

## Landgate Strata Titles Act Reform Consultation Paper October 2014

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# 1 Introduction

- 1.1 The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 The Society acknowledges the work of Landgate in the preparation of the *Strata Titles Act Reform Consultation Paper (Consultation Paper)* dated October 2014 and is pleased to be afforded the opportunity to comment.
- 1.3 The Society's comments are primarily focused on Parts 7, 8, 9 and 10 of the Consultation Paper but include general commentary on Parts 5 and 6.

The Society comments as follows in response to the Consultation Paper.

## 2 Part 5 - Tenure Reform: Leasehold strata schemes

*Leasehold tenure provides for an exclusive holding of land or a building (or part of a building) by a lessee for a fixed or periodic term.*

*Stakeholders have indicated that introducing a form of leasehold strata title may support development of additional land and potentially facilitate more affordable housing.*

*The third proposal for a flexible tenure framework is therefore to introduce a form of leasehold strata title.*

*This option may be limited to freehold land and conditional grants under the Land Administration Act 1997. If so, a State agency wishing to use the concept to develop land around existing infrastructure that cannot be sold, such as adjacent to or above rail stations, will first obtain a certificate of title.*

- 2.1 Two major difficulties are perceived with existing leasehold titles based on a head lease. For example, the Hillarys marina townhouses, a Crown leasehold.
- 2.2 For so long as the freehold owner has a right of forfeiture, no later title, (registered or not, strata or not) has the security of a freehold title. Section 82 of the *Property Law Act 1969* (WA) may not provide adequate protection. The Society suggests a statutory form of lease which does not allow forfeiture. This may seem a contradiction, but no more so than a registered leasehold strata title that is liable to forfeiture. If freehold owners want both to retain the freehold title and yet develop the land and give the buyer some security of title, then the "price" would be a special form of lease.
- 2.3 Cost and delay where the freehold owner (and subsequent owners) has to consent to dealings, by way of sub leases and where a head lessor can claim legal or other costs for any transaction relating to the head lease or sub lease. The statutory form of lease should exclude the need for these consents and/or the right to recover those costs.

### 3 Part 6 - Tenure Reform: Staged strata development

#### 6.3 Variations to disclosure in existing registered strata schemes

***Proposal 108: An expanded list of minor variations will apply for future staged strata schemes and will not apply retrospectively to existing strata schemes.***

- 3.1 The Society supports this proposal. However it is of the view that:
- there should be a capacity to seek variations to existing Survey Strata Schemes consistent with those proposed for future staged Strata Schemes; and
  - existing schemes should be able to take advantage of the relaxation of permitted 'minor variations'.
- 3.2 The stated reasons for not allowing existing schemes to take advantage of any relaxation are not accurate. For example, relaxing the permitted minor variations for 'internal' strata approval purposes would not alter the ability of external utility providers to levy headworks charges.
- 3.3 Further, unless existing schemes are included, most staged developments in large schemes will not occur. This is because of the practical impossibility of obtaining a unanimous resolution and particularly all required consents to re-subdivide.
- 3.4 The failure to proceed with the second and subsequent stages of a development will often prejudice existing owners in the first stage of a development (higher levies, large vacant wastelands etc).
- 3.5 It would be preferable to allow the later development stages to proceed with relaxed permitted 'minor variations'. If needs be for existing schemes, a developer of a subsequent stage in an existing scheme could be required to give notice to all owners of the minor variations and an owner in the first stage given a right to apply to SAT to stop the re-subdivision.

### 4 Part 7 - Vendor disclosure

#### 7.2 Proposed disclosure items

***Table of comparison between the disclosure requirements on a vendor in an established scheme and the disclosure requirements on an original proprietor (developer) – new items referring to changes to the disclosure information proposed to be introduced in this set of reforms.***

***Established Scheme item 8: A copy of the most recent AGM (and any subsequent EGM) Minutes.***

- 4.1 It should be noted that some minutes may be so old and inaccurate as to be misleading. Buyers under the Joint Form of General Conditions for the Sale of Land are almost always already given the right to inspect records of the Strata Company but this right is very rarely taken up. It would be preferable to oblige sellers/real estate agents to advise buyers of their right to inspect the records prior to making an

unconditional offer or alternatively making an offer conditional upon a review of the records proving satisfactory.

4.2 ***Original Proprietor (Developer) item 13: Where a lot is sold off-the-plan (prior to registration) disclosure of planning approvals (subdivision and development) and any review of those approvals***

4.2.1 Disclosure of planning approval may not be possible at the time the disclosure information is issued – in that case there should be a requirement for the planning approval to be disclosed once it has issued by way of a notifiable variation.

4.3 ***7.3.1 Combine general and specific disclosure information***

***Proposal 112: Incorporate generic and specific information currently spread over two separate forms (Form 28 and Form 29) into a single disclosure form to make it more understandable.***

4.3.1 The incorporation into a single disclosure form is supported. To render the disclosure less onerous for the reader the requirement to attach copies of the by-laws could be modified to require only those which deviate from the default by-laws.

4.4 ***7.3.2 Different disclosure form for each type of sale***

***Proposal 113: That there be 4 separate disclosure forms applicable to strata title property transactions:***

- a. *Sale of a strata lot by the original proprietor (including off-the-plan sales);*
- b. *Sale of a survey-strata lot by the original proprietor (including off-the-plan sales);*
- c. *Sale of a strata lot in an established scheme; and*
- d. *Sale of a survey-strata lot in an established scheme.*

4.4.1 This proposal is not supported. The availability of many forms will inevitably lead to mistakes. The Society favours the use of one form comprised of common provisions and specific provisions for each applicable Strata Title transaction.

4.5 ***7.3.4 Supply of information by the strata company (s43)***

***Proposal 115: Incorporate into the disclosure statement an 'application form' which the purchaser or his/her agent can use to apply to the strata company for additional information.***

4.5.1 The Society supports this proposal and suggests it be provided with the disclosure proposed by proposal 112.

4.6 ***Proposal 116: Add a list of information that is obtainable from the strata company and a checklist of information that a purchaser should understand about the scheme before the purchaser signs the contract.***

4.6.1 This proposal has merit however the prospective buyer should be provided with adequate time to consider the information and if necessary to seek advice in relation to it before being committed to a contract.

4.7 **7.3.6 Disclosure incorporated into the contract of sale**

***Proposal 118: If the vendor includes the disclosure details in the contract of sale rather than via the prescribed disclosure form(s), the information must be highlighted to the purchaser.***

- 4.7.1 The Society does not support the inclusion of Disclosure Information in the Contract of Sale. It is contrary to the notion of providing the Buyer with disclosure in advance of the creation of a contract. The Disclosure Information should be kept separate with an appropriate warning upon it. There should be a clear obligation imposed upon a Real Estate Agent to bring the Disclosure Information and the warning to the attention of a Buyer. The Society supports a mandatory pre-contractual disclosure "cooling off" period if Proposal 118 is not implemented as recommended by it.

4.8 **7.5 Notifiable variations (s69C)**

***Proposal 119: There will be an additional disclosure obligation describing any registered changes to the development disclosure document (see discussion under staged strata for further information).***

- 4.8.1 Some clarity is required. Is it intended to apply to all owners or only the "original owner"? Is it intended to apply to only "off the plan contracts" and is it to apply to the on-sale of Lots purchased "off the plan" before the plan is registered?

## **5 Part 8 - Management of strata schemes**

### **8.1.1 Powers of the strata company**

- ***The strata company will be given a new power to authorise a person to enter a lot for the purpose of carrying out any work which has been authorised by a resolution of the strata company***
- ***A person authorised by the strata company will have broad powers to inspect a lot or common property, in order to do something that the STA requires to be done. In the case of an emergency, they may do this at any time. If it is not an emergency, they may do this at any reasonable time if notice has been given to the occupier.***

- 5.1 The proposal to permit the Strata Company to enter onto a Lot in the circumstances contemplated could give rise to potential problems particularly if the power is capable of exploitation by an overbearing Strata Council.

- 5.1.2 The Society submits that a Strata Company should only be able to enter a Lot without notice in the event of an emergency and in other cases after the service of notice which affords the proprietor sufficient time to approach the State Administrative Tribunal for an Order dismissing the Notice.

5.2 **8.2.1 Empower the strata company to appoint members to positions on the strata council**

***Proposal 134: That written nominations for office bearers on the council are distributed before the meeting, with the notice of the meeting. These may provide background information on nominees. Nominations may still be made at the meeting itself.***

5.2.1 Although desirable, the Society considers this to be an impracticable imposition. The Society notes that there is nothing in the by-laws that would prevent a Strata Company gathering and distributing this information with the Notice of the meeting.

5.3 ***Proposal 135: The strata company has the option of appointing council office bearers at the meeting.***

5.3.1 The Society does not support this proposal as it is contrary to good governance principles.

5.4 ***Proposal 136: If the strata company does not take this option, the strata council may still appoint their office bearers in the first meeting.***

5.4.1 Maintenance of the status quo is supported.

5.5 ***8.3 Quorum***

***Proposal 138: If those present determine that it is appropriate, the meeting can still be reconvened in a week's time.***

5.5.1 The Society does not consider this proposal to be necessary. A meeting can always be adjourned as the meeting determines.

5.6 ***8.4 Audits***

***Proposal 139: That an audit of the strata company accounts be included on the agenda for discussion at every AGM. This will include consideration of the most appropriate checks and investigations an audit should contain, such as proper authorisation of payments.***

***Proposal 140: That a reserve fund forecast be on the agenda for discussion at every AGM.***

***Proposal 141: That insurance is on the agenda for discussion at every AGM.***

***Proposal 142: That financial control standards are on the agenda for discussion at every AGM.***

***Proposal 143: That educational material be developed to assist purchasers in understanding financial options and obligations of the strata company.***

5.6.1 These proposals are all strongly supported by the Society. Minimum financial control standards should be recommended for adoption by the Strata Company. The standard should be sufficient to facilitate efficient audits if that is desired by the Strata Company.

5.7 ***8.8 Electronically enable the STA***

***Proposal 146: Technological means of communication will only be deemed acceptable if all parties agree to this form of communication.***

5.7.1 The proposal is unclear as to whether "all parties" refers to "all proprietors" or all proprietors unable to attend the meeting in person.

5.7.2 In any case, the proposal should extend only to those proprietors who have consented to receiving notices by and participating in meetings by way of electronic means.

5.8 **8.9 By-laws not to be unreasonable or oppressive**

***Proposal 147: That by-laws cannot be put in place which are unreasonable or oppressive.***

- 5.8.1 This proposal is supported but it should go further. The Society notes that there is no proposed control over the content of By-Laws which often are beyond the power to the Strata Company. The Society favours a regime of statutory by-laws that can only be altered with approval – a power analogous to that under Section 13 (7) of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA). In any case, preparation of bylaws or amendments should be recognised as “legal work” as defined in section 12 of the *Legal Profession Act 2008* and should not be accepted for registration if not prepared by a legal practitioner. This control would aid the management of Strata Companies.
- 5.8.2 Few proprietors appreciate the function and powers of Strata Company By-Laws. The by-laws which govern management should be of a standard form to aid understanding. The existing Schedule 1 and Schedule 2 By-Laws should be improved and updated. An adequately funded information service would assist in educating and protecting the public. Reference the service provided under the *Retirement Villages Act*.
- 5.8.3 The power of the State Administrative Tribunal and the Supreme Court to review by-laws should be strengthened.

5.9 **8.10 Classification of by-laws**

***Proposal 148: That the STA provide guidance around the nature of Schedule 1 and Schedule 2 by-laws, in order to assist strata companies to correctly classify any new by-law as being in one or the other, and accordingly to use the correct voting protocols for their repeal or amendment.***

- 5.9.1 The Society favours the removal of the distinction between the 1 and Schedule 2 By-Laws so long as the By-Laws are alterable by Special Resolution subject to specific review powers by the State Administrative Tribunal to entertain objections from proprietors who consider the By-Laws to be unreasonable or oppressive. All proprietors should be able to vote on special resolutions if this occurs whether they are financial or unfinancial.

5.10 **8.11 Information Disclosure by strata managers**

**General comment:**

The Society notes that the recommendations set out in this part are contrary to what it considers to be the ideal solution for the control of Strata Managers, namely, a statutory control by way of licencing. This proposal is in the Society’s opinion very much a second best alternative.

***Proposal 152: That a code of conduct be introduced for strata managers. Breaches of the code are grounds for the strata company to apply to SAT for an order terminating the strata manager’s contract.***

- 5.10.1 This proposal should be approached with caution. A power to cancel a Strata Manager’s contract is onerous especially in an environment where the rules of evidence do not apply, appeal rights are currently very limited and where the Strata



Manager has no supervisory body. There would be few other commercial contracts able to be influenced by a Tribunal in the manner proposed.

## 6 Part 9 - Dispute Resolution

### 9.2. Broaden SAT powers to resolve strata disputes

- 6.1 The Society supports a proposed broadening of the State Administrative Tribunal's powers to make it the "one stop" shop for Strata disputes.

The Society recommends:

- a) That the new powers should not be so specific as to be restrictive in nature; and
- b) As the Rules of Evidence do not apply to hearings in the State Administrative Tribunal the Appeal rights under the *Strata Titles Act* should permit an Appeal with leave of and to the Supreme Court on questions of fact or law or mixed fact or law from a decision made by a Tribunal whose constitution does not include a judicial member and the appeal should be a de novo hearing.

### 6.2 9.2.2 Broaden the list of applicants and types of disputes resolved by SAT

***Proposal 157: Where an action for damages in compensation for loss is set out in the STA, the SAT order for damages will be not be limited.***

- 6.2.1 This proposal is not supported. Compensation should be limited to the Magistrates' Courts limit, particularly as the Tribunal is not bound by the rules of evidence and appeal rights are limited.

## 7 Part 10 - Termination of strata schemes

### 10.4 Process of terminating transferred to SAT from District Court

***Proposal 192: Jurisdiction for termination matters to be transferred from the District Court to SAT.***

- 7.1 The Society supports the transfer of the jurisdiction for determination of Strata Scheme Termination being transferred from the District Court to SAT so long as the Tribunal is constituted to include a presidential/judicial member.

### 7.2 10.4.1 Principles to assist a SAT decision on termination of a scheme

***Proposal 193: SAT will apply principles in determining all decisions on ending schemes, including that ending the scheme is just and equitable, objections are unreasonable and that ending the scheme is necessary taking into account any factors that may be prescribed in regulations.***

- 7.2.1 The expression 'just and equitable' is almost meaningless, it is not confined to property rights and does not take into account the emotional attachment of a proprietor.

7.2.2 The expression 'necessary' is also not useful; when will a termination be 'necessary'? It is too subjective.

7.2.3 The following alternative narrative is suggested:

*'SAT is to be satisfied that the termination of the scheme is **appropriate** and can be achieved in a **fair and reasonable** manner and in coming to that conclusion is to take into consideration any matters SAT considers relevant including any matters prescribed by regulations.'*

7.3 **10.5 Terminating a scheme of 10 lots or more lots by majority vote**

**10.5.1 The termination information statement**

**10.5.2 Next steps**

***Proposal 194: A scheme with 10 or more lots may resolve by majority vote to terminate the scheme.***

7.3.1 The Society does not agree to limit this proposal to schemes with 10 or more Lots. The logic behind the proposal applies equally to all schemes, including those with 2 to 10 Lots.

7.4 ***Proposal 195: The process of termination by majority vote for a scheme of 10 or more lots is commenced by the serving of an information statement on the strata company, which sets out details of the proposed termination.***

7.4.1 The Society recommends that the content of the Termination Information Statement should be approved first by SAT as complying with the prescribed information before being served on the Strata Company to avoid exposing SAT and the parties to wasted effort if the Statement is not compliant.

7.5 ***Proposal 196: The percentage of proprietors that approve the termination for a scheme would be:***

- ***95% for a scheme aged 15 or more years but less than 20 years***
- ***90% for a scheme aged 20 or more years but less than 30 years***
- ***80% for a scheme aged 30 or more years***
- ***The vote is on a 1 vote per lot basis.***

7.5.1 Despite having the appearance of making it easier, in the Society's view the proposed regime is in fact going to make termination harder. The Society notes that under current legislation, if a special resolution is achieved, the matter can be referred to the District Court.

7.5.2 The Society does not agree with the special treatment given for Schemes 15 to 20 years and recommends the status quo for all schemes.

7.5.3 The Amended Act should make it clear that all proprietors whether financial or non-financial should be permitted to vote on questions of Termination of Strata Schemes.

7.6 ***Proposal 198: Objecting owners may sell their lot to a third party, sell to the proponent of the process or seek review of the majority decision at SAT. SAT will apply principles in determining all decisions on ending schemes.***

7.6.1 Clarity around the expression 'proponent' is needed. Is it intended to include parties who are not proprietors? The principles described in alternative Proposal 193 should be applied in any review by SAT.

7.6 ***Proposal 200: SAT will have the authority fix the minimum price and the terms and conditions of sale after arranging for the valuation of the lot.***

7.6.1 "Valuation" of the lot must be carefully considered. Market value may be unreliable at this point of the Scheme's history. The value of the lot should be assessed at the date prior to the issue of the Termination Information Statement and should discount any increase or decrease in value attributable to the proposed Termination.

7.7 ***Proposal 201: If the vote fails the proponent can apply to SAT. The proponent cannot apply to SAT until after they have put the matter to a majority vote.***

7.7.1 The intent of the proposal is supported however the following alternative narrative is suggested:

*'If the required majority is not achieved, the proponent or any proprietor can apply to SAT in accordance with Section 51 for a declaration that the resolution has been passed and for Orders consistent with those set out in Proposals 198 and 199. In making the declaration SAT should apply the alternative Proposal 193 criteria.'*

7.8 ***Proposal 202: Once one attempt to obtain a majority vote is unsuccessful, a second attempt may not take place for 6 months.***

7.8.1 The word 'attempt' where it appears should be altered to 'motion'.

7.9 ***Proposal 206: Where there are different levels of management in a scheme, one level of the scheme cannot be brought to an end unless schemes which are subsidiary to that scheme are also ended.***

7.9.1 The expression 'are also ended' should be replaced with 'have been terminated'.



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