graham paddock & associates

Sectional Titles Ombudsman Investigation

Consultation Paper
to Inform the Design
of a Sectional Titles
Dispute Resolution System

AppropriateDispute Resolution for Sectional Titles Consumers

Reference: DLA 14/02C(2004/05)

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1. Introduction

1.1 General

This paper sets out for consultation various issues and comment is called for to inform the drafting of a submission to the Minister of Land Affairs.

We anticipate recommending that there should be an independent and specialist dispute resolution system established for sectional titles disputes. In this document, the proposed system will be referred to as the 'Ombudsman Service'.

1.2 Request for Responses

In order to develop the best approach to implementing a sectional title dispute resolution system, the views of stakeholders are sought in relation to the issues set out hereunder.

These issues and the specific questions in this paper are not necessarily comprehensive and you are welcome to comment on any other issue that you feel is relevant.

1.3 How to Respond

Please send your responses by **15 February 2005** to:

> ***Graham Paddock & Associates***
> P O Box 36171
> GLOSDERRY, 7702
> or
> E-mail: **graham@grahampaddock.com**

Responses should be in Microsoft Word® format.Respondents are requested to give their full names and titles as well as details of the body they represent. Representatives of non-governmental organisations are requested to indicate how many persons they represent and to indicate whether they have consulted with their constituents in the course of considering their responses to this consultation document.

The responses to this consultation document may be published.

2. Background

2.1 The Client

Our client is the Republic of South Africa, Department: Land Affairs ('the Department' and 'DLA') in the context of the Graham Paddock & Associates Tender DLA 14/02C(2004/05) in response to the Terms of Reference issued by the Department headed:

> **'INVITATION TO SUBMIT A PROPOSAL TO ACT AS LEAD CONSULTANT TO THE DEPARTMENT OF LAND AFFAIRS FOR THE PURPOSE OF INVESTIGATING THE ESTABLISHMENT OF THE OFFICE OF A SECTIONAL TITLES OMBUDSMAN OR OTHER DISPUTE RESOLUTION PROCEDURES AND FOR THE DRAFTING OF RELEVANT LEGISLATION AS WELL AS THE DRAFTING OF LEGISLATION TO REMOVE CONSUMER RELATED ASPECTS FROM THE SECTIONAL TITLES ACT, 1986 (ACT NO. 95 OF 1986)'.**

2.2 The Problem

The concept of sectional titles ownership is a multi-faceted tenure type which provides for:

- exclusive ownership of sections,
- shared ownership of common property;
- various other forms of personal and real rights, and
- compulsory membership of a community governance structure.

The concept was introduced in South Africa under the *Sectional Titles Act, 1971* (Act 66 of 1971) which was replaced by the *Sectional Titles Act*, 1986 (Act 95 of 1986, 'the Act'). The DLA is responsible for the administration of the Act.

The provisions of the Act are ideal for a high-density urban environment because schemes provide individual legal title in multi-unit buildings whilst maximising land use. But the Act covers three diverse aspects, being registration, survey and consumer aspects.

The shared ownership of common property, the operation of a body corporate for the governance of each scheme, obligatory meetings and the financial interdependence of owners have, amongst other issues, led to many disputes. Essentially the concept contains an uneasy compromise between a *'my home is my castle'* attitude of sectional owners and

the attitude of management bodies that they know best what is good for the community as a whole.

The nature of the DLA's mandate does not suit it or its staff to dealing with consumer related problems. Against the background of a plethora of complaints in regard to non-compliance with the Act and the prescribed management and conduct rules, the DLA finds itself unable to administer the consumer aspects of the Act. More specifically, it cannot address the problems currently being encountered by owners and other stakeholders in sectional title schemes. It did initiate the prescription of a model rule catering for the resolution of disputes by way of arbitration proceedings, but this rule has not provided an effective solution.

In summary:

The Minister of Land Affairs is responsible for the administration of the Sectional Titles Act, 1986. But the DLA exists primarily to deal with registration and survey issues; it does not have the capacity and expertise to deal with the complaints it receives from sectional owners, bodies corporate and professional managers arising from the administration and management of sectional titles schemes.

The dispute resolution mechanisms currently available to sectional titles consumers are ineffective in practice. Access to the courts to resolve sectional titles disputes is too expensive and time-consuming. The arbitration provision inserted in the management rules prescribed under the Act has not provided a viable alternative. There is a recognised need for the creation of a structure to address consumer issues arising from sectional ownership and the provisions of the Act.

In view of its inability to solve consumer related problems, the DLA has decided that it is imperative that legislation be promulgated providing for the establishment of the office of a sectional titles ombudsman.

2.3 The Mandate

The Terms of Reference issued by the DLA for this project stated under the heading 'Purpose':

> *The purpose of this tender is .....investigating the establishment of the office of a sectional titles ombudsman or other dispute resolution procedures and for the drafting of relevant legislation as well as the drafting of legislation to remove consumer related aspects from the Sectional Titles Act, 1986 ....*

Simply stated, our mandate is to:

- Investigate, consult on and recommend an appropriate dispute resolution system;
- Draft and assist the DLA in the passing of appropriate dispute resolution legislation and the promulgation of appropriate regulations; and
- Draft legislation to remove consumer related aspects from the Act.

The reform of sectional titles legislation generally and particularly the simplification of the provisions in the Act which regulate the management and control of sectional title schemes will be a considerable assistance to those who live in this form of housing. But this is not the focus of our project.

2.4 The Consultants

Lead Consultants:

- Professor Cornie van der Merwe BA. LLB, BA (Hons.) & BCL(Oxon), LLD
- Joseph Maluleke BA. LLB
- Graham Paddock BA. LLB (also Project Manager)

Sub-Consultants:

- Professor Henk Delport BA, LLB (cum laude) LLD
- Tertius Maree BA. LLB, LLM
- Gustav Radloff BA. LLB
- David Mitchell B.Com. LL.B., B.Compt. (Hons.), C.A.(S.A.), M.C.T.S.A., C.F.A.
- Frank Theron B Com (Hons.) (IS), Nat. Dip. Top. Survey, Dip. Datametrics

2.5 The Stakeholders

a) DLA Chief Directorate : Deeds Registration;
b) South African Local Government Association (SALGA)
c) National Treasury
d) Law Society of South Africa
e) Banking Council of South Africa
f) Financial Institutions
g) Estate agents
h) Department of Trade and Industry

i) Department of Communications
j) Department of Housing
k) Director-General Cluster (Social cluster of the Directors-General forum)
l) Department of Justice
m) Department of Social Development
n) Sectional Titles Regulations Board
o) Sectional Titles owners and Body Corporates
p) Interest Group for Retirement Villages;
q) South African Property Owners Association;
r) Association of Bodies Corporate; and
s) General Public

3. Comparable jurisdictions

Part of our brief is to carry out extensive international research into dispute resolution systems in comparable jurisdictions. A paper entitled *'Division and Selection'* by Prof. Cornie van der Merwe is attached as Appendix 'A' setting out the basis upon which he selected the jurisdictions to be compared and referred to for the purposes of our project.

These include:

a) Singapore
b) Sri Lanka
c) New South Wales (Australia),
d) British Columbia (Canada),
e) California, Nevada, Florida (United States of America),
f) England and Wales.

Of these Singapore and New South Wales have for some time had governmental regulatory bodies established to address 'strata titles' consumer issues.

California is in the process of establishing a 'Common Interest Development Bureau'.

Nevada and Florida have Ombudsman services (the latter only very recently introduced).

In England and Wales the existing Housing Ombudsman Service which has historically dealt with alternative dispute resolution in the context of social housing tenancy has had its mandate extended to deal with consumer issues arising from the Commonhold legislation that came into force with the promulgation of the necessary regulations in late 2004.

Thus our preliminary international research results show that a number of comparable jurisdictions currently provide education, information and dispute resolution services to 'strata titles', 'condominium', 'commonhold' and 'common interest' housing consumers.

Experience in those jurisdictions demonstrates the feasibility of such programs and shows that there is significant public demand for them.

4. Existing options for resolving sectional titles disputes

For those stakeholders who are not fully familiar with the existing options in regard to sectional titles dispute resolution, we attach as Appendix 'B' the text of a booklet entitled *'Options for Resolving Sectional Title Disputes'* published by Graham Paddock in 2002 which covers negotiation, mediation, litigation and arbitration in terms of prescribed management rule 71.

Negotiation and mediation processes are entirely voluntary and are not initiated, tracked or quality-controlled by any regulatory body. The terms of management rule 71 and the *Arbitration Act* No. 42 of 1965 are the only provisions that govern the conduct of the regulated arbitral process.

Professor David Butler, in a 1998 paper entitled entitled *'The Resolution of Disputes Pertaining to Sectional Title Developments under Management Rule 71'* states:

> *'It is also clear that rule 71 in its present form contains a number of problems and ambiguities which could have a severely negative effect on the successful use of arbitration for the resolution of those disputes pertaining to sectional titles which are covered by the rule..."*

The cost of sectional title arbitration varies tremendously. Anecdotal evidence and the experience of the consultants indicates that legal and arbitral costs in respect of a sectional title arbitration where the parties are represented by lawyers are seldom less than R30 000 and when arbitrations are dealt with in the manner of High Court litigation the additional arbitral costs make the process substantially more expensive than litigation.

There is no evidence as to whether sectional title owners, as a consumer group, see the prescribed arbitration process as effective, either in terms of results or costs. There is substantial anecdotal evidence that many sectional titles consumer disputes are not resolved at all and that owners feel at a financial disadvantage when they have an issue with the trustees who control the scheme’s funds.

In his paper *'Sectional-Title Courts as an Alternative to Arbitration for the Settlement of Disputes in a Sectional-Title Scheme',* Prof. Cornie van der Merwe concluded with the following comments:

> *'From the foregoing discussion it is clear that the normal arbitration rules and proceedings must undergo a considerable transformation to suit the basic requirements for settling sectional-title disputes. In addition, the relatively high remuneration that has to be paid for the services of a skilled arbitrator (even in cost-effective, expedited arbitration proceedings) does not make arbitration very attractive to the general public.*
>
> *Before matters get out of hand, a permanent structure for sectional-titles courts must be put in place. ....What I am suggesting is a kind of ombudsman for South Africa for sectional-title disputes regulated and conducted on the same lines as Strata Title Boards in Singapore and Australia. The costs of implementing such a mechanism cannot be too excessive a price to pay for the harmony gained in sectional-title schemes by the successful and authoritative settlement of disputes.'*

5. Consultation Part A - Oversight and coverage

5.1 Responsibility for government oversight

A primary issue is which government Department(s) should administer the Ombudsman Service.

The government Departments which will or might have an interest in the operation of the Ombudsman Service, in our opinion, include Justice, Housing, Trade and Industry and Land Affairs and we will be raising the issue of possible oversight of and ongoing assistance to the Ombudsman Service with each of these Departments.

If, as we expect may be the case, the Ombudsman Service does not fit neatly into the jurisdiction of only one Department, would it be practical for the administration of the Ombudsman Service to include a Board with representatives of a number of interested Departments?

We would value Departmental input on the question of which Departments are best suited to administer the Ombudsman Service law and whether other departments should play a role in its operations.

5.2 Similar tenure types

Our brief is to investigate dispute resolution only in the context of sectional title schemes. But a significant number of other high density housing schemes are similar to sectional titles in that they include shared use of real property, community government and financing. Examples are:

- share block schemes operated under their Memorandum and Articles;
- group and cluster schemes controlled by the rules of a homeowners association;
- retirement developments operated under life-rights and other forms of tenure; and
- Communal Property Associations established with constitutions.

All of these types of schemes have to resolve the same types of disputes as arise in sectional titles schemes.

Should the Ombudsman Service have the power to investigate disputes in other types of schemes which have to resolve disputes similar to those encountered in sectional titles schemes?

Should the law allow for Ministerial expansion of the scope of the disputes handled by the Ombudsman Service?

5.3 Mixed tenure types

The flexibility of the South African real property law allows for tenures to be 'mixed' or 'layered'.
Thus there are many sectional title schemes established within group housing schemes. In this context the owners are subject to two layers of regulation, being the scheme's management and conduct rules and the rules of the homeowners association.

Should the Ombudsman Service be entitled to investigate the governance of other types of schemes when these are related to the governance of a sectional titles scheme?

5.4 Parties to disputes

We suggest that the parties who should be served by and subject to the jurisdiction of the Ombudsman Service should include:

a) Owners of units, either individually or groups, who need consumer protection of their status as homeowners;

b) Non-owner occupants of sections, who are part of the sectional title community created for each scheme;

c) Trustees, who are responsible for the management of schemes, either individually or in groups;

d) Managing Agents, who are the professional managers employed by trustees to assist them in managing a scheme;

e) Developers of sectional titles schemes, insofar as concerns the enforcement of their obligations to sectional titles bodies corporate (as opposed to individual purchasers);

f) Holders of real rights in schemes, such as future development rights;

g) Levy Financiers, being those in the business of lending funds to sectional titles bodies corporate, only insofar as concerns their loan agreements with sectional titles bodies corporate and their interactions with sectional title levy debtors;

h) Administrators appointed by the High Court in terms of section 46 of the Act to administer a scheme in financial and/or administrative difficulties; and

i) Curators Ad Litem appointed by the High Court in terms of section 41 of the Act to investigate and, perhaps, institute claims on behalf of a scheme.

Do you agree that all these parties or groups should be subject to the jurisdiction of the Ombudsman Service for supervision and dispute resolution purposes? If not, please specify which you think should not be subject to the jurisdiction of the Ombudsman Service and give at least brief reasons.

How should the Ombudsman Service apply, if at all, to Financial Institutions and Local Authorities?

Should parties to disputes be entitled to be represented by legal practitioners or other representatives in adjudicative dispute resolution processes?

5.5 Defining the 'sectional title consumer'

Our project is designed to address the difficulties which sectional titles consumers have in resolving disputes.

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Should the primary focus be on consumers who own residential sectional title units?

Should the Ombudsman Service also be available to consumers who own commercial, industrial, retail, resort, timeshare and other types of sectional title units?

Should the Ombudsman Service also be available to developers of schemes and the holders of real rights in schemes?

In terms of the Act people who do not own sectional titles units but who occupy units are also subject to the provisions of the Act and the rules of the scheme.

Do you support the view that tenants and other long-term occupiers of units are also consumers in the sectional titles context and should be able to approach the Ombudsman Service with complaints arising from their disputes with owners, the

trustees, the managing agent and other parties who are authorised to control their behaviour?

Do you think that purchasers of sectional titles units should be dealt with as consumers entitled to use the Ombudsman Service in respect of issues they have with the developer or other persons who sell rights in a scheme? Or should the rights of purchasers of units be protected by special disclosure and other provisions in the Act?

Should sectional titles bodies corporate be entitled to approach the Ombudsman Service in respect of issues they have with local authorities and/or with developers?

6. Consultation Part B - Functions of the Ombudsman Service

6.1 Primary function - hearing complaints and providing alternative dispute resolution services

The primary function of a South African sectional titles Ombudsman Service should be to hear complaints regarding the running of sectional title schemes and to provide alternative dispute resolution services to reduce the high cost of court litigation.

Do you agree with this statement of the primary function of the Ombudsman Service? If not, please provide brief comments.

6.2 Nature of disputes

We expect that the Ombudsman Service will have to deal with a wide range of disputes, most falling into the following categories:

a) Financial management:
including Participation Quotas; Budgeting; Annual & Special Levies; Provision for Future Maintenance (Reserve Funds), Scheme Cash-flow / Levy Collection, Insurance(s) and Investments

b) Physical building management:
including Exclusive Use Areas; Owner Changes to Common Property; Enclosures; Extension of Sections; Dealings with Common Property; Improvements to Common Property; Adding Sections to Schemes / Phased Developments; Adding Land to Schemes and Repairs and Maintenance of Common Property

c) Control and administration of common property
including Anti-social Behaviour, Abuse of Rights and Nuisance

d) Meetings
including Trustee Meetings; Owner Meetings; Ordinary, Special and Unanimous Resolutions

e) Scheme Rules

including Management Rules; Conduct Rules; House Rules; Creating & Amending Rules, and Enforcing Rules

f) Administrative management

including Record Keeping; Certificates; and Scheme Contracts

We expect that disputes will be in regard to both facts and law and deal with technical and inter-personal issues.

The non-payment of levies in circumstances where there is no genuine dispute in regard to the liability is considered one of the primary consumer issues.

Do you consider the mere non payment of a levy to be a 'dispute' which should fall within the jurisdiction of the Ombudsman Service?

Within the existing civil court system administered by the Department of Justice, do you think levy recoveries can be handled sufficiently expeditiously and cost-effectively to address the reasonable expectations of sectional title consumers. If not, do you have any suggestions as to how the existing systems may be adjusted to deal more effectively with levy collections?

Do you think that existing legislation should be amended to provide for the recovery of levies in the Small Claims Courts?

Do you think that there are likely to be other categories of disputes or that any of those listed above are inappropriate for resolution by the Ombudsman Service?

Do you agree that some disputes may require either total or partial confidentiality?

6.3 Monitoring services

Apart from dealing with disputes whenever consumers bring them to the attention of the Ombudsman Service, there are various monitoring services which, we suggest, could very substantially reduce the number of disputes in sectional title schemes.

6.3.1 Quality control of buildings and amenities submitted to the sectional title regime

Since 1997 local authorities no longer approve new sectional title schemes except for building plans. The local authority's town planning expertise is no longer applied.

According to statistics about 60% of existing sectional title schemes in South Africa are conversions from rental buildings to sectional title tenure. Although occupiers of rental units are furnished with a report by an engineer detailing defects in the structural components and mechanical systems (amongst others water, electrical and sewerage systems), there are no quality controls of the buildings and amenities in a sectional title scheme.

Mens sana in corpore sano (a healthy spirit in a healthy body) transposed to sectional title schemes - *'a happy sectional title community in a scheme with sound structural components and mechanical systems'*.

Do you think that the Act should be amended to give the Ombudsman Service some kind of quality control over the physical condition of buildings that are submitted to the sectional title regime?

If so, do you think that this should apply only when rental buildings are converted to sectional title or do you think that the approval of new sectional title schemes should also be subject to quality control?

6.3.2 Quality control of rules submitted by developer on registration of sectional plan

In terms of the Act the developer has to submit a schedule of rules on application for the registration of a sectional plan and the opening of a sectional title register. In practice the developer is usually advised by conveyancers to submit the prescribed management and conduct rules contained in Annexures 8 and 9 to the Regulations under the Act.

The rules are lodged with the Deeds Registry without any examination as to their suitability for the particular scheme. However, the developer is entitled to change certain management rules and all the conduct rules to suit the particular scheme.

Do you think that the rules submitted with the application for registration should be monitored by the Ombudsman service and amended to suit the character of the particular scheme?

If so, should developers be charged for this service?

Should this service be extended to quality control rules submitted by trustees after the scheme is no longer controlled by the developer?

6.3.3 Allocation of participation quotas allotted to sections, especially their proportionate share in contributions for management and maintenance of the scheme

Harmony can only be achieved in a scheme if the cost of managing and maintaining the sectional title building and the amenities of the scheme is distributed fairly and equitably amongst the sectional owners.

In terms of the Act the developer is entitled to attempt such a distribution by means of an amendment of the management rules.

Should one of the functions of the Ombudsman Service be to offer advice in this regard and should the final distribution of these costs be monitored by the Ombudsman Service and made subject to its approval?

6.3.4 Financial affairs of the body corporate

Financial control of sectional titles schemes is the root of most complaints and perhaps the most significant consumer issue.

Do you think that it should be the function of the Ombudsman Service to monitor the financial affairs of the body corporate (e.g. the provision of an adequate reserve fund) of a particular scheme on receiving substantiated complaints from a sectional owner?

Should the Ombudsman Service be given mandatory powers to rectify the financial position if possible?

Should an ongoing investigation by the Ombudsman Service into the financial affairs of a scheme be an issue which must be disclosed to prospective purchasers and mortgagees of units?

6.3.5 Activities of trustees

Trustees deal with the day-to-day finances and administration of sectional title schemes. The acts and omissions of trustees are another very important consumer issue.

Do you think that the Ombudsman service should be given powers to compel trustees to comply with their functions if the Ombudsman receives a substantiated complaint that the trustees fail to:

- hold general meetings;
- allow members access to books and other records of the scheme;
- provide financial reports to members;
- comply with other specific member rights?

Alternatively, should it be sufficient for the Ombudsman to notify the trustees of the violation by means of a formal 'notice of violation'?

What sort of publicity, if any, should be given to an Ombudsman Service investigation into the trustees' management of a scheme?

6.3.6 State of maintenance of the sectional title building and amenities (including health and safety issues)

The physical maintenance of sectional title buildings is another very important consumer issue.

Do you think that the Ombudsman Service (like the Building Commissioner under Singapore legislation) should be given the power to monitor the state of maintenance of the sectional title buildings and amenities (including health and safety issues) on complaints received from sectional owners?

6.3.7 Information and education services

Purchasers into a sectional title scheme often have little knowledge of the type of tenure they are buying into. Especially they do not seem to understand that besides acquiring ownership of their section and an undivided share in the common property of the scheme, they also become part of the management structure of the scheme with responsibilities in respect of the efficient management of the scheme and the proper maintenance of the buildings and amenities of the scheme.

The management of sectional title schemes is initially in the hands of the developers, who very often seem more concerned with selling units than preparing owners to take over the management of the schemes.

In practice future owner / trustees have little basic knowledge of how to run meetings and pass resolutions or their responsibilities and liability as trustees.

Professional managers employed to assist trustees often lack sectional title expertise.

It would therefore seem that at all stages of the lifetime of a sectional title scheme, there are roleplayers that need information and basic education.

We would like your comments on the following suggested kinds of service that the Ombudsman Service could render in this respect. Suggestions of further possible kind of information or education services would be most welcome.

A brochure to inform purchasers into sectional schemes in layman's language about living in a sectional title community. This brochure could be modeled on the Californian 'Living in a California Common Interest Community'. [A Common Interest Community comprises of sectional title schemes, share block schemes (Real Cooperatives) and group and cluster housing under the governance of a Homeowners' Association (Planned Unit Development)].

Conducting basic informational seminars for trustees and sectional owners on sectional title topics including on running and documenting of meetings, budgeting (including provision for future repairs) insurance covering and the rights and responsibilities of trustees and sectional owners.

Sectional title courses for professional managers to fulfill certification and educational programmes required under an amendment of the Act or under other legislation.

Dispute resolution courses and training for dispute resolution service providers.

6.3.8 Custody of scheme management documents

We suggest that the DLA, in the light of this project, needs to re-consider and decide whether it wishes to continue to continue to hold and administer the documentation filed in respect of management of Sectional Title schemes.

The Act excuses the DLA from applying any degree of quality control to documentation filed. We have already suggested that one of the monitoring functions of the Ombudsman Service should be to monitor the management and conduct rules and amendments to the

distribution of management and maintenance expenses submitted by developers on registration of the scheme. In our view the task of quality controlling the lodgement of scheme documentation and the skills required for this purpose are the same skills required to investigate the legal status of all aspects of a scheme. Sectional titles consumer disputes will arise at an unnecessarily high rate so long as these documents are not properly examined prior to lodgement.

Should the scheme documentation not related to either survey or registration be lodged with, examined and held by the DLA or would these obligations be more appropriately handled by either the Ombudsman Service or some other government Department?

This question is not only important for its own sake but also because control of these records could provide the Sectional Title Ombudsman office with an important source of funding for its activities, by way of charges for copies of documentation filed with it.

Should the Ombudsman Service be required to create an informational database including the registration data held by the DLA and other relevant information and documentation?

6.3.9 Summary

Bearing in mind the possible functions set out above:

Do you think that the function of the Ombudsman Service should be restricted to the hearing of complaints and providing alternative dispute resolution services or should the Ombudsman Service play a wider role in monitoring sectional title schemes, rendering informational and educational services, and acting as custodian of scheme management documents and making them available to the public and interested stakeholders at appropriate charges?

7. Consultation Part C - Operations of the Ombudsman Service

7.1 Independence

"He who pays the piper calls the tune." (Proverb)

There could be a view that the Ombudsman Service will operate as a *'consumer protection'* body, putting the interests of sectional titles housing consumers before those of other stakeholders in the sectional titles industry, particularly if it is partially or wholly funded by government. Our preliminary view is that the Ombudsman Service will perform a far more valuable role if its remit requires complete independence.

Do you think the Ombudsman Service should strive to be independent in all its activities, not favouring any interest groups in its adjudication of disputes?

Do you think that all the complaints dealt with by the Ombudsman services should be open to public scrutiny or do you feel that the Ombudsman should have the discretion to conduct certain inquiries and hearings in private?

7.2 Powers

To be effective, the Ombudsman must have powers to ensure adequate redress to sectional titles consumers. This requires that the Ombudsman has an appropriate jurisdiction in terms of the nature of complaints, and sufficient powers to provide redress through binding determination on, and public reporting of, complaints.

When disputes cannot be resolved by consensus, do you agree that the Ombudsman Service should have the right to make binding determinations and orders that effectively address the issues in dispute?

Do you think there should be a financial limit on the jurisdiction of the Ombudsman? If so, please give brief details?

Are there any types of Sectional Title disputes which are inherently unsuitable for alternative dispute resolution procedures and should fall entirely outside the jurisdiction

of the Sectional Title Ombudsman service?

It is also important however that the Ombudsman Service's jurisdiction should not extend into areas already covered by other governmental regulatory bodies.

Are there any areas of potential overlap which you think should be addressed in the design stage of the Ombudsman's Service?

Should the Ombudsman Service be entitled to enter into agreements with other regulatory bodies in regard to the operation of dispute resolution schemes?

7.3 Appeal / Review

It may be argued that an adjudicative decision made under the Ombudsman Service should be final and binding. On the other hand it might be argued that the appeal or review proceedings should be within the jurisdiction of a court.

What, if any, form of review or appeal should be open to a sectional title consumer from a decision made under the Ombudsman Service?

An American jurisdiction allows an appeal or review if the decision does not comply with the law, if it is not supported by evidence, if it is arbitrary and capricious. Do you think such grounds are sensible?

Do you think that the Ombudsman service should be able to refer matters to the High Court and/or Magistrates Court and vice versa?

7.4 Dispute resolution techniques

Our initial view is that the Ombudsman Service should have the power to oblige parties to a dispute within its jurisdiction to submit both to non-adjudicative and adjudicative processes.

Should the Ombudsman Service be entitled to require that some form of conciliation or mediation be initiated before a complaint is adjudicated?.

Do you agree that the Ombudsman Service should only investigate complaints when

there is evidence of serious prejudice to sectional title consumers?

7.5 Dispute resolution service providers

The Ombudsman Service will need to have access to an affordable source of reliable, consistent, high quality dispute resolution service providers with a working knowledge of sectional titles law and practice. Providers may include mediators, adjudicators, or experts to perform neutral evaluation. There are a number of possible sources:

a. The Ombudsman Service could employ, train and deploy dispute resolution service providers;

b. External providers could be employed to work independently or in groups on a particular case, and

c. External providers could act in resolution dispute procedures managed by the staff of the Ombudsman Service.

We ask for commentary and recommendations in regard to the most appropriate and cost effective option or combination of options in this regard.

7.6 Industry-specific sub-contracting of dispute resolution

We have received indications that the managing agency and banking professions may be willing to create structures to handle preliminary conciliation and mediation procedures when their members are involved in disputes.

In principle, do you support the concept of outsourcing non-adjudicative dispute resolution procedures to industry representative bodies subject to quality control by the Ombudsman Service?

7.7 Case management

Many Ombudsman services provide oversight and direction for each case, determine the appropriate levels of intervention and manage the dispute resolution service providers involved.

Do you agree that cases should be closely managed by the Ombudsman Service, or do you think the management of dispute resolution processes can be substantially out-sourced to service providers?

8. Consultation Part D - Funding of the Ombudsman Service

The issue of the cost of obtaining resolution of sectional title disputes is of paramount importance. To be of practical use, alternative dispute resolution programs must be accessible. Affordability is an important component of accessibility.

We request input as to the funding model, or combination of models, which should apply to the Ombudsman Service.

We have considered the following possible sources of funding, but would be very interested to hear of others which Respondents may consider suitable.

8.1 Government funding

In some comparable jurisdictions information, advice and dispute resolution services are provided at no cost to the disputants.

It would be possible for the central government to fund the operation of the Ombudsman Service.

It is also possible that one of the interested government departments could fund the operations of the Ombudsman Service.

Do you see either of these suggestions as a sensible funding model?

8.2 A levy on sectional titles transactions

There have been suggestions that the operations of the Ombudsman Service should be funded by a levy on Sectional Title transactions.

This would mean that the people who buy into Sectional Title schemes and / or those are selling and mortgaging units would fund the Service.

This type of funding could be established on an *'ad valorem'* basis, so that the owners of more expensive sectional properties contributed more than the owners of less valuable

ones. There could also be an exemption for properties and mortgage bonds under certain threshold amounts.

The amounts would have to be collected by the DLA via the Deeds Registries and paid over to the Ombudsman Service.

Do you see this suggestion as a sensible funding model? If not, please give reasons.

8.3 A levy on sectional titles schemes

Some comparable jurisdictions tax the schemes who make use of the dispute resolution service. Our preliminary concern is that this type of funding may be very expensive to collect.

Do you see this suggestion as a sensible funding model? If not, please give reasons.

8.4 Charges for dispute resolution services

A number of jurisdictions levy charges for their Ombudsman dispute resolution services.

In some cases this is a relatively low amount which would seem to act as a filter, discouraging trivial complaints.

In other jurisdictions the services are rendered at no direct or indirect cost to the disputants.

It would be possible for the Ombudsman Service to charge for its dispute resolution services, perhaps on a ‘loser pays’ basis.

Do you see this suggestion as a sensible funding model? If not, please give reasons.

8.5 Charges for compulsory Ombudsman services

It has been suggested that the Ombudsman Service could perform quality control services which would serve to increase the certainty and reputation of sectional titles tenure and that these should be paid for at commercial rates by those who choose or are obliged by law to use those services.

We put forward a few ideas for debate in this regard:

a. Developers should be compelled to submit their allocation of participation quotas and the rules of the scheme to the Ombudsman Service for approval so as to ensure that they are reasonably fair and appropriate to the nature of the scheme. This obligation might go hand in hand with allowing developers more flexibility in the allocation of participation quotas within residential schemes, subject to disclosure requirements.

b. When units are destroyed or exclusive use areas cancelled, the plans should have to be approved by the Ombudsman Service.

c. Land Surveyors should be obliged to submit their sectional plans to the Ombudsman Service to ensure that they are appropriately drawn and will not give rise to avoidable financial inequalities, or, if they do, that these are taken account of in the rules of the scheme.

d. Schemes should be obliged to lodge proposed rule changes for scrutiny prior to 'filing', particularly those which affect liability for levies or create exclusive use rights.

e. There may be a concern that such quality control may introduce unwelcome delays in the approval of new development schemes. On the other hand it can be argued that this form of quality control is necessary from a consumer protection perspective and that the Ombudsman Service will be the agency best placed to carry it out.

Do you see this suggestion as a sensible funding model? If not, please give reasons.

8.6 Operating a register of scheme management documents

At present the DLA keeps all official documentation relevant to the management and control of sectional titles schemes. If this documentation were transferred to the control

of the Ombudsman Service on the basis that it is the government agency which understands and administers this documentation, it would also have the effect of giving the Ombudsman Service a database of information which could be used to generate income.

The general public as well as all stakeholders in the sectional titles context require access to sectional titles management documentation and at the moment they pay the DLA for the service of providing access to and copies of that documentation.

We suggest that one of the most viable funding models would be to allow the Ombudsman Service to the government agency charged with control of all sectional title management information and entitled to charge for public access and the examination of documentation lodged.

Do you see this suggestion as a sensible funding model? If not, please give reasons.

8.7 The sale of beneficiated sectional titles data

The Ombudsman Service will be in a position to add value to DLA data in regard to sectional titles schemes. Particularly if it takes control of scheme documentation, and especially if it enters into agreements with local authorities and other interested parties so as to develop data sets which have commercial value.

There are already initiatives by various industry players to create comprehensive databases which include but are by no means limited to the information currently held by the DLA. We suggest that in combination with other funding models the Ombudsman Service should be mandated to leverage its sectional titles expertise by developing commercially valuable data resources and should be empowered to enter into agreements with local authorities, government departments and any other stakeholders in the sectional titles industry who can add value to this process.

Do you see this suggestion as a sensible funding model? If not, please give reasons.

9. Summary of questions

Part A - Oversight and coverage

Responsibility for government oversight

1. Which government Department(s) should administer the Ombudsman Service?

2. Would it be practical for the administration of the Ombudsman Service to include a Board with representatives of a number of interested government Departments?

3. We would value Departmental input on the question of which Departments are best suited to administer the Ombudsman Service law and whether other departments should play a role in its operations.

Similar tenure types

4. Should the Ombudsman Service have the power to investigate disputes in other types of schemes which have to resolve disputes similar to those encountered in sectional titles schemes?

5. Should the law allow for Ministerial expansion of the scope of the disputes handled by the Ombudsman Service?

Mixed tenure types

6. Should the Ombudsman Service be entitled to investigate the governance of other types of schemes when these are related to the governance of a sectional titles scheme?

Parties to disputes

7. Should the following parties be served by and subject to the jurisdiction of the Ombudsman Service:
    a) Owners of units, either individually or groups;
    b) Non-owner occupants of sections;
    c) Trustees, either individually or in groups;
    d) Managing Agents;
    e) Developers of sectional titles schemes, insofar as concerns the enforcement of their obligations to sectional titles bodies corporate (as opposed to individual purchasers);
    f) Holders of real rights in schemes;
    g) Levy Financiers, only insofar as concerns their loan agreements with sectional titles bodies corporate and their interactions with sectional title levy debtors;
    h) Administrators appointed in terms of section 46 of the Act to administer a scheme; and
    i) Curators Ad Litem appointed by the High Court in terms of section 41 of the Act to investigate claims on behalf of a scheme.

8. Do you agree that all these parties or groups should be subject to the jurisdiction of the Ombudsman Service for supervision and dispute resolution purposes? If not, please specify which you think should not be subject to the jurisdiction of the Ombudsman Service and give at least brief reasons.

9. How should the Ombudsman Service apply, if at all, to Financial Institutions and Local Authorities?

10. Should parties to disputes be entitled to be represented by legal practitioners or other representatives in adjudicative dispute resolution processes?

Defining the 'sectional title consumer'

11. Should the primary focus be on consumers who own residential sectional title units?

12. Should the Ombudsman Service also be available to consumers who own commercial, industrial, retail, resort, timeshare and other types of sectional title units?

13. Should the Ombudsman Service also be available to developers of schemes and the holders of real rights in schemes?

14. Do you support the view that tenants and other long-term occupiers of units are also consumers in the sectional titles context and should be able to approach the Ombudsman Service with complaints arising from their disputes with owners, the trustees, the managing agent and other parties who are authorised to control their behaviour?

15. Do you think that purchasers of sectional titles units should be dealt with as consumers entitled to use the Ombudsman Service in respect of issues they have with the developer or other persons who sell rights in a scheme? Or should the rights of purchasers of units be protected by special disclosure and other provisions in the Act?

16. Should sectional titles bodies corporate be entitled to approach the Ombudsman Service in respect of issues they have with local authorities and/or with developers?

Part B - Functions of the Ombudsman Service

17. Do you agree that the primary function of a South African sectional titles Ombudsman Service should be to hear complaints regarding the running of sectional title schemes and to provide alternative dispute resolution services? If not, please provide brief comments.

18. Do you consider the mere non payment of a levy to be a 'dispute' which should fall within the jurisdiction of the Ombudsman Service?

19. Within the existing civil court system administered by the Department of Justice, do you think levy recoveries can be handled sufficiently expeditiously and cost-effectively to address the reasonable expectations of sectional title consumers. If

not, do you have any suggestions as to how the existing systems may be adjusted to deal more effectively with levy collections?

20. Do you think that existing legislation should be amended to provide for the recovery of levies in the Small Claims Courts?

21. Do you think that there are likely to be other categories of disputes or that any of those listed above are inappropriate for resolution by the Ombudsman Service?

22. Do you agree that some disputes may require either total or partial confidentiality?

Monitoring services

23. Do you think that the Act should be amended to give the Ombudsman Service some kind of quality control over the physical condition of buildings that are submitted to the sectional title regime?

24. If so, do you think that this should apply only when rental buildings are converted to sectional title or do you think that the approval of new sectional title schemes should also be subject to quality control?

25. Do you think that the rules submitted with the application for registration should be monitored by the Ombudsman service and amended to suit the character of the particular scheme?

26. If so, should developers be charged for this service?

27. Should this service be extended to quality control rules submitted by trustees after the scheme is no longer controlled by the developer?

28. Should one of the functions of the Ombudsman Service be to offer advice in this regard and should the final distribution of these costs be monitored by the Ombudsman Service and made subject to its approval?

29. Do you think that it should be the function of the Ombudsman Service to monitor the financial affairs of the body corporate (e.g. the provision of an adequate reserve fund) of a particular scheme on receiving substantiated complaints from a sectional owner?

30. Should the Ombudsman Service be given mandatory powers to rectify the financial position if possible?

31. Should an ongoing investigation by the Ombudsman Service into the financial affairs of a scheme be an issue which must be disclosed to prospective purchasers and mortgagees of units?

32. Do you think that the Ombudsman service should be given powers to compel trustees to comply with their functions if the Ombudsman receives a substantiated complaint that the trustees fail to:

    a) hold general meetings;

    b) allow members access to books and other records of the scheme;

    c) provide financial reports to members;

    d) comply with other specific member rights?

33. Alternatively, should it be sufficient for the Ombudsman to notify the trustees of the violation by means of a formal 'notice of violation'?

34. What sort of publicity, if any, should be given to an Ombudsman Service investigation into the trustees' management of a scheme?

35. Do you think that the Ombudsman Service should be given the power to monitor the state of maintenance of the sectional title buildings and amenities (including health and safety issues) on complaints received from sectional owners?

Information and education services

36. Do you think the Ombudsman Service should render the following services?

    a) brochures to inform purchasers into sectional schemes in layman's language about living in a sectional title community;

    b) basic informational seminars for trustees and sectional owners;

c) courses for professional managers to fulfill certification and educational programmes;

d) dispute resolution courses and training for dispute resolution service providers.

37. Do you have any further suggestions as to possible kinds of information or education services would be most welcome.

Custody of scheme management documents

38. Should the scheme documentation not related to either survey or registration be lodged with, examined and held by the DLA or would these obligations be more appropriately handled by either the Ombudsman Service or some other government Department?

39. Should the Ombudsman Service be required to create an informational database including the registration data held by the DLA and other relevant information and documentation?

40. Do you think that the function of the Ombudsman Service should be restricted to the hearing of complaints and providing alternative dispute resolution services or should the Ombudsman Service play a wider role in monitoring sectional title schemes, rendering informational and educational services, and acting as custodian of scheme management documents and making them available to the public and interested stakeholders at appropriate charges?

Part C - Operations of the Ombudsman Service

Independence

41. Do you think the Ombudsman Service should strive to be independent in all its activities, not favouring any interest groups in its adjudication of disputes?

42. Do you think that all the complaints dealt with by the Ombudsman services should be open to public scrutiny or do you feel that the Ombudsman should have the discretion to conduct certain inquiries and hearings in private?

Powers

43. When disputes cannot be resolved by consensus, do you agree that the Ombudsman Service should have the right to make binding determinations and orders that effectively address the issues in dispute?

44. Do you think there should be a financial limit on the jurisdiction of the Ombudsman? If so, please give brief details.

45. Are there any types of Sectional Title disputes which are inherently unsuitable for alternative dispute resolution procedures and should fall entirely outside the jurisdiction of the Sectional Title Ombudsman service?

46. Are there any areas of potential overlap which you think should be addressed in the design stage of the Ombudsman's Service?

47. Should the Ombudsman Service be entitled to enter into agreements with other regulatory bodies in regard to the operation of dispute resolution schemes?

Appeal / Review

48. What, if any, form of review or appeal should be open to a sectional title consumer from a decision made under the Ombudsman Service?

49. An American jurisdiction allows an appeal or review if the decision does not comply with the law, if it is not supported by evidence, if it is arbitrary and capricious. Do you think such grounds are sensible?

50. Do you think that the Ombudsman service should be able to refer matters to the High Court and/or Magistrates Court and vice versa?

Dispute resolution techniques

51. Should the Ombudsman Service be entitled to require that some form of conciliation or mediation be initiated before a complaint is adjudicated?.

52. Do you agree that the Ombudsman Service should only investigate complaints when there is evidence of serious prejudice to sectional title consumers?

Dispute resolution service providers

53. Please give us your views on the following possible sources of dispute resolution providers which the Ombudsman Service could utilise, as well as any combinations thereof:

    a. in-house Ombudsman Service employees;

    b. external providers who work independently or in groups on a particular case, and

    c. external providers who are managed by the staff of the Ombudsman Service.

Industry-specific sub-contracting of dispute resolution

54. Do you support the concept of outsourcing non-adjudicative dispute resolution procedures to industry representative bodies subject to quality control by the Ombudsman Service?

Case management

55. Do you agree that cases should be closely managed by the Ombudsman Service, or do you think the management of dispute resolution processes can be substantially out-sourced to service providers?

Part D - Funding of the Ombudsman Service

56. Do you have any ideas as to possible sources of funding for the Ombudsman Service which are not specified in the consulation document?

Government funding

57. Should the central government fund the operation of the Ombudsman Service?

58. Should one or more government department(s) fund the operations of the Ombudsman Service?

A levy on sectional titles transactions

59. Should the Ombudsman Service be funded by a levy on sectional title transactions?

60. If so, should the levy be collected on an 'ad valorem' basis and should there be any exemptions?

A levy on sectional titles schemes

61. Should the government tax the schemes who make use of the dispute resolution service to fund the Ombudsman Service?

Charges for dispute resolution services

62. Should the Ombudsman Service levy charges for its dispute resolution services?

63. If so, should the charge be levies on a 'loser pays' basis?

Charges for compulsory Ombudsman services

64. Should the Ombudsman Service charge at commercial rates for quality controlling:

    a) Developers' allocation of participation quotas and the rules of schemes;

    b) Sectional plans lodged when units are destroyed or exclusive use areas are cancelled;

    c) All sectional plans;

    d) Rule changes which affect liability for levies or create exclusive use rights; and/or

    e) All proposed rules.

Operating a register of scheme management documents

65. Should the Ombudsman Service be the government agency charged with control of all sectional title management information?

66. Should the Ombudsman Service charge for public access and examination of documentation lodged?

The sale of beneficiated sectional titles data

67. Sould the Ombudsman Service be entitled to develop commercially valuable data resources and utilise these to fund its operations?

ANNEXURE A - Division & Selection

1 Division into Categories

A. Self-Regulation

According to the British Columbia Instruction Guide 25.3 self-regulation means that owners and other interested parties must use the provisions of the Act (including arbitration and court action) to enforce the requirements of the Act. There is no government office which will investigate the activities of sectional title management bodies; order management bodies, trustees or sectional owners to do or refrain from doing an act or interfere with the decisions of trustees or bodies corporate.

The following jurisdictions have self-regulation provisions:

Colombia *Ley* 675 of 2001, Law 675 of 3 August 2001, *Diario Oficial* (Official Journal) Year CXXXVII, no. 44509, of 4 August 2001, p. 1. **(art 2(5) and 58)**

This Act provides for a **neighbourhood committee** (*comité de convivencia*) elected at a general meeting and holding office for a year. Its function is to solve social (not financial) disputes and inform parties of their rights and remedies. It is allowed to solve dispute by negotiation, mediation or arbitration.

Puerto Rico *Ley de Condominios* no. 104 of 25 June 1958, amended by Law no. 157 of 4 June 1976, Law no. 153 of 11 August 1995, Law no. 43 of 21 May 1996 and Law no. 103, of 5 April 2003. **(art 42(a)(1) and (cc) and 48)**

This statute provides for a **special conciliation committee** appointed by general meeting (3 members) to solve disputes amongst owners, tenants and the association about the use of apartments and the common property (again social rather than financial disputes) and resort to court only after conciliation committee has failed to solve dispute. Conciliation committee plays a more active role than in ordinary mediation.

British Columbia Strata Property Act (SBC 1998) c. 43 Bylaws

The Bylaws of this Act provides for the use of a dispute resolution committee if all parties involved in dispute agree.

Singapore

Note that the Real Estate Developers' Association of Singapore (REDAS) set up a **Conciliation Panel** in 1991 specifically to hear complaints against developers in response to the Government's call for self-regulation within the building industry. It provides a speedy and amicable manner of redress for owners with grievances on building defects. The panel is an independent body comprising members of government agencies, professional bodies of engineers, architects, surveyors and valuers.

B. Co-Regulation

Ontario Condominium Act, 1998 S.O. 1998 chap. 19) (s 132(4))

This Act provides that every declaration (constitutive document) shall be deemed to contain a provision that the corporation (body corporate) and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and if that fails to arbitration.

British Columbia Strata Property Act (1998) (s 181)

When a defined dispute (s 177(3)) is referred to arbitration, before holding a meeting the arbitrator must advise the parties of the possibility of a mediated settlement.

England: Commonhold and Leasehold Reform Act 2002 (s 35(3)(b) read with s 37(2)(i)).

It requires directors (trustees) of the commonhold association (body corporate) to have regard to the desirability of using arbitration, conciliation or mediation procedures instead of legal proceedings.

Florida Stat. Ann. § 718.1255(4)(a)

It compels condominium associations (sectional title bodies corporate) to submit to non-binding arbitration before seeking court action.

Comment

I call this co-regulation because the state is prescribing that alternative dispute measures must be tried first before court action can be taken. A further example of co-regulation would be where the state tries to induce greater independence and professionalism into the alternative dispute resolution process by prescribing a list from which mediators and arbiters can be chosen.

C. Government Regulation

Mexico *Ley de Propiedad en Condominio de Inmeubles para el Distrito Federal* (Property Law for Condominiums in Immovables for the Federal District), published on 31 December 1998, in the *Diario Oficial del Distrito Federal* (Official Gazette of the Federal District, updated to 10 February 2000) articles 65 – 68.

This Act provides for elaborate alternative dispute resolution measures under the supervision of the Public Social Prosecutor of the Federal District of Mexico. His function is to intervene in any social dispute except where the case has already been brought before a court. The prescribed measures include mediation, conciliation, arbitration and traditional administrative tribunal procedures. After a complaint is lodged, the defendant must be notified to attend a mediation meeting. If no solution is reached, the case is referred to arbitration. Although ordinary arbitration may be chosen, the parties are free to determine their own procedure and choose their own arbiter. Both arbitration judgements and negotiated agreements may be enforced by ordinary of summary court proceedings.

Sri Lanka

See **Condominium Management Authority** (below)

Singapore

See **Building Management Commissioner** (below)

D. Special Sectional Titles Court / Tribunal

The following two jurisdictions afford illustrations of the settlement of sectional title disputes by special courts or tribunals:

Singapore Land Titles (Strata) Act of 1987 cap.158, 1998 Rev. Ed. revised in 1999 **s 86**

Special **Strata Titles Boards** manned mostly by academics and persons conversant in sectional titles to solve all sorts of disputes. Organised on the model of Small Claims Courts. Eminently suitable for Singapore which covers an area as large as Cape Town, but perhaps too difficult to organise for a vast country like South Africa. See further 1999

South African Law Journal 624-271. Jurisdiction: to require management corporation to convene general meeting; to revoke amendment, repeal or addition to by-law or invalidate purported by-law; invalidate proceedings; vary rates of interest; vary contributions levied or manner of payment; annul resolutions where voting rights denied or due notice not given; require pursuance of insurance claim; require appointment of managing agent; settle disputes on costs of repairs; require management corporation to consent to alterations to common property; require supply of information or documents; affirm, vary or revoke decision of Commissioner and enforcement of performance or restraint of breach of a by-law. (Note that the jurisdiction of the **Board** corresponds to the jurisdiction of **adjudicators** under the NSW Strata Schemes Management Act 1996 No 138 Chapter 5 (see below)

Germany *Gesetz über das Wohnungseigentum und das Dauerwohnrecht* of 15 March 1951 *Bundesgesetzblatt* (*BGBl*) (Official Statute Book) of 15 March 1951 as amended by Law of 30 July 1973, Law of 8 December 1982, Law of 17 December 1990, Law of 22 March 1991, Law of 11 January 1993, Law of 3 January 1994 and Law of 24 June 1994

A Judge of first instance (magistrate's court) of the district where the sectional title building is situated hears disputes according to a special procedure (*freiwillige Gerichtsbarkeit*). Most of the work is done by the clerk of the court. Besides sectional title disputes he adjudicates on a potpourri of matters relating to wills, guardianship, public registers and authentication of signatures. The main difference with ordinary proceedings is that the representatives of the parties is not solely responsible for stating the facts of the case. In this procedure the judge can ask questions and ensure that all the facts are on the table. The judge negotiates orally with parties in order to reach an amicable settlement. If no settlement is reached, the judge may make his own procedural rules to hear the case. The judge is given a wide discretion to arrive at a reasonable decision. Reasons must be given for the decision and it must be framed in such a way that it can be enforced.

E. Office: Sectional Titles Ombudsman / Adjudicator

The following jurisdictions provides for the settlement of sectional title disputes by the office of an ombudsman or adjudicator

NSW Strata Schemes Management Act 1996 No 138 Chapter 5 s 123-210

Settlement of disputes by the Director-General of the Department of Fair Trading, adjudicators appointed by the Minister of Fair Trading or the Consumer, Trading and Tenancy Tribunal

The Act gives power to Adjudicators appointed by the Minister of Fair Trading and the Consumer, Trader and Tenancy Tribunal to make orders to settle disputes about certain matters relating to the operation and management of a strata scheme. Initially, an application for an order is processed by the Registrar. The Registrar must refuse to deal with a matter if satisfied that mediation was appropriate and was not attempted. A person may either apply to the Director-General of the Department of Fair Trading for mediation of a matter or make other arrangements for mediation. If mediation of a matter is unsuccessful or a matter is not appropriate for mediation, the Registrar may accept the application for the order. Depending on the nature of the order requested, the application will be dealt with by either an Adjudicator or the Tribunal. An appeal may be made to the Tribunal against an order of an Adjudicator and an appeal may be made to the Supreme Court against an order of the Tribunal.

Nevada Revised Statute 116.625 and 116.630
Some of duties of Ombudsman: assist in processing claims submitted to mediation or arbitration; explain rights and responsibilities to owners; assist management boards to carry out their duties; investigate disputes involving the interpretation of the Act, the regulations and other documents of the scheme; compile and maintain a register of all management corporations in the state indicating amongst others the number of foreclosures which were completed on units within the scheme and which were based on liens for the failure of the unit's owner to pay any assessments levied against the unit or any fines imposed against the unit's owner; and whether the required study of the reserves of the association has been conducted and, if so, the date on which it was completed.

Florida Code 718.5011-5012
Creating the office of the Condominium Ombudsman; attorney; he and staff no other position and no other public office; 5012: powers and duties: prepare and issue reports and make recommendations; liaison between parties, monitor condominium elections; assist unit owners and board of directors and to encourage voluntary resolutions to dispute before filing the matter as a formal complaint.

Sri Lanka Condominium Management Authority Act No. 24 of 2003
The main functions of the Sri Lanka **Condominium Management Authority** are to oversee the proper management and maintenance of condominium buildings in order to create a healthy atmosphere and habitable apartments; to educate owners as to upkeep of buildings and common property; to remove unauthorised structures; to co-ordinate the upkeep of common facilities like children's parks; to create confidence for purchasers to buy into condominiums by playing a major role in condominium property management; to facilitate loans from lending institutions; and to streamline the process of forming efficient management corporations.

Singapore Buildings and Common Property (Maintenance and Management) Act cap 30 1985 (Rev.Ed)
The main function of the **Commissioner of Buildings** is to oversee the management of the sectional title building; approve the schedule of quotas before units in scheme may be sold; approve additional levies in case of a change of use of a unit; exercising control during the initial period.

Puerto Rico (see above)
If the special conciliation committee cannot solve the social dispute, the complainant can submit the dispute to the **Consumer Affairs Department** where an administrative judge will try to solve the dispute subject to judicial review.

Ontario Condominium Act 1998 (s 130(1))
On the application by the body corporate (corporation), an owner or a mortgage creditor, the High Court of Ontario (Superior Court of Justice) can appoint an **Inspector** to investigate the **financial records** of the developer at the initial stage and later on the financial affairs of the body corporate (corporation).

2. Jurisdictions to be looked at from a comparative perspective

1. **New South Wales** (**Strata Schemes Management Act 1996)** (my personal opinion is that it smacks of over regulation)
2. **Singapore (Land Titles (Strata) Act and Buildings and Common Property (Maintenance and Management) Act**
3. **British Columbia Strata Property Act** and/or **Ontario Condominium Act** (on mediation and arbitration)
4. **Nevada Revised Statute or other American state statute** that makes provision for an ombudsman.
5. **England: Commonhold and Leasehold Reform Act 2002**
6. **Sri Lanka Condominium Management Authority Act** (if broader supervisory role is envisaged for ombudsman).

I do not consider it beneficial to investigate the provisions of European statutes since they derive from a fundamentally different stream than the Sectional Titles Act which derived from the original New South Wales statute. The German procedure used for the solution of sectional title disputes is also not suitable, since German inquisitorial system of civil procedure differs fundamentally from the South African adversarial procedure.

3 General Remarks:

It seems that we would have to distinguish between financial disputes and social disputes. It is paramount to achieve financial stability by efficient management and timely repairs and upgrading of the building and common facilities. This can only be achieved by a quick method of recovery of levies (even quicker debt recovery court procedure or an amendment of the Small Claims Court Act to allow bodies corporate to claim levies in the Small Claims courts). In addition we need an amendment of the Sectional Titles Act to allow the body corporate an automatic legal mortgage (hypothec, charge or lien) of six months priority over first mortgages. I do not know whether this is in our remit?? In addition, the ombudsman can oversee the condition of buildings and common facilities in schemes and the financial affairs of bodies corporate.

For social disputes, it seems that we would have to look at a combination of the methods employed in other statutes. We must first decide whether the conciliation committees chosen by owners from amongst themselves would not degenerate into kangaroo courts. Is so, an independent outside mediator can solve a considerable number of disputes. Can the ombudsman and his staff act as mediators, must industry supply conciliation panels for certain disputes or must that be left to the available mediation panels? And if mediation is unsuccessful, do we then refer disputes to arbitration, administrative tribunals (something like the Rent Board) (NSW) or directly to the court?

1. I am not sure whether ombudsman is the correct designation? Sectional titles ombudsperson is politically more correct.

2. Ultimately it is going to boil down to who is going to pay for this additional public office. (I do think that it is sufficiently important to warrant an independent office). Can one levy a payment of R4.00 a year on every sectional owner as part of the annual budget of every scheme. Or must one differentiate between normal and more luxurious schemes? And would it generate enough money? Or would the Government be prepared to subsidise this all-important way in which housing is provided for city dwellers?

3. Education for sectional owners: Sectional owners should be educated about living in a sectional title scheme. They have duties to the community. It is not a rental building in which occupants expect the landlord to do everything for them. In fact sectional title buildings are in an entirely different class from rental buildings and one should be able to see that from the outside appearance of the building. Sectional owners do not live in separate houses but in an intensified community. Collective rather than individualistic principles should predominate. Sectional owners are part of the management of the community, they, or representative chosen by them, must manage the scheme and ensure that the scheme is retained in a good state of repair and that there is harmony in the scheme.

The Colombia statute contains a kind of bill of rights which identifies the primary purpose of sectional title schemes: Art. 2 provides that a condominium should fulfil its social and environmental functions, promote peaceful coexistence and social solidarity, respect human dignity, promote free market initiatives in commercial and mixed-use condominiums and respect due process rules in arriving at resolutions.

CG van der Merwe
23 November 2004.

1 ANNEXURE B - Options for Resolving Sectional Titles Disputes

1. Introduction

There are many types of sectional title disputes. This guide is written primarily from an owner's perspective. But the information may also be of use to parties other than an owner or the body corporate, such as trustees or managing agents and others who become involved in sectional title disputes.

A sectional title dispute, from the owner's perspective, is any situation in which a significant difference of opinion has arisen between owners of units or between an owner and the body corporate. The dispute can be in regard to any aspect of the management and control of the scheme or from actions of trustees, owners or residents in the scheme. A typical sectional title dispute may involve one or more owners, tenants, the trustees and the managing agent. If the dispute is in regard to building construction, maintenance, improvements, alterations or repairs it may also involve the municipality, architects, land surveyors, engineers, developers, contractors and subcontractors. The large number of parties typically involved in and affected by sectional title disputes can make them quite complex.

Because of this complexity, resolving sectional title disputes through the traditional method of going to court (litigation) is an extremely lengthy and expensive process.

This guide is an introduction to dispute resolution options for people involved in sectional title disputes. It includes:

- general information on negotiation, mediation, arbitration and litigation, and
- information on prescribed Management Rule 71, *Determination of disputes by arbitration.*

DISPUTE RESOLUTION OPTIONS

Disputes can be resolved in many different ways. Some are more formal than others. It helps to think of dispute resolution options as existing on a scale from less to more formal.

NEGOTIATION	MEDIATION	ARBITRATION	LITIGATION
least formal <------	----------	----------	-------> most formal

The least formal way of resolving a dispute is through **negotiation** directly between the parties involved. A more formal version of this process is to have each party represented by an attorney who negotiates on their behalf.

When people are unable to resolve a dispute through negotiation, they may decide to involve an impartial third party. **Mediation** is an increasingly popular dispute resolution process in which the parties agree to meet with a mediator who can help them settle the matter. A mediator helps the parties to reach a settlement, but does not have any decision-making power.

A more formal option is **arbitration**. In arbitration, the impartial third party is a decision-maker appointed by contract or statute, or chosen by the parties. The arbitrator makes a final and binding decision - that is, a decision that can be enforced legally and cannot easily be appealed.

The most formal dispute resolution option is **litigation,** in which the matter is decided for the parties by the court system.

Each of these dispute resolution options has advantages and disadvantages (see table 1). When choosing the most appropriate option for resolving a dispute, you will need to consider the advantages and disadvantages of each option, as well as the details of the dispute. However, a general guideline is to start with the least formal option (negotiation), and use increasingly formal options only if the less formal options are unsuccessful.

TABLE 1

OPTION	ADVANTAGES	DISADVANTAGES
Less formal Negotiation Mediation	Can be faster and simpler Can be less expensive Parties have control over the process and the outcome Occurs in private Results are confidential Parties can make settelments that might not be possible in a court	Dependent on the cooperation of all parties Agreements are not binding unless parties take steps to make them so
More formal Arbitration	Can be faster and simpler Can be less expensive Parties have more control over the process than in litigation Occurs in private Results are usually confidential Not dependent on the cooperation of the parties Decisions are usually binding	Decisions usually cannot be appealed
Most formal Litigation	Not dependent on the cooperation of the parties Will inevitably result in a final decision Provides a process that increases the likelihood of full disclosure of all the relevant information and tests the honesty of the parties or the accuracy of the evidence	Can be more costly, time-consuming and complex Occurs in public Results are not confidential Parties have limited control over the process or the outcome

ACKNOWLEDGEMENT

This text was inspired by a booklet issued by the British Canadian government in respect of construction disputes; the contributors to and editor of this text acknowledge that its format and much of its content is based on this precedent.

2. Negotiation

2.1 What is Negotiation?

The first and least formal way to resolve a dispute is to negotiate. This means sitting down with the other party or parties and trying to come to an agreement that satisfies everyone's needs, or at least satisfies them in a way that is preferable to what they could achieve without negotiating.

FOCUS ON INTERESTS

One of the most important principles of any kind of negotiation is to focus on **interests** rather than **positions.** Each party in a dispute has needs, desires and concerns. These are **interests.** A **position** is something a party has decided on as a way to satisfy its interests. Behind the opposed positions in a dispute lie a range of both shared and conflicting interests.

2.2 Preparing for Negotiation

Before entering into negotiations with the other party or parties, ask yourself:

- What are your own interests (needs, desires, concerns)?
- Which of these interests are most important to you?
- What do you think the interests of the other party or parties might be?
- What is the best solution you could achieve **without** negotiating?

Once you have answered these questions for yourself, try to come up with some solutions that would satisfy as many of your own interests and those of the other party or parties as possible.

Before the negotiation begins, discuss the process itself with the other party or parties. Decide ahead of time where and when to meet, who can attend, and so on. It is useful to put the details in writing.

2.3 During the Negotiation

Another important principle of negotiating is to **separate the people from the problem.** Deal with the people problems - the emotions and behaviours of people on all

sides - directly. Don't try to solve them by making concessions in the substance of the dispute.

Clear communication is essential. Make your points as clearly as you can. Listen actively to the other party or parties, and make sure you understand their points - repeat them in your own terms, so that your understanding can be confirmed and any misunderstandings cleared up right away.

Express negative emotions by referring to the impact something has had on you, rather than by referring to what you think the other party or parties intended by their action. By doing this you are focusing on something you know, rather than on something you don't know and can therefore be challenged on.

Always look for ways to satisfy interests on all sides. When a solution is proposed, assess it in terms of how well it serves your interests. Compare it to the best solution you could achieve without negotiating, to make sure that the proposed solution is actually better.

2.4 Completing the Negotiation

Before finalizing an agreement, carefully assess it against:

- all of your interests, to ensure that your interests are being served; and
- the best solution you could achieve without negotiating, to ensure that the agreement is not actually harmful to you in some way.

Make sure that the agreement can actually be implemented by all parties. If one party requires the approval or cooperation of someone else, for example, don't finalize the agreement until this condition has been met.

Put all details of the agreement in writing, make copies for all parties, and have all parties sign each copy.

2.5 Negotiation Step-by-Step

1 Prepare for negotiation by identifying your interests, the interests of the other parties, the best solution you could achieve without negotiating, and some solutions that will satisfy as many of your needs and those of other party or parties as possible.

2 Discuss with the other parties the details of the negotiation process, including where and when you will meet, who will attend, and a time frame. Put these details in writing.

3 During the negotiation, separate the people from the problem itself, communicate clearly, listen actively, and always be looking for ways to satisfy the interests of all parties.

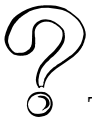
4 Assess each proposed solution - especially the one that could become a final agreement - carefully against your interests and the best solution you could achieve without negotiating.

5 Make sure that a final agreement can actually be implemented by all parties. If one party requires the approval of someone else, for example, don't finalize the agreement until approval has been given.

6 Put the agreement in writing and have all parties sign it.

3. Mediation

3.1 What is Mediation?



Traditionally, people have relied on the courts to resolve their disagreements. Mediation is an alternative to going to court. In mediation, all parties involved in a dispute meet and try to settle the matter with the help of an impartial mediator. The mediator is trained to help people settle conflicts collaboratively and has no decision-making power.

The mediation takes place in a private, informal setting with a non-confrontational atmosphere. The parties participate in the negotiation and design of a settlement. The dispute is settled only if all of the parties agree to the settlement.

Mediation focuses on interests, which means it is concerned more with the needs, desires and concerns of the parties than with their specific legal rights. (However, the legal rights of the parties can serve as a reference point for the mediation process.)

3.2 Advantages of Mediation

Speed	A mediation can be arranged in a relatively short period of time and gets settlement negotiations underway quickly.
Cost	By resolving a dispute quickly, people can save time and money and reduce emotional stress.
Privacy	Mediation takes place in private. Details of the dispute and resolution need not be publicly disclosed.
Control	The parties involved in a dispute control the resolution by designing the settlement and agreeing to live by it only if it is acceptable to them.
Informal atmosphere	The informal setting and atmosphere of mediation can improve communication between the parties. Many of the tensions and stresses of an adversarial process are avoided.
Separating the people from the problem	In disputes, personal feelings or emotions often become confused with the legal issues. The mediator helps to separate the personal dimension from the issues in dispute, reducing tension and making settlement more likely.
Preserving relationships	Often, people involved in a dispute must continue to deal with one another, either in business or otherwise, after the dispute is resolved. Because mediators try to avoid polarizing the parties, mediation can help to preserve working relationships.

3.3 Costs of Mediation

The cost of mediating a sectional title dispute will depend on the mediator and how long the mediation takes.

Experienced, legally trained mediators typically charge from R400 to R900 an hour. These rates are sometimes negotiable. Private mediation service providers will offer a full range of services, including setting up, planning and carrying out mediations. Other costs of mediation may include pre-mediation sessions, facility rental, travel and food.

Depending upon the complexity of the dispute, mediations may be completed in a single session or in several sessions over a period of weeks.

The cost of mediation is typically shared equally by the parties participating in the mediation, but the agreement to mediate can provide for any other arrangement. Sometimes other arrangements are negotiable as part of the final settlement.

If attorneys attend the mediation, they will usually charge for preparation time as well as any time spent at the mediation. The precise amount of the attorney's fee will depend on the hourly rate.

3.4 When to Mediate

Mediation cannot solve all disputes, but it can be helpful in many cases.

There are no set rules about what can or cannot be mediated. However, mediation is more appropriate in some situations than others.

Consider mediation for a sectional title dispute when:

- the parties want a flexible and informal process
- none of the parties can get away with simply ignoring the problem
- other options for resolving the dispute are unacceptable or problematic
- each party needs something from the other
- the dispute involves more than two people or businesses
- the case is complex and requires a creative solution
- the parties would prefer to settle the dispute in private.

Mediation is probably not appropriate for a sectional title dispute if:

- a party is challenging the validity of a rule or a decision of the trustees or owners
- an issue of law needs to be settled to serve as a legal precedent
- people not directly involved in the dispute may be unreasonably affected by the outcome.

You need not be confident that a dispute will be settled in order to go to mediation. Settlement rates are quite high in mediation. Disputes are often settled even when parties are far apart and feel pessimistic about resolving the dispute outside of court.

If you are considering mediation as a way to resolve a sectional title dispute, you should first make sure that:

- you understand the differences between mediation and other kinds of dispute resolution
- the dispute is appropriate for mediation.

Next, see if the other parties are interested. Don't be surprised or discouraged if the other people involved in the dispute aren't enthusiastic about the idea of mediation at first. Mediation is a relatively new process and it is not always well understood.

If everyone involved in the dispute agrees to try mediation, the next step is to agree on the selection of a mediator. The mediator will then work with everyone to reach an agreement on how the process will happen.Everyone will need to agree on the ground rules and payment of the mediator's fees.

3.5 The Mediator

Mediators are trained to help people work together to resolve a dispute in a way that is acceptable to everyone involved. Mediators come from many different backgrounds.

Mediators are impartial and unbiased. They do not have the power to make decisions about the case or impose a resolution. Instead, their role is to ensure that the discussion remains focused, organized and respectful. They are experts in making negotiations work.

A mediator:

- establishes ground rules for respectful conduct
- structures and manages the mediation process
- helps clarify the facts and issues
- helps the parties determine what they need out of a resolution and helps them to generate options for resolving their dispute

- keeps lines of communication open and discussions on track
- is a sounding board, innovator and reality-tester.

3.6 Finding a Mediator

 If you are considering mediation as a way to resolve a sectional title dispute, you can find a suitably qualified and experienced mediator through a variety of means. You can also get the names of mediators through:

- a private mediation service provider (most advertise in the Yellow Pages)
- the National Association of Managing Agents or a provincial Law Society
- personal referrals
- your managing agent or attorney.

Mediators should be able to provide you with information about their training and experience. Feel free to ask for résumés and references and to contact more than one mediator in order to make an informed choice.

The mediator must not have any personal or business involvement with any of the parties involved in the dispute. It is very helpful if the mediator has expertise in the subject matter of the dispute.

3. 7 Questions to ask a prospective Mediator

- What training have you received?
- How long have you been doing sectional title mediation? How many cases and what types of cases have you mediated?
- What standards of conduct do you abide by?
- What do you charge and what is included in your fee? How is travel, administrative and clerical time handled? Do you charge for an initial consultation?

3. 8 Preparing for Mediation

It is important to be well prepared for mediation. Gather together any documents you need to help resolve the dispute, including statements, invoices or photographs. Make copies to give to the mediator and each of the parties. Take the copies and the original documents to the mediation.

The mediator may arrange to exchange information before the first mediation session so that everyone has a chance to become familiar with it. This will make the mediation more efficient.

Sometimes you will be asked to provide the mediator with a short summary report before the first session. It would include:

•	the facts or circumstances that led to the dispute
•	what you think needs to be resolved
•	what you and the other parties agree about and what you disagree about
•	what has already been done to try to settle the dispute (e.g., any court proceedings, negotiations or settlement proposals)
•	what you are seeking as a favourable outcome.

3.9 Who can participate in the Mediation?

The mediator and all of the parties involved in the dispute must attend the mediation. It is important to ensure that each party has the authority to reach an agreement. For example, if any of the parties involved in the dispute is a trust, close corporation, company, or other ‘artificial person’, then the person attending the mediation on the party’s behalf must have the authority to settle the dispute on its behalf. (A person has the authority to settle if that person can agree to a proposed resolution without first getting approval from someone else.)

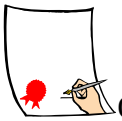
All parties should agree about who else can attend before beginning the mediation. For example, some parties may wish to have an expert make a presentation on a technical issue. They may also want to have their attorneys involved.

3. 10 Attorneys and Mediation

You do not need to have an attorney to mediate. However, it can be helpful to consult with an attorney before, during and after the mediation. Or you may choose to have your attorney attend the mediation, particularly when:

- a Court action has been commenced
- you feel the other parties have more power or experience than you have
- the other parties involved in the dispute will have their attorneys attend
- the financial or other stakes are high.

3.11 Agreement to Mediate



Once the people involved in a dispute agree to mediate, a written agreement is usually made between the mediator and the parties, setting out the rules and procedures to be followed in the mediation. The mediator and the parties usually sign the agreement to mediate before or at the first mediation session.

Individual mediators often have their own form of agreement, but most agreements include:

- the names of everyone involved in the dispute
- a very general statement of the issues
- a statement about what the parties are trying to accomplish in mediation
- confirmation of the role of the mediator as neutral and impartial
- a statement about confidentiality
- provisions for disclosure of relevant information in the mediation
- an agreement about how much the mediator will be paid, what other costs will be, and who will pay.

3.12 The Mediation

Most mediations are conducted informally in an office setting. Sessions may be scheduled for a few hours or for several days at time. Everyone involved in the dispute sits around a table with the mediator.

The process often includes these steps:

- The mediator makes a short opening statement explaining the process, reviewing ground rules and the agreement to mediate, and describing his or her own role.
- The mediator gives each party an opportunity to describe what they think needs to be resolved.
- The mediator works with the parties to clearly identify the issues that are in dispute.
- The mediator helps the parties to develop goals for the mediation, incorporating the needs and interests of the parties.
- The parties discuss the issues one at a time and identify options for resolving them. The mediator helps to assess and analyze the options, but does not take sides.
- At some points during the mediation, the mediator may want to meet separately with individual parties for a private "caucus." Parties can take a break at any time to talk to their attorneys or someone else.

You are never forced to agree to anything in mediation. To give the mediation process a fair chance of success, you should continue as long as the mediator thinks it is worthwhile. If you are unable to reach agreement, the mediator will end the mediation. The dispute must then be resolved some other way, usually through arbitration or the court system.

3.13 After the Mediation

If some or all of the issues in dispute are settled in the mediation, those issues will be formalized in a written and signed agreement. If a court action has been commenced, the agreement may also be formalized in a consent order. A consent order sets out the terms of the settlement agreement and makes the agreement enforceable by the court.

If some or all of the issues in dispute are not settled through mediation, the issues that have not been settled can go either to arbitration or through the court process. Even if mediation has not settled all the issues in dispute, it may be helpful in making arbitration or a trial shorter and less complicated.

3.14 Mediation Step-by-Step

1 If you want to resolve a sectional title dispute through mediation, approach the other parties to see if they are interested. You may need to give them some information on mediation before they will agree.

2 If everyone agrees to mediate, find a mutually acceptable mediator.

3 Prepare for mediation by gathering all relevant documents and making copies for the mediator and each of the other parties. The mediator may want to exchange information before the first mediation session. Sometimes the mediator will also ask for a short summary report about the dispute before the first mediation session.

4 Before the mediation begins, all parties and the mediator make and sign an agreement to mediate, which sets out the rules and procedures to be followed during the mediation.

5 The mediation process continues until all of the issues are resolved, or until some or no issues are resolved and the mediator feels that it will not be productive to continue.

6 If some or all of the issues in dispute are settled, formalise them in either a written and signed agreement or, if an action has been commenced in court, a consent order signed by a judge. If some or all of the issues in dispute are not settled, the parties can try to settle the remaining issues using the more formal dispute resolution options, arbitration or litigation.

4. Arbitration

4.1 What is Arbitration?

Arbitration is a process in which a neutral and independent third party hears evidence and arguments from the parties involved in a dispute, and settles the dispute by making a binding decision.

Arbitration is a more formal dispute resolution process than mediation. While mediators have no decision-making powers and assist parties in negotiating a mutually acceptable settlement of the issues in dispute, arbitrators are adjudicators who make decisions based on the legal rights of the parties. In this sense, arbitration is more like litigation, although it is usually less formal than litigation.

Unlike mediation, which focuses on interests, arbitration focuses on rights - that is, it is concerned with establishing the legal rights of the parties.

When parties agree to arbitrate, they agree to accept the decision (called the "award") of an arbitrator as final and binding. There are very limited grounds for appealing an arbitrator's decision.

4.2 Prescribed Arbitration proceedings

In terms of the Sectional Titles Act the government has made regulations for arbitration proceedings to resolve sectional title disputes. Prescribed Management Rule 71 provides that when a dispute between the body corporate and an owner or between owners arises out of or in connection with the Act or the rules it must be determined by arbitration, unless an interdict or other form of urgent relief is required.

The rule provides that:

- The aggrieved party must notify the other interested parties in writing and copies of the notification must be served on the trustees and the managing agents, if any.
- If the dispute or complaint is not resolved within 14 days of the notice, either of the parties may demand that the dispute or complaint be referred to arbitration.
- The parties must jointly appoint an independent and suitably experienced and qualifed arbitrator within 3 days after arbitration has been demanded.
- If the parties are unable to agree on the selection of an arbitrator, any party may apply to the local Registrar of Deeds who will appoint an arbitrator within 7 days of written application.

- The arbitrator determines the procedure to be used.
- The arbitrator may require that the party who demanded arbitration furnishes security for the costs of the arbitration, failing which the arbitration does not proceed.
- Where possible the arbitration should be concluded within 21 days.
- The arbitrator must make an award within 7 days of completion of the arbitration and may determine how the parties will bear the costs of the arbitration, having regard to the outcome.
- The arbitrator's award is final and binding on the parties; it may be made an order of the High Court on application by any person affected by the arbitration.

4.3 Advantages of Arbitration

Flexibility	Arbitration can accommodate the needs of the parties. Because the details and circumstances of every dispute differ, arbitration allows parties to design their own procedure or agree to use an established set of rules. Parties are consulted on the format that will be used for the hearing. When deciding when and where a hearing will be held, arbitrators can take into consideration the convenience of the parties. If required, an arbitrator may visit the scheme.
Efficiency and economy	Because arbitration is less formal than litigation, the hearing is usually shorter than a court case would be. Also, an arbitration hearing can be scheduled much sooner than a court date. The savings in time can be reflected in lower overall costs to the parties.
Certainty	Arbitration results in a final and binding decision that can be enforced as a court order.
Expertise	Parties have the option of selecting the person who will decide their case. For example, they can select an arbitrator who has technical expertise in a particular field or business area.
Control	Parties provide input on when, where and how the arbitration will proceed. This gives them greater control than in litigation, where court rules are inflexible and time frames depend on the availability of court resources.
Informal atmosphere	Although arbitration is an adversarial process in which each side tries to win its case, the flexibility of the process and the opportunity for the parties to design and participate in the hearing contribute to a less antagonistic atmosphere, which in turn helps

reduce stress and encourages cooperation. This can be a particular advantage if the parties continue a business relationship after their dispute is resolved.

Confidentiality In the arbitration of a sectional title dispute, matters remain between the parties and the arbitrator. Hearings are closed and the arbitrator's decision is not normally a matter of public record.

Structure Arbitration allows the parties as much control and decision-making as they are prepared to manage. Parties are free to use the rules of any organization or design their own procedure. A number of organizations and service providers administer arbitration programs and have their own arbitration rules (See "Arbitration Rules").

4.4 Costs of Arbitration

- the arbitrator's fees
- any fees charged by a neutral administrative body to oversee the process
- any fees charged by expert witnesses, if used, and
- any other expenses incurred for such things as meeting room rental, photocopies, faxing, long distance, travel costs, etc.

Most arbitrators charge by the hour. An arbitrator's hourly rate will depend on experience and qualifications. Some arbitrators have a negotiable hourly rate that depends on the complexity of the case, the number of parties involved, and the time estimated to prepare for and hear the dispute, and prepare the decision.

The arbitrator can decide how costs are divided between the parties, as part of the decision. The successful party may be reimbursed for some or all of their costs associated with the arbitration. Parties are usually required to pay their own legal fees. However, a party can ask the arbitrator for reimbursement by the other parties for this expense as well.

4. 5 When to Arbitrate

Arbitration should only be used other, less formal dispute resolution options (such as negotiation or mediation) have been considered or attempted.

Unless owners have by unanimous resolution removed prescribed Management Rule 71 they are bound to refer disputes between themselves and between any one of them and the body corporate to arbitration. But the parties involved in a dispute may still try to settle the dispute through negotiation or mediation before going to arbitration, and if they

both choose to do so, they can use litigation rather than arbitration to resolve their differences.

Arbitration is appropriate for a sectional title dispute when:

- other, less formal dispute resolution options have been unsuccessful in resolving all of the issues in the dispute
- parties want a flexible process that is less formal than litigation
- parties would prefer to settle the dispute in private
- parties want to settle the dispute with a binding decision.

Arbitration is probably not appropriate when:

- a party is challenging the validity of a law
- an issue of law needs to be settled to govern future legal cases or serve as a legal precedent
- the dispute involves public policy
- people not directly involved in the dispute may be unreasonably affected by the outcome.

It is important to understand that once parties undertake arbitration, they cannot withdraw from the process.

4.6 The role of the Arbitrator

While mediators are experts in negotiating and in helping others to negotiate effectively, arbitrators are experts in adjudication. An arbitrator:

- looks at the evidence and listens to the arguments put forward by each of the parties
- assesses the evidence
- makes findings of fact
- applies the law, and
- makes a decision that resolves the dispute.

4. 7 Appointing an Arbitrator

Technically, any impartial person can act as an arbitrator. But remember - the arbitrator's decision is final and binding. It is therefore recommended that parties select someone with experience as an arbitrator, as well as expertise in the subject matter of the dispute. (Even where the parties consider the dispute to be "factual," the arbitrator should be familiar with the applicable law.) Most importantly, the person appointed should be someone in whom all parties have confidence.

You can contact potential arbitrators to request information about them, but you must not discuss the details of a particular dispute with a potential arbitrator. It is a good idea to request information from a potential arbitrator in writing and to provide a copy of the correspondence to the other parties.

4. 8 What to look for in an Arbitrator

- Experience - how many arbitrations the prospective arbitrator has performed and the types of disputes arbitrated
- Expertise - whether the prospective arbitrator has any training or other background in sectional titles
- Impartiality - there should be nothing about the prospective arbitrator's background or current activities that could lead one of the parties to conclude that the arbitrator would not be a neutral decision-maker.

During the selection process, ask for the arbitrator's résumé, fee schedule and availability. If the parties cannot agree among themselves on the selection of an arbitrator, the local Registrar of Deeds will complete the selection process.

4. 9 Arbitration Rules

One of the first things the parties must do in preparing for arbitration is to choose the rules that will govern the arbitration and agree these with the arbitrator. Arbitration rules include how and when documents should be exchanged, and how the arbitrator will communicate with the parties.

Exchanging documents before the hearing ensures that each party knows the claim the other is making and has an opportunity to prepare a response. Because the arbitrator is a neutral adjudicator, parties cannot discuss details about the issues or evidence directly with the arbitrator unless the other parties to the dispute are present.

Some arbitration organizations have developed their own arbitration rules, which the parties may agree to adopt. All arbitration rules have common procedures that reflect the principles of:

- neutrality - arbitrators must be impartial and have no bias in favour of either a particular party or any specific outcome
- independence - arbitrators are independent decision-makers (i.e., no person or agency can influence his or her decision)
- the right to know the claim - all parties have the right to know the details of the case against them, the right to refute adverse evidence, and the right to present their own evidence.

Arbitrators must follow these principles to ensure that the arbitration process is fair.

4. 10 Attorneys and Arbitration

You do not have to hire an attorney to represent you in arbitration. However, parties may find the advice and skills of an attorney to be helpful.

Attorneys are trained to research and prepare a case. They advise on legal rights and responsibilities and provide objective opinions.

You may decide not to hire an attorney to represent you, but to consult with one so as to learn what law and facts are likely to be most important in the arbitration process.

IN DECIDING WHETHER OR NOT TO HIRE AN ATTORNEY, ASK YOURSELF :

- Do I have the time and skills to research and prepare my own case?
- Does the value of the dispute warrant the cost of hiring an attorney?
- Will hiring an attorney increase my chances of a successful outcome?
- Are the other parties represented by an attorney?

4. 11 Arbitration agreement

Once appointed, an arbitrator may arrange a preliminary meeting to discuss the details of the arbitration process with all of the parties, and document them in a written arbitration agreement, in order to avoid misunderstandings later on. (Even if a preliminary meeting is not held, details of the process should be documented in an arbitration agreement.)

Issues that should be decided at the preliminary meeting and documented in the arbitration agreement, in addition to the arbitration rules that will apply to the process, include:

- dates for the exchange of information
- whether evidence will be presented orally or in writing
- the use of attorneys and experts
- how the fees of the arbitrator and other expenses will be paid.

4. 12 The Arbitration

The arbitrator notifies each party about when the arbitration hearing will take place. If the issues are complex, more than one session may be required.

The arbitration hearing takes place in a location selected by the parties. The parties may sit at a table with the arbitrator or at separate tables opposite the arbitrator. Each party presents its case to the arbitrator, supporting its arguments with evidence and sometimes with witnesses. The person with the problem usually goes first. The arbitrator controls the process and has the power to decide what evidence will be accepted (it must be relevant to the case), when witnesses can be called, when the other party can ask questions, and so on. The arbitrator may ask questions of the parties or the witnesses to clarify issues.

All parties have an opportunity to summarize their cases at the end of the hearing.

The arbitrator considers the evidence given and arguments advanced by the parties and then makes a decision that takes into account the legal rights of the parties. Generally the decision is made in writing, and it may include the arbitrator's reasons for making the decision.

The arbitrator no longer has any jurisdiction in the matter once the decision has been made. In the majority of cases, parties abide by the arbitrator's decision. However, if necessary, a party can apply to to have the arbitrator's decision made an order of court which can then be enforced like any other court order.

4.13 Arbitration Step-by-Step

1 If you want to resolve a sectional title dispute through arbitration, having already considered or attempted negotiation and mediation, issue a notice of dispute setting out the nature of the dispute and serve it on the other party to the dispute, the trustees and the managing agent, if any.

2 If the dispute is not resolved within 14 days of the notice, either party can issue a demand for referral to arbitration

3 Independent, suitably qualified and experienced arbitrators can be found through arbitration organizations, the National Associatio of Managing Agents, a local Law Society, and personal referrals.

4 If the parties are unable to agree on an arbitrator, either of them can apply to the local Registrar of Deeds for the appointment of an arbitrator.

5 The arbitrator may call a preliminary meeting to decide on the details of the arbitration process. The parties and the arbitrator should sign an agreement setting out the various details, including the provision of security for costs of the arbitration.

6 At the arbitration hearing(s), the arbitrator hears the evidence and arguments of each of the parties.

7 The arbitrator issues a final and binding decision, usually in writing.

8 Any affected party may apply to the High Court for an order enforcing the decision.

5. Litigation

5.1 Introduction to Litigation

This section sets out the litigation process in general terms. It refers to litigation in the High Court only. The information contained here is not necessarily complete and is not legal advice. Every sectional title dispute is different, and legal advice should be sought in each case.

5.2 What is litigation?

Litigation is a formal process for resolving disputes in court, based on the rights of the parties involved. It is by nature an adversarial process. It is governed by extensive rules that are designed to increase the likelihood that all of the relevant facts are known by all parties.

If you believe your rights have been infringed by someone else, you have a cause of action against that person or group of people. (An action is a lawsuit brought against another person.) As the complaining party (normally called the plaintiff), you have to prove the facts that you say support your cause of action. The other party or parties (normally called the defendant) try to either show that those facts do not exist, or prove other facts that show that you should not be given what you are asking for.

Each party puts its best arguments forward and a judge determines which party is responsible and should pay to remedy the problem. The court recognizes certain rights and will only allow the plaintiff to succeed if one or more of those rights have clearly been infringed by the other parties.

5.3 Advantages of Litigation

Mandatory	Litigation does not rely on the cooperation of all parties. Litigation requires all parties to participate, and has strict and extensive rules to govern participants' actions throughout the process.
Disclosure	Litigation provides processes that ensure full disclosure of all relevant information, and that test the honesty of the parties and the accuracy of the evidence.
Certainty	Litigation inevitably results in a final decision that can be enforced by the court.

5.4 Costs of Litigaton

The costs of litigation can be extremely high, and being the successful party does not necessarily mean you will recover those costs. Costs include the attorney's fees - usually called "legal fees" - and various other fees and out-of-pocket expenses, or "disbursements."

Attorneys normally charge on an hourly basis, with rates varying from as low as R350 for newly qualified attorneys to R1200 or more an hour for senior attorneys. It is also common for more than one lawyer (advocates, attorneys and articled clerks) to work for a party in a sectional title dispute.

While it is difficult to estimate legal fees, you should ask your attorney for a budget of anticipated legal fees.

Disbursements include everything else - for example, any expenses incurred by the attorney while working for you (telephone, fax, couriers), fees for filing and serving court documents, and fees for expert reports, transcripts and so on. Over the course of a lengthy court case, disbursements can be very costly.

The unsuccessful party in a court action is usually required by the trial judge to pay the costs of the successful party. The specific amount to be paid is based on a tariff set by the court rules. The attorneys and advocates employed may charge at rates higher than the tariff. Only very rarely does the successful party recover all of its costs; a more common amount recovered by a successful party would be only 60 percent of legal fees and disbursements.

When selecting an attorney and advocate, ask about the fee structure such as hourly rates, retainer requirements and anticipated timing of any payments required. Some attorneys will provide an initial consultation at a nominal fee.

5.5 Finding the right Attorney

For sectional title disputes, select an attorney who specializes in or at least has a good working knowledge of the Sectional Titles Act . You may also need a specialist trial lawyer, known as an advocate.

You can get referrals from others who have gone through similar disputes. Find out if they were pleased with the final results. Don't make your selection based on unrelated work an attorney did for you or someone else (like a divorce or will).

Develop a shortlist of the attorneys that appear best qualified to provide the services you require, and with whom you are comfortable. Meet the candidates, ask questions, then make a selection.

SELECTING AN ATTORNEY

It is important to know the experience and qualifications of the attorneys you consider.

Let the candidates know if you are representing the trustees of a sectional title body corporate or yourself.

During your selection process, determine the following:

- What experience does the attorney have working with sectional title issues? How long has the attorney worked in sectional title law?
- Ask if there might be any conflicts of interest.
- If representing a body corporate, would the attorney be willing to attend body corporate and trustee meetings to explain issues and respond to questions from the owners and trustees?

5.6 Consulting an Attorney

When consulting an attorney, take the current rules of the scheme and all other relevant documents and information with you, including the names and addresses of the parties you believe have been involved in creating the problem. You should be able to describe the nature of the problem as fully as possible, and explain why you think the parties you have identified may be responsible.

At an initial consultation, or after the attorney has done a preliminary investigation and review, the attorney should be able to advise you on:

- whether the problem you have discovered is likely to give rise to a valid cause of action
- whether the dispute involves complex or simple issues
- which parties, generally, might be responsible for of involved in the solution of the problem
- what further steps need to be taken to determine the best way to proceed.

5.7 Collecting and organizing the facts

Once involved, the attorney should guide the investigative process, since one of the primary concerns will be whether there are sufficient facts to establish a valid cause of action against other parties.

A thorough review of the documents you have provided, as well as interviews with people who have been involved in any of the issues giving rise to the dispute, will help the attorney to:

- determine which matters require further investigation, and
- identify the parties against which an action should be commenced.

5.8 Expert advice

Obtaining expert advice on matters that others cannot properly give opinions on in court is another key part of the fact-finding process. When the matters are technical or complex, experts are needed to review and assess the facts and physical evidence. Their advice and evidence are used initially in discovering the nature of the problems and eventually in proving the plaintiff's case against the defendants. Expert advice can also be useful in identifying the parties against which an action will likely be successful, as well as the merits of the defence and the expert opinions put forth by other parties.

In sectional title disputes that involve building maintenance or repairs, expert opinions are often required. Where the dispute involves the principles that underly levy calculation and collection a lawyer may be the appropriate expert, whereas in matters of bookkeeping and financial analysis an accountant may be more suitable.

Experts are best retained through a attorney, or at least with the involvement of a attorney.

5.9 Assessing the law

While collecting and reviewing the facts, the attorney is also assessing the legal issues required to establish the cause of action. These processes - discovering the relevant facts and identifying the issues and applicable law - progress at the same time. The legal issues help to define which facts are most relevant, and the facts show which legal issues are in play.

The attorney assesses the law by looking at past cases that had similar facts. Reviewing the decisions of the courts helps the attorney to determine the strength of a cause of action and which facts are most important. Assessing the law and the legal issues also helps the attorney to identify the parties against which an action should be commenced.

5.10 Before the trial

5.10.1 Prescription Periods

A court action must be commenced within a certain time period. If you don't commence an action in court before the relevant prescription period expires, you lose the right to sue.

5.10.2 Commencing an Action

Once the attorney understands the relevant facts and knows what law and legal issues apply to the dispute, an action can be commenced. Actions are commenced by issuing a summons and serving it on the defendants.

The Summons informs the defendants that an action has been commenced against them, and that if they fail to respond to it within the specified time period, judgment will be taken against them.

The summons includes Particulars of Claim, in which the plaintiff sets out the facts that establish the cause of action brought against the defendants. The Particulars of Claim are extremely important, because they define which matters are important in the case. This allows the defendants to know how to defend themselves, and informs the court about the case.

In response to the Summons, each defendant files an Appearance to Defend. An Appearance to defend is a simple document that tells the plaintiff and the court that the defendant intends to defend the action, and identifies the attorney acting for that defendant.

In response to the Summons, each defendant files a Plea, which tells the plaintiff, other parties and the court why that defendant says it is not liable, and which sets forth the defendant's defence to the action.

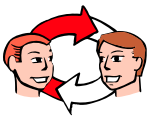
If a defendant says that other parties are liable for the plaintiff's problem, it can make those parties participate in the litigation by a process known as Joinder. This informs the new party and the court why the defendant says that the new party (the third party) should be held liable to the plaintiff.

5.10.3 Collecting and Exchanging Documents

Each party - the plaintiff, the defendant(s) and any third parties - must collect all documents that have any relevance to the claims and defences, and give them to its respective attorney. Each attorney then prepares a list of the documents which, in the attorney's opinion, should be disclosed, and gives the list to the other parties. The other parties can then ask to see and get copies of all of the documents on the list, or only those which are of particular interest. This way, each party has the opportunity to review the evidence that might be produced by every other party. In sectional title disputes,

especially those involving structural issues, building maintenance, the interpretation of the rules or accounting issues there may be hundreds of pages of relevant documents.

5.10.4 Pre-Trial Meeting



Before the trial the parties' legal representatives must meet to try to limit the issues in dispute and obtain agreement where possible so as to limit the length of the trial. A record of the meeting is supplied to the court.

5.10.5 Interlocutory Applications

Before a trial, there can be issues that need to be resolved in order for the parties to prepare for the trial, and on which the attorneys cannot agree. These issues often concern procedure. They are called interlocutory because they arise before a trial.

When this happens, the parties go to court and have a judge determine what should occur. An application to the court for the settling of an issue before trial is called an interlocutory application. The nature and number of interlocutory applications differ in each case.

5.10.6 Expert Reports

During the preparation for a trial, many facts cannot be determined by the parties without expert opinions - especially when matters are technical and beyond the knowledge of an ordinary person.

The rules of court contain specific provisions for expert reports; they must be provided in a specific form and exchanged between the parties in a certain time frame. If these requirements are not met, you may not be able to rely on the expert evidence you have obtained.

5.10.7 Getting a Trial Date

A trial date can be set when the parties have completed their Pleadings. The Plaintiff's attorney usually applies for a trial date and the Registrar of the court allocates a particular date. If the Plaintiff's attorney does not apply for a trial date the Defendant's attorney may do so.

5.10.8 Settlement

The fact that a court action has commenced does not rule out attempting to settle the dispute in other ways. The parties can reach a settlement at any time before or after a

judgment is granted. The rules of court include a number of procedures designed to assist the parties in reaching a settlement. Any party can deliver formal offers of settlement to the other parties at any time before the judgment is granted. There may be consequences for parties not accepting settlement offers.

The parties can also arrange and participate in mediation and/or arbitration while preparing for a trial, in an attempt to settle the case. In addition, if a formal settlement offer is made during the trial, the parties may ask the judge for an adjournment while they negotiate the settlement.

5.11 The trial

The trial includes several distinct stages. The plaintiff's case is presented first. The advocates usually:

- make an opening statement outlining their party's case that will be presented and the issues to be decided by the court
- tell the court what witnesses will be called and what their general evidence will be.

Then the plaintiff's advocate calls witnesses and examines them under oath. Each of the other parties has an opportunity to cross-examine each witness, including expert witnesses. Once all of the plaintiff's witnesses have been called and the defendants have cross-examined them, the defendants' cases are presented. The plaintiff's advocate can cross-examine each witness.

When all of the parties have presented their evidence, each is given an opportunity to make closing arguments, which usually include a review of the evidence and a submission concerning the applicable law. The advocates try to convince the court to grant judgment in favour of their client.

The judge then renders a decision, either orally immediately after the closing arguments, or, more commonly, in writing at a later date. Typically, the decision will say:

- who was successful
- what compensation or order the successful party is entitled to, and
- who will pay the costs of the legal action.

5.12 Appeals

After the parties receive the judgment, they may ask for leave to appeal. Usually, a party cannot appeal the judge's findings of fact. In other words, when a judge

decides that certain facts are true, a party cannot appeal this decision even if it thinks those facts are false. Appeals usually concern the manner in which the law is applied to the facts.

5.13 Litigation Step-by-Step

1 You start by consulting an attorney, take all relevant documents and the names and addresses of the involved parties. Be prepared to describe the problem as clearly as possible, and to explain why you think the other party or parties are responsible.

2 The attorney will advise you on whether there is a valid cause of action against other parties. If there is, the attorney then guides the process of discovering the facts. This process could include reviewing your documents, interviewing the parties involved, and seeking expert advice. While discovering the facts, the attorney also assesses the legal issues.

3 When the attorney understands the facts and legal issues, he or she commences the action by filing the Summons including Particulars of Claim with the court and serving them on the defendants. The action must be commenced within the relevant prescription period.

4 Each defendant files an Appearance to Defend in response to the Summons, and a Plea in response to the Particulars of Claim. If a defendant believes someone else is responsible for the problem, the defendant may apply to have that party joined as another party to the litigation.

5 The attorney for each party makes a list of all relevant documents in that party's possession and which in the attorney's opinion should be disclosed, and gives the list to all other parties. The other parties can then request copies of the documents they wish to see.

6 The attorneys arrange a pre-trial conference to limit the duration of the trial.

7 The attorneys apply for a trial date.

8 Any party can deliver formal offers to settle to other parties any time before the judgment is granted. Parties can also participate in mediation and/or arbitration at any time before the trial. In addition, if a formal settlement offer is made during the trial, the parties may ask the judge for an adjournment while they negotiate the settlement.

9 At the trial, the plaintiff's case is presented first, with the plaintiff's advocate introducing the case and examining witnesses, and the defendants' advocate cross-examining the witnesses. The defendants' advocate presents his witnesses, who are then cross-examined by the plaintiff's advocate. The judge is also entitled to question the witnesses to clarify any matter. When all parties have presented their evidence, each makes a closing argument. The judge renders the decision.

10 A dissatisfied party may apply for leave to appeal the judge's decision - specifically the judge's application of the law to the facts.