Proposed Part 12 of the Strata Titles Amendment Bill 2018
Standing Committee on Legislation

Response by Landgate Officers to list of questions for hearing with Landgate at 10.45am on Thursday 27 September 2018

1.1 Please give an outline of the policy intent behind proposed new Part 12 – Termination of strata titles scheme.

The first strata schemes in Western Australia were constructed over 50 years ago. Scheme buildings are ageing and many large older buildings are costing owners substantial amounts in maintenance. Owners are now getting to the point in some schemes where they cannot afford to maintain these old buildings. Those owners are going to start 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 more development occurs in a city, as is happening across the Perth metro area, viable redevelopment sites become more scarce and developers start looking to existing strata schemes as potential redevelopment sites.

Based on the experience in other jurisdictions where you have this combination of ageing strata schemes and more pressure for redevelopment sites, termination and redevelopment of strata / survey-strata schemes will become increasingly common.

The main concern that has driven the reforms to introduce safeguards for termination was that the existing termination provisions are inadequate to protect the rights of owners.

To protect the assets held by all strata owners, it is proposed that safeguards for the termination of a strata scheme will be introduced, as contained in Part 12 “Termination of strata titles scheme” inserted by clause 83 of Division 3, Part 2 of the Strata Titles Amendment Bill 2018 (the Bill).

1.2 Please outline the major differences between the relevant provisions in the Strata Titles Act 1985 and proposed Part 12 of the Bill.

The Landgate submission details the entire proposed termination processes. Below is an extensive summary of the termination provisions in the current STA:

s 30 Termination of strata scheme by unanimous resolution
Notice is given to owners of a proposed resolution to terminate the scheme. They call a meeting and vote. If the vote is unanimous, the next step is to lodge a notice of this with the Registrar. The outcome will be that they will become tenants in common of the parcel, in shares proportional to their unit entitlements.

30A. Termination of survey-strata scheme by unanimous resolution
Notice is given to the owners in a survey-strata scheme of a proposed resolution to terminate the scheme. They call a meeting and vote. If the vote is unanimous, the next step is to lodge notice of this with the Registrar. They will also have to get a certificate from WAPC which consents to the termination.

31. Termination of scheme by order of District Court

The strata company, an owner, or a registered mortgagee of a lot can apply to the District Court for an order terminating the scheme.
The District Court can make an order terminating the scheme setting out:

- the sale of the strata company's property and the discharge of its liabilities.
- who should pay what to discharge the liabilities of the strata company
- how assets of the strata company should be distributed
- the role of the strata company in the process
- any matter which is just and equitable, in the opinion of the Court.
- how the strata company is to be wound up
- whether insurance money can be paid directly to a mortgagee of a lot.

The District Court can amend any of these orders.

The District Court may make such order for the payment of costs as it thinks fit. Once the orders are made, the strata company must immediately lodge a copy of it with the Registrar, after which the Registrar will make an entry in the relevant plan and on any relevant certificates of title confirming the termination.

51. Relief where unanimous resolution or resolution without dissent required
Section 51 can be used for a resolution where the vote was required to be a unanimous resolution to pass, (such as a termination proposal) and it did not achieve this support, but did attain the support necessary for a special resolution. A person who has voted in favour of the proposal can apply to the District Court for an order that the resolution will be deemed to be unanimous. This process does not apply to a two-lot scheme.

Notice of the application to the District Court must be served on every person entitled to vote who did not vote for termination, and to every person the District Court declares has an interest in the proceedings. The District Court may direct that any person served with notice is to be joined as a party to the proceedings.

The District Court cannot order a dissenting party to pay the costs of a successful applicant unless it considers the actions of that party to have been unreasonable.

51A. Relief where unanimous resolution required for two lot scheme
For a two lot scheme, for any matter that fails to achieve the required unanimous resolution, one proprietor may apply to the District Court for an order declaring that the resolution is unanimous. The other owner must be served with notice of the application.

To make an order declaring the resolution to be unanimous, the District Court must be satisfied that this is in the best interests of the owners, or that the dissenting proprietor has been unreasonable in refusing to agree to the resolution.

The District Court cannot order a dissenting party to pay the costs of a successful applicant unless it considers the actions of that party to have been unreasonable.

1.3 Given there are a number of matters in proposed Part 12 which are intended to be dealt with by the regulations, such as prescribing matters relating to the determination of market value of a lot for a termination valuation report under proposed section 179(4), have these been drafted and can a copy be provided to the Committee?

The regulations for termination of schemes have not been drafted as yet. Please note that the regulations arising from Part 12 have yet to be fully consulted upon and the intent is that

full consultation on the regulations required for Part 12 will be undertaken when the Bill has been passed. Undertaking extensive consultation on the regulations arising out of Part 12 of the Bill is premature when this Part of the Bill is the subject of an Inquiry by the Standing Committee on Legislation given that such inquiries in the past have typically recommended changes to the proposed Bill.

1.4 If not:

- When will the regulations be ready for gazettal?

The Minister for Lands indicated in the Legislative Assembly that it will be at least 6 months after passage of the Bill before regulations can be completed. The time it takes to draft regulations is partly dependant upon the drafting priority allocated to the regulations. This timeframe may have to be extended out depending upon the priority rating for the regulations.

- Are you able to provide advance information on the matters that will be dealt with by regulation? For example:
  - The limits for fees a strata company may charge the proponent of a termination proposal under proposed section 189(2)?

The policy for this safeguard is to ensure that the strata company (and therefore the owners) are not left out of pocket as a result of receiving and responding to termination proposals.

- Whether the regulations will contain provision for proponents of termination proposals to enter into arrangements for lot owners to obtain independent advice or representation under proposed sections 171(1)(i) and 190(1)?

1. The proponent will be required under the regulations provided for in section 190 of the Bill to pay for owners who meet specified criteria (set out in the regulations) to obtain independent legal advice, legal representation, valuation advice and financial and taxation advice in connection with a termination proposal.
2. The regulations will likely specify that vulnerable owners are owners who meet the specified criteria and are therefore entitled to the funding to be paid by the proponent to obtain the independent advice and representation.
3. Section 190 has been drafted so that all owners could be the owners who meet specified criteria and are therefore entitled to be paid by the proponent to respond to the termination proposal.
4. The definition of owners who meet specified criteria and, in particular, vulnerable owners for the purpose of section 190 of the Bill is being developed in consultation with stakeholders, including community groups.
5. The reason for providing this definition in the regulations is that the concept of vulnerable changes over time as society's expectation change.
6. As a starting point, and subject to further consultation, the following criteria are proposed as being the basis on deciding whether certain people are vulnerable owners and therefore eligible for funding assistance under section 190:
   a) Due to age, illness, trauma or disability, or any other reason, the owner has an impaired ability to fully understand or participate in the termination process, present their case or make an informed decision
   b) The owner is financially disadvantaged to the extent that it would not be reasonable to expect them to pay for professional advice in response to the proposal.

7. The vulnerable owner funding under section 190 can be used to:
    a) obtain a licensed valuer's report to counter any valuation evidence submitted by the proponent
    b) pay for expert advice on the taxation and financial implications of the termination
    c) pay for legal advice on the termination proposal and
    d) pay a lawyer to represent the vulnerable owner in the SAT proceedings.
8. The regulations will provide how much money is to be set aside for each vulnerable owner

Policy

The intent of this vulnerable owner funding safeguard is to ensure that certain owners who would be at a disadvantage responding to a termination proposal have access to resources for additional assistance. This funding and assistance is aimed at ensuring that vulnerable owners are put on equal footing with other owners so that they can properly respond and if need be, effectively object to the termination proposal.

It is worth noting that the NSW Advocacy service for termination operated by Fair Trading NSW lists the people eligible for advice under that service as:

- recipients under the National Disability Insurance Scheme (NDIS)
- other persons with disabilities (not NDIS)
- Aboriginal and/or Torres Strait Islander people
- low income/Centrelink recipients
- persons under Public Guardianship
- persons on a full pension (subject to means testing).

1.5 Bearing in mind the wording of clause (b) of the Committee's terms of reference for this inquiry, please provide a list of other clauses of the Bill that would require amendment consequential to any amendments that the Committee may recommend to proposed Part 12?

The following clauses / sections refer to sections and terms used in Part 12.

Clause 7(2) inserting Section 3(1)

proponent of a termination proposal — see section 173;
termination infrastructure report — see section 179(2);
termination proposal — see section 174(1);
termination resolution — see section 182;
termination valuation report — see section 179(3);
type 1 notifiable variation

Clause 83, section 8(3)(i)

This section provides that the owner of the leasehold scheme is entitled to the reversion in the land on the expiry or termination of the scheme (leasehold).

Clause 83, section 33(6)

This section provides:

(6) A short form easement or restrictive covenant is discharged by —
    (a) registration of an amendment of the scheme plan to give effect to the discharge; or
    (b) termination of the strata titles scheme.

Clause 83, section 57(2)(a)

This section provides:

(2) On registration of a leasehold scheme —

(a) the fee simple of the parcel of land subdivided by the scheme is divided into the strata leases and a reversionary interest in the parcel that reverts to the owner of the leasehold scheme on the expiry or termination of the scheme;

Clause 83, section 104(1)(d)(vi)
This section provides that the strata company must keep:

(vi) any termination proposal submitted to the strata company that remains current. If the phrase termination proposal is retained, this provision will not need any further amendment.

Clause 83, section 120(2)
This section provides essentially that the owner of a lot can vote even if they are unfinancial (ie: have not paid their contributions) if the vote is a termination resolution.

Clause 83, section 156(1)(b)(vii)
This section requires the seller to disclose 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.

Clause 83, section 203(1)(b)
This section provides that a judicial member is required to make an order where (b) the order is an order confirming a termination resolution (as set out in section 183(18)).

Clause 83, section 204(b)(i)
This section provides that SAT cannot make an order deeming that the strata company has made a termination resolution.

Clause 36, Schedule 2A, clause 31B.
This clause provides that the division creating a process to convert a strata scheme to a survey-strata scheme does not impact on the termination of a scheme.

Clause 119, which inserts Schedule 5, clause 21
This transitional clause provides that if documents required to terminate a scheme by unanimous resolution under section 30 or 30A of the STA are lodged with the Registrar prior to commencement day, the termination is to be processed under sections 30 and 30A of the current Act.

Consequentials
Division 5 — Duties Act 2008 amended
132. Section 17 amended 22 (1) Before section 17(2)(b) insert:
(ac) an estate in land created as a strata lot in a freehold or a leasehold scheme on the registration of the strata titles scheme or an amendment of the strata titles scheme under the Strata Titles Act 1985;
Note for this paragraph: Common property created on the registration or amendment of a strata titles scheme is also not new dutiable property.
(ad) an estate in land created on termination of a strata titles scheme under the Strata Titles Act 1985;

Division 9 — Land Administration Act 1997 amended
(c) after paragraph (a)(ii) insert:

(iii) if it is land referred to in subsection (1)(b) subdivided by a leasehold scheme, remains so subdivided and the freehold reversion in the land is held by the Minister until the termination of the leasehold scheme, when the land becomes Crown land;

1.6 How many applications to the District Court for termination of a strata scheme have been made under section 31 of the Strata Titles Act 1985 and how were they determined?

At this point, Landgate is only aware of one application made to the District Court under section 31. That was the Argosy Court case in which the District Court gave the order to terminate a strata scheme. The majority of owners by unit entitlement objected to the termination.
The citation for that case is:

The Owners of Argosy Court Strata Plan 21513 v Wise & Ors [2016] WADC 145

1.7 Is an application made under this provision in cases where approval was unanimous or otherwise?

There is no requirement for a vote to be conducted before an owner or mortgagee makes an application under section 31. If a unanimous resolution is attained to terminate a scheme, there is not requirement to obtain an order of the District Court to terminate.

1.8 I note section 51 of the Strata Titles Act 1985 already provides a process for an owner in a strata titles scheme to apply to the District Court for its termination despite there not having been a unanimous vote in its favour, but just the support necessary to pass a special resolution, which I understand is 75%.

1.8.1 Why was this provision introduced?

Wisbey DCJ in the District Court decision McHattie v Tuscan Investments Pty Ltd (CIV 115 of 1997, CIV 115 of 1997) said of the policy intent of section 51:

"It is clear that the Parliament had in mind that in a situation such as this, the court could and should intervene to overcome an impasse between the proprietors."

In McHattie v Tuscan Investments Pty Ltd ((CIV 115 of 1997), the District Court used section 51 of the STA to order the sale of common property against the wishes of some of the owners of the strata scheme.

In that case the strata scheme had voted on a resolution to accept an offer made to purchase part of the common property, which was adjacent to the would-be developer's land. The vote did not achieve the required level, and subsequently an order was sought from the District Court to deem that the resolution had been passed, in order to enable the sale. The owners in favour of the sale argued that the land was not required, they would all benefit financially and that no owner would suffer significant disadvantage. The District Court found these arguments persuasive and ordered that the resolution be deemed to have been passed, against the wishes of those that opposed the motion.

1.8.2 How many applications to the District Court for termination of a strata scheme have been made under section 51 of the Strata Titles Act 1985 and how were they determined?

Landgate is not aware of any applications have been made to terminate a scheme under section 51.

1.8.3 If the provision has not been used widely by proponents of strata scheme terminations where they were not able to obtain the unanimous support of owners, can you shed any light on why it has not been used?

There are two important issues to consider with termination of schemes.

One is how many schemes are getting to the end of their life in terms of owners being able to afford the maintenance costs. As more schemes in WA age and become more run down, the cost to maintain those schemes will increase and this will lead to more owners seeking to terminate the scheme.

The other is whether there are suitable development sites available that are not subdivided by a strata titles scheme. Less vacant land and other suitable redevelopment sites will be available over time as Perth undergoes more intense development. This will lead developers to look at acquiring sites that are existing strata schemes, thereby increasing the likelihood of termination proposals.

As these two factors become more common over time, it is more likely that section 31, 51 and 51A will be more frequently used as a pathway to terminate.

1.9 Can you give examples by way of case studies where terminations of strata schemes under the existing legislation were not able to proceed because a unanimous resolution was not passed by the proprietors?

Case study 1
(from an email received 14 September 2018)

To whom it may concern
My name is (withheld) and I own 1 of 27 units in a strata property at XXXX, XXXXXXX.

The buildings on the property were erected in the 1970's and the strata fees have been increasing each year due to the increasing maintenance schedule associated with the age of the property.

The property and surrounding area has recently been rezoned as part of the XXXXXXXXXXX Activity Precinct. After identifying developer activity in the area and becoming concerned about a number of newer units driving down the price of our aging apartments, the owners went through an extensive process over the last 1.5 years to take the entire property XXXX to the open market.

After a lot of work to determine how to proceed with selling the entire site, 100% of owners agreed to list with a real estate agent to take the property to market.

The real estate agent managed to secure a lucrative offer that was subject to all owners agreeing to sell.

Contracts were ultimately drawn up spitting the proceeds according to unit entitlement. 25 out of the 27 owners (92.6%) agreed to the offer with no amendments. 2 owners, knowing that a 100% consensus was required, used the opportunity to negotiate additional consideration for themselves. The purchaser did not feel additional consideration was warranted, so the remaining 25 owners agreed to fund the additional consideration for these 2 owners out of strata funds.

Ultimately, the buyer did not to proceed with the investment and withdrew their offer (as was their right). The real estate agent we signed with is pursuing a number of alternative buyers. The same 2 owners are continuing to impede the sale process of the site as a whole in my view because they will again attempt to leverage their dissent for further additional consideration from any sale.

In my opinion, the hold out by 2 owners for their own additional personal gain amounts to extortion and is the perfect example of why the safeguards for termination of schemes is required to protect owners. My understanding is that the proposed Strata Titles Amendment Bill 2018 would allow us to be able to show a Tribunal that these 2 owners:
- Are receiving greater than market value for their unit; and
- Have already shown a willingness to sell, so cannot be considered vulnerable owners.

We would then have recourse to achieve a fair outcome for all owners without being held at the mercy of an unscrupulous minority.

I understand the Strata Titles Amendment Bill 2018 is currently before the Legislative Council and has been referred to the Standing Committee on Legislation. If the above fact pattern may be relevant to anyone currently contemplating the legislation, please pass on this information and advise them to contact me either by email or phone on _____ to discuss further.

Kind regards
(Name withheld)

Case study 2
(from an email received 25 May 2014)

Dear Sir or Madam,

I am interested in keeping up to date with development of proposals by the reform team.

My particular interest is in terminating existing schemes where the buildings are old and not fulfilling the potential of the site. I am an owner in 2 such schemes where one unit has been purchased by a developer who has stated he will stop any redevelopment of the scheme because of the requirement for a resolution without dissent.

I appreciate the need to protect long term owner-occupiers who might not want to leave their home and presumably the intention of the without dissent requirement was to protect such owners but that provision is being abused. From hearsay, this abuse of the process is widespread.

I suggest:

1. Consideration is given to disqualifying from voting on termination of a scheme for redevelopment any owner who has a vested financial interest in stopping redevelopment. This disqualification should be irrespective of how many percentage votes in the scheme is owned by the person with the vested interest.
2. The other impediment to redevelopment of an old scheme is the greed of owners even though they may be in favour. I suggest that the proceeds of termination of a scheme and its sale for redevelopment be distributed to owners strictly in accordance with their unit entitlements.

I would like to know how I can keep myself abreast of your work.

Regards,
(Name withheld)

Case study 3
(Received 6 November 2014 as part of the feedback to the public consultation paper, via the website consultation tool)

I am in favour of the proposed changes as it will allow more freedom in future development. Many old strata properties could vastly increase their unit potential under a re-development. If a majority versus unanimous vote was implemented then this will curtail current activity, as has been made evident in a current situation within our complex. We have one owner who purposely purchased one unit in our strata property so as to stop any future development of our strata complex for his own purposes, ie so that his new development to the rear would retain current views and has blatantly even advertised the sale of units in his new development by disclosing that his purchase of the one unit in our development was done to achieve his ultimate goal. To date this has worked to his advantage, and although there is currently no plan for a re-development on our site, the proposed changes would be very welcome for any future plans.
Thank you for the opportunity to make comments on the proposal.
Kind regards,
(Name withheld)

Case study 4
A case study included on Landgate's website, as a testimonial to the reasonableness of the proposed safeguards for termination. This case does not involve an attempt to terminate the scheme, but demonstrates one potential motivation to do so.

After more than 30 years living in four different units in the same development, Mo is happy to admit it might be time to knock the place over. Which is not to say the 10-unit is dilapidated, as it has been mended and maintained with great care. But the building dates from the 1960s, and the most recent lot of repairs – to six staircases and the balconies – cost the strata company (all of the owners) $40,000. That's just one job in a list of repairs that the strata company is working through. It's replaced asbestos, had some rewiring done so owners could install air-conditioners, and reroofed the carports.

The to-do list is extensive and includes cracked roof tiles, replacement of ridge caps, the driveway is badly affected by tree roots, there's more asbestos, the place is not compliant with fire regulations. The estimated cost to repair these outstanding items is about $160,000. Begging the question: is it in everyone's best interests to continue the repair and maintenance expenditure?

“If a developer came along now, and offered me a decent price, I’d take it,” says Mo, “but others in the complex wouldn’t agree with me on what a decent price would be.”

In her 70s and with worsening arthritis, Mo has been considering her future. “I’ve found the place I want to go to, but it’ll cost me $250,000 just to get in, and then I’d have to fit the place out, as well as pay for my removal costs.

“I know if we sold as a collective, the price would be higher for each of us, and I know this block would be attractive to a developer.”

The whole block is 2039m2, and it is in a lovely, leafy area near the river. Under the old strata law, all owners would need to agree to the sale for the developer to acquire the entire block, terminate the strata scheme and then redevelop it. Less likely, but still with legal precedent, one owner can apply to the District Court to terminate the scheme with little in the way of guidance for the court in its determination, and no provision for safeguarding the rights and needs of any of the owners.

1.10 Do you have any statistics on the number of times this has occurred?

No. Landgate has no mechanism to record that information currently. The proposed reforms will enable that data to be accurately captured because a strata company will have a requirement to lodge various notifications with Landgate where termination proposals are submitted to the strata company, where those proposals progress through various stages and where those proposals are withdrawn / come to an end.

1.11 Are sections 31 and 51 of the Strata Titles Act 1985 proposed to be expressly repealed by the Bill or by implication by the introduction of proposed Part 12?

Sections 31, 51 and 51A will be repealed by operation of clause 82 of the Bill.

1.12 What were the procedural and substantive reasons why the State Administrative Tribunal has been given jurisdiction under proposed Part 12 rather than the District Court under existing legislation or another judicial body?

SAT was chosen as the forum to review the termination proposal because:

a. SAT will be the one-stop-shop to resolve strata disputes
b. Being the specialist forum for resolving strata disputes (referred to as scheme disputes in Part 13 of the Bill), SAT will develop the expertise to efficiently resolve strata disputes.
c. That strata expertise will be essential in reviewing a termination proposal.
d. SAT is also recognised as being a more appropriate forum for people who are self-represented than the courts.
e. Orders under section 183 can only be made by a judicial member of SAT or by the Tribunal constituted of a judicial member.
f. SAT routinely handles building defect claims under the Building Services (Complaint Resolution and Administration) Act 2001. The extent of repairs required for a scheme is one of the issues SAT must consider when asking whether the proposal to terminate is just and equitable: section 183(12)(c).
g. SAT routinely makes determinations on the amount of compensation that should be paid under section 241 of the LAA.

h. SAT is well suited to holding effective mediations, which will be required to ensure termination proposals are appropriately modified.

1.13 I note section 2(b) of the Bill dealing with Commencement provides that all sections other than 1 and 2 will come into operation on a date to be fixed by proclamation and that different days may be fixed for different provisions.

1.13.1 On what day is it planned to proclaim the operation of proposed Part 12?

The operation of Part 12 will be proclaimed when all of the regulations in support of the Bill have been drafted and after all of the implementation preparations have been completed.

1.13.2 Will this be a date following the date the Bill is given Royal Assent so proposed Part 12 will not have retrospective application?

Proclamation will be after the Bill is given Royal Assent. The termination provisions in Part 12 will apply after proclamation. A termination process can begin any time after proclamation.

1.14 With respect to the position of occupiers who are tenants covered by the Residential Tenancies Act 1987:

1.14.1 Are any of the rights of tenants under the Residential Tenancies Act 1987 affected by Part 12? For instance, if a tenant has signed a lease and a termination proposal is accepted during the term of that lease, does the tenant have the right for that lease to run its full term before a strata titles scheme is terminated? In other words, can an owner terminate a tenant's lease before it has run its term to better facilitate a termination of a strata titles scheme?

The provisions of the *Residential Tenancies Act 1987* (RTA) apply to strata titles schemes. SAT must apply the RTA when making decisions in relation to termination. If a tenant has a fixed term residential lease, the termination cannot proceed while that lease is still running. SAT cannot order such a lease be terminated because an order to terminate a residential tenancy agreement can only be given by a court: see section 74 of the RTA. The reason why this is not expressly stated in section 183 of the Bill is because when legislation is drafted, there is no need to restate the law.

1.14.2 Can, for example, any order made by the Tribunal under proposed section 183(18) for an occupier to vacate a lot override these rights?

SAT cannot override the *Residential Tenancies Act 1987.*

1.14.3 Will a tenant have a new landlord during their lease by the potential operation of Part 12 if a strata titles scheme is terminated?

Potentially, yes, in the same way that an owner sells their lot and the new owner must take the lot subject to the fixed term residential tenancy.

1.15 I refer to proposed section 173(b) providing that a person proposing the termination of a strata titles scheme may be someone who has a contractual right to purchase a lot in a strata titles scheme.

1.15.1 Why was it decided that the class of persons include those who have a contractual right rather than an actual owner of a lot?

The legislation in NSW permits a person who is not an owner to propose a scheme be termination. Singapore also permits a non-owner to propose a majority termination.

Only people who own a lot or who have a contract to buy a lot within the scheme can be a proponent of a termination proposal in WA . This ensures that the proponent actually has an interest in the scheme (either as an owner or as a person with a contract to buy a lot in the scheme).

1.16 I refer to proposed section 173(c) providing that a person proposing the termination of a strata titles scheme may be a body corporate formed by '2 or more such persons'.

1.16.1 Just to clarify, is it correct to say the '2 or more such persons' are those persons of a class referred to in proposed sections 173(a) and (b) and that a third party who does fall within these classes is excluded from making a proposal?

A third party who does not fall within section 173(a) and (b) is excluded.

1.17 I refer to proposed section 174(2)(b) of the Bill providing that an outline of a termination proposal cannot be submitted to a strata company or owner of a leasehold scheme during any period not exceeding 12 months for which the strata company has, by ordinary resolution, prohibited termination proposals being submitted to it.

1.17.1 Is it open to a strata company, once any resolution has expired, or continue to pass the same resolution, effectively prohibiting an outline of a termination proposal from ever being submitted?

Yes. There is no limit to how many times the strata company can hold a general meeting and pass an ordinary resolution to prohibit outline proposals from being submitted. In other words, a strata company could hold a general meeting every year to extend the prohibition on the submission of outline proposals for a further 12 months.

1.17.2 If so, does the prospective proponent of a proposal have any other alternatives, such as making an application to the State Administrative Tribunal (given it can make an order prohibiting termination proposals being submitted under proposed section 174(2)(c))?

If the proponent is an owner of a lot, the proponent can apply to SAT for an order under section 200(2)(n) that the ordinary resolution to prevent termination proposals from being submitted to the strata company is taken to have not been passed. The proponent owner would have to prove that the passage of the resolution operates in an unreasonable or oppressive way that is in contravention of the strata company's objectives: see section 119 (Objectives).

1.17.3 If the proponent has a majority of votes on the strata company, is it left to an owner to apply to the State Administrative Tribunal to seek an order that no proposals are submitted for a certain period?

There may be situations where a person controls the majority of votes in a strata company and uses that voting power to prevent other owners from making an ordinary resolution to prohibit termination proposals being submitted to the strata company. If that happens and the strata company is being forced to consider new termination proposals on a regular basis, the owners who hold minority voting power have two options:

a. one owner can seek to obtain an order from SAT to:
    i. Bring an application on behalf of the strata company (section 198(1)) and
    ii. Then apply to SAT on behalf of the strata company for an order to prevent termination proposals (outline or full proposals) to terminate the scheme being submitted to the strata company for any period, including, for example, 5 years, to enable those owners to live in peace if they are being pursued by a developer.
b. one owner can apply to SAT under section 197 for an order that the ordinary resolution in support of the outline proposal is taken to have not been passed. SAT has the power to make such an order: section 200(2)(n). The basis on which SAT may make such an order will depend upon the facts (for example, having to consider and vote on yet another full proposal to terminate the scheme when the owners rejected a similar full proposal only a few months earlier) and whether those facts establish that the strata company has, in passing the ordinary resolution, fulfilled the strata company's objectives under section 119 of the Bill to not make a resolution that is oppressive or unreasonable.

1.18 I refer to proposed section 174(3), requiring a strata company which has been submitted a termination proposal outline to serve it within 14 days on owners of strata title lots or registered mortgagees of the lot.

1.18.1 Does the appearance of the word 'or' mean that if the registered owner of a lot has a mortgage over the lot, the mortgagee only will be served, or the registered owner and the mortgagee? If the latter, should it state 'and' rather than 'or'?

The key word in section 174(3)(a) is "each". Section 174(3)(a) provides that each person who is an owner or each person who is a registered mortgagee is to be served with the outline proposal.

This means that the strata company has to serve:
a. each person who is an owner and
b. each person who is a registered mortgagee.

1.18.2 Given a copy of a full proposal must also be served on an occupier of a lot under proposed section 178(4)(a)(i), why doesn't proposed section 174(3) also provide for an occupier to be served an outline? Should they not be notified at the same time as the registered owner that a termination proposal has been submitted?

The reason why occupiers are not served with an outline proposal is that the strata company could receive many outline proposals. There is no requirement for the strata company to

progress with an outline proposal or even vote on the outline proposal. Notifying occupiers that an outline proposal has been submitted to the strata company is not relevant to occupiers because they do not vote on whether the outline proposal should proceed to a full proposal. In non-termination circumstances, occupiers are not required to be notified when an owner of a lot receives an offer to sell their lot. An outline proposal is much less significant than an offer to acquire a lot and several key steps must occur before an outline proposal takes on any further significance for an occupier. A more appropriate point to notify occupiers of a termination proposal is where a full proposal has been submitted to the strata company (this is provided for in section 178).

1.19 I refer to proposed section 175(1)(d) which requires an outline of a termination proposal to describe, in general terms, any proposals for contracts to be offered to owners of lots in the strata titles scheme.

1.19.1 Can you give an idea of what information will be required that meets the 'general terms' requirement? For instance, how must the level of information compare to that required under proposed section 179(1)(c) for a full proposal?

If a proponent wants owners to vote in favour of a full proposal, the proponent should include sufficient detail about what contract an owner is being offered for their lot.

1.20 I refer to proposed section 175(1)(i) which provides that an outline of a termination proposal must provide details of the proposed arrangements if, under the regulations, the proponent of the proposal will be required to make arrangements for the obtaining of independent advice or representation of owners of lots affected by the proposal.
I also refer to proposed section 190(1), which provides the regulations may require proponents to enter into specified arrangements for lot owners to obtain independent advice or representation.

1.20.1 I note the Explanatory Memorandum of the Bill states, on page 5:
The amending Bill provides extensive guidance to assist the Tribunal in deciding whether the proposal is just and equitable. Vulnerable owners will also have access to funding for assistance to respond to the termination proposal.

Would it not be appropriate to ensure proposed sections 175(1)(i) and 190(1) reflect the intention set out in the Explanatory Memorandum? Should they not be amended to require the regulations to make provision for this advice or representation and then set out the relevant class or classes of persons in the regulations? In other words, to adopt mandatory rather than permissive language?

The reason for the permissive language is that section 190 may apply to all owners. In other words, the proponent may be required to pay money that every owner should be able to draw from in obtaining expert advice and representation in response to a termination proposal.

1. The proponent will be required under the regulations provided for in section 190 of the Bill to pay for owners who meet specified criteria (set out in the regulations) to obtain independent legal advice, legal representation, valuation advice and financial and taxation advice in connection with a termination proposal.

2. The regulations will likely specify that vulnerable owners are owners who meet the specified criteria and are therefore entitled to the funding to be paid by the proponent to obtain the independent advice and representation.

3. Section 190 has been drafted so that all owners could be the owners who meet specified criteria and are therefore entitled to be paid by the proponent to respond to the termination proposal.

4. The definition of owners who meet specified criteria and, in particular, vulnerable owners for the purpose of section 190 of the Bill is being developed in consultation with stakeholders, including community groups.

5. The reason for providing this definition in the regulations is that the concept of vulnerable changes over time as society's expectation change.

6. As a starting point, and subject to further consultation, the following criteria are proposed as being the basis on deciding whether certain people are vulnerable owners and therefore eligible for funding assistance under section 190:
a) Due to age, illness, trauma or disability, or any other reason, the owner has an impaired ability to fully understand or participate in the termination process, present their case or make an informed decision
b) The owner is financially disadvantaged to the extent that it would not be reasonable to expect them to pay for professional advice in response to the proposal.

7. The vulnerable owner funding under section 190 can be used to:
a) obtain a licensed valuer's report to counter any valuation evidence submitted by the proponent
b) pay for expert advice on the taxation and financial implications of the termination
c) pay for legal advice on the termination proposal and
d) pay a lawyer to represent the vulnerable owner in the SAT proceedings.

8. The regulations will provide how much money is to be set aside for each vulnerable owner

Policy
The intent of this vulnerable owner funding safeguard is to ensure that certain owners who would be at a disadvantage responding to a termination proposal have access to resources for additional assistance. This funding and assistance is aimed at ensuring that vulnerable owners are put on equal footing with other owners so that they can properly respond and if need be, effectively object to the termination proposal.

The definition of vulnerable owner is meant to be a wide definition to include a broad class of people.

1.20.2 Noting the provisions refer to the proponent 'making arrangements for the obtaining of independent advice', can you describe how the provisions assure it will actually be independent?

The regulations will provide that the advice is not to be provided by a lawyer or a valuer who represents the proponent. If advice is given by a person who is not independent, the process to terminate the scheme will not have been properly followed. If such evidence is put to SAT, SAT will not be able to confirm the termination resolution.

1.20.3 Does representation include having a lawyer represent them in Tribunal proceedings?

Yes. The vulnerable owner funding under section 190 can be used to:
a) obtain a licensed valuer's report to counter any valuation evidence submitted by the proponent
b) pay for expert advice on the taxation and financial implications of the termination
c) pay for legal advice on the termination proposal and
d) pay a lawyer to represent the vulnerable owner in the SAT proceedings.

1.21 I refer to proposed section 176(1) which provides that a termination proposal can only proceed further if within 3 months after it has been submitted the strata company passes an ordinary resolution supporting consideration of a full proposal.

1.21.1 Why is only an ordinary resolution required to be passed, which I understand requires only a simple majority, rather than a special resolution?

The ordinary resolution is the trigger to permit the proponent to apply for subdivision approval and prepare a full proposal. Special resolution was not proposed because that resolution was very similar to the original 75% termination resolution (contained in the *Strata Titles Amendment Bill 2018* (that was introduced to Parliament on 28 June 2018) required before making an application to SAT.

1.22 I refer to proposed section 177(2)(b), which provides that the *Planning and Development Act 2005* applies to the application subject to any other modifications set out in the regulations.

1.22.1 Would you regard this provision as enabling the amendment of the Planning and Development Act 2005 and, accordingly, a Henry VIII clause (which enables the amendment of an Act by subsidiary legislation)?
- If so, why and please provide justification for the use of this clause.
- If not, why not?

We do not consider this to be a Henry VIII clause. It was not intended to amend the *Planning and Development Act 2005* (PDA), but simply to read references in the PDA in a certain way to make the PDA work correctly for termination. There is no power to alter or modify the PDA as it applies to subdivision approvals. Section 177(2) extends the PDA to termination subdivision under the *Strata Titles Act 1985*, to which it would not otherwise apply, and which were not in mind when the PDA was drafted and enacted. In that context, provision is made for the PDA to be modified or adapted as it applies to termination subdivision, so that its provisions can operate rationally and effectively in that context.

1.23 I refer to proposed section 178(2)(a), which provides that a full proposal cannot be submitted to a strata company or owner of a leasehold scheme if it is more than 12 months since the requirements of proposed section 176 were met (the passing of an ordinary resolution by the strata company).

1.23.1 Why was it felt necessary to provide for up to 12 months for a proponent to prepare a full proposal, bearing in mind that it may cause uncertainty for lot owners in the meantime?

The proponent has 12 months to submit the full proposal to the strata company after the strata company supports the outline proposal by ordinary resolution because:

a. obtaining subdivision approval under section 177 could take several months
b. the preparation of the full proposal will take several more months, including:
   i. the requirement to prepare the termination infrastructure report and the termination valuation report.
   ii. obtaining information from the strata company about the total assets and liabilities of the strata company and
   iii. preparing specific offers for each owner.

1.24 I refer to proposed section 179(1)(i) which provides that a full proposal for the termination of a strata titles scheme must describe any proposals for the temporary relocation of owners of lots, including any payments proposed to be made to owners to enable them to arrange temporary relocation.

1.24.1 Does this provision require, if temporary relocation will take place, that the full proposal include details of payments to enable this, or does the use of the word ‘any’ mean this is optional only?

If the proponent does not specify payment to enable temporary relocation of an owner, the objecting owner will be able to show that they are actually worse off financially if the termination proposal goes ahead.

1.25 I refer to proposed section 179(3), which requires a full proposal incorporate a report prepared and certified by a licensed valuer setting out a valuation of the market value of each lot in the strata titles scheme.

1.25.1 Is it customary for only one valuation to be obtained, or do proposers usually obtain more than one?

There is no customary practice for valuation of a lot when an offer is being made on that lot.

1.25.2 If more than one, should this be reflected in this provision?

There is no need for multiple valuations to be provided within the full proposal. The termination valuation report within the full proposal is meant to provide owners with an indication of the market value for their lot. Owners can obtain their own valuation to counter any information contained in the termination valuation report and any evidence indicating that the termination valuation report has been prepared to favour the proponent will likely result in SAT finding that the full termination proposal provided by the proponent contains information that is misleading.

1.26 Can you give an idea of the matters the regulations may prescribe relating to the determination of the market value of a lot for a termination valuation report pursuant to proposed section 179(3)?

The regulations may prescribe how market value is to be calculated. The regulations will likely require that the market value is to be calculated taking onto account recent sales history, the highest and best use the land can be put to and the owner's share of the common property (which is provided for by the owner's unit entitlement). Further consultation on this point will be undertaken.

1.27 Regarding the full proposal meeting the requirements in proposed section 179:

1.27.1 Is it correct to say it will it be down to the owners and strata company to determine it meets the criteria when there is a unanimous vote in favour?

Yes.

1.27.2 Would they always be qualified to do so? Will strata managers have the required expertise?

Owners may determine whether the full proposal meets the criteria of section 179 where a unanimous resolution has been passed.

1.28 I refer to proposed section 181(3), requiring the persons needing to be served the full proposal to be given a reasonable opportunity to make submissions to the proponent of the proposal and the strata company.

1.28.1 Would it make sense for these submissions be made before the strata company convenes for the first time under proposed section 181(1) to consider the termination proposal, or is the intent that a 'reasonable opportunity' is at least 2 months after the service of the full proposal as referred to in proposed section 182(2)?
In other words, should there be a requirement that the strata company not meet for the first time to consider the proposal until after a reasonable time period for submissions to be made (so it can consider these submissions at that meeting)?

The period of 2 to 6 months to vote on a full proposal: This period was set to allow owners sufficient time to obtain advice before voting (2 months) and also to allow the proponent sufficient time to modify the proposal two times after the first vote (noting that there can be only 3 votes conducted on any one proposal even if the proposal is modified).

1.28.2 Will those served with a full proposal have a right to be heard at meetings of the strata company, including lessee occupiers who would not be members of the strata company?

Those served with a full proposal have a right to make submissions to the strata company: section 181(3). Those submissions may be in writing.

1.29 I refer to proposed sections 181(1) and (2) dealing with general meetings of the strata company to discuss the termination proposal.

1.29.1 If the strata company is able to resolve that a proponent be absent for the whole of the meeting, does this mean they do not have an automatic right to be heard by the strata company? If not, why not?
The proponent can make submissions in writing to owners. The purpose of the general meeting is to allow owners to discuss the proposal and if they feel they do not want the proponent present for those discussions, it is appropriate for the owners to have that wish met.

1.30 I refer to proposed section 181(4)(b), which provides the council of the strata company may inform the owners of discussions it may have with the proponent.

1.30.1 If such discussions take place, should it not be a mandatory requirement that they inform the owners?

The regulations can require the owners be informed of those discussions: section 181(5). The need to include absolutely every detail of procedure involved in the consideration of a full proposal and a vote within the Act is not appropriate. Procedural matters of this nature are best dealt with in regulations, especially when a new procedure is being introduced. Such a new procedure may need to be modified soon after enactment as a result of unforeseen procedural issues. Please note also that the discussions the council are involved with on a termination will form minutes that will have to be provided to SAT: section 183(6)(c)(iii).

1.30.2 Shouldn't occupiers who are not owners also be informed of those discussions, or is that left to the owners to inform them?

This will be left to owners. Owners have more at stake in these discussions than occupiers.

1.31 I refer to proposed section 182(2) which states that a termination resolution is only effective if the voting period opens at least 2 months after and closes not more than 6 months after the service of the full proposal.

1.31.1 Why were these time periods chosen?

The period of 2 to 6 months to vote on a full proposal: This period was set to allow owners sufficient time to obtain advice before voting (2 months) and also to allow the proponent sufficient time to modify the proposal two times after the first vote (noting that there can be only 3 votes conducted on any one proposal even if the proposal is modified).

1.32 I refer to proposed sections 182(4) and (10) and note that, in the Second Reading debate, the Minister stated that when developing the regulations 'independent person' will be defined.

1.32.1 Can you give any indication at this stage how this will be defined to ensure they will be fully independent?

Independent person: the purpose of the independent person is to ensure that the votes are tallied by a person who is not connected with the owners or the proponent. This was part of

recommendations contained in the Renewing the Compact City report by the City Futures Research Centre at the University of New South Wales.

The policy for the regulation making power in section 182(13) is that the regulations will provide further details of the secret ballot process and the requirements for an independent person who tallies the votes. Note that the regulations in NSW relating to the equivalent of an independent person (referred to as the returning officer) provide details that would be useful for the drafting of the regulations for this Bill: see Regulation 29 in the *Strata Schemes Development Regulation 2016* [NSW].

1.32.2 Why was it decided this be dealt with in the regulations rather than the Bill?

This is another procedural matter that is best dealt with in the regulations, as the NSW government has done.

1.33 I refer to proposed section 182(6) which provides that a termination resolution is passed if the number of votes cast in favour of the termination proposal equals the number of lots in the strata titles scheme. Why was this wording chosen instead of 'unanimous' as is used in the existing legislation?

A unanimous resolution can include the option of counting the vote by poll. This clause was drafted to clarify that the vote on a termination resolution is taken by lot, not by unit entitlement.

1.34 I refer to proposed section 182(7), which provides that a termination resolution is passed subject to Tribunal confirmation if the strata titles scheme has 5 or more lots and the number of votes cast in favour of the proposal is at least 80% of the total number of lots in the scheme.

1.34.1 What was the basis upon which these thresholds were chosen?

This voting threshold was chosen through Parliamentary debate. Only schemes with 5 or more lots are subject to the majority termination process.

At least 80% of the lots in a scheme must vote in favour of a majority termination proposal before the proponent applies to SAT for a fairness and procedure review.

Schemes with less than 5 lots are not subject to the majority termination process and can only terminate through unanimous resolution. 82 percent of all strata and survey-strata schemes in WA are less than 5 lot schemes and they will not be subject to the majority termination process.

1.34.2 Why was it thought to strike a suitable balance between the rights of lot owners not wanting to sell and those supporting the termination of the strata scheme?

The original voting percentage was 75% and this was modelled on the majority termination provisions in NSW.

1.35 I refer to proposed section 182(9), which provides a termination proposal must not be modified in a material particular by the proponent after a termination resolution has been passed.

1.35.1 Can you provide some examples of what would regarded as a material particular? Would this include, say, a variation of the amounts to be offered to owners for their properties?

Yes, a material particular would be the amounts offered to owners for their lot. A modification of the proposal to change the name of an owner or occupier of a lot as a result of a sale of the lot or new lease being signed is not a material particular.

1.36 I refer to proposed section 182(10)(c).

1.36.1 Are the words 'the independent person must' necessary or is this a drafting error (as these words already appear at the beginning of this section)?

The second use of the word must is not necessary.

1.36.2 If the independent person fails to keep information about who casts votes for or against the proposal, will there be a penalty imposed? If so, what penalty and if not, why not?

The regulations may specify a penalty if the independent person fails to keep information about who casts votes for or against the proposal. This will be consulted upon.

1.37 I refer to proposed section 183(1) providing that a proponent can apply to the Tribunal for confirmation of the termination resolution.

1.37.1 Why is the word 'can' used rather than 'must'?

Can is used because the proponent always has the option to not proceed with the proposal at any point. The passing of a termination resolution does not statutorily bind a proponent from proceeding with the proposal and applying to SAT.

1.38 I refer to proposed section 183(9)(b) requiring that the Tribunal can only confirm a termination resolution if the proponent satisfies it that the owner who does not support the proposal will receive fair market value for the lot or a like or like exchange for the lot.

1.38.1 Is it to be assumed that those owners who voted in favour of the proposal believe that the values that are contained in the proposal represent, in their view, a fair market value for their lots?

Owners can choose to vote in favour of a termination proposal and there is no requirement that an owner who votes in favour will receive fair market value. There is no requirement now stopping an owner of a lot or even non-strata land from selling their lot for less than market value.

The primary focus for SAT in section 183 is to protect the rights of the minority of owners who oppose the termination proposal.

1.38.2 Would they obtain their own advice on this, at their own expense, to consider any proposals, if required (to ensure they are obtaining fair market value)?

An owner who votes in favour of a termination proposal can obtain their own advice on the value of their lot. If that owner qualifies as a specified person under section 190, that owner will have access to funding (paid for by the proponent) to obtain an independent valuation of their lot.

1.38.3 Can you give some guidance, using examples if required from judicial decisions or other practical scenarios:

- Of what would be regarded as fair market value?

In considering the amount of compensation that would be payable under the *Land Administration Act 1997* section 241, SAT may also award an additional amount appropriate to compensate for the taking without agreement, but it may not be more than 10% of the amount otherwise awarded or offered unless SAT is satisfied that exceptional circumstances justify a higher amount.

Section 183(10)(b) clarifies how section 241 of the *Land Administration Act 1997* (LAA) applies in the case of calculating compensation payable for a termination, including that:

a. the reference in section 241(2) of the LAA to public works is to be disregarded. In earlier consultation on the Bill stakeholders thought that section 241 of the LAA would prevent an objecting owner's lot from being valued according to the highest and best use of the lot. Disregarding section 241(2) of the LAA enables SAT to consider the highest and best use of the lot when assessing fair market value. An objecting owner will be entitled to be compensated for the uplift in value that their lot will experience because the site has been rezoned. This must be done because such a rezoning should be considered when assessing highest and best use for the lot.
b. the reference in section 241(4) of the LAA to undertaking improvements after there is notice of intention is also to be disregarded. This means that if the objecting owner makes improvements to the lot after the termination proposal has been served or even progressed to the SAT hearing in section 183, the owner is to be compensated for those improvements.

12. Without limitation, SAT must consider the loss or damage, if any, sustained by the owner by reason of any of the following (section 183(10)(c)):

a. removal expenses
b. disruption and reinstatement of a business
c. liability for capital gains tax, goods and services tax or other tax or duty
d. conveyancing and legal costs and other costs associated with the creation or discharge of mortgages and other interests, including for the acquisition of a replacement property.

These are the types of expenses that should be paid for by the proponent to ensure that the objecting owner is no worse off financially if the termination proceeds. However, they are not the only expenses of an owner that should be paid by a proponent.

Fair market value is not set by the proponent. SAT assesses fair market value for each objecting owner according to that objecting owner's individual circumstances in accordance with section 183(9)(b), (10) and (11).

The fair market value test set out in section 183 specifically takes into account the individual financial circumstances of each objecting owner, especially with the requirement that no objecting owner is to be worse off financially if the termination goes ahead.

Requiring that an objecting owner is to be no worse off financially ensures that if a termination proceeds that objecting owner will be fully compensated by the proponent.

- Of what would be considered a like for like exchange?

The like for like replacement lot protection, when combined with the requirement that an objecting owner is to be no worse off financially and SAT's power to modify a termination proposal are a useful set of provisions that can ensure that objecting owners still have a home in the same suburb and are not financially out of pocket as a result of moving.

A like for like replacement lot is something a proponent can choose to offer to an objecting owner. However, If the objecting owner can give evidence to SAT that they need a like for like lot so that they are no worse off financially, SAT can modify the proposal (section 183(13)) to require the proponent to give the objecting owner a like for like lot and cover all taxes, moving costs and other transaction costs including discharging and re-registered a mortgage over the replacement lot.

An example of being financially worse off as a result of being paid a lump sum for a lot instead of being provided with a like for like replacement lot is where the objecting owner is a pensioner. If the pensioner were paid a lump sum by the proponent in exchange for their lot, they may lose their pension. In such a case, SAT could not order the termination proceed because the objecting owner who is a pensioner would be worse off financially as a result of the termination. SAT could order the modification of the termination proposal to require the proponent to:

a. provide the objecting owner with a like for like replacement lot that would:
    i. be in a nearby location
    ii. have equivalent facilities
    iii. have equivalent amenity and
    iv. be equivalent to the fair market value of their current lot.
b. pay all of that owner's duties, taxes and moving costs
c. ensure that owner will not lose their pension if the termination resolution is confirmed by SAT.

Another example of when SAT may modify the proposal to require the proponent to provide a like for like replacement lot would be where the objecting owner owns a lot worth $500,000 and has a mortgage registered against that lot for $1 million. If the objecting owner were forced to sell their lot in exchange for a lump sum of less than $1 million the objecting owner would be worse off financially as they would be required to pay the mortgagee the difference

between the amount paid for the lot and the mortgage. SAT could not order such a termination to proceed, unless SAT made an order modifying the termination proposal so that the proponent:

a. provide the objecting owner with a like for like replacement lot that would:
    i. be in a nearby location
    ii. have equivalent facilities
    iii. have equivalent amenity and
    iv. be equivalent to the fair market value of their current lot.
b. pay all of that owner's duties, taxes and moving costs
c. pay the owner's costs of discharging the mortgage over the current lot and any costs associated with the objecting owner mortgaging the replacement lot for the same amount.

A further example of when SAT may modify the proposal to require the proponent to provide a like for like replacement lot would be where the objecting owner owns a lot in a scheme within a suburb where there are no more old schemes. In such a case, if the objecting owner is paid a lump sum for their replacement lot, they would be unable to buy a lot within the same suburb with the lump sum. That objecting owner could show SAT that they will be worse off financially if the termination proceeds and they buy back into their current suburb. In such a case, SAT has the power to order the termination proposal be modified so that the objecting owner is provided with a like for like replacement lot in the same suburb (even though the replacement lot is worth more than the current lot) and all of the objecting owner's duties, taxes and moving costs are paid by the proponent.

1.38.4 What is the position in other jurisdictions who have termination of strata scheme provisions?

NSW and Northern Territory define compensation in reference to their equivalent of section 241 of the *Land Administration Act 1997*.

NSW
The regulations define market value as the amount for which the building and site would be sold by a willing but not anxious seller to a willing but not anxious
buyer, taking into account the highest and best use of the land regulation 27.

Note that the regulations can prescribe modifications to the Land Acquisition (Just Terms Compensation) Act 1991 or prescribe a different method of determining that value—the value of the lot determined in accordance with that method.

Northern Territory
An objecting owner who decides to sell the owner's unit to the proponent under this section must serve a written notice of intention to sell the unit on the proponent, the mortgagee, the body corporate and the schemes supervisor.
If the proponent and the objecting owner do not agree on a price, then the proponent must apply to the schemes supervisor to resolve the matter. The scheme supervisor will make arrangements for a valuer's report. The valuer must assess the value of the unit, using Schedule 2 of the Lands Acquisition Act in the same way as they would be used for an assessment of compensation payable for an acquisition of the unit under that Act.

The objecting owner must execute a binding agreement to sell their unit at the price recommended in the report, or apply to the Tribunal for their case to be considered

Singapore, NSW and NT do not have like for like provisions.

1.38.5 If a like for like exchange was not possible due, say, to the unavailability of suitable properties in the area, would that has any effect on the quantum of the fair market value be paid?

The unavailability of equivalent properties in the area could have a sizeable impact on the quantum of fair market value.

An example of when SAT may modify the proposal to require the proponent to provide a like for like replacement lot would be where the objecting owner owns a lot in a scheme within a suburb where there are no more old schemes. In such a case, if the objecting owner is paid a lump sum for their replacement lot, they would be unable to buy a lot within the same suburb with the lump sum. That objecting owner could show SAT that they will be worse off financially if the termination proceeds and they buy back into their current suburb. In such a case, SAT has the power to order the termination proposal be modified so that the objecting owner is provided with a like for like replacement lot in the same suburb (even though the replacement lot is worth more than the current lot) and all of the objecting owner's duties, taxes and moving costs are paid by the proponent.

1.39 I refer to proposed section 183(9)(c) which sets out what the Tribunal has regard to in deciding whether the termination proposal is otherwise just and equitable.

1.39.1 Would it be prudent to insert a subsection (vi) stating 'any other matters the Tribunal considers relevant' or does the appearance of similar wording in section 241(6)(e) of the Land Administration Act 1997 make this unnecessary?

Section 183(9)(c) was not meant to take into account other factors. The concern with allowing SAT to consider other factors is that it would allow SAT to consider, for example, whether the termination should proceed because the scheme was becoming an eyesore or was not consistent with the standard of buildings in the area. These should not be matters SAT considers when asking the question of whether the proposal is just and equitable.

1.40 Is there any other legislation in force (or previously in force) in Western Australia or other jurisdictions where the powers of compulsory acquisition have been used other than for the purposes of acquisition by the Government (i.e. for the benefit of private individuals or companies)? If so, please provide details and how they have been exercised.

Strata schemes are a form of property that is jointly owned. Owners might own their individual lot, but they are all joint owners of the common property that forms part of the scheme.

Where people jointly own a house as tenants in common that is not strata titled, if one of those owners who owns 50% or more of the house wants to sell the house and the other owner doesn't, section 126 of the *Property Law Act 1969* gives owners standing to apply to the Supreme Court for an order to sell the house and divide the proceeds.

This is called an order for sale in lieu of a partition order and it is not uncommon for such an order to be given. See, for example, the case Orrman v Orrman [No.2] [2008] WASC 17.

Another example of legislation forcing compulsory acquisition of land against the wishes of owners where the person acquiring was not the government is section 51 of the current Act.

In McHattie v Tuscan Investments Pty Ltd ((CIV 115 of 1997), the District Court used section 51 of the STA to order the sale of common property against the wishes of some of the owners of the strata scheme.

In that case the strata scheme had voted on a resolution to accept an offer made to purchase part of the common property, which was adjacent to the would-be developer's land. The vote did not achieve the required level, and subsequently an order was sought from the District Court to deem that the resolution had been passed, in order to enable the sale. The owners in favour of the sale argued that the land was not required, they would all benefit financially and that no owner would suffer significant disadvantage. The District Court found these arguments persuasive and ordered that the resolution be deemed to have been passed, against the wishes of those that opposed the motion.

1.41 I refer to proposed section 183(10)(a)(ii) which provides that the Tribunal must be satisfied in determining whether an owner of a lot will receive fair market value for the lot that they will not be disadvantaged in terms of their financial position as a result of the termination.

1.41.1 Can you give some guidance of what kinds of costs should be covered by the proponent to ensure the owner will not be disadvantaged? For example, would the fair market value be greater than the amount still owed under any mortgage and, if so, would the proponent need to ensure the mortgage is paid out, including any accompanying fees for early discharge?

Take the example of where the objecting owner owns a lot worth $500,000 and has a mortgage registered against that lot for $1 million. If the objecting owner were forced to sell their lot in exchange for a lump sum of less than $1 million the objecting owner would be worse off financially as they would be required to pay the mortgagee the difference between the amount paid for the lot and the mortgage. SAT could not order such a termination to proceed because it would leave that owner worse off financially. However, SAT could an order modifying the termination proposal so that the proponent is required to:

a. provide the objecting owner with a like for like replacement lot that would:
    i. be in a nearby location
    ii. have equivalent facilities
    iii. have equivalent amenity and
    iv. be equivalent to the fair market value of their current lot.
b. pay all of that owner's duties, taxes and moving costs
c. pay the owner's costs of discharging the mortgage over the current lot and any costs associated with the objecting owner mortgaging the replacement lot for the same amount.

1.42 I refer to proposed section 183(10)(b)(iii), which enables the Tribunal, in considering the amount of compensation that would be payable under section 241 of the Land Administration Act 1997 to add to the award or offer an amount appropriate to compensate

for the taking without agreement which shall not exceed 10% of this amount unless the Tribunal is satisfied that exceptional circumstances justify a higher amount.

1.42.1 Why was 10% chosen as a suitable percentage?

The reason for specifying that an owner may be paid up to 10% more for their lot to compensate for the taking without agreement was that this restates the position under section 241(8) and (9) of the LAA. If the amount payable to an owner above the fair market value is more that 10%, it encourages one owner to hold out to the detriment of other owners (who may well end up with less than the hold out) rather than moving towards a negotiated settlement. Note that SAT has full discretion to award up to 10% more than fair market value to an objecting owner. Exceptional circumstances might involve the fact that there are no other like-for like lots in the area, so SAT increases the amount paid above fair market value so that the objecting owner can afford to buy back into the same neighbourhood.

1.42.2 How harm resulting from the taking of property without agreement is quantified?

Section 183(10)(b)(iii) does not refer to harm, it refers to taking the property without agreement. An objecting owner is one whose lot is being taken without agreement and SAT has discretion to award up to 10% more than fair market value to an objecting owner.

1.42.3 Has the Tribunal awarded such an amount pursuant to section 241(9) of the Land Administration Act 1997? If so, please give details, including percentages and the circumstances that justified such an award.

We are not aware of whether the Tribunal or the Supreme Court have ordered an amount under section 241(9).

Beech J held in McKay v Commissioner of Main Roads [2011] WASC 223 that:

> The amount added under s 241(8) is compensation for the taking without agreement. Section 241(9) affects the fixing of that amount. It provides a limit of 10% of the amount otherwise awarded, unless I am satisfied that exceptional circumstances justify a higher amount.

Edelman J in Lenz Nominees PL v The Commissioner of Main Roads [2012] WASC 6 held in relation to section 241(8) and (9) of the LAA:

> The term 'solatium' does not appear in s 241 of the Land Administration Act. Its etymology is the Latin solacium, 'comfort'. The concern is to provide a monetary redress for a non-pecuniary loss arising from the taking of land without agreement. The statutory source for an award of solatium is s 241(8) and s 241(9).

1.42.4 What would constitute exceptional circumstances?

Exceptional circumstances would depend upon the facts of the case.

1.43 I refer to proposed section 183(12)(b) providing the Tribunal must also consider, when considering whether a termination proposal is just and equitable, the proportion of owners of lots in favour of and against the termination proposal in terms of numbers of lots and in terms of unit entitlement of lots.

1.43.1 Could you clarify the purpose of including this consideration? Was it envisaged that the greater the percentage of support above 80%, the greater weight is given to confirming the termination proposal, or otherwise?

The percentage of support for the termination proposal by unit entitlement is considered by SAT. For example, a termination proposal is supported by more than 80% of the lots, but if the same vote was taken using unit entitlement the support would be substantially less (in this example, 45% in favour and 55% against, by unit entitlement), SAT would have grounds to order the termination not proceed.

1.44 I refer to proposed section 183(12)(e) providing that the Tribunal must consider the benefits and detriments of the termination proposal proceeding or not proceeding for all those whose interests must be taken into account

1.44.1 Is this meant to capture all non-financial detriments such as mental stress, health conditions and physical requirements?

The individual circumstances for each owner, whether those circumstances are financial or non-financial (including if that owner has specific mental health issues, other health issues or other physical requirements) are to be considered by SAT when it asks the question whether the termination proposal is just and equitable and in particular when SAT considers:

> *The benefits and detriments of the termination proposal proceeding or not proceeding for all those whose interests (including owners) must be taken into account*: section 183(12)(e)

1.45 I refer to proposed section 183(17)(d), which provides the Tribunal may order, on specified conditions being met, the occupier of a lot or the common property vacate the lot or common property.

1.45.1 Might it be prudent to provide for a requirement that an occupier be required to vacate within a reasonable period of time and, if so, what period do you believe might be reasonable (i.e. 30 or 60 days)?

Section 9 of the *State Administrative Tribunal Act 2004* provides that the main objectives of SAT include:

> (a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;

In that context it is not necessary to specify such time periods as SAT is likely to make a decision that imposes a reasonable period within which a lot is to be vacated. Furthermore, the period between when SAT makes an order confirming a termination resolution and when the proponent lodges an application with the Registrar of Titles to terminate the scheme is likely to be at least a month (to enable the subdivision endorsement required in section 186 to be obtained).

1.46 I refer to proposed section 184(2) providing that the Planning and Development Act 2005 applies to a request to the Planning Commission to approve a diagram or plan of survey subject to any modifications set out in the regulations.

1.46.1 Would you regard this provision as enabling the amendment of the Planning and Development Act 2005 and, accordingly, a Henry VIII clause?

- If so, why and please provide justification for the use of this clause.

- If not, why not?

We do not consider this to be a Henry VIII clause. It was not intended to amend the *Planning and Development Act 2005* (PDA), but simply to read references in the PDA in a certain way to make the PDA work correctly for termination. There is no power to alter or modify the PDA as it applies to subdivision approvals. Section 184(2) extends the PDA to termination subdivision under the *Strata Titles Act 1985*, to which it would not otherwise apply, and which were not in mind when the PDA was drafted and enacted. In that context, provision is made for the PDA to be modified or adapted as it applies to termination subdivision, so that its provisions can operate rationally and effectively in that context.

1.47 I refer to proposed section 185 providing that a proponent can make an application for termination of a strata titles scheme.

1.47.1 Given the Explanatory Memorandum refers to this application being made to the Registrar of Titles, would it not, for the sake of clarity, be prudent to make this clear in this section?

1. Under section 185 the proponent can apply to the Registrar of Titles to terminate a scheme if:
    a. WAPC has endorsed the plan of survey under section 184
    b. the steps required to wind up the strata company:
    c. under the termination proposal prior to the termination have been taken or
        i. ii. under an order made under section 192 (for directions about winding up the strata company) prior to the termination have been taken
    d. the application is made within 12 months or the unanimous resolution to terminate or the SAT order confirming the termination proposal.

2. Under section 193 the application to a registrar of titles to register the termination of a scheme must:
    a. be made in an approved form
    b. be accompanied by the plan of survey endorsed with the approval of the WAPC
    c. be accompanied by evidence in an approved form that the requirements of the Act for termination of the scheme have been complied with
    d. be accompanied by a statement of how each item registered or recorded for the scheme in the Register is to be dealt with and disposition statement, instruments and other documents necessary for those dealings
    e. be accompanied by a fee.

3. The registration process for the Registrar of Titles to cancel the registration of the scheme and certificates of titles for the lots in the scheme is provided for in section 194. The scheme is terminated when the Registrar cancels the registration of the scheme.

The policy for these provisions is:

1. To ensure the assets and liabilities of the strata company have been properly dealt with before the application to register the termination of the scheme has been made.

2. To provide the proponent with sufficient time (12 months) to:
   a. obtain the endorsement of the plan of survey as required under section 184
   b. arrange all of the other terms of settlement (such as settling on the like for like replacement lots) and
   c. ensure that the assets and liabilities of the strata company have been properly distributed or dealt with.

3. To ensure each item registered or recorded for the scheme in the Register is properly dealt with when the scheme is terminated.

1.48 I refer to proposed section 187(1)(e)(i) providing a termination proposal cannot proceed further if the Tribunal makes a decision not to confirm the resolution.

1.48.1 Is it correct to say that, unless the strata company has made a resolution under proposed section 174(2)(b) or an application under proposed section 174(2)(c) has been successful, another termination proposal can be made to the strata company, including by the same proponent, initiating the process again?

An outline proposal to terminate the scheme cannot be submitted to a strata company:
   a) during a period where the strata company has passed an ordinary resolution in favour of an outline proposal and that proposal has not come to an end: section 174(2)(a)
   b) during a period (not exceeding 12 months) where the strata company has, by ordinary resolution, prohibited termination proposals from being submitted to it: section 174(2)(b). Note there is no limit to how many times the strata company can hold a general meeting and pass an ordinary resolution to prohibit outline proposals from being submitted. In other words, a strata company could hold a general meeting every year to extend the prohibition on the submission of outline proposals for a further 12 months
   c) during a period for which SAT has (on the application of the strata company) ordered that termination proposals are not to be submitted to the strata company: section 174(2)(c).

So, assuming SAT makes an order that the termination resolution is not confirmed and the termination proposal cannot proceed, a new outline proposal may be submitted to the strata company.

However, the strata company does not have to hold a general meeting to vote on the outline proposal. The outline proposal goes nowhere if the strata company does not pass an ordinary resolution within 3 months of it being submitted.

1.48.2 If so, do you believe any ‘cooling off period’ should be imposed whereby the same, or a different, proponent is prohibited from submitting a proposal for a period of time (perhaps

to ensure a period of certainty for owners and occupiers)? It is understood there is currently no restriction in Western Australia on applications re-submitting a planning application which has previously been dealt with.

A cooling off period was proposed in the Confidential Consultation draft of the Strata Titles Amendment Bill 2018 – Termination of Schemes. However, stakeholders were generally not supportive of an automatic cooling off period and they recommended the measures include in section 174(2)(b) and 174(2)(c).

1.49 I refer to proposed section 189, which deals with the costs of the termination proposal process incurred by the strata company.

1.49.1 With respect to proposed section 189(1):

- Given this is expressed in permissive, not mandatory language, in what circumstances would a strata company choose not to charge the proponent fees for activities?

If the strata company failed to charge a proponent fees because the proponent controlled the strata company, other owners could challenge this decision through an application to SAT under section 197 and obtain an order that the strata company should charge the fees. The grounds for such an order would be that the failure to charge the fees was a failure to fulfil the strata company's objectives under section 119 of the Bill to not make decisions that are oppressive or unreasonable.

- With respect to proposed section 189(4):

o Does this envisage that if the strata company undertakes the activity first, it would render an invoice to the proponent, giving a reasonable time for payment and then, as a last resort, applying to recover payment as a debt in court?

Yes.

o Would it not be entitled to do that in any event without this provision? If so, why is it required?

Section 189(4) puts the issue of recovery of the money beyond any doubt.

1.50 I refer to proposed section 191(1), which provides that an owner who owns all the lots in the strata titles scheme may apply for termination if under the Planning and Development Act 2005 a plan of subdivision for the termination has been approved and a diagram or plan of survey has been endorsed with that approval.

1.50.1 It is assumed that the owner in this scenario has approved the proposal with there being no requirement for it to be confirmed by the Tribunal.

When all lots in a strata titles scheme are owned by the same person, there is a simplified process to terminate the scheme provided in section 191 of the Bill. That owner of all the lots can apply to the Registrar of Titles to terminate the scheme (under section 193 of the Bill) if

the following approvals of the WAPC have been obtained under Part 10 of the Planning and Development Act 2005 (PDA):

a) a plan of subdivision for the termination of the scheme has been approved (that is, for the parcel to cease being subdivided by a strata titles scheme); and

b) a diagram or plan of survey has been endorsed with that approval.

There is no requirement for SAT to review a unanimous resolution to terminate.

However, given that under proposed section 183(9)(c)(iii) one of the factors the Tribunal has regard to when considering whether a proposal is just and equitable when it only has majority approval is the interests of the occupiers of the lots (who may not be owners), is there not scope for this to be considered as well in this scenario?

There is no requirement for SAT to review a unanimous resolution to terminate.

However, under section 193 the application to a Registrar of Titles to register the termination of a scheme must:

a. be made in an approved form
b. be accompanied by the plan of survey endorsed with the approval of the WAPC
c. be accompanied by evidence in an approved form that the requirements of the Act for termination of the scheme have been complied with
d. be accompanied by a statement of how each item registered or recorded for the scheme in the Register is to be dealt with and disposition statement, instruments and other documents necessary for those dealings
e. be accompanied by a fee.

So, if there are lots over which there is a registered or recorded estate, interest or right, the proponent needs to include a statement about how those estates, interests or rights are to be dealt with. If there is a mortgage registered against a lot, the termination of the scheme cannot be registered until that mortgage is discharged. In the same way, if one of the occupiers has a registered lease against the lot, the termination of the scheme cannot be registered until the registered lease is withdrawn.

1.50.2 Will occupiers of lots who are not owners be served with a copy of this application?

No.

1.51 I refer to proposed section 191(2)(b) which provides the Planning and Development Act 2005 applies to the required approval under 191(1) subject to any modifications set out in the regulations.

1.51.1 Would you regard this provision as enabling the amendment of the Planning and Development Act 2005 and, accordingly, a Henry VIII clause?

- If so, why and please provide justification for the use of this clause.
- If not, why not?

We do not consider this to be a Henry VIII clause. It was not intended to amend the *Planning and Development Act 2005* (PDA), but simply to read references in the PDA in a certain way to make the PDA work correctly for termination. There is no power to alter or modify the PDA as it applies to subdivision approvals. Section 191(2) extends the PDA to termination subdivision under the *Strata Titles Act 1985*, to which it would not otherwise apply, and which were not in mind when the PDA was drafted and enacted. In that context, provision is made for the PDA to be modified or adapted as it applies to termination subdivision, so that its provisions can operate rationally and effectively in that context.

1.52 How does proposed section 193 interact with proposed section 185?

1. Under section 185 the proponent can apply to the Registrar of Titles to terminate a scheme if:

a. WAPC has endorsed the plan of survey under section 184
b. the steps required to wind up the strata company:
c. under the termination proposal prior to the termination have been taken or
    i. ii. under an order made under section 192 (for directions about winding up the strata company) prior to the termination have been taken
d. the application is made within 12 months or the unanimous resolution to terminate or the SAT order confirming the termination proposal.

2. Under section 193 the application to a registrar of titles to register the termination of a scheme must:

a. be made in an approved form
b. be accompanied by the plan of survey endorsed with the approval of the WAPC
c. be accompanied by evidence in an approved form that the requirements of the Act for termination of the scheme have been complied with
d. be accompanied by a statement of how each item registered or recorded for the scheme in the Register is to be dealt with and disposition statement, instruments and other documents necessary for those dealings
e. be accompanied by a fee.

The policy for these provisions is:

1. To ensure the assets and liabilities of the strata company have been properly dealt with before the application to register the termination of the scheme has been made.

2. To provide the proponent with sufficient time (12 months) to:

a. obtain the endorsement of the plan of survey as required under section 184
b. arrange all of the other terms of settlement (such as settling on the like for like replacement lots) and
c. ensure that the assets and liabilities of the strata company have been properly distributed or dealt with.

3. To ensure each item registered or recorded for the scheme in the Register is properly dealt with when the scheme is terminated.

1.53 Could you explain how proposed sections 195(2)(e) and (3) will operate in practice, including rights of owners as tenants in common as well as joint tenants?

Section 195(2)(e) provides that the people who owned the lots immediately before termination become owners of the parcel (single lot of land) as tenants in common in shares proportional to the unit entitlements of their respective lots.

So, for example, in a two lot scheme:
Lot A is owned by John and the lot has a unit entitlement of 60 of 100
Lot B is owned by Frank and the lot has a unit entitlement of 40 of 100.
When the scheme is terminated. Lots A and B and the common property within the scheme all become one lot, lot C.

On termination, John and Frank own lot C as tenants in common, with John owning 60 of a 100 shares in lot C and Frank owning 40 of 100 shares in lot C.

Section 195(3) provides for what happens on termination when some of the lots are jointly owned. If two people owned a lot as tenants in common, on termination, they continue to own a share of the parcel as tenants in common. If two people owned another lot as joint tenants, on termination, they will jointly own their share of the parcel together as joint tenants. The relative shares of the parcel that each couple owns are in accordance with the unit entitlement of their respective lots.

An example of how section 195(3) operates for a two-lot scheme is:
Lot A is owned by Tom and Fiona as tenants in common in equal shares and their lot has a unit entitlement of 50 of 100.
Lot B is owned by Jenny and Sam as joint tenants and their lot has a unit entitlement of 50 of 100.
When the scheme is terminated. Lots A and B and the common property within the scheme all become one lot, lot C.

On termination, Tom, Fiona, Jenny and Sam all own the single parcel of land (Lot C) jointly as follows:
Tom and Fiona are tenants in common and they each own 25 of 100 shares in lot C. Jenny and Sam own 50% of lot C (50 shares in 100) and they own that 50% share of the lot as joint tenants.

1.54 Regarding section 105 of the State Administrative Tribunal Act 2004 allowing appeals from decisions of the Tribunal on questions of law:

1.54.1 Who would be the parties to such appeal proceedings?

The parties to the section 183 application would be the parties to the appeal proceedings.
Section 105 of the State Administrative Tribunal Act 2004 provides that:

> (1) A party to a proceeding may appeal from a decision of the Tribunal in the proceeding, but only if the court to which the appeal lies gives leave to appeal.

1.54.2 Bearing in mind the service provisions in proposed section 183(6) regarding an application to the Tribunal, do the relevant service provisions in legislation governing

proceedings before the Court of Appeal have equivalent provisions to ensure all interested persons, who may not be parties to the proceedings, receive notice and can be represented?

As we are not experts in the legislation governing proceedings before the Court of Appeal, we will not comment in response to this question.

1.54.3 Would a vulnerable owner have the same rights to receive independent legal advice and representation on an appeal to the Court of Appeal as they do under proposed sections 175(1)(i) and 190(1)? If not, why not?

No. The provisions in Part 12 are focused upon the termination process, not the possibility of appeals to the Court of Appeal or the High Court.