

**2020**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**PLANNING AND UNIT TITLES LEGISLATION AMENDMENT BILL  
2020**

**EXPLANATORY STATEMENT**

**and**

**HUMAN RIGHTS COMPATIBILITY STATEMENT**

*(Human Rights Act 2004, s 37)*

**Presented by**  
**Mr Mick Gentleman MLA**  
**Minister for Planning and Land Management**



## **PLANNING AND UNIT TITLES LEGISLATION AMENDMENT BILL 2020**

This Bill is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

### **Introduction**

This explanatory statement relates to the *Planning and Unit Titles Legislation Amendment Bill 2020* (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

### **Background**

The Bill is an omnibus bill to enable minor legislative amendments related to the portfolio responsibilities of the Environment, Planning and Sustainable Development Directorate (EPSDD) to be dealt with expediently and to consolidate amendments into one place, making the amendment process more accessible. The omnibus bill process helps the government to be agile and responsive to changing circumstances and to make sure that legislation remains clear, concise and up to date.

## **OVERVIEW OF THE BILL**

The purpose of the Bill is to make a range of amendments to improve the operation of three pieces of legislation administered by the Justice and Community Safety Directorate (JACS), and one piece of legislation administered by the Environment, Planning and Sustainable Development Directorate:

- *Civil Law (Property) Act 2006*
- *Civil Law (Property) Regulation 2020*
- *Civil Law (Sale of Residential Property) Act 2003*
- *Planning and Development Act 2007*
- *Unit Titles (Management) Act 2011*.

The amendments relate to unit title and community concessional lease provisions in the relevant legislation.

## **CONSULTATION ON THE PROPOSED APPROACH**

As the Bill is an omnibus bill designed to make minor and technical changes to various pieces of legislation, consultation on the Bill was conducted internally with ACT Government Directorates, including the Legislation, Policy and Programs and Human Rights and Social Policy divisions at the Justice and Community Safety Directorate.

The ACT Unit Title Reform Consultative Group, which is comprised of industry and community representatives, was consulted on the proposed amendments to unit titles legislation.

## **CONSISTENCY WITH HUMAN RIGHTS**

### **Rights engaged**

The Bill may be considered to engage the right to taking part in public life in section 17 of the *Human Rights Act 2004* (HRA).

#### **1. Nature of the right and the limitation (s28(a) and (c))**

Section 17 of the HRA provides:

Every citizen has the right, and is to have the opportunity, to—

- (a) take part in the conduct of public affairs, directly or through freely chosen representatives; and
- (b) vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and
- (c) have access, on general terms of equality, for appointment to the public service and public office.

Clauses 17 and 18, amending section 3.26 of the *Unit Titles Management Act 2011* (UTMA), could be perceived as being a limitation on this right. Providing that there is no limitation on the number of proxy votes the chairperson can hold and that excess proxy votes default to the chairperson, may be considered to interfere with the right of unit owners to freely express their will at owners corporation meetings; in being able to either directly express their voting preferences, or by way of a proxy that they have nominated.

A chairperson is however generally the chairperson of the executive committee, who not only has a casting vote on deadlocked matters (section 3.30 UTMA), but as an executive member is also subject to a code of conduct (section 46 and schedule 1, part 1.1 UTMA) and must act in the best interests of the owners corporation (item 4, schedule 1, part 1.1 UTMA). As such, it is unlikely that the chairperson would misuse his or her exemption from proxy voting restrictions to partake in voting behaviour which would lead to unfair outcomes for unit owners (such as “vote stacking”).

#### **2. Legitimate purpose (s28(b))**

The amendments in clauses 17 and 18 are intended to make sure that voting at owners corporations meetings is fair and that all owners can cast a vote, while avoiding unfair behaviour such as ‘vote-stacking’. Specifically, it aims to avoid the situation where an owner is unfairly (and possibly unknowingly) unable to vote because the proxy they have nominated already holds the maximum number of proxy votes.

### **3. *Rational connection between the limitation and the purpose (s28(d))***

There is a clear connection between, on the one hand, providing that excess proxy votes default to the chairperson and exempting the chairperson from restrictions on the number of proxy votes that can be held, and, on the other hand, ensuring all units owners are able to vote, and facilitating the efficient and effective running of meetings.

### **4. *Proportionality***

The amendments in clauses 17 and 18 are considered to be a reasonable and proportionate response to the limitations on proxy voting in section 3.26(4) of the UTMA. To the extent section 17 may be engaged, any limitation on the rights under section 17 is minimal, as while a person may be unable to use a proxy they have nominated because their proxy already holds the maximum number of proxy votes, allowing their proxy to default to the chairperson ensures that they will be able to express a vote.

There is a safeguard to prevent the chairperson engaging in unfair voting behaviour as the chairperson is subject to requirements to act in the best interests of the owners corporation. This is considered to be the least rights restrictive way of having a proxy voting system that is fair and that does not facilitate potentially unfair voting behaviour such as “vote-stacking”, which section 3.26(4) is intended to prevent.

Planning and Unit Titles Legislation Amendment Bill 2020  
**Human Rights Act 2004 - Compatibility Statement**

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Planning and Unit Titles Legislation Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA  
Attorney-General

## OUTLINE OF PROVISIONS OF THE BILL

### Part 1 Preliminary

#### Clause 1 Name of Act

This clause provides that the name of the Act is the *Planning and Unit Titles Legislation Amendment Act 2020*.

#### Clause 2 Commencement

This clause provides for the commencement of the Act. The Act commences on the day after its notification day.

#### Clause 3 Legislation amended

This clause lists the legislation which is amended by the Act.

### Part 2 Civil Law (Property) Act 2006

#### Clause 4 Definitions- pt 2.9

##### Section 259, new definition of *unit subsidiary*

This amendment includes the definition of *unit subsidiary* as provided for by the *Unit Titles Act 2001* in part 2.9. The term *unit subsidiary* is used in a number of sections in part 2.9 and a definition in the part will assist interpretation of the part's sections.

#### Clause 5 Meaning of *type 1 matter* and *type 2 matter*

##### New section 259A(1)(b)(va)

This clause inserts a new subsection in section 259A(1)(b) to provide that a change in the size of a unit subsidiary for the unit if the change is a decrease of 10% or more in a disclosure statement is a type 2 matter (other than a decrease to a unit subsidiary that is a type 1 matter).

Section 259A(1)(iii) provides that a 10% or more decrease in area of a unit subsidiary that is a courtyard or balcony is a type 1 matter. The amendment in clause 5 reflects the provision in section 259A(1)(iii) and provides that a 10% or more decrease in area for all other unit subsidiaries (such as carparks and storage cages) is a type 2 matter.

Type 1 and type 2 matters carry different rights for a buyer to rescind a contract for sale. Areas such as carparks and storage lockers are considered of a different nature to balconies and courtyards, and as such changes to their area are considered more appropriate as type 2 matters.

For a decrease of 10% or more in area of a unit subsidiary other than a courtyard or balcony area to be a type 2 matter, it must also affect, or be likely to affect, the use or enjoyment of the unit.

## **Clauses 6 and 7    New section 259A(2A)**

### **Section 259A(3), new definition of *potential variation***

Clause 6 introduces a new provision in section 259A to provide that in calculating a change to a matter in a disclosure statement (whether it be a type 1 or type 2 matter) as set out in section 259A(1), any potential variation must be disregarded. Clause 7 introduces the definition of potential variation; the information in the disclosure statement about the allowable change in the layout or size of the unit, unit subsidiary or unit entitlement estimate.

A disclosure statement may for example indicate that the size of the unit may vary by a certain amount. Clauses 6 and 7 clarify that in calculating a change to a matter in a disclosure statement, such an amount must be disregarded.

The permissible variance is the maximum set out in section s259A(1) (5% for decrease in overall floor area or unit entitlement estimate and 10% for decrease in area of unit subsidiary), before the change becomes a type 1 or type 2 matter, and this will include any allowable change noted in a disclosure statement, and any change that has occurred during progress of the development.

## **Clauses 8 and 9    Contract for sale of unit before registration of units plan**

### **Section 259A(3), new definition of *potential variation***

### **Dictionary, new definition of *unit subsidiary***

Clause 8 removes the definition of *unit subsidiary* from section 260(4), as a definition of the term is now provided for in the parts definition in part 2.9 (with clause 4 of the Bill).

Clause 9 inserts a definition of *unit subsidiary* into the Dictionary section of the Act, to cross-reference the definition of the term introduced in part 2.9 by clause 4.

## **Part 3                    Civil Law (Property) Regulation 2020**

### **Clause 10    Type 1 matter in disclosure statement- Act, s 259A(1)(a)(iv) Section 1A**

This clause removes section 1A. Section 1A originally prescribed that changes in layout and size for a type 1 matter were to be calculated disregarding a potential variation that may be stated in a contract for sale.

Clauses 6 and 7 of the Bill provide that potential variation must be disregarded when calculating a change in both type 1 and type 2 matters. Those amendments along with section 259A (1) (a) of the *Civil Law (Property) Act 2006* result in section 1A being redundant and as such it has been removed to prevent duplication.



## Part 4                      Civil Law (Sale of Residential Property) Act 2003

### Clause 11    **Meaning of *required* documents**                   **Section 9 (1) (g) (i) (B), new note**

This clause inserts a note into section 9, which sets out the required documents for a sale of residential property. The note makes clear that an eligible person may request a unit title update certificate from the owners corporation. A unit title certificate provides important information about the unit and the common property.

An eligible person is defined in the *Unit Titles Management Act 2011* (UTMA) and includes the owner or another person with an interest in the unit or an easement over the common property, a representative of a company if a company is the unit owner, anyone authorised in writing by the owner or a company representative, or, where necessary and appropriate, the planning and land authority. Clause 16 of the bill provides that an *eligible person*, under section 119 of the UTMA includes a person who enters into a contract of sale for a unit for which information is required.

Section 119 (1) of the UTMA provides that an eligible person may request both a unit title certificate, and a unit title update certificate from the owners corporation. However, buyers may not be aware of their ability to request a unit title update certificate, even where they have already requested a unit title certificate. The unit title update certificate will provide valuable updated information in relation to the unit and common property, and may be particularly important where there is delay between executing the contract for sale (and receiving the initial unit title certificate) and settlement of sale.

The intent of the note introduced by clause 6 is to make clear to buyers, in the context of documents required for sale, that they can request a unit title update certificate, at any time (particularly at a time closer to the date of settlement).

### Clause 12    **Section 9 (1) (h) (v)**

This clause removes the requirement to provide, as part of a sale of residential property, the minutes of owners corporation and executive committee meetings held in the two years before the day the property was first advertised or offered for sale or listed with an agent.

This information will instead be required to be included in a unit title certificate, prepared under section 119 of the UTMA. A unit title certificate gives important information about a unit, and the relevant units plan.

The requirement for a seller to provide owners corporation and executive committee minutes as part of the contract of sale has cost implications for the seller; the seller must provide these minutes, however managing agents for owners corporations may charge at their discretion to prepare the minutes. This can be contrasted with a unit title certificate under section 119 of the UTMA, which carries a maximum recoverable fee.

Furthermore, section 9 (1)(h)(v) does not make clear who is responsible for preparing the owners corporation/executive committee minutes, whereas section 119 of the UTMA makes clear that the owners corporation is required to prepare the unit title certificate.

**Clause 13 Certain documents etc to be available- sale of unit in retirement village**  
**Section 10A(7), definition of *later required documents***

The amendment in this clause, removing the reference to section 9 (1) (h) (v) from section 10A(7) is necessary due to clause 12, which removes this subsection.

**Part 5 Planning and Development Act 2007**

**Clause 14 Meaning of community concessional lease provisions**  
**Section 253G (d)**

This clause substitutes “certificate of compliance” with “certificate of occupancy” in section 253G(d). Section 253G(d) currently provides that if a community concessional lease includes a building and development provision, a community concessional provision means a provision stating that provisions (e) to (h) of section 253G commence on the issue of a certificate of compliance stating that the building and development provision has been complied with. Provisions (e) to (h) relate to the required uses of the lease

A building and development provision requires certain works to be completed. A certificate of compliance is issued under the *Planning and Development Act 2007* if a building and development provision of a lease has been fully complied with. In practice, there can be a delay to issuing a certificate of compliance. A certificate of occupancy, however, granted under the *Building Act 2004* upon required works being completed, is required as evidence that the building is fit for occupation.

Accordingly, a certificate of occupancy is considered, in practice, a more appropriate indicator that the works required under a building and development provision have been completed, and as such, more appropriate for provisions (e) to (h) of section 253G to commence alongside.

**Clause 15 Restrictions on dealings with concessional leases**  
**Section 265 (3)**

Clause 9 amends section 265(3) to require that a dealing in relation to a concessional lease with a building and development provision must be consented to by the planning and land authority (the Authority).

Currently, such a dealing does not require the consent of the Authority. This may have unintended consequences, for example a lease may be transferred to an entity that does not meet the requirements for a concessional lease.

Under section 298(2) of the *Planning and Development Act 2007*, the Authority may consent to the transfer of a lease containing a building and development provision if it is satisfied that the entity to which it is being transferred has the financial means and intention to comply with the provision. However there is no requirement in section 298 for the Authority to consider if the entity also meets the requirements to be a concessional lessee, as provided for elsewhere in the *Planning and Development Act 2007*. This amendment intends to make sure that only lessees that meet eligibility requirements can hold concessional leases.

## **Part 6                      Unit Titles (Management) Act 2011**

### **Clause 16    Unit title certificate and access to owners corporation records New subsection 119 (7)**

This clause clarifies that, for the purposes of section 119, the definition of *eligible person* provided for in the Dictionary section of the Act includes a person who enters into a contract for sale for the unit in relation to which access to information is required.

*Eligible person* is currently defined as the owner or another person with an interest in the unit or an easement over the common property, a representative of a company if a company is the unit owner, anyone authorised in writing by the owner or a company representative, or, where necessary and appropriate, the planning and land authority.

This amendment removes any doubt that a buyer, who may or may not yet have an “interest” in the unit, may request a unit title certificate under section 119.

### **Clauses 17 and 18                      Proxy votes Schedule 3, section 3.26(4) Schedule 3, new section 3.26(5)**

These clauses amend section 3.26 to exempt the chairperson at a general meeting from the restrictions on number of proxy votes that apply to voting and provide that the chairperson must exercise excess proxy votes.

Currently, a person must not, in the case of a units plan with more than 20 units, exercise a number of proxy votes that is more than 5% of the total number of units, and in any other case, more than 1. These restrictions were introduced with the intention of avoiding voting behaviour, such as “vote stacking”, which may lead to unfair meeting outcomes. Currently, if a unit owner nominates a proxy and that proxy is not eligible to hold that proxy vote due to having already reached the proxy vote limit, that owner may be unfairly (and possibly unknowingly) unable to vote.

Exempting the chairperson from proxy voting restrictions will allow the chairperson to exercise an indefinite number of proxy votes. The amendment, and providing that the chairperson must exercise excess proxy votes, is intended to make sure that all unit owners can exercise their voting rights, for the efficient and effective running of meetings and, by extension, the efficient and effective management of the units plan.

A chairperson is generally the chairperson of the executive committee, who not only has a casting vote on deadlocked matters (section 3.30 *Unit Titles Management Act 2011* (UTMA)), but as an executive member is also subject to a code of conduct (section 46 and schedule 1, part 1.1 UTMA) and must act in the best interests of the owners corporation (item 4, schedule 1, part 1.1 UTMA). As such, the chairperson is unlikely to participate in the sort of unfair behaviour that the proxy voting restrictions were introduced to address.