



Government of **Western Australia**  
Department of Commerce

# **CONSULTATION**

REGULATORY IMPACT STATEMENT AND  
DISCUSSION PAPER

## LICENSING OF STRATA MANAGERS IN WESTERN AUSTRALIA

OCTOBER 2011





Government of **Western Australia**  
Department of **Commerce**

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MANAGERS  
IN WESTERN AUSTRALIA***

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## CONSULTATION RIS AND DISCUSSION PAPER

Prepared by the Department of Commerce  
October 2011

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The Government is interested in receiving feedback on the issues presented in this paper. This document has been prepared in compliance with the Western Australian Government's requirements for Regulatory Impact Assessments and to facilitate public consultation on licensing of strata managers. Interested persons should also look at the consultation documents for the National Occupational Licensing System (NOLS) which will include draft amendments to the model Victorian *Occupational Licensing National Law Act 2010*; draft national regulations; and a supporting Regulation Impact Statement for the National Occupational Licensing System, which are expected to be released in December 2011. Copies of the consultation documents will be available from: [www.nola.gov.au](http://www.nola.gov.au).

After the consultation period concludes, all responses received will be publicly available on the Department of Commerce website. Please note that because your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become available to the public.

Written comments, queries and submissions should be forwarded no later than close of business 29 February 2012.

Please provide your comments on the issues to: The Director, Strategic Policy and Development, Consumer Protection Division, Department of Commerce, Locked Bag 14, Cloisters Square, Perth, WA 6850 or by email to [responses@commerce.wa.gov.au](mailto:responses@commerce.wa.gov.au)

Additional copies of this paper may be downloaded from:

[www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State](http://www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State)

or collected from reception at Consumer Protection, The Forrest Centre, Level 7, 219 St George's Terrace, Perth. Copies of the paper are also available from Consumer Protection's Contact Centre on 1300 30 40 54.

All other telephone inquiries should be directed to 1300 30 40 54 or (08) 9282 0804.

## **Message from the Minister**



I am pleased to release this *Consultation Regulatory Impact Statement and Discussion Paper: Licensing of strata managers in Western Australia*. The purpose of this paper is to seek comment on whether the State Government should introduce a licensing regime for strata managers.

Strata title has become an increasingly popular form of ownership within the property market, currently accounting for over one third of all forms of titles registered in Western Australia. There is considerable variety in the type, size and value of strata title properties. This being the case, managing a strata titled property can range from being a relatively straightforward exercise to one that is quite complex. While many strata proprietors manage their own property, there is also a considerable number who engage the services of professional strata managers. Whether self-managed or professionally managed, strata proprietors, not unreasonably, have an expectation that their property will be managed in a proper and transparent manner.

Over the past decade, two Parliamentary inquiries and an independent review have been undertaken in relation to the regulation of strata managers in Western Australia. While both inquiries and the review recommended greater regulation in this area, there was some divergence on the question of whether strata managers should be licensed and no single inquiry covered all the relevant issues.

This paper considers the question of licensing of strata managers in the context of the proposed National Occupational Licensing System (NOLS). NOLS is the result of an intergovernmental agreement to develop an occupational licensing system, the purpose of which is to establish a nationally uniform system of licensing for nominated occupations, administered in accordance with common, uniform policies.

This paper also constitutes a Regulatory Impact Assessment. Regulatory Impact Assessment requirements have been put in place by the Government to ensure rigorous analysis of regulatory proposals, effective and appropriate consultation, and transparency of process.

I would urge everyone with an interest in this important issue to take the time to consider this paper and to provide their views on its content so that as Minister I get the best understanding of the community's opinion on the licensing of strata managers.

Hon. Simon O'Brien MLC  
**MINISTER FOR COMMERCE**

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## **1. EXECUTIVE SUMMARY**

In July 2008 the Council of Australian Governments (COAG) agreed to develop a National Occupational Licensing System (NOLS) the purpose of which was to establish a nationally uniform system of licensing for nominated occupations, administered in accordance with common, uniform policies. The first wave of occupations to be introduced under the NOLS will include licensing of property agents, which includes strata managers.

The Western Australian Government is committed to the principle of the NOLS but wishes to ensure that the needs of local stakeholders are adequately addressed in the detail of the proposed regulatory framework.

At present, strata managers are licensed only in New South Wales the Northern Territory and the Australian Capital Territory. Strata managers are regulated in other jurisdictions in various forms other than licensing. In Western Australia strata managers are not specifically regulated.

The Intergovernmental Agreement for the NOLS makes it clear that in implementing the NOLS, States and Territories are not obliged to introduce licensing for a particular occupation if there is no requirement to currently license them. The Intergovernmental Agreement precludes jurisdictions from implementing stand alone licensing regimes or hybrid forms of licensing (such as registration and negative licensing) for occupations that are within the scope of the NOLS. As a consequence, if NOLS is introduced in WA and licensing of strata managers is also introduced in WA, then strata managers will have to be licensed in accordance with the NOLS model.

Since 2003, two parliamentary inquiries and one independent review have been undertaken in relation to the regulation of strata managers in Western Australia. Although the recommendations of both inquiries and the review highlight the need for greater regulation of strata managers, there are divergent views on the need for licensing and none of these inquiries covered all of the issues that would need to be considered before the Government could consider introducing licensing for strata managers. Nevertheless, the evidence presented at both inquiries has been relied upon in preparing this paper.

Having regard to the NOLS, the Hon Simon O'Brien, MLC, Minister for Commerce, agreed that further consultation should be undertaken on the feasibility of licensing strata managers in Western Australia under the NOLS.

This Consultation RIS/Discussion paper looks at three options for the strata management industry:

1. licensing of strata managers under NOLS;
2. regulation of conduct of strata managers without licensing; and
3. maintaining the status quo.

Regulatory impact assessment requirements apply to policy proposals for new and amending legislation that may have a significant negative impact on business, consumers, the government or the economy. One way in which regulatory impact assessments are carried out is via a Regulatory Impact Statement (RIS). The Department of Treasury's Regulatory Gatekeeping Unit requires the development of a RIS for consultation purposes and to inform decision-making. The purpose of a RIS is mainly to ensure that sufficient consideration is given to any adverse consequences or costs (direct or indirect) that the proposed reform may impose, so as to ensure that any potential disadvantages of reform do not outweigh the benefits.

This paper therefore constitutes a Consultation RIS and it includes a preliminary assessment of the likely costs of implementing each of the above options. It also seeks to obtain feedback from interested parties on the options and impacts and to ensure that the options presented to the Government are accurate and confirmed by the community. Views received as a result of this consultation will be considered in the final recommendations presented to the Government.

## 2. STRATA MANAGEMENT IN AUSTRALIA

### 2.1 Strata title schemes in Western Australia

Strata titles in Western Australia are created and regulated under the *Strata Titles Act 1985* (Strata Titles Act) which is administered by Landgate. This Act applies to a range of property types including:

- residential duplexes;
- larger residential developments, ranging from several to over 100 units;
- commercial properties, ranging from small-scale business premises of several units, to large office blocks in the central business district;
- caravan parks, including long-term residential parks; and
- retirement villages.

The role of a strata company is defined in section 35 of the Strata Titles Act. In essence a strata company is required to manage and maintain the common property of a strata complex, enforce its by-laws and fulfil other statutory requirements.

Strata companies in Western Australia are obliged to comply with the Strata Titles Act and the *Strata Titles General Regulations 1996*. The Strata Titles Act covers the subdivision of land into strata title schemes. The point at which a strata plan or survey-strata plan is registered with the Registrar of Titles, the associated strata company comes into being.

Approximately 78.5% of strata properties are residential<sup>1</sup> however, strata schemes can be mixed residential and commercial schemes, for instance with commercial enterprises on the ground floors and residential apartments above. In addition, a residential strata scheme may have units which are largely owned by a business, making the distinction between residential and commercial difficult.

Strata managers may be engaged by a strata company (or its council) to assist with the management of the company's property. Depending on the size and nature of the strata property, strata managers may perform a wide range of functions. Duties typically include:

- assisting with meetings;
- paying accounts;
- keeping the strata company's financial records;
- collecting and banking strata company levies;
- engaging contractors to maintain and repair the common property;
- managing the insurance of the property; and
- maintaining a reserve fund (or 'sinking fund') for long-term maintenance and unexpected expenses.

In 2010 there were 231,088 strata units in Western Australia spread across 55,419 strata companies.<sup>2</sup>

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<sup>1</sup> Report of Legislative Council Standing Committee on Public Administration into Western Australian Strata Managers, September 2011, p18

<sup>2</sup> Ibid p16

There is little doubt that strata development is increasing in Western Australia, mainly in response to the demand for higher density development. Landgate has advised that an average of 10,000 new strata lots are created every year; and that since 2007 the proportion of newly created strata to newly created freehold lots has increased each year as follows:

2007	-	31.2%
2008	-	39.4%
2009	-	45.4%. <sup>3</sup>

The projected number of strata units in 2020 is 349,920.<sup>4</sup>

It is difficult to obtain precise information on the number of strata managers operating in Western Australia, however the peak industry body for strata managers in WA - Strata Community Australia (WA) - estimates that there are approximately 300 practitioners, ranging from people whose full time occupation is strata management, to others (often lawyers, real estate agents or accountants) who provide strata management services from time to time.

There are currently 4,300 real estate and business agents licensed in WA, however, many of these licences are dormant or are held for the purpose of underpinning the operation of a body corporate licensee (e.g. for a body corporate to hold a licence, there must be at least one licensed director of the corporate entity which translates, in practical terms, to one 'operational' licence between them). Records held by the Department of Commerce indicate that there are approximately 1,150 licensed real estate and business agencies currently operating in Western Australia.

While the number of strata managers is low compared to the number real estate and business agencies, strata managers can hold comparable sums of money on behalf of clients. Again, there is no definitive information on the amounts held, but anecdotal evidence suggests it is not unusual for strata managers to be responsible for strata company funds totalling several million dollars.

The estimated capital value of strata properties in WA in 2010 was \$96 billion.<sup>5</sup> The projected capital value in 2020 is \$467 billion.<sup>6</sup>

## **2.2 Current regulation of strata managers in Western Australia**

The Strata Titles Act does not currently recognise strata managers or their functions and responsibilities. The Strata Titles Act does contain extensive management provisions that apply to strata companies, strata councils, meetings, insurance and conducting the business of the strata company. Schedule 1 of the Strata Titles Act contains provisions that relate to the powers and duties of proprietors, strata companies, strata councils, the Treasurer and Secretary, and rules that apply to the constitution of the councils, elections, meetings and decisions of the council.

<sup>3</sup> Landgate, Submission to Public Administration Committee Legislative Council, *Inquiry into Western Australian Strata Managers*, January 2010, p.4.

<sup>4</sup> Report of Legislative Council Standing Committee on Public Administration into Western Australian Strata Managers, September 2011 p16

<sup>5</sup> Report of Legislative Council Standing Committee on Public Administration into Western Australian Strata Managers, op cit p15

<sup>6</sup> Ibid p15

The Strata Titles Act recognises that in some strata schemes, it may be impractical for all owners to participate in the day-to-day management of the scheme and therefore provides for the strata company to be operated by a council of owners. The strata company is run by the council in accordance with the conditions specified in the Strata Titles Act and the by-laws in force for the strata scheme. By-laws made by strata companies, are required to be lodged and registered with Landgate in order to have legal effect.

Larger strata schemes often employ a strata manager to assist the council to carry out the duties of the strata company imposed by the Strata Titles Act. The quality and level of service the strata company receives from the strata manager often depends on the effective instructions and control of the strata council. The only powers strata managers have are those given to them by the strata company. Strata managers generally cannot make decisions on behalf of the strata company and cannot do anything that requires a resolution of the strata company.

It should be noted that a number of real estate agents also provide strata management services. Although a real estate agent must be licensed, a person does not have to be a licensed real estate agent to conduct strata management. Where a licensed real estate agent in their role of undertaking strata management collects strata levies, they are required under the *Real Estate and Business Agents Act 1978* (the REBA Act) to deposit that money into a REBA trust account. This is because the definition of a ‘real estate transaction’ under the REBA Act is considered to include the collection of strata moneys. While money must be received into a REBA trust account, it may then (with the relevant consent of the strata company) be transferred to an interest-bearing subsidiary REBA trust account or withdrawn from the REBA trust account and deposited to an account that is not regulated under the REBA Act.

Property managers may also provide strata management services, however they would be registered as real estate sales representatives rather than licensed as agents; and under the REBA Act the trust account obligations rest with agents.

The Code of Conduct for Real Estate Agents and Sales Representatives, made under the REBA Act, also imposes a range of general duties upon real estate agents in their dealings with principals (a principal being, in the context of strata management, a strata company).

#### *Accreditation*

Strata Community Australia (WA) (SCAWA), formerly the Strata Titles Institute of Western Australia, is a membership organisation for strata managers. Membership is voluntary. The organisation provides an accreditation program which requires attendance at training events and evidence that professional indemnity insurance is in place. Members of the SCAWA are bound by a Code of Ethics which sets out a minimum standard of behaviour. If a complaint is made against a SCAWA member, SCAWA will attempt to resolve the complaint. The ultimate sanction that SCAWA can impose is expulsion from membership.

### *Dispute Resolution*

The State Administrative Tribunal (SAT) is empowered to make orders for the settlement of disputes or rectification of complaints with respect to the exercise or performance of (or failure to exercise or perform) a power, authority, duty or function conferred or imposed by the Strata Titles Act, or in relation to the by-laws of a strata scheme. The SAT has jurisdiction over strata title disputes, but only in regard to disputes between strata proprietors and strata companies.

As previously indicated, strata managers are contracted to assist strata councils to carry out the duties imposed on strata companies by the Strata Titles Act. The quality and level of service a strata company receives from the strata manager depends on the instructions and control exercised by the strata council. The only powers strata managers have are those given to them by the strata company. The Strata Titles Act does not recognise the role of strata managers and does not empower the SAT to hear applications about their conduct.

Licensing of strata managers will not alter the contractual relationship between strata companies and strata managers or allow individual strata proprietors to take action against strata managers. If a strata manager is not performing their obligations under the Strata Titles Act, a strata proprietor's only right of action is against the strata company.

### **2.3 Regulation of strata managers in other jurisdictions**

The fundamental structure of a strata scheme is consistent across Australia, that is, a number of lots comprise a scheme, most residential and some commercial, and many with common property. The approach each jurisdiction takes to strata management, including the terminology, varies between States and Territories. No two jurisdictions have the same model. New South Wales and the Northern Territory are the only jurisdictions that require strata managers to be licensed.

A snapshot of the regulatory situation around Australia is provided below.

<b>Licensing</b>	<b>Registration only</b>	<b>Statutory Code of Conduct</b>	<b>Fit and proper person test</b>	<b>No specific regulation</b>
New South Wales	Victoria	Queensland	Australian Capital Territory	South Australia
Northern Territory				Tasmania
				Western Australia

## New South Wales

New South Wales employs a full licensing regime whereby strata managers must be licensed agents under the *Property, Stock and Business Agents Act 2002*. The responsibilities and accountability for strata management are clearly defined under the *Strata Schemes Managing Act 1996*. The NSW strata industry is considered to be highly regulated and the regulatory regime is very prescriptive as to the requirements of strata companies and strata managers.

Features of the licensing scheme include:

- an education-based licensing model (Certificate IV qualification);
- the functions of the strata company may be delegated to a strata manager, including accountability for the function, with some exceptions;
- strata managers must undertake continuing professional development;
- strata company accounts must be held in a trust and the interest must be paid into the Property Services Compensation Fund, managed by the NSW Office of Fair Trading;
- prescribed eligibility requirements for a licence, including being a fit and proper person and holding relevant qualifications;
- no requirement for compulsory professional indemnity insurance although there is the option of having this prescribed by regulation.

Management of strata companies is regulated through:

- financial accountability, with a requirement of maintaining accounting records and financial statements for five years and compulsory insurance;
- large schemes (100+) must also have their accounts audited every year, create a budget of expected expenditure items during the year and obtain quotes on large purchases; and
- all strata schemes, with the exception of two lot schemes, must have a sinking fund.

NSW has a Property Services Compensation Fund that covers dealings with licensees under the *Property, Stock and Business Agents Act 2002* and the *Conveyancers Licensing Act 2003*. The Fund was established to assist people who suffer a loss where an agent (including a strata management agent) or conveyancer, in the course of carrying on the business of a licensee, fails to account for money or other valuable property held in trust.

## Northern Territory

The Northern Territory requires strata managers to be licensed as real estate agents under the *Northern Territory Agents Licensing Act 2001*. The licensing scheme is an education-based model (Certificate IV qualification).

Strata managers are exempt from the provisions of the *Agents Licensing Act 2001* insofar as it relates to the handling of trust monies, so long as they comply with the provisions relating to trust monies that rest in the *Northern Territory Agents Licensing Regulations*.

An Agents' Licensing Fidelity Guarantee Fund was established in the Northern Territory under the *Agents Licensing Act* which applies to agents, including strata managers. The Fund was established to compensate any person who suffers a pecuniary loss arising from a defalcation of trust monies or misappropriation of any other property.

Strata managers in the Northern Territory are required to have indemnity insurance.

#### Victoria

The Victorian *Owners Corporations Act 2006* requires strata managers in Victoria who receive a fee or reward for their service to be registered with the Victorian Business Licensing Authority. The Business Licensing Authority holds a public register of strata managers. This register includes details of any orders made against a manager.

The *Owners Corporations Act 2006* also provides that all registered managers must be appointed by an instrument or contract of appointment in the approved form; and act honestly and in good faith. The Act also provides that all registered managers must:

- carry professional indemnity insurance;
- hold all money on behalf of an owners corporation on trust;
- account separately for money held for each owners corporation it manages;
- report to the owners corporation at each annual general meeting;
- if there is a committee, report to the committee as required; and
- lodge an annual statement with the Business Licensing Authority.

#### Queensland

In Queensland, strata managers are not required to be licensed however they are subject to a statutory Code of Conduct under the Queensland *Body Corporate and Community Management Act 1997*. The Code of Conduct prescribes how strata managers are to approach the management of strata properties and also forms part of the agreement between the parties.

The *Body Corporate and Community Management Act 1997* further provides regulation modules detailing specifics on particular areas of management for different scheme types. The four different regulation modules that apply to strata schemes are the standard module; accommodation module; commercial module; and small schemes module. This allows for easier modification to particular areas of regulations. Strata companies may decide for themselves which regulation module best suits their individual circumstances.

A strata company cannot delegate its powers, but can authorise a strata manager to exercise the powers of a strata council. This effectively gives the strata manager the power to make decisions for the strata company. Where a strata company engages a strata manager to carry out its functions, there is no council for the strata company.

A strata company must prepare budgets for both the administrative fund (a general administration and maintenance fund) and a sinking fund. Sinking fund budgets must be prepared based on 10 years of anticipated expenditure.

Accounts must be kept and if managed by a strata manager, the strata manager must provide reconciliation statements on a monthly basis to the strata company. Accounts must be audited on an annual basis.

#### Australian Capital Territory

In the Australian Capital Territory (ACT), strata managers are required to comply with the Code of Conduct prescribed under the ACT's *Unit Titles Act 2001* and to maintain public liability insurance. The Code of Conduct is substantially the same as that prescribed for strata managers in Queensland.

Managers must also maintain public liability insurance against death, bodily injury or illness to anyone and loss or damage to property as a result of any act or omission in the management of the owners corporation. Managers are empowered by owners' corporations and the executive committee through the delegation of all or any of their functions.

All strata companies must create an administrative fund, however only a strata company comprising four or more units is required to create a sinking fund. An initial 10 year plan must be prepared to establish the sinking fund. This plan must be reviewed at least every four years, with a new plan to be made every subsequent 10 years. The legislation details the level of investment based on unit development classifications.

Strata companies must have both public liability and building insurance. Financial statements must be prepared annually, however accounts are only audited if required by the strata company.

#### Tasmania

Tasmania currently has no regulation of strata managers.

The Tasmanian *Strata Titles Act 1988* provides that a strata company may appoint strata managers and delegate functions relating to administration, management and control of the common property. This Act also provides that the manager is subject to control and direction by the body corporate acting in general meeting or through a committee of management.

A strata company must have building, common property and public liability insurance. There is no requirement to create financial statements, nor have audits performed on any accounts.

The Recorder of Titles appointed under the Tasmanian *Land Titles Act 1980* determines strata disputes.

## South Australia

There are two Acts that apply to strata management in South Australia: the *Strata Titles Act 1988* and the *Community Titles Act 1996*. The first Act recognises strata schemes, the second recognises community titles. Although both schemes are similar, in a strata scheme the boundaries are defined by reference to structural divisions in a building, whereas in a community scheme, lot boundaries are determined by surveyed land measurements and generally do not relate to a structure. The community titles system is gradually replacing the strata titles system. Since 1 January 2002, no new strata schemes have been created under the *Strata Titles Act 1988*. Strata schemes may apply to be converted to community title.

Under the *Strata Titles Act 1988*, strata managers can only be appointed in an advisory capacity and do not have any powers independent of the strata company. Strata managers are obliged to act in the best interest of the strata company however it is the strata company's responsibility to ensure the strata manager is performing.

Under the *Community Titles Act 1996*, a community corporation must have a presiding officer, treasurer and secretary, and may establish a management committee to carry out the functions and perform the duties of the corporation within the limits of the committee's powers. A community corporation may also delegate some of its functions to a person outside the corporation (for example a strata manager) to assist in the running of the corporation.

Trust accounts must be utilised by agents appointed to manage strata companies. Monthly reconciliations are to be provided to the strata company, proper financial statements and reports prepared on an annual basis with an audit performed. Building and public liability insurance is compulsory.

Under a community title, in addition to those requirements for strata titles, schemes are required to maintain both administrative and sinking funds.

## **2.4 Licence/Registration fees in other jurisdictions**

Jurisdiction	Initial Application Fee	Annual Renewal Fee	Annual Compensation/Fidelity Fund Contribution	Miscellaneous
<b>NSW</b>	\$390	\$265	\$63	\$188 (Certificate IV Qualification)
<b>NT</b>	\$351	\$351	Nil	
<b>VIC</b>	\$174.30	\$122.30	Nil	

### **3. STATEMENT OF THE ISSUE**

Since 2003, two parliamentary inquiries and one independent review have been undertaken in relation to the regulation of strata managers in Western Australia. Although the recommendations of both inquiries and the review highlight the need for greater regulation of strata managers, there were divergent views on the need for licensing and none of these inquiries covered all of the issues that would need to be considered before the Government could finally consider introducing licensing for strata managers.

The Legislative Council's Standing Committee on Public Administration conducted the most recent inquiry into strata management. Its report, tabled in the Legislative Council on 1 September 2011, reported that the Committee unanimously found that:

- there is an increasing volume of strata titled properties and strata title funds;
- there are reports of significant incompetent or inappropriate fund management;
- a growing reluctance of lot proprietors to sit on the strata council imposes further responsibility on strata managers; and
- there are significant ramifications for community confidence in strata titles in the face of further incompetent or inappropriate management of funds.

The Committee concluded that the case for regulation of strata managers was overwhelming and recommended that strata managers be regulated by a system of positive licensing. The Committee also recommended changes to the *Strata Titles Act 1985* to, *inter alia*, regulate the relationship between strata managers and strata companies; and to provide greater security of monies held in trust<sup>7</sup>.

Under the Intergovernmental Agreement for the National Occupational Licensing System (NOLS), States and Territories are not obliged to introduce licensing for an occupation if there is no existing requirement to license that occupation. However, should Western Australia decide to license strata managers in the future the State Government could only do so under the NOLS.

Having regard to the NOLS, the Hon Simon O'Brien, MLC, Minister for Commerce, agreed that further consultation should be undertaken on the feasibility of licensing strata managers in Western Australia under the NOLS.

For further information about previous inquiries see section 3.1.4 below.

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<sup>7</sup> Standing Committee on Public Administration: Report in Relation to the Inquiry into Western Australian Strata Managers, September 2011, pp43-58

### **3.1 Context of the issue**

#### **3.1.1 National Occupational Licensing System (NOLS)**

##### Scope of the NOLS

In July 2008 the Council of Australian Governments (COAG) agreed to develop a national occupational licensing system, the purpose of which is to establish a nationally uniform system of licensing for nominated occupations, administered in accordance with common, uniform policies. The objectives of the national system are outlined in the *National Licensing System for Specified Occupations: Consultation Regulation Impact Statement, October 2008*, as being to:

- ensure that licences issued by the national licensing body allow licensees to operate in all Australian jurisdictions;
- ensure that licensing arrangements are effective and proportional to that required for consumer protection and worker and public health and safety, while ensuring economic efficiency and equity of access;
- facilitate a consistent skill base for licensed occupations;
- ensure effective coordination exists between the national licensing body and relevant jurisdictional regulators;
- promote national consistency in:
  - licensing structures and policy across comparable occupational areas;
  - regulation affecting the conduct requirements of licensees (this has been assigned as a separate project deferred to its own project);
  - the approaches to disciplinary arrangements affecting licensees;
- provide flexibility to deal with jurisdiction or industry specific issues; and
- provide access to information about licensees.

In achieving these objectives, the overlapping and inconsistent regulation between jurisdictions will be substantially improved. Licensees will only need a single licence for their particular occupation in order to operate in any Australian jurisdiction. This licence will be subject to the same entry requirements and on-going obligations in any State or Territory.

It is not the intention of the NOLS to force licensing regimes upon jurisdictions that do not currently regulate a particular occupation. The focus is on streamlining the licensing regimes for the specified occupations, where they are already regulated. However, a jurisdiction may elect to bring a previously unregulated occupation under the scope of the NOLS. Importantly, jurisdictions will be unable to implement different stand alone licensing regimes for occupations that are within the scope of NOLS.

It is expected that occupational areas will be introduced under the NOLS in two waves. The first wave of occupations will include property agents including:

- real estate agents;
- real estate salespersons;
- business agents;
- business sales representatives; and
- strata managers.

A decision was taken by COAG to implement NOLS under a delegated agency model, where the national licensing authority would have administrative responsibility of the NOLS legislation, but would delegate the operation of licensing services to existing jurisdictional regulators. This will allow the States and Territories to use their existing infrastructure for their delegated licensing functions.

### Legal framework

An Intergovernmental Agreement (IGA) was developed for the NOLS between the Commonwealth and the States and Territories in April 2009 and was signed by Western Australia during October 2009. The IGA sets out the objectives and principles of the national licensing system, the legislative scheme to be adhered to and the minimum requirements of the national legislation. Under the IGA, the NOLS is to be implemented in the States and Territories by applying an Act (the model law) and Regulations (national regulations), enacted in Victoria.

A national Regulatory Impact Statement (RIS) for the introduction of NOLS is also currently being developed by a NOLS Taskforce. It is intended that draft regulations and the RIS will be released for public comment later this year.

The model law will establish a National Licensing Authority and the licensing and disciplinary frameworks for the system. The national regulations will contain the detail for these frameworks and other occupation-specific provisions such as education and probity requirements.

To implement these reforms in Western Australia, the *Occupational Licensing National Law (WA) Bill 2010* was introduced into State Parliament in November 2010. At the time of writing the Bill had passed the Legislative Assembly and had been considered by the Legislative Council's Standing Committee on Uniform Legislation and Statutes Review which tabled its report in April 2011. Further consideration of the Bill has been deferred, pending likely changes to the model law. A draft amendment Bill, regulations and Regulatory Impact Statement are expected to be released for consultation in December 2011. The current scheduled commencement date for NOLS is 2013.

#### **3.1.2 Regulation of Conduct**

While the NOLS scheme provides for a single national licensing regime for specified occupations, it does not seek to regulate licensee conduct ie. the regulatory requirements a licensee must comply with when undertaking licensed work (generally referred to as conduct requirements).

In recognition of the potential benefits to business and consumers from increased consistency in policy setting and regulation of the way in which work is performed, the Ministerial Council on Consumer Affairs (MCCA) established a Working Group to undertake harmonisation of conduct requirements, initially limited to the following areas:

- management and supervision of the business;
- auctions;
- trust accounts;
- information requirements;
- agency agreements and commissions;
- standards and behaviour; and
- appointment of an external intervener.

MCCA also directed that the conduct harmonisation should enhance consumer protection by adopting the best practice in State and Territory legislation and supplement and support the new Australian Consumer Law (ACL), but avoid duplicating it.

The ACL took effect on 1 January 2011 and is a single, national law for fair trading and consumer protection which applies the same way to all businesses nationally and in each state and territory.

The ACL creates general standards for business conduct as well as providing specific protections for consumers against unfair business practices. The provisions of the ACL of particular relevance to the conduct of strata managers include those that:

- prohibit false or misleading representations made in trade or commerce;
- prohibit unconscionable conduct; and
- provide consumers with statutory guarantees in relation to the supply of services – services must be rendered with due care and skill.

In contrast with the ACL, conduct requirements in State and Territory laws are more specific because they regulate particular kinds of market behaviour that are characteristic of the occupations.

Conduct laws are broadly consistent with, and supportive of, ACL principles. For example, the misleading and deceptive conduct provisions made under the *Real Estate and Business Agents Act 1978* spell out particular kinds of misleading and deceptive conduct that are distinctive to the industry. However, by providing specific examples of prohibited conduct, industry specific legislation provides greater certainty for traders and consumers. Industry specific legislation may also, in some instances, allow more effective regulatory action than the ACL.

Having to comply with multiple pieces of legislation is a cost to industry. It can be assumed that, like other business costs, the additional cost will be passed on to the consumer. Similarly, a large number of overlapping laws to administer can also increase costs to taxpayers or industry through increased fees. From a regulator's perspective, overlapping laws can also hamper effective regulatory action.

Although attempts are being made to harmonise conduct among jurisdictions, the regulation of conduct of licensed occupations will remain the responsibility of each individual jurisdiction.

There are a range of ways conduct regulation for specific occupations could be implemented in Western Australia. As strata managers are not subject to any specific occupational legislation at this time, their conduct could be regulated by:

- new legislation that provides specifically for the regulation of strata manager conduct only;
- new legislation that provides for the regulation of conduct of any occupation under the NOLS, including strata managers;
- amending existing legislation, such as the *Strata Titles Act 1985* or *Real Estate and Business Agents Act 1978*, to include strata management activities and provide for a code of conduct to be made in respect of strata managers; or
- developing and mandating a code of practice for strata managers under the *Fair Trading Act 2010*.

### **3.1.3 Previous inquiries into the regulation of strata managers**

As previously noted, there have been three inquiries into the strata title management industry in Western Australia in the past decade. The first was by the Legislative Assembly's Economics and Industry Standing Committee which tabled its report in the Western Australian Parliament in 2003. The second inquiry commissioned by the (then) Department of Consumer and Employment Protection was carried out by Stamfords Consultants and reported in 2007. The report of the third inquiry by the Legislative Council's Standing Committee on Public Administration was tabled in the Western Australian Parliament on 1 September 2011. Each of these inquiries is discussed in more detail below.

#### Economics and Industry Standing Committee's Inquiry into the Strata Management Industry.

In 2003 the Legislative Assembly's Economics and Industry Standing Committee (EISC) conducted an inquiry into the strata management industry to examine and report on:

- the potential risks posed to consumers by the current absence of regulation of the strata management industry;
- the need for and most appropriate method of regulation (if deemed necessary) of the strata management industry; and
- any other matters deemed relevant by the Committee.

The Committee's report titled *Inquiry into the Strata Management Industry*, tabled in the Legislative Assembly on 26 June 2003, reported that there was no evidence of a crisis in the strata management industry but recommended stronger financial reporting mechanisms, the establishment of reserve funds and that the *Strata Titles Act 1985* be amended to recognise the existence and role of professional strata managers.

The EISC also recommended that strata managers be licensed and that schemes of six to 20 lots, and all multi storey schemes from two lots upward, be required to appoint a licensed strata manager. Copies of the EISC Inquiry report may be found at:

[www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State](http://www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State)

The then Government tabled its response to the EISC Report on 14 October 2003 noting that there was no evidence of market failure in the industry. It should be noted that in response to the EISC Report, the two main government agencies, the Department of Consumer and Employment Protection (DOCEP) and Landgate, had many different views on the recommendations.

The Government's response concluded that the available data did not indicate the necessity of a high degree of regulatory intervention, such as the introduction of a licensing regime, but that further consultation and assessment was needed. Consequently, Stamfords Advisors and Consultants was engaged by DOCEP to conduct a review in relation to the proposed licensing and/or regulation of strata title managers by DOCEP.

#### *Stamfords Consultant's Report on the Regulation of Strata Managers*

In 2007, DOCEP engaged independent consultants Stamfords to conduct a review in relation to the proposed licensing and/or regulation of strata managers. The review was jointly funded by DOCEP and Landgate. Stamfords considered the nature and risk posed to strata proprietors and the costs and benefits of regulating strata managers. Stamfords' Report, published in 2007, concluded that there was no evidence of market failure in the strata management industry and did not recommend that strata managers be licensed or registered.

The Stamfords' Report, which was endorsed by the (then) Minister for Consumer Protection in July 2007, did, however, recommend amendments to the *Strata Titles Act 1985* including: the recognition of professional strata managers; a requirement for strata managers to hold adequate professional indemnity insurance; and a requirement to hold all strata company funds under their management in a trust account. The report also recommended a number of non-regulatory initiatives in regard to the operations of both strata companies and strata managers. These were primarily education initiatives designed to assist strata councils to reduce identified risks and to be better equipped to monitor the performance of a strata manager.

Copies of the Stamfords report may be found at:

[www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State](http://www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State)

#### *Public Administration Committee Inquiry into Western Australian strata managers*

The Legislative Council's Standing Committee on Public Administration (PAC) commenced its own motion inquiry into Western Australian strata managers on 17 November 2009. In particular, the PAC looked at the functions and responsibilities of strata managers; the education of strata managers; whether strata managers should be licensed; and other relevant matters.

The PAC tabled its report in the Legislative Council on 1 September 2011. The report makes a number of recommendations in regard to strata managers, the key recommendation being that strata managers should be regulated by a system of positive licensing.

The PAC also recommended that a new section be introduced into Part IV of the *Strata Titles Act 1985* providing that assets held by strata managers on behalf of strata companies be deposited in a trust account with a separate trust account for each strata company. Any transactions undertaken by the strata manager on behalf of the strata company are to be conducted through the relevant trust account. These trust accounts, held by strata managers, could be subject to audit by the regulatory body on a random basis or following a complaint but would not be subject to regular mandatory auditing.

Another recommendation of the PAC is that the *Strata Titles Act 1985* be amended to make provisions in regards to the appointment of proxies and voting; prescribed forms for the appointment of strata managers; disclosure of services provided and not provided by the strata manager; and disclosure of any commissions.

A further recommendation of the PAC is that the Department of Commerce be the lead agency for strata title matters and that the *Strata Titles Act* be divided into two new Acts, with:

- Act 1 providing for all matters in relation to creation, variation, termination and conversion of all strata schemes and be administered by Landgate; and
- Act 2 containing strata manager licensing and conduct provisions along with strata company management provisions and being administered by the Department of Commerce.

The PAC also recommended that the Department of Commerce be funded to provide an information, conciliation and initial legal advice service for all strata title queries and further that it be responsible for coordinating the provision by Landgate of advice in its area of expertise through a *one stop* service.

The PAC report did not address the issue of whether private (unpaid) strata managers should be licensed or what criteria should be applied to determine when a licensed strata manager should be engaged.

A copy of the Committee's report may be found at:

[www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State](http://www.commerce.wa.gov.au/ConsumerProtection/Content/Resources/Consultations.html#State)

### **3.1.4 Proposed reform of the Strata Titles Act 1985**

Landgate has also been reviewing the strata industry and has been developing major reforms to the *Strata Titles Act 1985*. A Tenure Committee, comprising representatives from industry, government and the community, has been providing specialist advice in a review of aspects of Western Australia's strata titles and tenure legislation.

Key reform proposals developed by the Committee include schemes within schemes, leasehold strata, information disclosure and amendment of management statements. These reforms are proposed to address housing affordability, development and lifestyle options, consumer choice and innovative solutions. The matter of strata management is not addressed in the suite of proposed reforms.

For further information on the reforms proposed by the Committee, refer to the Consultation Paper dated July 2010 on Landgate's website at <http://www.landgate.wa.gov.au>

## **4. OBJECTIVE**

The policy objective is to determine and, if necessary, implement the most appropriate reform of regulation for strata managers in Western Australia having regard to the growth in the number of strata developments and the potential risks to strata proprietors (particularly in relation to the management of proprietor's funds); and the costs and benefits of each reform option.

## **5. OPTIONS TO ADDRESS THE ISSUE**

Having regard to the potential risks identified in this paper and the national occupational licensing reforms that are underway, there are three possible options for addressing these issues<sup>8</sup>:

- Positive licensing and conduct regulation.
- Conduct regulation only.
- Maintaining the status quo.

### **5.1 Option 1 – Positive licensing and conduct regulation.**

#### **5.1.1. Background**

Government intervention in the marketplace can be justified where there is a market failure. Licensing is the most prescriptive form of regulation designed principally to protect the public from harm. It does this by providing barriers to entry, such as experience or qualification requirements, character checks and financial probity checks.

Typically, a licensing scheme would also involve the regulation of conduct that is specific to the occupation. It might also require licensees to take out professional indemnity insurance to insure against losses arising from negligence or mistakes of licensees or their employees.

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<sup>8</sup> Ordinarily negative licensing would also be considered however this form of regulation falls within the scope of the NOLS and is therefore not an available option.

In the case of strata managers, a licensing scheme might also involve the establishment of a fidelity fund from which strata companies could seek reimbursement for any pecuniary loss suffered as a result of defalcation (misappropriation) by the licensee, similar to the fidelity funds that currently exist in the real estate and settlement agents industries. In both these industries, the fidelity funds are funded principally from interest earned on trust monies.

Licensing of strata managers does not necessarily need to apply to all persons managing strata complexes. Having regard to risk, it may, for example, be appropriate to impose a cap on the number of units managed before a person is required to hold a licence or to only require persons that provide strata management services for fee or reward to hold a licence.

### **5.1.2 How would a licensing scheme be implemented?**

Subject to the successful passage of the *Occupational Licensing National Law (WA) Bill 2010*, presently before the State Parliament, strata managers could be licensed by the National Occupational Licensing Authority (NOLA). While the NOLA would have administrative responsibility for the NOLS, it will delegate the operation of licensing services to existing jurisdictional regulators which would allow the States and Territories to use their existing infrastructure for their delegated licensing functions. In Western Australia this function would be performed by the Commissioner for Consumer Protection.

As the NOLS does not provide for the regulation of conduct of licensees, separate legislation would be required to specifically regulate conduct. There are a range of ways conduct regulation for specific occupations could be implemented in Western Australia. Where an occupation is already regulated by specific legislation, as is the case with real estate agents under the *Real Estate and Business Agents Act 1978* for example, the Act itself (or the code of conduct under that Act) could simply be amended to harmonise conduct requirements with other jurisdictions.

As strata managers are not subject to any specific occupational legislation at this time, their conduct could be regulated by:

- introducing new legislation that provides specifically for the regulation of strata manager conduct only;
- new legislation that provides for the regulation of conduct of any occupation under the NOLS, including strata managers;
- amending existing legislation, such as the *Strata Titles Act 1985* or *Real Estate and Business Agents Act 1978*, to include strata management activities and provide for a code of conduct to be made in respect of strata managers; or
- developing and mandating a code of practice for strata managers under the *Fair Trading Act 2010*.

## **5.2 Option 2 - Conduct regulation only**

Conduct regulation is about setting rules within which a licensee (or market participants generally if no licensing scheme exists) must operate when conducting business. Conduct can be regulated with or without a positive licensing scheme.

Conduct provisions under a licensing regime typically include requirements for:

- supervision of unlicensed staff;
- provision of information to consumers;
- financial controls, such as audits and trust accounts; and
- other provisions to address specific risks to consumers, such as conflicts of interest.

Conduct provisions are generally underpinned by a range of regulatory activities including education, pro-active compliance inspections, investigations and prosecution action. The types of enforcement action that can be taken against a licensee in the event of misconduct could also include the imposition of conditions, suspension, or cancellation of a licence.

As indicated in section 5.1.2 above, the NOLS does not provide for the regulation of conduct of any occupation. Accordingly, legislation or regulations will be required to regulate the conduct of strata managers if they are to be licensed. This could be implemented in a range of ways as detailed in section 5.1.2.

Should a decision be taken not to license strata managers, their conduct could still be regulated by amending the *Strata Titles Act 1985* to make specific provision for their regulation. Alternatively, a code of practice could be mandated under the *Fair Trading Act 2010*. Codes of practice under the *Fair Trading Act 2010* are prescribed by regulation and carry a maximum penalty of \$50,000 for non compliance. The *Fair Trading Act 2010* also provides for persons to be permanently restrained from engaging in conduct that is in contravention of a code<sup>9</sup>.

### **5.3 Option 3 – Maintaining the status quo**

Although implementing complying and enforcing either or both options one and two could have a significant financial impact on government, business and strata proprietors, that in itself would not preclude government intervention. However, should a cost benefit analysis of the problem fail to demonstrate, on balance, the need for intervention, it will be open to the Government to maintain the status quo unless and until intervention is justified.

## **6. IMPACT ANALYSIS**

### **6.1 Impact on market function and competition**

Both options one and two carry requirements that would impact on strata managers, strata companies and strata proprietors. The Government would also have responsibility to monitor and enforce compliance.

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<sup>9</sup> *Fair Trading Act 2010*, Part 7 Division 3.

Although both options one and two provide for increased accountability and greater security of monies held in trust by strata managers (a key risk identified by two Parliamentary Committees and Stamfords Consultants<sup>10</sup>), option one would further prohibit unqualified persons or persons that are not “fit and proper” from practising as strata managers. Option one provides greater clarity about businesses operating in the market, enabling more comprehensive supervision of compliance. Option one would also provide for the expulsion of a strata manager in extreme cases of non compliance, in addition to any other sanction that may be imposed.

With option one, character checks; qualification requirements; and any associated costs necessarily incurred to obtain a licence under a licensing regime (such as licence fees or mandatory professional indemnity insurance) will impact upon the ability of strata managers to enter and remain in the marketplace and the range of persons who have access to the market. Option two might also act as a barrier to entry into the industry having regard to the cost of meeting conduct obligations.

## **6.2 Impact of costs on market participants**

### **6.2.1 Option 1 – Positive licensing (including conduct regulation)**

Both the Economics and Industry Standing Committee and Public Administration Committee, cited in section 3.1.4, recommended licensing of strata managers but did not address the cost of administering a licensing regime or consider other alternative regulatory options.

State Government policy requires new regulatory regimes to be self-funded and sustainable without relying on additional recurrent expenditure. Agencies responsible for administering regulatory regimes are expected to meet any costs or additional costs from existing resources.

Administration of a licensing scheme involves: assessment of licence applications and renewals; monitoring compliance with the licensing scheme and any associated code of conduct; enforcement and prosecution action; and on-going education.

Excluding set-up and transitional costs, the on-going administration of a licensing scheme for an estimated 400 licensed strata managers would require approximately 15 additional full time equivalent staff (15 FTE's) at an indicative cost of about \$2.25 million per annum including on costs. The actual cost would depend on the nature and scope of the final regulatory model decided upon by the Government and final licence numbers.

If the Commissioner for Consumer Protection was to be the licensing authority for strata managers, it is also likely that the Department of Commerce will become the first point of contact for all strata inquiries even though responsibility for the Strata Titles Act rests with Landgate. Accordingly, additional resources may be required in the short to medium term to conduct further education about the role and responsibilities of each agency.

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<sup>10</sup> *Op cit*

Licensing can also be a significant regulatory burden on business. Strata managers would face compliance costs in applying for and renewing their licences and in meeting the requirements imposed on licence holders such as auditing and the cost of professional indemnity insurance. These costs are likely to be passed on to strata proprietors in the form of prices that are higher than would be the case if the licensing scheme did not exist.

Establishing a fidelity fund is an important if not critical adjunct to licensing of strata managers to provide a source of compensation in the event of misappropriation of money by strata managers.

If the establishment of a fidelity fund was to be included as an adjunct to licensing, consideration would need to be given to how it might be funded. One method of funding could be to require a portion of interest earned on monies held in trust to be redirected and paid into the fund as is currently the case with real estate and settlement agents. In doing so, however, strata proprietors would be deprived of that interest and this could have a significant impact on them particularly in the case of sinking funds which can hold substantial amounts of money.

The method of funding a separate fidelity fund specifically for claims against strata managers would determine how quickly the fund accumulates sufficient monies to be self sustaining. As an alternative to establishing a separate fidelity fund, consideration could be given to permitting claims to be made against the existing Real Estate Agents Fidelity Account or using this Account to underwrite claims against strata managers until the new fidelity fund is self sustaining.

### **6.2.2 Option 2 – Conduct regulation only**

As previously indicated, the conduct of strata managers could be regulated separately without a licensing scheme. Conduct regulation is about setting rules within which a market player (or licensee) must operate when conducting business.

Having regard to the risks identified in previous inquiries cited in this paper, the requirements for strata managers could include:

- mandatory use of trust accounts;
- auditing of trust accounts;
- maintenance of accounting records;
- requirement to take out professional indemnity insurance;
- restrictions on the use of proxies; and
- mandatory disclosure of information to strata proprietors.

Conduct provisions are underpinned by a range of regulatory activities including proactive compliance inspections, investigations, prosecution action and education. However, such programs would be limited due to the absence of complete information about market participants.

Monitoring and enforcing a code of conduct of an estimated 400 strata managers would require approximately six full time equivalent staff (6 FTE's) at an indicative cost of about \$900,000 per annum including on costs. Without licensing, this cost would be unfunded.

Complying with a code of practice can be a significant regulatory burden on business. These costs are likely to be passed on to strata proprietors in the form of prices that are higher than would be the case if a code did not exist.

### **6.2.3 Option 3 – Maintaining the status quo**

Although two recent inquiries into the strata management industry failed to find any evidence of a crisis in the industry, the most recent inquiry found that the forecast growth of strata titles as a form of property ownership made regulation of the industry imperative.

The potential cost implications of maintaining the status quo option are unascertainable as they are contingent on events that may or may not occur should a decision be made not to regulate strata managers.

The most significant identifiable risk relates to the potential mismanagement or misappropriation of funds. Although the total amount held by strata managers in WA is unknown, it is likely that substantial funds are held in sinking funds alone given the estimated capital value of strata properties of \$96 billion in 2010<sup>11</sup>.

## **6.3 Benefits and disadvantages of options**

### **6.3.1 Option 1 – Positive licensing (including conduct regulation)**

The potential benefits of this option are as follows:

- reduces the prospect of unsuitable persons entering or remaining in the strata management industry;
- comprehensive financial and audit controls reduce the risk of misappropriation or mismanagement of funds held in trust;
- mandatory professional indemnity insurance and/or a fidelity fund would provide alternative access to compensation where there is negligence or misappropriation of money;
- imposes better standards of management to better protect the capital investment of strata proprietors;
- improves confidence in the industry;
- other specific conduct of strata managers could be mandated; and
- the regulator will know who is operating in the industry; can monitor their behaviour and can take a wide range of enforcement and disciplinary action including imposing conditions on a licence, suspending or cancelling it.

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<sup>11</sup> Public Administration Committee report op cit.pxx

The potential disadvantages of this option are that it;

- imposes additional compliance costs on business through licence and renewal fees, education/qualification requirements, professional indemnity insurance and auditing costs;
- imposes additional costs on strata proprietors from having to engage licensed strata managers;
- may involve the establishment of a fidelity fund funded by a portion of interest earned on trust monies which would result in the loss of interest currently earned by strata companies;
- requires new or amending legislation to implement;
- imposes costs on government to administer;
- education/qualification requirements; and character and probity checks create barriers to entry into the industry;
- restricts competition in service provision by allowing only those licensed as strata managers to perform services;
- reduces choice for strata proprietors who might otherwise self manage strata complexes or engage persons they trust but who do not meet licensing requirements; and
- may require participants in the property industry to hold multiple licences (due to the range of available categories in the NOLS).

### **6.3.2 Option 2 – Conduct regulation only**

The potential benefits of this option are as follows:

- mandating specific conduct (such as financial controls and audits) would raise confidence in the industry by reducing the risk of misappropriation or mismanagement of funds held in trust;
- does not require new legislation or amending legislation to implement (implementation of a mandatory code of practice may be possible under existing legislation<sup>12</sup>);
- enforcement action could be taken by the regulator, including prosecution or injunctive action to permanently restrain a strata manager from engaging in conduct that contravenes a mandatory code;
- no cost to strata proprietors (including no loss of interest to a fidelity fund); and
- would allow strata proprietors to continue self managing strata complexes if they choose to do so.

The potential disadvantages of this option are;

- cost of on-going compliance may act as a barrier to entry into the industry or might otherwise act to limit the number of market participants;
- it provides no check on the competency of strata managers;
- the regulator will not know who is operating in the industry to monitor on-going compliance;

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<sup>12</sup> Fair Trading Act 2010 Part 7 Division 3 op cit

- the absence of a source of revenue to fund compliance may undermine effective supervision and capacity to investigate/respond to complaints and conduct proactive compliance checks; and
- absence of a fidelity fund to access in the event of misappropriation by a strata manager.

### **6.3.3 Option 3 – Maintaining the status quo**

The potential benefits of this option are as follows:

- there will be no cost incurred by strata proprietors; and
- it would allow strata proprietors to continue self managing a strata complex if they choose to do so.

The potential disadvantages of this option are that it;

- provides no check on the competency of strata managers engaged by a strata company; and
- does not address the increasing risk of misappropriation or mismanagement of funds held in trust.

## **6.4 Discussion questions**

To assist you in preparing a submission, you are invited to address some or all of the questions outlined below. However, these questions are not intended to be exhaustive and you are welcome to raise any other issues you believe are relevant to this issue.

### **6.4.1 Option 1 – Positive licensing (including conduct regulation)**

- a) Is there a need to license strata managers in WA?
- b) If the Government introduced licensing:
  - should the use of a licensed strata manager be compulsory for all strata complexes? or
  - should there be a licensing threshold so that low-risk strata complexes are not required to be managed by a licensed strata manager? If so, what criteria should be used to determine that threshold? (For example: only strata complexes with more than xx units or perhaps only those where strata managers perform a service for fee or reward).
- c) As the Department of Commerce will be responsible for the regulation of other occupational licensees under the NOLS, would you support the regulation of strata managers under an Act separate from the *Strata Titles Act 1985*?
- d) Do you support the establishment of a fidelity fund as an integral part of a licensing scheme for strata managers? If so, how should it be funded? (For example: by redirecting part of the interest currently earned on monies held in trust by strata managers).

- e) Do you support the establishment of a single fidelity fund for the property industry, similar to that in New South Wales?
- f) Do you think that licensed strata managers should be required to take out professional indemnity insurance?
- g) Should regular auditing of trust accounts be made mandatory?
- h) What aspects of a strata manager's conduct should be regulated under a licensing scheme?
- i) What are the likely costs to strata proprietors and strata managers of this option?
- j) Would the benefits of this option outweigh any potential disadvantages for strata proprietors and strata managers?

#### **6.4.2 Option 2 – Conduct regulation only**

- a) Do you support the regulation of conduct only (without licensing)? If so, why?
- b) Should a code of conduct or code of practice apply to anyone who manages a strata complex?
- c) Should the range of conduct regulated be the same under a licensing scheme as without a licensing scheme?
- d) What are the likely costs to strata proprietors and strata managers of this option?
- e) Would the benefits of this option outweigh any potential disadvantages for strata proprietors and strata managers?

#### **6.4.3 Option 3 – Maintaining the status quo**

- a) Do you support maintaining the status quo? If so, why?
- b) What are the likely costs to strata proprietors and strata managers of this option?
- c) Would the benefits of this option outweigh any potential disadvantages for strata proprietors and strata managers?

#### **6.4.4 Other suggestions?**

Although this paper focuses principally on three options there are potentially many simpler ways of reducing the risks identified in this paper. For example:

- amending the *Strata Titles Act 1985* to require strata managers to hold all monies in trust accounts;
- requiring nominated strata council members to be co-signatories to account withdrawals over a certain threshold amount;
- mandating disclosure of information to strata proprietors; and/or

- limiting or precluding strata managers from holding proxies for strata proprietors at general meetings.

This paper should not be taken to be an exhaustive list of options. Any suggestions you may wish to make on how the industry could be regulated to mitigate the identified risks would be welcome.

## **6.5 Summary and comparison of costs**

Option one (positive licensing and regulation of conduct) would likely impose the greatest cost on strata proprietors and strata managers. Strata managers will be required to satisfy licence criteria, pay licence and renewal fees and possibly professional indemnity insurance premiums. Subject to any low risk threshold for licensing that might be set, strata proprietors will be required to appoint only licensed strata managers. The cost incurred by strata managers in complying with a licensing scheme is likely to be passed on to strata proprietors. The cost of regular audits of trust accounts would also be incurred by strata proprietors if made mandatory. Should a decision be made to establish a fidelity fund and fund this using interest earned on trust monies, strata proprietors will also be deprived of interest currently earned on those monies. Government will also incur significant costs to establish and administer the licensing scheme, provide education for strata managers, monitor conduct and take enforcement and disciplinary action when required.

Option two (conduct regulation only) will potentially result in additional costs to strata proprietors flowing from regular auditing of trust accounts. Strata manager fees are also likely to increase due to additional compliance costs. Option two will also impose a cost on Government to monitor compliance, provide education and take enforcement action when required.

Option three (status quo) will involve no direct cost to any party in the immediate term. Any cost is contingent on events that may or may not occur should a decision be made not to regulate strata managers. The most significant identifiable risk relates to the potential mismanagement or misappropriation of funds if no regulatory action is taken.

Below is an indicative summary of the potential cost impact on strata proprietors, strata managers and Government of each of the options.

### **POTENTIAL COST IMPACTS**

	<b>OPTION ONE Positive licensing</b>	<b>OPTION TWO Conduct regulation only</b>	<b>OPTION THREE Status quo</b>
Strata Proprietors	Medium-High	Low	Low-Medium
Strata Managers	Medium-High	Medium	Low
Government	High	Medium/High	Low

## **7. CONSULTATION**

This consultation RIS aims to gather information and feedback from strata proprietors and industry participants on the options and likely impacts.

Responses to the discussion questions are particularly welcome however feel free to provide feedback on any issue you consider relevant to regulation of strata managers. Where possible, please provide reasons or examples to support your view.

### **7.1 Timeframe**

The deadline for lodging submissions is Wednesday 29 February 2012. Once feedback from the consultation process has been compiled, a decision RIS will be finalised and recommendations will be presented to the Government on the preferred option.

## **8. IMPLEMENTATION AND EVALUATION STRATEGY**

### **8.1 Implementation**

Licensing of strata managers under option one would be implemented under the NOLS. However, regulating conduct, establishing a fidelity fund and/or requiring strata managers to take out professional indemnity insurance will require separate legislation. This could be effected in a range of different ways including:

- amending the *Real Estate and Business Agents Act 1978* to include strata managers as a new category of agent; or
- repealing the *Real Estate and Business Agents Act 1978*, *Settlement Agents Act 1981* and the *Land Valuers Licensing Act 1978* and drafting new legislation to provide for the regulation of conduct of all property occupations.

Option two could be advanced by way of amendment to the Strata Titles Act however the Code of Practice provisions of the *Fair Trading Act 2010* may provide a simpler means of implementing a Code.

### **8.2 Evaluation**

As the intent of this paper is to determine and implement the most appropriate regulatory reform based on the problems identified, evaluation of the success of the reform option settled on should logically focus on the extent to which it has addressed those problems.

If the success or otherwise of a reform is gauged by reference to problems that might emerge despite implementation of a reform, it is important to note that such evidence would not be conclusive because a reform might also act to prevent problems that might otherwise occur.

If the reform requires new legislation or legislative amendment it would appropriate to conduct an evaluation after a period of five years in line with a general statutory review. If the reform is implemented via a Code of Practice under the *Fair Trading Act 2010* that review would take place within three years.

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