

Better Buyer Information

Every buyer of a lot in a strata titles scheme (which can be a strata scheme or a survey-strata scheme) in Western Australia (WA) should receive information about the strata scheme before they sign a contract (the offer and acceptance). It is very important the right information is provided to a buyer before they purchase a property. Strata owners are subject to by-laws, unit entitlement, common property and common agreements. These aspects of strata will impact on the use, ownership and obligations of the owner. Giving buyers information about strata ensures that a buyer understands they are buying a property that has different rules and obligations to a non-strata property.

The seller must also give the buyer information about certain variations (changes) to the scheme as they happen after the buyer signs the contract and before settlement.

Under the current *Strata Titles Act 1985* (the Act) if the seller sells the lot off-the-plan, the buyer's deposit must be held by a solicitor, real estate agent or settlement agent and the plan must be registered within six months (or in the timeframe set out in the contract).

The reforms aim to:

- give the most relevant information to a buyer
- set out the information in a clear way
- make sure the buyer knows where they can get more information
- make sure the obligation on the seller to provide information is reasonable
- clarify on what grounds a buyer can avoid the contract if the seller fails to provide the information to the buyer.

The current law: Information the seller must give the buyer

Under the current Act the seller must give the buyer:

- a copy of the strata plan
- details of the unit entitlement
- by-laws
- other general information.

Where the seller is the original proprietor they also have to give the buyer information about service contracts, levies and dispositions of the common property.

The original proprietor is the person who is registered as the owner when a strata plan is first registered (in most cases this is the developer who developed the scheme).

After the reforms: Information the seller will need to give to the buyer

The following information relating to the strata titles scheme must be provided to the buyer before the contract is signed:

- the scheme notice, scheme plan, scheme by-laws (including those not yet registered) and schedule of unit entitlements
- the strata lease for the lot, if it is a leasehold scheme
- the name and address for service of the strata company
- one of the following, in relation to the minutes:
 - minutes of the most recent annual general meeting and any extraordinary general meetings held since then
 - a statement that the strata company does not keep minutes of its meetings; or
 - a statement that the seller has been unable to get a copy of the minutes, and the reason why
- one of the following, in relation to a statement of accounts:
 - the last statement of accounts
 - a statement that the strata company does not prepare a statement of accounts
 - a statement that the seller has been unable to get a statement of accounts, and the reason why
- If the seller has received notice of a current termination proposal, a copy must be given to the buyer.

The seller must also give the buyer specific information about the lot before the contract is signed, including:

- the location of the lot on the scheme plan
- the definition (boundaries) of the lot, as contained in the scheme plan
- the unit entitlement of the lot, in addition to the sum of the unit entitlements of all the lots in the scheme
- contributions that will be payable by the owner (amount and due date), if this has been determined by the strata company in the last year, but if not, a reasonable estimate of these details after the proposed settlement date
- details of any debt owed by the owner of the lot to the strata company including how the debt arose, the date and the amount outstanding
- details of any exclusive use by-laws that apply to the lot
- other information required by the regulations.

If the lot has not yet been created, the information which is required is:

- the latest version of any draft scheme documents (scheme notice, scheme plan, scheme by-laws and schedule of unit entitlements), with any amendments, relevant to the lot
- a reasonable estimate of unit entitlement, and any other matter, such as contributions payable, which are relevant to the lot as proposed.

Information to be given where the seller is a scheme developer

Certain extra information is required in any of the following circumstances:

- the strata titles scheme has not been registered
- the first annual general meeting has not been held
- the scheme developer owns 50% or more of the lots in the strata titles scheme
- the scheme developer owns lots with a total unit entitlement of 50% of the scheme aggregate.

If the above circumstances apply and the scheme developer is the seller, the buyer must be given all of the following additional information:

- a statement of the estimated income and expenditure of the strata company for the 12 months after the proposed settlement date
- details of any required disclosure that the scheme developer has to make to the strata company, (for example in relation to remuneration or other benefit arising from a contract, lease or licence entered into)

- details of any existing or proposed contract for the provision of services or amenities to the strata company or its members, arranged by the scheme developer or the strata company, including its terms and conditions, the consideration and the estimated costs to the members of the strata company
- details of the terms and conditions of any lease, licence, right of exclusive use and enjoyment or special privilege (or proposed lease, licence, right of exclusive use and enjoyment or special privilege) over common property.

In all cases, the seller must give the buyer the information in the approved form or include it in the contract in the manner set out in the regulations.

In any court or tribunal proceedings connected with a contract for the sale of a lot, it is the seller who must prove that the required information was given.

Disclosure forms

Changes to the format of the disclosure forms

New disclosure forms will be developed for strata and survey-strata schemes. There will also be new disclosure forms developed for leasehold schemes and community title schemes. The new disclosure forms will be clearly set out, easy to read, and will give the buyer some guidance on relevant issues they might want to consider.

The seller will be able to give the buyer the information electronically

The seller will be able to provide the disclosure electronically as long as:

- the seller and buyer both agree to that method of providing the information
- the buyer gives the seller an electronic address to send the information to
- the buyer provides some acknowledgement that they have received the information.

The seller will still have to prove what and when files were sent to the buyer and keep records of the disclosure they provide electronically.

Notifying buyers of a certain variations before settlement

What are notifiable variations?

After the buyer and seller have signed a contract to transfer a lot in a strata or survey-strata scheme, if certain changes occur, the seller has to tell the buyer.

Under the current *Strata Titles Act 1985* the seller has to tell the buyer about changes to:

- agreements for amenity or service with the strata company
- the by-laws
- a material particular on the strata plan
- the individual and aggregate unit entitlement
- any rights over the common property.

These items are referred to as “notifiable variations”.

Currently the seller must tell the buyer about these notifiable variations as soon as the seller becomes aware of the change.

Under the current *Strata Titles Act 1985* the seller must tell the buyer if there is any change to the plan or unit entitlement between when the contract is signed and when settlement happens. This can mean that a buyer might be able to get out of a contract if there is a change to the plan that impacts on a lot on the other side of the scheme but doesn't have any direct impact on them.

Reform to notifiable variations

Notifiable variations will be made up of two classes: Type 1 and Type 2 notifiable variations.

Type 1 variation

A type 1 notifiable variation means any of the following that occur after a contract for the sale and purchase of a lot in a strata titles scheme is entered into but before the settlement date for the contract:

- a. the area or size of the lot or proposed lot is reduced by 5% or more from the area or size notified to the buyer before the buyer entered into the contract
- b. the proportion that the unit entitlement, or a reasonable estimate of the unit entitlement, of the lot bears to the sum of the unit entitlements of all the lots is increased by 5% or more, or decreased by 5% or more, from the proportion that the unit entitlement, or the estimate of the unit entitlement, of the lot notified to the buyer before the buyer entered into the contract bears to the sum of the unit entitlements of all the lots as so notified
- c. anything relating to a proposal for the termination of the strata titles scheme is served on the seller by the strata company
- d. any other event classified by the regulations as a type 1 notifiable variation.

Type 2 variation

A type 2 notifiable variation means any of the following that occur after a contract for the sale and purchase of a lot in a strata titles scheme is entered into but before the settlement date for the contract and that do not give rise to a type 1 notifiable variation:

- a. the scheme plan, or proposed scheme plan or amendment of the scheme plan, for the strata titles
- b. scheme is modified in a way that affects the lot or the common property
- c. the schedule of unit entitlements, or proposed schedule of unit entitlements or amendment of the schedule of unit entitlements, for the strata titles scheme is modified in a way that affects the lot
- d. the scheme by-laws, or proposed scheme by-laws, are modified
- e. the strata company or a scheme developer:
 - (i) enters into a contract for the provision of services or amenities to the strata company or to members of the strata company or a contract that is otherwise likely to affect the rights of the buyer or
 - (ii) varies an existing contract of that kind in a way that is likely to affect the rights of the buyer
- f. a lease, licence, right or privilege over the common property in the strata titles scheme is granted or varied
- g. any other event classified by the regulations as a type 2 notifiable variation.

The seller must give the buyer sufficient information

Currently the seller has to give the buyer 'full particulars' about the notifiable variation. Sellers and buyers are often confused about what full particulars are.

The reforms will require the seller to tell the buyer enough information about the notifiable variation for the buyer to figure out if they have been negatively impacted by the change (ie: have they been materially prejudiced?).

The seller must tell the buyer about the variation within ten working days

Under the current *Strata Titles Act 1985* the seller has to tell the buyer about the change as soon as they find out about it. This has led to buyers avoiding a contract, claiming they were not notified within minutes of the seller finding out.

The reforms will provide that if a notifiable variation arises, the seller must let the buyer know:

- as soon as practicable, if the seller becomes aware of it less than 15 working days before the settlement date

- not more than 10 working days after becoming aware it, in any other case.

If a court or tribunal proceeding arises in relation to a notifiable variation which happens after the contract is signed, it is the seller who has to prove that proper notice was given to the buyer.

Substantial compliance

The reforms will require the seller to substantially comply with the requirement to give the notifiable variations to the buyer within 10 days.

Notifiable variations listed in the contract

If the seller uses the contract to inform a buyer of a potential change before settlement, the seller will need to confirm with the buyer if the variation actually happens.

The current *Strata Titles Act 1985* already allows the seller to give the buyer notice in writing that there may be a variation in the future. Currently if the variation matches what was in the original notice, the seller doesn't have to tell the buyer about it again. Currently, seller use the contract to list possible variations.

The reforms will provide that if the contract contains a list of possible notifiable variations and:

- a. one of those notifiable variations occurs and
- b. the seller gives the buyer notice that such a notifiable variation has occurred (within 10 working days after the seller is aware that the notifiable variation has occurred) and
- c. The notice contains sufficient details to enable buyer to make an informed assessment whether the notifiable variation that occurred matches the notifiable variation listed in the contract,

then the buyer will have no avoidance right as a result of the notifiable variation.

Community title schemes: variation to the Community Development Statement

The seller of a lot in a community title scheme will tell the buyer about any of the amendment to the Community Development Statement (CDS).

Leasehold schemes: changes to the lease, or any proposals for change

The seller of a lot in a leasehold scheme will have to tell the buyer about all the same variations that the seller of a lot in a freehold strata / survey-strata scheme would tell a buyer.

Delay in settlement

A buyer may, by written notice to the seller, postpone the settlement date if:

- the seller did not provide all of the required information before the contract was signed; or
- a notifiable variation arises and the seller didn't comply with the notification requirements.

When does a buyer have the right to avoid a contract?

Avoidance for failure to give the pre-contractual information to the buyer

Reforms will mean that if the seller fails to give the buyer the information required to be given prior to the contract being signed, the buyer may avoid the contract if the buyer has suffered material prejudice (ie. the buyer would be adversely affected).

If the seller gives the buyer the pre-contractual information after the contract is signed (ie: later than the seller was required to by the Act), then the buyer must decide within 15 working days of receiving that late notice of the pre-contractual information if they want to avoid the contract and the buyer will also have to prove that they have suffered material prejudice.

Avoidance arising from notifiable variations

Currently, a buyer can avoid the contract where:

- the seller fails to tell the buyer of the notifiable variation or
- the seller does tell the buyer of the notifiable variation within the required time and the buyer is then able to prove that they would suffer material prejudice as a result of the change.

Under the reforms, a buyer will have avoidance rights arising from the notifiable variations as set out in Table 1 Notifiable variations and avoidance rights.

When Notice is Given	Type 1 Notifiable Variation Avoidance	Type 2 Notifiable Variation Avoidance
If seller gives the buyer notice (of the notifiable variation) within the time required by the Act: 10 working days of variation or if within 15 working days of settlement, immediately.	Buyer may avoid the contract within 15 working days of notification provided the buyer: a. has not already agreed to the notifiable variation in the contract, and b. the buyer is materially prejudiced by the notifiable variation	
If notice of notifiable variation has not been given by the seller to the buyer	Buyer may avoid the contract at any time before settlement (no need to prove material prejudice)	Buyer may avoid the contract any time before settlement provided buyer is materially prejudiced by the notifiable variation.
If notice of the notifiable variation is given late	Buyer may avoid the contract within 15 working days of receiving notice	Buyer may avoid the contract within 15 working days of receiving notice, provided buyer is materially prejudiced by the notifiable variation

Table 1 Notifiable variations and avoidance rights

Buyer’s obligations when avoiding a contract

Information in the notice to avoid a contract

If the buyer gives the seller notice they want to avoid the contract, the notice must set out information about why the buyer is avoiding the contract.

Notice of intention to avoid the contract

Reforms will specify the buyer will have 15 working days, from the time they find out about a change (variation), to give the seller notice that they are avoiding the contract. Under the current Act the period is only seven working days, however feedback indicated this does not give the buyer enough time to consider their position, seek advice if necessary, and put their reasons for avoiding in writing.

Buying off-the-plan: Deposits

The current *Strata Titles Act 1985* requires that if the seller sells a lot off-the-plan, any deposit the buyer pays must be paid to a solicitor, real estate agent or settlement agent, to hold it in trust for the buyer, until the plan is registered. Reforms will clarify this to mean that 'solicitor' is an Australian Legal Practitioner (as is the definition in the *Legal Profession Act 2008*).

Getting information from the strata company

Under the current *Strata Titles Act 1985* (the Act) an authorised person can request information from the strata company. In most cases the strata council or strata manager supply the information on behalf of the strata company. The list of information that can be requested from the strata company is in the Act and includes meeting minutes, schematics for the building, resolutions, dealings with the common property and other documents. Accessing this information attracts a fee listed in the regulations.

Who is an authorised person?

The reforms will provide that an authorised person is an owner, a mortgagee, a buyer who has entered into a contract to buy a lot or someone with written authorisation from an owner, buyer or mortgagee.

Copy of the maintenance plan

The reforms will require strata companies for larger schemes (a scheme that has 10 or more lots or a scheme that has a high building replacement value as set out in the Regulations) to prepare a maintenance plan every ten years (such a maintenance plan may guide the strata company in deciding how much money they need to set aside in the reserve fund). The reforms will also require larger strata companies to provide a copy of the maintenance plan if an authorised person makes a request for that information.

Access to legally privileged documents

A strata company must keep certain records, but some of these records may include privileged legal advice to the strata company. The reforms will make it clear that the strata company is not required to allow an authorised person to see a document if the strata company believes the document contains privileged legal advice.

Defence for providing access to information containing defamatory material

The reforms will provide that where a person is required by the Act to provide information relating to the strata company to an authorised person, the person who provides the information will have a defence from any claim for defamation.

A buyer in a community title scheme can access information from the community corporation

An authorised person in a community title scheme will be able to request additional information from the community corporation for their scheme in the same way an authorised person can in a strata scheme.

Buyer information for Community Titles Schemes

Information every seller will need to give to a buyer in a community title scheme

The seller of a lot in a community titles scheme will have to give a buyer the same information that strata lot owners have to give, as it applies to the community title scheme. In a community title scheme the seller will also have to give a buyer a copy of the Community Development Statement.

A seller can authorise a buyer to ask for information and certificates

A seller can give a prospective buyer written authorisation to inspect community corporation records and ask for certificates verifying certain information. A seller will be able to do this for a lot in a community title scheme.¹

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¹ Disclaimer

This information has been prepared for the purposes of informing stakeholders and the community on the nature and scope of the proposed reforms to the legislation relating to strata title. Every effort has been made to ensure the information presented is accurate at the time of publication. Because this information avoids the use of legal language, information about the law may have been summarised or expressed in general statements. This information should not be relied upon as a substitute for professional legal advice or reference to the actual or proposed legislation. The contents should not be relied on as a guide for current or future legislation relating to strata title in Western Australia or in relation to current or future subdivision or development proposals, commercial transactions or dealings in strata title.