follows:

### 2.1 Schemes with 10 or more units

1. A right for the specified majority (see paragraph 2) of the ownership to decide that a cancellation should occur.
2. That the right exist for all schemes regardless of whether they came into force before or after the enactment of the new terminations legislation.
3. The percentage that would make up the 'specified majority' would vary depending on the age of the building. Thus, for example, the percentage will be 95% for 15-20 year old buildings, 90% for 20-30 year old buildings, 80% for buildings older than 30 years. If the age of a building cannot be determined, the deemed age will be the date on which an occupation approval was issued under the applicable building legislation or, if that information is not available, the date on which the current plan or scheme was registered by the Registrar-General.
4. A right for any person in the minority to challenge the decision in the Administrative Decisions and Appeals Tribunal<sup>1</sup>(with a right of appeal to the Supreme Court).
5. The proponents would need to provide for the matters suggested by the Property Council of Australia namely:
  - (a) **notice** – termination of a scheme is initiated by either a current owner or a third party engaged by owners. The notice is issued to all owners and other interested parties (e.g. mortgagees)
  - (b) **renewal plan** – a detailed "renewal plan" is then produced by the proponents. This will set out the preferred development outcomes, proposed works and applications, architectural plans, obligations and liabilities of the parties, costings and work programs
  - (c) **relocation** – owners and tenants will be fully informed of any rehousing arrangements required during the life of the works, as well as relocation arrangements either back into the development or elsewhere following the completion of the development
  - (d) **certification** – a minimum of three months consultation will apply before the Renewal Plan is advanced. It would also be submitted to an independent statutory officer (see paragraph ) to confirm that it contained all relevant content required for owners
  - (e) **voting** – after three months of consultation, owners accept or reject the proposed Renewal Plan. If no more than 25% of owners disagree, the scheme will move towards termination

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<sup>1</sup> On 27 August 2013 the Northern Territory Attorney-General and Minister Justice made a Ministerial Statement (see Hansard of that day) announcing an in principle decision in favour of establishing an Administrative Appeals Tribunal to deal with various administrative decisions and reviews.

- (f) **participation** – once the Renewal Plan is approved, owners then have the opportunity to participate in redevelopment of the scheme or a third party can do so. The scheme remains in force until all of the Renewal Plan conditions are met
- (g) **fair reward** – if an owner does not participate in the redevelopment, an independent valuation is secured to preserve the entitlement of individual owners. Sales will be at the expense of existing owners. Disputes are settled by the owners appointing one appraiser, the owners corporation appointing another and those two appraisers agreeing on a third.
- (h) **dispute resolution** – if obligations under the Renewal Plan are not being met, an application is made to an independent statutory officer regarding the procedural issues and to the Supreme Court on matters of law.
- (i) **termination** – the scheme’s termination sees either existing owners interests retained within a new scheme or transferred by agreement to new owners.
6. Additionally:
- (a) the proponents of the cancellation would also be required to provide details of what happens to the financial reserves of the body corporate with the default position being that, in the absence of unanimous agreement to the contrary, the reserves (and any other assets) are shared between the owners at the time of cancellation in a way that is proportional to their unit entitlements; and
- (b) the proponents of the cancellation should be obliged to disclose any arrangements in place or proposed between themselves and any third party developers of the property.
7. For the purpose of ensuring compliance with the requirements set out in paragraph (2)(d) (above) section 100 of the Unit Title Schemes Act would be amended so that the Schemes Supervisor has the role, under both Acts, of providing the required certification on the payment of a prescribed fee with the fee to be the responsibility of the proponents of the cancellation (ie not the body corporate).
8. If a proposal is challenged in the Administrative Decisions and Appeals Tribunal or in the Supreme Court the legislation set out criteria for considering any such application. The criterion would include:
- (a) any economic necessity for the re-development (e.g. if the costs of repairs are such that reasonable owners would not incur them) (this would be identified as the main criterion);
- (b) any land use benefits for the community as a whole in the redevelopment of the land;
- (c) the financial benefits and risks of the proposed redevelopment (along with the provisions of the proposed redevelopment seek to ensure that varying interests of owners are taken into account);
- (d) the adverse consequences to the minority if an application is approved;
- (e) the adverse consequences to the majority if an application is not approved; and
- (f) the extent to which some other order of the Court may ameliorate the situation.

## **2.2 Schemes comprising less than 10 units**

9. For small schemes, under 10 units, where there is deadlock between the some of the owners and an owner wanting to cancel the scheme the current law should remain except for the specification of criteria to be taken into account by the Tribunal when making a decision. The proponent owners should be able to make an application for cancellation to the Administrative Tribunal despite not having the required 100% support if the owner can make out that there is an economic necessity for the re-development (e.g. if the costs of repairs are such that reasonable owners would not incur them and/or the owners cannot or are unwilling to pay for the costs of repairs and maintenance).

## **3 DISCUSSION PAPER**

### **3.1 Issues raised in the Discussion Paper**

The following questions were put to the stakeholders in the Discussion Paper:

1. Are there significant problems or potential problems in the NT now or can we wait to see the outcomes of reforms likely to put into effect in places such as NSW?
2. If reform is required, should it be along the lines of:
  - (a) a scheme that requires positive court approval (see options 3 and 4 as detailed in Part 4 of this report); or
  - (b) a scheme where a court only becomes involved at the instigation of unit owners who oppose termination (options 1 and 2 as detailed in Part 3 of this report); or
  - (c) a scheme based around renewal plans (options 5 and 6 as detailed in Part 4 of this report).
3. If any of the options are adopted what should be the threshold level of support for the termination?
4. Are there any constitutional problems in the retrospective changes of the rules regarding terminations?

### **3.2 Summary of responses**

Below is an outline of the responses received from stakeholders in answer to the questions above.

1. Are there significant problems or potential problems in the NT now or can we wait to see the outcomes of reforms likely to put into effect in places such as NSW?

NSW is currently undergoing a two year review of strata schemes operating under the *Strata Schemes Management Act 1996*, *Strata Schemes (Leasehold Development) Act 1986* and the *Strata Schemes (Freehold Development) Act 1972*. The Review is being conducted by the Australian Research Council and it is anticipated that the current unanimity requirements for cancellation of schemes may be replaced with a majority percentage requirement.

Potential legislative reform in NSW is similar to potential reform options that are currently being considered in the NT. Consequently stakeholders were asked to consider whether there was merit in waiting for NSW or other states to amend legislation so that the outcomes of these reforms may be taken into account when considering reform of the NT Acts. The NT would otherwise be one of the first jurisdictions to implement a scheme whereby a unanimous decision to cancel a unit plan or scheme is not required.

UDIA acknowledged the potential benefits of waiting to see what reforms will be adopted in NSW but was concerned that doing so will mean that potential delays to legislative reform in NSW will delay reform progress in the NT. UDIA notes that there have been recent NT examples of proposed redevelopments of unit complexes failing to proceed due to one or two unit owners refusing to agree to the proposal. They do not want current and future redevelopment opportunities to be missed and believes timely implementation of reforms should be a paramount consideration.

The Carinya Redevelopment Committee does not support the proposal to wait for legislative reform to occur in NSW. They, like UDIA, do not want to see further delay to reforms in the NT. They are currently attempting to reach an agreement with unit owners at Carinya Units (located in the inner city area of Darwin) in regard to potential redevelopment opportunities. Further delays to legislative reform may result in delays to the redevelopment of this building complex. Additionally they considered that NSW has little or no relevance to the economic parameters of the NT.

PLan was of the view that given that NSW, Vic, WA, Qld, SA and the ACT all still required unanimous agreement of unit title holders for cancellation of a unit plan or scheme it would be too early for NT to legislate on a different basis. PLan considered that for some options, particularly options 5 and 6, which outlined the potential to implement renewal plans, required more detail. Waiting for this type of reform to be implemented in other jurisdictions would allow the NT to consider its merits more adequately.

Generally the stakeholders who supported legislative reform expressed the opinion that reform in the immediate future was ideal as there have been recent incidences where cancellation of unit plans and schemes have been attempted but failed due to the inability to obtain a unanimous vote.

However it is noted that waiting for other jurisdictions to implement reforms would be beneficial in allowing the NT to make provisions that are more effective in the first instance by learning from changes in NSW and possibly other jurisdictions.

2. If reform is required, should it be along the lines of:
  - (a) a scheme that requires positive court approval (options 3 and 4); or
  - (b) a scheme where a court only becomes involved at the instigation of unit owners who oppose termination (options 1 and 2); or
  - (c) a scheme based around renewal plans (options 5 and 6).

SCA, UDIA, RIENT and the Carinya Redevelopment Committee generally supported option 2 (with some reservations). This is a scheme where a court only becomes involved at the instigation of unit owners who oppose termination of a unit plan or scheme.

There was no express support for other options put forward to stakeholders in the Discussion Paper. Mr Jackson (unit owner) supported legislative change but did not have a preference as to which option should be implemented. PLan and unit owners, Ms Paech and 'Jon and Tess' were of the view that no legislative amendments were required and the member of the public who provided a confidential submission did not provide a view on this issue.

See Part 4 of this report for further discussion of stakeholder views on the options presented in the Discussion Paper.

3. If any of the options are adopted what should be the threshold level of support for the termination?

SCA, UDIA, RIENT and Carinya Redevelopment Committee all generally supported the percentage majorities suggested in option 2, which varied depending on the age of the building. They were:

- 95% for 1-5 year old schemes;
- 90% for 6-10 year old schemes;
- 80% for 11-20 year old schemes; and
- 70% for schemes older than 20 years.

Stakeholders who supported option 2 were generally supportive of the suggested percentages and did not comment further on any variations. Further discussion on the submission of stakeholders is discussed in Part 4 of this report.

PLan expressed concern that the age of buildings should not be used as a determinant for percentage majorities required for cancellation of a unit title or scheme. PLan noted that it is based on the incorrect assumption that the age of the scheme is a reflection of the current condition of the building.

PLan and unit owners, 'Jon and Tess' and Ms Paech, did not support any legislative change. The implication of this is that the threshold should remain at 100%.

Other stakeholders did not comment on the suggested threshold level for support for cancellation of a unit title or scheme.

4. Are there any constitutional problems in the retrospective changes of the rules regarding terminations?

The Discussion Paper identified the potential constitutional problems that arise when legislation is reformed to operate retrospectively. However the paper outlined that the Northern Territory Government is liable to pay compensation if legislation operates so as to acquire property otherwise than on just terms (section 50 of the *Northern Territory (Self-Government) Act 1978*). It is not considered that any of the options discussed in the paper would involve any liability for compensation if they were designed to operate in respect of schemes that came into existence prior to any new provisions dealing with termination. That is, the statutory provisions concerning termination are not property rights and do not operate so as to provide anyone with a property right of any kind.

Therefore, as pointed out in the Discussion Paper, any issues concerning the operation of legislation that might be considered 'retrospective' are not constitutional matters.

No stakeholders submitted any concerns with this issue with the member for the public who made a confidential submission stating that she felt this matter was for the consideration of lawyers within the Department.

### **3.3 General support for change to the legislation**

Mr Graham Jackson (unit owner) made a submission in support of legislative amendments that would allow non-unanimous agreement for the cancellation of a unit plan or scheme. He did not express any specific opinion as to which option would be most suitable and stated that they

all had some merit. Mr Jackson made a number of recommendations to ensure protection of all interested parties (i.e. both the minority and majority) should the legislation be amended:

- Disclosure of private agreements with developers. This relates to agreements made with developers by anyone associated with the unit plan or scheme including individual owners, committees and managers. All parties must have full knowledge of private agreements before a vote to cancel a unit plan or scheme is made. The requirement of disclosure should be a legally enforceable statutory declaration or other document for which criminal sanctions could apply.
- All owners should be provided with a detailed proposal (written document) of any planned developments or sales well in advance of a vote for cancellation of a unit plan or scheme.
- All owners should have the opportunity to present their views on the proposal to everyone.
- The government should make available an independent moderator to facilitate communication between owners at meetings.
- A non-binding vote of unit holders should be held and it should be done in writing and appropriately supervised.

Carinya Redevelopment Committee was established by the Body Corporate of Carinya Units at 79 Mitchell Street, Darwin. The submission of the committee discussed the current and historical attempts for the redevelopment of Carinya Units. It is an example of a unit plan that has been unable to reach agreement to terminate due to a minority of unit owners who do not support redevelopment proposals. The first attempt to redevelop units was made approximately 10 years ago. Initially 100% of owners agreed with the proposal. The proposal was that the existing units would be demolished which would be substituted with a major commercial, residential and hotel complex with a replacement unit for unit owners (double the size of the existing units) at no cost to the owners. At the last minute three unit owners (of a total of 72 unit owners) withdrew their support of the proposal. The redevelopment plans did not go ahead as the unanimous threshold was not met.

As of January 2013 Carinya Redevelopment Committee was making attempts to seek unit owner support for redevelopment. Potential developers have approached the Committee and presentations have been conducted at special meetings to inform unit owners of development opportunities. Financiers of the potential redevelopment will not commit to the project without a guarantee that it will be supported by 100% of unit owners as required by legislation.

The Carinya Units were built in 1954 and there are many age related issues including overloaded electrical reticulation, plumbing deterioration, the cracking of terracotta sewerage pipes, rusting on parts of the roof and general failure of the original structure. The building requires a substantial amount of money to maintain and as a result chasing body corporate fees from unit owners becomes challenging but is a necessity to make the units liveable.

### **3.4 Submissions against change to the legislation**

PLan was against changes to the legislation allowing a non-unanimous agreement for the cancellation of a unit plan or scheme. PLan is concerned that there are many unit owners under unit plans or schemes that are unaware of the proposal to amend the legislation and will be directly affected by such amendments. PLan suggests that one method of ensuring wider communication with unit owners is to hold public meetings and consultations.

PLan believes that changes to the legislation are too premature as other larger jurisdictions have yet to implement any of the suggested options. There is no precedent in Australia as to the effect that the changes would have on stakeholders.

PLan submitted that minority unit owners should not become isolated and have to live in stress because others want to sell. They should not be put in a position of being the party to take a matter to court for resolution. That is the responsibility of the corporate body if it wishes to renew. The influences of third parties should be limited in such matters. PLan is also concerned that NT does not have an Administrative Appeals Tribunal and what would be meant by an 'independent statutory officer' to resolve disputes.

Submissions by unit owners and also by PLan refer to the idea that home ownership is a right and making these legislative changes would take away the fundamental right to security in home ownership. It also undermines encouragement of unit living in the NT as a solution to a competitive housing market and an increasing population.

Submissions from unit owners (Ms Paech and 'Jon and Tess') did not support any legislative amendments to the current Acts. Ms Paech is the owner of a townhouse that is part of a unit complex that is older but well built and still structurally sound. Her concern is that owners of complexes such as hers will be vulnerable to forced sales and redevelopment under new legislation that does not require unanimous decision making. Ms Paech believes that owners should have the right to live where they want, remain in a place where they are happy and pass on assets to their families. She is concerned that owners that must sell when they have not supported the cancellation of the unit title or scheme and will be forced to enter a competitive and expensive housing or renting market or may even become homeless.

Furthermore Ms Paech raised concerns that the requirement to sell your home due to the cancellation of a unit plan or scheme may mean pressure to sell quickly which in turn will result in below market sales.

All submissions against the legislative change refer to the right to home ownership as a primary concern. Owning a home is not a fundamental right protected by the constitution or by common law. However, individuals have the perception that being forced to sell or redevelop your home is akin to a breach of a fundamental right as generally understood to exist in the community.

## **4 DISCUSSION OF THE OPTIONS**

### ***4.1 Introduction***

A number of options were put forward in the Discussion Paper for consideration by stakeholders. There was some confusion in the Discussion Paper as to whether the options referred only to schemes under the *Unit Title Schemes Act* and not unit plans under the *Unit Titles Act*. In giving their views, all stakeholders who noted this issue correctly assumed that the intention was that the options included schemes and unit plans under both Acts and submissions were made on the basis of this assumption. Generally the view was expressed that whatever option was implemented should be done uniformly across both Acts.

### ***4.2 Option 1 (cancellation based on majority support but with right to court review)***

*This would involve the following features:*

- 1. A right for the specified majority of the ownership to decide that a cancellation should occur.*
- 2. That the right exist for all schemes regardless of whether they came into force before or after the enactment of the new terminations legislation.*

3. *A right for any person in the minority to challenge the decision in court.*
4. *The legislation set out criteria for considering any such application. The criterion would include:*
  - a. *any economic necessity for the re-development (e.g. if the costs of repairs are such that reasonable owners would not incur them);*
  - b. *any land use benefits for the community as a whole in the redevelopment of the land;*
  - c. *the financial benefits and risks of the proposed redevelopment (along with the provisions of the proposed redevelopment seek to ensure that varying interests of owners are taken into account);*
  - d. *the adverse consequences to the minority if an application is approved;*
  - e. *the adverse consequences to the majority if an application is not approved; and*
  - f. *the extent to which some other order of the Court may ameliorate the situation.*

There was no express support from stakeholders for option 1 although there was support for option 2 as a variation of option 1 (see below).

#### ***4.3 Option 2 (same as option 1 excepting required support would vary with age of building)***

*Same as option 1 excepting that the percentage that would make up the 'specified majority' would vary depending on the age of the scheme for the building. Thus, for example, the percentage might be 95% for 1-5 year old schemes, 90% for 6-10 year old schemes, 80% for 11-20 year old schemes and 70% for schemes older than 20 years.*

This option was stated in the Discussion Paper as being more efficient than options 3 and 4, in the sense that courts will only become involved if there is an actual dispute. Options 1 and 2 also place the onus on the minority owners to seek a judicial decision, rather than the majority.

SCA, REINT and UDIA agreed that the specified majority should vary depending on the age of the building but they expressed concern regarding the meaning of a building's age. They noted that the registration of a building with the Land Titles Office may not be the same as the age of the building. Many buildings built before Cyclone Tracey, for example, were not registered under the Unit Titles Acts until years after they were built. SCA, REINT and UDIA were of the view that this should be expressly provided for in amendments to the legislation.

SCA suggested an amendment to the wording of option 2, which would resolve issues that arise in relation to both the age of buildings and the inclusion of unit plans (and not just schemes) in the proposed reform. The following phrase was suggested:

*"A right for the specified majority of the ownership would vary depending on the age of the scheme or unit plan for the building, noting that with unit plans, the registration date of the unit plan with the Land Titles Office does not necessarily reflect the age of the building. The percentages application for the termination would be based on 95% of the majority for a 1-5 year old scheme or unit plan; 90% for 6-10 year old scheme or unit plan; 80% for a 11-20 year old scheme or unit plan and 70% for schemes or unit plans older than 20 years"*

This re-phrasing was supported by REINT. SCA also had concerns with the practical operation of option 2 in relation to duplexes. While they were unable to offer an effective solution to issues that would arise from the implementation of option 2 to duplexes, they expressed the need for this to be considered and a solution to be found. SCA sought further clarification on how this issue may be resolved in amendments to the legislation.

REINT raised this same issue, stating that options 2 (and option 4) have the ability to be more easily applied to larger developments as compared to smaller developments.

Carinya Redevelopment Committee strongly supported option 2 as it allows for flexibility when dealing with schemes and unit plans of different ages whilst also protecting the rights of individual owners to make an application to the court should they disagree with the majority owners.

PLan submitted that the age of a building is an inaccurate way to establish majority percentages for the cancellation of unit plans and schemes as it will not necessarily reflect the condition of the building. Using the ages of buildings to establish majority percentages will create uncertainty among unit title owners. PLan also submits that buildings that are less than 20 years old should not need to be redeveloped unless there are specific safety concerns arising from construction of the building.

#### **4.4 Option 3 (court approval based around support of a specified majority)**

*This would be the same as option 1 excepting that the body corporate, operating on the instructions of a specified majority would need to make an application to the court.*

There was no express support from stakeholders for option 3.

#### **4.5 Option 4 (same as option 3 excepting that the majority required varies with age of the building)**

*Same as option 3 excepting that the percentage that would make up the 'specified majority' would vary depending on the age of the scheme for the building. Thus, for example, the percentage might be 95% for 1-5 year old schemes, 90% for 6-10 year old schemes, 80% for 11-20 year old schemes and 70% for schemes older than 20 years.*

There was no express support from stakeholders for option 4. The Stakeholders' identification of a need to specify the meaning of the age of a building in option 2 also applies to option 4. Further PLan's submission on option 2 above regarding the potential uncertainty associated with using the age of a building to establish what percentage of owners are required for an agreement also applies to option 4.

#### **4.6 Option 5 (Property Council of Australia's renewal plans process)**

*The Property Council of Australia, in its submission to the NSW "Strata & Community Title Law Reform Discussion Paper", suggested the following option:*

- **notice** – termination of a scheme is initiated by either a current owner or a third party engaged by owners. The notice is issued to all owners and other interested parties (e.g. mortgagees)
- **renewal plan** – a detailed "renewal plan" is then produced by the proponents. This will set out the preferred development outcomes, proposed works and applications, architectural plans, obligations and liabilities of the parties, costings and work programs

- **relocation** – owners and tenants will be fully informed of any rehousing arrangements required during the life of the works, as well as relocation arrangements either back into the development or elsewhere following the completion of the development
- **certification** – a minimum of three months consultation will apply before the Renewal Plan is advanced. It would also be submitted to an independent statutory officer to confirm that it contained all relevant content required for owners
- **voting** – after three months of consultation, owners accept or reject the proposed Renewal Plan. If no more than 25% of owners disagree, the scheme will move towards termination
- **participation** – once the Renewal Plan is approved, owners then have the opportunity to participate in redevelopment of the scheme or a third party can do so. The scheme remains in force until all of the Renewal Plan conditions are met
- **fair reward** – if an owner does not participate in the redevelopment, an independent valuation is secured to preserve the entitlement of individual owners. Sales will be at the expense of existing owners. Disputes are settled by the owners appointing one appraiser, the owners corporation appointing another and those two appraisers agreeing on a third
- **dispute resolution** – if obligations under the Renewal Plan are not being met, an application is made to an independent statutory officer regarding the procedural issues and to the Supreme Court on matters of law.
- **termination** – the scheme's termination sees either existing owners interests retained within a new scheme or transferred by agreement to new owners.

PLan did not support options 5 and 6 as it considered that there was not enough information on how Renewal Plans would look and how they would be implemented. PLan suggested that waiting for other jurisdictions to implement similar mechanisms would be the most effective way to determine whether this reform type would be beneficial in the NT. Until this has happened it would not be ideal to implement such a proposal.

#### **4.7 Option 6 (same as option 5 excepting the required percentage report would vary with age of the building)**

*Same as option 5 excepting that the percentage (25%) mentioned as determining whether a scheme is blocked could vary depending on the age of the scheme.*

There was no support from stakeholders for option 6. See also discussion of option 5 above.

#### **4.8 Disbursement of Funds following the cancellation of a unit plan or scheme**

REINT raised an issue relating to management of funds after the termination of a unit title or scheme. Upon termination, the body corporate will cease to exist and consequently REINT raises concern about how the holding of or disbursement of funds (both body corporate trust funds and any funds coming from a developer) would be managed. REINT sought to raise the issue as something that should be considered when implementing legislative amendments in relation to provisions of unit plan and unit title schemes.

#### **4.9 Provisions on the transfer of interests upon cancellation of a unit plan or scheme**

UDIS submitted that amendments need to make clear provision to enable the effective transfer of the interests of all unit owners upon cancellation of the plan or scheme. Particularly in the circumstances where there will potentially be a minority that will not have voted in favour of the

cancellation and well not be able to be compelled to execute an instrument of transfer in respect of their resulting interest as a tenant in common.

UDIA noted that the Acts do not provide sufficient guidance on the way a unit title should be terminated. For example the *Unit Title Schemes Act* and Management Module 1 in the Regulations are not clear on this point and the only guidance comes from regulation 70:

**“70 Plan of termination**

(1) A **plan of termination** is a document about the termination of the scheme that includes the following:

(a) full details of the proposed termination, including:

(i) the proposed date of the termination; and

(ii) whether it is proposed to sell the scheme land following the termination or form a new scheme under the existing ownership;

(b) the market value, determined by a valuer as defined in section 4(1) of the *Valuation of Land Act*, of:

(i) the scheme land; and

(ii) each unit;

(c) a statement setting out the effect of the proposed termination, including details of the distribution of any proceeds of sale in accordance with section 17(1)(b) of the Act;

(d) if it is proposed to form a new scheme with the scheme land under the existing ownership – the arrangements to compensate or temporarily relocate each unit owner affected by the proposal;

(e) if it is not proposed to form a new scheme with the scheme land under the existing ownership – the amount to be paid to each unit owner to compensate the owner for the following:

(i) the difference between the value of the owner's share of the scheme land and the value of the owner's unit;

(ii) the costs of relocation, including, for example, costs associated with purchasing a new property and the cost of temporary accommodation;

(f) the security to be provided to unit owners for the payment of an amount specified for paragraph (d) or (e);

(g) an undertaking, given by a person required under the plan of termination to pay an amount to a unit owner, that the person will pay the amount in accordance with the plan.”

UDIA suggested the inclusion of provisions to the Regulations to enable the contract of sale and an instrument of transfer to be executed by someone on behalf of all unit owners of the scheme or unit plan upon its termination.

#### **4.10 The Singaporean Model**

The member of the public who made a confidential submission provided views on the current operation of the Singaporean scheme, which was discussed in the Discussion Paper. Many of the en-bloc sales in Singapore are driven by property developers who approach residents with a sale agreement. Disputes among owners who want to sell and those who do not, cause stress and worry for all unit owners. She raises concerns that unit owners become pressured from constant applications for the cancellation of schemes and suggests that to resolve this issue a provision should be provided to limit the number of times owners can apply for the cancellation of a unit title or scheme.

#### **4.11 Other Issues Raised**

*Other provisions of the Acts that need to be reviewed*

Some comments on this paper also raised other issues concerning the Unit Titles Acts. These comments will be incorporated into the more general review of the legislation (see Discussion Paper entitled *Enforcement of Articles and By-laws under the Unit Titles Act and the Unit Title Schemes Act and Other Issues*, released in February 2013).

*Speculation and the use of emotive language in the Discussion Paper*

The member of the public who made a confidential submission also noted that the Discussion Paper contained what she described as emotive language and speculation. She suggested that, for example, there was no evidence to support the following assertions:

- there is a “perception that courts will tend not to intervene”;
- “courts are seen as protectors of the castle”; and
- “persons seeking cancellation are not willing (sic) to take the risk of the judicial process”.

She was also concerned with statements in paper relating to the intention of the minority unit owners who refuse to agree to the cancellation of a scheme or unit where they are described as possibly “blackmailing the other owners” or may have an “aggressive capitalist outlook” for wanting to get the highest return. She stated that this was not necessarily accurate.

All these observations and criticisms are, no doubt, valid to the extent that the comments in the Discussion Paper may have over generalised the issues.

## **5 WAY FORWARD**

### **5.1 Discussion**

There is little doubt that there is a need to reform the Unit Titles legislation so that the processes for cancelling titles are clearer.

The main options for doing this range from:

- modifying the current court based process by specifying criteria that the court must have regard to when dealing with an application. Development of such criteria would need to be such as to give a clear direction, rather than comprise an all-encompassing list of possible criteria. In essence a decision would need to be made determining whether the main criterion related to the safety/physical health of the building or the economic interests of the various owners.

- providing for decisions to be made by a majority vote with a review mechanism from a Tribunal or Court that occurs either (a) for the purposes of permitting the application to proceed (so that the proponents seek approval) or (b) for the purposes of blocking a proposal (so that the opponents need to take action).

Fairly obviously, there is no right or wrong answer to the policy issues. For any particular case there may be issues where there are genuine differences of view regarding lifestyle and economic interests. In other situations it may well be the case that some owners are behaving badly in either trying to force an outcome (for re-development) on others or in withholding agreement regardless of the factual situation. In respect of developers it is possible to argue that if they buy up units with the view to re-development they do so knowing the risk that not everyone may agree. In that case, why should remaining owners be forced to sell or take the risks of re-development simply because others have made that decision.

Also of relevance is that often re-development is in the overall community interest in the sense that re-development based on the economics of land use will probably lead to better use of land.

### **5.2 General Principles for reform**

Taking all of these issues into account the following general principles are proposed:

1. A majority of owners should be able to agree to re-development subject to the right of the minority to test the proposal in a tribunal or court with the tribunal or court being required to make a decision in accordance with criteria to be set out in the legislation with the main criterion being that of whether there is an economic necessity to develop the building for the purpose of the health, safety or general amenity of the building.
2. The majority support required should vary depending on the age of the building and the number of units. For old buildings the majority should be less than that required for more modern buildings. For small complexes (under 10 units) there is no need for a majority (ie the current law will remain) but the only criterion would relate to the health, safety or general amenity of the building.

In more detail the proposal is as follows:

### **5.3 Schemes with 10 or more units**

1. A right for the specified majority (see paragraph 2) of the ownership to decide that a cancellation should occur.

*Reason: Ownership is shared. Subject to including safeguards to prevent unfair or oppressive conduct, key decisions affecting the owners as a whole should be able to be made by the majority.*

2. That the right exist for all schemes regardless of whether they came into force before or after the enactment of the new terminations legislation.

*Reason: It would be preferable to be comfortable about the fact that owners are aware of cancellation options when they bought their unit. In a broad sense they should be aware given that court-based cancellations options have always been available. Unless the reforms are applied to all units, regardless of when they were created, there is little chance of resolving current issues.*

3. The percentage that would make up the 'specified majority' would vary depending on the age of the building. *Thus, for example, the percentage will be 95% for 15-20 year old buildings, 90% for 20-30 year old buildings, 80% for buildings older than 30 years.* If the age of a building cannot be determined, the deemed age will be the date on which an occupation approval was issued under the applicable building legislation or, if that information is not available, the date on which the current plan or scheme was registered by the Registrar-General.

*Reason: It seems too inflexible to fix a particular percentage to be applied to all circumstances. It also seems reasonable to expect that persons buying or owning old units can expect that issues regarding re-development and cancellation will be something that will need to be addressed. In considering this matter it also seems reasonable to determine the relevant "age" by reference to the age of the building rather than the age of the units plan (in terms of the time since it was registered under the land titles legislation by the Registrar-General).*

*Fairly obviously determining the actual percentages is a matter of judgment rather than policy science. This would be an issue that will need to be kept under consideration as any new terminations legislation is developed. For this reform relatively conservative periods of time have been determined as being appropriate. These selected time periods are not expected to cause any practical problems in terms of the present day issues in the NT.*

4. A right for any person in the minority to challenge the decision in the Administrative Decisions and Appeals Tribunal <sup>2</sup>(with a right of appeal to the Supreme Court).

*Reason: In these matters there is clearly a possibility that minority owners interests might suffer quite badly. It is critical that the minority owners have the right to a review. It is also important that any review processes ought to be able to occur quickly. The NT Government is in the process of establishing a new Administrative Tribunal that will have both review and merit based decision functions. It appears appropriate that the Tribunal have the function of dealing with these applications subject to a right of review on legal issues to the Supreme Court.*

5. The proponents would need to provide for the matters suggested by the Property Council of Australia namely:
  - a) **notice** – termination of a scheme is initiated by either a current owner or a third party engaged by owners. The notice is issued to all owners and other interested parties (e.g. mortgagees);
  - b) **renewal plan** – a detailed "renewal plan" is then produced by the proponents. This will set out the preferred development outcomes, proposed works and applications, architectural plans, obligations and liabilities of the parties, costings and work programs.
  - c) **relocation** – owners and tenants will be fully informed of any rehousing arrangements required during the life of the works, as well as relocation arrangements either back into the development or elsewhere following the completion of the development.

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<sup>2</sup> On 27 August 2013 the Northern Territory Attorney-General and Minister Justice made a Ministerial Statement (see Hansard of that day) announcing an in principle decision in favour of establishing an Administrative Appeals Tribunal to deal with various administrative decisions and reviews.

- d) **certification** – a minimum of three months consultation will apply before the Renewal Plan is advanced. It would also be submitted to an independent statutory officer (see paragraph ) to confirm that it contained all relevant content required for owners.
- e) **voting** – after three months of consultation, owners accept or reject the proposed Renewal Plan. If no more than 25% of owners disagree, the scheme will move towards termination.
- f) **participation** – once the Renewal Plan is approved, owners then have the opportunity to participate in redevelopment of the scheme or a third party can do so. The scheme remains in force until all of the Renewal Plan conditions are met.
- g) **fair reward** – if an owner does not participate in the redevelopment, an independent valuation is secured to preserve the entitlement of individual owners. Sales will be at the expense of existing owners. Disputes are settled by the owners appointing one appraiser, the owners corporation appointing another and those two appraisers agreeing on a third.
- h) **dispute resolution** – if obligations under the Renewal Plan are not being met, an application is made to an independent statutory officer regarding the procedural issues and to the Supreme Court on matters of law.
- i) **termination** – the scheme’s termination sees either existing owners interests retained within a new scheme or transferred by agreement to new owners.

*Reason: It seems reasonable to ensure that there are appropriately detailed plans for any proposals and its implementation, that there is appropriate disclosure, appropriate notice and independent checking of compliance.*

6. Additionally:

- a) the proponents of the cancellation would also be required to provide details of what happens to the financial reserves of the body corporate with the default position being that, in the absence of unanimous agreement to the contrary, the reserves (and any other assets) are shared between the owners at the time of cancellation in a way that is proportional to their unit entitlements; and
- b) the proponents of the cancellation should be obliged to disclose any arrangements in place or proposed between themselves and any third party developers of the property.

*Reason: Bodies corporate accumulate reserves for the purposes of the building, not to fund re-development. It is critical to ensure that each owner retains control of their share of the reserves. It also seems critical that there be full disclosure of all commercial arrangements between owners and the developer.*

7. For the purpose of ensuring compliance with the requirements set out in paragraph (2)(d) (above) section 100 of the Unit Title Schemes Act would be amended so that the Schemes Supervisor has the role, under both Acts, of providing the required certification on the payment of a prescribed fee with the fee to be the responsibility of the proponents of the cancellation (ie not the body corporate).

*Reason: Under the Unit Title Schemes Act there is a schemes supervisor. There is no such role under the Unit Titles Act. The schemes supervisor's role is currently limited to dealing with issues relating to providing views to the Court when a Court is considering terminations, security deposits and the contents of management modules (see sections 14, 67 and 94 of the Unit Title Schemes Act). Given the significance of cancellation, it is important that there be independent certification that the processes required under the Act have been followed.*

8. If a proposal is challenged in the Administrative Decisions and Appeals Tribunal or in the Supreme Court the legislation set out criteria for considering any such application. The criterion would include:
- a) any economic necessity for the re-development (e.g. if the costs of repairs are such that reasonable owners would not incur them) (this would be identified as the main criterion);
  - b) any land use benefits for the community as a whole in the redevelopment of the land;
  - c) the financial benefits and risks of the proposed redevelopment (along with the provisions of the proposed redevelopment seek to ensure that varying interests of owners are taken into account);
  - d) the adverse consequences to the minority if an application is approved;
  - e) the adverse consequences to the majority if an application is not approved; and
  - f) the extent to which some other order of the Court may ameliorate the situation.

*Reason: It seems important that criteria be established to guide decision making by the Tribunal or the Court. It would be useful, in the course of development of the legislation for policy decisions to be made about what are the main criteria.*

#### **5.4 Schemes comprising less than 10 units**

10. For small schemes, under 10 units, where there is deadlock between the some of the owners and an owner wanting to cancel the scheme the current law should remain except for the specification of criteria to be taken into account by the Tribunal when making a decision. The proponent owners should be able to make an application for cancellation to the Administrative Tribunal despite not having the required 100% support if the owner can make out that there is an economic necessity for the re-development (e.g. if the costs of repairs are such that reasonable owners would not incur them and/or the owners cannot or are unwilling to pay for the costs of repairs and maintenance).

*Reason: For small schemes voting based on percentages for "majority support" does not work. Nonetheless, there will be situations where there is a practical requirement for the cancellation of the units plan or scheme. It seems appropriate to retain the current law (so that section 14 of the Unit Title Schemes Act and 95 of the Unit Titles Act continue to apply but modified so that the initial decision maker is the Tribunal). However, there is a need to set the criteria that will guide the Tribunal (and the Supreme Court when reviewing a decision of the Tribunal). The suggested main criteria for small schemes cancellations is that of there being an economic necessity based around the physical condition of the buildings and the readiness of owners to contribute funds to deal with the physical issues.*

