

**SUGGESTED AMENDMENT(S) TO THE STRATA TITLES
(GENERAL) REGULATIONS 2019 IN RESPECT OF SECTION
143(5)(a) OF THE AMENDED STRATA TITLES ACT 1985 (WA)**

October 2019



Introduction

Earlier this month, the Strata Community Association of WA (SCA WA) provided comment to Landgate regarding the Strata Titles (General) Regulations 2019 as part of its public consultation process.

In that submission, we referred to Section 143(5)(a) of the Amended the Strata Titles Act 1985, the Act of parliament on which the draft regulations are based, stating that the section:

“stops strata managers from engaging a contractor (e.g. builder, accountant) as agent for or on behalf of the strata company. Practically, this means managers will require that councils engage most contractors, and this will significantly increase the workload of (volunteer) councillors.”

Since the publication of that document our concern regarding the implications of that section has deepened. In simple terms, we are concerned that unless the regulations are altered to offset it, section 143(5)(a) will have a material, deleterious impact on the strata industry.

Specifically, it could be interpreted so as to prohibit many of the current and longstanding practices of strata managers and strata companies in respect of their engagement of contractors/suppliers. Additionally, section 143(5)(a) will, in our view, have a material and deleterious impact on strata lot owners. It will create, at best, a lack of clarity regarding the engagement of contractors between strata councils and strata managers and at worst inefficiencies and delays in how contractors are engaged to carry out, for example, remedial repair work at a strata scheme, as well as increase the financial risk to lot owners in relation to the management of their scheme. Finally, by, seemingly, prohibiting the current and longstanding practices of strata managers in respect of their engagement of contractors, those same contractors will be negatively impacted as long established and understood ‘terms of engagement’ with strata managers and councils are altered.

SCA WA understands that the intent of the Act and the regulations is to make improvements on the existing legal framework for the benefit of all stakeholders. SCA WA suspects that the drafters of the Section 143(5)(a) did not fully appreciate, for example, the high volume of work orders that strata managers, particularly in respect of larger schemes, authorise and process on behalf of strata councils during a financial year, the material value of that work in financial terms and the negative impact that the section will have (See

Annexure A for further detail). As such, we are hopeful that this issue can be addressed and ameliorated before the final regulations are published. Accordingly, SCA WA has sought expert opinion on the matter with a view to proposing a solution to Landgate.

SCA WA representatives are happy to meet with Landgate to discuss the contents of this submission as part of its consultation process with key stakeholders before the regulations are finalised.

SCA WA's suggested solution

SCA WA wishes to use this submission to make further comment on Section 143(5)(a) based on the expert opinion it has received and general industry knowledge and request that:

The Strata Titles Regulations 2019 include a regulation, under sections 143(5)(h), 224(1)(a) and 224(1)(b), to the effect that:

- a. Section 143(5)(a) does not apply until the end of the 5-year transitional period defined in the proposed regulation 165, and
- b. Managers take appropriate care in engaging contractors as a disclosed agent of the strata company.

SCA WA suggests that the following drafting be considered:

Regulation 175

- 1) Section 143(5)(a) created by the 2018 amending Act does not apply to a strata company or a strata manager until the end of the 5-year transitional period.
- 2) During the 5-year transitional period, a strata manager cannot be authorised to perform the scheme function of engaging a person to perform another scheme function as an agent, employee or contractor of the strata company unless the authority to the strata manager requires that the strata manager requires that the exercise a reasonable degree of skill, care and diligence in his selection and engagement of that person.

Rationale

The rationale for SCA WA's suggested solution is informed by expert advice received by SCA WA on October 17th 2019. The relevant sections of that legal advice are as follows:

Legislative Scheme

11. Section 143 deals with managers undertaking scheme functions.
12. Section 143(5) sets out some functions that a manager cannot be authorised to perform.
13. Sections 143(5)(b) to 144(5)(g) contain clear prohibitions which reflect, in our respectful view, sensible restraints on the authority of managers.
14. However, crucially, section 143(5)(a) provides that a manager cannot be authorised to perform the function of:
 - a. authorising a person to perform a scheme function other than as an agent, employee or contractor of the strata manager.
15. Section 143(5)(h) prohibits a manager from performing:
 - a. a scheme function declared by the regulations to be a scheme function that may not be performed by a strata manager.
16. Notwithstanding section 143(5)(a), section 143(6) provides:

An act or thing done by a person under an authorisation under this section--

 - a. has effect as if it were done by the strata company, council or officer of the strata company (as the case requires); and
 - b. is taken to have been done by the strata company, council or officer of the strata company (as the case requires).
17. Section 148 deals with the operation of accounts maintained by a manager on behalf of a strata company and section 148(5) provides:

Money paid into a trust account is not available for the payment of the debt of any creditor of the strata manager and cannot be attached or taken in execution under an order or process of any court at the instance of a creditor of the strata manager.

18. Section 3(1) defines “scheme function” to mean:
- b. a function of the strata company;
 - c. a function of the council of the strata company; or
 - d. a function of an officer of the strata company.
19. However, the Amended Act does not otherwise define “function” or identify the ‘scheme functions’ of the strata company, council and officers.

Advice: Likely interpretation

20. In our view, after section 143(5)(a) takes effect, is likely to be interpreted by a Court or Tribunal to outlaw the current practices of managers and strata companies concerning the engagement of contractors.
21. The phrase “scheme functions” is to be interpreted in the context of the duties of the strata company, council and officers under the Amended Act. It follows that “scheme functions” would include, for example, the repair of common property.
22. Given our instructions at paragraphs 3 to 10 above and established principles of agency, it is apparent managers currently typically act as a disclosed agent of the strata company in engaging contractors “for and on behalf of” the strata company.
23. However, in our view, section 143(5)(a) would likely be interpreted to prohibit a manager acting as an agent of the strata company in engaging contractors. The section clearly states that a manager can only authorise a person to perform a scheme function as agent, employee or contractor of the manager. There is no ambiguity in the section about this.
24. As a simple example, in our view, the section would prohibit a manager from issuing a work order, for and on behalf of a named strata company, to a contractor to repair common property.
25. Parliament may have been concerned to reduce the risk of poor work by contractors by requiring that managers engage contractors on their own account, with the resultant direct liability thought to reduce the prospect that a manager would engage an unqualified or unskilled contractor. However, section 143(5)(a) is not, in our view, necessary to achieve this as:
- a. section 144 requires that managers meet educational or other qualifications (aimed at ensuring managers meet professional standards);
 - b. section 144 requires that managers maintain professional indemnity insurance;

- c. sections 144 and 145 require that a written agreement, meeting specified minimum requirements, be in force between a manager and strata company, which would result in a manager having a contractual obligation to meet known and agreed standards in performing their duties; and
 - d. section 146 requires that managers meet defined and appropriate standards in the performance of their duties.
26. We have also considered whether section 143(6) resolves the problem created by section 143(5)(a). In our view, it does not.
27. In our view, the reference in section 143(6) to an “act or thing done by a person under an authorisation under this section” is, in the context of a contractor being engaged, a reference to the work (‘scheme function’) carried out by the contractor. Thus, if a contractor is engaged to paint the building in a scheme, it is the painting, by virtue of section 143(6), that “has effect as if it were done by the strata company” and that “is taken to have been done by the strata company”.
28. To interpret the “act or thing done” as the engagement of the contractor would render section 143(5)(a) meaningless. Consider the following:
- a. a manager engages a contractor;
 - b. the engagement “has effect as if it were done by the strata company” and “is taken to have been done by the strata company”;
 - c. in other words, the strata company is deemed to have engaged the contractor; and
 - d. the contractor is therefore the contractor of the strata company.

However, section 143(5)(a) expressly provides that the engagement by the manager must be, and therefore is, as the “contractor of the manager”.

Advice: Likely impact

29. Based on our instructions, the current practices concerning the engagement of contractors (before the Amended Act takes effect) mean that:
- a. the contractor is obliged to provide services or goods to the strata company;
 - b. the strata company obtains the benefit of those services or goods;
 - c. the strata company is obliged to pay the contractor;

- d. if the contractor breaches the contract, the strata company has a direct ability and right to sue the contractor for that breach; and
 - e. if the strata company fails to pay the contractor, the contractor can sue the strata company.
30. However, in our view, after section 143(5)(a) takes effect, if a manager engages a contractor to perform a scheme function:
- a. the contractor will still be obliged to provide services or goods, but that obligation will be owed to the manager;
 - b. the strata company will still obtain the benefit of the services or goods;
 - c. the manager, not the strata company, will be obliged to pay the contractor but the manager will not (because of section 148(5)), be able to use funds held by it on trust on behalf of the strata company to make that payment;
 - d. if the contractor breaches the contract, the strata company may not be able to sue the contractor for that breach (not being a party to the contract);
 - e. the strata company would not obtain the benefit of contractual and statutory warranties arising from the contract between the manager and contractor;
 - f. if the contractor breaches the contract, the manager may be able to sue the contractor for that breach, but:
 - i. would not have any express obligation under the Amended Act to sue;
 - ii. would not have any express right under the Amended Act to be indemnified by the strata company for the costs of suing; and
 - iii. the manager's right to sue might be of limited value; for example, poor work might result in the strata company suffering a loss, but not the manager; and
 - g. if the contractor breaches the contract, the strata company may seek to direct the manager to sue the contractor, but the Amended Act would not oblige the manager to do so and even if the manager did sue, the strata company would not be in control of the litigation.

31. Further, if a strata company directs a manager as per paragraph 10 above, section 143(5)(a) could force a manager to enter into a binding contract they would otherwise not enter into.
32. If strata companies require that managers directly engage contractors after section 143(5)(a) takes effect, we anticipate that managers would seek reimbursement from strata companies of at least the amounts they are required to pay to contractors. However:
 - a. this will significantly adversely impact the cash flow of managers;
 - b. if councillors decide not to reimburse the manager in respect of a contractor, the manager will be significantly out of pocket; and
 - c. managers would likely increase their fees (to compensate for the additional financial and legal risks) and that would increase costs for strata companies.
33. If, alternatively, strata companies directly engage contractors after section 143(5)(a) takes effect, it is likely this will significantly increase the workload of strata councillors (particularly in issuing routine, low value work orders), increase costs for strata companies and delay necessary work.

About Us

SCA WA is the peak industry body for strata and community titles in Western Australia, representing 120,000 strata lots under management. As a not-for-profit, member based organization, SCA WA is committed to the ongoing support of its' members by providing education, advocacy and promoting professionalism.

Our Members

SCA WA membership is open to anyone with an interest in strata in WA; including strata managers, strata lot owners and organisations that provide products and services to the strata sector. With close to 1,000 members with an interest in strata titles in Western Australia, SCA WA continues to work in the best interest of its members.

Our Advocacy

As the peak industry body, SCA WA advocates both locally and nationally on issues that impact strata in WA. This includes strata reform, short stay and cladding. By working with government agencies, other industry bodies and members, SCA WA is the voice for all involved in the strata sector.

Our Training and Events

We offer a range of professional development and education courses for strata managers and lot owners. The aim of our training is to educate all on strata titles in WA and provide further insight into topical issues. A full list of professional development and training can be found on our website.

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Annexure A

SCA WA have surveyed some of its members to gather indicative data in respect of the volume and type of work orders an average strata portfolio would deal with on a monthly basis:

The average volumes for a portfolio of 5,000 lots / 200 schemes under strata management

- 1,200 to 1,500 work orders issued monthly (~15,000 to 18,000 p.a.);
- representing around \$1mill to \$1.2mill paid monthly to contractors/suppliers;
- equating to \$800 to \$1,000/invoice and around \$12mill to \$14.4mill p.a. for a medium sized strata management business.

The type of work orders vary significantly from simple instructions to fix reticulation and change light bulbs, to complex \$300,000 lift replacements with detailed payment plans and project milestones. Many work orders relate to problems with plumbing at strata schemes. Other common issues include repairs arising from lift malfunctions and electric gates. Approximately 10% of work orders are issued after hours and would be considered by Strata managers and, in many cases, under the Residential Tenancies Act, as urgent repairs.

In most cases the work orders are issued via the strata managers management IT program which provides a work order function for ease of recording and tracking. More modern IT programs enable the strata manager to easily track expenditure under specified cost centers which ensures the strata company does not issue a work orders that may exceed the approved budgeted allowance.

The work orders will generally specify that the work order is issued on behalf of the owners of the strata plan, care of the strata manager. The contractors and suppliers take a degree of comfort in being instructed by the strata company because they are aware the work order would not be issued if there were insufficient funds, thus it is very rare that a contractor would need to write off a work order as a bad debt.