The New Strata Titles Regime in WA

Transitioning and Preparing Pre-Sale Contracts

Real Estate Alert

25 June 2020
By: Eagul Faigen | Robyn Rogers | Madison Orr

Background

Wholesale changes have recently been implemented to the *Strata Titles Act 1985* (WA) (**Act**) and developers are starting to come to terms with the amended legislation and the impact it will have on how new developments are undertaken and managed.

In a series of three articles, we will outline what some of the more material changes to the Act, as amended by the *Strata Titles Amendment Act 2018* (WA) (**amended Act**) and the *Strata Titles Act (General) Regulations 2019* (**Regulations**) will mean for developers, and how they can manage the transition to the new legislative regime. We will also comment on what the amended Act will mean for strata managers, and how strata managers can best transition to the new regime.

In this article, we focus on the transition period, the establishment of new strata schemes and our tips for getting it right when developers are preparing and entering into pre-sale contracts in the context of freehold strata schemes. Whilst some of the more material changes to the Act are outlined below, this article should not be read as a substitute to reading the amended Act and Regulations.

Transitional Arrangements

Various transitional arrangements are in place to manage the transition from the Act to the amended Act.

Whilst the amended Act does not affect the continued existence of current strata schemes, it does affect the operation of existing by-laws, the preparation of scheme documents for new schemes, the conduct of strata council members, scheme developers and strata managers, and the notifiable information to be provided to buyers.

Developers should identify those pre-sale contracts which will continue to be regulated, in part, by the terms of the Act prior to amendment as well as how the amended Act will affect those existing pre-sale contracts. Developers should also be aware of how the amended Act will affect pre-sale contracts entered into after 1 May 2020.

By-Laws – Existing Schemes

The amended Act categorises by-laws into ‘governance’ by-laws and ‘conduct’ by-laws. By-laws (including those included in any management statement) in force immediately before 1 May 2020 will continue in force but will be

categorised and applied as if they had been made on 1 May 2020.

Strata companies and strata managers should not rely on the face-value categorisation of existing by-laws as Schedule 1 or Schedule 2 by-laws. Every by-law existing before 1 May 2020 will need to be assessed as to whether it is a governance by-law or a conduct by-law. The category of by-law is relevant in determining the rules that apply in respect of amending, adding to, or repealing a particular by-law.

Close attention should be given to by-laws that are made up of both conduct and governance components with correct categorisation essential to the application, enforcement, variation or repeal of those by-laws.

The Regulations also prescribe that if a new by-law is made or if a current by-law is modified or repealed after 1 May 2020, this triggers an obligation to consolidate and recategorise all of the by-laws as 'governance' or 'conduct' by-laws in a manner consistent with the amended Act. A strata company may otherwise update its scheme by-laws at any time to make them compliant with the amended Act. Strata schemes should consider this when seeking to make a new by law or when seeking to amend or repeal an existing by-law.

Scheme documents

For the purposes of scheme documents prepared before 1 May 2020:

- a certificate of a licensed surveyor or licensed valuer given in relation to a strata or survey-strata plan or schedule of unit entitlement before 1 May 2020 in accordance with the Act is taken to comply with the requirements of the amended Act; and
- an approval of the Planning Commission or local government given under a provision of the Act before 1 May 2020 is taken to be an approval under the corresponding provision of the amended Act.

The Regulations also prescribe that an application for registration of a strata or survey-strata plan under section 4 of the Act that was lodged with the Registrar of Titles (Registrar) but not finally dealt with before 1 May 2020 is taken to have been lodged under section 56 (Application for Registration) of the amended Act as an application for registration of a scheme plan, if the Registrar is satisfied in relation to prescribed matters.

Developers should refer to Landgate's guidance in relation to the various forms and certificates that will be accepted by Landgate, with the lodgement of a plan on or after 1 May 2020, if they were signed, and dated before 1 May 2020.

Pecuniary interests

The amended Act has retrospective effect to contracts, leases and licences that scheme developers have entered into before 1 May 2020 that will bind strata companies which are created upon registration of the strata scheme under the amended Act.

For example, if a scheme developer enters into a services contract prior to 1 May 2020 for a scheme that is registered after 1 May 2020, the scheme developer must disclose to the strata company as soon as reasonably practicable details of any:

- remuneration or benefits the scheme developer or their associates have received or expects to receive in respect of that services contract; and
- other direct or indirect pecuniary interest that the scheme developer or their associates has (other than as a member of the strata company) in respect of that services contract.

Separately, the transitional provisions require that a member of a strata council or an officer of a strata company who continues in that capacity after 1 May 2020:

- must inform the council in writing, as soon as practicable after that day, of any direct or indirect pecuniary or other interest that the person has that conflicts or may conflict with the performance of a function as a member of the council or, if applicable, an officer of the strata company; and
- in the case of a member of the council, must not vote on a matter in which the member has an interest required to be disclosed under paragraph (a).

Scheme developers, members and officers should conduct a review of their interests to ascertain if they need to

give notice of those interests to the strata company following the commencement date of the amended Act and registration of the strata scheme.

Protection of Buyers

Sale contracts entered into prior to 1 May 2020 will continue to be governed under Part V of the Act. Conversely, contracts entered into on or after 1 May 2020 will be governed under Part 10 of the amended Act.

If developers are in the process of entering into (or have entered into) pre-sale contracts both prior to and after 1 May 2020, they must have regard to what notifiable information is required to be provided to the buyer under the contract to ensure strict compliance with either the Act or the amended Act, as applicable to the relevant sale contract.

Whilst the information required to be provided to buyers under Part 10 of the amended Act is similar to Part V of the Act, there are some differences and it is critical for developers to get it right as the failure to disclose the correct information gives buyers powers to avoid their contracts.

We set out the differences below.

Notifiable Information

When contrasted with Part V of the Act, Part 10 of the amended Act expands the amount of notifiable information sellers are required to provide to buyers.
Each of the new items of information must either be included in the new Precontractual Disclosure Statement (replacing the former Form 28 and Form 29) or by including the information or statements in the contract to be signed by the buyer, as prescribed by the Regulations.

The Regulations prescribe that the information specific to the sale of a strata lot must be included in the contract in a prominent position (such as the front page) and the general information about strata titles schemes must also be included in the contract, but may be provided in a form that is separate to the contract.

The new items of notifiable information that must be provided by all sellers of strata titled property to a buyer follow. See section 156 of the amended Act for the full list detailing these and all other items of notifiable information.

Information relating to the strata titles scheme

- **Scheme Notice** – to contain details of the name of the scheme and address for service of the strata company. The scheme notice will be lodged with the application to register the strata scheme and will be registered on the scheme plan.
- **Minutes** – of the most recent AGM and of any subsequent EGM of the strata company, or a statement that the strata company does not keep minutes of its meetings, or a statement of why the seller has been unable to obtain the minutes.
- **Statement of Accounts** – for those last prepared by the strata company, or a statement that the strata company does not prepare a statement of accounts, or a statement of why the seller has been unable to obtain a statement of accounts. The statement of accounts must detail the assets and liabilities of the strata company at the end of the financial year and the income and expenditure of the strata company for the financial year.
- **Notice of Termination** – a copy of any notice received by the seller from the strata company in relation to any current termination proposal for the strata titles scheme.

Information relating to the lot

- **Definition of lot** – the definition of a strata lot as contained in the scheme plan. There is currently no guidance on what the “definition” of a lot must include.
- **Debt** – details of any debt owed by the owner of the lot to the strata company, including how the debt arose, the date on which it arose and the amount outstanding.
- **Special lot** – if the lot is a special lot, details of the exclusive use by-laws that apply to that lot. Whilst this concept is not new, the obligation now applies to all sellers.

Information prescribed by the Regulations

- **Voting rights restrictions** – if the contract contains any voting rights restrictions, a statement that the contract restricts the buyer's right to vote as owner of the lot and that sets out particulars of the voting right restrictions.
- **Approved form** – the approved form of general information about buying and selling in strata schemes. This is now detailed in Part A of the Precontractual Disclosure Statement to the Buyer.In addition to these items of new notifiable information, the amended Act also amends the scope of additional information to be provided to buyers.

The additional information must be provided by sellers where:

1. the strata titles scheme has not been registered; or
2. the first annual general meeting of the strata company has not been held; or
3. the scheme developer (which includes both the original proprietor and the owners of lots that are subdivided by any subsequent subdivision):
   a. is the registered proprietor of 50% or more of the lots in the scheme; or
   b. is the owner of lots with an aggregate unit entitlement of 50% or more of the total unit entitlement of the lots in the scheme.

The ***new additional information*** to be provided by sellers who fall into one or more of the categories above is set out below.

Income and expenditure

- **Expenditure of strata company** – a statement of the estimated income and expenditure of the strata company for the 12 months after the proposed settlement date. This is not an entirely new concept, however the timing of the 12 month period is now based on the proposed settlement date and not the strata plan registration date. This means that the expenditure statements will need to be modified to accommodate different proposed settlement dates.

Pecuniary interests

- **Disclosure by scheme developer and associates** – a scheme developer and its associates must disclose in writing to the strata company details of any:
  - remuneration or other benefit that they received or have a reasonable expectation of receiving; and
  - other direct or indirect pecuniary interest that they have in a contract, lease or licence other than as a member of the strata company.

Again, whilst this isn't a new concept, it has been expanded to scheme developers *"and their associates".*

Contracts

- **Amenity or service contracts** – details of any contracts (or proposed contracts) for the provision of any amenity or service to the strata company or to members of the strata company entered into or arranged by the scheme developer including the terms and conditions of the contract, the consideration for the contract and the estimated cost to the members of the strata company.

Again, this is not a new concept, but it has been expanded to apply to members of the strata company and contracts arranged (not just entered into) by the strata company.

Sellers of strata titled property should ensure that they are aware of the new items of notifiable information and additional information, and the manner in which it must be presented to buyers. A failure to provide a buyer with notifiable information gives buyers rights to avoid the pre-sale contract.

Failure to Provide Notifiable Information

Under the amended Act, buyers still have rights in certain circumstances to delay settlement under the contract

and avoid the contract where a seller has failed to provide notifiable information or has failed to provide notifiable information in the time required.

We summarise below the buyers rights in this regard under the amended Act.

Delay in settlement for failure to give information

If a seller has not provided the buyer with the notifiable information in accordance with section 156 of the amended Act, a buyer may by written notice to the seller postpone the settlement date for up to 15 business days after the latest date on which the seller provides the required notifiable information.

Avoidance of contract for failure to give information

If a seller:

1. has not provided the buyer with the notifiable information in accordance with section 156 of the amended Act; and
2. if the seller were now to comply with section 156 of the amended Act the buyer would receive information or a document that would disclose material prejudice to the buyer (proof of which lies on buyer),

the buyer may avoid the contract at any time before the settlement date.

However, if the seller gives the buyer a notice substantially complying with section 156 of the amended Act before the buyer avoids the contract, the buyer may only avoid the contract if the buyer does so within 15 business days after the seller's notice is given to the buyer.

Sellers should familiarise themselves with the notifiable information required under the Amended Act, to avoid the buyer becoming entitled exercise its rights to delay settlement or avoid the contract.

By-Laws

Earlier in this article we spoke about the transitional arrangements between the Act and the amended Act and how they were relevant to existing by-laws, including the categorisation of by-laws into 'governance' by-laws and 'conduct' by-laws'. Other changes to the by-laws under the amended Act are also relevant to developers and developers should have regard to these changes when preparing the by-laws for new strata schemes. Some of the more relevant changes follow.

- **No "management statement"** – the terminology of a management statement no longer exists. However, the general concept of registering alternate scheme by-laws remains and if a strata company does so, this will amend or repeal the Schedule 1 and Schedule 2 by-laws as set out in the amended Act.
- **AGM process removed from by-laws** – the process for annual general meetings is no longer found in the by-laws but is now in the amended Act. This process cannot be contracted out of through the registration of new by-laws, and any by-law which is registered that deals with the AGM process will be invalid to the extent that it is inconsistent with the amended Act.
- **Categorisation of by-laws** – the by-laws must be categorised into governance by-laws and conduct by-laws. Governance by-laws deal with the governance of the scheme, subdivision and development of land and the exclusive use of common property. The conduct by-laws deal with the conduct of owners and occupiers and the management, control, use and enjoyment of the lots and common property. To make, amend or repeal a governance by law it will require a resolution without dissent. To make, amend or repeal a conduct by-law it will require a special resolution.
- **Exclusive Use by-laws** – exclusive use by-laws can now provide exclusive use rights over part of the common property to the owners of more than one lot.
- **Invalidity of by-laws** – the amended Act details a far more extensive list of circumstances where a by-law will be invalid, including where the by-law is unfairly prejudicial or unfairly discriminatory against one or more lot owners or if the by-law is oppressive or unreasonable.
- **Penalties for breach** – by-laws may no longer prescribe penalties for breach of a by-law. Under the amended Act, penalties are prescribed and enforced by the State Administrative Tribunal. The Regulations prescribe that the maximum amount that may be imposed by the State Administrative Tribunal by way of penalty for

contravention of scheme by-law is $2,000.

Closing

The amended Act brings wide spread changes to the establishment of strata schemes. Developers should ensure they have due regard to the changes to ensure that they are getting it right when both preparing and entering into pre-sale contracts for the sale of strata lots.

For specific advice in relation to your obligations under the amended Act please contact our offices and keep an eye out for the next article in this series “Managing Pre-Sale Contracts and Ensuring Enforceability” which focuses on ensuring that developers obligations in respect of notifiable variation under the amended Act.

AUTHORS

Eagul Faigen
Partner
Perth | T: +61 8 6467 6000
Eagul.Faigen@dlapiper.com

Robyn Rogers
Special Counsel
Perth | T: +61 8 6467 6000
robyn.rogers@dlapiper.com