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13 January 2017

Property Law Review
C/- Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001
Via email: propertylawreview@justice.qld.gov.au

Dear Sir / Madam

**RESPONSE TO THE PROPERTY LAW REVIEW ISSUES PAPER 4: PROPERTY LAW ACT 1974 (QLD) – MORTGAGES, CO-OWNERSHIP, ENCROACHMENT AND MISTAKE**

We refer to the Queensland Government Property Law Review Issues Paper 4.

Strata Community Australia (Qld) ("SCA (Qld)") thanks the Honourable Attorney-General and Minister for Justice Yvette D'Ath MP for inviting submissions in relation to the Issues Paper 4.

## Introduction

SCA (Qld) is a non-profit, professional organisation for bodies corporate, body corporate managers and suppliers of services to the body corporate industry in Queensland. SCA (Qld), through its predecessor CTIQ, was established in 1984 and currently has more than 600 individual and 230 corporate members. SCA (Qld) members administer more than 65% of all strata titled properties in Queensland and up to 90% of all managed properties.

The core objectives of SCA (Qld) include:

- representation on body corporate and community title issues to Government;
- educating the general community on strata management and lifting the profile of the profession;
- provision of ongoing professional educational development to its members;
- facilitating relationships between members, government, sponsors and suppliers of services; and
- the establishment and maintenance of professional standards of practice for SCA (Qld) members.

SCA (Qld) works closely with the Office of the Commissioner for Body Corporate and Community Management in Queensland and has a well established relationship with the Attorney General in regards to body corporate matters. The nature of our organisation enables us to assist in advising on strata community title living.

The submissions on the various questions below are consistent with what SCA (Qld) considers to be most appropriate in the context of a community title scheme.

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**53. Do you think the use of a minimum compensation measure which is calculated on the basis of the unimproved capital value of the subject land is still valid for the purposes of the PLA? Please provide your reasons for your view.**

No, unimproved capital value is no longer a relevant concept with respect to compensation for encroachment. Market value should be used instead. Market value should be used because the nature of the encroachment may have an impact upon the market value but not the unimproved capital value. For example an encroachment that takes away a view or which renders a particular use difficult, may have minimal impact upon the unimproved capital value of the land but a significant impact upon the market value.

**54. Do you think imposing a penalty amount of three times the unimproved capital value of the subject land where the encroaching owner cannot satisfy the court that the encroachment was not intentional and did not arise from negligence is appropriate? Please provide your reasons for your view.**

Yes, a three times penalty for the (market) value of the subject land encroached upon would be an appropriate penalty, subject to one proviso. The penalty should be the greater of the three times market value or another amount the court considers appropriate. The danger with any formula for a penalty which prescribes a maximum is that a deliberate breach may be invited where the capital value of the encroachment is less than even the three times penalty.

**55. If the measure of compensation is retained, do you think the term 'unimproved capital value' should be updated to 'market value' or a similar term to reflect the current measure of property value?**

No, unimproved capital value should not be used. Market value should be used.

**56. Do you think the compensation provision should expressly clarify the position in relation to the payment of compensation where the encroachment was not erected by the encroaching owner? Please provide your reasons for your view.**

No, a subsequent purchaser of the encroaching land should be vicariously liable for the actions of their predecessor in title. If they are forced to pay a penalty as a result of the actions of their predecessor in title then they should pursue the predecessor in title.

Making a purchaser vicariously liable for the actions of their predecessor in title will have the effect of encouraging boundary surveys to be conducted where there is doubt as to the property boundaries and potential encroachments. This will lead to a more accurate freehold land register as there will be more frequent resurveys of boundaries.

While there would be an increase in transaction costs as a result, that increase will be unevenly distributed (in practice only the buyers of properties with the potential for an encroachment would have a boundary survey conducted).

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**57. Do you think the court should simply be provided with a broad discretion to order the payment of compensation at an amount determined by the court? For example, under the Western Australian legislation, the payment of 'any sum or sums of money' as the court thinks fit. In New Zealand reasonable compensation can be ordered as determined by the court where one or more other relief options have been ordered.**

Yes, the court should have a broad power of discretion to order compensation.

**58. How much guidance do you think the encroachment compensation provision should provide to the court when exercising its discretion to order compensation?**

The provisions dealing with encroachment compensation should provide a starting point for the court only. The court should be free to take into account such matters in the circumstances as it considers appropriate. The discretion however would be limited in that the minimum amount of compensation that could be awarded would be firstly in the case of a "innocent" encroachment the market value of the encroached land and secondly in respect of a deliberate encroachment a minimum of three times the market value of the encroached land.

**59. Is there a case for a consistent approach to the calculation of compensation more generally under the PLA?**

Yes, there is a case for a more consistent approach to the calculation of compensation, from the perspective that once the minimum costs flowing from an encroachment are understood they will provide a genuine disincentive for potential encroachers to wilfully or negligently erect structures that encroach.

**60. Are you aware of any particular reasons arising from your practical experience with the encroachment provisions which would support a change to the current legislative approach to calculating compensation?**

No.

**61. Do you think the definition of 'subject land' needs to be expanded to accommodate land 'reasonably required as curtilage and for access' to the encroachment? Please provide reasons for your view.**

Yes, the definition of "subject land" should be expanded to provide for curtilage and access so as to ensure that an encroachment dispute is finally determined and does not result in further disputes about access to the encroaching structures.

**62.Do you think there is any benefit in adopting an approach similar to Part 6, subpart 2 of the *Property Law Act 2007*(NZ),which creates a single category of 'wrongfully placed structures' and a single, consistent approach to providing relief to the affected land owners? Please provide your reasons for your answer.**

No, the fundamental difference between encroachment and wrongfully placed structures is that encroachment does and should continue to deal with lands that are adjacent to each other whilst wrongfully placed structures can deal with lots which are not related in any way. There are underlying conceptual differences between the two scenarios which should be reflected in the provisions dealing with each.

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**63. Do you think the mistaken improver provisions in sections 196 to 198 of the PLA should be retained?**

Yes, the mistaken improver's provisions should be retained.

**64. Is it the case that the incidence of building on one allotment in mistake for another (particularly in the case of large scale developments) remains common?**

No, the incidence of a building being constructed on the wrong allotment is, in our experience quite low.

**65. Are you aware of how regularly issues which would fall within scope of sections 196 to 198 of the PLA arise in practice?**

Tthe lead author of these submissions (Michael Kleinschmidt) has not come across an instance of mistaken improvement in over 15 years of practice.

**66. Do you think there is any benefit in adding further guidance within Division 2, Part 11 in terms of what the court may have regard to when determining whether or not it will make an order for relief?**

No, there is no benefit in providing any further guidance within division 2 part 11.

**67. Do you think the meaning of a 'lasting improvement' is clear under Division 2, Part 11 of the PLA?**

Yes, the definition of lasting improvement is sufficiently clear.

**68. What is covered by the term 'lasting improvement'?**

SCA (Qld) understands a 'lasting improvement to be any improvement of a non-temporary nature.

**69. Should the term 'lasting improvement' be defined in the PLA in a non-exclusive way? For example, to clarify that fences are not intended to be an improvement?**

Yes, if it is necessary to define "lasting improvement" then it should be drafted in a way so as to provide non limiting examples that deal with the most common mistaken improvements such as fences, garages or associated "outbuildings".

Generally the issue of encroachment and wrongful improvement is one that can occur in the context of a Community Title Scheme given the decision in *Macdonald & another v Clark & another [2012] QSC418 (21 December 2012).* Particularly the exclusive operation of chapter 6 of the *Body Corporate & Community Management Act 1997* is not engaged in circumstances where the relief sought is a transfer of the subject land of an encroachment.

Accordingly it is entirely possible, and indeed as occurred in the *Macdonald* case that there will be an encroachment from one Lot in a Community Title Scheme into another. In that circumstance SCA (Qld) recognises and endorses the primacy of the Supreme Court in dealing with disputes in relation to the ownership of land.

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## FURTHER INFORMATION

In conclusion, the SCA (Qld) Legislation Committee has discussed many of the proposed items in detail which could not be reflected adequately in this submission. Our Committee consists of various stakeholders in the sector and we would appreciate an opportunity to speak to the QUT Property Law Review Panel to explain some of the consequences the ne lot entitlements model may have. In this regard, the Panel may contact:

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Sincerely

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