

40TH PARLIAMENT



Report 37

STANDING COMMITTEE ON LEGISLATION

*Proposed Part 12 of the Strata Titles Amendment Bill 2018 –
Termination of Strata Titles Scheme*

Presented by
Hon Dr Sally Talbot MLC (Chair)
October 2018

Standing Committee on Legislation

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EXECUTIVE SUMMARY

- 1 On 13 September 2018 the Legislative Council referred proposed Part 12 (Termination of strata titles scheme) inserted by clause 83 of Division 3, Part 2 of the Strata Titles Amendment Bill 2018 (Part 12) to the Standing Committee on Legislation for consideration and report.
- 2 The key policy objectives of Part 12 are:
 - the revision of the process of terminating a strata titles scheme to facilitate redevelopment of strata land in light of the ageing of strata scheme buildings in Western Australia and increasing investment by owners in their maintenance
 - to overcome the shortcomings of the current law governing the termination of strata titles schemes.
- 3 Part 12 provides a detailed statutory process for the termination of strata titles schemes, including a majority termination process where unanimous support for a proposal is not obtained. This will apply to schemes of five lots or more and where the number of votes cast in favour of the proposal is at least 80% of the total number of lots in the scheme.
- 4 The majority termination process provides various safeguards for owners and others with an interest in strata titles lots, including a fairness and procedural review by the State Administrative Tribunal (Tribunal).
- 5 The Committee received evidence of a broad range of issues arising from Part 12. Some stakeholders expressed a number of concerns, including its impact on the property rights of strata lot owners and the use of compulsory acquisition powers for what they regarded as purely a private purpose. Other stakeholders were supportive of the reforms as representing an appropriate balance between the interests of owners wishing to terminate strata schemes and those who do not support a termination.
- 6 Following consideration of the evidence before it the Committee generally supports the policy behind Part 12 and the process it provides for the termination of strata titles schemes. The Committee is satisfied, in the main, that Part 12 contains adequate procedural safeguards and oversight by the Tribunal.
- 7 However, the Committee is concerned that safeguards for owners and vulnerable people in relation to advice and representation are not currently located in Part 12, with no legislative guarantee that they will be provided, despite references in explanatory material and evidence to this inquiry.
- 8 The Committee has also identified a number of Henry VIII clauses in Part 12.
- 9 The Committee has made recommendations it believes will further enhance the safeguards for those subject to a termination process.

Findings and recommendations

RECOMMENDATION 1

Page 19

The Committee recommends that clause 83, Part 2, Division 3 include a requirement that after the receipt of a full termination proposal, the strata company must refer it to an independent advocate and set out details of their role, as follows:

Page 266, after line 22 – to insert:

178A. Reference of full proposal to independent advocate

- (1) In this section —

independent advocate means a person to whom a full proposal is referred under subsection (2).
- (2) A strata company to which a full proposal is submitted under section 178 must refer the proposal for review and assessment to a person who —
 - (a) is independent of the strata company and the proponent of the termination proposal; and
 - (b) satisfies any requirements of the regulations regarding experience or qualifications.
- (3) The independent advocate must, in accordance with the regulations —
 - (a) review the full proposal; and
 - (b) provide the strata company with an independent assessment of the full proposal; and
 - (c) at a time and place arranged with the strata company, make a presentation of its assessment open to the persons mentioned in section 178(4)(a), conducted so as to take account of the needs of any of those persons who have sensory or mobility disabilities.
- (4) The independent advocate must —
 - (a) endeavour to identify any owners of lots for whom arrangements for fuller or more extensive advice or representation are to be made under regulations made under section 190(1)(b); and
 - (b) advise those owners of their entitlements under regulations made under section 190; and
 - (c) if requested by those owners, refer them to independent providers of the advice or representation which they are to obtain; and
 - (d) if requested by those owners, assist them in obtaining benefits under the trust referred to in section 190(2).
- (5) In any proceedings before the Tribunal under Part 13 in which there is a dispute about whether an owner of a lot in the strata titles scheme is entitled to a fuller or more extensive advice or representation under regulations made under section 190(1)(b) or is entitled to benefit under a

trust referred to in section 190(2), the independent advocate may represent the owner in the proceedings.

- (6) The strata company —
 - (a) must pay the remuneration of, and reimburse the expenses incurred by, the independent advocate; and
 - (b) may charge fees under section 189 to cover those costs.

RECOMMENDATION 2

Page 20

The Committee recommends that, during the Committee of the Whole House, the Minister representing the Minister for Lands explains how clause 83, Part 2, Division 3, proposed section 189 will require the proponent of a termination proposal to pay the strata company's costs of an independent advocate.

RECOMMENDATION 3

Page 22

The Committee recommends that clause 83, Part 2, Division 3, proposed section 175(1)(i) be amended to require the proponent to provide, in the outline of a termination proposal, details of arrangements for the obtaining of independent advice or representation for owners of lots affected by the proposal, in accordance with the regulations.

This may be effected in the following manner:

Page 263, lines 23 to 28 – to delete the lines and insert:

- (i) provide, in accordance with the regulations, details of proposed arrangements for obtaining independent advice or representation referred to in section 190; and

RECOMMENDATION 4

Page 23

The Committee recommends that clause 83, Part 2, Division 3, proposed section 190 be amended to ensure all owners benefit from arrangements by the proponent for them to obtain independent advice or representation, including those owners who require fuller or more extensive advice or representation identified in the regulations as vulnerable.

This may be effected in the following manner:

Page 286, lines 5 to 17 – to delete the lines and insert:

- (1) The regulations —
 - (a) shall require the proponent of a termination proposal to enter into specified arrangements for the owners of lots in the strata titles scheme proposed to be terminated to obtain independent advice or representation in connection with the proposal; and
 - (b) shall specify arrangements for obtaining fuller or more extensive advice or representation for a class or classes of owner identified in or under the regulations as vulnerable, having regard to —

- (i) advanced age, illness, trauma, disability or other factors that may impair the ability of an owner to consider and make an informed decision in relation to a termination proposal; or
 - (ii) financial disadvantage which would significantly impair the ability of the owner to bear the cost of obtaining appropriate professional advice in relation to a termination proposal.
- (2) Without limitation, the arrangements may include a requirement for the proponent of a termination proposal to pay an amount to a trustee to be held in trust for owners to obtain independent legal advice or representation, valuation advice or reports or financial or taxation advice in connection with the proposal.

RECOMMENDATION 5

Page 24

Clause 83, Part 2, Division 3, proposed section 179(4) be amended to require that the regulations prescribe matters relating to the determination of market value of a lot for a termination valuation report which takes account of relevant recent sales history; the highest and best use of the lot; and the value attributable to the owner's interest in the common property of the strata titles scheme.

This may be effected in the following manner:

Page 270, lines 10 to 12 – to delete the lines and insert:

- (4) The regulations must prescribe matters relating to the determination of the market value of a lot for a termination valuation report, including a valuation methodology which takes account of —
 - (a) relevant recent sales history; and
 - (b) the highest and best use of the lot; and
 - (c) the value attributable to the owner's interest in the common property of the strata titles scheme.

FINDING 1

Page 25

The Committee finds that clause 83, Part 2, Division 3, proposed sections 177(2)(b), 184(2) and 191(2)(b) are Henry VIII clauses.

RECOMMENDATION 6

Page 26

The Committee recommends clause 83, Part 2, Division 3, proposed section 177(2) be amended as follows:

Page 265, lines 1 to 7 – to delete the lines and insert:

- (2) The *Planning and Development Act 2005* applies to the application subject to the modification that a reference to subdivision is to be read as including a reference to termination of a strata titles scheme.

RECOMMENDATION 7

Page 26

The Committee recommends clause 83, Part 2, Division 3, proposed section 184(2) be amended as follows:

Page 282, lines 25 and 26 – to delete the lines and insert:
request under subsection (1).

RECOMMENDATION 8

Page 26

The Committee recommends clause 83, Part 2, Division 3, proposed section 191(2) be amended as follows:

Page 287, lines 1 to 8 – to delete the lines and insert:

- (2) The *Planning and Development Act 2005* applies to the required approval subject to the modification that a reference to subdivision is to be read as including a reference to termination of a strata titles scheme.

RECOMMENDATION 9

Page 30

The Committee recommends that during the Committee of the Whole House, the Minister representing the Minister for Lands advise the Legislative Council whether an owner of a strata titles lot can grant a long term residential tenancy to potentially defeat terminations of strata titles schemes under clause 83, Part 2, Division 3, proposed Part 12.

RECOMMENDATION 10

Page 31

The Committee recommends that, during the Committee of the Whole House, the Minister representing the Minister for Lands advise the Legislative Council of the Government's response to the recommendation made by the Commissioner for Consumer Protection that clause 83, Part 2, Division 3, proposed section 183(6)(b) be amended to read:

if a retirement village within the meaning of the *Retirement Villages Act 1992* operates over or includes any of the lots or common area under the strata titles scheme – service notice of the application on the Commissioner within the meaning of that Act; and

1. Referral and procedure

1.1 On 13 September 2018, the Legislative Council referred proposed Part 12 (Termination of strata titles scheme) inserted by clause 83 of Division 3, Part 2 of the Strata Titles Amendment Bill 2018 (Part 12) to the Standing Committee on Legislation.

1.2 The motion of referral read as follows:

That in relation to the Strata Titles Amendment Bill 2018 —

- (a) proposed Part 12 (Termination of strata titles scheme) inserted by clause 83 of Division 3, Part 2 to the Strata Titles Amendment Bill 2018 (Bill) be referred to the Legislation Committee for consideration and report by Tuesday, 16 October 2018;
- (b) the Legislation Committee may consider other clauses of the Bill to the extent that any amendments to Part 12 (Termination of strata titles schemes) recommended by it require consequential amendments to the Bill;
- (c) in its consideration of Part 12 and other clauses of the Bill under paragraph (b) the Legislation Committee has the power to consider the policy of the Bill in those clauses only;
- (d) the House may proceed with consideration of the Bill, other than the matters referred under paragraph (a) but the Committee of the Whole House shall not agree to a resolution to report the Bill to the House until after the Legislation Committee reports on the referral of proposed Part 12 and any related matter; and
- (e) That so much of standing orders be suspended to allow the Legislation Committee to meet in relation to this inquiry whilst the Council is sitting.¹

1.3 In support of this motion, the Minister stated:

Members have voiced a number of concerns about proposed part 12 and we agreed that the best way of dealing with this in the most expeditious manner was to ask the Standing Committee on Legislation of the Council to deal with that. This is what this motion seeks to do.²

1.4 At the outset of the inquiry, Hon Donna Faragher MLC was substituted for Hon Nick Goiran MLC under Standing Order 163 for the duration of the inquiry, which was reported to the House by the President.³

1.5 The Committee called for submissions by inviting the stakeholders listed in Appendix 1 to make a submission and, on 18 September 2018, advertising the inquiry in *The West Australian* newspaper, by way of media release and on the Legislative Council social media accounts.

1.6 Submissions received are listed in Appendix 1 along with witnesses with whom the Committee held hearings.

¹ Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 September 2018, p 5762.

² *ibid.*

³³ Hon Kate Doust MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 September 2018, p 5909.

- 1.7 The Committee extends its thanks to everyone who took the time to provide the Committee with their views within the short timeframe for the inquiry. In particular, the Committee would like to thank Landgate and Fulvio Prainito for their willingness to appear before the Committee at very short notice and the thorough responses they gave to the Committee's questions.
- 1.8 The Committee invited the State Administrative Tribunal (Tribunal) to attend a hearing. The Tribunal declined, advising it did not consider it appropriate to do so.⁴
- 1.9 The Committee was surprised and disappointed in this response as it considered the Tribunal could have provided helpful feedback on Part 12.
- 1.10 The Committee also notes that, in other inquiries undertaken by committees of the Legislative Council, senior members of the judiciary have appeared in hearings without objection and provided important assistance to the Parliament.

2 Committee approach

- 2.1 Having been given the power to inquire into the policy of Part 12, the Committee has considered whether there is sufficient justification for the introduction of a new process for the termination of strata titles schemes to replace the current requirements under the *Strata Titles Act 1985*.
- 2.2 It has also considered the adequacy of the various safeguards proposed by Part 12 to protect the interests of strata title lot owners.
- 2.3 As with previous inquiries, the Committee's scrutiny of proposed Part 12 has included an assessment as to whether it is consistent with fundamental legislative principles (FLPs).
- 2.4 Whilst consideration or application of those principles is not mandatory in Western Australia, the Committee has used them as a framework for fair and effective scrutiny of legislation since 2004 and includes a list in Appendix 2.
- 2.5 The Committee has scrutinised each provision in Part 12; considered all submissions made and received evidence on a range of concerns raised in submissions.
- 2.6 Following a review of the evidence the Committee was left with several outstanding concerns about Part 12.
- 2.7 Due to the short timeframe for this inquiry, this report focusses on these outstanding concerns.

3 Background

Legislation

- 3.1 Strata titles were first introduced in Western Australia on 1 November 1967 with the commencement of the *Strata Titles Act 1966* to meet the growing demand for individual ownership of home units as an alternative to traditional style housing.
- 3.2 This legislation enabled the obtaining of a freehold title for part of a building through the subdivision of a parcel of land into a number of lots and, in some cases, common property.⁵

⁴ Kathleen Halden, Executive Manager, State Administrative Tribunal, Email, 27 September 2018.

⁵ Western Australia, Legislative Council, Standing Committee on Public Administration, Report 13, *Report in Relation to the Inquiry into Western Australian Strata Managers*, 1 September 2011, p 1.

- 3.3 The legislation provided that the Supreme Court of Western Australia may order the settlement of a scheme where a strata building is damaged, which could include the reinstatement of the building and the transfer of the interests of owners of lots that have been destroyed.
- 3.4 The *Strata Titles Act 1966* was replaced by the *Strata Titles Act 1985*, which contains a number of avenues by which a strata scheme can be terminated:
- 3.4.1 Sections 30 and 30A: The unanimous resolution of all owners.
- 3.4.2 Section 31: The strata company, one owner or mortgagee can apply to the District Court to terminate a scheme.
- 3.4.3 Section 51: A person (part of the majority in favour of a termination resolution that was supported to the extent necessary for a special resolution) may apply to the District Court to have the special resolution as so supported declared sufficient to authorise the termination.
- If the District Court makes this declaration, the resolution will be deemed unanimous.⁶ This applies in any case where under the *Strata Titles Act 1985* a unanimous resolution is necessary, so applies to the termination of strata schemes by virtue of section 30.⁷
- 3.5 According to Landgate, these processes do not currently provide adequate safeguards for owners in relation to the termination of a strata scheme as:
- there is no requirement for a detailed proposal be prepared or even given to other owners before launching the District Court action
 - there is no requirement for a vote before applying to the District Court
 - there is no additional assistance or safeguards for vulnerable owners to help them in responding to the District Court action and
 - the Act provides no guidance to the District Court on how it should assess a termination application.⁸
- 3.6 Landgate has also stated that:
- The need for a unanimous resolution of owners to end the scheme means that the resolution is rarely obtained. Landgate records indicate that since 1970 only 1129 schemes have come to an end. This is in the context of there being more than 60,000 registered schemes.⁹

Reform process

- 3.7 The current round of reforms to strata laws that included the development of the termination process provided for in Part 12 began in 2013 with the development by Landgate of a series of discussion papers.
- 3.8 In August 2014 Landgate produced a discussion paper on the termination of strata schemes which, in addition to highlighting the deficiencies of the processes in the *Strata Titles Act*

⁶ *Strata Titles Act 1985* s 51(1).

⁷ See also Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, pp 4-5. Some of these avenues were either introduced or amended by amendment to the Act in 1995 and 1996.

⁸ *ibid.*, p 5. See also Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, pp 2-4; Submission 29 from Landgate, 25 September 2018, p 3 and Submission 24 from Hon Rita Saffioti MLA, Minister for Lands, 25 September 2018, p 2.

⁹ Submission 29 from Landgate, 25 September 2018, Appendix A, p 94.

1985, noted that strata schemes have a finite life determined by the age of the building, its capacity for refurbishment and the owners' capacity to pay for this.¹⁰

- 3.9 In October 2014 Landgate also produced a consultation paper which included a chapter on majority termination of schemes (where a unanimous resolution was not required for termination) and contained some elements of a proposed termination process, including safeguards for owners.
- 3.10 In this consultation paper, Landgate recognised:
- There is an inherent tension between the owner's property rights conferred by the strata title and share in the common property and the fact that those property rights are part of a broader strata or community scheme of rights and obligations.
 - There is an argument that democracy and a majority vote to terminate should prevail over the wishes of a dissenting minority.
 - In view of the broad range of reasons why people buy into strata and their reasons for staying as owners of that strata lot it is hardly surprising that there is no common view on when a scheme can be brought to an end and why the obtaining of unanimous consent is difficult to obtain.¹¹
- 3.11 After taking into account feedback from submissions during the consultation process, Landgate advised the Committee that it had considered other jurisdictions in which contemporary strata scheme termination processes have been in operation, namely Singapore, New South Wales and the Northern Territory.¹²

Policy behind Part 12

- 3.12 In addition to the shortcomings of the current law identified by Landgate, the following observations reflect the policy justification behind Part 12.
- The first strata schemes in Western Australia were constructed over 50 years ago, with many scheme buildings ageing, losing value and requiring ever increasing investment by lot owners in their maintenance as a result of falling into disrepair.¹³
 - The growth in Western Australia's population and the ever increasing demand for redevelopment sites to provide housing has seen increasing pressure to terminate existing strata schemes to meet this need.¹⁴
 - Without the ability for the majority of owners to seek a termination, schemes may be left to fall into disrepair, adversely impacting both the owners within the scheme, and the broader community.¹⁵
 - Part 12:
 - provides a transparent termination process that requires a vote¹⁶

¹⁰ *ibid.*, p 36.

¹¹ *ibid.*, Appendix A, pp 94-95

¹² *ibid.*, p 36.

¹³ Submission 24 from Hon Rita Saffioti MLA, Minister for Lands, p 2. See also Submission 15 from the Department of Planning, Lands and Heritage, 25 September 2018, p 1; Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, p 4 and Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 2.

¹⁴ See Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 2.

¹⁵ Submission 24 from Hon Rita Saffioti MLA, Minister for Lands, 25 September 2018, p 2.

¹⁶ Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, p 5.

- provides a streamlined process for termination where there is a unanimous resolution by owners¹⁷
- enables a majority termination process that will protect the assets held by all strata lot owners by providing a set of safeguards¹⁸ and removing the ability of single owners to use their interest to block redevelopment against the wishes of the majority¹⁹
- provides a full procedural review by the State Administrative Tribunal to consider the views of all owners.²⁰

4 Termination process steps in Part 12

- 4.1 The processes for unanimous and majority termination of strata schemes²¹ provided for in Part 12 involve a number of procedural and other steps for the consideration of termination proposals, a summary of which follows:²²

Step 1

- 4.2 The proponent (who must either own or have the option to own a lot within the scheme or be a body corporate formed by two or more such persons) prepares an outline of a termination proposal (outline). This contains sufficient detail to identify the proponent and the scheme to be terminated (proposed section 174).
- 4.3 The outline must contain certain information, including an explanation of the reasons for the termination proposal (proposed section 175).

Step 2

- 4.4 The proponent submits the outline to the strata company, which serves it on all owners and mortgagees within 14 days of receipt. A notification of this is lodged with the Registrar of Titles (proposed section 174 of the Bill).

Step 3

- 4.5 If the strata company passes an ordinary resolution supporting the consideration of a full proposal from the proponent, the proposal can proceed (proposed section 176).
- 4.6 An outline cannot be submitted in the following circumstances:
- during any period from when the strata company has passed an ordinary resolution in support of an outline and ending when the proposal cannot proceed further (proposed section 174(2)(a))

¹⁷ Submission 24 from Hon Rita Saffioti MLA, Minister for Lands, 25 September 2018, p 2.

¹⁸ Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, p 4.

¹⁹ Submission 24 from Hon Rita Saffioti MLA, Minister for Lands, 25 September 2018, pp 2-3.

²⁰ Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, p 5. See also Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 28 August 2018, p 5338.

²¹ This includes the new leasehold strata scheme and leasehold survey-strata scheme introduced by the Strata Titles Amendment Bill 2018, which is defined in clause 83, Part 2, Division 3, proposed new section 8(3). These have been referred to as 'essentially the strata or survey strata scheme that is set up for a fixed term of 20 to 99 years'. See Hon Rita Saffioti MLA, Minister for Lands, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 21 August 2018, pp 4976-4977 as well as Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council pp 9-10.

²² See also Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, pp 5-7.

- when the strata company has passed an ordinary resolution prohibiting their receipt for a period which cannot exceed 12 months (proposed section 174(2)(b))
- during any period for which the Tribunal has, on application by the strata company or the owner of the leasehold scheme, prohibited a termination proposal being submitted (proposed section 174(2)(c))
- where an individual lot owner has successfully applied to the Tribunal for an order preventing termination proposals being made (proposed section 198(1)).

Step 4

- 4.7 The proponent must obtain approval for a plan of subdivision from the Western Australian Planning Commission (WAPC) (proposed section 177).

Step 5

- 4.8 The proponent prepares a full proposal for the consideration of the strata company, which must contain detailed information about what is being offered to owners, including contracts for the sale and purchase of lots and what is proposed to occur on termination of the scheme (proposed sections 178 and 179).
- 4.9 The full proposal must also include:
- a termination infrastructure report comprised of the following:
 - a report by a structural engineer on the state and condition of each scheme building and the common property infrastructure
 - a report on the scope of works required to repair or replace scheme buildings or infrastructure
 - a report by a quantity surveyor estimating the cost of the works (proposed section 179(2))
 - a termination valuation report prepared and certified by a licensed valuer setting out 'a valuation of the market value of each lot in the strata titles scheme' (proposed section 179(3)).

Step 6

- 4.10 The proponent submits the full proposal to the strata company within 12 months of the vote on the outline proposal, which then serves it on various persons, including owners, occupiers and mortgagees (proposed section 178).

Step 7

- 4.11 All owners vote on the full proposal after the strata company has considered it and gives all those served with a copy a reasonable opportunity to make submissions to the proponent and the strata company (proposed sections 181 and 182).
- 4.12 If the vote in favour of the full proposal is unanimous, the application for termination can proceed further (see Step 10 below).
- 4.13 If the scheme has five or more lots and the number of votes cast in favour of the full proposal is at least 80% of the total number of lots in the scheme, a termination resolution is passed subject to the confirmation of the Tribunal. This has been referred to as a 'procedural and fairness review'²³ (proposed section 182(7)).

²³ *ibid.*, p 5.

4.14 If the vote fails to meet this threshold, the termination process comes to an end.

Step 8

4.15 The proponent applies to the Tribunal for confirmation of the termination resolution, which can only occur if the Tribunal is satisfied of the following:

- The termination process was properly followed.
- Every owner who did not support the termination proposal will receive fair market value, or a like for like exchange, for their lot.
- The termination proposal is otherwise just and equitable having regard to specified matters (proposed section 183(9)).

4.16 The Tribunal must have regard to a number of factors in determining whether the proposal is just and equitable, including the interests of occupiers of lots.²⁴

4.17 In determining fair market value, the Tribunal must be satisfied the owner will receive an amount that is at least the amount of compensation required to be paid under section 241 of the *Land Administration Act 1997* and that they will not be disadvantaged in terms of their financial position (proposed section 183(10)).

4.18 The Tribunal can also award an amount to reflect the taking of property without the owner's agreement. This must not exceed 10% of what has been offered unless exceptional circumstances justify a higher amount (proposed section 183(10)(b)(iii)).

4.19 The Tribunal will also have regard to loss or damage sustained by the owner by reason of removal expenses, disruption and reinstatement of business, liability for capital gains tax and conveyancing and legal costs (proposed section 183(10)(c)).

4.20 In considering a like for like offer, the Tribunal must consider whether the value of the replacement lot is equivalent to the fair market value of the current lot as well as how the location, facilities and amenity of the replacement lot compares to the current lot (proposed section 183(11)).

Step 9

4.21 If the Tribunal orders that the majority termination proposal can proceed, the proponent needs to request the WAPC to approve a diagram or plan of survey and endorse the approval of the plan of subdivision (proposed section 184).

Step 10

4.22 The proponent applies to register the termination with Landgate (proposed section 185).

4.23 Set out below in Figure 1 is a flowchart of the majority termination process produced by Landgate.²⁵

²⁴ *ibid.*, p 7.

²⁵ See Submission 29 from Landgate, 25 September 2018, p 9.

Majority Termination Process

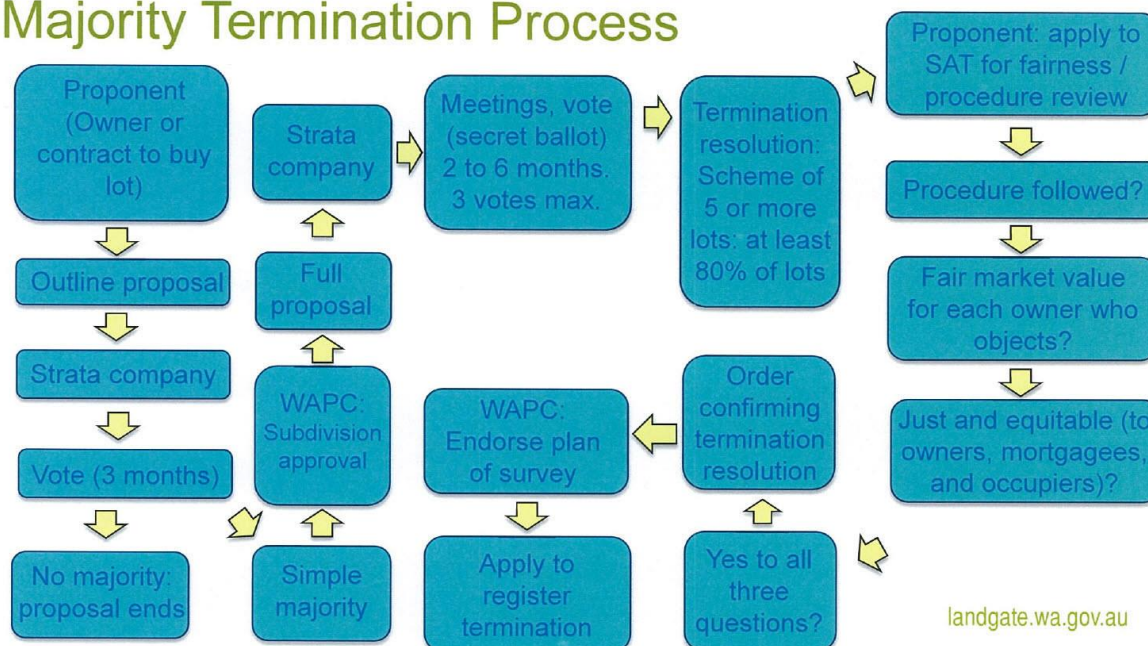


Figure 1. Flowchart of the majority termination process
[Source: Submission 29 from Landgate, 25 September 2018, p 9]

5 Safeguards provided for in Part 12

- 5.1 Part 12 provides a number of safeguards for the protection of owners subject to a termination proposal.
- 5.2 Landgate has also advised the Committee they anticipate providing further safeguards in the regulations.
- 5.3 These safeguards fall into the following categories:
 - procedural safeguards which provide for a fair and transparent process, such as the making of submissions and meeting a voting threshold before a termination resolution can be passed
 - financial safeguards which protect the financial position of the strata company and owners
 - non-financial safeguards which provide for the Tribunal to consider other matters such as the benefits and detriments of the termination proposal proceeding or not proceeding for all those whose interests must be taken into account (which could include stress arising from relocation).
- 5.4 The Committee has detailed these safeguards with an accompanying policy explanation from Landgate, where available, in the following table.²⁶ While a number of them fall into a single category, such as safeguards one to three, four and six (procedural), others falls across all three categories, such as safeguard five.

²⁶ See Submission 29 from Landgate, 25 September, pp 11-13, 17-18 (and pp 30-31 for leasehold schemes) and Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, p 7.

Table 1. Safeguards expressly provided for in Part 12 (as advised by Landgate)

Safeguard	Policy	Category
Safeguard One The strata company can stop outlines being submitted for a specified period (proposed section 174(2)).	This safeguard provides owners with a useful mechanism to prevent termination proposals from being submitted to the strata company in circumstances where owners do not wish to terminate (e.g. they are in a prime redevelopment location but are not faced with high maintenance costs).	Procedural
Safeguard Two A proponent must obtain the approval from the strata company by way of an ordinary resolution before they can prepare a full proposal (proposed section 176).	This enables a strata company to decide whether it wishes to consider a more detailed proposal.	Procedural
Safeguard Three All those required to be served with a copy of a full termination proposal must be given a reasonable opportunity to make submissions to the proponent and the strata company (proposed section 181(3)).		Procedural
Safeguard Four If a termination proposal does not have unanimous support, it can only be passed if the scheme has five or more lots and the number of votes cast in favour of the full proposal is at least 80% of the total number of lots in the scheme. This is subject to the confirmation of the Tribunal (proposed section 182(7)).		Procedural

Safeguard	Policy	Category
Safeguard Five The Tribunal must undertake a procedure and fairness review before it can confirm a majority termination resolution (proposed section 183).	The Tribunal considers a number of matters, including whether: <ul style="list-style-type: none"> the termination process was properly followed every owner will receive fair market value for their lot or a like for like exchange if a like for like lot is being offered, its value is equivalent to the fair market value of the current lot and how its location, facilities and amenity compare to the current lot the proposal to terminate is otherwise just and equitable (having regard to specified matters). The Tribunal must also be assured owners are not financially worse off as a result of the termination proposal. ²⁷	Procedural; financial and non-financial
Safeguard Six The procedure and fairness review can only be undertaken by a judicial member of the Tribunal or a judicial member and other members (proposed section 183(18)). ²⁸		Procedural
Safeguard Seven The strata company may charge a proponent of a termination proposal reasonable fees to cover its expenses associated with the proposal (proposed section 189).	This safeguard ensures the strata company is not left out of pocket as a result of receiving and responding to termination proposals. ²⁹	Financial

[Source: Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council; Submission 29 from Landgate, 25 September 2018]

²⁷ See Submission 29 from Landgate, 25 September 2018, pp 24-26.

²⁸ Submission 24 from Hon Rita Saffioti MLA, Minister for Lands, 25 September 2018, p 4; Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council, p 52; Submission 29 from Landgate, 25 September 2018, pp 24, 26.

²⁹ Submission 29 from Landgate, 25 September 2018, p 11.

Table 2. Safeguards not expressly provided for in Part 12 but may be provided for in regulations (as advised by Landgate)

Safeguard	Policy	Category
Safeguard One Regulations may impose additional requirements about the process required for consideration by the strata company after receipt of a full termination proposal (proposed section 181(5)).	Landgate has suggested these regulations may include a requirement that a strata company refer the proposal to an independent advocate for assessment. ³⁰ This would ensure the strata company has access to its own independent assessment of a full termination proposal before it is voted on.	Financial
Safeguard Two The regulations may require the proponent to make arrangements for owners to obtain independent advice or representation in connection with the proposal (proposed section 190(1)).	In addition to this general safeguard, Landgate has stated the proponent will also be required under the regulations to pay for owners who meet specified criteria to obtain independent legal advice, legal representation, valuation advice and financial and taxation advice in connection with a termination proposal. ³¹ According to Landgate, this safeguard is aimed at ensuring that vulnerable owners are put on an equal footing with other owners so that they can properly respond to and, if need be, effectively object to a termination proposal. ³²	Financial

[Source: Strata Titles Amendment Bill 2018, *Explanatory Memorandum*, Legislative Council; Submission 29 from Landgate, 25 September 2018]

- 5.5 The Committee has provided commentary, in section 9, on those safeguards it believes should be expressly provided for in Part 12 rather than subject to a regulation making power.

6 Issues raised with Part 12 of the Bill

- 6.1 There were a broad range of issues and concerns raised about Part 12 during the second reading debate in the Legislative Assembly as well as in submissions and hearings for this inquiry. There were also submissions in support of Part 12. Some of these are listed in Appendix 3.

³⁰ *ibid.*, p 18; Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, pp 26-27.

³¹ *ibid.*, p 4, p 17.

³² *ibid.*, p 17. See also Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 7.

6.2 There were a number of key themes to emerge from this feedback, as follows:

- The financial impact of a successful termination proposal on dissenting owners. This was a particular concern to a number of submitters. Some felt that the financial considerations the Tribunal must take into account when deciding whether to confirm a termination resolution would not adequately compensate owners in a depressed property market and also fail to cover short term improvements made to properties.
- The impact on the existing property rights of owners, interfering with their security of tenure and their ability to choose when they wish to sell their property. Some submitters were of the view Part 12 should only apply to strata schemes set up after its commencement rather than existing schemes to protect these rights.
- The length of time that a termination process would take and the resulting uncertainty for owners and lessees as well as the potential impact on the maintenance of strata buildings. A number of submitters pointed to a potential timeframe of 21 months and a scenario where a proponent of a termination proposal may control sufficient votes on a strata company to ensure there was no expenditure on maintaining buildings during this period.
- The potential for pressure to be exerted on owners to sell as well as the non-financial impacts resulting from being required to move out of their property, including stress.
- The termination process as it relates to buildings of a certain age.
- The role of Part 12 in breaking deadlocks amongst owners.
- The importance of the safeguards in ensuring dissenting owners are protected.

7 Scrutiny of the policy behind Part 12

General

- 7.1 The Committee generally supports the policy behind Part 12, which addresses identified shortcomings in the current law. It considers Part 12 contains robust, transparent and fair processes that enable strata titles schemes to be terminated in such a way that adequately balances the needs of supporters and objectors to termination proposals.
- 7.2 The Committee is also of the view that the safeguards provided in Part 12, subject to the Committee's concerns set out in section 9, are adequate to protect the interests of dissenting owners and ensure fairness.³³ This includes how the Tribunal determines whether an owner will receive fair market value for their lot as well as, if offered, a like for like exchange.
- 7.3 In particular, the Committee notes that the requirement that the Tribunal must be satisfied that an owner must not be financially disadvantaged as a result of the termination of a strata titles scheme and can take into account a number of other factors gives a further level of assurance that the position of owners will be protected. This is discussed in more detail in section 10.
- 7.4 The Committee also makes the following observations arising from evidence received.

³³ This includes safeguards applying to leasehold schemes. See Submission 28 from Landgate, 25 September 2018, p 30.

- 7.5 Both the Minister for Lands and Landgate have stated that 82% of all strata schemes in Western Australia are less than five lots and will not, therefore, be subject to a majority termination process and will require a unanimous resolution to terminate the scheme.³⁴
- 7.6 Avenues to break deadlocks in other instances where there is a sharing of assets already exist. For instance, under section 126 of the *Property Law Act 1969* the Supreme Court may order the sale of property where co-owners cannot agree on its use or management.³⁵
- 7.7 Importantly, the Committee notes that under Part 12 it is open to an owner to apply to the Tribunal for an order preventing termination proposals from being made. This could be done in circumstances where someone controls a majority of votes on a strata company and prevents an ordinary resolution prohibiting termination proposals being submitted to the strata company.³⁶ Landgate made the following observations during a hearing:

There may be situations where a person actually controls a majority of votes in a strata company and they use that voting power to prevent other owners from making an ordinary resolution to prohibit termination proposals being submitted to the strata company. I refer here to section 174(2)(b). There is a power of the strata company, by ordinary resolution, to say “for the next 12 months we don’t want any termination proposals being served on us”. But if you have a majority owner stopping that resolution from being passed, if that happens and the strata company and those owners are then being forced to consider new termination proposals on a regular basis, the owners who are in a minority have two options. Firstly, that owner could seek to obtain an order from SAT to (a) bring an application on behalf of the strata company. They would do that under section 198(1). With that order having been made, that owner can then bring an application on behalf of the strata company to apply to SAT for an order preventing termination proposals—that is outline or full proposals—from being submitted to the strata company for any period. That period could be, for example, up to five years or more. That would then enable those owners to live in peace if they are actually being pursued by a developer.

The second pathway is this: one owner actually has the ability to apply to SAT under section 197 of the bill. They could apply for an order that the ordinary resolution in support of an outline proposal is taken to have not been passed. SAT actually has the power to make that order. This is set out in section 200(2)(n). The basis that SAT may make such an order will depend upon the facts.³⁷

- 7.8 The Committee has provided further commentary below on certain policy drivers behind Part 12.

Issues with the current law

- 7.9 The Committee accepts the Government’s rationale about why the current process for the termination of strata titles schemes under Part III, Division 2 of the *Strata Titles Act 1985* should be replaced by that in Part 12. The lack of detail in the existing termination process contrasts starkly with that provided for in Part 12, including the detailed list of what the Tribunal must consider when deciding whether to confirm a termination resolution.

³⁴ Submission 23 from Hon Rita Saffioti MLA, Minister for Lands, 25 September 2018, p 2; Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 12.

³⁵ Submission 20 from Mark Atkinson, 25 September 2018, p 1.

³⁶ Strata Titles Amendment Bill, clause 83, Part 2, Division 3, proposed section 200(2)(n). See also Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 21.

³⁷ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 21. See also Submission 29 from Landgate, 25 September 2018, p 13.

Building age

- 7.10 In light of the concerns expressed in some submissions about the ageing of strata scheme buildings and the significant maintenance cost to owners being a key policy driver for Part 12³⁸, the Committee has given consideration to this issue.
- 7.11 Despite this being a key policy driver, the Committee notes building age is not expressly referred to in Part 12, nor does it restrict the use of the majority termination process to instances where there is a need for development due to the strata building not being in a good state of repair.
- 7.12 There was some support amongst those who made submissions or gave evidence to the Committee for the proposal that Part 12 should focus on ageing strata buildings that require replacement.
- 7.13 It was submitted that schemes that are less than 10 years old should only be terminated when there is unanimous approval from owners:³⁹

There is nothing wrong with profit seeking but Part 12 of the Bill does not distinguish between property flipping, rent seeking speculators from value adding, productivity increasing real developers. The net result will be underachieving renewal projects leading to further undermining of public confidence in the benefits of higher density.

There are no provisions in the Bill to prevent dissenting long term strata home owner occupiers in a fit for purpose strata scheme like mine being forced to sell in a depressed market, like now, while actual redevelopment does not occur until the property market is booming.⁴⁰

- 7.14 Another view was that:

The policy should be to limit the new Part 12 to buildings over 50 years of age which are not classed as single tier.

The scope of this Part should cover maintenance costs that exceed the reserve fund and *not* simply re-zoning matters.

The purpose of new Part 12 should be to prevent the building becoming a *slum* because of a recalcitrant owner.⁴¹

- 7.15 During stakeholder consultation on Part 12 in 2014, Landgate considered including the age of strata buildings as part of the voting threshold for the majority termination process:

The proposal is to allow a majority vote for schemes which have 10 or more lots and are at least 15 years old. This is to reflect the reality that buildings have a finite life, and repair and refurbishment costs may impact more heavily on older schemes. A lesser percentage vote will be required as the age of the scheme increases.⁴²

- 7.16 Landgate explained to the Committee why the proposal to refer to the age of the building was not included in the Bill:

³⁸ Strata Titles Amendment Bill 2018, Explanatory Memorandum, p 4. See also Submission 17 from Department of Planning, Lands and Heritage, 25 September 2018, p 1.

³⁹ Submission 11 from Fulvio Prainito, 22 September 2018, pp 4-5.

⁴⁰ *ibid.*, p 6.

⁴¹ Private submission.

⁴² Submission 29 from Landgate, 25 September 2018, Appendix A, p 97.

You have an issue in that some older schemes are actually very well maintained. Some newer schemes, because of build quality—there is evidence that build quality can drop in certain periods, so some newer schemes actually have serious building defects. We did not particularly think there was merit in looking at the age of scheme. The other issue with age of scheme is that it is quite difficult to define the age of a scheme where you have a strata scheme that was developed in stages. If it is developed in stages that take 12 to 15 years, how do you define the age of the buildings there?⁴³

- 7.17 The Committee is satisfied that the termination processes in Part 12 should not be limited to strata buildings of a particular age, bearing in mind the number of reasons for which a termination proposal may be made, which include a decline in lot values and the initial poor set up of the scheme.⁴⁴
- 7.18 The Committee is also satisfied Part 12 makes adequate provision for the Tribunal, in deciding whether to confirm the termination resolution, to consider the purpose for which a termination proposal is being made.
- 7.19 For instance, proposed section 183(12)(c) requires the Tribunal to consider, in deciding whether the termination proposal is just and equitable pursuant to proposed section 183(9)(c), the termination infrastructure report and options to address problems identified in the report.

8 Matters to be dealt with by regulation

- 8.1 The Committee notes that Part 12 has left a significant number of matters to be dealt with in the regulations, which have yet to be drafted.
- 8.2 Landgate has provided the Committee with the following feedback on the development of the regulations:

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.

...

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 [sic] upon the drafting priority allocated to the regulations. This timeframe may have to be extended out depending upon the priority rating for the regulations.⁴⁵

- 8.3 Some of the matters proposed to be dealt with in the regulations are:
- 8.3.1 The regulations may require the proponent to make arrangements for the obtaining of independent advice or representation by owners of lots and, if so, the outline of the termination proposal must provide details of these arrangements (proposed section 175(1)(i)).

⁴³ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 24.

⁴⁴ See Submission 20 from Mark Atkinson, 25 September 2018, p 2, who provides a list of the circumstances where strata schemes may be terminated.

⁴⁵ Answers to written questions tabled by Sean Macfarlane, Senior Lawyer, Landgate during hearing held 27 September 2018, p 2.

- 8.3.2 The regulations may modify the application of the *Planning and Development Act 2005* to an application for approval of a plan of subdivision for the proposal (proposed section 177(2)).
- 8.3.3 A full proposal must incorporate a termination infrastructure report comprising a report of a person of a class specified in the regulations on the scope of works required to repair or replace scheme buildings or infrastructure (proposed section 179(2)(b)).
- 8.3.4 The regulations may prescribe matters relating to the determination of market value of a lot for a termination valuation report (to include in a full proposal for the termination of a strata titles scheme) (proposed section 179(4)).
- 8.3.5 The preparation of a termination infrastructure report or a termination valuation report (proposed section 179(6)).
- 8.3.6 The regulations may impose additional requirements about the process required for consideration of a termination proposal (proposed section 181(5)).
- 8.3.7 The record made of each vote by the independent person appointed to tally and count the votes on a termination proposal must be provided in the manner required by the regulations (proposed section 182(10)(c)).
- 8.3.8 The regulations may impose additional requirements about the process required for voting on a termination proposal (proposed section 182(13)).
- 8.3.9 The regulations may modify the application of the *Planning and Development Act 2005* to a request made under proposed section 184(1) to the Planning Commission to approve a diagram or plan of survey if a termination proposal can proceed further, including when the SAT has confirmed the termination resolution (proposed section 184(2)).
- 8.3.10 Any limits imposed by the regulations for fees a strata company may charge the proponent of a termination proposal to cover costs associated with undertaking an activity must not be exceeded (proposed section 189(2)).
- 8.3.11 The regulations may require proponents to enter into specified arrangements for lot owners to obtain independent advice or representation in connection with the proposal (proposed section 190(1)).
- 8.3.12 The regulations may modify the application of the *Planning and Development Act 2005* to an application by a single owner for a plan of subdivision for the termination of a scheme where all lots are owned by the same person (proposed section 191(2)(b)).
- 8.3.13 The notice of an expiry or application for termination of a scheme must be accompanied by the fee fixed by the regulations (proposed 193(1)(f)).
- 8.4 In evidence to the Committee, Landgate gave the following feedback on the balance to be struck on providing for procedural matters in the Bill or the regulations:

The point that we had to reach in drafting was to what extent do we put procedural detail in the bill and to what extent do we put procedural detail into the regulations. I would suggest that the need to include absolutely every detail of procedure involved in the consideration of the full proposal and vote within the act itself is possibly not appropriate. Procedural matters of this nature are often best dealt with in regulations. This is especially so when you have a new procedure

being introduced. Such a new procedure may need to be modified soon after enactment as a result of unforeseen procedural issues.⁴⁶

8.5 While the Committee is satisfied that some of the matters set out in paragraph 8.3 are of a type which are appropriate to be dealt with in the regulations, it has provided commentary in section 9 on some matters which:

- it believes should be provided for in the Bill
- the Bill should require the regulations to address.

9 Specific concerns with Part 12

9.1 The Committee has identified the following issues of concern with Part 12:

- the failure to expressly provide protection for vulnerable owners in the legislation
- the failure to expressly guarantee owners will have access to independent advice or representation in connection with a termination proposal
- inadequacies in the provisions for determining the market value of a lot
- the use of Henry VIII clauses.

Access by strata company and owners to an independent advocate

9.2 Much of the public debate on Part 12 has centred around protections for ‘vulnerable owners’. In this section the Committee explores this concept in more detail.

9.3 In relation to strata ownership the concept of vulnerability is not a simple one. As Landgate states:

At this stage, we believe that the definition of “vulnerable owner” is meant to be a very wide definition and it should include a broad class of owners.⁴⁷

9.4 Landgate further stated:

So perhaps all owners should be entitled to receive some sort of funding so that they can all respond to a termination proposal, and perhaps owners who are vulnerable should actually receive a higher level of funding so that all the owners are on an even playing field.⁴⁸

9.5 On the question of vulnerability, Landgate informed the Committee during a hearing that it is currently exploring the idea of a strata company referring a full termination proposal to an ‘independent advocate’ for assessment.⁴⁹

9.6 Landgate indicated the provision of an independent advocate is subject to further consultation. Landgate submitted that the regulation making power in proposed section 181(5) could be used for this purpose and that the regulations will specify that:

- a. a strata company must refer the full proposal to an independent advocate (the regulations will specify who can be an independent advocate)

⁴⁶ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 11.

⁴⁷ *ibid.*, p 7.

⁴⁸ *ibid.*, p 6.

⁴⁹ Submission 29 from Landgate, 25 September 2018, p 18; Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 26-27.

- b. The independent advocate will:
 - i. review the full proposal and provide the strata company with an independent assessment of the full proposal
 - ii. arrange a briefing session (conducted on a multisensory basis to cater for people with disabilities) for owners to deliver the independent assessment of the full proposal
 - iii. assess which owners in the scheme are vulnerable for the purposes of section 190
 - iv. provide initial advice to vulnerable owners
 - v. refer the vulnerable owners to a panel of specialist advisers (lawyers, etc) who vulnerable owners can see to obtain advice and or representation as provided in section 190
 - vi. assist vulnerable owners in obtaining the funding provided by the proponent under section 190 to pay for the advice and or representation
 - vii. represent vulnerable owners in SAT if the proponent disagrees about who is or is not a vulnerable owner entitled to the funding under section 190 (to ensure vulnerable owners have access to funding to pay for expert advice and legal representation).
- c. The strata company will be required to pay the independent advocate for the services listed above.⁵⁰

9.7 Landgate also states the policy for this safeguard is to ensure vulnerable owners are properly identified early in the termination process and have access to advice and representation before the full proposal is voted on and reviewed by the Tribunal.⁵¹

9.8 The Committee is of the view this represents a welcome and important initiative:

- to enable the strata company to obtain its own, independent assessment of the full termination proposal rather than having to rely on expertise that it and the owners may not necessarily possess⁵²
- that recognises the need for those vulnerable people to receive support so they are in the same position as other owners in obtaining advice, representation and other assistance in responding to a termination proposal.

9.9 The Committee considers the protection of vulnerable owners is a vital safeguard. As such it is the Committee's view that Part 12 should make express reference to the referral of a full termination proposal to an independent advocate and their role, including the identification of owners who require more extensive advice or representation.

9.10 The Committee makes the following recommendation.

⁵⁰ Submission 29 from Landgate, 25 September 2018, p 18; Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, pp 26-27.

⁵¹ Submission 29 from Landgate, 25 September 2018, p 18.

⁵² See Submission 4 from the Real Estate Institute of Western Australia, 19 September 2018, p 3.

RECOMMENDATION 1

The Committee recommends that clause 83, Part 2, Division 3 include a requirement that after the receipt of a full termination proposal, the strata company must refer it to an independent advocate and set out details of their role, as follows:

Page 266, after line 22 – to insert:

178A. Reference of full proposal to independent advocate

- (1) In this section —
independent advocate means a person to whom a full proposal is referred under subsection (2).
- (2) A strata company to which a full proposal is submitted under section 178 must refer the proposal for review and assessment to a person who —
 - (a) is independent of the strata company and the proponent of the termination proposal; and
 - (b) satisfies any requirements of the regulations regarding experience or qualifications.
- (3) The independent advocate must, in accordance with the regulations —
 - (a) review the full proposal; and
 - (b) provide the strata company with an independent assessment of the full proposal; and
 - (c) at a time and place arranged with the strata company, make a presentation of its assessment open to the persons mentioned in section 178(4)(a), conducted so as to take account of the needs of any of those persons who have sensory or mobility disabilities.
- (4) The independent advocate must —
 - (a) endeavour to identify any owners of lots for whom arrangements for fuller or more extensive advice or representation are to be made under regulations made under section 190(1)(b); and
 - (b) advise those owners of their entitlements under regulations made under section 190; and
 - (c) if requested by those owners, refer them to independent providers of the advice or representation which they are to obtain; and
 - (d) if requested by those owners, assist them in obtaining benefits under the trust referred to in section 190(2).
- (5) In any proceedings before the Tribunal under Part 13 in which there is a dispute about whether an owner of a lot in the strata titles scheme is entitled to a fuller or more extensive advice or representation under regulations made under section 190(1)(b) or is entitled to benefit under a trust referred to in section 190(2), the independent advocate may represent the owner in the proceedings.
- (6) The strata company —
 - (a) must pay the remuneration of, and reimburse the expenses incurred by, the independent advocate; and
 - (b) may charge fees under section 189 to cover those costs.

- 9.11 The Committee believes it is appropriate that the qualifications of the independent advocate are set out in the regulations.
- 9.12 The Committee also refers to its recommended amendments to proposed section 190 in recommendation 4 with respect to the references made in recommendation 1.

Payment of the independent advocate

- 9.13 As stated above, Landgate has submitted that the regulations will specify that the strata company will be required to pay the independent advocate for their services.⁵³
- 9.14 In a hearing Landgate stated that 'section 189 would be used to require the proponent to pay the strata company'.⁵⁴
- 9.15 The Committee notes proposed section 189(1) provides that a strata company may, rather than must, charge the proponent reasonable fees to cover costs associated with undertaking an activity and that the fees must not exceed any limits imposed by the regulations.
- 9.16 The Committee is of the view a proponent should be required to reimburse a strata company the cost of services provided by an independent advocate, including in circumstances where the proponent may control over 50% of the votes and, potentially, block any reimbursement being made.⁵⁵

RECOMMENDATION 2

The Committee recommends that, during the Committee of the Whole House, the Minister representing the Minister for Lands explains how clause 83, Part 2, Division 3, proposed section 189 will require the proponent of a termination proposal to pay the strata company's costs of an independent advocate.

Obtaining independent advice or representation

Regulations 'may' rather than 'must' require access for owners to advice or representation

- 9.17 It has been recognised that matters to be dealt with by regulation should not contain matters that should be in primary legislation, such as appropriations of money; significant questions of policy; and rules which have a significant impact on individual rights and liberties.⁵⁶
- 9.18 As stated in paragraph 8.3, proposed sections 175(1)(i) and 190(1) both provide that the regulations may require the proponent of a termination proposal to make arrangements for the obtaining of independent advice or representation for owners of lots affected by the proposal.

⁵³ Submission 29 from Landgate, 25 September 2018, p 18. See also Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 27.

⁵⁴ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 27.

⁵⁵ While matters of the type raised by Recommendation 2 would normally be debated at the second reading stage, the Committee has referred to the Committee of the Whole House due to the wording of the referral of this inquiry to the Committee, namely:

(d) the House may proceed with consideration of the Bill, other than the matters referred under paragraph (b) but the Committee of the Whole House shall not agree to a resolution to report the Bill to the House until after the Legislation Committee reports on the referral of proposed Part 12 and any related matter.

⁵⁶ Stephen Argument, *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation*, Paper for Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011, p 19.

- 9.19 In the following exchange Landgate was asked for its feedback on why the regulations 'may', rather than 'must', include a requirement for owners to receive funding support.

Hon DONNA FARAGHER: Can I just ask with respect to section 190, both of the subsections refer to the regulations "may" require or "may" include a requirement. Can I ask why it would not be "must" include a requirement? I particularly reference that with regard to vulnerable people. We get into semantics about "may" versus "must" a lot in relation to legislation, but the way you have just spoken to us then gives me the very clear impression that they must provide it. But when you actually look at the text of the legislation, it says "may".

Mr MACFARLANE: The text says "may" and part of the reason for that was we were not sure what amount of funding should be provided, who it should be provided to and exactly what that funding could be used for when this provision was drafted.

Hon DONNA FARAGHER: But could you, I suppose, clarify some of those elements in the regulations, notwithstanding that the principal act would refer to "must", so that everyone is clear effectively that they must receive some support? The technicalities of the range and all that sort of thing could be left to the regulations.

Mr MACFARLANE: I would agree with that.

Ms WHITFIELD: Certainly, we were proceeding with investigating and consulting on the matter with every intention of creating regulations on those items.

Hon DONNA FARAGHER: So from your point of view, just so that I am clear, based on that—thank you for that—you would not see that there was necessarily a major issue if the word "may" was changed to "must"?

Ms WHITFIELD: I cannot speak for the government's position on that.

Hon DONNA FARAGHER: I appreciate that.

...

Hon DONNA FARAGHER: Do you see any specific concerns or issues that would arise from changing the terminology from "may" to "must"?

Mr MACFARLANE: From a drafting perspective, no.⁵⁷

- 9.20 Given the importance placed on ensuring those affected by termination proposals receive advice and representation, it is notable Part 12 does not provide any mechanism to determine who will qualify for funding support (unless recommendation 1 is adopted) or whether any support must actually be given.

Access to advice or representation for all owners

- 9.21 In its submission, Landgate states:

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.

⁵⁷ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 7.

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.

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.

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.

The reason for providing this definition in the regulations is that the concept of vulnerable changes over time as society's expectation change.⁵⁸

9.22 To date, Landgate has proposed the following criteria to determine whether a person is a vulnerable owner:

- 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.⁵⁹

9.23 Following consultation with stakeholders, Landgate is considering whether the class of persons who should receive funding should be broadened from 'vulnerable persons' to all owners of lots in strata schemes for which a termination proposal has been submitted.⁶⁰

Committee comment

9.24 The Committee is of the view it is essential vulnerable persons are given the advice and support they require to respond to termination proposals. This can be facilitated by the independent advocate.

9.25 The Committee has concluded that regulations should require the provision of independent advice or representation to all owners, with vulnerable owners receiving a 'higher level of funding so that all the owners are on an even playing field', as suggested by Landgate.⁶¹

RECOMMENDATION 3

The Committee recommends that clause 83, Part 2, Division 3, proposed section 175(1)(i) be amended to require the proponent to provide, in the outline of a termination proposal, details of arrangements for the obtaining of independent advice or representation for owners of lots affected by the proposal, in accordance with the regulations.

⁵⁸ Submission 29 from Landgate, 25 September 2018, p 17. A note for proposed section 190 reads:

Note for this section:

The main purpose of the arrangements is to ensure that vulnerable owners have access to independent advice about a termination proposal.

though notes for legislative provisions do not form part of the law.

⁵⁹ Submission 29 from Landgate, 25 September 2018, p 17.

⁶⁰ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 6.

⁶¹ *ibid.*

This may be effected in the following manner:

Page 263, lines 23 to 28 – to delete the lines and insert:

- (i) provide, in accordance with the regulations, details of proposed arrangements for obtaining independent advice or representation referred to in section 190; and

9.26 The Committee is of the view proposed section 190 should be amended to:

- ensure regulations must require the proponent to enter into arrangements for all owners to obtain independent advice or representation in connection with a termination proposal
- provide for fuller or more extensive advice or representation for a class of owner identified in the regulations as vulnerable
- outline some factors the regulations will have regard to when identifying a class or classes of owner as vulnerable

and makes the following recommendation.

RECOMMENDATION 4

The Committee recommends that clause 83, Part 2, Division 3, proposed section 190 be amended to ensure all owners benefit from arrangements by the proponent for them to obtain independent advice or representation, including those owners who require fuller or more extensive advice or representation identified in the regulations as vulnerable.

This may be effected in the following manner:

Page 286, lines 5 to 17 – to delete the lines and insert:

- (1) The regulations —
 - (a) shall require the proponent of a termination proposal to enter into specified arrangements for the owners of lots in the strata titles scheme proposed to be terminated to obtain independent advice or representation in connection with the proposal; and
 - (b) shall specify arrangements for obtaining fuller or more extensive advice or representation for a class or classes of owner identified in or under the regulations as vulnerable, having regard to —
 - (i) advanced age, illness, trauma, disability or other factors that may impair the ability of an owner to consider and make an informed decision in relation to a termination proposal; or
 - (ii) financial disadvantage which would significantly impair the ability of the owner to bear the cost of obtaining appropriate professional advice in relation to a termination proposal.
- (2) Without limitation, the arrangements may include a requirement for the proponent of a termination proposal to pay an amount to a trustee to be held in trust for owners to obtain independent legal advice or representation, valuation advice or reports or financial or taxation advice in connection with the proposal.

- 9.27 The Committee believes it is appropriate that the quantum of the funding for advice and representation and arrangements for its delivery should be dealt with in the regulations.⁶²

Regulations 'may' rather than 'must' prescribe matters relating to the determination of the market value of a lot

- 9.28 Proposed section 179(4) provides the regulations may prescribe matters relating to the determination of market value of a lot for a termination valuation report (to include in a full proposal for the termination of a strata titles scheme).
- 9.29 In the following exchange Landgate explained how the highest and best use of the land will be taken into account in a full proposal:

Mr MACFARLANE: The regulations may prescribe how market value is to be calculated and the regulations will likely require that the market value is to be calculated taking into account recent sales history and the highest and best use of the land and also the owner's share of the common property in that scheme. We will undertake further consultation on that point before that particular part of the regulations will be drafted.

The CHAIR: Which would presumably satisfy the criticism that there is not enough weight given to the potential development value of the site.

Mr MACFARLANE: Absolutely. That particular point addresses the question of to what extent the highest and best use of the land is actually taken into account when a valuation is done.⁶³

- 9.30 The Committee regards this as an additional safeguard which Part 12 should ensure is addressed in the regulations and makes the following recommendation.

RECOMMENDATION 5

Clause 83, Part 2, Division 3, proposed section 179(4) be amended to require that the regulations prescribe matters relating to the determination of market value of a lot for a termination valuation report which takes account of relevant recent sales history; the highest and best use of the lot; and the value attributable to the owner's interest in the common property of the strata titles scheme.

This may be effected in the following manner:

Page 270, lines 10 to 12 – to delete the lines and insert:

- (4) The regulations must prescribe matters relating to the determination of the market value of a lot for a termination valuation report, including a valuation methodology which takes account of —
 - (a) relevant recent sales history; and
 - (b) the highest and best use of the lot; and
 - (c) the value attributable to the owner's interest in the common property of the strata titles scheme.

Henry VIII clauses

- 9.31 When scrutinising legislation the Committee considers whether the Bill allows or authorises the amendment of an Act only by another Act (FLP 14 in Appendix 2).

⁶² See Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 8.

⁶³ *ibid.*, pp 9-10.

- 9.32 Clauses of this nature are known as Henry VIII clauses.
- 9.33 In its report on the Animal Welfare Amendment Bill 2017, the Committee went into some detail on Henry VIII clauses, observing that they are 'generally felt to be repugnant in that they remove from the Parliament to the Executive the power to make or repeal statute law'.⁶⁴ The Committee also stated it was:
- firmly of the view that the use of Henry VIII clauses, and clauses akin to them, should be avoided in the absence of compelling reasons for them being required.⁶⁵
- 9.34 The Committee identified proposed sections 177(2)(b), 184(2) and 191(2)(b) as possible Henry VIII clauses on the basis they provide for the application of primary legislation to be modified by subsidiary legislation, potentially infringing FLP 14.
- 9.35 In the absence of information in the explanatory material for Part 12, the Committee sought Landgate's feedback on whether it regarded these proposed sections as Henry VIII clauses:
- There are three sections within part 12 and we do not actually consider that those sections are Henry VIII clauses. It was not intended to amend the Planning and Development Act, but simply to read references in the Planning and Development Act in a certain way to make the Planning and Development Act work correctly for termination. There is no power to alter or modify the Planning and Development Act as it applies to subdivision approvals. For example, section 177(2) within the bill extends the Planning and Development Act to termination subdivision under the Strata Titles Act to which the Planning and Development Act would not otherwise apply. When the Planning and Development Act was drafted, termination subdivision was not considered. In that context, provision has been made for the Planning and Development Act to be modified or adapted only as it applies to termination subdivision so that termination provisions can operate rationally and effectively in that context.⁶⁶
- 9.36 Regardless of the intention at the time of drafting the proposed sections, the ability to modify the application of primary legislation by regulation amounts, in effect, to an authorisation of its amendment.
- 9.37 Accordingly, the Committee regards proposed sections 177(2)(b), 184(2) and 191(2)(b) as Henry VIII clauses, thereby infringing FLP 14.
- 9.38 The Committee is also of the view Landgate has not provided a sufficiently compelling reason for the inclusion of Henry VIII clauses in proposed sections 177(2)(b), 184(2) and 191(2)(b). There is scope for any modifications to the application of the *Planning and Development Act 2005* to be set out in the Bill, as is provided for by proposed section 177(2)(a).

FINDING 1

The Committee finds that clause 83, Part 2, Division 3, proposed sections 177(2)(b), 184(2) and 191(2)(b) are Henry VIII clauses.

⁶⁴ Western Australia, Legislative Council, Standing Committee on Legislation, Report 36, *Animal Welfare Amendment Bill 2017*, 28 June 2018, pp 29-30.

⁶⁵ *ibid.*, p 30. See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 96, *Co-operatives Amendment Bill 2015*, 25 February 2016, pp 12-13.

⁶⁶ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, pp 19-20.

RECOMMENDATION 6

The Committee recommends clause 83, Part 2, Division 3, proposed section 177(2) be amended as follows:

Page 265, lines 1 to 7 – to delete the lines and insert:

(2) The *Planning and Development Act 2005* applies to the application subject to the modification that a reference to subdivision is to be read as including a reference to termination of a strata titles scheme.

RECOMMENDATION 7

The Committee recommends clause 83, Part 2, Division 3, proposed section 184(2) be amended as follows:

Page 282, lines 25 and 26 – to delete the lines and insert:

request under subsection (1).

RECOMMENDATION 8

The Committee recommends clause 83, Part 2, Division 3, proposed section 191(2) be amended as follows:

Page 287, lines 1 to 8 – to delete the lines and insert:

(2) The *Planning and Development Act 2005* applies to the required approval subject to the modification that a reference to subdivision is to be read as including a reference to termination of a strata titles scheme.

10 Other matters

- 10.1 The Committee wishes to bring to the attention of the Legislative Council the following additional matters raised by submissions which the Committee has considered.

Non-financial considerations

- 10.2 Some submitters expressed concern about what they regard to be a lack of attention given in Part 12 to non-financial impacts on those who do not support termination proposals.
- 10.3 For example, in its submission to the Committee, Shelter WA stated:
- Shelter WA is concerned that, even though the potential financial and economic costs of a termination of strata scheme process are covered, little attention is being paid to potential social costs that owners might experience because of this process. Social costs that need to be considered include the time that tenants and owners might have to invest into finding a new house and increased stress for vulnerable persons regarding the change in their personal circumstances.⁶⁷
- 10.4 The Committee sought clarification from Landgate about the types of non-financial considerations that can be taken into account by the Tribunal in considering whether to confirm a termination resolution pursuant to proposed section 183. Landgate explained that:

⁶⁷ Submission 23 from Shelter WA, 25 September 2018, p 2.

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)*⁶⁸

- 10.5 The Committee is satisfied that the considerations the Tribunal must take into account pursuant to proposed section 183 are broad enough to ensure non-financial matters are considered.

Retrospectivity of Part 12

Commencement date

- 10.6 The Committee notes the commencement provision in section 2(b) of the Bill 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.
- 10.7 Landgate explained that 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. A termination process can begin any time after proclamation.⁶⁹
- 10.8 The Committee notes, for the attention of the Legislative Council, that proclamation is an executive action and affects the Parliament's sovereignty as the commencement dates will be controlled by the Executive. There is nothing in the Bill that requires that Part 12 be proclaimed within a specified time. It is conceivable that a proclamation may never be made and the will of the Parliament, in passing the Bill, would be frustrated.⁷⁰

Effect on existing property rights

- 10.9 There were differing views amongst those who made submissions to the Committee about whether Part 12 is retrospective.
- 10.10 Some were of the view it is retrospective because existing property rights of strata lot owners are adversely affected rather than owners of new strata developments in the future:

The retrospective aspect of this Bill does adversely affect a dissenting long term strata home owner occupier right to housing and liberty of enjoying his home as if it was his castle that dates back to the Magna Carta. Undoubtedly the most important liberty infringed by this Bill is that of choosing the time of when to sell one's own home.⁷¹

⁶⁸ Answers to written questions tabled by Sean Macfarlane, Senior Lawyer, Landgate during hearing held 27 September 2018, p 27. See also Kelly Whitfield, Principal Policy Officer, Landgate, *Transcript of evidence*, 27 September 2018, p 16.

⁶⁹ Answers to written questions tabled by Sean Macfarlane, Senior Lawyer, Landgate during hearing held 27 September 2018, p 11.

⁷⁰ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 115, *Education and Care Services National Law (WA) Amendment Bill 2018*, 14 August 2018, p 14.

⁷¹ Submission 11 from Fulvio Prainito, 22 September 2018, p 2. See also Submission 9 from Nyree Dwyer, 21 September 2018 and Submission 27 from the Western Australian Institution of Surveyors, 25 September 2018, p 1.

10.11 A contrary view was:

The legislation does not retrospectively remove rights.

1. Part 12 preserves the existing right to terminate by unanimous resolution, but provides owners with much more information; and
2. The existing District Court power to terminate, on unspecified criteria, on an application by what could be just one owner is replaced with a SAT power to terminate (with vulnerable owners receiving funding for legal assistance, etc) if it is satisfied that:
 - 80% of owners voted for it;
 - the strata company followed the very detailed mandatory procedure (including providing substantial information for owners); and
 - most significantly, if owners will receive fair compensation and termination is just and equitable, etc.⁷²

10.12 This raises FLP 7, which states:

Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

General principles on retrospectivity

10.13 The classic statement regarding retrospective legislation was enunciated by Dixon CJ in *Maxwell v Murphy*:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.⁷³

10.14 Retrospective laws offend against the general principle that legislation intended to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law.⁷⁴

10.15 There is a presumption that Parliament intends all statutes, except those which are declaratory or related to matters of procedure, to operate prospectively and not retrospectively unless the language used plainly manifests in express terms or by clear implication, a contrary intention.⁷⁵

Committee comment

10.16 The Committee recognises that the question about whether Part 12 operates to adversely affect rights and liberties retrospectively is a matter on which competing arguments can be made. However, after balancing the differing opinions, the Committee is of the view Part 12 is not retrospective on the basis that the current law already provides for the District Court to order the termination of a strata titles scheme on, potentially, less favourable terms than provided for in Part 12.

⁷² Submission 20 from Mark Atkinson, 25 September 2018, pp 3-4.

⁷³ (1957) 96 CLR 261 at 267.

⁷⁴ GC Thornton, *Legislative Drafting*, London, Butterworths, 1996, p 117.

⁷⁵ Western Australia, Legislative Council, Standing Committee on Legislation, Report 30, *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*, 10 November 2015, pp 51-52.

- 10.17 The Committee also observes that Part 12 will only affect termination proposals made after it comes into force and will not alter the law applying to matters taking place before this date.

Proposed grandfathering clause

- 10.18 A grandfather clause exempts certain pre-existing classes of people or things from the requirements of legislation.
- 10.19 It was submitted that Part 12 should only apply to new strata titles and that a transitional, grandfather clause should exempt existing strata title owners.⁷⁶

This would seem much fairer as it would protect the property rights currently held by all of the citizens who own strata titled property while at the same time allow for gradual change to a new system.⁷⁷

- 10.20 Mr Fulvio Prainito, in a hearing before the Committee, stated:

I am here to beg the Legislative Council, via this committee, to consider making a transitional provision in this bill that would grandfather from non-unanimous termination until 1 July 2025 owner-occupiers that bought their home before 1 July 2008 in existing strata titled schemes, unless it is beyond reasonable doubt that the strata building structure is unsafe and beyond the financial capacity of owners to repair. This would be about five to six years after the regulations are done and this bill becomes effectively law. This is the minimum period for dissenting long-term strata home owner-occupiers to adjust to the fact that they would be forced to sell their home for the public benefit of renewal and the rights of strata property investors.⁷⁸

- 10.21 The Committee is of the view that a grandfather clause of the type proposed would fundamentally dilute the purpose of the legislation and undermine its effectiveness, considering it is the clear intention of Part 12 to cover existing strata schemes. It would therefore be, from this perspective, unworkable.

Long term tenants

- 10.22 As stated in paragraph 3.12, part of the policy justification behind Part 12 is to remove the ability of single owners to use their interest to block redevelopment against the wishes of the majority.⁷⁹
- 10.23 In the following exchange, Landgate was asked about the potential for a residential tenant to restrict redevelopment:

Hon SIMON O'BRIEN: I refer to the several case studies that form part of your response today to illustrate the sort of pressures that happen. One of those was the case where someone had complained to your agency, I think, saying that one of the units in their strata scheme had been purchased by a developer of another property over the back or at the side, and in order for that developer to protect, say, the view available and to ensure that their ritzy new development would not be built out and thereby devalued, had purchased an old unit in the scheme in front and was using that as the basis to block any redevelopments. The bill, as I understand it, is part of the mechanism to get around that happening improperly. My question is: what if that obstructive owner installed a residential tenant into

⁷⁶ Submission 7 from Gary Dufour, 21 September 2018; Submission 11 from Fulvio Prainito, 22 September 2018, p 7. See also Submission 30 from Mount Lawley Society, 25 September 2018, p 6.

⁷⁷ Submission 7 from Gary Dufour, 21 September 2018.

⁷⁸ Fulvio Prainito, *Transcript of evidence*, 27 September 2018, p 1.

⁷⁹ Submission 24 from Hon Rita Saffioti MLA, Minister for Lands, 25 September 2018, p 2.

that block? Would not that also, under the provisions of the bill before us, restrict the options for redevelopment of the property in front?

Mr MACFARLANE: That is a good question. The bill does not give the tribunal the power to overturn the provisions of the Residential Tenancies Act. So if you have a fixed-term residential tenancy agreement, SAT cannot order that fixed-term residential tenancy agreement to come to an end.

Hon SIMON O'BRIEN: So despite all the safeguards we might try to build into the legislation, of course there is always someone with a dollar incentive who will attempt to find some clever way to get around it. Would it be possible in that situation for such an obstructive owner to set out a long-term residential tenancy arrangement that would frustrate redevelopment options for years and years?

Mr MACFARLANE: Potentially, yes. These reforms were not meant to overturn the Residential Tenancies Act and the way that it relates to fixed-term residential tenancy agreements.⁸⁰

- 10.24 While the Committee has not had the time to investigate this matter in any detail, the Committee notes the potential for an owner to bypass one of the purposes behind Part 12 by installing a long term residential tenant to effectively block redevelopment and makes the following recommendation.

RECOMMENDATION 9

The Committee recommends that during the Committee of the Whole House, the Minister representing the Minister for Lands advise the Legislative Council whether an owner of a strata titles lot can grant a long term residential tenancy to potentially defeat terminations of strata titles schemes under clause 83, Part 2, Division 3, proposed Part 12.

Concerns of the Commissioner for Consumer Protection with proposed section 183(6)(b)

- 10.25 Proposed section 183(6)(b) provides that the strata company must, within 14 days after being given notice of the application to the Tribunal to confirm a termination resolution, serve notice of the application on the Commissioner within the meaning of the *Retirement Villages Act 1992* if the strata titles scheme constitutes or includes a retirement village meaning of that Act.
- 10.26 In his submission to the Committee, the Commissioner for Consumer Protection expressed concern that the definition of 'strata titles scheme' in proposed section 7 does not align with the definition of 'retirement village' in the *Retirement Villages Act 1992* to enable a strata titles scheme to constitute or include a retirement village. This is because buildings and land are not the strata titles scheme itself and only when these buildings and land are used for the purposes of a retirement village scheme do they constitute all or part of a retirement village.⁸¹
- 10.27 The Commissioner has expressed the following further concern with proposed section 183(6)(b):

Even if a strata titles scheme itself could be said to constitute or include a retirement village, this description will not include all the WA retirement villages

⁸⁰ Sean Macfarlane, Senior Lawyer, Landgate, *Transcript of evidence*, 27 September 2018, p 22.

⁸¹ Submission 39 from Commissioner for Consumer Protection, 28 September 2018, pp 2-3.

that may be affected by termination of a strata titles scheme. Some WA retirement villages currently operate on land:

- subject to several strata title schemes – Landgate records indicate that one WA retirement village currently operates over land subject to eight strata titles schemes; and
- that is in part strata titled and is in part not strata titled – Landgate records indicate more than one WA retirement village that comprises strata and other title land.⁸²

10.28 To address these concerns the Commissioner has proposed the following amendment to proposed section 183(6)(b) so that it reads:

if a retirement village within the meaning of the *Retirement Villages Act 1992* operates over or includes any of the lots or common area under the strata titles scheme – service notice of the application on the Commissioner within the meaning of that Act; and⁸³

RECOMMENDATION 10

The Committee recommends that, during the Committee of the Whole House, the Minister representing the Minister for Lands advise the Legislative Council of the Government's response to the recommendation made by the Commissioner for Consumer Protection that clause 83, Part 2, Division 3, proposed section 183(6)(b) be amended to read:

if a retirement village within the meaning of the *Retirement Villages Act 1992* operates over or includes any of the lots or common area under the strata titles scheme – service notice of the application on the Commissioner within the meaning of that Act; and

11 Conclusion

- 11.1 Following consideration of the evidence before it the Committee generally supports the policy behind Part 12 and the process it provides for the termination of strata titles schemes. The Committee is satisfied, in the main, that Part 12 contains adequate procedural safeguards and oversight by the Tribunal.
- 11.2 The Committee is of the view that the legislation strikes a reasonable balance between the interests of lot owners who support and oppose termination resolutions.
- 11.3 However, the Committee recognises there are issues raised by Part 12 which could be regarded as contentious and about which stakeholders have concerns.
- 11.4 The Committee is concerned that safeguards for owners and vulnerable people in relation to advice and representation are not currently located in Part 12, with no legislative guarantee that it will be provided, despite references in explanatory material and Landgate's evidence to this inquiry.
- 11.5 The Committee is of the view that the recommendations it has made will further improve the termination process, including providing greater assuredness that strata councils and lot owners will receive the advice they require on termination proposals.



Hon Dr Sally Talbot MLC
Chair

⁸² Submission 39 from Commissioner for Consumer Protection, 28 September 2018, p 3.

⁸³ *ibid.*

APPENDIX 1

STAKEHOLDERS CONTACTED, SUBMISSIONS RECEIVED AND PUBLIC HEARINGS

Stakeholders contacted

Number	Name
1	Hon Rita Saffioti MLA, Minister for Lands
2	Department of Planning, Lands and Heritage
3	Landgate
4	State Administrative Tribunal
5	Law Society of Western Australia
6	Real Estate Institute of Western Australia
7	Urban Development Institute of Australia (WA) Inc
8	Strata Community Australia (WA)
9	Property Council of Western Australia
10	Atkinson Legal
11	Fulvio Prainito

Submissions received

Number	From
1	Jeffrey Hull
2	John Kriziotis
3	Sandra Boulter
4	Real Estate Institute of Western Australia
5	Private submission
6	Barrie Clark
7	Gary Dufour
8	Nyree Dwyer
9	Private submission
10	John Yeatman
11	Fulvio Prainito

Number	From
12	Chilla Bulbeck
13	Marc Gibbs
14	Kathy Lovell
15	Department of Planning, Lands and Heritage
16	Carolyn Milton-Smith
17	Ken Leighton
18	Jim Downing
19	Elizabeth Gorey
20	Mark Atkinson
21	Tim and Vidette Wood
22	Private submission
23	Shelter WA
24	Hon Rita Saffioti MLA, Minister for Lands
25	Private submission
26	Alex and Joanne Knight
27	Western Australian Institution of Surveyors
28	Property Council of Australia
29	Landgate
30	Mount Lawley Society
31	Marilyn and Rob Johnston
32	Strata Community Association WA
33	Lorraine Young
34	Urban Development Institute of Australia
35	Malcolm Murray
36	Helen Sadler
37	Christina and Michael Bailey
38	Kevin and Elizabeth Edwards
39	Commissioner for Consumer Protection
40	Maria Prainito

Number	From
41	Peter and Carol Wisbey

Public hearings held

Date	Participants
27 September 2018	<p>Fulvio Prainito</p> <p>Landgate</p> <ul style="list-style-type: none"> ○ Sean Macfarlane, Senior Lawyer ○ Kelly Whitfield, Principal Policy Advisor

APPENDIX 2

Fundamental Legislative Principles

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 3

Issues raised with proposed Part 12 of the Bill

Issues raised during parliamentary debate

1. Using the compulsory acquisition powers of the State to terminate strata schemes in the context of a proposal by a private individual or organisation.
2. The way speculators may use the termination provisions given there is no requirement compulsory acquisition will only apply to strata buildings regarded as being in an unfit condition.
3. Whether appropriate safeguards in place to ensure the rights of lot owners are respected.
4. Ensuring all relevant matters are taken into account by the State Administrative Tribunal when it is considering whether to terminate a strata titles scheme, including the potential impact on the health of owners who may be required to sell.
5. What constitutes fair and just compensation to be awarded after the termination of a strata titles scheme?
6. What constitutes a 'like for like' exchange for the purposes of proposed sections 183(9) and (11)?
7. Concerns that the 12 month period within which the proponent of a termination proposal must make an application (to the Registrar of Titles) for the termination of the strata titles scheme is too long a period and creates uncertainty for owners and occupiers.
8. In the scenario where the proponent holds a majority of the votes on the strata company, proposed section 189(1) provides that the strata company may (rather than must) charge the proponent reasonable fees to cover costs associated with undertaking an activity.
9. The adequacy of the 10% limit on the amount over and above the amount offered to a lot owner under section 241 of the *Land Administration Act 1997* to compensate for the taking of the lot without agreement.⁸⁴

Issues raised in submissions

1. Difficulties in obtaining long term leases due to the 'likelihood of compulsory acquisition'⁸⁵
2. The impact on elderly people with limited resources and inadequate knowledge to enable them to deal with a proponent⁸⁶
3. Uncertainty for lessees running businesses in strata complexes resulting in a reduction of value⁸⁷
4. The termination process being able to be initiated by 50% of strata owners.⁸⁸
5. The failure to limit the application of the termination process to strata buildings over a certain age.
6. The termination process applying to existing rather than new strata schemes, which would protect existing property rights.⁸⁹

⁸⁴ Hon Liza Harvey MLA, Dr David Honey MLA, Hon Dean Nalder MLA, John McGrath MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 21 and 22 August 2018.

⁸⁵ Submission 2 from Jeffrey Hull, 18 September 2018.

⁸⁶ Private Submission.

⁸⁷ Submission 21 from Tim and Vidette Wood, 25 September 2018.

⁸⁸ Submission 3 from John Kriziotis, 18 September 2018.

⁸⁹ Submission 11 from Fulvio Prainito, 22 September 2018, p 1; Submission 7 from Gary Dufour, 21 September 2018.

7. A proponent should cover the cost of providing independent advice to owners and this should be provided for in the Act.
8. The Tribunal should be required to consider ontological security and disruption in deciding whether to confirm a termination resolution.⁹⁰
9. It should be mandatory for a proponent to offer an owner who objects to the termination proposal a 'like for like' replacement lot.⁹¹
10. The most important liberty infringed by proposed Part 12 is that of choosing the time when to sell one's own home.⁹²
11. Allegations of bullying and pressure on owners to sell their lots to enable redevelopment.⁹³
12. The Tribunal should have greater flexibility to vary financial compensation.⁹⁴
13. Part 12 retrospectively takes away an individual's property rights.⁹⁵
14. Part 12 should not exclude small schemes from accessing a review by the State Administrative Tribunal as they face the same issues as larger schemes.⁹⁶

Points made in support of Part 12

1. The need to prevent some owners who block the sale of a strata complex by holding out for an unreasonable purchase price⁹⁷
2. The ability of a developer to purchase a unit in a strata complex for the purpose of blocking its sale and potential redevelopment to ensure there is no impact on the vies or amenities of a nearby development⁹⁸
3. The significant shortcomings of the current legislation, including the lack of transparency and safeguards for owners⁹⁹
4. The wide range of measures that provide robust protections to owners¹⁰⁰
5. The need for avenues to break deadlocks that will benefit participants and society by ensuring 'valuable assets are not stranded in failed ventures.'¹⁰¹

⁹⁰ Submission 12 from Chilla Bulbeck, 22 September 2018, p 1. Ontological security is a stable mental state derived from a sense of continuity in regards to the events in one's life.

⁹¹ Submission 11 from Fulvio Prainito, 22 September 2018, pp 1-2.

⁹² *ibid.*, p 2.

⁹³ Submission 12 from Chilla Bulbeck, 22 September 2018; Submission 17 from Carolyn Milton-Smith, 25 September 2018.

⁹⁴ Private Submission.

⁹⁵ Submission 27 from Western Australian Institution of Surveyors, 25 September 2018, p 1; Submission 8 from Nyree Dwyer, 21 September 2018, p 1; Submission 11 from Fulvio Prainito, 22 September 2018, pp 1-2.

⁹⁶ Submission 20 from Mark Atkinson, 25 September 2018, p 4.

⁹⁷ Private Submission.

⁹⁸ Submission 26 from Alex and Joanne Knight, 25 September 2018, pp 1-2.

⁹⁹ Submission 28 from Property Council of Australia, 25 September 2018, p 1.

¹⁰⁰ Submission 34 from Urban Development Institute of Australia, 25 September 2018, p 2.

¹⁰¹ Submission 20 from Mark Atkinson, 25 September 2018, p 1.

Standing Committee on Legislation


Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'4. Legislation Committee

- 4.1 *A Legislation Committee* is established.
 - 4.2 The Committee consists of 5 Members.
 - 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
 - 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'
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