

Any risk for Strata Managers: a “Legal Conversation”

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Professional Strata Managers possess wealth of knowledge about the legislative framework governing the Strata industry in Western Australia, including the *Strata Titles Act 1985* (WA) (**STA**) and the regulations to that Act.

Whilst the Strata industry in WA is experiencing growth in professionalism and maturity, I expect that such growth will continue, at least, because of the impending statutory requirement for greater transparency about the respective obligations and rights between Strata Companies and Strata Managers.

Strata Schemes are multi-faceted. This means that Strata Managers must be adept at managing many complexities amongst Strata communities to ensure the Schemes they manage are well operated and regulated. It is a demanding environment.

As a result, some Strata Managers might:

- advise developers about inclusions to off-the-plan Strata developments;
- draft inclusions to off-the-plan Strata developments;
- advise Strata Companies about Strata By-laws and other statutory documentation such as “permissions” to Proprietors or others about the use of Common Property (whether by exclusive use, lease, licence or “otherwise”);
- draft Strata By-laws and other statutory documentation;
- advise Strata Companies and complete statutory and non-statutory documentation for them; and
- appear for Strata Companies in the State Administrative Tribunal (**SAT**).

Do Strata Managers have any statutory risk by undertaking any of such work, particularly drafting statutory documentation?

The answer, to some, might be: “who cares” or, “we have always done so and see no real risk.”

Is there any real risk?

The meaning of “legal practice” in WA

The *Legal Profession Act 2008* (WA) (LPA) makes it a “criminal” offence for a person to engage in

legal practice unless they are an Australian Legal Practitioner; as defined in the LPA.

Legal work is defined in section 12(1) of the LPA as:

- (a) any work in connection with the administration of law; or
- (b) drawing or preparing any deed, instrument or writing relating to or in any matter dealing with or affecting:
 - (i) real or personal estate or any interest in real or personal estate; or
 - (ii) any proceedings at law, civil or criminal, or in equity.

The term: “administration of law” is not defined in the LPA, but has been judicially determined to mean the “practice of law”.

Various WA Supreme Court decisions set out the boundaries of “legal practice” and, therefore, the extent of the prohibition provided in section 12 of the LPA.

Those decisions variously held:

“where an instrument is shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to ensure a specific result and to guard against others, more than the knowledge of a layman is required and a charge for such a service definitely brings it within the term “practice of the law”;

“where a person, in bringing documents into existence exercises his mind as to what is the appropriate form of words to accommodate the particular case, then this can be regarded as drawing or performing a legal document. A process of that kind goes beyond mechanical or clerical tasks and is of a kind required to be performed by a solicitor”; and

“the administration of law includes representing another before the courts and giving legal advice in regard to the preparation of legal instruments”.

In summary, legal practice involves more than the performance of general, clerical or administrative tasks. The task must involve a consideration of legal issues or documentation that affects person’s rights and obligations. This can include not only

court and tribunal appearances and the giving of legal advice, but also the creation and completion of various documents.

Strata Company By-laws and “legal practice”

Strata Company By-laws include the default By-laws under the STA, hybrids of the default By-laws (by way of alterations, additions and amendments) and adopted terms by way of Strata Company resolution or by a decision of the Original Proprietor.

The function of Strata Company By-laws is the regulation of persons’ rights, obligations and interests. Strata Company By-laws are deemed a “statutory contract” between Proprietors and each Proprietor and the Strata Company.

The determination that legal work includes the exercise of the mind about the appropriate form of words in a document which affects rights and obligations can be directly related to drafting, enforcing and advising about strata By-laws.

The relationship between By-laws and “legal practice” is clear. If a Strata Manager drafts By-laws or amends existing By-laws, they will necessarily be affecting statutory contracts based on facts unique to the circumstance and affecting “real or personal estate” or interests in any such estate, as referred to in section 12 of the LPA.

Therefore, by drafting, amending or advising about By-laws, a Strata Manager is most likely engaging in legal practice and, therefore, breaching the prohibition in the LPA.

“Off the plan” contracts and “legal practice”

The general form of a real estate contract is in terms of the contract for sale commonly referred to as the “Offer and Acceptance and “Joint Form of General Conditions for the Sale of Land”.

The Real Estate Institution of Western Australia (REIWA) notes the following in relation to “off the plan” contracts:

“Buying off the plan is quite a different process to buying an existing house and the contracts are often lengthy, complex legal documents. If the property is an apartment then you’ll be buying a strata titled lot and the developer has probably drafted a set of strata by-laws, so make sure you read and understand what these by-laws are.”¹

There is no statutory or factual standard form of an off-the-plan sales contract. The STA details necessary inclusions in such off the plan contracts, but not the precise wording for all inclusions.

Off the plan contracts affect, primarily and subsequently, legal rights and obligations between the:

- (a) Strata Manager and the Developer – if a Strata Manager accepts work from the Developer to draft all or part of any such contract;
- (b) Developer and the Buyer/Proprietor;
- (c) Buyer/Proprietor and the Strata Company; and
- (d) Strata Manager and the Strata Company – if a Strata Manager is subsequently contracted by the Developer or Strata Company to be the Strata Manager of the Strata Scheme.

If a Strata Manager conducts work that is more than merely filling in a form and either advises on or drafts conditions in an off-the-plan contract, they will most likely be engaging in “legal work” as defined under, and in breach of, section 12 of the LPA.

Leases and licences of Common areas and “legal practice”

Under section 19 of the STA, Strata Companies can execute a transfer or lease of common property (provided all persons concerned consent).

Drafting a lease or a licence is “legal work” under the LPA because drafting such documents requires skills beyond that of a lay person but also because they deal with and affect real or personal property or interests in them.

SAT Proceedings and “legal practice”

Applications, statutory declarations, affidavits and submissions in the SAT or for use in or about proceedings in the SAT (and other similar documents), require skills beyond that of a layperson. Such documents are also legal in nature and affect the legal rights of others.

Such activity is almost certainly “legal work” under section 12 of the LPA and, therefore, required to be completed by a legal practitioner.

Any statutory risk?

Strata Managers engaging in drafting and/or advising about Strata By-laws, off-the-plan contracts, leases, licences or other uses of Common Property and SAT proceedings are performing work that can accurately be described as “legal work” under Section 12(1) of the *Legal Profession Act*.

It is extremely unlikely that a Court would agree, if it was argued, that a Strata Manager could effectively copy and paste a By-law, inclusion in an off the plan contract or matter related to a SAT

hearing from 1 Strata Scheme to another without “turning their mind” to whether such a By-law or other inclusion was appropriate for use in the Strata Scheme.

Will the enactment of the proposed and expected amendments to the STA make a difference to the above conclusion?

The proposed amendments to the STA do not include any express authorisation allowing Strata Managers to engage in “legal work” as above defined.

However, those amendments will likely focus Proprietors and Strata Companies (and perhaps developers) minds about Strata Managers’ roles and obligations under the STA.

If so, it is likely that the expected amendments to the STA will, in turn, cause a deeper consideration of the above issues by Proprietors, Strata Company and Strata Managers.

Take care, and take advice.

If you require advice or assistance on the preparation of any legal document, or advice on any general Strata matter, please contact us at Park Legal Solutions on (08) 9221 6611 or at

