Submissions on the Strata Schemes Management Bill 2015 & Part 10 of the Strata Schemes Development Bill 2015

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SUBJECT: Submissions on the Strata Schemes Management Bill 2015 and Part 10 of the Strata Schemes Development Bill 2015

1. Introduction

This is a submission from Bannermans Lawyers addressing a number of issues with the Bills, based on our experience acting for owners corporations, lot owners, strata managing agents and contractors in relation to strata transactions and disputes.

This submission will focus on issues arising from changes made to the current bill, as compared with the previous bill and what we see as unresolved issues carried over from the previous bill. We (in a previous submission) and others have raised other issues, which will not be addressed again in the submission. Further, we note that **unavailability of draft regulations**, which would necessarily deal with very important matters, precludes proper assessment of the impact of some of the provisions of the bills. Significant issues may arise out of the draft regulations when available.

In our view, the critical problems with the Bills, as presently framed, are as follows:

1. **Part 10 of the Development Bill, dealing with collective sale and redevelopment, gives far too much latitude to developers and lot owners dealing with them to compulsorily acquire dissenting owners' properties and the safeguards are inadequate.**

2. **Part 11 of the Management Bill, dealing with building defect prevention and dispute resolution, is likely not to apply to much of the construction work taking place as part of the current boom and in any event, contains a number of deficiencies.**

3. **Section 255 of the Management Bill, absolving office bearers and persons acting under their direction from liability if acting "in good faith".**

Our general concern is that a number of provisions of the draft bills work against their stated objectives. Specifically:

1. As to Part 10 of the *Strata Schemes Development Bill 2015* ("Development Bill"), the stated objectives included facilitating the collective sale and redevelopment of freehold strata schemes, but many provisions leave unresolved issues and potential for disputes and litigation. We are particularly concerned about the following:

    a. An unbalanced preference of the interests of developers and owners dealing with them over the interests of owners who do not wish to participate in a collective sale or a redevelopment.

b. Inadequate regard to the interests of other stakeholders, including lessees and mortgagees.

c. Inadequate regard to the potential impact on conveyancing, leasing and lending practice.

2. As to the *Strata Schemes Management Bill 2015* ("Management Bill"):

a. Generally, the stated objectives included reduction of red tape and facilitating resolution of disputes, but many provisions work against achieving that objective, by adding additional areas of complexity and potential dispute.

b. As to building defect issues, the relevant provisions were intended to benefit property owners struggling with such issues, but may miss the current property boom, which is inappropriate, given that developers have already had the benefit of a substantial rewrite of statutory warranties under the *Home Building Act 1989*.

2. Development Bill

Our main concern with the Development Bill is that it effectively establishes compulsory acquisition powers, without adequate safeguards, especially in the areas of control of the sale/redevelopment process and valuation.

Part 10 of the Development Bill changes the landscape, effectively undermining the concept of ownership and potentially creating scenarios in which people, including elderly and /or disabled people, may be removed from their homes against their wishes. Moreover, in contrast with compulsory acquisition powers under the *Land Acquisition (Just Terms Compensation) Act 1991* ("Acquisition Act"), which benefit public authorities acting for public purposes, compulsory acquisition powers under Part 10 benefit private parties (generally developers and lot owners dealing with them) acting for self-interested commercial purposes.

Part 10 borrows concepts from and cross-references to the Acquisition Act. However, the context is entirely different, suggesting that valuation principles and other provisions of the Acquisition Act are not adequate in this context and that further safeguards are required. In particular:

1. Section 182 suggests that if the prescribed mechanism is followed, requisite levels of approval are obtained and the specified "compensation value" is paid, a dissenting owner will have very limited scope to challenge a collective sale or redevelopment plan. Section 182 effectively provides that the **Court must make an order giving effect to the plan if it is satisfied with these matters**. Reference is made to the Court being satisfied about vague matters such as the parties acting in "good faith" and the terms being "just and equitable in all the circumstances", but it is unclear whether that would support an argument that compulsory acquisition or the calculated compensation value are unfair in the particular circumstances.

2. Section 154 defines Compensation Value by cross-reference to Section 55 of the Acquisition Act or as determined by regulation. However, the draft regulation is not available and it is unclear whether now or in the future some methodology other than that specified by Section 55 will be applied.

3. Assuming that Section 55 will be applied, the **valuation methodology** may be appropriate to the compulsory acquisition by a public authority for a public purpose, but is **not appropriate to compulsory acquisition by developer of a person's home**, especially a strata unit. Section 55 specifies the matters to be taken into account in assessing the compensation value, each of which is problematic in this context. Considering each:

    a. Market value as at the date of acquisition - This is problematic, for at least the following reasons:

        - In contrast with the relatively straightforward mechanism for compulsory acquisition under the Acquisition Act, the mechanism created by Part 10 will be a complex process over an extended period of time, possibly years. **Market values will presumably change significantly over this period of time**, meaning that market value determined at the commencement of the process will not be the market value as at the date of acquisition. This appears to invite disputes and at least creates confusion as to how to comply with this requirement, in a strata renewal plan preceding the actual transactions, possibly by years.

        - Further, although judicial decisions in the area of land acquisition law suggest that the "highest and best use" is to be considered in

determining market value, i.e. that potential uses of the property can be taken into account, that can be very difficult to apply in practice, creating further potential for disputes. Further, this concept of "highest and best use" is not applied in Section 182(1)(d). This section in effect provides for a dissenting owner, in relation to a redevelopment proposal, to receive the greater of the compensation value and a proportion of the proceeds of "the redevelopment". What redevelopment? At this stage, the redevelopment is only proposed and after acquiring the site, the developer could either abandon it (or be forced to by insolvency) or expand it (e.g. by increasing levels from 6 to 10). The real problem though is the one raised in paragraph 6 below, namely that an order can be made giving effect to a plan involving a hypothetical redevelopment.

- In addition, Section 55 suggests that market value is calculated in relation to the lot. That is problematic, as there could and generally would be a **substantial difference between market value of a lot and a proportionate interest in the market value of the scheme as a whole**. Further, acquisition of all of the lots in a scheme would **put a developer in possession of the scheme's administration and sinking funds**, potentially very large sums of money, which would not be taken into account in determining the value of a particular lot.

b. Special value - This reflects special value attached to land, e.g. proximity of a business conducted on the land to customers of the business. Judicial decisions suggest that sentimental attachment is not sufficient and this is unlikely to support a further payment to a lot owner.

c. Disturbance - This reflects financial costs of relocation. In theory, this could cover legal costs, mortgagee costs, stamp duty and other costs associated with a relocation, but there is no certainty that the owner will be fully compensated for these costs. For example, **it is unclear what if any regard will be had for the following**:

- CGT and other tax implications for an owner as a result of relocation.

- The need to modify a replacement property to meet the special needs of an elderly or disabled owner.

- Implications of trusts and estate planning arrangements.

- Actual or potential claims under family law, e.g. under the Family Law Act 1975 or succession law, e.g. provision claims under Chapter 3 of the Succession Act 2006.

- Liability to a lessee whose lease is terminated as a result of the plan.

d. Solatium - This reflects non-financial costs of relocation. **The maximum amount is currently capped at $26,260**. Whether or not that is appropriate in the context of the compulsory acquisition by a public authority for public purposes, it will in some cases be grossly inadequate in the context of compulsory acquisition for the purpose of a development. There will be situations in which people, particularly elderly or disabled people, may be severely disadvantaged. They may have a strong sentimental attachment to a property (which may have been their home for a long time). They may benefit from proximity to medical and other support services, family and community.

4. **There will be situations in which an owner does not wish to sell for any price and that position may well be reasonable**, especially where factors such as those outlined in paragraph 3(d) above apply and especially in smaller strata schemes. Section 182 should be amended to provide for the court to withhold making an order giving effect to a plan if not satisfied that it should proceed for such reasons, perhaps specifying qualifying reasons.

5. These amendments will have a substantial impact on conveyancing, leasing and lending practice and these implications appear not to have been properly considered. All of these involve substantial investments premised on long standing concepts of ownership, which are undermined by Part 10. The interests of the parties should be properly considered and protected. For example, it is inadequate to provide in Sections 184 & 185 for a lease to be terminated and then simply state that this “does not affect a right or remedy a person may have under the lease”.

6. **Part 10 does not appear to require an actual development**, but rather a proposal to develop. As presently framed, sections 184 & 185 could result in developers gaining control of buildings for the expressed purpose of urban renewal, without actually carrying out the proposed redevelopment or any redevelopment. Sections 184 & 185 only make sense if Section 182 operates as a filter to ensure that approved plans involve a real and enforceable plan, which does not presently appear to be required. This could result in a range of problematic scenarios, including:

    a. The developer not proceeding (or being prevented from doing so by insolvency) allowing the building to further degenerate, where commercial considerations favour retention of the building as an investment, rather than undertaking a development.

    b. Owners being excluded from the site and possibly being removed from title, without certainty as to what proceeds will be received and when.

    c. Owners being left on title and being liable for building defects issues arising from construction works forming part of the redevelopment.

7. **Section 184 provides an effect that an order giving effect to a plan terminates a lease** of the lot, but does not affect a right or remedy a person may have under the lease, leaving unresolved issues and potentially litigation between the owner and lessee.

3. Management Bill

Our main concerns with the Management Bill are as follows:

1. Building defects - The Management Bill includes a number of provisions apparently intended to assist owners corporations in dealing with building defect issues, particularly Part 11, but a number of these are problematic. In particular:

    a. The proposed commencement date of Part 11 set out in Clause 16 of Schedule 3, i.e. that it only applies to building works under contracts entered into after the commencement date of the clause, is inappropriate. Developers have already had the benefit of a substantial rewrite of the statutory warranty provisions under the *Home Building Act 1989*. However, unless Part 11 is given retrospective effect, a substantial

proportion of the buildings constructed during the current boom may not be subject to these provisions. **Part 11 should operate retrospectively**, perhaps to the first reading speech for the Bill.

b. Section 16 provides that the original owner must provide specified documents at the first AGM. In our view, this list is not sufficiently comprehensive and **building contracts and subcontracts should be included**. Given the greatly reduce timeframes for pursuing proceedings under the *Home Building Act 1989* and the requirement for various notices to be given, including notices to subcontractors, an owners corporation wishing to pursue building defect issues will require these documents as soon as possible.

c. Section 17 provides an unnecessary complex mechanism for enforcing Section 16. Rather than providing for a meeting to be convened, Section 17 should simply provide for an order for provision of the documents to be made.

d. Section 190 defines developer in terms of a developer on whose behalf building work was carried out. This potentially recreates issues which arose under the *Home Building Act 1989*, where a complex structure has someone other than the owner of the land contracting with the builder, possibly resulting in the owner not being a developer and escaping liability. Both **the owner and the party engaging the builder should have liability**, to avoid permitting structures aimed at avoiding liability.

e. An issue arising from the decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36* should be resolved. Judicial comments made in this case cast doubt on whether an owners corporation has standing to pursue a claim for damages in negligence for pure economic loss. **The opportunity should be taken to confirm that it does**.

2. Agency Agreements - Issues arise from the provisions relating to engagement and termination of strata managing agents. In particular:

a. Provision in Section 50 for appointment of a strata managing agent at the initial AGM to be limited to a term of 12 months is not the best solution to protect owners corporations from being saddled with agreements on

adverse terms with associates of the developer. The more direct and appropriate response to this would be to **preclude developers and their associates from acting as strata managing agents**, at least for a specified period from registration of the strata plan.

b. Provision in Sections 50(4) & (5) requiring notices and limiting extensions on expiry of the term of appointment of a strata managing agent is unworkable, particularly in light of provisions regarding variable dates for setting an AGM. In our view, a rollover mechanism is required, perhaps for three-month periods.

3. Gifts and Benefits to agents - Restriction in section 57(2) & (3) of gifts and other benefits being provided to strata managing agents is inappropriate and undermines commercial relationships which may actually benefit owners corporation clients.

4. Owner Alterations - Sections 109 and 110 gives owners unnecessary latitude in carrying out works without reference to the owners corporation. In our view, the mechanism should involve notice to the owners corporation and potential for objection where the owners corporation is adversely affected.

5. Office bearers liability - There is a tension between Section 255, which absolves office bearers from liability, if acting in good faith and Section 37 which imposes various duties on office bearers. This is problematic for a number of reasons, including:

a. It extends to a **person acting under the direction of an office bearer** such as a strata manager or lawyer following instructions from an executive committee member and doing so in good faith, being exempt from personal liability. This results in lot owners having lesser rights than other owners of managed property, e.g. company shareholders.

b. It is unclear how a duty can be meaningfully imposed if no liability is attached.

c. It is novel and highly inadvisable to place office bearers in a position of responsibility, including **financial management, without liability** for their actions.

d. This was a lost opportunity to make office bearers liability insurance mandatory.

6. Electronic service of documents - No provision appears to be made for service of documents electronically. This may be permissible under the *Electronic Transactions Act 2000*, but only with consent of the addressee. This can render compliance with a number of obligations under the Management Bill impractical, e.g. services of notices of meetings under Schedule 1 and service of notices of tribunal applications under Section 226.

7. Payment of levies - The combined effect of section 83(3) and 85(2) is that a lot owner has more than one month to pay levies and more than two months to pay before interest accrues. This is unnecessary and unreasonable and precludes an owners corporation from raising funds required on an urgent basis.

4. Recommended Action

As to Part 10 of the Development Bill, we see the key being to amend Section 182 to **give the Court clear and robust powers to review the process** of collective sale or redevelopment. These powers would include the power not to make an order giving effect to a plan if not satisfied about an expanded range of factors, including:

1. A clear, appropriate and enforceable renewal plan, i.e. with clear steps and owners receiving defined amounts by specified dates, with proper interim arrangements, i.e. arrangements for the period between the plan taking effect and the collective sale or redevelopment being completed.

2. Appropriateness of compulsion at all in the particular circumstances, e.g. precluding a transaction involving an owner being seriously adversely affected, especially an elderly or disabled person.

3. Adequate compensation for the affected owner's costs in the case of a collective sale or adequate participation in the proceeds in the case of a redevelopment. It may be necessary to specify a range of additional criteria.

4. Adequate protection of the rights of third parties, such as lessees.

As to the Management Bill:

1. **Part 11 dealing with building defects should be given retrospective effect**.

2. The other suggested amendments under the heading “3. Management Bill” should be considered.

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