



Common Property Installation Approval Best Practice Guideline

Reference: SCAWA200

This Practice Guideline has been developed for Strata Community Managers by SCA (WA) and Lavan.



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Chapter One: Responsibility for the common property

Lot boundaries and common property

- 1 In a strata scheme, the default boundary of an owner's lot within a building extends from the inner surfaces of the boundary walls, the upper surface of the floor and the under surface of the ceiling: section 3(2)(a) of the *Strata Titles Act 1985 (Act)*. Those boundaries may vary depending on what is provided on the floor plan of the strata plan.
- 2 When an owner installs an item, like a hot water heater, onto the outside of the building in a strata scheme, they may in fact be installing that hot water heater on common property.

Management and control of the common property

- 3 Common property is:
 - 3.1 those parts of a strata scheme / survey-strata scheme that are not a lot: section 10 of the Act; and
 - 3.2 owned jointly by all owners within the strata titles scheme as tenants in common proportional to the unit entitlements of their respective lot: section 13(7)(c) of the Act.
- 4 The common property must be controlled and managed by the strata company for the benefit of all owners: section 91(1)(b) of the Act (**Control Duty**).

- 5 The Strata Company has a statutory duty under section 91(1)(c) of the Act to keep in good and serviceable repair, properly maintain and, if necessary, renew and replace the common property (**Maintenance Duty**).
- 6 An owner needs the approval of the strata company before they install an item on the common property.

Chapter Two: Overview of the methods a strata company can use to authorise an owner to install an item on the common property

Overview: Authorisation to install an item on the common property

- 1 A strata company can authorise an owner to install an item on the common property:
 - 1.1 through an exclusive use by-law with a special privilege;
 - 1.2 through a lease of the common property;
 - 1.3 through an easement created under section 64 of the Act; or
 - 1.4 through a licence.

Exclusive Use By-law with a special privilege

- 2 A strata company can authorise an owner to install an item on the common property if the strata company makes and registers an exclusive use by-law¹ which:
 - 2.1 grants the owner exclusive use of part of the common property (**Special Common Property**); and
 - 2.2 also grants that owner the special privilege of installing an item on the Special Common Property²: *Wong v Reid* [2016] WASC 59.

Lease of the common property

- 3 A strata company can also authorise an owner to install an item on the common property if the strata company grants the owner a lease of common property (**Leased Area**) specifying that the owner can install the item on the Leased Area for the duration of the lease.
- 4 A lease of the common property requires a resolution without dissent of the strata company: section 93 of the Act.

Section 64 Easement with an Infrastructure Contract

- 5 A strata company can authorise an owner to install an item on the common property if the owner obtains the approval of the Strata Company for the item they want to install by:
 - 5.1 signing an infrastructure contract with the Strata Company (Infrastructure Contract); and
 - 5.2 having an ordinary resolution of the Strata Company passed to apply

section 64 of the Act to the Infrastructure Contract,

which gives the owner an easement to install the item on the common property in accordance with section 64 of the Act (**Section 64 Easement**).

- 6 The Section 64 Easement can only apply to sustainability infrastructure or utility infrastructure.

Licence of the common property

- 7 A strata company can authorise an owner to install an item on the common property if the strata company grants the owner a licence over the common property specifying the owner can install the item on the common property (**Licensed Area**).

Chapter Three: Section 64 Easement with an Infrastructure Contract

What is an Infrastructure Contract?

- 1 An Infrastructure Contract is a contract between the strata company and the infrastructure owner.
- 2 An Infrastructure Contract:
 - 2.1 sets out the rights and obligations of the strata company and infrastructure owner; and
 - 2.2 must contain specific conditions, as required by section 64 of the Act and Part 10 of the *Strata Titles (General) Regulations 2019* (**Regulations**).

¹ This requires a resolution without dissent of the strata company and the written consent of the owner being given the benefit of the exclusive use by-law. The by-law must also be registered against the strata plan: sections 43, 44 and 48 of the Act.

² If the exclusive use by-law does not grant the owner the special privilege to install an item on the common property, the owner does not have any right to install the item: *Wong v Reid* [2016] WASC.

- 3 The infrastructure owner who owns the infrastructure could be either:
- 3.1 the owner of a lot in the strata titles scheme; or
 - 3.2 a third party, such as an energy retailer or solar panel supplier.
- 4 Specialist legal advice should be sought on the terms of an infrastructure contract.

What is a Section 64 Easement?

- 5 A section 64 Easement is a statutory easement that gives the infrastructure owner rights over the common property to:
- 5.1 install and remove the infrastructure specified in the Infrastructure Contract (**Infrastructure**) on the common property;
 - 5.2 operate the Infrastructure on the common property; and
 - 5.3 examine, maintain, repair, modify and replace that Infrastructure,
- subject to the conditions specified in the Infrastructure Contract: section 64(3) and (4) of the Act.
- 6 The Infrastructure Contract can only be used if the Infrastructure is:
- 6.1 utility infrastructure; or
 - 6.2 sustainability infrastructure.

What is utility infrastructure?

- 7 Utility infrastructure means:
- infrastructure and equipment necessary for, or related to, the provision of a utility service: section 3(1) of the Act.

- 8 Utility service means:
- the collection and passage of stormwater; or the supply of water for drinking or any other use; or a sewerage and drainage service; or a garbage collection service; or a gas, electricity or air service, including air conditioning and heating; or a communication or data service, including telephone, radio, television and internet; or a service classified by the regulations as a utility service; or another like service: section 3(1) of the Act.
- 9 Based on these definitions, utility infrastructure could include:
- 9.1 air conditioning units and condensers;
 - 9.2 hot water heaters;
 - 9.3 electricity switchboards, submeters and other electricity infrastructure;
 - 9.4 television antennae;
 - 9.5 satellite dishes; and
 - 9.6 broadband / NBN related infrastructure.

What is sustainability infrastructure?

- 10 Sustainability infrastructure means:
- infrastructure that is designed or is likely to avoid, remedy or mitigate adverse effects on the environment: section 3(1) of the Act.
- 11 The note in the Act below this definition states:
- Examples for this definition:
Sustainability infrastructure includes solar panels, clothes lines and rainwater tanks.

12 Based on this definition, sustainability infrastructure could³ include:

- 12.1 solar panels;
- 12.2 solar inverters;
- 12.3 a shade sail⁴; and
- 12.4 an electric car charging station⁵.

Special procedures for the notice to apply an Infrastructure Contract

- 13 When the strata company sends owners a notice of a proposed ordinary resolution to apply an Infrastructure Contract, the notice must contain:
- 13.1 a copy of the Infrastructure Contract; and
 - 13.2 a statement to the effect of section 64(3) to (7) of the Act: regulation 64(1) of the Regulations.
- 14 An example of a proposed resolution to apply an Infrastructure Contract is contained in Annexure A.

Entry rights under a Section 64 Easement

- 15 If a person needs to enter a lot or the common property in order to exercise rights under a Section 64 Easement, that person needs to give notice:
- 15.1 for entry to a lot, to the occupier of that lot: section 65(2)(a) of the Act;
 - 15.2 for entry to the common property, to the strata company; and
 - 15.3 for common property subject to an exclusive use by-law (**Special Common Property**), to the occupiers

³ Note that as at the date this guide was prepared, there have been no decisions by the State Administrative Tribunal or the courts on the meaning of utility or sustainability infrastructure in the context of the Act. Specialist legal advice should be sought on this at the time the infrastructure contract is being finalised.

of the lots that have the benefit of the exclusive use by-law (**Special Lots**),

by using the approved form *Notice of Entry under Statutory Easement* (**Approved Form**) available to download from Landgate's website: section 65(4) of the Act.

16 Giving notice with the Approved Form is unnecessary:

- 16.1 in an emergency if there is insufficient time to give notice;
- 16.2 for entry to a lot, if the occupier of that lot dispenses with the requirement for notice;
- 16.3 for entry to the common property:
 - 16.3.1 if the purpose of entry is only for inspection; or
 - 16.3.2 if the strata company dispenses with the requirement for notice; and
- 16.4 for entry to Special Common Property, if the occupier of that Special Lot dispenses with the requirement for notice: section 65(3) of the Act.

17 The length of notice given by an owner or third party must be at least:

- 17.1 28 days, unless a shorter period is agreed to by:
 - 17.1.1 the strata company for entry to the common property; or
 - 17.1.2 the occupier of a lot, for entry to a lot or to Special Common Property: section 65(5) of the Act.

⁴ If it could be proved that the shade sail reduces the amount of electricity used to cool a lot and therefore mitigates the adverse effect on the environment of that electricity use.

⁵ If it could be proved that the electric car charging station reduces the amount of petrol used by the owner and therefore mitigates the adverse effect on the environment of a petrol powered car.

18 Rights of entry under a Section 64 Easement include rights of entry by the Infrastructure Owner's:

18.1 agents;

18.2 employees; and

18.3 contractors,

with vehicles, equipment, materials and other items as reasonably necessary for the purpose of exercising rights under the Section 64 Easement: section 65(7) of the Act.

Installing utility conduits connected with the Infrastructure under an Infrastructure Contract

19 A Section 64 Easement also entitles the Infrastructure Owner to install on the common property the pipes, wires, cables and ducts (**Utility Conduits**) that are required to operate the Infrastructure, subject to the terms of the Infrastructure Contract: regulations 67(2)(a) and 67(3).

20 We recommend that the Infrastructure Owner consider giving the strata company notice using the Approved Form (the same document as described above, but with details of where the Utility Conduits will be installed) if they want to enter parts of the common property to install the Utility Conduits required to operate the Infrastructure.

Chapter Four: Licence of the common property

Issues with a licence of the common property

- 1 The Act does allow for licences of the common property: see sections 26, 79(1)(c), 104(1)(c)(viii), 116(1)(i) of the Act.
- 2 However, the Act does not specify what type of resolution is required for the grant of a licence.
- 3 The power of the strata company to grant a licence over the common property is done under the strata company's inherent power to manage and control the common property for the benefit of all owners under section 91(1)(b) of the Act: *Fisher and The Owners of Esplanade Court - Strata Plan 363* [2008] WASAT 301; *Surrol Nominees Pty Ltd and The Owners of 1321 Hay Street West Perth Strata Plan 9821* [2013] WASAT 77 (**Surrol Case**).
- 4 At very least, the strata company must properly execute a written licence with the owner: *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [2020] WASAT 39 (**Engwirda Case**).
- 5 The licence must specify that:
 - 5.1 the owner has the right to install the item temporarily on the licensed area of the common property (**Licensed Area**);
 - 5.2 the owner does not have exclusive use of the Licensed Area; and
 - 5.3 the item will be removed when the licence comes to an end.
- 6 A licence can be overturned by SAT where SAT finds:
 - 6.1 the licence is actually a lease: *Engwirda Case*; or

- 6.2 the licence does not provide an overall benefit⁶ to all owners: *Surroll Case*.
- 7 Specialist legal advice should be sought when a strata company is considering granting a licence over the common property.

Chapter Five: Installation of items on the common property without approval and other points

Order to remove unauthorised items installed on the common property

- 1 In a recent decision of the State Administrative Tribunal (**SAT**), an owner was ordered to remove a gate that was installed on the common property⁷:
- 1.1 over which the owner had the benefit of an exclusive use by-law; and
 - 1.2 in circumstances where all the previous owners had agreed in writing through a deed to the gate being installed on the common property.
- 2 The key reason why SAT ordered the gate be removed was that:
- 2.1 the exclusive use by-law did not grant the owner the special privilege to install the gate on the common property; and
 - 2.2 the deed under which all the previous owners agreed in writing to the gate being installed on the common property was not signed by the current owner of the lot that had the benefit of the exclusive use by-law.

Other approvals may be required

- 3 In addition to the approval of the strata company to install an item on the common property, an owner may also need the approval of the local government and any other relevant authorities before installing the item on the common property.

⁶ That overall benefit does not mean that every owner needs to obtain a benefit. The test involves comparing the overall benefit against the

potential for some owners to not benefit: *Clarke and the Owners of Waterfront Mews - Strata Plan 14082* [2011] WASAT 110.

⁷ *Bamford and Fong & Anor* [2021] WASAT 1.

Annexure A: Example resolution to apply an Infrastructure Contract

Proposed Resolution

- 1 The owners resolve by ordinary resolution of the strata company to apply section 64 of the *Strata Titles Act 1985 (Act)* to the Infrastructure Contract contained in Annexure 1 below in accordance with section 64(1)(b) of the Act (**Section 64 Resolution**).
- 2 In accordance with regulation 64(1) of the *Strata Titles (General) Regulations 2019 (Regulations)* this notice of the Section 64 Resolution includes the following information:

“Section 64(3) of the Act: The person (the infrastructure owner) who, from time to time, owns the infrastructure the subject of an infrastructure contract has an easement over the common property specified in the infrastructure contract that entitles the infrastructure owner —

- (a) to install and remove the infrastructure specified in the contract; and
- (b) to operate that infrastructure; and
- (c) to examine, maintain, repair, modify and replace that infrastructure.

Section 64(4) of the Act: The easement is subject to any conditions set out in the infrastructure contract (as in force from time to time).

Section 64(5) of the Act: The infrastructure contract may be varied by agreement between the strata company and the person who is the infrastructure owner from time to time.

Section 64(6) of the Act: The easement ceases to exist if the infrastructure contract is terminated or otherwise ceases to have effect.

Section 64(7) of the Act: The rights conferred by the easement must be exercised so as to minimise, as far as reasonably practicable, interference with the enjoyment and use of the common property.”

Annexure 1: Infrastructure Contract

[Note: Insert the Infrastructure Contract as Annexure 1 to the Notice of the proposed resolution]

SCA (WA) wish to acknowledge and thank Lavan for their contribution.

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