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FEEDBACK AND COMMENT ON THE STRATA TITLES (GENERAL) REGULATIONS 2019

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Strata Community Association WA

The peak industry body for strata and community titles

Introduction

SCAWA welcomes the opportunity to provide feedback to Landgate in relation to the draft regulations which have been published for the purpose of public consultation.

This submission builds on previous SCAWA submissions and comment to Landgate, in different forums and formats, during the last 12 months on a matter of vital interest to its members.

The SCAWA board of management appreciates the opportunities that have been provided to SCAWA to have input into the drafting, and the time that Landgate staff have invested in consultation with us. We are pleased to see that much of the feedback we have provided in the past has been incorporated in the draft regulations.

General remarks

Having now had the opportunity to view the draft regulations in their entirety, we offer the general observation that the regulations are, arguably, overly complicated in many instances. There are also instances where the regulations are so broad as to be entirely redundant because the breadth of the matters prescribed results in virtually no prescription. We contend that that more should be done to simplify the regulations, make them more user friendly (bearing in mind the high rates of lay reference to strata titles legislation) and remove unnecessary prescriptions.

Additionally, we contend there is a need for the Regulations to, where possible, clarify and rectify some (probably unintended, yet problematic) consequences of the drafting in the *Strata Titles Amendment Act 2018* as enacted. Specifically:

1. **Section 128(3)** – requires that 50% of all lots convene the requisitioned meeting, not just 50% of the requisitionists, as per existing default by-laws. This will stop schemes from getting back on track after experiencing problems. Is there anything the Regulations can do to ameliorate this?

2. **Section 130(3)** - provides that a quorum is 50% of all lots, not 50% of all financial lots, as per existing default by-laws. Owners at a general meeting will be forced to wait for 30 minutes before proceeding if some owners have not paid their levies. Owners should not be forced to wait because the quorum requirements have been (perhaps inadvertently) changed by this section. Is there anything the Regulations can do to ameliorate this?

3. **Section 143(5)(a)** – stops strata managers from engaging a contractor (e.g. builder, accountant) as agent for or on behalf of the strata company. Practically, this means managers will require that councils engage most contractors, and this will significantly increase the workload of (volunteer) councillors. Is there anything the Regulations can do to ameliorate this?

4. **Section 148(5)** - stops strata manager from using the trust account to pay any contractors they engage to perform a scheme function. If not from this account, how then is a manager to pay contractors? Is there anything the Regulations can do to ameliorate this?

Feedback on specific regulations

SCAWA feedback in relation to specific regulations is as follows:

Reg 10: key documents – ought to include Notices of Practical Completion for each building in the scheme. These notices are needed so strata companies and owners know when the 6-year statutory defects limitation period expires.

Reg 57. Scheme By-laws – needs clarification – does 2(b) require that every time there is a by-law change a consolidated set must be lodged?

Reg 69: transfer of ownership of infrastructure – is unnecessary and will lead to disputes. Further, as drafted, the strata company could refuse to provide consent on any grounds without limitation. There ought to simply be an obligation for the infrastructure owner to notify of any transfer of ownership.

Reg 76(2)- 10 year plan- needs to allow a strata company to resolve by special resolution to remove an item or items from the plan (this decision to be reviewable by SAT);

Reg 79: expenditure on common property requiring special resolution - this is a significant problem, as the $500 per lot limit is unduly restrictive. In practice, it will be an unnecessary impediment to keeping buildings up to scratch. It will result in many old schemes being unable to proceed on budgeted maintenance issues, because for example; replacing the old central hot water system results in an improvement to the common area plant room to comply with a new Standard and the old system is redundant, thus an improved system can only be installed. It will also be productive of pointless 'classification' disputes by minority owners who oppose works or expenditure. It is not based on any evidence about existing problems. Most work on common property involves 'altering' it (changing paint colour; replacing cabling; changing meters, replacing guttering, replacing windows, etc). A $500 limit allows for expenditure of just $2 500 for a 5-lot scheme and $5 000 for a 10-lot scheme. This $500 limit means a material amount of the work within a typical budget will need a special resolution. However, the strata company won't know the timeframes or the other required details by the time of the AGM. Therefore, the strata council will need to convene EGMs later in each year to seek to pass the required special resolutions. There may be a legitimate concern about expensive alterations such as new amenities or structures (e.g. balconies), being forced on owners who can't afford them. However, the limit to adequately address this problem would be $7 500 per lot or thereabouts. There are already adequate extensive safeguards – budgeted expenditure needs an ordinary resolution and SAT can overturn any strata company decision to expend money.

Reg 80 & Section 102(6)(a) Budget Variations – these provisions introduce a new limit on expenditure to an amount of just $100 per lot **per year** - this is a significant problem. This annual limit is a new restriction, not justified by any evidence of abuse of the existing section 47 provisions. This Reg and section significantly reduce flexibility and diminish owners' power to do what is needed when it is needed. SCAWA suggests there be a maximum spend limit of $100 per lot on any one occasion and a maximum of $1 000 per lot per year. There are already adequate extensive safeguards - SAT can overturn any strata company decision to expend money.

Reg 88 definition of 'designated person' - this definition is too broad and makes the Part 13 scheme of criminal record checks and educational qualifications unworkable. Many 3rd party non-trades contractors to managers (for example, accountants, auditors, debt recovery agents, insurance brokers, lawyers, software suppliers, town planners, etc) will be captured in the regulatory net as if they were a strata manager themselves and therefore required when combined with Regulations 90(3) and 90(4) - to provide criminal records checks, including for all WA employees. One can imagine the reaction if a strata manager requires a contractor such as Aon, KPMG or Herbert Smith Freehills to provide criminal record checks for every partner and director and every employee who might be involved in a strata matter in WA for a manager. Additionally, combined with Regulations 93(1)(b), 94 & 95(1)(b), those same contractors will be required to obtain the prescribed educational qualifications (if they undertake any of the activities in Reg 94(1)).

Reg 88 definition of 'property or dishonesty offence' - this definition is too broad and makes the Part 13 scheme of criminal record checks unworkable and uncertain. Arguably, most offences are "usually motivated by financial gain" (even very minor offences) but would not affect a person's suitability to be a strata manager. Further, how is a strata manager who must make a statutory declaration (Reg 91(3), under threat of criminal sanction) to know whether offences shown on a criminal record check are or are not "usually motivated by financial gain"? We suggest instead that "property or dishonesty offence" be defined by reference to specific offences in the *Criminal Code* and in other criminal legislation (or, less desirably, as "an offence which has dishonesty or financial gain as an element of the offence" or similar).

Reg 88 definition of 'repair or maintenance function' - should also include the function of controlling or managing common property under section 91(1)(b).

Reg 96 Professional Indemnity Insurance: The reg should additionally require that the strata manager's professional indemnity insurance include "run-off cover", that is, that it be required to cover claims made after the expiry or termination of the relevant contract.

Reg 110(1) Assessment by Independent Advocate – we suggest that (1)(b) & (1)(c) be deleted, as the independent advocate's role ought to be confined to the matter in sub-regulation (a) and as assessing these other matters is beyond the skills and competence of legal practitioners and, in fact, beyond the skill and competence of any one occupation. There are ample other safeguards in the Act and the other Regulations.

Reg 112(1) and Reg 132 Maximum Charge and Funding amounts - The maximum amount that could be required to be paid for the independent advocate under Reg 112(1) and the guaranteed funding to be paid to owners for advice and representation under Reg 132 are each excessive and, combined with the other requirements of the *Act* and Regulations, would operate as a prohibitive disincentive to a termination.

As an example of the costs payable under just Regulations 112(1) and 132, assume a 100-lot scheme; 80 owners who are not vulnerable and 20 owners who are vulnerable; 15 dissenting owners to the termination proposal, five of whom are not vulnerable and 10 of whom are vulnerable. Reg 112(1) and 132 would require the termination proponent to pay up to $406 000[1] under just these two regulations, detailed below:

- Reg 112(1) maximum payment to independent advocate that could be required: up to $13 000 + $1 000 x (100–2) = up to $111 000;
- Reg 132(2)(a) payment for advisory services to 80 non-vulnerable owners: 80 x $1 500 = $120 000;
- Reg 132(4)(a) payment for advisory and ancillary services to 20 vulnerable owners: 20 x $3 000 = $60 000;
- Reg 132 (2)(b) payment for representation services to 5 non-vulnerable dissenting owners: 5 x $5 000 = $25 000; and
- Regulation 132(4)(b) payment for representation services to 10 vulnerable dissenting owners: 10 x $9 000 = $90 000.

The payments required under Regulations 112(1) and 132 do **not include** the other costs which will be incurred by the termination proponent under the *Act* and other Regulations:

a. costs of the termination infrastructure report (that is, the costs of a report from each of a structural engineer, a builder and a quantity surveyor);

b. valuer's costs;

c. accountancy costs;

d. legal costs;

e. planning costs to obtain sub-division approval;

f. surveying costs;

g. costs of the independent vote counter under Reg 119;

h. strata company's costs;

i. costs of the trustee of the trust established under Reg 125;

j. document service fees;

k. filing fees; and

l. other costs and disbursements that SAT can order the termination proponent to pay.

[1] Assuming no lots are-co-owned by vulnerable people. If lots are co-owned by vulnerable people, that increases amount payable: regulation 132(5).

The termination proponent would incur these costs either:

- without knowing whether the requisite number of owners will accept the termination proposal; or, if they do;
- then without knowing whether SAT will approve the termination proposal.

The costs above also **do not include** the amounts that must be part of the termination proposal to satisfy the SAT under section 183 (and section 192):

a. costs to purchase each lot at fair market value, or to supply a like for like exchange for each lot;

b. costs to compensate owners for the taking of the lots (up to 10% above the lot's fair market value, or more in exceptional circumstances);

c. costs to compensate tenants and licensees;

d. costs to compensate for disruption and reinstatement of businesses;

e. costs to supply alternative accommodation;

f. costs of moving;

g. costs to reimburse capital gains tax, GST, duty, etc to owners, tenants, etc;

h. costs of conveyancing, legal costs and other costs associated with the creation or discharge of mortgages and other interests, including for the acquisition of replacement properties; and

i. costs to discharge the liabilities of the strata company.

Reg 119 Independent Vote Counter - the Regs do not prescribe a maximum amount chargeable by an independent vote counter, but ought to.

Reg 125 Proponent's Trust - the Regs do not prescribe a maximum amount chargeable by a trustee of a trust, but ought to.

Reg 170 Requirement **to have a 10-year plan**. - allows between 12 to 24 months for all designated schemes (thousands of schemes) to commission, obtain and present a plan. It is anticipated that this will create 5 yearly 'peaks' of demand for the services involved in creating these plans, causing not only workload issues but also potentially skewing the market and inflating costs. Can the regulations make some provision to enable a staggered transition, over 5 years, based on strata plan number? For example, require designated schemes with:

a. plan numbers from 1 to 15 000 to present a plan at first AGM 12 months after commencement;

b. plan numbers from 15 001 to 30 000 to present a plan at first AGM 24 months after commencement; and

c. so on, following this method.

Part 18 Transitional Provisions – a further regulation is needed that obliges Landgate to register orders and take all other steps required by orders made by a Court under the transitional provisions in the *Act* schedule 5 clause 30. Otherwise, Court orders under the transitional provisions will be of no use.

Schedule 4 Educational Qualifications for Strata Managers: the Regs should provide for the recognition of the Certificate IV in Property Services as an alternative qualification for Designated persons and Principals. There are many highly experienced and competent strata managers who have this qualification. SCA submits that the attainment of this qualification adequately and properly qualifies a person to operate as a strata manager. Even if the Certificate IV in Property Services is not recognised in isolation as a sufficient qualification, some recognition should be given so as to exempt a person with that qualification from being required to complete all of the Cert IV in Strata or all the units.

Further, the list of core units in the Regulations does not include units which are, in SCA's opinion, critical for competence in strata management, such as:

- Facilitate Meetings: the strata manager's role in facilitating meetings requires extensive and comprehensive knowledge of the Strata Titles Act and by-laws.
- Report on Financial activity: this unit will have increasing importance under the new financial reporting regime introduced by the amendments to the Act.

SCAWA welcomes the opportunity to discuss the above feedback with any members of the Landgate team, and we are happy to provide further information if requested. We otherwise look forward to hearing from you as to Landgate's position on the matters raised in this submission.