

WHAT IS COMPANY TITLE?

Company Title is just one of many forms of property ownership in existence. Other more well known forms include Torrens Title, Community Title and Strata Title. Company Title is the ownership of property through a corporate entity (or “Company”). This Company is incorporated with the Australian Securities and Investment Commission (ASIC) and in accordance with the ASIC Rules and Regulations a Constitution (previously known as Memorandum and Articles of Association) is prepared which sets out the rules and regulations of the particular Company.

Some issues which the Constitution deal with include:-

- * Shares issued by the Company;
- * Director’s and Shareholder’s responsibilities; and
- * Proxies and General Meetings (similar to Body Corporate meetings)

A Company Title property is in many ways similar to either a Strata Title or Community Title property. The main difference is that you own “shares” in the Company which entitle you to exclusive rights in the home unit/townhouse and your ownership is set out in a Share Certificate rather than a conventional Certificate of Title.

As the owner of the shares you are able to transfer them to another party in order to sell the property occupancy rights. Furthermore, you can mortgage your shares with most Banks or other lenders, however, you should note that our experience has shown that most lending authorities will only lend funds to a maximum of 85% of the actual value of the property. Under the terms of our Constitution, you can also lease your property and subject to compliance with the Constitution and any Government regulations, you can alter the external appearance of your building. In some circumstances the building can also be demolished and rebuilt on your entitlement parcel.



SUMMARY OF MAIN PROVISIONS OF COMPANY TITLE

Definition

Company Title is a form of right of occupancy of land whereby: -

- a Company owns the land
- shareholders own shares in the Company
- the land owned by the Company is normally unencumbered i.e. there are no mortgages on it
- the ownership of a share or a block of shares gives the exclusive right of occupancy to a defined (by survey plan) area of land (these rights and the plan are incorporated in the Constitution for the Company)
- the shareholder has the right to sell shares or mortgage his shares
- mortgages are secured against the shares not the land
- the shareholder has the right to let his parcel
- the shareholders in the Company have certain obligations such as to insure, to maintain and to live in harmony with their neighbours.

Do you need Council Approval to company title

The ownership of land by a company does not require Council approval. Where Council has approved houses to be constructed on separate parts of the property and the approved plans show that those separate parts will be occupied exclusively by the different occupants in the houses, then the Constitution of company simply reflects rights already approved by Council. It is the view of this firm that the Constitution of a company should simply repeat the approval to use parts of the property already granted by Council.

Note that the Company Title does not give you the right to obtain approval to separately occupy the two dwellings, it simply enables you to deal with the two dwellings consistent with the approval from Council for the two dwellings to be erected and separately occupied.

The Courts of Australia have consistently found that the ownership of shares in a company, whilst perhaps giving exercisable rights in respect of property are not an interest in land and therefore sale of shares does not fall under the umbrella of subdivision as envisaged by the Environmental Planning and Assessment Act. Council approval to the share ownership or transfer in these circumstances is not therefore required.

Shareholding in a Company gives Shareholders the right to deal in shares in such fashion as they see appropriate.

Some councils (such as Pittwater) do have provisions within their planning scheme which may prevent Company Title.

The advice of this firm should therefore be obtained prior to purchasing or proceeding with a development of a property in a Company Title scheme.

Can the Company refuse a sale or transfer of Shares

The Hones La Hood Constitution removes all vested rights to unreasonably refuse a transfer of shares to any purchaser.

Does a shareholder have a right to Lease

The Hones La Hood Constitution allows individual dwellings to be leased and as far as possible, entitles a shareholder to lease to such person as he feels appropriate.

Can easements and rights of way be created for one shareholder to access other parts of the property?

Where one company title lot needs rights or easements over an adjoining lot, the Hones La Hood Constitution ensures that provided the plan attached to the constitution shows the position of an easement and provided further (not always required) that the plan is accompanied by an instrument in form similar to an 88B instrument, the easements are created by the constitution in the same form as they would have been created by the Conveyancing Act.

Can a shareholder mortgage their shares to raise finance

The Hones La Hood Constitution allows the shares to be mortgaged and gives to the mortgagee rights similar to those rights they would otherwise have of dealing in realty in the event of a default by a Shareholder.

A mortgage is not placed over the title but over shares.

The mortgage only affects the person who takes out the mortgage not the adjoining owner/shareholder.

It is our experience that most lenders will advance between 60-85% of valuation of the purchase price. The charges for application fees in respect of lending are normally similar to those in respect of normal property transactions. Legal costs for mortgage documents can be a little higher than standard conveyancing fees. A purchaser should obtain written finance approval before proceeding to bind themselves in a sale contract to acquire shares.

Capital Gains Tax

Does a person incur a liability for Capital Gains Tax even though it is his own home?

The answer to this is no. The Income Tax Assessment Act excludes the family home, including a Company Title family home, from the provisions of Capital Gains Tax. However, advice should be obtained from a specialist tax advisor prior to committing to a purchase of shares.

Land Tax

Company Title units are deemed to be strata lots and therefore, although normally a Company would be liable to pay land tax, a Company Title unit is treated differently. The individual lodges a Land Tax return for his home or unit and it is dealt with in the same fashion as any normally titled residential property would be dealt with.

What is the cost to sell a Company Title property?

Costs of sale of shares by way of Company Title sale are charged by Hones La Hood at \$2,400.00 or greater depending on complexity. In addition are the usual statutory

disbursements and GST. Additional fees may be incurred dependent upon how much assistance we may be required to give to the Purchaser's Solicitors.

Ongoing Costs

An Annual Return must take place every year. This need not be done by an Accountant in which case the yearly fee is \$212.00 payable to the Australian Securities & Investment Commission. This sum may fluctuate and should be confirmed yearly.

Saleability

Our experience is that since there are often no conventionally subdivided lots in the vicinity of the project, sale prices for the Company Title structure are set by the developer and market forces. The principal of Supply & Demand as observed by us indicates that prices are often commensurate with conventionally titled properties in the vicinity of the property to be sold.

There may be some buyer resistance arising out of a solicitor's opinion on Company Title. A Summary sheet setting out the Constitution clauses overcoming the "difficulty" clauses is available from our office. This summary sheet and the clauses incorporated in our constitution will often overcome the problems perceived by some lawyers.



CAPITAL GAINS TAX

The Income Tax Assessment Act sets out when Capital Gains Tax is payable. In summary, s118.110 provides the basic case for when Capital Gains Tax is payable and states:

- (1) A capital gain or capital loss you make from a CGT event that happens in relation to a CGT asset that is a dwelling or your ownership interest in it is disregarded if:
- (a) you are an individual; and
 - (b) the dwelling was your main residence throughout your ownership period; and
 - (c) the interest did not pass to you as a beneficiary in, and you did not acquire it as a trustee of, the estate of a deceased person.

Note 1: You may make a capital gain or capital loss even though you comply with this section if the dwelling was used for the purpose of producing assessable income: see section 118-190.

Note 2: There is a separate rule for beneficiaries and trustees of deceased estates: see section 118-195.

- (2) Only these CGT events are relevant:
- (a) CGT events A1, B1, C1, C2, E1, E2, F2, I1, I2, K3, K4 and K6 (except one involving the forfeiting of a deposit); and
 - (b) a CGT event that involves the forfeiting of a deposit as part of an uninterrupted sequence of transactions ending in one of the events specified in paragraph (a) subsequently happening.

Set out below is an extract from Section 118.115 of the Income Tax Assessment Act 1997 as well as the definition of dwelling. You will note that interestingly the definition of dwelling does not indicate an interest of land but rather “a unit of accommodation”. Provided an owner lives in the dwelling purchased by Company Title then the same provisions of Capital Gains relief apply to that shareholding as would apply to a conventional residential dwelling.

The Act then defines in respect of a dwelling at s118.115

- (1) A dwelling includes:
- (a) a unit of accommodation that:
 - (i) is a building or is contained in a building; and
 - (ii) consists wholly or mainly of residential accommodation; and
 - (b) a unit of accommodation that is a caravan, houseboat or other mobile home; and
 - (c) any land immediately under the unit of accommodation.
- (2) However, except as provided in section 118-120, a dwelling does not include any land adjacent to a building.

Relevantly, the Act does not define what form of title or ownership applies and thus Company Title dwelling falls under the same provisions as a conventionally titled dwelling.



LAND TAX

Under Section 21A of the Land Tax Management Act 1956 (as amended) Company Title units which are occupied by persons who have a share giving exclusive occupancy of the unit are exempt. The section states as follows:-

21A Company title units taken to be strata lots

- (1) This section applies to land if:
 - (a) the land is owned by a company in which all the issued shares are owned by persons each of whom, because of that share ownership, has an exclusive right to occupy a part of a building on the land or one of 2 or more buildings on the land, and
 - (b) the Chief Commissioner is satisfied that the whole of the land is reasonably used in connection with the occupation of the building or buildings.

- (2) For the purposes of assessing land tax in respect of land to which this section applies:
 - (a) each shareholder is deemed to be the owner of that part of the building or that building that the shareholder is entitled to occupy because of that share ownership, and
 - (b) each such part of the building, or each such building, is deemed to be a strata lot under the Strata Schemes (Freehold Development) Act 1973, and
 - (c) the company is not to be regarded as the owner of the land.

- (3) For the purposes of the application of section 9AA to and in respect of a part of a building, or a building, deemed by this section to be a strata lot, the proportion that the unit entitlement of that lot bears to the aggregate unit entitlement is:
 - (a) unless paragraph (b) applies, the proportion that the deemed owner s shareholding in respect of the lot bears to the total issued share capital of the company, or
 - (b) if the Chief Commissioner is not satisfied as to the fairness and reasonableness of the proportion obtained in accordance with paragraph (a), the proportion arrived at by the Chief Commissioner on a redetermination in accordance with subsection (4).

- (4) The Chief Commissioner s redetermination is to be by reference to:
 - (a) the proportion that the floor area of the deemed lot bears to the total floor area that is separately occupied, or capable of being used for separate occupation, in the building, or
 - (b) in the case of an entitlement to occupy one of 2 or more buildings, the proportion that the floor area of the deemed lot bears to the total floor area that is separately occupied, or capable of being used for separate occupation, in all of those buildings.

- (5) This section applies to land tax payable in respect of the year commencing on 1 January 1991 and any succeeding year.

In summary, the ownership and occupancy of a Company Title dwelling is treated in the same way as the ownership of a Strata or Torrens Title property.

CONSTITUTION

Hones Lawyers have prepared a Constitution which will enable you to undertake a Company Title subdivision. A brief summary of some of the features of the Constitution is as follows: -

- A. The owners of either shareholder have exclusive right to occupy, let or lease the premises without restriction (see 25.5.1).
- B. Each shareholder has the right to mortgage his shares. There are rights vested in the mortgagee to satisfy mortgagee's needs from time to time and these rights are spelt out in Clause 26.
- C. The owners of shares may transfer their shares and subject to ASIC restrictions placed on any share dealing, the right to transfer shares does not rely upon the consent of directors and in this regard you should refer to Clause 21.1.
- D. On the death of a shareholder the shares can be transferred to a joint shareholder or the legal personal representative of the deceased. Clause 22 deals with this.
- E. Insurance is to be effected by the Company and the cost of insurance can be levied against the shareholders. Insurance is referred to in Clause 9.
- F. Upon the sale of the shares/property, a Certificate similar to a Section 109 Certificate issued by a Body Corporate will be given setting out details of ownership, insurance, Directors, Secretary, Managing Agent, levies, etc. as set out in Clause 29 and in the form shown in Schedule 5.
- G. In the event that a division of the property is possible by either strata or conventional subdivision then the Company is entitled to so subdivide and the Company structure is then wound up. See Clause 33.
- H. In the event of a dispute between the parties, the dispute is firstly referred to Arbitration (Clause 34).
- I. A shareholder is entitled to undertake works to his lot. Clause 8.1.4 obliges the Company to give consent to the works whilst the ability to alter lots is set out in Schedule 1 By-Laws and Clause 8.
- J. If a Townhouse is occupied as the principal place of residence by a party, then that Townhouse would seem, at the date of this letter, to be exempt from Land Tax and Capital Gains Tax under the usual rules.
- K. Clause 25.5.2 grants to each share group holder the right to "*demolish, build, alter, paint (internally or externally) or add to in any way the Town House or any part thereof upon such Share Group Holders Lot which do not affect the structural integrity of a Town House upon any other Share Group Holders Lot . . .*".
- L. The by-laws are presented as a format which is a guide to commonly required standards of operation of a Company. It is up to the members/directors to make change to either the Constitution or the by-laws if they so wish.

- M. The Directors can exercise the powers of the Company (see Clause 7.5 of the Constitution) but they must act strictly in accordance with the Constitution. The Company can change its Constitution by a Special Resolution – see Section 136(2) of the Corporations Act 2001.
- N. Where an easement is required over an adjoining lot in the plan to the Constitution and provided the plan shows that easement and the plan is accompanied by an instrument in form similar to an 88B instrument under the Conveyancing Act then rights are vested in, or obligations imposed upon each of the shareholders for the same effect as rights and obligations under the Conveyancing Act.
- O. As mentioned above, a share group holder has the power to alter or modify his home and naturally this covers the question of re-painting. The external trim, of course, needs to be complementary to the colours of the adjoining premises. The word “complimentary” is subjective and it is up to the individuals to endeavour to work with each other in regard to the trim requiring painting. Where premises are not full brick or are rendered brick then the external coating may need to be replaced and in this case it will be up to the share group holders / directors to pass any special resolution that they feel appropriate.

