
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : EFFICIENT BUILDING TEAM PTY LTD and THE OWNERS OF 25, 27, 29, 31 PARRY STREET FREMANTLE STRATA PLAN 6413 [2021] WASAT 158

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 22 SEPTEMBER 2021 AND 22 OCTOBER 2021

DELIVERED : 13 DECEMBER 2021

FILE NO/S : CC 1672 of 2020

BETWEEN : EFFICIENT BUILDING TEAM PTY LTD
Applicant

AND

THE OWNERS OF 25, 27, 29, 31 PARRY STREET
FREMANTLE STRATA PLAN 6413
First Respondent

PERTH RECRUITMENT SERVICES PTY LTD
Second Respondent

ANTHONY ELTON ANDERSON
Third Respondent

FILE NO/S : CC 1742 of 2020

BETWEEN : EFFICIENT BUILDING TEAM PTY LTD
Applicant

AND

PERTH RECRUITMENT SERVICES PTY LTD
Respondent

Catchwords:

Strata Titles Act 1985 (WA) (as it applies from 1 May 2020) - Resolution of scheme dispute - Scheme by-laws - Vehicle parking - Whether vehicle permitted to overhang common property - Whether access to lot obstructed or blocked - Exclusive use by-law or special privilege over common property - Requirement for written consent for exclusive use by-law or special privilege over common property - Proper construction of by-laws - Tribunal proceedings - Discretion of Tribunal to make declarations and orders to resolve dispute or proceeding - Turns on own facts

Legislation:

State Administrative Tribunal Act 2004 (WA), s 95, s 95(1)

State Administrative Tribunal Rules 2004 (WA), r 42A

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 81(10)

Strata Titles Act 1985 (WA), s 10, s 13(7)(b), s 13(8), s 13(9), s 14(1), s 14(6), s 14(8), s 29, s 43, s 43(5), s 44, s 44(1), s 44(2)(b), s 45, s 47(3), s 48(1), s 59, s 91, s 91(1)(b), s 112, s 119(1), s 123, s 123(2), s 140(2), s 142, s 197, s 197(2), s 197(4), s 199, s 199(3), s 199(3)(c), s 199(3)(d), s 200, s 200(1), s 200(2), s 200(2)(m) s 200(2)(n), s 200(2)(o), s 200(7), s 202, s 207, s 207(1), s 207(2)(b), s 208, Sch 1, Sch 2, Sch 5, cl 4(1), cl 4(2), Pt 8, Pt 13

Strata Titles Amendment Act 2018 (WA)

Result:

Application unsuccessful
Declarations and orders made

Category: B

Representation:

CC 1672 of 2020

Counsel:

Applicant : In Person
First Respondent : Did not participate
Second Respondent : In Person
Third Respondent : In Person

Solicitors:

Applicant : N/A
First Respondent : N/A
Second Respondent : N/A
Third Respondent : N/A

CC 1742 of 2020

Counsel:

Applicant : In Person
Respondent : In Person

Solicitors:

Applicant : N/A
Respondent : N/A

Case(s) referred to in decision(s):

Efficient Building Pty Ltd and Rosskeen Pty Ltd [2021] WASAT 157
The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd
[2020] WASAT 9

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 In or about November 2019, the applicant, Efficient Building Pty Ltd (**Efficient**) purchased Lot 8, which is one of four strata lots on Strata Plan 6413 and having the address of 25, 27, 29 and 31 Parry Street, Fremantle. The strata scheme comprises four limestone cottages built in the late 1890s and are therefore in excess of 120 years old.

2 On 8 December 2020, Efficient commenced the proceeding (matter CC 1672 of 2020) in the Tribunal by an application under s 197(4) of the *Strata Titles Act 1985* (WA) (**ST Act**).¹ Efficient seeks declarations and orders from the Tribunal to resolve a scheme dispute involving the second respondent, Perth Recruitment Services Pty Ltd (**Perth Recruitment Services**) that owns Lot 7 on Strata Plan 6413 and the third respondent, Mr Anthony Elton Anderson (**Mr Anderson**) who is the owner of Lot 6 on Strata Plan 6413. The first respondent, The Owners of 25, 27, 29 and 31 Parry Street, Fremantle Strata Plan 6413 (the **strata company**) did not participate in these proceedings.²

3 On 17 December 2020, Efficient commenced a separate proceeding (matter CC 1742 of 2020) in the Tribunal by an application under s 47(3) of the ST Act. In that proceeding, Efficient seeks declarations and orders from the Tribunal concerning the alleged contravention of the scheme by-laws by Perth Recruitment Services.

4 At a directions hearing, the Tribunal ordered that the proceedings for CC 1672 of 2020 and CC 1742 of 2020 (the matters before me) are to remain separate proceedings but are to be heard and determined together and evidence in one proceeding is to be evidence in the other proceeding.³

5 The proceedings before me under the ST Act come within the Tribunal's original jurisdiction (s 29 of the ST Act).

6 There is a further separate proceeding (matter CC 1682 of 2020) before the Tribunal. The applicant is Efficient, and the respondents are Rosskeen Pty Ltd that owns of Lot 5 on Strata Plan 6413 and the

¹ In these reasons all references to the ST Act are to the ST Act as it applies from 1 May 2020 (unless expressly stated otherwise).

² See the orders of the Tribunal made on 11 May 2021 (Exhibit 1, at page 515).

³ See order 3 of the orders made by the Tribunal on 11 May 2021 (Exhibit 1, at pages 515-516).

strata company. The Tribunal published its decision in that matter on or about the same date as it published its decision for the matter before me (see *Efficient Building Pty Ltd and Rosskeen Pty Ltd* [2021] WASAT 157).

7 In its application for the first matter before me, CC 1672 of 2020, Efficient originally sought the following orders and declarations from the Tribunal:⁴

- a) A declaration that the resolution concerning the parking arrangement on the common property purportedly passed at the meeting of the strata company on 7 July 2020 is invalid.
- b) An order that the strata company be prohibited from passing any resolution or by-law concerning any parking arrangement which may give rise to an exclusive use of or special privileges in relation to part of the common property by Perth Recruitment Services and Mr Anderson, including their employees and visitors, resulting in the obstruction to Efficient's access to its own Lot 8 via the common property and interference with Efficient's use or enjoyment of the common property.
- c) An order under s 207 of the ST Act that:
 - i) the Tribunal's order made in the proceeding CC 644 of 2020 on 19 June 2020 be varied or substituted to include express prohibition on parking of vehicles by Perth Recruitment Services and Mr Anderson on their respective lots overhanging into or encroaching the common property or encroaching the air space above the common property; and
 - ii) Perth Recruitment Services and Mr Anderson pay to Efficient an amount (to be determined by the Tribunal) by way of compensation for the failure to act in accordance with the Tribunal's order made in the proceeding CC 644 of 2020 on 19 June 2020.

⁴ Exhibit, at page 6.

- d) Any other declarations or orders that the Tribunal considers appropriate.

8 In its application for the other matter before me, CC 1742 of 2020, Efficient originally sought the following orders and declarations from the Tribunal:⁵

- a) An order requiring the respondent to park and take all reasonable steps to ensure that its employees, agents and visitors park, wholly within the boundaries of the respondent's lot (Lot 7) and without encroaching upon the common property, overhanging into the common property or overhanging into the airspace above the common property.
- b) An order requiring the respondent to pay a specified amount (to be determined by the Tribunal) by way of penalty for contravening the scheme by-laws.
- c) A declaration or order that s 95(1) of the *State Administrative Tribunal Act (SAT Act)* applies to order a) above, alternatively the Tribunal's decision in this proceeding.
- d) Any other orders that the Tribunal considers appropriate.

9 On the last day of the final hearing (22 October 2021), Efficient sought to replace the above orders it seeks in relation to CC 1672 of 2020 with the following orders:⁶

- a) The resolution purportedly passed by the strata company on or about 7 July 2020 seeking to allow vehicles to overhang into the common property by up to one metre is invalid ab-initio.
- b) The resolution for which notice was given on or about 1 February 2021 to create conduct by-law 2(e) to allow vehicles and carport roofs to overhang the common property by up to 1 metre is invalid ab-initio.

⁵ Ibid, at page 47.

⁶ Ibid, at pages 106-108 (Applicant's Minute of Proposed Amendments to Declarations and Orders sought in CC 1672 of 2020).

- c) The conduct by-law 2(e) purportedly created by a resolution for which notice was given on or about 1 February 2021 seeking to allow vehicles and carport roofs to overhang the common property by up to 1 metre and its registration by the Registrar of Titles is invalid ab-initio.
- d) Effective as of the date of this order the strata company is prohibited from passing any resolution or by-law which may give rise to exclusive use or special privileges for Perth Recruitment Services and Mr Anderson including their employees and visitors, in relation to any part of the common property or the airspace above the common property other than by a governance by-law passed by special resolution without dissent.
- e) The order made on 19 June 2020 in CC 644 of 2020 be varied and substituted with the following order:
- With effect from the date one day after the date of this order Perth Recruitment Services and Mr Anderson including their employees and visitors shall not park any vehicle on, encroaching or overhanging the common property.
- f) An order:
- i) that Efficient is granted leave to apply for compensation comprising its legal costs incurred in these proceedings in an application for costs by filing with the Tribunal and giving to the respondents the following documents on or before seven days after the date of the decision in these proceedings:
- (A) a schedule of the costs claimed in sufficient detail to enable the Tribunal to assess and fix any costs which might be awarded together with any supporting documents upon which Efficient wishes to rely; and
- (B) written submissions addressing the basis upon which it is contended costs

should be awarded, and the quantum of costs claimed and the period of time which the respondents should be given to pay any costs awarded.

- ii) if Efficient makes an application for costs pursuant to this order the respondents may within 14 days after the date of the decision file with the Tribunal and, if so, must also give to Efficient, written submissions opposing the application and stating the period of time the respondents should be given to pay any costs awarded to Efficient.
- iii) if Efficient makes an application for costs pursuant to this order the Tribunal will determine the application on the documents and will fix the amount of any costs awarded and the date by which the costs must be paid in the same determination.
- iv) in determining the amount of any costs to be awarded the Tribunal shall consider the merit of the application for costs having regards to the SAT Act, this order and also s 207(2)(b) and s 200(2)(o) of the ST Act.
- g) The Registrar of Titles shall amend the scheme documents by deleting conduct by-law 2(e).
- h) Perth Recruitment Services and Mr Anderson shall not later than 21 days after the date of this order, remove such portion of the carports on their respective Lot 7 and Lot 6 that encroach or overhang the common property.

10 Similarly, on the last day of the final hearing (22 October 2021), Efficient sought to replace the above orders it seeks in relation to CC 1742 of 2020 with the following orders:⁷

- a) With effect from the date of this order the respondent, its employees and visitors shall not park any vehicle on

⁷ Ibid, at page 103 (Applicant's Minute of Proposed Amendments to Orders sought in CC 1742 of 2020).

the common property or on its lot (Lot 7) in a position that encroaches upon, or overhangs the airspace above the common property and shall take all reasonable steps to ensure its employees and visitors comply with the terms of this order.

- b) The respondent shall pay \$2,000 penalty for contravening the scheme by-laws.
- c) Section 95(1) of the SAT Act is declared to apply to order a) above.

11 Perth Recruitment Services and Mr Anderson did not object to the amended orders (set out above at [9] and [10]) sought by Efficient on the last day of the final hearing (22 October 2021). Consequently, I gave leave to Efficient to amend the orders sought in these proceedings to those set out above at [9] and [10] apart from [9(f)] which concerns an application for costs on the basis that it is premature for an application for costs to be made as the Tribunal had not yet made its decision. A party may seek costs in these proceedings by making an application to the Tribunal within 21 days of the orders to which the application relates being made by the Tribunal (see r 42A of the *State Administrative Tribunal Rules 2004* (WA)). The parties may, therefore, following the publication of these reasons and the orders made by the Tribunal make an application to the Tribunal seeking costs in these proceedings (that is, in relation to CC 1672 of 2020 and CC 1742 of 2020).

12 Efficient's position is that the parking encroaches on common property on a daily basis and this encroachment obstructs the lawful use of common property for vehicle access to, and egress from Efficient's Lot 8 in breach of the by-laws and the order by consent of the parties made by the Tribunal on 19 June 2020 in matter CC 644 of 2020 (**19 June 2020 consent order**). Further, Efficient says that attempts made by Perth Recruitment Services and Mr Anderson to pass a resolution to create a by-law seeking to permit the encroaching on common property as a permanent arrangement are invalid. Consequently, Efficient in these proceedings seek declarations and orders from the Tribunal requiring Perth Recruitment Services and Mr Anderson, including their employees and visitors, not to park any vehicle on, encroach or overhang the common property of the strata plan.

13 The following statement reflects the position of Efficient in these proceedings:⁸

They [the respondents] were just blatantly parking and not caring about their neighbour.

...

[The] photo clearly indicates no effort being made to park on the private lots [Lot 6 and Lot 7] and considerable overhanging to the common property.

14 Perth Recruitment Services and Mr Anderson say they have complied with the 19 June 2020 consent order and therefore oppose all of the orders sought by Efficient and submit that the applications should be dismissed. Further, they contend conduct by-law 2(e) is valid.

15 The following statement reflects Perth Recruitment Services' and Mr Anderson's position:⁹

[T]hese are frivolous and farcical applications to restrict parking. Farcical, because the applicant's proposed solution to her [Ms Janet Williamson's] perceived 'access issues' was to increase the area of the private lots and decrease the common area driveway by a metre. Obviously this 'solution' would simply be a change in the strata plan drawing only and not create any additional physical land. Cars would still park where they do at present and access would remain the same.

Prior to her [Ms Williamson] destruction of the carports, parking was on common property and this posed no problems nor created issues of access to any of the owners. Note also that this parking on common property was authorised by the City of Fremantle (City) and evidenced by the Private Parking Agreements granted to Lots 6 and 7[.]

16 The crux of these proceedings, and on which the decision turns, is whether Sch 2 conduct by-law 2(e), registered with Landgate on or about 31 May 2021, concerning parking and overhang on to the common property is invalid, and if it is invalid, what declarations and orders should the Tribunal make.

17 For the reasons given below, I conclude that the Efficient's applications are unsuccessful apart from the resolution of July 2020 which I will declare to be invalid.

⁸ Ibid, at page 34.

⁹ Ibid, at page 409.

Relevant procedural history and evidence

18 I heard the matter over two days on 22 September 2021 and
22 October 2021, following which I reserved my decision.

19 Ms Janet Williamson and Mr Geoffrey Chambers are directors of
Efficient and attended the final hearing in person. Efficient had one
witness, Ms Williamson, who is a registered builder and has
qualifications in architectural drafting. Her 'Summary of expected
witness evidence' is dated 16 April 2021 and was filed with the
Tribunal.¹⁰ Ms Williamson's witness evidence is summarised below
at [24] to [26].

20 Mr Tim Kullack is the managing director of Perth Recruitment
Services.

21 Mr Anthony Eaton Anderson is an accountant with Anderson
& Co.

22 Both Mr Kullack and Mr Anderson attended the final hearing in
person. In accordance with orders of the Tribunal,¹¹ Mr Kullack and
Mr Anderson gave oral evidence in respect of the matters referred to in
their joint response and bundle of documents filed with the Tribunal on
1 April 2021. Mr Kullack's and Mr Anderson's witness evidence is
summarised below at [27].

23 In accordance with the Tribunal's usual practice in matters of this
nature, the hearing was conducted on the basis that all the documents
filed with the Tribunal would be regarded as being in evidence,¹²
subject to any objection. No objection was made. At the hearing, the
Tribunal marked the following documents, to which I have had regard
for the purpose of my determination in these proceedings, as exhibits:

Exhibit 1 Hearing Book for CC 1672 of 2020 prepared
by the Tribunal dated 9 July 2021 pages 1
to 517.

Exhibit 2 Hearing Book for CC 1742 of 2020 prepared
by the Tribunal dated 9 July 2021 pages 1
to 518.

¹⁰ Ibid, at page 396.

¹¹ See orders of the Tribunal made on 11 May 2021 (Exhibit 1, at page 515).

¹² Although forming part of 'exhibits', the parties' contentions, and submissions in Exhibit 1 and Exhibit 2 are taken to be submissions, rather than evidence.

- Exhibit 3** Applicant's further documents, being an email dated 25 May 2020 from Ms Williamson to Mr Kullack, Mr Anderson and others and an email in response dated 2 June 2020 from Mr Kullack to Ms Williamson and others.
- Exhibit 4** Applicant's further documents filed with the Tribunal on 3 October 2021 including the applicant's request for amendment to orders sought in both matters (CC 1742 of 2020 and CC 1742 of 2020) and a recent copy of the strata plan and by-laws.
- Exhibit 5** Applicant's further documents including various emails of February 2021 regarding the proposed conduct by-law 2(e).
- Exhibit 6** Respondents' further documents including various emails of October 2020 and July 2021 regarding a 'possible solution'.

Witness evidence

Ms Williamson

24 Much was said by the parties about the toilets on part Lot 7 and part Lot 8; in particular by Ms Williamson, who gave evidence about how the toilets obstruct vehicle access to, and egress from Lot 8. It was not until the end of the hearing on the first day, 22 September 2021, that the Tribunal was informed that the toilets had in fact been demolished and removed by the end of July 2021 and that part Lot 7 and part Lot 8 are vacant lots (and are therefore the same as part Lot 6 which has been a vacant paved lot for about 30 years). Much of the evidence about how the toilets obstruct access to and egress from Lot 8, since the end of July 2021, is of no consequence on Ms Williamson's concession that it was easier to access and egress from Lot 8 with the demolition and removal of the toilets. I will therefore only refer to the evidence about the toilets where relevant.

25 Further, much was said by the parties about the removal of the carports between part Lot 6 and part Lot 7 by Ms Williamson during a long weekend, allegedly without the authority of Perth Recruitment Services and Mr Anderson. While the removal of the carports has caused much discomfort for Mr Kullack and Mr Anderson because they

contend that there was no agreement for Ms Williamson to remove the carports, the issue is not directly relevant to the vehicle parking overhang on to the common property issue that I must determine in these proceedings.

26 Ms Williamson's relevant evidence may be summarised as follows:

- a) The strata scheme contains common property situated directly at the rear of the four lots and is extended to the rear of the strata plan which is used for vehicle access and maneuvering. The common property driveway is mostly 5.8 metres wide, except for interruptions by part Lot 6, part Lot 7 and part Lot 8 as shown on the strata plan.
- b) When Efficient purchased Lot 8 in 2019, the parking of vehicles was along the back wall (on common property).¹³
- c) The application in CC 644 of 2020 was made as access to Lot 8 was confined to a route over Lots 5, 6 and 7 and there was no easement or other written agreement allowing for this. The applicant in that matter was Efficient, and the respondents were Perth Recruitment Services and Mr Anderson. The strata company was not a party. On 19 June 2020, the parties consented to the 19 June 2020 consent order:

The respondents and their visitors and employees shall not park on the common property or in a position on the respondents' lots which encroaches on the common property in a manner that obstructs vehicle access and egress for the applicant's lot, Lot 8, via the common property.

- d) She agreed to the 19 June 2020 consent order in the spirit of neighbourly cooperation. She may have indicated that she would turn a blind eye from time to time, but this was done with the clear understanding that her vehicle access to Lot 8 would not be obstructed and that she was not conceding her rights in any sense. She did not expect the overhang on to the common

¹³ Exhibit 1, at page 86.

property to be a metre and she did not think that it would be every day. At the time she was mostly concerned about vehicles being parked entirely on the common property and she had not gone into a detailed assessment, but a good eyeball assessment told her that Mr Anderson could park his vehicle entirely on Lot 6 if he removed the asbestos fence and that Mr Kullack would be able to park his vehicle entirely on Lot 7.

- e) Following the 19 June 2020 consent order, Perth Recruitment Services and Mr Anderson continued to allow vehicles to be parked on Lot 6 and Lot 7 where vehicles overhung the common property by about 1 metre which prevented her accessing Lot 8. She emailed Mr Kullack of Perth Recruitment Services as well as an employee, 'Mel', requesting them not to park their vehicles on the common property as that did not accord with the 19 June 2020 consent order. Nothing changed after her request because the vehicles parked on Lot 7 continued to overhang on to the common property. She never agreed for vehicles to overhang common property by 1 metre.
- f) A car could fit within Lot 7 if the screen fence, which sits forward of the adjacent building line, is moved back a little bit on Lot 7. It seems to her that obstructing her access to Lot 8 was more important to Mr Kullack rather than relocating the screen fence on Lot 7.
- g) On a daily basis, vehicles drive over part Lot 6 (owned by Mr Anderson) which is a vacant paved area and has been for many years. Perth Recruitment Services refuses to give written permission for vehicles to drive over the now (since July 2021) vacant part Lot 7 to access Lot 8.
- h) On 16 July 2020 she held an auction for the sale of Lot 8 as she had finished renovating the property as an Airbnb. The auction was held on a Saturday. Mr Kullack parked his car on Lot 7 adjacent to the timber fence of Lot 8 and left his car with the front wheel hanging entirely on to the common property and

thereby putting into the minds of potential buyers that there may be a problem with access to, and egress from Lot 8.

- i) The resolution purportedly passed on 7 July 2020 is invalid (**July 2020 resolution**). This is because the resolution confers on all lot owners, in particular Perth Recruitment Services and Mr Anderson, special privileges or exclusive use for parts of the common property and as such the resolution must be passed as a 'resolution without dissent'. Efficient did not vote in favour of the resolution, and therefore the resolution is invalid.
- j) Further, the July 2020 resolution contradicts conduct by-law 2 which provides that owners and occupiers must not interfere with the use and enjoyment of the common property. It is also in breach of, or inconsistent with, and seeks to undermine the terms of the 19 June 2020 consent order. In any event, the notice requirements (s 123 of the ST Act) were not complied with as the requirement of giving each owner a minimum period of 14 days' notice of the terms of the proposed resolution was not given to Efficient.
- k) The effect of the July 2020 resolution is to reduce the width of the pinch points on the common property accessway to less than 6.1 metres which is less than what is required by the Australian Standard and adopted by the City of Fremantle (**City**) *Local Planning Scheme No 4 (LPS)*.
- l) The strata company has acted unfairly, prejudicially and discriminatorily against Efficient and/or oppressively and unreasonably in respect of Efficient's right to use the common property as an accessway to Lot 8 which would be limited by the operation or terms of the July 2020 resolution if it is not declared invalid by the Tribunal.
- m) Perth Recruitment Services has breached the 19 June 2020 consent order by allowing, or failing to prevent, vehicles from encroaching on the common

property in such a way that obstructs vehicle access to, and egress from Lot 8 as evidenced by numerous photographs.

- n) As the accessway to Lot 8 stops at the property boundary, she reasonably expected to have the entire area to the rear of the lots, that is the common property, available for vehicle manoeuvring and access.
- o) Because of the breach of the 19 June 2020 consent order, that order should be amended or substituted with an express prohibition on the parking of vehicles on private lots or elsewhere within the strata scheme in a manner that encroaches or overhangs any of the common property, including the air space above it.
- p) The respondents are confusing 'obstructing' and 'blocking'. Obstructing is making difficult and it is very difficult to get the vehicle into Lot 8 when the respondents say that she can drive through to Lot 8 and therefore access is not obstructed. She says she is blocked from getting her vehicle into Lot 8. By overhanging the common property by just a few millimeters she says she is completely blocked.
- q) She accepts that over the past year, there have been more than 40 vehicles that have driven into Lot 8. However, in regards to these vehicles, she has had frequent complaints from people, including from her cleaners, and people asking for help to get into the car parking space on Lot 8. Her property manager refuses to park on Lot 8 and has suggested to her that she advertise the Airbnb without parking. Her property manager deals with complaints about the Airbnb including parking.
- r) In her view, guests at the Airbnb are not that fussy as most of them typically drive smaller cars. She does not know if the property manager or guests at the Airbnb have approached Perth Recruitment Services or Mr Anderson about getting access to, or egress from Lot 8.

- s) She has not approached Mr Kullack nor Mr Anderson to ask them to move their vehicles as she finds them intimidating, but she has sent to them frequent emails asking them not to obstruct access to Lot 8.
- t) She prepared the sketch and it uses the sweep path of 5.8 metres radius turn for a B85 vehicle (85th percentile) per the Australian/New Zealand Standard Parking facilities Part 1: Off-street car parking.
- u) The City's LPS and the Australian Standards apply to vehicle access requirements.
- v) Mr Kullack was not truthful in giving evidence:
 - i) about the screens on Lot 7 because the so called 'barbeque courtyard area' is not used and it was only put there two days after the carport came down to create an argument that he could not park his vehicle further within Lot 7; and
 - ii) about the July 2020 resolution because it is trying to give each of Lot 6 and Lot 7 an extra metre where vehicles overhang the common property.
- w) Mr Anderson was not truthful in giving evidence when he stated the carports on Lot 6 and Lot 7 were not common property as they were paid for by the respective owner of the lot.
- x) The private parking agreement lapsed in 1998.
- z) If the July 2020 resolution is to take effect and vehicles are allowed to overhang on to the common property by up to a metre, Mr Anderson could build a structure on part Lot 6 or place a fence or other structure on part Lot 6 and thus could hold Lot 8 to ransom.
- aa) Ms Williamson was not notified that the by-laws were going to be consolidated in or about May 2021; no meeting was held to elect or nominate Mr Kullack as the representative of the lot owners to deal with

Landgate on the consolidation or on any other strata matters.

- bb) In 2020, the City issued a building order requiring the owners of part Lot 7 and part Lot 8 to agree to either demolish or to repair the toilet block. Ms Williamson presumes that Mr Kullack continued to obstruct her access to Lot 8 by retaining the toilet on part Lot 7 because she would not agree to pay for the demolition and removal of the toilet and the cost to build a new carport for Lot 7. Further, the toilet block was retained (until July 2021) by Perth Recruitment Services in order to deliberately maximize obstruction to her and to Lot 8.
- cc) In early July 2021, shortly after the by-laws were consolidated by Landgate on 31 May 2021 and an amendment request to include conduct by-law 2(e), Mr Kullack demolished and removed the toilet block on part Lot 7 but left the central wall and the toilet on part Lot 8 intact. About two weeks later (late July 2021) she demolished and removed the toilet block on part Lot 8.
- dd) She does not accept that the July 2020 resolution was intended to be registered with Landgate but rather it was to serve as a written permission for the lot owners to park on common property.
- ee) The purported resolution of 1 February 2021 (**February 2021 resolution**) is invalid as Efficient voted against it. A resolution without dissent was required because the proposed conduct by-law 2(e) concerns common property.

Mr Kullack and Mr Anderson

27 Mr Kullack's and Mr Anderson's evidence may be summarised as follows:

- a) The vehicles were historically parked on the common property, for the past 30 years, as required by the City. There were no private lots at the rear of the buildings then. The carports were paid for by each lot owner

who sought permission from the City to install the carport. The City gave them a private parking agreement which allowed them to park on what is the common property. There was not any exclusive use by-law or any other by-law for the strata scheme conferring a right of occupancy for any lot owner of those carports.

- b) Before Efficient purchased Lot 8 in 2019, the parking worked well, including accessing Lot 8 by driving over Lot 6 and Lot 7.
- c) Mr Anderson has been driving over his part Lot 6 for the past 30 years and has allowed all the lot owners and occupiers and visitors to the lots to do the same. If he was to put something, for example a structure, on his part Lot 6, it would impede his access to Lot 6. He has no plans to put anything on his part Lot 6.
- d) Mr Anderson does not want to change the drawings or the strata plan because when they were changed a few years ago, it caused problems. Because of that he does not see any reason to agree to any more changes. Parking has worked fine in the past; it is working now and will continue to work.
- e) Ms Williamson destroyed the carports without the respective owners' approvals and therefore Mr Anderson said that he will not assist her to make any changes to the strata plan.
- f) Any photographs presented by Efficient which predate the 19 June 2020 consent order are irrelevant to these proceedings.
- g) Both Mr Kullack and Mr Anderson along with their employees have parked their vehicles as per the 19 June 2020 consent order. Therefore, there is nothing to amend or adjust in that order.
- h) Ms Williamson's sketch does not correctly reflect where vehicles are parked on Lot 7 as they are parked as close as possible to the boundary with Lot 6.

- i) Of the 40 or so vehicles that entered or drove into Lot 8 in the past year, not a single driver stopped to ask them to move their vehicles in order to gain access to, or egress from Lot 8. Further, if anyone had complained about not being able to access or egress from Lot 8, Efficient have not emailed to inform them or to ask that they move their vehicles.
- j) In response to the question, 'Would you agree that the vehicles are being parked in the position that we described and discussed in the SAT transcript?'¹⁴ Ms Williamson said, 'No' with the explanation that 'You have not made every effort to park close to your building'. Yet Ms Williamson accepted that in the photograph¹⁵ Mr Kullack's vehicle was parked as close as possible to the screen fence on Lot 7.
- k) Ms Williamson in giving oral evidence:
 - i) understood the dimensions of the strata plan and the dimensions of Mr Kullack's and Mr Anderson's vehicles yet she stated in giving her evidence in these proceedings that by agreeing to the 19 June 2020 consent order that she did not consent for vehicles to overhang the common property by 1 metre;
 - ii) accepted that there is a distance of about 5 metres from the front of cars parked on Lot 7 to the boundary;¹⁶
 - iii) accepted that Perth Recruitment Services typically does not park in the area on Lot 7 that is closest to the boundary fence with Lot 8 and that this was done as 'it might help [her] get cars in and out of [Lot 8]';
 - iv) accepted that one of her proposals was to increase the size of the lots by 1 metre;

¹⁴ Exhibit 1, at page 109 (photograph).

¹⁵ Ibid, at page 443 (bottom photograph).

¹⁶ Ibid, at page 446 (bottom photograph).

- v) that small cars (which are usually driven by guests to the Airbnb) are not having problems accessing or egressing from Lot 8;
 - vi) accepts that the City considered and approved development to the strata plan, such as carports, which rely upon the existing access arrangements;
 - vii) accepts she drove (squeezed) her vehicle with a refrigerator on the back of her Ute into Lot 8 and then reversed out of Lot 8 on 1 October 2020, with the toilet block in situ and with the fencing around the toilet block, without asking Perth Recruitment Services or Mr Anderson to move their vehicles; and
 - viii) no one has stopped her (or anyone else) driving over part Lot 7 and part Lot 8 since the toilets were demolished and removed in late July 2021.
- l) Mr Kullack has a large LandCruiser vehicle which photographs show that he reversed into and drove out of the pinch point to Lot 8 with 'Mel's' vehicle parked on Lot 7 and overhanging the common property. In response Ms Williamson stated that she agreed the vehicle is large and that the vehicle got in and out of the pinch point but stated that there is little room on either side of the vehicle. Ms Williamson stated that she was not talking about 'vehicle access where you can squeeze past' but rather she was talking about 'common vehicle access'.¹⁷
- m) In an email dated 25 May 2020, Ms Williamson stated in part:¹⁸

My suggestion is we remove the carports along the back so we can reinstate a vehicle access leg over the common property. There will be room for the existing parking on the private rear portions of the individual lots and even if there is a need for a little overhang into

¹⁷ ts 80, 22 September 2021.

¹⁸ Exhibit 1, at page 429.

the common property there will still be room for access and maneuvering as only 3 [metres] is required for an access leg (driveway). At some stage in the future it might make sense to reduce the common property from 6 [metres] wide to maybe 4 [metres] or 5 [metres] to put more space into the private lots. The lots will be more valuable this way.

- n) The parking issue for Lot 8 has arisen because Ms Williamson installed the timber fence on Lot 8 with the boundary to Lot 7.
- o) On 6 July 2020 Mr Kullack circulated an email to all owners with the July 2020 resolution, asking them to read it and reply. On 7 July 2020 Mr Kullack circulated an email to all owners recording the votes of the owners noting that only Efficient voted against the July 2020 resolution.
- p) They had intended to have the July 2020 resolution registered with Landgate but did not realise it had to be done within three months. That is why Mr Kullack circulated the February 2021 resolution on 1 February 2021. A new conduct by-law was proposed by Mr Kullack as follows:

Use of Common Property 2(e)

All vehicles parking on the private areas of all lots and roof structure of all carports shall be permitted to overhang a reasonable extent over the common property by up to one (1) metre and which would not impede or hinder vehicles using the six (6) metre wide accessway.

- q) The February 2021 resolution only required three out of the four owners to agree as it does not grant any special privileges or exclusive use arrangements to any particular owner. It does not discriminate against anyone because it applies to everyone. All the owners agreed to the February 2021 resolution except for Efficient.
- r) The February 2021 resolution does not transfer any property to any owner. Rather, the February 2021 resolution allows for the overhang of vehicles on to the

common property by up to 1 metre. It does not grant an exclusive use or any special privilege. It applies to all the owners and not just some owners which the 19 June 2020 consent order was limited to (Perth Recruitment Services and Mr Anderson). In this regard, the February 2021 resolution is tidying up the 19 June 2020 consent order.

- s) Any parking on Lot 6 is irrelevant because there is nothing physically behind Lot 6. From the front of Mr Anderson's vehicle to the boundary there is 6 metres. Mr Anderson's parking of his vehicle on Lot 6 does not reduce access to Lot 8 by 2 metres as suggested by Ms Williamson. Further, any suggestion of continued and blatant obstruction by Mr Anderson for access to and egress from Lot 8 by Ms Williamson is simply wrong.
- t) The photographs show a clear and unobstructed access to Lot 8; particularly after the removal of the toilet block on part Lot 7 and part Lot 8 in late July 2021. They have not received any complaints about not being able to access or egress from Lot 8. The only complaint they received was from a guest at the Airbnb about the timber fence on Lot 8 (not the fence that was around the toilet block) which the guest stated obstructed the guest getting into the carport of Lot 8.
- u) The photographs submitted by Efficient show that the respondents have parked in accordance with the 19 June 2020 consent order.
- v) The screens on Lot 7 are security screens. One is to screen the females when they exit the back door of the cottage to go to the toilet. That screen has been in place since 2014. The other screen is to cordon off the private courtyard. That screen has been in place since May 2020 and prior to that there were bollards in place.
- w) The toilet block on part Lot 7 did not obstruct access to Lot 8. The City told Mr Kullack that he could remove the toilet on his part Lot 7 but to not disrupt the middle

wall. He demolished and removed the toilet block on his part Lot 7 in early July 2021.

- x) They do not know why Efficient is still pursuing them through the Tribunal. The toilet block was demolished in July 2021 and the new carports on Lot 6 and Lot 7 were built in June 2021.
- y) Mr Chambers knew on 2 July 2021 that Landgate had registered conduct by-law 2(e).
- z) There is no council for the strata company. They understand that it is the job of the lot owners to control what goes on in the strata complex. There are no formal meetings. It is all done informally. Mr Kullack believes that he had the authority to act on behalf of the strata company. They believe along with the owner of Lot 5 that they are responsible for managing the common property including parking and related issues in line with the 19 June 2020 consent order, the ST Act and the by-laws.

Relevant history of matter CC 644 of 2020

28 It is useful at this point to briefly set out the relevant history in matter CC 644 of 2020 which concerns the application made by Efficient and to which the parties agreed for the Tribunal to make an order by consent, being the 19 June 2020 consent order (see [26(c)] above).

29 Ms Williamson explained that she did not agree to remove the toilet block¹⁹ on part Lot 7 and part Lot 8 and to provide new carports on Lot 6 and Lot 7 and therefore proceeded to make the application to the Tribunal on 6 June 2020.²⁰ The respondents to that application were Perth Recruitment Services Pty Ltd and Mr Anderson. The strata company was not a respondent in that proceeding. Neither was the owner of the remaining lot on the strata plan, Lot 5.

30 Ms Williamson stated that at that time her access route to Lot 8 was confined to travelling over Lots 5, 6 and 7 but there was no written

¹⁹ According to Ms Williamson, the toilet block was in imminent danger of collapse. The City issued a building order requiring the owners of Lot 7 and Lot 8 to either demolish or refurbish the toilet block (ts 31, 22 September 2021).

²⁰ ts 27, 22 September 2021.

agreement allowing for this or any form of easement for this access over the Lots. The reasons for this according to Ms Williamson was because vehicles associated with Lot 6 and Lot 7 were parked on the common property between part Lot 6 and part Lot 7 (under the then carport).

31 According to Mr Kullack and Mr Anderson parking on the common property between part Lot 6 and part Lot 7 had been in place for a very long time and was working well. At that time there was a toilet block on both part Lots 7 and part Lot 8. There was nothing on part Lot 6 as the toilet on that part lot had been removed many years earlier and vehicles drive over it, although it is owned by Mr Anderson.

32 The matter did not proceed to a final hearing as the parties agreed at the directions hearing, on 19 June 2020, to the 19 June 2020 consent order by the Tribunal²¹ (see above at [26(c)]):

33 The 19 June 2020 consent order has two components. First, there is to be no parking of vehicles on the common property. Second, that vehicles parked on lots which do encroach the common property must not obstruct vehicle access to and egress from Lot 8 via the common property.

34 The second component of the 19 June 2020 consent order lacks some kind of measurement or specific detail and may therefore give rise to further argumentation or interpretation.

35 Ms Williamson submits that the 19 June 2020 consent order is not working. Perth Recruitment Services and Mr Anderson disagree. Their position is that the 19 June 2020 consent order is working and conduct by-law 2(e) tidies up the 19 June 2020 consent order.

36 I now turn to the current proceedings.

37 Efficient contends that it was necessary for it to make the application in CC 1672 of 2020 (which is part of the current proceedings before me) because parked vehicles overhang on to common property in a manner that obstructs vehicle access to and egress from Lot 8 via the common property.

38 Mr Kullack and Mr Anderson strongly reject that there has been any obstruction to access and egress from Lot 8 via the common

²¹ Mr D Aitken, SM.

property either before or after the removal of the toilets on part Lot 7 and part Lot 8 in July 2021.

39 I will now set out the issues to be determined in these proceedings for both matters, followed by the legal framework relevant to these proceedings by reference to the relevant provisions of the ST Act, and I will then make relevant findings of facts and set out the parties' main contentions. Finally, I will address each of the issues for determination in turn.

Issues

40 The parties agree that the issues or questions that require determination by the Tribunal in these proceedings are as follows:²²

Issue 1: Whether the July 2020 resolution and February 2021 resolution concerning parking and overhang on to the common property are invalid? If 'yes' should the Tribunal make a declaration or order, or both, that one or both of the resolutions are valid and conduct by-law 2(e) is valid?

Issue 2: Whether the Tribunal may make an order prohibiting the strata company from passing an exclusive use parking by-law or the granting of a licence if doing so allows for the obstruction of Efficient's access to its Lot 8 for its use and enjoyment? If 'yes', should the Tribunal exercise its discretion to make an order prohibiting the strata company from passing an exclusive use parking by-law or the granting of a licence?

Issue 3: Whether the Tribunal can vary or substitute the 19 June 2020 consent order? If 'yes', should the Tribunal vary or substitute that order to require Perth Recruitment Services and Mr Anderson not to allow vehicles to park on their respective Lot 7 and Lot 6 which encroach on the common property?

²² ts 7, 22 September 2021.

Issue 4: Whether Perth Recruitment Services and Mr Anderson failed to comply with the 19 June 2020 consent order? If 'yes' should the Tribunal impose a penalty on Perth Recruitment Services and Mr Anderson and if 'yes', how much should the penalty be and when is it to be paid?

Issue 5: Whether the Tribunal may make a declaration under s 95(1) of the SAT Act? If 'yes', should the Tribunal make such declaration?

41 I note that Efficient in its Statement of Facts, Issues and Contentions,²³ seeks to raise other issues such as whether the resolution fails to comply with 4.7.6(i) of the City's LPS. While these other issues are important and of interest to Efficient, they are not issues directly relevant to determining the application before me, which is essentially, whether conduct by-law 2(e) is invalid, and if it is invalid, what declarations and orders should the Tribunal make.

42 It is first necessary to set out the regulatory framework and factual background against which the consideration of the above issues must be made.

Regulatory framework

The strata plan

43 The strata plan was registered on 12 December 1978. The parcel and building are described as:

Four brick, stone, galvanized iron and fibro single-storey commercial units situated on Lot 123 of Diagram 2061, and having an address of 25, 27, 29 and 31 Parry Street, Fremantle WA 6160[.]

44 A notification (by instruments F739080, F739077, F739081, F739078 and F739079) provided for the subdivision of strata Lots 1, 2, 3 and 4 and common property into strata Lots 5, 6, 7 and 8 and a portion of the common property included in each of strata Lots 5, 6, 7 and 8 was registered with Landgate on 25 November 1994.

²³ Exhibit 1, at page 40.

45 A further notification (by instrument N844663) was registered with Landgate on 6 February 2018. That notification provided for the merger of buildings and land.

46 Finally, a notification (by instrument O752814) was registered with Landgate on 31 May 2021 which provided for the first consolidation of the scheme by-laws and which included an application to amend the by-laws by adding conduct by-law 2(e) concerning vehicle parking.

ST Act

47 Major amendments to the ST Act came into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018* (WA) (**ST Amendment Act**). However, the coming into operation of the ST Act does not affect the continued existence of the strata scheme, the strata company, or its council, amongst other things (Sch 5 by-law 2(1) of the ST Act).

48 In this case, Efficient filed its applications with the Tribunal after 1 May 2020. This means that the provisions of the ST Act, as they are after the amendments, apply to the determination of this application (Sch 5 by-law 30(1) of the ST Act).

Common property

49 Common property is property that is jointly owned by all owners in the strata title scheme as tenants in common and is not contained within any lot. The term common property is relevantly defined in s 10 of the ST Act as:

- (1) The *common property* in a strata titles scheme is -
 - (a) that part of the parcel of land subdivided by the strata titles scheme that does not form part of a lot in the strata titles scheme[.]
- (2) The *common property* includes, for a strata scheme, those parts of a scheme building that do not form part of a lot[.]

50 Importantly, the owner of a lot cannot separately deal with or dispose of the owner's share in the common property of the strata titles scheme. This is provided for in s 13(8) of the ST Act.

Resolution of scheme dispute

51 Section 119(1) of the ST Act provides that the strata company in performing its functions is to have the objective of implementing processes and achieving outcomes that are not, having regards to the use and enjoyment of lots and common property in the strata titles scheme:

- (a) unfairly prejudicial to or discriminatory against a person; or
- (b) oppressive or unreasonable.

52 Section 197 of the ST Act provides for resolution of certain scheme disputes including:

- (a) a dispute between scheme participants about -
 - ...
 - (ii) the performance of, or the failure to perform, a function conferred or imposed on a person by this [ST] Act or the scheme by-laws; or
 - ...
 - (vi) any other matter arising under this [ST] Act or the scheme by-laws[.]

53 The term 'scheme participants' in s 197 is defined in s 197(2) of the ST Act and includes the strata company and the owner or occupier of a lot in the strata title scheme.

54 Section 197(4) provides that an application may be made by a party to the Tribunal for the resolution of a scheme dispute. In this case, Efficient, as the owner of Lot 8 has made an application to the Tribunal for the resolution of the scheme dispute.

Scheme by-laws

55 Scheme by-laws are the rules the strata company, owners and occupiers need to abide by. This is provided for in s 45 of the ST Act.

56 Under s 44 of the ST Act, the strata company has broad powers to make, amend and repeal scheme by-laws. Scheme by-laws cannot be inconsistent with the ST Act and other relevant law.

57 If a by-law is registered with Landgate, it cannot be presumed that the by-law is valid or enforceable. This is provided for in s 59 of the ST Act as follows:

59. No presumption of validity of scheme by laws

- (1) The Registrar of Titles may, but is not obliged to, examine scheme by laws lodged for registration for compliance with this Act.
- (2) It must not be presumed that, because the Registrar of Titles has registered scheme by laws, the by laws are valid or enforceable.
- (3) The State does not guarantee the validity or enforceability of scheme by laws.

58 In respect of by-laws, the by-laws as they applied immediately before commencement day (1 May 2020) continue to apply as provided for by Sch 5 cl 4(1) and cl 4(2) of the ST Act as follows:

4. Scheme by-laws

- (1) The by-laws (including any management statement) of a strata company as in force immediately before commencement day continue in force, subject to this Act, as scheme by-laws and if they had been made as governance by-laws or as conduct by-laws according to the classification into which they would fall if they had been made on commencement day.
- (2) However, all by-laws that are in force immediately before commencement day in the terms set out in Schedule 1 clauses 11 to 15, or Schedule 2 clause 5, as then in force are taken to be repealed on commencement day.

59 The relevant by-laws for these proceedings are the consolidated by-laws (consolidated on 31 May 2021) which comprise Sch 1 of the ST Act by-laws 1 to 10 but excluding Sch 1 by-laws 11 to 15 (general meeting, proceeding at general meeting, votes, and common seal) and Sch 2 of the ST Act by-laws 1 to 15 and including conduct by-law 2(e) but excluding by-law 5 (children playing upon common property) (the **by-laws**).

60 It is possible to create by-laws granting an owner exclusive use and enjoyment of, or special privileges in respect of, common property

or any part of it (see *The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd* [2020] WASAT 9 (*Del Mar*) at [35]).

61 Section 43 of the ST Act deals with such exclusive use or special privileges by-laws and relevantly provides:

- (1) *Exclusive use by-laws* of a strata titles scheme are scheme by-laws that confer exclusive use and enjoyment of, or special privileges over, the common property in the strata titles scheme or specified common property in the strata titles scheme (the *special common property*) on the occupiers, for the time being, of a specified lot or lots in the strata titles scheme (the *special lots*).
- (2) Exclusive use by-laws may include the following -
 - (a) terms and conditions on which the occupiers of special lots may use the special common property;
 - (b) particulars relating to access to the special common property and the provision and keeping of any key necessary;
 - (c) particulars of the hours during which the special common property may be used;
 - (d) provisions relating to the condition, maintenance, repair, renewal or replacement of the special common property;
 - (e) provisions relating to insurance of the special common property to be maintained by the owners of special lots;
 - (f) matters relating to the determination of amounts payable to the strata company by the owners of special lots and the imposition and collection of the amounts.
- (3) Subject to the terms of exclusive use by-laws, the obligations that would, apart from this subsection, fall on the strata company under section 91(1)(c) in relation to the special common property fall instead on the owners of the special lots.
- ...
- (5) Exclusive use by-laws can only be made, amended or repealed if the owner of each lot that is or is proposed to be a special lot has given written consent to the by-laws.

62 The principles applicable to the proper construction of by-laws was summarised in *Del Mar* at [46] - [48]. I will apply the principles in

determining the proper construction of the by-laws in regards to the by-laws which Efficient say that Perth Recruitment Services and Mr Anderson have breached.

63 The strata company may, by resolution of the strata company, make governance by-laws or conduct by-laws for the strata titles scheme including by-laws that amend or repeal the by-laws it is taken to have made on registration of the scheme (s 44(1) of the ST Act). The resolution to make by-laws must be:

- (a) for governance by-laws - a resolution without dissent; and
- (b) for conduct by-laws - a special resolution.

64 Efficient contend that the resolutions sought to be made by the strata company by the July 2020 resolution and the February 2021 resolution are invalid as they are each required to be a resolution without dissent.

65 Conduct by-law 2(e) does not appear in Sch 2 of the ST Act. It is a contentious by-law because Efficient submits that the by-law was registered by Landgate but should not have been so registered because the resolution was not made without dissent. It is common ground that Efficient did not vote in favour of the resolution that comprises conduct by-law 2(e). The three other lot owners voted in favour of conduct by-law 2(e) and argue that as the by-law is a conduct by-law only a special resolution is required. I deal with conduct by-law 2(e) later in these reasons at [112] to [119].

Tribunal proceedings

66 Part 13 of the ST Act deals with Tribunal proceedings.

67 In proceedings under the ST Act, the Tribunal *may* make any order it considers appropriate to resolve the scheme dispute or proceeding (s 200(1) of the ST Act). The types of orders that the Tribunal may make are set out in s 200 of the ST Act and include, for example, an order under s 200(2)(m) of the ST Act requiring a person to take specified action or to refrain from taking specified action to remedy a contravention or prevent further contraventions of the ST Act or scheme by-laws. In addition, the Tribunal may provide that the order is to remain in force for a specified period, until a specified event or until further order (s 200(7) of the ST Act).

68 Instead of, or in addition to any order that the Tribunal may decide to make to resolve the scheme dispute or proceeding, s 199 of the ST Act provides that the Tribunal *may* make a declaration concerning a matter in the proceeding. An example of a declaration that the Tribunal may make is to declare that a resolution of the strata company is, or is not, invalid (s 199(3)(d) of the ST Act).

69 It is also possible for the Tribunal to make a decision not to make an order or declaration. This is provided for in s 202 of the ST Act.

70 Section 207 of the ST Act deals with enforcement of orders to act. Relevantly, it provides:

...

(2) If the Tribunal is satisfied that an order to act has not been complied with, or has been complied with in part only, by the person to whom it was given, the Tribunal may -

(a) vary, revoke or substitute the order to act; and

(b) make an order that the person to whom the order to act was given pay to the applicant a specified amount by way of compensation for the failure to act or to refrain from acting.

(3) Subsection (2) applies whether or not the person to whom the order to act was given has been convicted of an offence under the State Administrative Tribunal Act 2004 section 95 before the revocation of the order.

(4) The variation, revocation or substitution of an order does not affect -

(a) anything done under the order before the revocation; or

(b) a penalty that has been or may be imposed under the State Administrative Tribunal Act 2004 section 95 for the failure to comply with the order.

71 In this case, Efficient seeks orders under s 207 of the ST Act to vary or substitute the 19 June 2020 consent order. If the Tribunal decides to make an order under s 207 of the ST Act the order applies to the person to whom it was given, which in this case would only be Perth Recruitment Services and Mr Anderson as neither the strata company nor the owner of Lot 5 were respondents in the proceeding CC 644 of 2020.

72 Finally, s 208 of the ST Act provides that if an order of the Tribunal under the ST Act is inconsistent with a scheme by-law as in force when the order is made, the order prevails over the by-laws to the extent of the inconsistency.

Factual background

73 The key facts are not in any real dispute. I make the following findings of fact which are relevant to the issues to be determined by me in these proceedings:

- a) The sketch prepared by Ms Williamson²⁴ shows the lot boundary of Lot 8 (by the 45 degree truncation that crosses the word 'carport'). The common property is most of the area coloured yellow and the white area under the carport that follows the truncation around to the building of Lot 8. The common property is interrupted by part Lots 6, 7, and 8 which all previously had outside toilets. Part Lot 6 was cleared and paved, and for all intents and purposes was part of the accessway. The toilet blocks on each of part Lot 7 and part Lot 8 were demolished and removed by late July 2021. Lot 8 has a timber fence erected by Efficient on the boundary with Lot 7 and is slightly short (30 to 40 millimeters) of the common property. The entrance to the strata complex (Holdsworth Street) is approximately 4.5 metres wide.
- b) The strata company has been mostly inactive.
- c) On 6 July 2020, Mr Kullack of Perth Recruitment Services circulated an email to the lot owners requesting a vote on the following 'special resolution' (July 2020 resolution):²⁵

All vehicles parking on the private areas of all lots shall be permitted to overhang a reasonable extent over the common property accessway by up to one (1) metre and which would not impede or hinder other vehicles using the six (6) metre wide accessway.

²⁴ Ms Williamson prepared the sketch at page 82 of Exhibit 1. Ms Williamson qualified as an architectural drafter, but she is now a registered builder. Ms Williamson used an electronic drawing from the surveyor, Mr Dion McAliece, who is reported to have prepared the drawings for the merger by resolution, which was done in 2018, as the base plan. See also ts 25, 22 September 2021.

²⁵ Exhibit 1, at page 482.

- d) On the same date (6 July 2020), Ms Williamson responded stating the original proposed resolution serves no purpose. She suggested the following proposed resolution:²⁶
1. Provided a 4.5 metre access leg is created alongside the rear of the property, as shown on the attached plan, by the removal of the existing old toilets on [part] lots 7 and 8 and the registration of easements for the purpose of right of carriageway also as indicted (sic) on the plan, then;
 2. Areas of common property between the 4.5 metre wide access leg and the private lots shall be for the exclusive use of the respective private lots as shown on the plan, and
 3. Consent is hereby given jointly and severally by all members of the scheme to carports, sheds, garages, fences, gates and doors being installed on the private lots including the exclusive use areas at the respective lot owner's discretion and cost, without further permission of the strata company or adjoining lot owner, but subject only to the necessary approvals of relevant authorities and in addition to this by-law serving as enduring consent and authority of the respective relevant lot owners to such relevant authority(s), all lot owners shall give written further consent to such authorities who require it, and
 4. The members of the strata company shall execute all such documents to give effect to this resolution without delay and this resolution shall be taken by all relevant authorities as agreement and authority on any application to give effect to this resolution, and
 5. This resolution authorises Landgate to register this by-law and such notations on the strata plan to give effect to it.
- e) The July 2020 resolution was not registered by Landgate.
- f) On 1 February 2021, Mr Kullack of Perth Recruitment Services circulated an email to the lot owners requesting a vote on the following resolution by 16 March 2021 (February 2021 resolution):

²⁶ Ibid, at pages 479-480.

Schedule 2 Conduct by-laws

Use of Common Property 2(e)

All vehicles parking on the private areas of all lots and roof structure of all carports shall be permitted to overhang a reasonable extent over the common property by up to one (1) metre and which would not impede or hinder vehicles using the six (6) metre wide accessway.

- g) On 11 February 2021 Ms Williamson wrote to the lot owners to note Efficient's vote against the February 2021 resolution.
- h) Conduct by-law 2(e) was registered by Landgate following the first consolidation of the by-laws on or about 31 May 2021.
- i) By late July 2021 the toilets on part Lot 7 and part Lot 8 were demolished.

Parties' main contentions

74 Efficient's main contentions may be summarised as follows:

- The July 2020 resolution and the February 2021 resolution should each be declared invalid because they purport to confer on Perth Recruitment Services and Mr Anderson the right to use, exclusively, part of the common property and therefore required a resolution without dissent.
- The 14 days' notice period for voting for the July 2020 resolution was not met.
- The obstruction of common property prevents an owner from exercising his or her right on the common property and is an obstruction which interferes to an appreciable practical extent with the right every lot owner has to use the whole of the common property and to use it at all times and under all circumstances.
- Peaceful enjoyment of the common property is being compromised by parking or allowing the parking of

vehicles overhanging on the common property from Lot 6 and Lot 7.

- The width of the common property access way (the pinch point) between the boundary of Lots 6, 7 and 8 and the respective part Lots 6, 7 and 8 is reduced to 3 metres. By allowing vehicles to overhang on to the common property by 1 metre, the width of the pinch point is reduced down to 2 metres (down from 3 metres). The 2 metre width of the available common property at the pinch point, relative to the area of the rest of the common property access way of approximately 6 metres, is an obstruction.
- Perth Recruitment Services and Mr Anderson continue to breach the 19 June 2020 consent order.

75 Perth Recruitment Services and Mr Anderson's main contentions may be summarised as follows:

- The February 2021 resolution is valid. Conduct by-law 2(e) and was registered by Landgate on or about 31 May 2021.
- Efficient agreed to the overhang of parked vehicles on to the common property when it agreed to the 19 June 2020 consent order. Efficient understood the size and type of vehicles driven by Mr Kullack and his employee 'Mel'.
- The overhang of vehicles on to the common property does not obstruct Efficient (or anyone else's) access to, and egress from Lot 8.
- By its various applications to the Tribunal, Efficient is seeking to increase the area size of Lot 8 and decrease the area size of the common property.

76 I now turn to address each of the issues identified at [40] above.

Issues 1 to 3

77 Following the 19 June 2020 consent order, Mr Kullack issued an email to the owners putting forward a resolution about parking. In my view, it is not necessary to consider in detail the July 2020 resolution

put forward by Mr Kullack as it was not registered by Landgate. The July 2020 resolution is invalid for the following two reasons.

78 First, 14 days' notice of the terms of the proposed resolution was not given to each owner before voting on the resolution opened. This is because the evidence before the Tribunal is that Mr Kullack issued an email on 6 July 2020 setting out the July 2020 resolution but not giving the required 14 days' notice (as required by s 48(1) of the ST Act) before voting on the resolution opened.

79 Second, on 6 July 2020 Ms Williamson emailed Mr Kullack to vote against the resolution and suggested an alternative resolution. For these reasons, I would declare the July 2020 resolution is invalid.

80 It is Mr Kullack's evidence that all the owners, apart from Efficient which voted against the resolution, intended to have the July 2020 resolution registered with Landgate but did not realise it had to be done within three months. It is because of this that Mr Kullack stated that he circulated the February 2021 resolution which was then lodged with, and registered by Landgate on or about 31 May 2021.

81 It is useful to restate the February 2021 resolution which was circulated by email to the owners by Mr Kullack on 1 February 2021. The resolution provides:

Use of Common Property 2(e)

All vehicles parking on the private areas of all lots and roof structure of all carports shall be permitted to overhang a reasonable extent over the common property by up to one (1) metre and which would not impede or hinder vehicles using the six (6) metre wide accessway.

82 In his email of 1 February 2021, Mr Kullack requested the lots owners to consider the above resolution and to vote on it by 16 March 2021. This meets the 14 days' notice requirements in s 48(1) of the ST Act. The only owner which did not agree to the above resolution was Efficient. Ms Williamson emailed Mr Kullack and the other owners on 11 February 2021 stating Efficient did not agree with the proposed resolution.

83 As the February 2021 resolution concerns overhang on to the common property (indeed the resolution uses the words 'common property'), a resolution without dissent was required. That is, no vote attached to a lot in the strata scheme is to be cast against the resolution (s 123(2) of the ST Act). The reason for this is because the

owner of a lot cannot separately deal with the owner's interest in the common property (see s 13(9) of the ST Act). In this case, it is common ground that Efficient voted against the February 2021 resolution. The consequence is that the February 2021 resolution, while meeting the notice requirement, was not a resolution without dissent.

84 It is Mr Kullack's and Mr Anderson's evidence that they understood that as conduct by-law 2(e) (as set out above at [81]) is a Sch 2 conduct by-law that only a special resolution, as set out in s 44(2)(b) of the ST Act, was required. It is on that basis, that Mr Kullack says that he organised for the by-laws to be consolidated and then to be amended to include conduct by-law 2(e) (as set out above at [81]) on or about 31 May 2021.

85 It is Ms Williamson's evidence that she was not informed of either the consolidation or the amendment to include conduct by-law 2(e), which she says could not be included as it is invalid as a resolution without dissent was required but not achieved because Efficient voted against the resolution.

86 Part 8 (s 91 to s 142) of the ST Act sets out the functions, procedures and other matters relevant to the strata company. The strata company is established upon registration of the strata titles scheme (s 14(1) of the ST Act). In this case, as the strata titles scheme was registered on 12 December 1978 as shown on Strata Plan 6413, the strata company was established on 12 December 1978. Further, the strata company is comprised of the owners for the time being of the lots in the strata titles scheme (who are the members of the strata company) (s 14(8) of the ST Act). In this case, the current owners of Lots 5, 6, 7 and 8 are the members of the strata company. Finally, the governing body of the strata company is the council of the strata company (s 14(6) of the ST Act). In this case, the evidence before the Tribunal is that there is no council. This means that all the members of the strata company (that is all the current owners) comprise the council.

87 The evidence of Mr Kullack and Mr Anderson is that prior to Efficient buying Lot 8 the owners worked together and resolved any issues as they arose.

88 A general duty of the strata company is the duty to control and manage the common property for the benefit of all the owners of the lots (s 91(1)(b) of the ST Act).

89 A function of the strata company is to comply with the by-laws and to enforce compliance with those by-laws by others to whom they apply (s 112 of the ST Act).

90 As already noted, it is possible to create by-laws granting an owner exclusive use and enjoyment of, or special privileges in respect of, common property or any part of it (see *Del Mar* at [35]). This requires an exclusive use by-law which is provided for in s 43 of the ST Act. Importantly, exclusive use by-laws can only be made, amended or repealed if the owner of each lot that is or is proposed to be a special lot has given written consent to the by-law (s 43(5) of the ST Act).

91 Reading Sch 2 conduct by-law 1 which concerns vehicles and parking and s 44(2)(b) of the ST Act in isolation it is understandable how Mr Kullack and Mr Anderson arrived at the (incorrect) conclusion that all they were dealing with was a conduct by-law and therefore all that was needed was for the resolution to be passed by a special resolution (and not a resolution without dissent).

92 The standard form used to notify Landgate of the first consolidation provides as follows under 'Part 2 - Application to Amend':

Part 2 – Application to Amend

In compliance with the Strata Titles Act 1985 Section 56 and Schedule 5 clause 4 and the Strata Titles (General) Regulation 2019 Regulation 180(1), applies to the Registrar of Titles to register an amendment to the strata titles scheme by amending the scheme by-laws and registering a consolidated set of scheme by-laws

and certifies that:

....

By special resolution, the voting period for which opened on and closed on (and which must be registered within 3 months from closing date) the additions/amendments repeal to the Conduct by-laws where made as detailed here.

...

93 Again, reading the above form in isolation, it is understandable how Mr Kullack and Mr Anderson would have arrived at the (incorrect) conclusion that all they were dealing with was a conduct by-law and

therefore all that was needed was for the resolution to be passed by a special resolution (and not a resolution without dissent).

94 Importantly, just because Landgate registered conduct by-law 2(e), that in itself, does not mean the by-law is valid or enforceable (s 59 of the ST Act).

95 It is common ground that conduct by-law 2(e) concerns vehicle parking and overhang on to the common property. Consequently, as the by-law concerns special privileges for the use of part of the common property, which all owners have an undivided share in the common property as a tenant in common with the other owners, proportional to the unit entitlements of their respective lot (s 13(7)(b) of the ST Act), each and every owner must give written consent to the by-law (s 43(5) of the ST Act). In other words, as the by-law grants a special privilege in respect of part of the common property, each and every owner must consent in writing to the by-law. It is common ground that Efficient did not consent to conduct by-law 2(e).

96 No minutes of meeting recording the passing of a resolution for the adoption of conduct by-law 2(e) are before the Tribunal. This is not surprising in the case here of a four lot scheme, in respect of which the strata company is not required to keep minutes of meetings (s 140(2) of the ST Act).

97 Subject to the following discretion to make a declaration or an order or both, because every owner did not consent in writing to the February 2021 resolution, it is invalid, even though it was registered by Landgate (because, as noted earlier, s 59 of the ST Act provides that registration of a by-law does not make it valid). The Tribunal may decide to make a declaration or order or both under the ST Act that the resolution is not invalid as follows.

98 The Tribunal *may* decide, without limitation, to make a declaration under s 199(3)(c) of the ST Act that the February 2021 resolution is valid. In addition to making the declaration under s 199(3)(c) of the ST Act, the Tribunal *may* also decide to make an order under s 200(2)(n) of the ST Act that the strata company is to be taken to have passed the February 2021 resolution required under the ST Act as a resolution without dissent. The use of the word *may* in both s 199 and s 200 of the ST Act connotes that the Tribunal retains an overall discretion, based on the particular circumstances of the matter before it.

99 The ST Act does not provide any guidance when the Tribunal would decide that a resolution is not invalid or decide that the strata company is to be taken to have passed a resolution required under the ST Act as a resolution without dissent.

100 Efficient's position is that Mr Anderson readily agreed at the directions hearing on 19 June 2020 to consent to an order that he not park on the common property or encroach on to the common property.²⁷ Efficient submits that I should find that Mr Kullack and Mr Anderson have colluded to deliberately obstruct access to Lot 8 including but not limited to being intent to try to force Efficient into paying the cost of removal of the old toilets and providing new carports on Lot 6 and Lot 7.²⁸ Efficient contends that the issues in these proceedings arise from a transition from a long-standing access and parking arrangements for the strata scheme where two carports occupied the common property behind Lot 6 and Lot 7 such that access for vehicles was achieved by driving across the private lots of Lot 5, Lot 6 and Lot 7.

101 I do not accept Efficient's contention that Mr Kullack and Mr Anderson colluded deliberately to obstruct access to Lot 8. On the evidence before the Tribunal none of the owners of the 40 vehicles that entered Lot 8 complained to Perth Recruitment Services or Mr Anderson directly that their access to or egress from Lot 8 was obstructed or blocked. This leads me to find that access to, and egress from Lot 8 was not obstructed or blocked by Perth Recruitment Services or Mr Anderson as claimed by Efficient. Ms Williamson's evidence is that her cleaners and others have asked for help to get into the car parking space on Lot 8. That, in my view, does not support the conclusion that Efficient wants me to reach that access is obstructed.

102 I accept that Mr Anderson consented to an order that he not park on the common property or encroach on to the common property. He gave evidence of such, including that his vehicle is parked wholly within Lot 6.

103 In the circumstances of this case, it is necessary to first consider the proceeding in the earlier matter before the Tribunal in CC 644 of 2020 and the resulting 19 June 2020 consent order, and then to set out the proper construction of conduct by-law 2(e) in order to decide whether I should exercise the Tribunal's discretion to make a

²⁷ ts 206, 22 October 2021.

²⁸ ts 204, 22 October 2021.

declaration, or a declaration and an order under s 199(3)(c) and 200(2)(n) of the ST Act.

104 In the matter of CC 644 of 2020 which was commenced by Efficient on 6 June 2020, Mr Anderson and Perth Recruitment Services were the respondents. Neither the strata company nor Rosskeen Pty Ltd (the owner of Lot 5) were respondents in that matter. The issue in CC 644 of 2020 is the same issue that is before me in these proceedings. That is, the overhang of vehicles on to common property closest to Lot 6 and Lot 7 which Efficient alleges blocks or obstructs access to Lot 8.

105 At the directions hearing for CC 644 of 2020 on 19 June 2020 Mr Anderson explained how the issue arose as follows:²⁹

ANDERSON, MR: ... I mean, before this issue came up, where the parks (sic) were parked before on common property, there was no problem at all with egress or access to Ms Williamson's property [Lot 8]. This has only been caused by her insisting that we move our cars from where they've been parked for 28 years across to our property, and now there could be a potential issue.

106 The parties discussed the issue of encroaching on to the common property and the issue of obstructing vehicle access to and egress from Lot 8 at the directions hearing on 19 June 2020. It is useful to set out part of that discussion:³⁰

AITKEN MR: Sure. Yes. So the order they're seeking is as follows: the respondents, and any of their visitors or employees, shall not park on, or in a position that encroaches the common property, or otherwise obstructs vehicle access and egress for lot 8 via the common property.

...

KULLACK, MR: The issue with encroaching on the common property, the problem I have is that my vehicle will encroach on to the common property and there's a pinch point right where those building are right behind my building [the toilet block on part Lot 7 and part Lot 8]. And I've parked

²⁹ ts 16, 19 June 2020.

³⁰ ts 11-17, 19 June 2020.

where the applicants have suggested in the past, and this still wasn't acceptable to them, so there is an issue there.

...

WILLIAMSON, MS: If he can park in a manner that doesn't obstruct vehicle access and ingress - and he could easily do this by parking on the right-hand side of the area as opposed to the left ---

...

KULLACK, MR: Not only does my - I have a Land Cruiser, which is the biggest vehicle. Now, the applicants are saying if I park over on the right-hand side that would suit them. But even a smaller vehicle, or a normal mid-sized vehicle - which is what my staff do have - that will also encroach on to part of the common property. So how much are they willing to have something encroach on to the common property; 100 millimeters; is it 600 millimeters; is it ---

AITKEN MR: Well, let - yes, let me just - let - well, the test is going to be whether it encroaches to a degree that obstructs vehicle access and egress. Now I know that can be subject to interpretation, ...

....

So the order would say, ... "The respondents, and any of their visitors, employees, shall not park on the common property, or within their lot, in a manner that encroaches the common property, which obstructs vehicle access and egress for lot 8 via the common property".

...

Now, that would contemplate that there might be parts of a vehicle that is sticking out into common property, or a vehicle that's sort of within Mr Kullack's lot, but not totally within it, and the question is whether the bit that's sticking out obstructs vehicle access, and that's where I can see there's just a danger of, you know, how many centimetres out is preventing the access. And I - apart from getting some

kind of measurement or putting some specific details there, I'm not sure it's - if you think you can make that work because the understanding is clear and you communicate if problems came up, that might be enough to do the job.

...

KULLACK, MR: Look, I could - I could work with that if commonsense prevails that if we're parking our vehicles as close to the rear of our property as we can, it's physically not possible for me to do any more.

...

WILLIAMSON, MS: Look, the wording of the order you've proposed is acceptable to me.

107 At the end of the directions hearing, on 19 June 2020, the Tribunal made with the consent of the parties the 19 June 2020 consent order (see above at [26(c)]).

108 It is clear, having regard to the evidence to which I have referred, that the parties agreed that there would be some overhang of parked vehicles on to the common property.

109 The 19 June 2020 consent order does not specify that it is to remain in force for a specified period, until a specified event occurs or until a further order (s 200(7) of the ST Act). Further, the transcript of 19 June 2020 is silent as to whether the order is to remain in force for a specified period, or until a specified event occurs or until a further order of the Tribunal.

110 In the ST Act there does not appear a provision equivalent to s 81(10) of the ST Act (as it was before 1 May 2020) which provided:

Except to the extent that the order otherwise provides, an order under this Division (not being an order for payment of money referred to in section 84(1)(a)) ceases to have any force or effect upon the expiration of the period of 2 years that next succeeds the making of the order.

111 The consequence is that the 19 June 2020 consent order and conduct by-law 2(e) which was registered by Landgate on 31 May 2021 are both in force (from 31 May 2021) (unless the Tribunal decides that conduct by-law 2(e) is invalid). Both the 19 June 2020 consent order

and conduct by-law 2(e) deal with overhang on to the common property. However, their terms are not the exact same.

112 Conduct by-law 2(e) goes a step further than the 19 June 2020 consent order in that it specifies how much the overhang can be. It provides that the overhang can be up to 1 metre provided it does not impede or hinder vehicles using the 6 metre accessway. Efficient takes issue that the 'accessway' (see below at [116]) is not 6 metres and in any event, there are two part lots (part Lot 6, and part Lot 7) which the respective owners have refused to provide an easement allowing for vehicles to drive over. Perth Recruitment Services' and Mr Anderson's position is that there is no need for an easement, as there was no need for an easement in the past. This is supported by Mr Anderson's evidence which stated that people have been driving over his part Lot 6 for the past 30 years and there has never been any issue.

113 The need to specify in conduct by-law 2(e) that the overhang of vehicles on to the common property must not exceed 1 metre provided that it does not impede or hinder vehicles using the 6 metre accessway is appropriate in all of the circumstances of this case. This is because the parties agreed there would be some encroachment on to the common property. Further setting an upper limit (up to 1 metre) resolves the proceeding and should avoid the need for any further applications to the Tribunal on this parking issue. Ms Williamson's evidence (see above at [27(m)]) is that 'even if there is a need for a little overhang into the common property there will still be room for access and maneuvering as only 3 [metres] is required for an access leg (driveway)'.

114 Efficient also contends that conduct by-law 2(e) will allow a lot owner to park on its respective part Lot and that will obstruct access to Lot 8. Efficient agreed to the 19 June 2020 consent order without the need for an easement, for example over part Lot 6. Further, the 19 June 2020 consent order provides that Perth Recruitment Services and Mr Anderson shall not park in a position on their respective lots which encroaches on to the common property in a manner that obstructs vehicle access and egress for the applicant's lot (Lot 8) via the common property. This means, for example, that if Mr Anderson parked on his part Lot 6 and that obstructed vehicle access and egress to Lot 8 via the common property (the accessway which the parties describe as 6 metres or 5.8 metres) he would be in breach of the order. Similarly, under conduct by-law 2(e), if Mr Anderson parks a vehicle on his part Lot 6

and that impedes or hinders access to Lot 8 via the common property that would be a breach of conduct by-law 2(e).

115 Conduct by-law 2(e) uses the terms 'impede' and 'hinder' whereas the 19 June 2020 consent order uses the term 'obstructs'. 'Impede' ordinarily means to delay or prevent (someone or something) by obstructing them; to hinder. 'Hinder' ordinarily means to make it difficult for (someone) to do something or for (something) to happen. 'Obstruct' ordinarily means to block (for example, an opening) or to get in the way, or to deliberately make (something) difficult. In my view, in the context of the ST Act and the by-laws the terms 'impede', 'hinder' and 'obstruct' can be read interchangeably in conduct by-law 2(e) and the 19 June 2020 consent order.

116 Conduct by-law 2(e) does not expressly refer to Lot 8, unlike the 19 June 2020 consent order. Rather, conduct by-law 2(e) deals with overhang on to the common property from all lots and not just Lot 6 and Lot 7. Further conduct by-law 2(e) uses the term 'accessway'. That term is defined by Efficient as follows:³¹

The whole of the common property situated directly to the rear (West) of and adjacent to the Lots and extending to the rear of the Strata Plan is used for vehicle access and maneuvering to and from the Lots and is approximately 5.8 metres wide except for interruptions by part Lots 6, 7 and 8.

117 In my view conduct by-law 2(e) acts fairly and without prejudice or discrimination against any owner. That is, it applies equally to all owners. In dealing with all the lots in the same way, in my view, conduct by-law 2(e), is reasonable and not oppressive.

118 Finally, conduct by-law 2(e) introduces the roof structure of carports overhanging on to the common property which the 19 June 2020 consent order does not deal with. The carports were installed in June 2021, that is after the 19 June 2020 consent order and after the previous carports that were on common property between part Lot 6 and part Lot 7 were demolished and removed (allegedly without the approval of Perth Recruitment Services and Mr Anderson). The by-law only deals with roof structures overhanging the common property (the airspace). As the new carports are in place on Lots 6 and 7, in my view, it is appropriate for the conduct by-law 2(e) to deal with the issue of roof structures to ensure they only overhang up to 1 metre of airspace but provided the roof structures do not impede or hinder

³¹ Exhibit 1, at page 35 (Applicant's Statement of Facts, Issues and Contentions).

vehicle access on the accessway. This by-law also covers the carport roof on Lot 8.

119 In summary, conduct by-law 2(e) properly construed means:

- a) no vehicles may park on the common property except as provided for in (b);
- b) a parked vehicle may overhang on to the common property by up to 1 metre provided that the vehicle does not impede or hinder vehicles using the remainder of the common property;
- c) no carport roof structure may overhang on the common property except as provided for in (d); and
- d) a carport roof structure may overhang on to the common property by up to 1 metre provided the carport roof structure does not impede or hinder vehicles using the remainder of the common property.

120 It may be found that on construing a by-law, that the by-law is contrary to a provision of the ST Act, or alternatively, that to give effect to the by-law would not be in the interests of all proprietors because, for example, it is unworkable, or may have unintended and undesirable consequences. I am unable to make any such finding in this case. While some of the wording in conduct by-law 2(e) may be described as infelicitous drafting, in my view, the proper construction of the by-law is clear as set out in the previous paragraph, and has the effect of restricting all owners' use of the common property to only what is required by the strata company's duty to control and manage the common property for the benefit of all the owners. In other words, the restriction of the vehicles parked overhanging on to common property of up to 1 metre provided that such overhang does not impede or interfere vehicles using the 6 metre wide accessway (the common property) is, in my view, to be regarded as being in the interests of, and for the benefit of all the owners.

121 Section 208 of the ST Act provides that if an order of the Tribunal is inconsistent with scheme by-laws as in force when the order is made, the order prevails over the by-laws to the extent of the inconsistency. In such a case, the Tribunal may make an order requiring the by-laws to be amended in a specified manner. In this case, the 19 June 2020 consent order does not, and cannot, prevail over conduct by-law 2(e)

as this by-law was not in force when the 19 June 2020 consent order was made. However, the 19 June 2020 consent order prevails over by-laws 1(1) and (2) and by-law 2(a), (b), (c) and (d) as those by-laws were in force on 19 June 2020.

122 All of this leads me back to s 200(1) of the ST Act which provides that the Tribunal *may* make any order it considers appropriate to resolve the scheme dispute or proceeding. In particular, s 199(3)(d) provides that the Tribunal *may* declare that a resolution of the strata company is not invalid and s 200(2)(n) of the ST Act provides that the Tribunal *may* make an order that the strata company is to be taken to have passed a specified resolution required under the ST Act or the scheme by-law as a resolution without dissent. As noted earlier, there are no guiding principles for the Tribunal to consider in exercising its discretion to make a declaration under s 199(3) of the ST Act or, instead of, or in addition to, to make an order under s 200(2) of the ST Act.

123 In this case, there is clear friction between the parties³² in this four-lot strata complex about parking and the common property which needs to be resolved, in order for the parties to move forward. Three owners support conduct by-law 2(e) and the remaining owner does not support it but rather wants an order preventing any overhang of parked vehicles on to the common property even though Ms Williamson accepted that there would be some overhang when she agreed to the 19 June 2020 consent order.

124 I am persuaded to exercise the Tribunal's discretion in this case not to make declarations and orders in favour of Efficient for the following reasons.

125 First, besides Ms Williamson and Mr Chambers (both representing Efficient) no other person gave evidence that vehicles seeking to access or egress from Lot 8 were obstructed due to vehicles overhanging on to the common property.

126 Second, *if* there was any obstruction or blocking of access to Lot 8, it was likely to have been caused by the toilets and the fence around the toilet block on part Lot 7 and part Lot 8 which were demolished and removed in or about July 2021. Ms Williamson's evidence is that since July 2021 no one has stopped her driving over part Lot 6, part Lot 7 and part Lot 8 to access or egress from Lot 8.

³² ts 43. 22 September 2021.

127 Third, the June 2020 consent order was agreed to by Efficient, Perth Recruitment Services and Mr Anderson and conduct by-law 2(e) was agreed to by all owners except for Efficient. They both deal with parking and common property. Ms Williamson accepted there would be some overhang of vehicles on common property when she agreed to the 19 June 2020 consent order.

128 For the above reasons, I will make the following declarations and orders to resolve these proceedings:

- a) Pursuant to s 199(3)(d) of the ST Act it is declared:
 - i) the July 2020 resolution is invalid; and
 - ii) the February 2021 resolution is valid.
- b) Pursuant to s 199(3)(c) of the ST Act it is declared:
 - i) the conduct by-law 2(e) is valid.
- c) Pursuant to s 200(2)(n) of the ST it is ordered:
 - i) the strata company is taken to have not passed the July 2020 resolution;
 - ii) the strata company is taken to have passed the February 2021 resolution; and
 - iii) the strata company is taken to have passed the conduct by-law 2(e) as a resolution without dissent.

129 In my view, it is necessary to read down the 19 June 2020 consent order so that the order remains in force until a further order is made by the Tribunal (s 200(7) of the ST Act). This means upon the making of the above orders, the 19 June 2020 consent order will no longer have any force.

130 Finally, in my view, it is not appropriate for the Tribunal to make an order to, in general, prohibit the strata company from granting an exclusive use or special privileges over part of the common property by-law or the granting of a licence over part of the common property. To do so, would be to undermine the strata company's by-law making powers and the general duty of the strata company to control and

manage the common property for the benefit of all of the owners of lots.

131 Finally, I turn to consider to the remaining issues as set out above at [40].

Issue 4

132 Efficient seeks compensation in the amount of \$2,000 to be payable to it by Perth Recruitment Services and Mr Anderson under s 207(2)(b) of the ST Act. This is on the basis that Efficient alleges that Perth Recruitment Services and Mr Anderson have breached and continue to breach the 19 June 2020 consent order.

133 Under s 207(1) of the ST Act, a person who was the applicant in a proceeding (in this case, Efficient) may apply to the Tribunal for the enforcement of an order where the order to act has been complied with in part only by the person to whom it was given (in this case, Perth Recruitment Services and Mr Anderson).

134 The evidence before the Tribunal is that Mr Anderson parks his vehicle within his Lot 6 and does not encroach on the common property. It is the evidence of Mr Kullack that when the 19 June 2020 consent order was made it was understood by all parties that he drives a LandCruiser and that it would encroach on the common property. I accept Mr Kullack's evidence that he and his employee, 'Mel', park their vehicles on Lot 7 as close as possible to the boundary with Lot 6 and as much as possible within Lot 7 and in doing so, complied with the 19 June 2020 consent order.

135 While I accept that driving into Lot 8 may have been a bit tight before the toilets were demolished and removed in July 2021, as evidenced by photographs of Ms Williamson driving her Ute into and egressing from Lot 8, there is no evidence before the Tribunal, besides that of Ms Williamson and Mr Chambers (representing Efficient), that vehicle access to, and egress from Lot 8 is obstructed or blocked.

136 For reasons given above, I would not require Mr Anderson to pay any compensation to Efficient as there is no evidence that he has obstructed vehicle access to and egress from Lot 8 or has breached the 19 June 2020 consent order. Similarly, in relation to Perth Recruitment Services, I would not require it to pay any compensation to Efficient as, in my view, it has not breached the 19 June 2020 consent order.

Issue 5

137 Section 95 of the SAT Act provides for the imposition of a penalty of \$10,000 if a person fails to comply with a decision (apart from a decision that is a monetary order) of the Tribunal. Relevantly, the section provides:

95. Failing to comply with decision

(1) A person who fails to comply with a decision of the Tribunal commits an offence.

Penalty: \$10 000.

(2) Subsection (1) does not apply if, or to the extent that, the decision is a monetary order.

(3) Subsection (1) does not apply in relation to a decision unless -

(a) the Tribunal, in the decision, declares that subsection (1) applies; or

(b) after a person fails to comply with the decision, the Tribunal makes an order declaring that subsection (1) applies and the failure continues after notice of that order is served on the person[.]

138 There is nothing before the Tribunal to suggest that either party would fail to comply with a decision of the Tribunal. Consequently, in my view, it is therefore not necessary to make the declaration sought by Efficient under s 95 of the SAT Act.

Conclusion and orders

139 These proceedings have come about because of the change in the long-standing parking arrangements where two carports occupied the common property behind Lot 6 and Lot 7 (demolished and removed in July 2021) such that access for vehicles to Lot 8 were by driving across Lot 5, Lot 6 and Lot 7.

140 Reflecting back on the orders sought by Efficient (refer above at [9]-[10]), and the findings reached in respect of the five issues before me (see above at [40]), I would make the following declarations and orders for CC 1672 of 2020 and CC 1742 of 2020:

The Tribunal declares:

- (a) Pursuant to s 199(3)(c) of the *Strata Titles Act 1985* (WA) conduct by-law 2(e) (notified to Landgate on 31 May 2021 by instrument O752814) is not invalid.
- (b) Pursuant to s 199(3)(d) of the *Strata Titles Act 1985* (WA) the resolution of:
 - (i) 6 July 2020 of the strata company is invalid; and
 - (ii) 2 February 2021 of the strata company is not invalid.

The Tribunal orders:

1. Leave is granted to the applicant to amend the orders sought to those set out in the applicant's Minute of Proposed Amendments to declaration and orders sought in CC 1672 of 2020 and the applicant's Minute of Proposed Amendments to orders sought in CC 1742 of 2020 dated 3 October 2021.
2. Pursuant to s 200(2)(n) of the *Strata Titles Act 1985* (WA) The Owners of 25, 27, 29, 31 Parry Street, Fremantle, Strata Plan 6413 are taken to:
 - (a) have passed:
 - (i) the resolution of 2 February 2021 required under the *Strata Titles Act 1985* (WA); and
 - (ii) a resolution without dissent authorising conduct by-law 2(e).
 - (b) have not passed:
 - (i) the resolution of 6 July 2020.
3. For avoidance of doubt the orders made by the Tribunal on 19 June 2020 (in matter CC 644 of 2020) are superseded by the above declarations and orders.
4. The application is otherwise dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS R PETRUCCI, MEMBER

13 DECEMBER 2021