

2018

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

Agents and Land Legislation Amendment Bill 2018

SERIAL NO. 57

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Agents and Land Legislation Amendment Bill 2018 makes amendments:

- (a) to the *Agents Licensing Act* to provide for the annual audit of the Agents Licensing Fidelity Guarantee Fund of the Northern Territory (the Fund) established under section 94 of the *Agents Licensing Act*;
- (b) to the *Agents Licensing Act* to provide for the addition of two additional members of the Fund (namely persons appointed by the Minister on the recommendation of the Chief Executive Officer of the Department of Treasury and Finance and of a person who is a member of a relevant industry body);
- (c) to the *Agents Licensing Act* to provide for the appointment of alternative members of the Fund;
- (d) to the *Agents Licensing Act* to provide for an offence for a member of the Fund to participate in a matter before the Fund where there is a conflict of interest;
- (e) to the *Unit Titles Act* and the *Unit Title Schemes Act* to provide processes oversights by the scheme supervisor and the Northern Territory Civil and Administrative Tribunal (NTCAT) for the making of by-laws made after the registration of the relevant units plans under those Acts (including making by-laws without the need for tabling as subordinate legislation and without, in the case of units under the *Unit Title Schemes Act*, the need to amend the scheme statement for the land);
- (f) to the *Interpretation Act*, *Unit Titles Act* and *Unit Title Schemes Act* that provide for the validation of by-laws made before the commencement of the legislation in circumstances where the by-laws may not have been provided to the relevant Minister for the purposes of section 63 of the *Interpretation Act*;
- (g) to the *Unit Title Schemes Act* to provide for the scheme supervisor to have a role in providing informational materials to the public and in providing conciliation service;
- (h) to the *Unit Title Schemes Act* to provide for the funding of the scheme supervisor's role from the Fund;
- (i) for the *Unit Title Schemes Act* to provide that NTCAT can appoint an administrator to manage a dysfunctional body corporate;
- (j) for the amendment of the *Northern Territory Civil and Administrative Tribunal Act* so as to set out that the internal review provisions of that Act operate subject to contrary provisions in other legislation;

- (k) drafting of offences in the *Agents Licensing Act* concerning disclosures of interests (and for them to be drafted in accordance with Part IIAA of the Criminal Code);
- (l) for various amendments of a statute law revision nature to the *Agents Licensing Act* and the *Termination of Units Plans and Unit Title Schemes Act*.

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1. Short title

This is a formal clause, which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Agents and Land Legislation Amendment Bill 2018*.

Clause 2. Commencement

This is a formal clause that provides that the commencement of the Bill will occur on a day fixed by the Administrator.

Part 2 Amendment of *Agents Licensing Act*

Clause 3. Act amended

This clause provides that Part 2 amends the *Agents Licensing Act*.

Clause 4. Section 22A amended (Board may approve course of competency-based training)

This clause makes a statute law correction so that the reference in section 22A to the abolished Northern Territory Education and Training Authority is replaced by a reference to the Chief Executive Officer responsible for the *Training and Skills Development Act*.

Clause 5. Section 31B amended (Board may approve course of competency based training)

This clause makes a statute law correction so that the reference in section 31B to the abolished Northern Territory Education and Training Authority is replaced by a reference to the Chief Executive Officer responsible for the *Training and Skills Development Act*.

Clause 6. Section 94 amended (Establishment of Fund)

This clause amends section 94 so that the Fund established under section 94 must cause its accounts to be prepared in accordance with Australian Accounting Standards and that the audit report must be forwarded to the Minister before 30 June.

This new section is drafted having regard to the fact that the Fund's financial year runs from 1 April to 31 March.

Clause 7. Section 95 replaced

This clause provides for the repeal and replacement of section 95 by new sections 95 and 95AA.

95 Members of the Fund

New section 95 provides that the Fund is to be comprised of the Registrar, the Chairperson of the Board, a person with financial expertise appointed by the Minister, a person appointed

by the Minister on the recommendation of the Chief Executive Officer of the Department of Treasury and Finance and a member of an industry body appointed by the Minister.

95AA Alternate members

New section 95AA provides that the Minister can appoint alternate members for the members of the Fund. An alternate member can act as a member of the Fund if the relevant member is prevented from performing the duties of the position, the operation of section 95AB (conflict of interest) or any other cause considered by the Registrar to be sufficient.

Clause 8. Section 95A amended (Meetings of the Fund)

This clause amends section 95A by specifying that a quorum for a meeting of the Fund is three members.

Clause 9. Section 95AB inserted

This clause provides for new section 95AB.

95AB Conflict of interest of member

New section 95AB provides for conflicts of interests of members of the Fund. It is an offence for a member to intentionally participate in a deliberation or decision of the Fund when the person has knowledge of a direct or indirect interest in a matter.

The maximum penalty for breach is 100 penalty units.

Strict liability applies in respect of factual elements of the offence.

The clause also provides that Part IIAA of the Criminal Code applies to the offence.

Clause 10. Section 122 repeal (Service of documents)

Section 122 provides for the service of documents. It is currently deficient because it does not refer to agent's representatives. It is also unnecessary because a similar provision is contained in the *Interpretation Act* (section 25). The *Interpretation Act* provision is preferred because it is couched in broader terms so that, for example, it applies to service of document on both agents and agents representatives. Accordingly, section 122 is to be repealed.

Part 3 Amendment of *Interpretation Act*

Clause 11. Act amended

This clause provides that Part 3 amends the *Interpretation Act*.

Clause 12. Section 63 amendment (Procedure for making subordinate legislation)

This clause amends section 63 so as to specify that failure to comply with section 63(2) (requirements to table subordinate legislation) before the new section 63(2A) commences does not affect the validity of, or operation of, the by-law. This amendment only affects by-laws made under the *Unit Titles Act* or under the *Unit Title Schemes Act*.

Part 4 Amendment of *Northern Territory Civil and Administrative Tribunal Act*

Clause 13. Act amended

This clause provides that Part 4 amends the *Northern Territory Civil and Administrative Tribunal Act*.

Clause 14. Section 140 amended (Review of original decision)

Currently section 140 operates so that there is a right for an internal review by NTCAT of decisions made by NTCAT except if there is a regulation that provides that there is no such right. This clause amends section 140(1A) so that it is clear that other legislation can also exclude the right to an internal review (as proposed by clause 24, new section 98A, concerning the jurisdiction of NTCAT regarding the administration of bodies corporate).

Part 5 Amendment of *Termination of Units Plans and Unit Title Schemes Act***Clause 15. Act amended**

This clause provides that Part 5 amends the *Termination of Units Plans and Unit Title Schemes Act*.

Clause 16. Section 7 amended (Termination by resolution)

This clause corrects a typographical error contained in section 7. Section 7 is intended to provide that a unit title arrangement under either the *Unit Titles Act* or the *Unit Title Schemes Act* can be terminated if all of the owners of the units agree. However, the section has been drafted so that, literally, it only applies to units that form part of a scheme (under the *Unit Title Schemes Act*).

The correction involves replacing the words 'the scheme' with the word 'it'. The effect is that section 7 will then apply to all unit title developments.

Part 6 Amendment of *Unit Title Schemes Act***Clause 17. Act amended**

This clause provides that Part 6 amends the *Unit Title Schemes Act*.

Clause 18. Section 12 amended (Changes to scheme statement)

This clause provides for the deletion of a note concerning changes to by-laws. The note will become unnecessary when the proposed enactment of sections 95A-95E takes effect (see clause 23 of this Bill). When that occurs there will no longer be any requirement to amend the scheme statement.

Clause 19. Section 20 amended (Responsibilities relating to registration of scheme statement)

This clause provides for the removal of a note and the inclusion of a new note to section 20(4). The current note refers to section 93(7). That provision is being repealed by this Bill with the consequence that that aspect of the note is no longer required.

Clause 20. Section 21 amended (Decision of body corporate to endorse scheme statement)

This clause provides for the removal of a note to section 21(4). The current note refers to section 93(7). That provision is being repealed by this Bill with the consequence that that aspect of the note is no longer required.

Clause 21. Section 85 amended (Application for resolution of disputes)

This clause provides for the repeal of section 85(4). That subsection provides that Part 3.3 (dealing with disputes) does not affect any other remedy that the parties might possess. The subsection is unnecessary. Accordingly it is being repealed.

Clause 22. Section 86 amended (Tribunal to resolve dispute)

This clause provides for the repeal and replacement of section 86(3). Currently section 86(3) provides that it is an offence for a body corporate to fail to lodge with the Registrar-General a copy of amendments to by-laws. The effect of this clause is to provide a time limit (20 working days) of when the order must be lodged. The working days terminology has been used so as to maintain consistency with the rest of the *Unit Title Schemes Act*.

Clause 23. Sections 95A to 95D inserted

This clause provides for new sections 95A, 95B, 95C and 95D.

95A Amendments to by-laws

This proposed section sets out the key obligations for amending or revoking a by-law contained in schedule 2 or a by-law that was registered as part of the registration of a scheme statement. Those obligations are:

- the need for a 'special resolution' (see section 79 of the *Unit Title Schemes Act*);
- the need for the amendment of the scheme statement to be certified by the schemes supervisor; and
- lodgement of the amending by-law with the Registrar-General.

Proposed sections 95A to 95D do not apply to the making of the by-laws that are contained in the original scheme statement.

95B Review and certification of by-law amendments

This proposed section sets out that a body corporate proposing to make a by-law:

- must, at the direction of the schemes supervisor, submit a proposed by-law to the schemes supervisor; and
- in other circumstances, may submit the by-law for consideration by the schemes supervisor; and
- must pay a prescribed fee.

Proposed amendments to by-laws can take the form of a consolidation of the amendment and the current by-law.

The duties of the schemes supervisor when considering a by-law are set out in proposed section 95B(4). The scheme supervisor must have regard to whether the by-law is authorised by the Act, does not constitute an unusual or unexpected use if that authority and that it is has an appropriate form, style and consistency with the by-law being amended. The scheme supervisor has 20 working days to consider certification. If a decision is not made within time the scheme supervisor is considered to have refused to certify the by-law.

95C Lodgement of by-law amendments

This new section imposes a duty on the body corporate to lodge with the Registrar-General any amending by-laws. The by-laws cannot be lodged unless certified by the scheme supervisor.

95D Review by Tribunal

This new section provides that NTCAT can, on application from the body corporate representative of the body corporate or a member of the body corporate, review any refusal of the scheme supervisor to certify the by-laws.

Clause 24. Sections 97 and 98 replaced

This clause provides for the repeal of sections 97(exclusive use by-laws) and 98 review of exclusive use by-laws) and the enactment of new sections 97, 98, 98A, 98B, 98C, 98D, 98E and 98F.

97 Exclusive use by-laws

Section 97 has been re-drafted so as to provide for the amending or making of exclusive use by-laws without the need to replace the entire scheme statement (which is how the current legislation operates - see section 12).

This new section replaces current section 97. It provides a definition of 'exclusive use by-law' and that, as a general rule, an amendment to an exclusive use by-law can only be made by unanimous resolution. The exception is where the amendment relates to exclusive use rights allocated to a body corporate manager, a service contractor or a letting agent. If such a unit owner agrees an ordinary resolution will be sufficient. Section 97(6) provides that new sections 95A to 95D apply to the making of amendments to exclusive use by-laws.

Section 97(8) and (9) provides that it is a strict liability offence for a body corporate to fail to lodge amended by-laws within 20 working days of the certification of them.

98 Tribunal order regarding exclusive use by-laws

Section 98 has been re-drafted so as to take account of the re-drafting of section 97. The new section maintains the right of an appeal from a refusal of a body corporate manager, a service contractor or a letting agent to consent to an amendment of an exclusive use by-law that benefits them.

Division 3 Administrator of bodies corporate**98A Jurisdiction of Tribunal**

This new section provides that NTCAT has original decision regarding the administration of bodies corporate. The provisions mirror those in Part VII of the *Unit Titles Act*. The section also provides that the internal review provisions of the *Northern Territory Civil and Administrative Tribunal Act* do not apply to matters under Division 3.

98B Appointment of administrator

This new section provides that a body corporate, a creditor in a person with an interest in a unit scheme may apply to NTCAT for the appointment of an administrator. The proposed section is based on section 90 of the *Unit Titles Act*.

If satisfied that there is a need for an administrator, NTCAT can appoint a person and fix the terms and conditions of appointment. The costs of the appointment are considered to be expenses incurred by the body corporate.

98C Removal or replacement of Administrator

This new section provides for NTCAT to give directions that an order made under sections 98B or 98C be given to the body corporate and the Registrar-General.

The proposed section is based on section 91 of the *Unit Titles Act*.

98D Notice to Registrar-General and corporation of order

This new section provides that the administrator or the body corporate, a creditor or a person with an interest in a unit scheme may apply to NTCAT for the removal or replacement of the administrator.

The proposed section is based on section 92 of the *Unit Titles Act*.

98E Duties, functions and powers of Administrator

This new section provides that the administrator is to perform the role of the body corporate to the exclusion of the body corporate and the body corporate's committee. The administrator can only perform acts requiring unanimous resolutions with the consent of NTCAT.

The proposed section is based on section 93 of the *Unit Titles Act*.

98F Administrator may delegate duties, functions and powers

This new section provides that the administrator may delegate roles.

The proposed section is based on section 94 of the *Unit Titles Act*.

Clause 25. Section 100 replaced

This clause provides for the repeal and re-enactment of section 100 (functions of the schemes supervisor).

100 Functions of schemes supervisor

Proposed section 100 provides for the functions of the schemes supervisor. Those functions including providing educational and informational materials to the public, providing conciliation services and performing other functions given by any legislation.

In performing the educational and informative functions the schemes supervisor must consult with the Real Estate Institute of Northern Territory, the Law Society Northern Territory and any other bodies determined by the Minister.

The differences between new section 100 and current section 100 relate to the education/information and conciliation functions.

Clause 26. Section 102A inserted

This clause inserts new section 102A into the *Unit Title Schemes Act*.

102A Using the Agents Licensing Fidelity Guarantee Fund

New section 102A provides that the Minister responsible for the *Agents Licensing Act* may make arrangements for the use of monies from the Agents Licensing Fidelity Guarantee Fund for the purposes of meeting the operating costs of the office of the schemes supervisor.

These arrangements can only be made after the Minister has consulted with the Agents Licensing Fidelity Guarantee Fund, the Commissioner of Consumer Affairs and any other bodies that represent the interest of developers, bodies corporate and unit owners.

Clause 27. Section 108 amended (Regulations)

This clause provides for the correction of section 108(2)(c) which currently contains a reference to codes of practice. The correct terminology is 'codes of conduct' as that is the terminology used elsewhere in the Act.

Clause 28. Part 4.5 inserted

This clause provides new Part 4.5. This part provides for transitional matters concerning the *Unit Title Schemes Act* arising from the *Agents and Land Legislation Amendment Act 2018*.

Part 4.5 Transitional matters for *Agents and Land Legislation Amendment Act 2018*

117 Definitions

New section 117 provides for definitions of 'by-law' and 'commencement'.

118 Validity of prior by-laws

This new section provides that, as a general rule, all by-laws made under the *Unit Title Schemes Act* are valid despite any failure to comply with the provisions of section 63 of the *Interpretation Act* regarding providing subordinate legislation to the Minister for the purposes of the tabling of it in Parliament.

119 Review of prior by-laws

A person affected by a by-law validated as referred to in new section 118 may submit the by-law for review by the schemes supervisor. In reviewing the by-law the schemes supervisor must take into account the factors set out in proposed section 95B(4). Reviews of any decision of the schemes supervisor can be carried out by NTCAT and, in turn, the Supreme Court. A by-law only becomes invalid at the end of any possible procedures with NTCAT or the Supreme Court.

Part 7 Amendment of *Unit Titles Act*

Clause 29. Act amended

This clause provides that Part 7 amends the *Unit Titles Act*.

Clause 30. Section 4 amended (Interpretation)

This clause provides for a definition of 'schemes supervisor' to be inserted. The definition is necessary for the purposes of new sections 79AA and 79AE.

Clause 31. Part VAA inserted

This clause provides for the insertion of Part VAA.

Part VAA review and lodgement of by-laws

79AA Requirements for by-laws

This clause provides that Part VAA applies to by-laws made by estate management corporations and building management corporations.

This clause provides for new sections 79AA, 79AB, 79AC, 79AD and 79AE.

79AA Amendments for by-laws

This proposed section sets out the key obligations for the making, amending or revoking a by-law under the Act. The key requirements are:

- the need for certification by the scheme supervisor; and
- lodgement of the by-law with the Registrar-General.

Under the *Unit Titles Act* by-laws can be made by estate management corporations (under section 26ZD) and by building management corporations (under section 26ZZA).

79AB Review and certification of by-laws

This proposed section sets out that a body corporate proposing to make a by-law:

- must, at the direction of the schemes supervisor, submit a proposed by-law to the schemes supervisor; and
- in other circumstances, may submit the by-law for consideration by the schemes supervisor; and
- must pay a prescribed fee.

Proposed amendments to by-laws can take the form of a consolidation of the amendment and the current by-law.

The duties of the schemes supervisor when considering a by-law are set out in proposed section 79AB (4). The scheme supervisor must have regard to whether the by-law is authorised by the Act, does not constitute an unusual or unexpected use if that authority and that it is has an appropriate form, style and consistency with the by-law being amended. The scheme supervisor has 28 ordinary days to consider certification. If a decision is not made within time the scheme supervisor is considered to have refused to certify the by-law.

79AC Lodgement of by-laws

This new section imposes a duty on the body corporate to lodge within 28 ordinary days with the Registrar-General any amending by-laws. The by-laws cannot be lodged unless certified by the scheme supervisor. The period of time for the days has set by reference to ordinary days rather than business days or working days so as to maintain consistency with the time periods set out in the rest of the *Unit Titles Act*.

79AD Review by the Tribunal

This new section provides that NTCAT can, on application from the body corporate representative of the body corporate, review any refusal of the scheme supervisor to certify the by-laws.

Clause 32. Section 106 amended (resolution of disputes, &c.)

Clause 32(1) amends the heading of section 106 so as to reflect current drafting practice. Clause 32(2) amends section 106 so that it is that the provisions of section 106 regarding dispute under the articles of bodies corporate also apply to disputes under by-laws.

Clause 33. Part XIV inserted

This clause provides for new Part XIV.

This Part provides for transitional matters concerning the *Unit Titles Act* arising from the *Agents and Land Legislation Amendment Act 2018*.

Part XIV Transitional matters for Agents and Land Legislation Amendment Act 2018**120 Definitions**

New section 117 provides for definitions of 'by-law' and 'commencement'.

121 Validity of prior by-laws

This new section provides that, as a general rule, all by-laws made under the *Unit Titles Act* are valid despite any failure to comply with the provisions of section 63 of the *Interpretation Act* regarding providing subordinate legislation to the Minister for the purposes of the tabling of it in Parliament.

122 Review of prior by-laws

A person affected by a by-law validated as referred to in new section 121 may submit the by-law for review by the schemes supervisor. In reviewing the by-law the schemes supervisor must take into account the factors set out in proposed section 79AB(4). Reviews of any decision of the schemes supervisor can be carried out by NTCAT and, in turn, the Supreme Court. A by-law only becomes invalid at the end of any possible procedures with NTCAT or the Supreme Court.

Part 8 Repeal of Act**Clause 34. Repeal of Act**

This is a standard clause for parts of legislation which consists entirely of amendments to other legislation. It provides that the Act ceases to have effect once it has performed its function of repealing or amending the other legislation.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3) as adopted on 24 August 2017.

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) – namely:

- the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965;
- the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966;
- the International Covenant on Civil and Political Rights done at New York on 16 December 1966;
- the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979;
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984;
- the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); and
- the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006.

OVERVIEW OF THE BILL

The Bill provides the framework for the establishment of an information and conciliation service to be operated by the schemes supervisor and funded from the Agents Licensing Fidelity Guarantee Fidelity of the Northern Territory (the Fund). The Bill also reforms the process for the making of by-laws under the unit titles Acts and to validate certain by-laws.

The Bill also reforms the governance provisions concerning the Fund. It provides for the annual audit of the Fund, the addition of two members of the Fund (namely persons appointed by the Minister on the recommendation of the Chief Executive Officer of the Department of Treasury and Finance and of a person who is a member of a relevant industry body), the appointment of alternative members of the Fund and that it is an offence for a member of the Fund to participate in a matter before the Fund where there is a conflict of interest (and for it to be drafted in accordance with Part IIAA of the Criminal Code).

HUMAN RIGHTS IMPLICATIONS

The Bill does not engage any of the applicable rights and freedoms.

CONCLUSION

This Bill is compatible with human rights.