Atkinson Legal
STRATA AND COMMERCIAL LAWYERS

our ref:
your ref:

25 September 2018

Hon Dr Sally Talbot MLC
Chair of Standing Committee on Legislation
Legislative Council Committee Office
18-32 Parliament Place
WEST PERTH WA 6005

By email: lcco@parliament.wa.gov.au

Dear Honourable Member

INQUIRY INTO PART 12 *STRATA TITLES AMENDMENT BILL 2018*

Thank you for the opportunity to provide written submissions on this part of these important reforms. This is my personal submission, not that of my firm.

I am the legal director of Atkinson Legal (specialists in strata law). I have acted for and against developers, strata companies and individual owners for over 20 years and have often advised on termination of schemes. I have been involved for many years in the consultations with Landgate leading to the *Bill* and have regularly relied on my experiences with strata owners to inform that consultation, including on Part 12.

I support the reforms to the *Strata Titles Act*.

State's obligations to provide a system to break deadlocks

Most of Western Australia's 70 000 strata schemes function well and can themselves resolve any disputes that arise. However, occasionally schemes cannot resolve their disputes: about 160 strata disputes go to the State Administrative Tribunal (SAT) each year. It is to be expected that occasionally people living or working together will be unable to break a deadlock between themselves.

In every area involving long-term or substantial economic relationships, Parliaments around Australia, including Western Australia, have provided avenues to break deadlocks between those involved about the future of their 'joint venture'. This benefits the participants, but also benefits society in ensuring valuable assets are not stranded in failed ventures. For example:

1. The *Corporations Act* allows companies to be liquidated by members' resolution and by order of a Court because of disputes about the future of the company.
2. The *Property Law Act* allows a co-owner of land to apply to the Supreme Court for an order for the sale or partition of co-owned land where the co-owners cannot agree on its use or management. See for example *Orrman v Orrman* [No 2][1], in which the Court ordered a sale of a house and land as the co-owners had not co-operated for some time about the management or use of the property.

[1] [2008] WASC 17

3. The *Associations Incorporation Act 2015* allows associations to be wound up either by the Supreme Court or by a resolution of not less than three-fourths of the members of the association who cast a vote at a meeting (and that is then approved by the Commissioner).
4. The *Partnership Act 1895* allows partnerships to be dissolved by notice by one partner to the others.

Strata lot owners are collectively involved in a long-term, substantial economic 'joint venture', sharing ownership and management of buildings often worth many millions of dollars. I respectfully submit that Parliament:

- cannot expect strata lot owners to agree in all circumstances about the future of their 'joint venture'; and
- is obliged to provide a fair system to resolve disputes that occur between strata owners about the future of their 'joint venture'.

In what circumstances are strata terminations likely to be needed or desired?

Strata schemes occasionally need to be terminated, or a majority of owners want to terminate them, in the interests of the lot owners and perhaps society more broadly. These circumstances are likely to include the following, solely or in combination:

1. The building has reached the end of its design life.
2. Money spent on required repairs and maintenance would, put simply, be wasted; that is, when the building is in a maintenance 'death spiral'.
3. Lot values have declined significantly.
4. The building poses a serious safety risk (today's building standards are much higher than before).
5. Significant 'up zoning' of the area in which the strata scheme is located.
6. The scheme was poorly set up initially (for example, poor design or mistakes made by surveyor).
7. Strata owners cannot agree about the management and maintenance of the building and are involved in prolonged, incessant and intractable disputes.
8. Some strata owners cannot afford to maintain the building as required.
9. The building is suffering from planning blight, with crime and anti-social behaviour out of control.
10. The building has been wholly or substantially destroyed.

These are examples drawn from my experience as a strata lawyer.

What can make a termination by unanimous resolution impossible?

In our experience, a unanimous resolution is difficult to achieve in any strata scheme in any circumstance. However, it is impossible, in a practical sense, to achieve a unanimous resolution in large schemes (schemes of over 200 lots are increasingly common). It is also impossible to achieve a unanimous resolution if any of the

following owners are present, even if the unanimous resolution is objectively in the best interests of owners:

1. The holdout; that is, the person who wants to be the last person to agree so they obtain 'extra' money for agreeing (very common).
2. The strategic blocker; that is, the person who will vote against a unanimous resolution on something other than its merits (for example, to preserve views from an adjoining property or to prevent a rival developer from going ahead with a development in competition with theirs).
3. The uncontactable and uninterested owner (for example, an owner who invested via their super fund in a forestry strata scheme to obtain tax benefits).
4. The irrational owner (for example, owners who do not recognise the authority of the State, refuse to answer to their name and assert that Courts are corporations incorporated in Delaware; owners who won't 'let go' of some perceived slight by another owner; owners who just say no to everything).
5. The mentally unwell but still legally capable person (more common than I thought before practicing law).

These are scenarios and examples drawn from my experience as a strata lawyer.

In my experience, the prevalence of these factors means that once I advise strata councillors that a unanimous resolution is needed, they will often not bother taking the matter any further. The consequences of this are difficult to quantify but include poor economic outcomes and immense frustration for regular owners and missed opportunities to improve Western Australia's built environment.

Fundamental Legislative Principles

In my view, the proposed reform legislation meets fundamental legislative principles.

Part 12 provides all owners with natural justice. Any claim that this part does not is ill-informed. SAT must, by its legislation, provide natural justice to those involved in disputes before it.

Owners will receive just compensation for property acquired as a result of this legislation, if enacted. In determining whether an owner of a lot will receive fair market value for the lot, the SAT must be satisfied that the owner will not be financially worse off because of the termination of the strata scheme. The SAT has proven itself capable over 13 years of making these sorts of difficult determinations.

The legislation does not retrospectively remove rights. It would be best to provide full details at a hearing, but in summary:

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.

Exclusion of small schemes

The Bill ought not exclude small schemes from accessing relief from SAT if necessary:

1. Small schemes face the same issues as any other scheme and have the same types of owners as in any other scheme;
2. The Bill provides extensive protections to all owners and there is no reason to doubt SAT's ability to protect owners in small schemes as it could for larger schemes; and
3. Excluding small schemes means over 50 0000 strata schemes will be locked in to their present structure, no matter how dysfunctional or disastrous for owners.

Submissions by others

I have spoken to owners in schemes where most owners want a termination to proceed but are blocked by strategic blockers and other holdouts. As I understand it, these people feel unable to make a submission to this Committee while they are still trying to work with other owners to achieve a scheme termination that will be in the interests of all owners.

Hearing

I can attend and provide evidence at a hearing if held.

Yours faithfully
Atkinson Legal

Mark Atkinson
Director