STRATA TITLES, MEDIATION AND RESTORATIVE JUSTICE MAKING OUR LIVES LIVABLE[1]

By Bertus de Villiers[2]

1. Introduction

Population density in Australian cities is on the increase. Apartments rise overnight like anthills. Residential blocks that once upon a time seemed too small for one house, are now subdivided into two or more lots. Strata title is seen as the way to manage our closeness and the population growth. It is widely accepted that in order to accommodate Australia's future growth, our cities would have to 'go up' and people would have to 'get closer'. As Forster & Hamnett observed:

> All five major Australian cities have prepared revised metropolitan strategies in recent times which aim to accommodate at least 60 per cent of future urban development within growth boundaries.[3]

As neighbours, we are getting closer to each other. We hear each others' music, teenagers, pets, working in sheds and walking as if the activities are taking place in our own home; and, we often do not like what we hear or see. The closer we get to each other, the further we often grow apart. Kids playing in the backyard become a nuisance. A newspaper being delivered at 5.30 am leads to complaints. An air-conditioning unit that runs after 10 pm causes a ruckus. Junk mail being removed from a mailbox leads to strife. Some residents having a cuppa without inviting everyone in the scheme becomes a conspiracy. A car washed in the wrong area brings discontent.

But it is not all gloom and conflict in strata schemes. Hundreds of thousands, if not millions, of Aussies live and work happily in strata schemes.

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[1] Paper read at the conference entitled "Strata and Community Title in Australia for the 21st Century 2011" held under the auspices of Griffiths University from 7-9 September 2011.

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[3] Forster, C. and S. Hamnett (2008). "The State of Australian Cities" Built Environment **34**(3): 24-254.

Strata title enables us to take control of our neighbourhoods. It is local democracy in action. It clothes us with the power to make decisions that affect our lives. It provides a basis to work closely with neighbours for the improvement of living conditions. Strata title is, in effect, a fourth tier of government that often affects our lives more intimately than many decisions of any of the other tiers of government.

The closeness of living in strata schemes means the conflicts that arise are often unique in character. The conflicts regularly represent close encounters of a very personal kind. The disputes are frequently much more intense and personal than disputes between green-title neighbours. An unresolved dispute can affect an entire scheme. Strata title disputes are so much more than neighbours arguing. Strata title disputes can affect the soul of the scheme.

The way in which strata title disputes are resolved therefore becomes important for our peace and well-being. A dispute is not resolved just for the sake of making a decision as to who is the winner and who is the loser. Parties to a dispute must still live together in the same strata scheme. The settlement must, where and if possible, restore and build relationships.

'Mediation' and 'restorative justice'[4] have become key words to direct the mechanisms and procedures to resolve strata title disputes. There is a vast body of literature on mediation and restorative justice. The *State Administrative Tribunal Act 2004* (WA) (SAT Act) refers to 'mediation' but does not define it. The SAT Act does not refer to 'restorative justice'.

Mediation for purposes of this overview refers to -

> '… a method of dispute resolution which includes undertaking any activity for the purpose of promoting the discussion and settlement of disputes, bringing together the parties to any dispute for that purpose, and the follow-up of any matter being the subject of such discussion or settlement'.[5]

[4] Although restorative justice is mainly associated with proceedings and outcomes in criminal courts, the author contends that the general principles that underlie restorative justice can also be applied to the restoration of inter-personal relationships in an area such as strata title disputes.

[5] **Butterworths Business and Law Dictionary** (1997) Butterworths, Perth. For general background reading refer to Boulle, L., **Mediation: Principles Process and Practice** (2nd ed, LexisNexis, 2005); Della Noce DJ, Barush Bush RA and Folger JP "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy" (2002) 3 **Pepperdine Dispute Resolution Law Journal** 39 and Love, L, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) **Florida State University Law Review** 937.

Restorative justice for purposes of this overview -

> '…seeks the restoration of victims, offenders and communities primarily through mediated outcomes between victims and offenders - and in some cases their supporters - where they discuss what happened, in relation to harmful behaviour, and why it happened, and determine what offenders will do to make amends'.[6]

The experiences of the State Administrative Tribunal (SAT) of Western Australia has since its inauguration on 1 January 2005 gained valuable insight and experience in how mediation can contribute to restorative justice within strata schemes. These experiences are mirrored by developments in resolving strata title disputes other states. The contribution seeks to provide a brief overview from a practitioner's point of view of conflict resolution in strata schemes.

2. Restorative justice

Restorative justice has, as its origin, the criminal law and focuses on ways to involve the victim, the wrongdoer and the community in moving beyond an event that impacts on their lives. Reconciliation, restoration and building of trust are all elements of restorative justice. It also takes the mending of relationships outside the sphere of a strict judicial or legal process. A holistic approach is therefore taken to resolve a dispute and the consequences thereof.

The theory and practice of restorative justice can also be brought home under the resolution of disputes in strata title schemes. Where formal Court-driven alternative dispute resolution often focuses on the legal issues in dispute, restorative justice casts the net wider by looking at underlying values, emotions, causes and effects of actions.

Resolving strata title disputes often involves much more than a decision as to who is right or wrong. It requires an understanding of what caused a dispute to be brought to the Tribunal; what the options are to resolve the dispute and how the impact of the settlement can be managed. The scope of restorative justice therefore goes wider than just the issue at hand.

Although the mechanics of alternative dispute resolution and restorative justice may be similar, the underlying premise often differs. Restorative

[6] King, M, A Freiberg, B Batagol and Hyams, R, **Non-adversarial justice** 2009: 39 (The Federation Press Sydney).

justice is aimed at restoring a relationship and not at just solving a problem.

Members of SAT are, therefore, acutely aware that the way in which they conduct mediation in strata title schemes, the aim is not only to get an agreed outcome, but also to enable parties to restore, if possible, a relationship.

3. SAT's mediation procedures and experiences

The use of mediation to resolve strata title disputes or at least to clarify or reduce issues in dispute, is for all practical purposes, the default position for SAT. It is rare for a strata dispute to go directly to a hearing without any attempt by the presiding Member to assist parties to settle it by way of some form of facilitative dispute resolution.[7] A dispute may be referred for mediation with or without the consent of the parties.[8]

Facilitative dispute resolution can occur in a directions hearing or at a formal mediation or compulsory conference.[9] The use of facilitative dispute resolution contrasts sharply with the role and functions of the previous Strata Title Referee who did not have the power to mediate disputes.

In a short space of time, dispute resolution in strata title in Western Australia has shifted from a predominantly arbitration process to a predominantly mediation process.

In a recent assessment of SAT's mediation processes, a parliamentary committee found as follows after having considered submissions from the public:

> 'The Committee finds that the State Administrative Tribunal's mediations and compulsory conferences are effective'.[10]

The main characteristics of SAT's mediation experiences in strata title can be summarised as follows:

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[7] Facilitative dispute resolution refers to the active, hands-on involvement of the Tribunal in the settlement of a dispute by way of mediation; compulsory conference or directions hearings.
[8] S54(3) State Administrative Tribunal Act 2004 (WA).
[9] S52 State Administrative Tribunal Act 2004 (WA) deals with Compulsory Conferences but for purposes of this overview no distinction is drawn between the mediation processes within a formal mediation and a compulsory conference.
[10] **Report 14: Standing Committee on Legislation – Inquiry into the jurisdiction and operation of the State Administrative Tribunal** May 2009 (99).

- **Self-represented parties**

By far the majority of parties in strata title disputes are self-represented. This requires particular sensitivity by the presiding Member, for example:

- sympathy for the stress people experience when appearing in a hearing room;
- adopting informal procedures to make parties feel at ease but not so informal that the respect and dignity of a hearing is lost;
- showing an awareness that parties may lack an understanding of the complexities of the *Strata Titles Act 1985* (WA);
- knowing that parties would often not be aware of previous decisions of the Tribunal that may be applicable to their dispute; and
- being patient when parties so readily rely on 'legal advice' received from their strata manager, an officer at Landgate or administrative staff of the Tribunal.

Self-represented parties, however, also bring opportunities in restorative justice. Self-representation enables the Member to deal directly with parties, understand their issues, explore options with them and assist them to resolve disputes without getting bogged down in adversarial stand-offs that often characterise proceedings where parties are legally represented.

Self-represented parties often experience the Tribunal as a helpful resource to assist them to resolve a dispute, rather than a Court that tells them what the outcome should be.

There is also a greater sense of ownership when self-represented parties work out a resolution amongst themselves rather than to have it imposed on them. It is the experience of the Tribunal that after successful facilitative dispute resolution, parties often leave the room talking to each other, joking, or shaking hands. The atmosphere from the start of a mediation to the conclusion thereof, often changes dramatically. In this way the outcome of the proceedings contributes to harmony in a strata scheme.

- **Members as trained mediators**

All Members of SAT are trained as mediators. Although mediation training is done mainly by LEADR or IAMA, SAT has developed a unique style and blend of mediation that may, in some respects, deviate for classical mediation theory.[11] The purpose of this overview is not to do an assessment of the mediation style of SAT, but the general comment can be made that Members are often more actively involved to assist parties in reaching a resolution than the classical theory of mediation might envisage. A healthy mix of mediation and conciliation probably characterises SAT mediation.

The benefits of Members being involved in mediation and facilitative dispute resolution by way of directions hearings and mediation are obvious: Members are available on a full time basis:

- for mediation;
- Members are up to date with the most recent developments and decisions in strata title;
- Members develop a corporate knowledge base and style that facilitates dispute resolution by agreement; and
- Members attend from time to time professional development courses to ensure they remain abreast of recent developments in the field of mediation.

SAT is therefore a mediation-engine room where facilitative dispute resolution is not only a part of the game plan - it is THE plan.

- **Interactive directions hearings**

  The directions hearings are general programming hearing where matters of process rather than substance are considered. The directions hearings of SAT often serve a multi-purpose, namely:

  - clarifying issues to determine what the dispute is exactly about; ensuring that the application is well articulated and brought under the appropriate section of the *Strata Titles Act 1985*(WA);

[11] In a submission made by LEADR to a Parliamentary Committee on the operation of SAT, it was observed that: "The mediators do a good job but, based on my experience and anecdotal reports, it seems that mediators will often come close to expressing a view or in fact express a view, on the merits of the case as a method of, perhaps, progressing the mediation. That would not fall within the - if I can put it this way - pure LEADR style of mediation in which the mediator is entirely neutral and does not express a view." **Report 14: Standing Committee on Legislation - Inquiry into the jurisdiction and operation of the State Administrative Tribunal** May 2009 (104).

- encouraging parties to explain briefly what their position is in regard to a dispute so as to assess how the application should be programmed; and
- consider possible ways to resolve the dispute.

The SAT Act requires from members to 'make appropriate use of (their) knowledge and experience'[12] and this mandate is taken seriously. This does not mean that a Member-mediator loses his/her impartiality but merely that the knowledge that is available is put to the disposal of the parties where and when appropriate.

The first directions hearing for strata title applications are therefore scheduled for 30 minutes each, so as to allow sufficient time for interaction to occur and for the presiding Member to develop a good understanding of the issues involved. If necessary, another directions hearing may be scheduled.

A well structured directions hearing is of incredible value to the parties and the Member. It enables the Member to become actively involved in understanding the dispute; to put questions of clarification to the parties; to explain to parties what they need to establish; to refer parties to recent Tribunal decisions that may be of relevance to the dispute; to gauge the atmosphere for possible settlement; to explain to parties the benefits of reaching an agreement; and to actively explore possible settlement options without crossing the line that might disqualify a Member to hear the matter.

A large number of disputes are resolved at the directions hearing level with no need to refer a matter to mediation.

It often happens that a second or a third directions hearing will be convened to allow time for further discussions between parties; to enable parties to seek advice; or to direct parties to decisions of the Tribunal.

An increasing number of applications settle as a result of interactive directions hearings without a matter being set down formally for mediation.

The success of SAT at using directions hearings for purposes of facilitative dispute resolution has been emphasised in a submission by

[12] S9(c) State Administrative Tribunal Act 2004 (WA).

SAT to a parliamentary review of the functioning of SAT. The review concluded as follows:

> 'The Committee finds that the State Administrative Tribunal's practice of utilising directions hearings is effective'.[13]

When parties reach agreement in a directions hearing they often have a high sense of satisfaction and achievement. They feel that they have been able to work through an issue by themselves without having to resort to a formal hearing. They also view the Tribunal as a resource to assist them but without the Tribunal being required to make a decision on their behalf. The sense of ownership and of injustice being restored by way of cooperation and agreement is therefore high.

- **One-stop shop**

SAT offers a one-stop shop for the resolution of strata title disputes. This means that whether a dispute is scheduled for mediation or a hearing; whether the dispute is complex or simple; whether parties are represented or self-represented; whether the monetary amount is miniscule or large; or whatever aspect of the *Strata Title Act 1985* (WA) is concerned - it all gets resolved within the same institution. This contrasts with some other states where mediation and hearing functions are not necessarily integrated into a single institution.

The one-stop shop simplifies proceedings for parties and makes it easier to understand what could otherwise be a very complex process. At a directions hearing the Member can explain to parties:

- exactly what process is being followed and what is expected of each party;
- parties can seek an urgent directions hearing if something needs to be clarified or if orders require adjustment or if there is failure to comply with orders;
- the administrative member of staff of the Tribunal who is responsible for a specific file can explain to parties between hearings what happens and when it happens,
- or the staff member can seek clarification from the Member who has the carriage of the matter and convey it to the parties.

[13] **Report 14: Standing Committee on Legislation – Inquiry into the jurisdiction and operation of the State Administrative Tribunal** May 2009 (85).

The integrated one-stop shop nature of the proceedings from start to finish reduces stress and uncertainty to self-represented parties.

- **All Members are involved in mediation and decisions**

The same Members who are involved in hearings of strata title disputes are also responsible for the mediation of disputes. The same Member can obviously not deal with a matter in mediation and in a hearing (unless the parties agree).[14] There is not, as in some states, separate teams for mediations and hearings.

The SAT integration of Members for hearings and mediations present several benefits, such as:

- ✓ Members are trained in law and this offers an opportunity for parties to seek clarification of legal concepts and construction of statutes without actual advice being given.
- ✓ The knowledge and experience of Members assists parties to refine and clarify issues in mediation even if the dispute is not resolved entirely. Members often assist parties in mediation to better explain their respective positions, to address the key issues in dispute and to amend the application, if necessary. Even if a matter does not settle in mediation, the dispute is often better presented to the Member responsible for the hearing.
- ✓ There is regular interaction between Members about their experiences in mediations. Members therefore gain from each others' experiences and that in turn benefits the parties.
- ✓ Members are up to date with the most recent strata title decisions and can share that knowledge with parties or refer parties to relevant decisions for their consideration. Members may even take copies of relevant decisions to mediations to discuss with parties or to make available for reading.
- ✓ The ability of Members to undertake 'reality resting" in mediation and to assist parties to identify alternative options for settlement is enhanced by the fact that the same Member may, in another matter, be required to decide a dispute. The value added by a Member to the mediation process is therefore substantial.

[14] S54(10) State Administrative Tribunal Act 2004 (WA)

- ✓ In the eyes of self-represented parties, the fact that a Member also does mediation often gives greater credibility to the mediation process - knowing that in another matter the same Member will be the decision-maker, assists parties to take seriously the issues and questions raised by the mediator-Member. It regularly occurs in the case of represented parties that legal representatives would during a private session invite the mediator-Member to provide an honest assessment of some issues in dispute.
- ✓ The close and personal interaction with a Member in mediation contributes to parties being relaxed and having a sense that they can express their views without being technically precise or feeling that they are engaged in an atmosphere of adversity.
- ✓ The ability of Members to control and direct proceedings in mediation is enhanced since they are seen as formal officers of the Tribunal and not as private mediators.
- ✓ The Members may make orders to give final and binding effect to an agreement reached by the parties.[15] The parties therefore experience a sense of 'finality' in that an agreement can lead to a binding outcome. There is no need for the agreement to be referred to another person to be given the status of an 'order'.

- **From adversarial to collegial**

Mediation offers the opportunity for Members to assist parties to move from adversarial mode to collegial mode. This is particularly the case when parties are legally represented. The legal profession is increasingly adjusting to the SAT-mode of dispute resolution whereby agreed outcomes are preferred to determined-outcomes. Adversarial styles and behaviour do not sit well in the atmosphere of mediation and agreement.

Although more informal than Court hearings, the hearings in SAT retain adversarial elements especially when one party is legally represented and the other party is not, therefore the balance can be skewed and an unrepresented party may feel at a disadvantage. The role of the Member includes the duty to assist such an unrepresented party.[16]

[15] S54(8) and S56(1) State Administrative Tribunal Act 2004 (WA)
[16] S32(6) State Administrative Tribunal Act 2004 (WA) requires that the Tribunal must take measures that are reasonably practicable to ensure parties understand the nature of assertions; and the legal implications of the assertions.

Mediators often engage in the following techniques to set the atmosphere of the mediation:

- ✓ Seating arrangements in the mediation room are often in a way that would allow a party to sit close to the Mediator.
- ✓ Parties are encouraged to speak for themselves - even if they are legally represented.
- ✓ Parties are directly addressed by the Mediator and their views are canvassed - specially during private sessions.
- ✓ Inflammatory comments by legal representatives or point-scoring between legal representatives are curtailed.
- ✓ Non-represented parties are assisted in that the Member may explain to them the basic elements of a claim and the legal framework within which it will be determined.
- ✓ The reality of hearing-legal costs versus mediation-settlement is highlighted.

- **Joint and private sessions**

SAT mediations generally use a combination of joint and private sessions to facilitate dispute resolution. The Tribunal allows telephone mediation but where possible prefers to conduct mediation face to face.

Although mediations usually commence with a joint session before it moves into private session, the Mediator may decide to commence with separate private sessions.[17]

Joint sessions are generally used to give parties the opportunity to air their grievances, explore resolution thereof and to get a 'feel' for the mediation process. This is a very important phase for the Mediator to establish rapport with the parties and to build an atmosphere of expectation of problem solving.

The dynamics of the joint sessions are important because parties must be assisted to move from identifying problems to identifying solutions. It is also a very testing phase since parties often have a long history of conflict and to get them to discuss their concerns in a calm and collected manner can be challenging. Opportunity is often given to parties to 'let off steam' before the focus is moved to solutions.

[17] The Mediator generally determines the procedure for the mediation. S54(7) State Administrative Tribunal Act 2004 (WA).

The joint sessions offer an opportunity for the mediator to share 'neutral' information, for example, recent decisions of the Tribunal; benefits of mediation; risks of hearings and so on.

Private sessions provide the opportunity for the Member to actively explore possible outcomes and to explore further into the causes of a dispute. Although, in theory, the mediator should be policy neutral, SAT mediators are often actively engaged with parties during private sessions to assess strengths and weaknesses of a dispute, discuss relevant Tribunal decisions and develop possible solutions - all this is done in the context of impartiality and objectivity.

Mediators have a wide range of experiences in strata issues and parties often look at mediators for guidance or inputs. This is also the phase where mediators do active 'reality testing'. Reality testing entails assessing and analysing the strengths and weaknesses of a case. Parties, especially lay persons, often express appreciation for the frank and open discussions that occur in mediation. Obviously the mediator should undertake this function without appearing to be biased or to give some form of advice.

- **Reality testing and alternative solutions**

Reality testing and development of alternative solutions is a two-edged sword. It can easily go wrong. The mediator's purpose of reality testing and development of alternative solutions is not to prescribe; to give advice; to discourage or to take sides. It must be done in a balanced manner to assist parties to understand the potential strengths and weaknesses of their claims; to be aware of decisions that may impact on their matter; and to understand the benefits of a mediated outcome and to consider new ideas.

The mediator is therefore a resource rather than a judge.

The high success rate of mediation in SAT can to a large extent be attributed to the active, albeit balanced, approach of Members in the arena of reality testing and development of alternative solutions.

This in turn contributes to restorative justice since parties often go away with a sense that they have together came to a solution; an awareness that both sides have an argument worth considering and a realisation that an agreement is better than a determination.

- **Mediations on site or not**

The question often arises whether mediation should be conducted on-site. In some states mediation on-site is highly exceptional or not even undertaken at all.

SAT takes a flexible and open approach in regard to mediation on site. The question is whether there is an particular benefit that can be obtained by an on-site mediation that may contribute to the settlement of the dispute, for example, discussing a proposed alteration of a lot and options available to the proponent; reducing noise that emanates from one lot to another; dealing with elderly parties in a retirement village where participation by several persons are required; identifying areas of common property that could become the subject of an exclusive use by-law; taking into account the special needs of parties; gaining particular insight by way of a site inspection and so on.

There are pro's and con's to mediations on site and all those should be considered. In some instances, the formal nature of a mediation room at the offices of the Tribunal may contribute to a settlement, for example, it is usually easier to manage a querulous person in the formality of a mediation room. In other instances, the ability of parties to meet on site and to discuss in a practical way their concerns with the mediator, may lay the groundwork for settlement.

It is often in a directions hearing that the presiding Member is required to make the judgement call as to whether a settlement may be facilitated by an on-site mediation. The mediator also has access to the transcript of proceeding in which the rationale of a site inspection is explained.

- **Success rate and restorative justice**

Much more qualitative and quantitative research is required before firm conclusions can be drawn of the impact that SAT's mediation and alternative disputes resolution processes have on restorative justice in strata title disputes.

The following observation can however be made on the basis of personal experiences, discussions with colleagues and feedback from members of the public:

- ✓ Regardless of the sharp increase in strata title schemes in Western Australia since 2004,[18] the number of strata title applications before SAT has remained constant - at around 130-140 per year.[19] The fourth tier of government is doing remarkably well and facilitate dispute resolution is playing its part therein.
- ✓ Parties and strata managers show an increasing awareness of decisions that SAT has handed down. This awareness is facilitated by the brief summary that accompanies each decision of the Tribunal. Decisions are available on the internet via the SAT webpage. The quarterly summary of decisions is also available on subscription for free. Public accessibility of decisions is therefore high and the general knowledge of residents and especially strata managers is on the increase.
- ✓ Around 70-80% of strata applications before SAT settle by way of withdrawal or consent orders. This means only a relatively small number of applications are determined by way of a hearing.
- ✓ A request for mediation is becoming a default proposal by parties in proceedings before SAT.
- ✓ Parties involved in mediation often express appreciation towards SAT for the assistance given.
- ✓ Mediators often report of the positive reaction they get after mediation, with parties shaking hands, smiling, and leaving in a positive mood and atmosphere.
- ✓ SAT is seen by parties as a resource to assist them to find solutions. The role of SAT within the conflict resolution process contrasts with the perception of courts and their duties.

4. Summary

Mediation in strata title schemes is the preferred way to resolve disputes. Mediation brings parties together; it enables them to deal with issues that go wider than the dispute at hand; and it enables them to return to their place of residence with a win-win outcome rather than as a winner and a loser. Mediated outcomes contribute to a psychology of restorative

[18] According to Landgate the total registered strata title schemes registered in the year 2003/4 was 1929 while in the year 2009/10 the total number of schemes registered was 2 367. Information provided to SAT on 29 May 2011.

[19] In fact, the number of applications since the inauguration of SAT in 2005 has declined slightly with 138 in 2006/5 and 132 in 2009/10. When the number of strata title applications in the respective states is compared, account should obviously be taken of the nature of each jurisdiction – for example in some states applications dealing with enforcement of levies can be made by the SAT-equivalent while it is not included in the SAT jurisdiction.

justice whereby the emphasis is not on a win-lose but on a win-win outcome.

In summarising my personal experiences during the past 6 year, I would identify the following key elements of successful mediation (which may or may not find approval from the mediator-dogmatists):

(a) Clarify what is at the heart of the matter
(b) Pursue a resolution with enthusiasm
(c) Remember, small things can be big things in conflict resolution
(d) Be creative in assisting the parties
(e) Some conflicts cannot be resolved by leaving it to the parties themselves
(f) Conflict resolution is a journey not an event
(g) Be aware that some persons may deliberately attempt to disrupt the process
(h) Leadership – including that of the mediator - matters
(i) External circumstances must support or frustrate a settlement
(j) Never give up as long as you can help it.

In this overview I have shown how SAT uses mediation and facilitative dispute resolution to enable parties to consider underlying issues that gave rise to a dispute, to make arrangements for future share and enjoyment of a strata scheme and which frequently restores the relationship between neighbours. In conclusion the process of facilitative dispute resolution often contributes to restorative justice.