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Tony Sievers
Chair
Economic Policy Scrutiny Committee
GPO Box 3721
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Via email: EPSC@nt.gov.au

Dear Mr Sievers

Thank you for your query in relation to the Inquiry into the Agents and Land Legislation Amendment Bill 2018 that the Economic Policy Scrutiny Committee is conducting.

Please find attached the response to the questions raised by the Economic Policy Scrutiny Committee.

I note that the Committee wrote directly to the Department about this matter. I would ask, that all future correspondence between Departments and the Committee is directed through yourself as Chair to the relevant Minister's office.

This will allow a consistent and clear process for the public servants involved in providing information, and will also ensure the timeliness of the information provided to the Committee.

Please don't hesitate to contact my office on 89365610 if you require any further information.

Yours sincerely

Natasha

NATASHA FYLES

08 OCT 2018

NORTHERN TERRITORY GOVERNMENT

ECONOMIC POLICY SCRUTINY COMMITTEE
Informal Response to Preliminary Questions of 26 September 2018

Agents and Land Legislation Amendment Bill 2018

Department of the Attorney-General and Justice

Fidelity Fund

1. The DCLS expressed concern that financing the operating costs of the office of the Schemes Supervisor may reduce the funds available for tenancy advice and support in the NT, and proposed instead that the Schemes Supervisor be funded from a levy on body corporate management agencies "who stand to benefit from the role".

   The Law Society notes that a 2013 Report by the Department stated that the question "Should the Agents Licensing Act be amended so that one of the purposes for which monies of the Fidelity Fund established under that Act can be spent is that of establishing a dispute and advice service..." was to be the subject of a further report but is unaware of any such consultation. It further comments:

   > *The Society questions if sufficient nexus exists between the ALA and the UTSA, particularly having regard to the source of funds that have accumulated in the Fidelity Fund that would warrant the substantial repurposing of monies held in the Fidelity Fund as proposed. The beneficiaries of the information and conciliation services to form part of the revised scheme supervisor's role appear to be directed at body corporate managers and members of the general public who do not contribute to the Fidelity Fund, rather than benefiting the licensed agents who are a substantial source of the funds held in the Fidelity Fund.*

   The Committee may wish to seek the Department's comments on these views and in particular:

   a. *What is the rationale for the suitability of money from the Agents Licensing Fidelity Guarantee Fund being used to finance the Schemes Supervisor?*

In terms of nexus, monies comprising the Fund may be provided (on approval by the Minister) to registered training organisations and industry bodies for educational schemes, and improving regulatory compliance and the quality of services provided by persons regulated under the *Agents Licensing Act* (sections 92 and 93 respectively). Currently, monies are provided to the REINT for education and training activities of licensed agents.

Additionally, section 16 of the *Residential Tenancies Act* (RTA) enables the application of monies from the Fund (on approval of the Minister) to meet the costs of administering the RTA, educating landlords, agents and tenants about their rights and obligations, and providing tenancy advisory and legal services. DCLS and the Commissioner of Consumer Affairs receive annual grants from the Fund for those purposes.

Applying the Law Society's nexus to the current application of the Fund, the funding of DCLS' Tenancy Advice Service, notwithstanding the statutory provision of funding under the RTA, would be tenuous at best. Neither DCLS, nor the members of the general public who access those tenancy services, contribute to the Fund. DCLS' Tenancy Advice Service often act against those real estate agents who contribute to the Fund through their license fees (amongst other things). It is not suggested that the funding arrangements of DCLS' Tenancy Advice Service be changed.

The unit titles legislation regulates certain land dealings that result in close quarter community living arrangements with communal ownership of aspects of the real estate (land and buildings). The legislation requires that the communal aspects be managed by body corporates on behalf of the unit holders. Managers of those body corporates tend to have close affiliations with the real estate industry, either as licensed agents or members of the REINT.

Given that body corporate managers would benefit from the clarity and certainty that would come from the revised activities of the schemes supervisor (educational material, dispute resolution etc.), it seems appropriate, given the close nexus, that funding for those activities be derived from the Fund which those managers contribute to (i.e. the Agents Licensing Fidelity Guarantee Fund).

Likewise, there is a nexus between the provision of information to unit holders, as that information relates to their rights and obligations in terms of their specific consumption of real estate products. In this regard, unit holders are not 'the general public' at large (similar to tenants). It is also intuitive to note that the REINT, as the peak industry body, has been supportive of such an approach to funding of the expanded activities of the schemes supervisor.

b. *What alternative sources of funds were considered for the Schemes Supervisor and why were they not selected?*

There are a number of alternative funding options, including levies, and user pays. Given the nexus between the benefit that property/body corporate managers and the consumers of their services (unit holders) would receive, and the nature of the Fund (as noted in the response to question 1 (a) above), the Fund is considered to be the better vehicle.

Levies raised on body corporate managers would be passed on to unit holders through higher management fees, increasing costs to unit holders. Likewise, a user pays system (where parties, i.e. unit holders and body corporates, share the cost of dispute resolution or the cost of reviewing by-law amendments) would also increase cost exposures, particularly for unit owners on lower incomes, risking an increase in inequity.

c. *What impact might funding the Schemes Supervisor from the fund have on the funding of tenancy advice and support?*

There would be no impact unless there is a suggestion that DCLS' Tenancy Advice Service funding be varied due to limited nexus.

Funding of the schemes supervisor's revised functions is proposed to be provided for 2 years at which time the operation and impact of the schemes supervisor's revised functions are to be reviewed. That review will reassess funding from the Fund.

Appointment of Administrators

2. The Law Society notes that the Bill does not provide any criteria for the appointment or qualification of an Administrator by the Tribunal, despite the significant powers granted to such an appointee.

The Committee may wish to seek the Department's comments on:

a. *How does the Bill ensure that the delegation of the power of an administrator is only made to appropriate persons (this is an issue for the Committee's consideration under Sessional Order 13(4)(c)(iii)(C))?*

It is noted that the Law Society's question relates to the NTCAT appointing a person as an administrator of a body corporate. Such an appointment is not a delegation, it is a replacement.

In terms of the ability for an administrator to delegate its duties, functions and powers to another, that delegation power is in the usual form applied across the Territory's statute book. It is a matter for the person delegating a power to ensure it is done in a proper manner and given to an appropriate person. If a person with an estate or interest in a unit scheme was concerned about the exercise of the delegation to another person, they could make an application to remove the administrator.

It should be noted that the administrator does not have unfettered authority. Proposed section 98E limits the administrator to performing the body corporate's general day to day functions. The administrator is not able to carry out functions where an action would ordinarily require the unanimous vote of the body corporate membership. The administrator is also governed by directions provided to it by NTCAT under section 98E(3), and those directions would apply equally to anyone the administrator delegated authority to.

b. *Whether it would assist the Tribunal if the Bill was amended to provide criteria necessary to satisfy the appointment of an administrator and what qualifications that administrator may need to hold.*

The Law Society's question appears to be generally presupposing that the NTCAT is unable to make such an assessment when exercising its discretion. The proposed NTCAT functions were developed in consultation with the NTCAT, who are best placed to assess the level of guidance required.

The skills and qualifications of an administrator may necessarily be influenced by circumstances unique to the particular application. Prescribing considerations may inadvertently restrict the NTCAT's discretion when considering the suitability of the person put forth by the applicant. The proposed section 98B(3) requires the NTCAT to be satisfied that an order appointing an administrator is justified sufficiently, which compels the NTCAT to take all appropriate matters into consideration, including qualifications.

Review of By-laws

3. The DCLS commends the requirement for by-laws to be reviewed by the schemes supervisor, but recommends that proposed s 95B(4) be amended to include as a criteria for review that the by-law is not 'oppressive' to minority unit holders.

   The Committee may wish to seek the Department's comments at the appropriateness and practicality of including a criteria of whether a by-law is oppressive (I note that 'oppressive' is a term used in the *Unit Titles Schemes Act*).

   The term oppressive is somewhat prescriptive and limiting. The bar to establish that a by-law was tyrannical and overpowering would be very high. Unusual or unexpected, as is presently within proposed section 95B(4)(b), sets a lower bar that would necessarily capture oppressive by-laws – if they are oppressive, then it is more likely than not that they would be unexpected, and therefore unusual. Inclusion of the term oppressive in the same subsection would tend to reduce the broadness of 'unusual or unexpected' as they would then be considered in the vein of oppressiveness.