STRATA TITLES AMENDMENT BILL 2018

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 83: Insertion of sections 4 and 5 and Parts 2 to 14 —

Debate was interrupted after the clause had been partly considered.

Mrs L.M. HARVEY: I will just get back to our discussions around common property on page 133 of the bill. I refer to proposed section 13(5)(c) at the bottom of that page and common property that has been subdivided. Can the minister give me some examples of when common property might be subdivided?

Ms R. SAFFIOTI: An example would probably be an older property that contains a large garden or lawn area and a strata agreement to reduce the size of that common property. I recall a case in the city in which a block of units had a significant amount of unused land or land that was used for parking down the back—a general common area—and the decision was made to subdivide it. There are examples whereby decisions have been made to create lots or new property out of what were once large portions of garden or common property.

Mrs L.M. HARVEY: Could the minister outline what the process would be for commencing the subdivision of common property?

Ms R. SAFFIOTI: I have been advised that the process is not changing. The existing process involves a number of things—for example, a unanimous resolution and other key requirements. Does the member want me to outline all the steps in the current process?

Mrs L.M. HARVEY: No. If the existing process is not changing, I am satisfied with that.

I will move on to proposed section 14, titled, "Strata company". On page 136, proposed subsection (7) states —

> A strata company may have a common seal, but it does not have to do so.

Why is that proposed subsection in there? Why do we need to refer to that in the legislation?

Ms R. SAFFIOTI: The feedback from stakeholders is that there is a keenness to make that seal optional and not mandatory, and to use other determining representatives to sign documents on their behalf. It is optional, but the requirement is no longer there.

Mrs L.M. HARVEY: I will move on to proposed section 19. Is this a reworking of the existing legislation or is it a new provision?

Ms R. SAFFIOTI: This provision tries to clarify an existing process by creating a new section. It basically sets out the requirements of what needs to be lodged with the Western Australian Planning Commission, which must be satisfied to give approval to subdivide. In some of these examples that we are going through now, the provision is trying to clarify and make more transparent the processes that currently occur by detailing them more clearly in the legislation.

Mrs L.M. HARVEY: I will move on to proposed section 21 titled, "Approval for modification of restricted use condition". Under what circumstances would this provision be used?

Ms R. SAFFIOTI: In the current act it is dealt with under section 6. However, this clause clarifies that the approval of the planning commission is required for the amendment of a scheme plan that imposes, varies or revokes a restriction of use shown on that scheme plan. An example given to me is aged-care housing. The provision clarifies what would need to be done to revoke that restriction.

Mrs L.M. HARVEY: To further clarify that aged-care scenario, is the minister referring to a restricted use over a development for aged-care purposes in the context of a strata plan?

Ms R. SAFFIOTI: Yes.

Mrs L.M. HARVEY: Does this cover an individual who wants to modify a restriction for aged care and convert it to a strata title?

Ms R. SAFFIOTI: An example would be that when a strata scheme was established, only people over the age of 55 years could be part of that scheme. If someone wanted to change that age and either reduce or increase it, this is the process they would need to go through.

Mrs L.M. HARVEY: Are the following two proposed new sections, 22 and 23, connected to the approval for a restriction of use condition, or do they relate to other changes?

Ms R. SAFFIOTI: I will read my notes on proposed new section 22. This proposed new section clarifies that the Western Australian Planning Commission or a local government can require a strata company to have by-laws to

achieve a planning purpose, and that the consent of the Planning Commission or local government is required for the planning scheme by-laws condition to be amended or repealed. That is currently section 42(2)(d). Proposed new section 23 clarifies the current requirement that local government approval is required for a subdivision when two or more lots are being consolidated or one or more lots are being converted into common property, or land that is common property is being removed from the parcel.

Mrs L.M. HARVEY: Proposed new sections 25 and 26 refer to leases or licence over common property or temporary common property, and the requirement for the approval of the local government in those circumstances. That is how I read it. I am just trying to work out whether this is a rewrite of existing legislation or whether it is new, and the circumstances in which this sort of requirement would apply.

Ms R. SAFFIOTI: This provision will change the current requirements. It will be invoked when a strata company leases out its property to another party. The member is right; the current requirement is that the local government has to give its consent.

Mrs L.M. HARVEY: Just to be clear on a working circumstance that this might operate in, if some available land was leased to an owner for use for parking, for example, or a visitor bay that would otherwise be common property is leased to an individual owner, would that require registration with local government?

Ms R. SAFFIOTI: Is this question in relation to proposed new section 25 or 26?

Mrs L.M. HARVEY: Well, both really. Probably more proposed new section 26, if common property might be leased for the exclusive use of a particular tenant. Is this that kind of leasing arrangement, or is there a by-law that allows a particular lot owner exclusive use of common property? Is this about those circumstances, when a body corporate has a lease to allow exclusive use of a section of common property to a particular owner, and will that require local government approval, or is this in relation to other circumstances?

Ms R. SAFFIOTI: This would normally apply when a company is leasing out to another party. It could be an existing owner, but it is primarily when a company is leasing common property to another party, and it is not an exclusive-use by-law.

Mrs L.M. HARVEY: I realise it is not an exclusive-use by law, but there is at least an opportunity to get a lease for exclusive use of common property. Is that the case in these circumstances? For example, it is common in strata developments for individuals to have a lease that allows them to put in a condenser unit, for example, on common property. Would that need to be registered with the local government? Is it in every circumstance, or is there a threshold limit before it needs to be lodged with local government for approval?

Ms R. SAFFIOTI: There are different mechanisms for installing or having access to common property. The leases we are describing now are exclusive by-laws or other arrangements; exclusive by-laws do not go to council, but the lease of course would.

Mrs L.M. HARVEY: To clarify, if a council of owners was to have a lease agreement with any individual, be it a neighbour, business or individual owner, within that complex for, say, use of a parking bay—that is probably the most common example—would that require lodgement with the local government before it can be valid?

Ms R. SAFFIOTI: Sure. It depends on the length of the lease, and the regulations will set that out. As in when people need to go to local government, the regulations will specify that.

Mrs L.M. HARVEY: So when it comes to the length of the lease, is any particular time frame that might be a guideline for when people would need to lodge with local government envisaged, and will the regulations also specify whether income can be returned to the council of owners through an arrangement like that?

Ms R. SAFFIOTI: In relation to the length, we will undertake some stakeholder consultation in preparing these regulations. In relation to the income, it would normally go into the administration fund.

Mrs L.M. HARVEY: I am pleased to hear there will be some consultation on that, because obviously if we are looking at a 20-year lease over a parking bay that might change some of the views of the local government with respect to adherence to the local planning scheme; whereas if it is a temporary lease for 12 months in particular exceptional circumstances, it would seem to be an unwieldy regulatory burden to have to lodge with local government. I am pleased that the minister is looking at consulting on that one.

I move to proposed new section 37 in division 3, "Schedule of unit entitlements". I would like some feedback from the minister on whether the calculation of the unit entitlement will change with this legislation, or whether this is just a rewording in the format of existing arrangements.

Ms R. SAFFIOTI: This proposed section retains the concept of unit entitlement as provided in section 14 of the current act and includes that the regulations may prescribe matters relating to the determination of the value of a lot. I can get further information on that if the member would like.

Mrs L.M. HARVEY: Could the minister provide a little further explanation of what has changed?

Ms R. SAFFIOTI: The regulations will provide that when a valuer assesses the value of a strata lot, they will not need to inspect every lot. I understand that the reason for this change is that a case in 2012 stated that valuers should try to get access to each individual unit to assess their value, but that is difficult if an owner will not give access to their lot, for example. Through regulations, this will provide that when a valuer assesses the value of a strata lot, they do not need to inspect every lot.

Mrs L.M. HARVEY: Presumably, if a valuer in those circumstances does not need to inspect each individual lot, we are going to be very reliant on the accuracy of strata plans and strata drawings to ensure unit entitlement.

Ms R. SAFFIOTI: There will be reliance on plan sampling. This was requested by valuers, who find that there are difficulties on the ground when trying to get the values for every individual lot.

Dr D.J. HONEY: I refer to proposed section 37(2). The minister gave me some answers on this previously. If I understand this correctly, it says that the unit entitlement cannot affect the value by five per cent more or five per cent less. I was just a little concerned in terms of the questions I asked before around a highly desirable unit versus a much less desirable unit. Does the plus or minus five per cent restrict that, or is this something quite different? To be specific, I am talking about compensation for the compulsory acquisition of a unit.

Ms R. SAFFIOTI: Again, the unit entitlement does not go to compensation. This five per cent variance exists in the current legislation.

Mrs L.M. HARVEY: I move forward to proposed section 40, "Leasehold by-laws". There is a provision for the postponement of the expiry day for the scheme by an owner. By the sounds of it, there is a requirement that when the scheme commences, the by-laws need to articulate how a postponement of the expiry day is going to be treated with respect to remuneration back to the lessor and other requirements. Can the minister explain what sits behind this and how this is going to work? Also, is there an ability within this legislation for the new leasehold by-laws to be changed during the process to contemplate an extended expiry date?

Ms R. SAFFIOTI: The leasehold by-laws provide a mechanism for the owner of a leasehold scheme to provide the following options—the grant to the owners of the lots of an option to extend the strata lease by postponing the expiry day of the leasehold scheme, or the option to provide that compensation will be payable by the owner of the leasehold scheme to the owners of the lots for improvements to those lots. If the by-laws do not contain an option to postpone the expiry date—I think this is what the member was referring to—the life of the leasehold scheme cannot be extended. The expiry date cannot be postponed to a day more than 99 years after the registration of the scheme and must be supported by a resolution, without dissent, of the strata company. Leasehold by-laws may provide for a fee to be paid to the owner of the leasehold scheme by the owner of a lot when the expiry date is postponed. Leasehold by-laws can be made, amended or repealed only with the consent of the owner of the leasehold scheme. The reason for including the postponement of the expiry date and compensation for improvements within the leasehold by-laws is to provide a transparent process. The by-laws can be searched by the public; the information contained within these by-laws can be ascertained by a single search of the by-laws. If the postponement of the expiry day was contained in the strata leases, a person would have to search every strata lease within a scheme to understand whether the option to postpone the scheme was available; and, if so, on what terms.

Mrs L.M. HARVEY: I am just trying to get my head around leasehold title, because it is new. By the sounds of this, the by-laws may make provision for these circumstances but they are not required to. Is that correct?

Ms R. Saffioti: Yes.

Mrs L.M. HARVEY: There is another provision about the by-laws having to contemplate compensation that might be payable to a lessee who has made improvements to their lot. At the expiry of the scheme there is an ability for the lessor to pay out the lessee for any improvements they have made to their lot close to the expiry of the scheme. I presume that improvements like that would need to be approved by the body corporate and the lessor in any event before they commenced with an individual entitlement. Alterations would require approval. The improvements would not necessarily require approval because it would depend on the nature of those and whether they can be seen from outside the lot.

Mrs L.M. HARVEY: I am trying to understand how this might work. If a leasehold scheme is heading towards its expiry date and an individual has gone ahead and replaced their kitchen or upgraded their bathroom or whatever it might be, a by-law would be needed to allow for compensation to that individual when the scheme expires. That would need to be contemplated in the by-laws for that to occur; is that correct?

Ms R. SAFFIOTI: That is correct. It would need to be in the by-laws.

Mrs L.M. HARVEY: Further to this, it says over the page in proposed section 40(5) —

> Leasehold by-laws can only be made, amended or repealed if the owner of the leasehold scheme has given written consent to the by-laws.

The lessor or the owner of the leasehold scheme has to give approval of the by-laws, so at any given time, even if the council of owners is looking after the leasehold strata scheme and wants to change the by-laws, unless the lessor agrees to that, they cannot become law; is that the case?

Ms R. SAFFIOTI: The owner of the leasehold scheme has control over a limited class of by-laws and those by-laws relate to postponement and compensation.

Mrs L.M. HARVEY: Let us move on to proposed section 41, "Resolution for postponement of expiry day under leasehold by-laws". Proposed section 41(1)(c) provides that 75 per cent of the number of lots in the scheme must vote in favour of the resolution for postponement of expiry. Obviously, the legislation provides that the leasehold strata scheme expires on the date that was set when it was put in place, but it seems that if 75 per cent of the owners want to postpone that expiry date, there is a possibility that they can. Can they do that without the consent of the lessor, if 75 per cent of the owners wanted to push out the expiry date, or does the scheme terminate regardless of the wishes of the leasehold titleholders if the lessor disagrees to an extended expiry?

Ms R. SAFFIOTI: To clarify, if the by-laws give the strata company the option, the expiry date can be postponed. The owner of the leasehold scheme, when registering the scheme, can include in the by-laws an option to postpone the expiry date and this also requires the consent of the Planning Commission. With the consent of the owner of the leasehold scheme and the Planning Commission, the strata company can also make a by-law that includes the option to postpone the expiry date. But in answer to the member's direct question, it needs the approval of a leasehold owner. Further, to postpone the expiry date, the following must be done: the strata company must make a resolution with at least 75 per cent of lots in favour and serve the resolution to the owner of the leasehold scheme.

Mrs L.M. HARVEY: Ultimately, in that circumstance, an expiry period of 30 years might have seemed reasonable when a building was built. Say that the building is well maintained and we are heading towards the end of the expiry date and the owners who hold the leasehold title want to extend it for another 30 years, if 75 per cent agree to it, but the lessor disagrees, is there an appeal mechanism for them to continue to request that or is that it?

Ms R. SAFFIOTI: The precondition is that that option has to be in the by-laws, which would have had the consent of the leasehold owner. So, in a sense, it "cannot not" have consent from the leasehold owner. It has to be an option in a by-law. There is no other option.

Mrs L.M. HARVEY: I think I have this straight. When a leasehold title scheme is registered, there needs to be a by-law that contemplates potential postponement with the expiry of the title under the certain circumstances set out in the act; and if that by-law is not in place at the beginning, there cannot be an option for the leasehold title owners to postpone the expiry of the scheme.

Ms R. SAFFIOTI: The other part is with the consent of the owner of the leasehold scheme and the Planning Commission, the strata company can make a by-law that includes the option to postpone the expiry date after registration. If it is not at registration, it can be done after registration, but the leasehold owner has to be part of the process. The leasehold owner is the one who decides whether to give the option.

Mrs L.M. HARVEY: I understand where we are going. I will say it back to the minister to see whether I have it right. A leasehold title scheme has been registered. At the time of registration, it may have a by-law that contemplates an extended expiry option, but once the scheme is in place, at any time along the continuum from the start to the expiry date of the scheme, a by-law could be introduced to contemplate an extended expiry date of the scheme, but that can occur only with the authority of the leasehold owner.

Ms R. SAFFIOTI: And the Planning Commission.

Mrs L.M. HARVEY: Bewdy. Got it. Thanks. Let us move along to proposed section 64, "Common property (utility and sustainability infrastructure) easement". These easements obviously have been contemplated in the context of solar panels and that sort of infrastructure. Would any other functions be contemplated under this proposed section? Does the minister think it might apply to other functions?

Ms R. SAFFIOTI: Perhaps this will satisfy the member's question. The explanatory memorandum states —

> This clause provides a mechanism for owners or other people to enter into an agreement with the strata company to install sustainability infrastructure (such as solar panels) or utility infrastructure on common property and that strata company's approval to do so is by an ordinary resolution. This clause also provides that the person who owns the sustainability infrastructure or utility infrastructure is granted an easement over the common property where the infrastructure is located.

The current problem with strata title is that if one owner wants to put solar panels on a property, the other owners are third party owners of the common property and the current act requires a resolution without dissent to create

and/or endorse an exclusive by-law or lease over the common property. The bill will support the installation of sustainable utility infrastructure on common property through the common property utility and sustainability infrastructure easement. Utility infrastructure also includes generators, for example, to provide electricity, and I suspect that batteries and other types of renewable or sustainable energy items will be covered by this.

Mrs L.M. HARVEY: Would this provision cover those who may potentially seek approval for things such as retrofitting of blackwater and greywater recycling and rainwater collection devices—tanks and that sort of thing?

Ms R. SAFFIOTI: Yes.

Mrs L.M. HARVEY: I move now to part 6, "Scheme developer". This part contains some very good new provisions so I will probably have some dorothy dixers for the minister. I would like to understand what is the crux of most of these changes. Some of the strata scheme issues that have come to my attention often involve the unhealthy crossover of a developer putting in the strata title scheme, locking in contracts, and even locking in themselves or an affiliate as the strata manager, and in some cases also placing themselves into a position by way of a by-law on the council of owners. Could the minister outline the crux of the new requirements for scheme developers?

Ms R. SAFFIOTI: New duties will be imposed on developers. Developers must hand over key documents to the strata company. Failure of the scheme developer to meet their obligation to provide scheme documents will be dealt with by SAT. The tribunal must make an order that it considers appropriate to resolve the dispute or proceeding. The SAT order can be converted into a monetary order. Under proposed section 79, "Disclosure of remuneration and other benefits", the explanatory memorandum states —

> The objective of this clause is to ensure that the scheme developer discloses all remuneration or benefits from contracts, leases or licences which may bind the strata company. This is to discourage scheme developers from entering into agreements which benefit the scheme developer but may not benefit the owners or the strata company.

Developers must disclose the commission they earn from contracts that bind the strata company. SAT can order a developer to pay the commission that the developer receives to the strata title company. I am not sure whether the member wants me to deal with defects of strata. It is a big change. How does the bill deal with building defects? Developers cannot vote on building defects, so developers who own a lot within a scheme will not be able to vote on building defects for 10 years after the building has been constructed. That has been a major issue in some developments in the city. The strata company will have the statutory right to sue a construction company over building defects. A strata company will be able to step into the shoes of a developer to directly sue the construction company for building defects. This will overcome a 2014 High Court decision that stated that owners in a strata scheme are not owed a duty of care by the builder.

Mrs L.M. HARVEY: Is that when it comes to being able to sue the developer for scheme defects?

Ms R. SAFFIOTI: It is the ability to sue the builder for the scheme defects.

Mrs L.M. HARVEY: Does that ability extend to the individual or the company that was responsible for the construction or just the proprietary limited entity with the ABN?

Ms R. SAFFIOTI: It will just be the company.

Mrs L.M. HARVEY: Is there any way—it is probably more within the commonwealth's jurisdiction—of going after the individuals responsible? In my own example, in the apartments that I was in, the very first job we needed to do was to replace all the tiling and install a new waterproof membrane and new expansion joint. It was either the developer or the builder who had run out of the money and substandard materials had been put into the development. Those defects cost the owners as a whole $300 000 to rectify several years later. When we were chasing the developer, both the developer and the builder had wound up their companies and were operating under different company names and we could not legally go after the individuals, the directors of those companies or the shareholders of companies to try to claw back that $300 000. I expect that would probably come under the commonwealth's jurisdiction around ASIC and company law, but I was wondering whether any recompense could be pursued under any state statute.

Ms R. SAFFIOTI: I have been told by one adviser that the commonwealth Phoenix Taskforce is looking into this issue—that is, the responsibility of particular company directors in these types of issues. I have been advised that that task force has progressed some amendments, but that it is looking into the matter further.

Mrs L.M. HARVEY: It will be great for the strata company to be able to sue the developer for defects. Will there be any penalty for developers who basically sell buildings as part of a strata scheme that have defects in them?

Ms R. SAFFIOTI: There is no provision for that in this legislation. I think that this issue would relate to not only strata title. The way strata schemes are set up means that those companies will not be able to ignore defects and will be unable to use their voting power to stop the recognition of the defects.

Mrs L.M. HARVEY: I move on to insurance, and proposed section 97. This provision will basically require the strata company to have insurance for the usual stuff that would be expected and also to have public liability insurance. Have any changes been made to those requirements? Obviously the level of insurance for public liability has changed over time, but I am interested to know whether this is different from the existing legislation.

Ms R. SAFFIOTI: This clause amends the section by increasing the required insurance from $5 million to $10 million. The penalty has been revised from $400 to $3 000 for consistency with penalties in equivalent legislation. A new provision has also been added to provide that, under certain circumstances, the strata company need not use money from an insurance payout to replace or repair whatever insurable asset was damaged.

Mrs L.M. HARVEY: We are getting there. I refer to proposed section 111, "Legal professional privilege and defamation". Yesterday during consideration in detail, I mentioned a particular case I was aware of, although not in my patch, in which there was a toxic relationship between some of the owners in a strata scheme and the management. They made all sorts of claims against each other, then one of the managers of the scheme launched a defamation case against one of the owners in the complex. They incurred $250 000 worth of fees and damages in the process, which are now apparently being paid by all the owners. I suspect that this provision is more to provide protection for people on the council of owners, but could the minister explain a little bit more what this section is about?

Ms R. SAFFIOTI: This proposed section establishes that the requirements for the strata company to provide information and certificates does not extend to any information that is subject to legal professional privilege. Further, it provides that is a defence to an action for defamation if the defendant proves that the defamatory matter was contained in information or documents required to be given under the subdivision. Basically, as I understand it, if the strata company gives information that is required, it cannot be subject to defamation or other challenges because it is required to provide that information.

Mrs L.M. HARVEY: I expect this is probably an important clause in the context of vexatious owners who might be sending a flurry of emails and making all sorts of claims at annual general meetings about other individuals or the performance of council owners. In providing information to a third party, I presume they would need to be looking at the author of the comments rather than the provider of the information. Would that be correct?

Ms R. SAFFIOTI: To address the point the member made, it protects the distribution of that information—not necessarily the author, but the company in its duties to distribute information.

Mrs L.M. HARVEY: Moving to proposed section 123, "Resolutions", this includes reference to "unanimous resolutions", "resolutions without dissent" and "special resolutions". Have any of these provisions changed from the old legislation in this new legislation? Depending on what the council of owners or the owners might be considering at an annual general meeting or an extraordinary general meeting on by-laws and licences and that sort of thing, different resolutions need to be met. Has the construction of those resolutions changed?

Ms R. SAFFIOTI: The existing processes and definitions are clarified by bringing them together under this proposed section that deals with resolutions. It aims to clarify the different types of resolutions and put them in one section of the act.

Mrs L.M. HARVEY: I think we canvassed this last night, but that seems like a long time ago. For the voting to be valid, proxies need to be put forward and there are options for electronic voting and some other virtual forums that people can use to vote. Are all these different forms of achieving an outcome for a resolution validated by the legislation or will they be prescribed by regulation?

Ms R. SAFFIOTI: The bill provides for electronic voting and voting before a meeting.

Mrs L.M. HARVEY: There were some anomalies in the previous legislation for voting by proxy. Co-proprietors who were tenants in common needed to proxy each other for the purpose of an annual general meeting. Are those requirements still part of this legislation?

Ms R. SAFFIOTI: Yes, they are.

Mrs L.M. HARVEY: Proposed section 125(2), "Disqualification from voting as proxy", states —

> A person must not vote as a proxy of another person on a resolution relating to the provision of goods, amenity or service to the strata company if the person so voting … has a direct or indirect pecuniary or other interest in the provision of the goods, amenity or service.

Is there any penalty for somebody who contravenes that, or is it just a matter of rendering the vote ineligible and the strata company then having to reconvene at another meeting?

Ms R. SAFFIOTI: It renders the vote ineligible and it has to be reconvened.

Mrs L.M. HARVEY: I am conscious of the time and I will probably not get an answer to this question, but it is to do with conducting business at general meetings. One issue that arises in some of these meetings is when there are personality conflicts between people in the group. Really, there needs to be some kind of code of conduct requirement, which is often difficult with some groups. We hear of councils of owners and annual general meetings that become quite toxic and hostile. I am interested to know whether this bill contemplates any code of conduct or vexatious or bullying behaviour-type penalties for individuals who make a pain of themselves at meetings.

Ms R. SAFFIOTI: I have been advised that the best mechanism to do that would be by-laws. A code of conduct could be created in those by-laws that would apply.

Mrs L.M. Harvey: I am mindful of the time. I have more questions, but we will come back to it later.

Debate interrupted, pursuant to standing orders.

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