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Urban Development Institute of Australia
WESTERN AUSTRALIA

8 March 2019

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Via email: StrataTitlesActReform@landgate.wa.gov.au

Dear Sean

Strata Titles Regulations Discussion Papers: Management and Seller Disclosure, Termination of Schemes, and Staged Subdivision

Thank you for the opportunity to provide feedback in relation to the three above discussion papers. The Urban Development Institute of Australia (UDIA) WA is the peak body representing the property development industry in Western Australia. UDIA is a membership based organisation with members drawn from the residential, commercial and industrial property development sectors. UDIA members include both private and public sector organisations. Our industry represents approximately 12.7% of Western Australia's Gross State Product, contributing $31.7 billion annually to the Western Australian economy and $264.98 billion nationally. As well as helping to create sustainable and liveable communities, the industry employs a total of 215,100 Western Australians and 2.044 million Australians across the country.

As part of the broader Strata Titles Regulations consultation process UDIA welcomes the release of three discussion papers and acknowledges Landgate's efforts to engage with industry. WA's changing demographics and lifestyle preferences mean that the Strata Titles Regulations are critical to ensuring that development is able to respond to these evolving demands effectively.

Fulfilling the State Government's Development Objectives

Through the Metronet program, the release of Design WA, and the Perth and Peel @3.5m Framework, the State Government has set out a clear agenda to increase infill development and provide greater housing choice in Perth. It is critical that strata title reform is able to support this agenda by making development that facilitates these desired outcomes an attractive development proposition. To achieve the outcomes that government seeks, whilst providing adequate safeguards for individuals, these safeguards must not be to the detriment of the needs of the greater WA community. As such, whilst supporting the strata title reform program, UDIA encourages Landgate to ensure that the regulations provide for an efficient strata development process.

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Recommendation

The regulations seek to ensure the delivery of the State Government's development objectives by providing an efficient strata development process.

Transitional Arrangements

Whilst welcoming the new Strata Titles Act and Regulations, the Institute is deeply concerned about how the transition to new requirements will be managed. It is particularly unclear how development with pre-sales signed before the proclamation of the new act and regulations will be managed with different purchasers within the same strata scheme governed by two different sets of regulations with different requirements. At the practical level, this means that situations will arise whereby some purchasers may be affected by a notifiable variation whilst others are not. Further, the proclamation of the Act itself is likely to cause developers to have to amend strata by-laws and thereby having to notify purchasers of these changes some of whom will seek to use this process to void their contractual commitments. It is imperative that any pre-sale commitments cannot be cancelled merely as a result of amendments to strata schemes dictated by requirements of the new regulations.

To avoid confusion and provide certainty and consistency to all parties involved it is critical that appropriate transitional arrangements are put in place. The Institute strongly recommends that a 'grandfather' clause is adopted enabling any strata schemes containing lots purchased or with pre-sale commitments made prior to the proclamation of the 2018 Strata Titles Amendment Act to continue to be governed by the existing requirements of the 1985 Act, unless all lot owners unanimously agree to transition to the new regulations.

Recommendation

The regulations provided include a 'grandfather' clause, enabling recently completed and emerging strata development projects with sales and pre-sale commitments prior to the proclamation of the 2018 Strata Titles Amendment Act to remain governed by the existing 1985 Act, unless all purchasers unanimously agree to transition to the new regulations.

In response to specific questions posed by the three discussion papers, UDIA provides the following advice for your consideration.

Management and Seller Disclosure

Application by person with proper interest in information: Section 107

The regulations should also provide for proponents of the termination of strata title schemes to apply for information and inspect strata company records.

Protection of buyers: Pre-contractual information: Section 156

The discussion paper identifies possible amendments to pre-contractual information with sellers having to disclose if they were proposing to restrict the buyer's right to vote. The Institute assumes this is in reference to power of attorney authorisations. These are generally standard industry practice with details of how the power of attorney is to be exercised explained in detail, usually with a clear sunset period. This process is typically carried out as part of the signed contract which usually provides the necessary consent. UDIA queries whether Landgate is suggesting a new approach, if so this should be fully clarified.

Protection of buyers: Notifiable variation: Section 157

This is a critical section of the regulations for industry and it is imperative that clear guidance is provided to ensure developers are fully compliant with the regulations requirements. In particular, it is imperative that a clear definition of 'materially prejudiced' is provided.

UDIA supports the principle of ensuring that only information directly relevant to purchasers should be disclosed, however without clearing setting out specific details and examples of when this may, or may not be appropriate, it is likely that developers will enclose full documentation to avoid any doubt about potential non-disclosure liabilities. Clarification is also needed regarding minor amendments and whether those expressly stated in contracts and made within time can proceed without notification.

In order to resolve these queries and set out clear guidance concerning notifiable variations, UDIA suggests that a decision tree should be provided accompanying the regulations, identifying clearly what actions constitute a notifiable variation and the consequences of notifying or failing to notify buyers of such variations, within and beyond the prescribed time periods. By way of example, when the original proprietor enters into an agreement for services on behalf of the strata company to be provided over a future period, a decision tree document could allow for key aspects of the agreement to be summarised as part of any notifiable variation including whether or not a related party is involved, if the proposed term is in excess of five (5) years, whether or not a tender process was initiated for awarding of the contract etc.

The Institute queries whether consideration has been given to reassessing the variations framework, rather than modifying the existing arrangements. An alternative approach could be to provide notification of all notifiable variations three months prior to the registration of strata plans. This would avoid the uncertainty of issues such as when did the decision to amend actually occur, triggering the notification timelines. This is a common argument used in an attempt to void off-the-plan contracts of sale.

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Type 1 and 2 Notifiable Variations: Sections 3 (1)

As the list of type 1 and type 2 variations is very comprehensive, UDIA does not support expanding these lists any further. To the contrary, the Institute is concerned by the reference in Part (e) of the Type 2 notifiable variations which includes a lease, licence, right or privilege over the common property. This servicing is highly process driven and is usually resolved post-development marketing launch. The Regulations should provide greater clarity that amendments such as these do not materially prejudice purchasers and therefore cannot be used to trigger a contract cancellation. Similarly, whilst section 64: Common Property makes provision for physical alterations to conduits and easements within the common property, it should be extended to include variations to contracts to maintain such infrastructure.

Termination of Schemes: Strata Titles Discussion Paper

UDIA understands and fully supports the intent of the provisions to ensure that vulnerable persons are adequately protected and that they receive appropriate money in return for their property. However, as the discussion paper notes, 'strata buildings are aging, in many schemes owners are now getting to the point in some schemes where they cannot afford to maintain these old building with owners looking for ways to terminate the scheme and receive a good return on their lot before the building becomes too rundown or even unsafe'. As such UDIA contends that the regulations need to provide for an efficient termination process allowing property owners to maximise the value of their property and not erode the value of their investment to cumbersome administrative processes.

The Institute is concerned that whilst well intended, the cumulative impact of multiple conservative and time consuming procedures required to be fulfilled in order to terminate a scheme will prevent many termination proposals from coming forward, let alone being achieved. As a result, despite the attempt to ensure people are protected financially, the regulations are likely to diminish the value of peoples' housing investments and leave an increasing number of households and in particular the most disadvantaged households, living in poorly maintained housing which is inappropriate for their needs. It is important the regulations seek to strike an appropriate balance which enables homes at the end of their lifespans to be regenerated efficiently, generating maximum financial and social returns to ensure that all owners are left better off as a result of a strata termination.

To provide some certainty to all stakeholders involved, the costs of the various requirements of the various stages of the termination process should be capped, relative to the value of the lots within the scheme. This would also help in ensuring the funding provided to owners is used effectively and efficiently.

Content of outline of termination proposal: Section 175

Whilst the questions posed by the discussion in relation to section 175 of the Act ask what information the proponent of a termination should be required to provide about the funding that the proponent must provide to all owners, it is also important to consider what information will be provided to the proponent to be able to undertake an assessment of funding requirements. It is particularly important

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that termination proponents are able to identify potential vulnerable persons and ensure that they are able to present outline proposals with sufficient detail for strata owners to properly consider.

The Institute is concerned that without appropriate parameters or limits to the funding to be provided by proponents to all owners, having to provide this funding could seriously prevent termination proposals from coming forward. The Institute queries whether any legal advice/representation at SAT is to be shared amongst owners, with a representative appointed to jointly represent owners; or whether funding is to be made available to owners individually? Provision should also be made to allow owners to provide their consent to opt out of the legal representation process.

Reference of full proposal to independent advocate: Section 178A

Whilst the discussion paper poses questions regarding the qualifications that independent advocates should have, it is important to also recognise that transitional arrangements will be needed until this new industry has matured to a sufficient level to be able to deal with the emerging requirements of the regulations. Furthermore, given the wide-ranging considerations needed to be undertaken, it is likely that a very diverse skillset will be required. Therefore a multidisciplinary team of advocates is likely to be able to provide more accurate advice than that of a single individual advocate. Nevertheless, it is imperative that the cost of obtaining an independent assessment is not excessive and prohibitive.

To offer certainty to all stakeholders involved, UDIA strongly supports imposing time limits on independent assessment reporting periods. Provision could be made to extend these time limits providing the agreement of both proponents and lot owners is obtained.

The discussion paper queries whether the regulations should prescribe that the independent advocate should not be an associate of the proponent. Whilst a definition of 'associate' is needed, the regulations also need to recognise the very niche nature of this particular type of work and the relatively small size of the development industry within Perth. To overcome this issue, UDIA suggests that it may be appropriate to give consideration to establishing a professional code of conduct or licencing assessors, retaining powers to revoke a licence should the assessor act inappropriately.

UDIA also queries whether the cost of undertaking the independent assessment is factored into the property valuation process? Including these costs within the valuation of schemes at the outline stage of the termination process could help to ensure that all owners only seek appropriate levels of advice to not erode the value of their strata lots and scheme.

Content of a full proposal: Section 179

The Institute supports permitting only registered builders to be able to prepare a termination infrastructure report and suggests that in addition, quantity surveyors should also be permitted and perhaps, would be better placed to prepare such reports.

Given the wide ranging and complex requirements that are needed to be fulfilled in order to terminate a strata scheme, the Institute suggests that the date by which the termination valuation report remains valid, be 28 days rather than the 21 days proposed. Extending this period will help ensure

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that any further process delays are avoided, whilst the value of schemes is unlikely to change in this additional time period.

The regulations should not be overly prescriptive regarding the valuation methodology and recognise that the valuation methodology may vary depending upon the different nature of strata schemes. However, the valuation report should take into consideration the likely cost of terminating the strata scheme.

Content of process: Section 189

Fees that the strata company may charge a termination proponent should be limited to a portion of the value of the scheme, unless otherwise agreed by the development proponent.

Independent advice and representation for owners: Section 190

As previously discussed, the maximum amount of funding available to each owner to obtain independent advice should be capped relative to the price of the lot. The Institute suggests that a figure of 5% would be more than sufficient, noting that the median Perth unit price of $390,000 would provide owners with a maximum of $19,500. However, these costs should also be factored into the valuation of individual lots. An additional 5% could be made available to vulnerable owners, to take their total allowance to a maximum of 10%.

The definition of vulnerable owners is critical, however section 190(1)(b) provides a very broad definition of vulnerable owners. Further guidance should be provided to ensure that only those that genuinely require additional assistance and advice are provided with such assistance, recognising that funding for advice is available to all owners. The Institute suggests that whilst the Act refers to 'vulnerable owners', the intent of this provision was to protect vulnerable owners living within the strata scheme subject to the termination proposal. Therefore UDIA recommends that owners whose primary residence is not subject to the termination process such not be considered vulnerable persons, even if they are able to fulfil another aspect of the vulnerable person's criteria. Clarity is also needed as to how the regulations will apply where property is held jointly, but only one partner is considered to be a vulnerable person.

The Institute strongly recommends that consideration is given to the suitability of the housing within the existing strata scheme given the current and likely future needs of vulnerable persons and whether the persons affected by the proposal would benefit from moving into more suitable housing.

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Staged Subdivision and Dispute Resolution

The Institute welcomes the amendments which will improve the staged strata process. Much of the focus of the discussion paper is on amendments to staged subdivision driven by the developer. However, recognition also needs to be given to the fact that many subdivision amendments are likely have arisen from strata owner feedback and/or developers whom desire to improve amenity to existing and future residents of strata schemes. For example, unforeseen issues may have arisen from the use of buildings and common property that in order to address, dictate amendments to future development stages. The regulations should seek to provide greater support to such amendments.

Clarity is needed regarding the status of the current industry practice to include expressed consent under a power of attorney within 'Off the Plan' (OTP) contracts which provides developers a measure of control in the initial phases of a staged development.

Sufficient compliance with by laws: Section 36

UDIA suggests that careful thought be given as to whether type 3 subdivisions should allow for some element of deemed consent where the effect is minimal. Any amalgamation is likely to affect most other lots in a scheme due to minor modifications of unit entitlement. As such, UDIA recommends that the regulations do not require the consent of the other owners when the effect is marginal.

The Institute suggests that registered leases be removed from having an ability to object to a change to the scheme plan. Those without a direct property ownership interest should not necessarily have a right to object unless it relates directly to the use of their lease or common property areas denoted in their lease, or should they have extended lease periods. This could be reconsidered in the future as residential leases potentially evolve over time and as new leasing models such as build-to-rent models come into the market.

In relation to the questions posed, the Institute supports enabling licenced surveyors to be able to determine minor amendments. Further, minor variations need to be widened somewhat, for example, amalgamations (of up to 10%) of lots should be deemed as minor. UDIA also has concerns regarding the extent of parties with a designated interest that are able to apply for a review of a determination. Whilst taking an overly broad path will completely protect everyone's rights, it will also potentially forestall the use of staged subdivision. The drafting of the regulations provides the opportunity to remove ambiguity and provide clear guidance to set out with certainty what constitutes minor amendments to schemes. Providing this clarity to all stakeholders will limit potential challenges to minor amendment determinations. Whilst recognising that in order to cater for all circumstances a determination review process is needed, the Institute suggests that an application fee, set at an appropriate level, should be applied to requests to review determinations in order to help prevent frivolous review requests. This fee could be refunded should the tribunal determine that the amendment is not minor.

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Timelines for review should be short to avoid unnecessary delays. Recognising that minor amendment determinations are made by suitably qualified professionals, the Institute suggests that that a maximum of 14 days is provided to persons with a designated interest to be able to review a minor amendment determination.

In practice, there are likely to be multiple amendments to a staged strata scheme, which raises the question as to whether developers will need to make multiple notifications to owners. As previously discussed in relation to the *Management and Seller Disclosure* discussion paper, the Institute queries whether these could be packaged and presented together at a time prior to the commencement of the particular development stage?

Requirements for staged subdivisions by-laws: Section 42

The requirements for staged subdivision, as set out by section 42, are fundamental to the success of staged subdivisions and whether or not the market takes up this development form. It is critical that as per the requirement of 42(2)(a)(i) that *"the by-laws must describe in detail the stages of subdivision that are agreed"* is clearly defined. Does this mean only future stages that have planning/development approval? The discussion paper appears to imply this, or at the very least close to the level of information required by a DA. This is unreasonably onerous, particularly given that section 42(4) of the Act provides that by-laws do not bind the Planning Commission or local governments and section 42(5) does not bind the developer to undertake subdivision. The recent release of the Design WA state planning policy suite, which includes the Apartment Design Guide and requirements to undertake design review processes, adds further uncertainty to development outcomes that are not yet approved. Further, recognition also needs to be given to the fact that DA approvals are only valid for two years, which is likely to be a far shorter timeframe that a staged subdivision development. If staged subdivision is be an attractive development option, greater flexibility is needed. UDIA recommends that details of further stages should be limited to general uses, broad unit numbers, building scale and massing and total unit entitlement outcomes.

From a development perspective, whilst there is some comfort in deemed consents, it still is an involved process and there is the potential for appeal from multiple parties. Unless the requirement to provide specific development design details can be relaxed, developers will have to rely on the power of attorney to retain sufficient confidence in development outcomes.

Review of Planning Commission and local government decisions: Section 27 and Section 28
The Institute supports retaining the 40 day period in which to lodge an appeal against either a decision of the Planning Commission or local government.

Scheme disputes: Section 197
There is a wide and comprehensive list of disputes classes provided by section 197, therefore extending this list appears unnecessary, however the Institute suggests that it may be appropriate to review the classes of dispute as part of a broader review of the Act and Regulations at a suitable time following proclamation.

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Should the Department require any assistance or further information regarding this matter, the UDIA would be delighted to assist. Should any further information be required in relation to the comments above, please contact Chris Green, Director Policy and Research at cgreen@udiawa.com.au or 9215 3400.

Yours sincerely

Tanya Steinbeck
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