

Leasehold strata schemes

Leasehold strata schemes are a new type of scheme where:

- an owner of a long-term lease of a lot within a leasehold strata scheme will be issued with a Certificate of Title
- the scheme is created for a fixed-term (from more than 20 years to a maximum of 99 years)
- people can buy and own long-term leases of lots within the leasehold strata scheme (more than 20 to 99 years)
- an owner of a long-term lease (lessee) of a lot within the leasehold strata scheme can easily sell the long-term lease of that lot, without needing the consent of the landlord (lessor)
- buyers of long-term leases of lots in leasehold strata can apply for a mortgage over those lots.

Leasehold strata schemes will give Western Australia a new option for owning strata lots over a fixed period. These schemes already exist in New South Wales and Queensland.

Benefits

Leasehold strata schemes give the freehold land owner (lessor) an opportunity to develop land which they otherwise wouldn't or couldn't develop.

This is of particular benefit to organisations such as churches and universities who need to retain ownership of their land and make it available for development. Private landowners can contract with a developer to construct a strata building and to sell leasehold interests, without being actively involved in the maintenance of the building. The lessor then has a limited role in the leasehold strata scheme decisions. Leasehold strata also offers an alternative form of tenure for retirement villages.

Further advantages of leasehold strata include:

- local government rates and land tax liability will be specifically addressed, removing uncertainty that can exist in a leasehold environment
- a leasehold Certificate of Title will simplify financing, as lending bodies recognise Certificates of Title and mortgagees will have the protection of a power of sale
- the leasehold strata scheme will expire, which is a more streamlined and clear way of terminating strata schemes.

Freehold compared to leasehold

The majority of the *Strata Titles Act 1985* will apply to leasehold strata schemes in the same way as it applies to freehold strata schemes. The schemes can be strata (built strata) or survey-strata schemes. However, it will not be possible to develop a community title scheme under leasehold strata. Community title schemes are always developed on freehold land.

New definitions in the *Strata Titles Act 1985*

Definitions in the *Strata Titles Act 1985* will be updated to make sure the requirements that apply to existing strata, generally also apply to leasehold strata where appropriate.

New definitions that will be included in the legislation to apply to leasehold strata schemes include:

- **Proprietor** – in the case of leasehold strata schemes, a person registered as proprietor (owner) of a leasehold lot will be regarded as the proprietor of the lot for the length of the lease. It won't include anyone who subleases the lot from the leasehold proprietor.
- **Original proprietor** – a similar change will be required to the term 'original proprietor'. In a leasehold strata scheme an original proprietor will be a person who is entitled to a leasehold estate in all the lots in the scheme, immediately after the plan for the scheme is registered.
- **Leasehold strata scheme** – will be defined as a strata scheme in which all lots in the scheme are subject to a lease or leases that create the leasehold tenure when the strata plan is lodged.
- **Freehold strata scheme** – is a strata scheme where no lots are subject to leases under a leasehold strata title.
- **Strata company** – applies to leasehold strata schemes in order to ensure the strata company is responsible for maintenance and insurance, rather than the lessor.
- **Lessor** – is the owner of the parcel of freehold land, which was subdivided by the leasehold strata scheme.
- **Lessee** – is the lessee of the leasehold estate under a lease registered on the Certificate of Title for the lot.
- **Mortgagee** – means a mortgagee of the leasehold strata lot. Leasehold strata lots can be used as security for loans.
- **Plans** – the terms 'strata plan', 'strata scheme', 'survey-strata plan' and 'survey-strata scheme' will include leasehold strata plans and schemes. Similarly the terms 'strata plan of re-subdivision', 'survey-strata plan of re-subdivision', 'strata plan of consolidation', 'survey-strata plan of consolidation' and the provisions supporting such plans will include leasehold strata schemes.
- **Land** – refers to land under the operation of *the Transfer of Land Act 1893* and either held in (freehold) or by the proprietor of a registered lease of greater than 20 years but not exceeding 99 years.

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Leasehold strata lots will have a Certificate of Title

Every lot in a leasehold strata scheme will have a Certificate of Title

Every leasehold strata lot will have a leasehold Certificate of Title. This will be different to a normal strata Certificate of Title because the title will clearly show that it is the title for a leasehold interest in the lot and show the date when the leasehold interest will expire. Once the lease ends the title will end and will be cancelled.

There will not be a Certificate of Title for the common property in a leasehold strata scheme

Certificates of Title for the common property in strata schemes are not issued in Western Australia. This will also be the case for leasehold strata schemes.

Features of leasehold strata title

The lease must be for a period of greater than 20 years but not exceeding 99 years

The minimum term of the lease will be greater than 20 years and the maximum term of the lease (including any option of renewal) will be 99 years. This is to ensure certain planning obligations can be met.

Every lot lease in the scheme will expire at the same time

All leases must have a common (synchronised) expiry date. Options to renew the lot leases can be included but these also need to have a common expiry date (and can't extend the total term of the lease past 99 years). This ensures part of the scheme doesn't expire while the rest of the scheme is still running, which would confuse ownership arrangements and management.

The leases, the plan and the titles are all tied to one another

Under a leasehold strata scheme the plan and the leases are interdependent; one cannot exist without the other. This means that every leasehold plan must have a lease and a leasehold Certificate of Title for each lot.

Leasehold strata schemes can be either strata or survey-strata

A leasehold strata scheme can either be for a building (strata) or an area of land with surveyed boundaries (survey-strata).

Leasehold strata can only be used on freehold land and conditional tenure land

A leasehold strata plan can only be lodged over land which is either freehold land or conditional tenure land. Conditional tenure land is Crown land the State has transferred to a new owner as freehold, but with conditions attached. Leasehold strata cannot be developed over Crown land.

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The same person can be a lessor and a lessee of a leasehold strata lot

The owner of freehold land (lessor) may also be a leasehold lot owner (lessee) of one or more leasehold strata lots. This can occur when a leasehold strata plan is first registered or when a lessee breaches the lease, and the freehold land owner takes over the leasehold lot. This is not the case in a normal lease, because if one person is both the lessor and lessee their interests merge. But when a leasehold strata plan is first registered, or when a lessee breaches the lease, the lessor may take on the leasehold lot and become the owner of the leasehold interest.

Valuation and unit entitlement

The existing valuation and unit entitlement provisions in the *Strata Titles Act 1985* will apply to leasehold strata schemes.

Transfer of a leasehold strata lot will be dutiable

Transfers of a leasehold strata lot will be dutiable, which means it will need to be assessed for stamp duty, including where the developer sells the leasehold lot for the first time. A long-term lease by the freehold landowner to a developer in order to develop a leasehold strata scheme will also be dutiable. However, duty will not need to be paid when the developer is lodging a leasehold strata plan, and the leases for each lot replace the single lease the developer already has with the freehold landowner.

When a leasehold strata lot is transferred, the buyer will either make:

- a single payment
- a deposit followed by a further balance payment
- payment according to a terms contract, as stated under the *Sale of Land Act 1970*.

The buyer of a leasehold strata lot will not be able to buy that lot with periodic payments like rent.

Leasehold strata can't be used in a community title scheme

The new community title schemes, which are being introduced, will not be able to include leasehold strata title.

How a leasehold strata scheme is created

A leasehold strata scheme can either be created by:

- the freehold landowner who does their own construction and development
- by a developer that the freehold landowner has leased the land to with the intention of developing a leasehold strata scheme.

The process of creating a leasehold strata scheme is slightly different depending on whether the freehold land owner has entered into a long-term lease with a developer or is doing their own development.

Where the freehold land owner develops their own land

The owner of the freehold land parcel can do their own development. When the construction is complete they can lodge a leasehold strata plan. Along with all the usual things that must be lodged with the plan, in a leasehold strata scheme, the freehold land owner must lodge separate leases for each lot shown on the plan. All the leases must start and end at the same date. If there is any option to renew the start and end dates, that renewal must be the same in every lease. The WA Planning Commission must approve the plan but doesn't have to approve every lease.

Where the freehold land owner leases the land to a developer

This second method will have a slightly different approach in terms of documentation. The owner of the freehold land parcel can enter into a long-term lease with a developer (20-99 year lease). This original lease, which the developer has obtained from the freehold owner, will have terms that deal with how the land is going to be developed, authorises construction and allows the developer to lodge a leasehold strata plan once development is complete. It will also need to have been assessed for duty prior to registration.

After construction is complete the developer will lodge a leasehold strata plan. When the developer lodges the leasehold strata plan, the original lease will be replaced by new leases for each strata lot. The replacement strata leases will expire on the same date as the lease to the developer, but will not have the same conditions. The conditions of the lease may change from authorising construction of a building to conditions dealing with maintenance, services, rating, insurance etc. Once the strata leases are registered the original lease will be cancelled.

Interests, caveats, rights and obligations on the development lease will still apply to the lot leases unless they are inconsistent with the strata lease or varied by the parties.

How a leasehold strata scheme will be managed

A leasehold strata scheme must have a Management Statement

Every leasehold strata scheme must have a Management Statement containing the by-laws for the scheme as the control, management and maintenance of the building and common property will be the responsibility of the strata company. This will provide an appropriate management framework for the leasehold development, particularly in relation to building maintenance. The statement may also set out procedures for voting, exercising options, negotiating new leases and the handover or removal of lessee improvements at expiry. The requirements for a leasehold strata scheme Management Statement will be detailed within the Regulations.

The lease will override the by-laws where they are inconsistent

If there is any inconsistency between the strata lease and the by-laws of the leasehold strata scheme, the lease will override the by-laws and Management Statement. In the case of a Staged Development Statement, the lease provisions will override it to the extent of any inconsistency. The strata lease cannot be inconsistent with the *Strata Titles Act 1985*.

The strata company will be responsible for maintenance

In a leasehold strata scheme the control, management and maintenance of the scheme and common property will be the responsibility of the strata company, just as it is in a freehold strata scheme. The lessor (land owner) will not be responsible for maintenance in a leasehold strata scheme.

The strata company will be responsible for insurance

Under the *Strata Titles Act 1985* the strata company is responsible for insuring the common property to replacement value and against public liability. A leasehold strata company will have the same insurance obligations as a freehold strata company.

In a normal lease situation insurance of any buildings would normally be the responsibility of the lessor. This would not be appropriate for most leasehold strata schemes because the strata company will be responsible for maintenance and running of the scheme.

Governance of strata leases

The *Strata Titles Act 1985* prevails over any conditions in a strata lease. If the strata lease requires the lessee to contribute, financially or otherwise, towards the maintenance or improvement of common property, personal property or other lots within the scheme, this contribution as set out in the strata lease can be reviewed by the State Administrative Tribunal.

What the lessor will be involved in

Structural erections, alterations and extensions

An owner under the current *Strata Titles Act 1985* must get either the approval of the strata company (every proprietor) in order to carry out alterations, erections or extensions on their lot. In a leasehold strata scheme an owner will also need to get the approval of the lessor.

Common property

The leasehold lot owners will own the common property as tenants in common. However, some changes to common property will need consent from the lessor before they can be lodged. These changes are where:

- lots are converted into common property
- more land is added to the scheme as common property
- common property is transferred out of the scheme.

This is because adding land, taking away land or changing land from a lot to common property changes the layout of the parcel, and the lessor will have a direct interest in it.

Consent of re-subdivision and consolidation

Any re-subdivision or consolidation of lots or common property in a leasehold strata scheme will need to have the lessor's consent before it can be lodged. The only exception is where the re-subdivision is part of a staged development.

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If there is staged development of a leasehold strata scheme, the Staged Development Statement (SDS) will set out the planned re-subdivision. If the lessor has previously agreed to the SDS then further consent will not be required unless the statement is changed.

What the lessor will not be involved in

Management of a leasehold strata scheme

The lessor will not be involved in building maintenance; these duties will pass to the strata company. The lessor's rights and obligations will be replaced by strata company rights and obligations.

The lots can be transferred (sold) without the lessor's consent

Leasehold strata will be treated in the same way as freehold strata, and can be freely bought and sold without getting consent from the lessor. The only time the lessors consent is needed for a sale/purchase is where the strata company is planning to sell common property or buy neighbouring land.

The leasehold lot proprietors will pay rates and land tax

The leasehold lot proprietors will pay rates and land tax on their leasehold lots. The lessor (the owner of the underlying freehold parcel) will not have to pay rates and land tax while the leasehold strata scheme exists. Leasehold lot proprietors are expected to pay full rates, but all the usual tax and rate exemptions will apply. Exemptions from land tax for the principal residence and seniors discounts for land rates will apply to leasehold strata schemes.

Re-subdivision and consolidation

Re-subdivision

Any time there is a re-subdivision in a leasehold strata scheme, a new lease must be lodged for each lot which is impacted by the re-subdivision. This might be the case where a new lot is created or the boundaries of the lots are adjusted.

The same rights and obligations that applied under the old lease will apply to the new lease, unless they have been 'extinguished' or 'varied'. The expiry date and any options to renew will remain the same across the whole leasehold strata, including any new leases. When the re-subdivision plan is registered, any lot which is impacted will receive a replacement title (this is the same as the current system for freehold strata).

Consolidations

Similarly to re-subdivisions, new leases will be required to accompany the consolidation plan for all affected lots.

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Consents

Refer to 'What the lessor will be involved in' above.

A leasehold strata scheme will expire

Every leasehold strata scheme will have an expiry date, just like a normal lease. The lease must be greater than 20 years but cannot exceed 99 years (including any options to renew). The end date of the leasehold strata scheme will be clearly shown on the Certificate of Title for the leasehold lot.

As the leasehold strata scheme will expire, plans for what will happen leading up to the expiry, and after the expiry, will need to be set out in the lease and Management Statement.

Lessor's power of re-entry

In a lease situation, the lessor will have the power to terminate the lease on the breach of conditions. This power is to be diluted for leasehold strata schemes as there is a duty on the strata company to enforce by-laws, lease conditions etc.

Differences between leasehold strata and current leases

There are fundamental differences between leasehold strata scheme leases and normal leases where a leasehold strata scheme lease is for a long-term (more than 20 years and up to 99 years). A leasehold strata scheme typically involves the lessee purchasing the long-term lease by paying a single amount. That single payment is equivalent to the purchase of a freehold unit.

The lessor's power of re-entry in a normal short-term lease is justified as the damage a lessee can do to the lessor's asset (the lot) during that term is relatively large compared to the losses suffered by a lessee, who loses possession of the lot under a short-term lease. This applies where the lessor is only receiving relatively small payments of money (as rent and the lease is for a relatively short period).

Under the reforms, forfeiture and re-entry of the parcel or a lot within a leasehold strata scheme will only be by order of the State Administrative Tribunal. Any statement within the strata lease or original lease which suggests otherwise does not apply. Stipulations in the *Transfer of Land Act 1893* which give a lessor a right of re-entry, will not apply to the original and strata leases of leasehold strata schemes. Provisions of the *Property Law Act 1969* relating to the powers of re-entry in a lease will not apply to the original and strata leases of leasehold strata schemes.

The State Administrative Tribunal (the Tribunal) will be empowered to make an order:

- for damages against the lessee in favour of the lessor as reasonable compensation for losses suffered by the lessor on a breach of the lease
- requiring the lessee to do or not do something to remedy the breach of the lease
- for the lessor to re-enter only in very specific circumstances where re-entry or forfeiture is the only option

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- for damages against the lessor in favour of the lessee as compensation for losses suffered if the lessor re-enters the leasehold parcel or leasehold strata scheme lot, without first obtaining an order from the Tribunal
- for the lessor to give possession of the parcel or the lot in a leasehold strata scheme back to the lessee
- transferring the lease of the parcel or the lot to the mortgagee or under-lessee, for the remaining term of the lease or a shorter term, on the conditions the Tribunal or the court considers just and equitable, including, for example, conditions relating to:
 - the execution of a dealing or other document
 - the payment of rent
 - costs, expenses, damages or compensation
 - the giving of a security.

When can a leasehold strata scheme be renewed (extended)

The lessor of a leasehold strata scheme will be able to grant further leases of lots in the scheme before the scheme is terminated. This can either be done either by exercising an option to renew in the lease or negotiation between the lessor and lessees (through the strata company).

Differences in the renewal of leasehold strata leases from other lease situations include:

- getting the approval of the proprietors to the renewal
- making sure all leases are consistent
- in the absence of an option for renewal, any new lease resulting from agreement between lessor and lessees may require new planning approval.

Option to renew included in the lease

Any right to exercise an option to renew must be clearly set out in the lease(s). If the freehold owner has entered into a lease with a developer, the option to renew must be in both the original lease to the developer, and in the strata leases for each lot. The process to exercise the option, the voting procedures, notice requirements, and ability for proprietors to opt out will be set out in the *Strata Titles Act 1985*. The initial lease as well as any option to renew must be less than 99 years.

Renewing the lease (where there is no option in the lease)

Where there is no option to renew in the lease, the lessor will be able to negotiate new leases with the strata company. The Management Statement may contain a voting process for this because it is unlikely it would be contained within the lease. If there was no previous option to extend it, the new lease will need the consent of the WA Planning Commission.

Process for renewing a leasehold strata scheme

Every scheme that wants to renew will have to follow the process set out in the *Strata Titles Act 1985* to ensure that both the lessor and lessees have a say in whether the scheme is renewed.

Where there is an option to renew, the first step is for the strata company to hold a vote on whether or not to renew. At least 75 per cent of the lot owners will need to vote in favour of renewing before they can approach the lessor with their decision. They must give the lessor written notice at least six months before the expiration of the leases. They must also provide a copy of the new strata leases

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that they want the lessor to sign. If less than 75 per cent vote in favour, the leasehold strata scheme will expire on the original expiry date.

If new strata leases are granted by the lessor, they must be granted for every strata lot within the scheme, even those where the lessee voted against renewal. Where a lot proprietor chooses not to renew their lease, the strata lease for that lot will be created/renewed in the lessor's name. Every renewal will start as soon as the current lease ends and every new strata lease will expire at the same time.

The lessor may decide not to renew a particular strata lease in the lessees name if that proprietor has breached the strata lease (and hasn't remedied it) or hasn't done the renovations the strata lease required (either to the lot or common property). The strata leases can be renewed at any point up to three months before the leases expire.

The State Administrative Tribunal will be given the power to resolve disputes arising from renewal of a strata lease, including the power to:

- amend the proportionate allocation of renewal fees required to be paid by each owner to the lessor in consideration for the renewal
- order a lessor to sign strata leases
- extend the term (duration) of the strata leases and the term of the scheme to enable registration of the renewal.

Converting leasehold to freehold strata

When can a leasehold strata scheme be converted to a freehold strata scheme?

Any time before a leasehold strata scheme expires (or is terminated) the lessor and strata company can decide to convert the leasehold strata scheme to a freehold strata scheme. This conversion turns the leasehold strata scheme into a 'normal' strata scheme and means that it won't expire.

The leasehold strata may be able to convert to a freehold strata if either:

- the lease includes a term that allows the conversion
- the lessor gives the lot owners the right to convert and take over the lessor's interest in the land.

Not every leasehold strata scheme will be able to convert to a freehold scheme. It will depend on the particular strata leases in that scheme, WA Planning Commission approvals, or what the lessor offers to the lessee's before the scheme expires. There is no obligation on the lessor to let the strata company convert the scheme.

How is a leasehold strata scheme converted to a freehold strata scheme?

The process for converting a leasehold strata scheme into a freehold strata scheme will be set out in the *Strata Titles Act 1985*. The conversion will require:

- the WA Planning Commission's approval
- endorsement by the leasehold strata company by minimum 75 per cent resolution
- acceptance by the proprietor of the freehold estate
- approval by holders of registered interests in the affected land.

If a lessee does not take up the offer, the strata company or lessor may acquire the lease of a lot.

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In addition, a governance framework will be imposed over the conversion process for leasehold strata schemes including requirements that:

- a conversion proposal contain prescribed information
- a conversion proposal be served on all proprietors
- all proprietors have at least three months to consider a conversion proposal
- the vote on the conversion proposal was properly conducted at a meeting of the strata company which was properly convened
- if 75 per cent of the proprietors voted in favour of the proposal, the strata company may submit the proposal to the State Administrative Tribunal (the Tribunal) to undertake a fairness and procedure review
- every non-unanimous conversion proposal which has secured a 75 per cent vote in favour requires an order from the Tribunal to proceed.

Despite the above conditions, if the owner has acquired the reversion (the interest a lessor has over a lot whilst a lease is in operation) within six weeks after the date of the meeting, the strata company may, by unanimous resolution, acquire the reversion and lease of the lot.

If the reversion in a lot has not, within three months after the date of the meeting, been acquired by the owner of the lot or the strata company, the lessor may acquire the lease of the lot.

What happens after the leasehold strata has ended

A leasehold strata scheme can end naturally if it expires, or it can be terminated, or converted into a freehold strata scheme. What happens after the leasehold strata scheme ends will be different in each case but generally speaking all the strata company obligations need to be dealt with and the leasehold plan and titles will be cancelled.

If the leasehold strata scheme expires

If the leasehold strata scheme expires, the plan, leases and titles are cancelled, the strata company is dissolved and the parcel of land goes back to the freehold owner. The former leasehold lot owners will individually take on the rights and liabilities of the strata company.

If the strata company votes to terminate the leasehold strata scheme early

If the strata company terminate the leasehold strata scheme before it expires, the plan, leases and titles are cancelled and the strata company is dissolved:

- if the termination is by unanimous resolution: the parcel of land is returned to the freehold owner ,
or
- if it is a termination by majority resolution: the parcel of land can be temporarily assigned to the strata company in order to resolve any outstanding issues.

If the lessee has improved the parcel the lessor may pay compensation

The lessor won't automatically have to pay the lessee for any improvements the lessee makes to the lot or common property. The lessor will only have to pay compensation if there is a condition in the lease that requires the lessor to pay. If the lessor and lessee disagree about whether compensation is

to be paid or how much should be paid, they can go to the State Administrative Tribunal to resolve the dispute. Refer to [Clearer and easier ways to resolve strata disputes](#) for more information.

The strata company may be extended to deal with scheme obligations before winding up

If the strata company's affairs can't be neatly wound up before the leasehold strata scheme expires or is terminated, the State Administrative Tribunal (the Tribunal) can make an order that the strata company continue, even after the scheme has ended. If the Tribunal orders the strata company to continue, it will be for a set period of time so it can sell or dispose of property, discharge liabilities, distribute assets, properly wind up the strata company affairs, or deal with any legal proceedings.

Disclaimer

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