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FORUM 9/07/17 – LEGAL MATTERS

'Co-operative Residential Title Shares (CRTS)'

Apologies to those who couldn't make it to the forum due to the clash with the Bellingen Music Festival. Thanks to all who sent questions.

The forum, requested by the previous forum on 28/6/17, was well attended with nearly 40 members and a few visitors. It started with a 2-hour session of questions & answers with Nigel Hill, Bundagen's solicitor. Nigel has 25 years' experience as a lawyer specialising in Co-operative Law. He knows Bundagen well, after representing us during the Arbitration of 2013-14, and visiting us twice.

The Arbitration highlighted some potential problems and this is why the Co-op started looking at how to modify the legal structure for long term sustainability.

In his introduction, Nigel stated that Residential Members already have an **implied** Licence to Occupy (as

was established in the final judgement of the Arbitration). This Licence to Occupy seems to have worked for the last 30 years, so why change? The answer is that there are several areas where it exposes the Co-op to danger. For example, it is uncertain how the Licence to Occupy interacts with the Residential Tenancy Act. If we were found to be under the Residential Tenancy Act, there would be changes to Bundagen's structure and liabilities which would fundamentally change how the community operates, not necessarily in accordance at all with our values. Also, currently, the Co-op and all its members could be liable for accidents and injuries caused by just one member's negligence, with potential for massive payouts. Another issue is the inability to get loans or Owner Builder Licences under the present arrangement.

Questions & Answers with Nigel Hill

Numerous questions were put to Nigel; here's a summary of what was discussed, with added information obtained from Nigel after the forum.

What is the Co-operative Residential Title Shares (CRTS) scheme?

The CRTS scheme is the legal model Nigel has recommended for Bundagen. The CRTS are similar to Company Titles, which have been around for 100 years. Nigel pointed out that there are a number of Company Title schemes in Sydney and there are at least two other Co-ops using CRTS.

With Co-op Title Shares, which are different to the current ones, Resident Members would have their rights and obligations in relation to their structures **attached to** their shares. Members' shares would

henceforth be the instrument by which members secure their rights, in the same way that Company Title Shares confer rights to Company Title holders.

What would be the advantages of the CRTS?

The CRTS scheme is designed to give Resident Members

explicit exclusive rights of occupancy (this might help Resident Members get the Owner Builder Permit). The CRTS would also reduce the Co-op's liability in case of accidents (as Resident Members would be responsible for their structures). CRTS would also exempt us from the Residential Tenancy Act

(there is an exclusion in the Residential Tenancy Act for Co-operative Titles). It would also be a more attractive proposition for banks which may be more prepared to lend, since they are already familiar with Company Title

What about Non-Residential Members?

Nigel advises that Non-Resident Members could retain their shares which would give them rights to communal areas, but no exclusive rights to particular structures (keeping the *status quo*). In effect, there would be two categories of shares, one for Resident Members and the other for Non-Resident Members. Non-Resident Members would retain full voting rights. A Non-Resident Member could also still apply to become a Resident Member, following the same procedure we currently have in our By-laws.

schemes. Nigel added it would ultimately be a matter for the community to decide whether loans from banks would be allowed and, if so, under what circumstances. Although Resident Members would have exclusive rights of occupancy, that is, they can exclude other people from their structure, the Co-operative would still own individual structures and retain control on who buys in. The exclusive rights would also go hand in hand with obligations on the member similar to the obligations under our existing By-laws.

How would the CRTS work?

Shares would be identified by numbers and would confer rights to particular structures. The shares would also spell out the rights and responsibilities of Resident Members, marrying to the shares the rights and obligations we have under the present implied Licence to Occupy through our Rules and By-laws. As the right to occupy the structures would be attached to the shares, the shares would be more valuable (that is, price of shares plus price of structure). We could either convert the existing shares or issue new shares (this is still to be determined). There could be two sets of shares: the current ones (same for Resident Members and Non-Resident Members) and additional allocation of shares for Resident Members, OR the same shares as now, but with an extra part – the exclusive right of occupancy - for Resident Members. We could go either way. Whichever is the easiest.

Are CRTS the same as Strata or Community Title? Is it a subdivision? Would the DA with Council be changed?

CRTS are NOT the same as Strata or Community Title. It is NOT a subdivision. There are recent court decisions on this matter. No change in DA would be required. And the Co-op would unquestionably remain a not-for-profit organization.

What are the rights and responsibilities of Resident Members under CRTS?

The CRTS is an entirely flexible structure that can be crafted to give similar freedom and flexibility to what currently exists. The key goal with the scheme is to replicate what currently works while addressing what doesn't. Resident Members would continue to be liable for repairs and maintenance to the structure(s) on their shares, safety, insurance etc. This would be spelt out clearly on the CRTS (and it would be left to the member to decide to do these things).

Would the Resident Members own their house?

Will the Resident Members own the structure and structural components? No, since these will remain fixtures on Bundagen land. They will have the exclusive legal right to occupy the structure.

What about liability in 'areas of responsibility' and shared facilities?

The CRTS would be over the Residents Members' structure(s) ONLY, and the community would need to work closely with Nigel to draft non-exclusive rights to areas of responsibility, expanded house common areas, village commons etc. As a general principle, the responsibilities will be modelled on what is already in our By-laws and/or current practice. One of the key advantages of a CRTS is that there is a significant amount of flexibility to how we design it. The CRTS can be implemented without borders and subdivisions.

Would the Co-op be liable if an accident occurs in a non-compliant structure, as the Co-op would still own all structures?

With CRTS, it would be the member who would have the liability. If an accident were to occur, the victim's solicitor would presumably be looking at suing both the member and Bundagen, but the CRTS will point the responsibility to the Member who had exclusive rights to the structure(s). Nigel pointed out that, under the Civil Liability Act, where two or more people are sued for the

What's the 'carrot' for Residential Members?

- a) The CRTS would spell out for the first time that members have exclusive rights of occupancy, and it will leave freedom to Resident Members to do what they want in their place (in terms of insurance, compliance, safety, repairs etc.).
- b) If there is a catastrophic accident in one of the homes, other members and the Co-op as a whole wouldn't be liable for it.
- c) Resident Members couldn't be kicked out of their homes as if the Co-op was found to be under the Residential Tenancy Act (note: under the CRTS, the expulsion procedure would remain as it is in our By-laws).

There would be NO changes for Non-Resident Members.

same loss, the Court is required to apportion responsibility between them. In doing so, it would review the CRTS scheme in place and note that the member had exclusive rights and responsibilities to the structure and that the Co-operative had carefully considered the allocation of responsibility for these matters and concluded that it was not appropriate for the entire community to bear the responsibility for the default of one member. The Court can't base its decision on the size of pockets; it would depend on circumstances and the proportion of liability will be up to the Court but, in Nigel's view, the Court is likely to apportion most of the responsibility to the member in view of the CRTS scheme. In other words, the CRTS would put the Co-op in a much better position to defend itself against such a claim.

When a structure transfer occurs, the Co-op would cancel the shares of the seller and issue new shares for the buyer. The Co-op would have a disclaimer that it is up to the buyer to assess the risks him/herself and that

the Co-op gives no warranties or guarantees, as is the case in any house sale in Australia. So the Co-op would be able to effectively limit any liability for transferring a non-compliant or unsafe structure.

Where would the insurable interest vest with structures?

The CRTS will spell out that Resident Members have the insurable interest in their structure(s). Presently it is a grey area.

What about fines from Council, as has happened in other communities?

The CRTS would have a strong influence on preventing the Co-op being fined for non-compliance of a member; only the member would most likely be fined (or if both Bundagen and the individual were to be fined, it could be strongly defended in Court that it is the member's responsibility and therefore Bundagen is not liable).

How much money and administrative work would the CRTS scheme entail? How long would it take to set up?

\$15,000 was the original quote, and Nigel doesn't think it will be more than that. It could be much less depending on how much work we do ourselves. The CRTS scheme could be ready to be presented to a GM before the end of the year, perhaps within 3 months. We have everything we need so far with the current By-laws and Agreements, and what Nigel has researched already. A second opinion could be sought from a barrister (extra cost) if we wish.

Wouldn't considering Members' structures as 'Chattels' (as in Tuntable Community) be simpler and less expensive than CRTS?

Nigel is of the view (without in any way disparaging a sister community scheme) that the Chattel scheme presents some difficulties. In Property Law there is a distinction: chattels are movable structures and categorized as "personal property", whereas land and buildings fixed to the ground ie immovable are what is known as "real property". Nigel believes there is a degree of artificiality in saying that a building structure that is clearly affixed to land is in some way "moveable". The communities that have adopted "chattel" schemes have suggested that there are some cases that support this; Nigel has reviewed these cases and is not convinced they are sufficiently strong enough to base the entire community's legal structure on it. Even with By-laws saying the structures are chattels, it is a grey area as to how it would hold up in a Court of Law, as, by Common Law, all structures belong to the owner – Bundagen Co-op. Nigel advises that if Bundagen embarks on a restructuring, it should be to secure more certainty, not less, and he fears that the chattel arrangements will simply exacerbate uncertainty. On the contrary, he believes the Title Shares scheme, being long recognised, will deliver far more certainty and security. Nigel also pointed out that in the chattel

schemes, sale of the structures could be liable for stamp duty.

What about couples and couples splitting up, members changing sites or temporarily without a site?

These issues exist regardless of what scheme we adopt. To the extent that there are current arrangements dealing with these issues that work, they would be adopted. To the extent that there aren't, we would need to work together to come up with acceptable solutions. There is no reason why special provision couldn't be made for "floaters". It would be the same as the Licence to Occupy. CRTS won't add any complexity to it, it will continue as is.

What about bank loans?

CRTS should make it easier to borrow money as banks are familiar with Co-op titles. However, as such loans might involve default and banks involving the open market, the consequences of such personal loans will need to be thoroughly investigated as a separate matter to the CRTS scheme. Nonetheless the CRTS may facilitate the option, if the community decided that it was prepared to allow residents to raise finance (whether on a case by case basis or more generally). In other words, the CRTS would leave the door open to the option, but ultimately whether it is allowed will have to be determined by the community, independently of the adoption of the CRTS.

What are the tax implications for the transfer of structures? Stamp duty? Capital Gains Tax? Is Bundagen liable? Could the CRTS be seen as a device to avoid tax?

With CRTS, the valuation process and transfer would be the same as it is presently. It wouldn't be a 'sale' as the Co-op would cancel the shares and then issue new shares to the buyer. This is not fundamentally different to the current arrangement. CRTS wouldn't attract stamp duty and tax. There could be Capital Gains Tax implications based on how much you have contributed to the increase in value. However, where residences are primary residences there would be no liability. The current arrangement for transfer could stay in place. The same would apply if someone dies, that is, the estate would have to wait for an incoming Residential Member and would have the rights and responsibilities meanwhile; this is standard everywhere.

What in case of bankruptcy? What is the risk?

The risk is there with the Licence to Occupy and would be the same.

What about children and visitors?

Unless we change something, the existing By-laws will continue with CRTS. The children's position would be much the same as it is now, but with the added security of their parents having Title Shares to the family home.

The forum continues...

After Nigel left, about a third of the members present stayed to discuss in small groups. Further questions were asked that have been answered by Nigel. The answers are either included in previous questions, or are below.

What happens to the By-law which says members can demolish and remove dwellings anytime they want?

If the community want to preserve the right for a residential member to demolish and remove, then this could continue, though Nigel suspects that this, in reality, would not be a particularly attractive (or feasible) option for a departing Residential Member anyway.

After the CRTS, do we need to look at further protection for the Co-op?

The CRTS is not the ultimate solution to all issues. It is always a good idea to look at further tweaking or additions.

Should we look at exemption from the Residential Tenancy Act if the CRTS doesn't come to fruition?

Nigel thinks it would be desirable.

What happens when a new Resident Member is accepted and they buy a structure?

The Resident Member does not buy the structure(s); they are issued with Title Shares that confer the right to exclusive occupy the building.

What happens when a Non-Resident Member is accepted as Resident Member, are they issued new shares (and their old 'ordinary' shares bought back)?

That would be the preferable option, but we would need to expressly provide for this in the Constitution.

Are CRT shares issued recorded in the current membership register along with old shares, or will we need to start a new/separate register?

Title Shares will be part of the formal share register.

Will the non refundable joining fee be recorded?

Not on the shares.

How are the current and future Rules, Bylaws and Agreements (i.e. member's responsibilities) attached to the shares?

This would involve some legal drafting.

Does a valuation or agreed price of, and map reference of the subject dwelling, need to be recorded?

Certainly, we will need map references recorded. The valuation and agreed price could be kept much as it currently is.

Are sale/purchase transactions made via a Coop bank account or some holding facility or can they be direct?

It would be preferable that it be via the Co-op bank account, but it could be structured so that the funds go direct and instead we simply have a journal entry

in the Co-op books.

What is the work we could do to get this proposal ready for a GM? Could we have a detailed plan?

Bundagen would need to set up a team and break the project down into components and allocate different components to different people. Not much point in getting into that detail unless and until the community expresses its view about the scheme.

Yes, a detailed plan would be provided by Nigel for us to work from.

What are the next steps?

A forum/Special CM to:

- Discuss the CRTS scheme further, informing those who couldn't come to this forum
- Set up a workgroup of dedicated people to work closely with Nigel
- Plan a Special GM to decide if the CRTS is the way we want to go (in November?).

DATE SUGGESTED FOR NEXT FORUM:

SUNDAY 13th or 21st AUGUST

(to be decided at CM 1st August)

What now?

One important point discussed at the second part of the forum was how to disseminate the information to those members who weren't at the forum, and include their opinions/comments. Suggestions included:

- Write a comprehensive report to be published in a Bundy Flyer and sent to members (a special mail-out to Non-Resident Members). **This is the report.**
- Have another forum sometimes in August (which could be a forum/special CM) for information sharing as well as how to move forward (for example, formulate a proposal for a Special GM maybe in November?).

- Set up a workgroup of dedicated members to do the legwork to help Nigel work out the details of the CRTS (and save money).

Other suggestions included:

- Looking at how Bundagen can help people make their structures safe.

If you have any comments or questions, please contact either of us.

Phil, Marijo & Réjane (vetted by Nigel Hill)