

4 October 2019

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Strata Titles Act Reform
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Via email: StrataTitlesActReform@landgate.wa.gov.au

Dear Kelly,

Strata Titles (General) Regulations 2019 Consultation Draft

Thank you for the opportunity to provide feedback on the Consultation draft of the Strata Titles (General) Regulations 2019. 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.

Support for the draft Regulations

UDIA WA welcomes the release of the draft Strata Title Regulations and acknowledges the efforts made by Landgate to deliver these reforms. It is important that the Strata regulations are robust and provide confidence to owners and potential purchasers of strata property. Therefore, the Institute fully appreciates the complexity of the Strata Title legislation and also recognises the complexity of the legislative amendment process. Whilst this has meant that Strata reform has taken several years and successive Governments to progress, UDIA congratulates Landgate and the Government for preparing a comprehensive set of draft Strata Title Regulations.

WA's changing demographics and lifestyle preferences mean that having contemporary Strata Title Regulations is critical to enabling development to respond to these emerging community needs and providing a choice of housing options. Through the McGowan Government's 'Our Priorities' program and initiatives such as METRONET and the release of Design WA, the Government has set out a clear agenda to increase infill development and provide housing choice. Strata Title reform is essential to supporting these objectives and delivering improved development outcomes that support the emerging needs of our future communities.

UDIA also wishes to once again acknowledge Landgate for the comprehensive and ongoing industry engagement process that they have undertaken. The consultation process adopted by Landgate provides an exemplar model that other government agencies should seek to replicate when undertaking regulatory reform. UDIA is pleased that much of the feedback provided by the development industry during the stakeholder consultation process has been duly considered, however two key areas of concern remain, the termination of schemes and the transition arrangements for emerging strata development under construction with some pre-sale commitments and other lots remaining available for sale.

Termination proposals

Despite our support for the draft Regulations, we remain concerned by the high cost associated with the termination of schemes and in particular, the lack of certainty that the three staged termination process provides.

As Landgate's discussion paper relating to the termination of strata schemes correctly identified, *'strata buildings are aging, many schemes owners are now getting to the point in some schemes where they cannot afford to maintain these old buildings 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'*. To satisfy these desires and to ensure that strata owners in schemes with insufficient sinking funds do not suffer from housing blight and become trapped by poor quality housing, it is vital that investment in these properties remains an attractive proposition. Therefore, it is imperative that the Strata Titles Act and Regulations provide for the efficient termination of schemes.

To further illustrate the need for effective strata scheme termination provisions, as you will be aware, the Minister of Planning recent amended the City of Nedlands Local Planning Scheme to ensure the delivery of the State Government's infill dwelling targets. The focus for the majority of future development in Nedlands is along Stirling Highway. Here, approximately one third of all lots suitable for development, larger than 1,000m² and zoned for higher density (R-AC1) are strata title. Other activity centres are similarly characterised by large numbers of strata properties. Therefore, and as the Nedlands example highlights, without efficient and effective strata termination provisions, the Government's infill development objectives will be severely undermined.

UDIA fully recognises that the Regulations need to provide appropriate safeguards to protect all owners subject to a termination proposal, however the multiple and arduous termination requirements set out in the draft Regulations mean it is highly unlikely that any strata scheme will be terminated, without the unanimous resolution of all owners within a scheme. This is contrary to what the Strata reform program and regulations sought to achieve. Therefore, UDIA encourages the State Government and Landgate to commit to reviewing the Regulations within three years of its commencement and to undertake detailed annual monitoring and reporting to provide an evidence base to inform this review and enable an accurate evaluation of the effectiveness of the termination provisions.

Recommendations

- UDIA strongly recommends that the Regulations and Act be reviewed within three years of the regulations coming into effect.
- Landgate provide an annual report setting out the number of strata terminations.
- Suitable provision be included in the regulations to provide for the three-year review and annual reporting of strata development and termination proposals.

Transitional Arrangements

The Institute is pleased that the draft Regulations provide a number of transitional arrangements, however much of this focus appears to be on fully established strata schemes and it remains unclear how developments with pre-sale commitments made prior to the commencement of the new Act and Regulations will be governed.

The Institute is concerned about the potential for different owners within the same strata scheme to be governed by two different sets of regulations, each with different requirements. At the practical level, the Institute is keen to ensure that regulations do not give rise to situations 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 have 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.

Specific Comments

Part 4 — Planning and development

17. Matters to be considered on application for subdivision approval

Regulation 17 notes that;

“the Planning Commission must have regard to all relevant matters including...

(h) any relevant local laws relating to town planning

(i) any objections or recommendations made by a local government, a public authority or a utility services provider after consultation.”

However, the Planning and Development Act states that decision makers must have ‘due regard’ to relevant matters. Therefore, the Institute queries this inconsistency and whether this difference will have any material impact on decision makers, particularly as the list refers to any objections or recommendations made by a local government, public authority or utility service providers.

Part 5 — Short form easements and restrictive covenants

32. Light and air easement

Clarity is needed regarding what constitutes unimpeded access for light and air easements. For example, is it considered to mean no overshadowing in the case of light or a setback of 1m for air?

Part 6 — Staged subdivision

49. Significant variations

UDIA acknowledges and supports the intent of the regulation to ensure that buyers are appropriately protected from significant and unreasonable variations to staged schemes. UDIA supports the proposed 10% threshold for variations to unit entitlement and the corresponding 10% adjustment to the number of lots within a scheme. These are sensible thresholds which provide the flexibility needed to deliver staged strata development whilst also providing adequate certainty for purchasers.

Nevertheless, this flexibility will be compromised by the bluntness of part (c) of regulation 49 which means that any amendments to the number of floors within a future stage of development are considered to be significant variations. This is an extremely blunt measure that will prevent developers and development designers from making positive amendments to development stages that are beneficial to owners of lots in pre-existing development stages.

These requirements should not be viewed in isolation and it is important to note the other requirements of r.49 and limitations to the number of lots and unit entitlement, which provide buyers with sufficient certainty regarding the scale of future development stages.

UDIA understands that the intent of this limitation is to ensure that any future stage of development does not give rise to any unexpected negative impact upon purchasers of previous development stages, such as the loss expected of views. Therefore, the Institute suggests that a performance-based approach be used to ensure this is achieved. A licensed valuer should be permitted to undertake an assessment to determine whether the proposed development amendments constitute a significant variation, with consideration given to impacts such as solar access and access to views.

Noting that the regulations also entitle a range of persons to dispute a significant variation determination, the Institute reiterates our previous recommendation that regulation 49(c) be removed, or alternatively, expanded to state *“unless the change does not have a material adverse impact on any existing lots within the scheme”* (as per the provisions of r.49 (1)(d)).

51. Persons entitled to dispute determination

The Institute queries whether the individual dispute process against determinations should be formalised through the Strata Company, noting this is potentially relevant to several areas.

Part 12 — Strata Companies

76. Requirement to have 10-year plan

Clarity is needed regarding maintenance that is of a ‘routine nature’ 76 (2), noting that routine maintenance is essential to maintaining the performance and functionality of the items listed.

79. Expenditure on common property requiring special resolution.

The expenditure requiring special resolution is very low and the Institute suggests that this should be tied to a percentage of the total value of the building or to the strata scheme annual budget. In addition, any expenditure identified and approved in the strata scheme’s maintenance plan should not be restricted by this expenditure limit. Strata budgets are now commonly exceeding \$1M, therefore to potentially require special resolution when the monetary value of expenditure is a very small percentage of the total budget or asset value, is cumbersome and inefficient.

UDIA suggests that a more effective approach would be to use a combination of the percentage of total value, and cost to individual lots, using whichever is the greater, dollars or percentage cost, to cater for both smaller scheme and larger schemes.

96. Strata manager must obtain professional indemnity insurance

UDIA queries whether the level of professional indemnity insurance is sufficient and suggests that this should be increased to reflect the increasing size and complexity of strata schemes, including multi-staged schemes. The Institute suggests that consideration should be given to adopting a scale-based approach based on the size of the strata scheme. The Institute also queries the absence of Public Liability cover.

98. Disclosure of remuneration and other benefits

UDIA supports full disclosure of all commissions and commercial relationships. By their very nature, commissions influence strata managers in recommending that work and services be undertaken, or not, and also in awarding, or proposing that work/services to be undertaken by certain bodies. The Institute would also support declarations of any relationships between a developer and strata manager.

Part 15 — Termination Proposals

As previously stated, UDIA remains concerned about the high cost and lack of certainty regarding the termination process and recommends that terminations are monitored annually to help inform a review of the regulations within 3 years of being adopted.

109. Qualifications of independent advocate

Although it is imperative that a robust framework is put in place to ensure that independent advocates have sufficient expertise and act appropriately, UDIA is highly sceptical that many, and certainly any major law firms would undertake this work. This then raises issues as to the quality of representation, despite the relatively high costs, and the consequential negative impacts of what is likely to become a lengthy and laborious process for all stakeholders involved. UDIA suggests that a broader definition of an independent advocate, whilst ensuring that they retain the appropriate skills and experience, would allow strata owners to receive appropriate advice more cost effectively.

Division 9 – Provisions for unanimous owner-initiated termination proposals

UDIA is pleased that the regulations provide for a more streamlined termination process when a proposal has the unanimous support of all lot owners within a scheme. This is a sensible approach that effectively means ‘business as usual’ for the processing of unanimous termination proposals.

Part 18 — Repeal, savings and transitional

As discussed previously, the Institute supports the phasing-in of many of the new requirements that the strata regulations bring in. However, given the two to three-year time period that many strata developments take to be delivered, with purchase commitments occurring at various times in the development process, clarity regarding the governance requirements for emerging strata schemes is needed. In particular, we would welcome clarity as to whether the provisions of r.171 and any amendments to scheme by-laws required by the Act, mean that such amendments do not trigger notifiable variations.

169. Applications for registration lodged before 2018 amending Act

It is our understanding that the effect of this regulation will be to ensure that strata applications, lodged, but not registered will be determined in accordance with the requirements of the ‘new Act’. Should this necessitate any by-law amendments for such developments, whilst notification should be provided to off the plan purchasers, it should not give rise to cancellation of contract rights.

Schedule 2 — Explanation of effect of section 47

cl.3 How this could affect you

The Institute queries whether the \$2,000 maximum penalty that the Tribunal can impose provides a sufficient deterrent to prevent the contravention of scheme by-laws. The Institute queries whether the maximum penalty is the same for individuals as it is for companies?

In closing, the Institute wishes to reaffirm our support for the draft Strata Titles Regulations, however to avoid any unintended consequences that the regulations may give rise to and to also ensure that the termination requirements are appropriate, we strongly encourage annual monitoring and reporting of strata scheme development and termination proposals.

Should Landgate 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
Chief Executive Officer