New strata laws in NSW & the NSW Civil & Administrative Tribunal (NCAT)

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Introduction:

1. In late 2015 NSW Parliament assented 2 new Acts which have large effects on strata laws in NSW, the *Strata Schemes Development Act 2015* ("**SSDA**") & the *Strata Schemes Management Act 2015* ("**SSMA**"). These 2 Acts will replace the currently operating *Strata Schemes Management Act 1996* (the "**Old Act**"), the *Strata Schemes (Freehold Development) Act 1973* and the *Strata Schemes (Leasehold Development) Act 1986.*

2. The two new Acts are expected to commence in September 2016, and the development of the two new Acts is a process that commenced in 2011 and involved consultation with numerous associated groups.

3. The importance of effective laws concerning management and development of strata schemes in NSW cannot be ignored, the changes occurring in the nature of residential and commercial space was summarized conveniently by the Hon Victor Dominello in the Second Reading Speech for the introduction of the two new acts:

   Twenty five per cent of the population of greater Sydney lives in strata title properties. It is estimated that by 2040 half of Sydney's residential accommodation will be strata titled. Currently there are approximately 75,000 strata title schemes registered in New South Wales, with over 100 more

schemes being registered every month. The vast majority of those are residential schemes. However, there are 7,235 schemes zoned for business uses, such as retail and commercial, with 3,257 zoned for other purposes including industrial, non-urban environmental living and tourism.[1]

4. This paper examines the new strata laws in NSW and the NSW Civil & Administrative Tribunal ("**NCAT**"). With particular focus on dispute resolution in the new system and Part 11 of the SSMA relating to building work undertaken on the strata scheme.

Dispute resolution:

Old process:

5. Currently a lot owner or the owners corporation ("OC") can apply to the Principal Registrar of the NCAT to have a dispute mediated.

6. If mediation fails an application may be made to have the matter adjudicated by an adjudicator appointed by the NCAT, a party must file the necessary application with the NCAT. The adjudication process involves the NCAT corresponding with interested parties and requesting written submissions with the relevant evidence attached thereto. The Adjudicator considers the submissions and evidence of the parties and provides a written decision and the reasons for same. A notice of the orders is sent out to the parties involved. Importantly, certain disputes, such as disputes concerning re-allocation of unit entitlements pursuant to s183 of the Old Act and applications for penalty orders.

7. The orders that can be made by an adjudicator are wide[2] and include orders for repairs to common property, enforcement of by-laws, orders for repairs of water penetration through windows, appointment of a

[1] http://www.parliament.nsw.gov.au/prod/parlment/HansArt.nsf/V3Key/LA20151014057?open&refNavID=HA8_1

[2] Part 4 of Chapter 5 of the *Strata Schemes Management Act 1996.*

strata scheme management agent and orders concerning the validity of meetings of the OC.

8. The adjudicator's decision may be appealed to the Consumer & Commercial Division of the NCAT; this must be done within 21 days. Upon the appeal to the NCAT the matter is heard by a Member or Senior Member of the NCAT. The NCAT has very wide powers[3] and may dismiss the application, vary or revoke the order under appeal and make such ancillary orders as it sees fit.

9. Legal practitioners in most instances need leave to appear in NCAT[4], this is still the case for strata matters; some factors to consider in making the application are the nature and complexity of the matter, whether expert evidence will be required (for example building disputes), whether the OC or the individual lot owner has a lawyer instructed and importantly the quantum of the dispute. For a discussion of costs in relation to matters in the NCAT see below.

10. Upon the decision being made by a Member of the NCAT the parties previously appealed the matter to the District Court of New South Wales. Since the NCAT was established in January 2014 any matter which is appealed is appealed to the internal appeals panel of the NCAT[5]. In relation to appeals from the Consumer & Commercial Division of the NCAT (which includes strata matters) the appeal can be made as of right on a question of law, or alternatively with the leave of the Appeal Panel[6]. The Appeal Panel may only grant leave for the matter to be appealed if it is satisfied that there has been a substantial miscarriage of justice because the original decision of the NCAT was not fair and equitable or the decision was against the weight of evidence or significant new evidence has arisen which was not reasonably available when the matter was heard at first instance[7]. An

[3] Part 5 of Chapter 5 of the *Strata Schemes Management Act 1996.*
[4] S45, *Civil & Administrative Tribunal Act 2013*.
[5] S32 & Schedule 4, part 6, cl 12 of the *Civil & Administrative Tribunal Act 2013.*
[6] S80, *Civil & Administrative Tribunal Act 2013*.
[7] Schedule 4, Part 6, cl 12, *Civil & Administrative Tribunal Act 2013*.

examination of these particular sections and considerations for granting leave is found in *Collins v Urban* [2014] NSWCATAP 17.

New process:

11. The changes coming into force in late 2016 will greatly expand the NCAT's powers to deal exclusively with the majority of disputes concerning strata matters; this includes orders for recovery of outstanding levies. The powers allow the outstanding debt to be registered with the Local Court of New South Wales ("**Local Court**"), and debt recovery which includes the power to make a garnishee order on individual lot owner's incomes, and additionally rent paid by a tenant through a real estate agency could the be undertaken. These methods will be able to be utilised to recover strata levies which remain outstanding.

12. The new SSMA effectively removes the adjudication stage and confers this power on the NCAT. It is expected this change will avoid the extra time and cost implications for parties noting the requirement for written submissions which can consume considerable time and skill to prepare. Additionally it removes one level of the process and ensures strata disputes are dealt with consistently with other matters in the Consumer & Commercial Division of the NCAT.

13. Importantly the NCAT is also afforded new powers to make orders about strata managing agent agreements; this power is limited to an application by the OC and cannot be made by individual lot owners. Section 72 of the SSMA relevantly provides:

> *(1) The Tribunal may, on application by an owners corporation for a strata scheme, make any of the following orders in respect of an agreement for the appointment of a strata managing agent or building manager for the scheme:*
> *(a) an order terminating the agreement,*
> *(b) an order requiring the payment of compensation to a party to the agreement,*
> *(c) an order varying the term, or varying or declaring void any of the conditions, of the agreement,*

(d) an order that a party to the agreement take any action or not take any action under the agreement,
(e) an order dismissing the application.

(2) …
(3) The Tribunal may make an order under this section on any of the following grounds:
(a) that the strata managing agent or building manager has refused or failed to perform the agreement or has performed it unsatisfactorily,
(b) that charges payable by the owners corporation under the agreement are unfair,
(c) that the strata managing agent has contravened section 58 (2),
(d) that the strata managing agent has failed to disclose commissions or training services (including estimated commissions or value of training services or variations and explanations for variations) in accordance with section 60 or has failed to make the disclosures in good faith,
(e) that the strata managing agent or building manager has failed to disclose an interest under section 71,
(f) that the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

14. As it currently operates, should the strata scheme be operating in a dysfunctional manner, the only option for the NCAT is to appoint an alternative strata managing agent to replace the current strata managing agent who is not undertaking their duties satisfactorily. As often will be the case this is far from a suitable response to many of the issues, is expensive and inefficient & further creates disharmony amongst lot owners in a strata scheme which is often already suffering numerous problems.

15. The NCAT can make orders concerning disputes between adjoining strata schemes without the need for mutual consent between those strata schemes. The NCAT also has the power to restrict decision making for particular matters for committees and can require voting on certain things.

16. The NCAT's expanded powers go some way to assisting owners corporations to operate smoothly and efficiently, noting the often dysfunctional strata schemes. The powers extend so far as being able to remove members of the executive committee, removing the strata managing agent if there is one in place and forcing elections of office holders in the OC.

17. Importantly the OC itself has the power to implement an internal dispute resolution mechanism in any way it sees fit[8]. This is an incredibly broad power and whilst it appears to be the most sensible starting point for dispute resolution in community living no doubt will cause much debate amongst members of OC's themselves and additionally in the NCAT when a dispute concerning same reaches that point. Importantly basic principles of natural justice and procedural fairness will need to be dealt with firstly by the OC itself and then by the NCAT should some dispute arise. An important consideration for parties involved in a dispute in the NCAT will be what dispute resolution process was implemented by the OC, how it was adhered to and how this application might be perceived by the NCAT when it is required to determine a dispute. A further consideration is the flow on effect should the internal dispute resolution process result in an outcome which is unfair or prejudicial to a party and how this particular issue might be determined by the NCAT. Importantly it is unclear whether the NCAT can review the internal dispute resolution process itself and whether it will be able to make a determination as to the validity of same.

18. The new SSMA still requires most matters to be mediated first, this is even the case should the OC implement its own internal dispute resolution process. Then if no resolution can be achieved an application can be made for the matter to be determined in the Consumer & Commercial Division of the NCAT. Should an appeal be made from this it is to the Internal Appeals Panel of the NCAT and no change is made from the process currently in place as identified above at paragraph 10.

Building defects in new buildings:

19. Part 11 of the SSMA provides for a new process concerning building defects in new buildings. The aim of the new process is to reduce costs

[8] S216, *Strata Schemes Management Act 2015*.

for each party involved, minimising time delays in determining disputes over building defects, and to attempt to reduce the likelihood of protracted and expensive litigation concerning disputes over building defect.

20. The process provided for in part 11 of the SSMA is not, however, intended to remove the OC's right to pursue legal action through alternative avenues, including the *Home Building Act 1989* ("**HBA**"). The new proposals include a structured process to promote early identification of issues and to attempt to resolve such issues in a quick and cost efficient manner.

21. Part 11 does not apply to building work in which Home Owners Warranty Insurance ("**HOWI**") is a requirement pursuant to part 6 of the HBA, nor does it apply where building contracts were entered into before the commencement of the SSMA. Importantly it is not intended to extend its scope to minor building upgrades for existing strata schemes.

22. Part 11 of the SSMA introduces changes including mandatory defect inspection reports[9] and the imposition of a building bond[10]. The aim being to provide better consumer protection for owners in the strata scheme if the new building has defects and additionally to assist in prolonging the life of the building. It is unclear how this bond might be paid whether it is by bank guarantee, a bond itself or by some other form prescribed by the regulations.

23. A building bond for the construction of buildings over 3 stories in height and high rise strata buildings promotes accountability for developers and builders alike. Under the new SSMA developers will be required to provide a 2 per cent bond for the build price. This is maintained as a bond to attend to the costs associated with the rectification of any

[9] S194, *Strata Schemes Management Act 2015*.
[10] S207, *Strata Schemes Management Act 2015*.

defective works. Importantly a maintenance schedule is required to be developed[11] by the developer and is to be provided at the first AGM which might inform individual lot owners and OC's of the obligations they have in regards to maintenance.

24. Having a single process for independent defects reports will help avoid each party in the dispute spending thousands of dollars commissioning competing reports which is a common occurrence; this will result in pooled resources. It is a requirement[12] that an independent building inspector will inspect the work and provide a report identifying defective works not earlier than 15 months and not later than 18 months after completion of the building.

25. The proposed changes provide scope which hopefully will encourage developers and builders to attend to the rectification of defective works swiftly.

26. Part 11 also provides for conflict of interest provisions to exclude anyone with a personal or pecuniary interest in the building work from being appointed as the inspector for that building work[13]. This is an effort to ensure the independence and credibility of the building inspector. Importantly the building inspector must be approved by the OC[14], further the developer and the building inspector must disclose if they have any previous employment relationship with each other[15].

27. The building inspector plays an integral part in this process. If the OC and original owner cannot agree on the appointment of a building inspector, the original owner is required to notify Fair Trading, who then appoints a building inspector. The interim building report is required to be provided to the original owner, the builder, the OC and Fair Trading.

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11 S115, *Strata Schemes Management Act 2015*.
12 S194, *Strata Schemes Management Act 2015*.
13 S197, *Strata Schemes Management Act 2015*.
14 S195(1), *Strata Schemes Management Act 2015*.
15 S195(2), *Strata Schemes Management Act 2015*.

28. Part 11 of the SSMA provides rights to the builder to enter and attend to the rectification of any defects identified in the interim report[16]. The builder is provided with at least three months to carry out the rectification work before the final inspection can be undertaken. Should the builder be required to enter individual lots it is required to provide 2 weeks notice to the lot owners and/or tenants. The owner cannot unreasonably refuse access and any breach is subject to possible financial penalties. The final report cannot extend to the identification of new defects[17]. The scope of the final report is strictly limited to assessing the defects identified in the interim report, and any assessment of any work required to attend to the rectification of those defects. Importantly it is noted that SSMA makes no provision by which the content of the report itself can be contested. How this might affect the process is entirely unclear at this point. It may be the case that provision is made for this in the near future.

29. The two-year statutory warranty period provided for in the HBA[18] is extended by three months, this gives the OC the opportunity to go through the new process prior to exercising any rights which might be available under the HBA. The bond can be released on the findings in the final building report. Limited grounds exist in which a party may make an application to the NCAT, examples of this are orders to allow access to rectify defects in individual lots and orders concerning the contract price through which the bond is calculated[19].

30. Should the final building report not identify any defective works then the bond is returned to the developer. Should defective works be identified, the OC will have the portion of the bond necessary to account for the rectification of the defective works released to it. The OC must use the

[16] S206, *Strata Schemes Management Act 2015*.
[17] S201(3), *Strata Schemes Management Act 2015*.
[18] S18E, *Home Building Act 1989*.
[19] S211, *Strata Schemes Management Act 2015*.

portion of the bond release to attend to the rectification of the defective works[20].

31. Fair Trading is able to extend the timeframes provided by the part 11 of the SSMA in some circumstances, this includes if the report cannot be completed in time due to circumstances beyond the control of the building inspector[21]. It is clear that the above imposes significant additional obligations and costs upon developers however the changes protect those in strata schemes where in circumstances in the past they would be put to the cost of rectifying problems not caused by them.

32. It is expected that regulations to accompany the SSMA will provide for the required qualifications and experience of the building inspectors which might be appointed pursuant to part 11. The regulations will likely also provide for the scope of the interim inspection report and any detail that may be required to be included in the final report. It is unclear whether a standard form report will be utilised however the importance of a 'Scott Schedule' cannot be ignored.

Maintaining and repairing common property:

33. Section 106 of the SSMA provides:

(1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and

[20] Ss209 - 210, *Strata Schemes Management Act 2015*.

[21] S212, *Strata Schemes Management Act 2015*.

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

(4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

(5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

(7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.

(8) This section does not affect any duty or right of the owners corporation under any other law.

34. Noting that subsection (1) uses the term "must" the duty in accordance with s106 is a strict duty[22] to maintain and repair common property so it serves the purpose for which it exists. This is the same as s62 of the Old Act which is currently in place. However there is an exception to this found in section 106(4), where an *"…owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme."* The issue being the term "taken action" is not defined and could be construed as simply writing a letter of demand. This may need to be addressed and some

[22] *Seiwa Australia Pty Ltd v The Owners – Strata Plan No 35042* [2006] NSWSC 1157.

limitations in scope placed upon the meaning of the term “taken action”.

35. Additionally s106(5) provides a penalty provision which states *“An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.”* This provides a remedy for owners o a lot in circumstances where they suffer a reasonably foreseeable loss directly caused by a contravention of the section.

By-law enforcement process:

36. Part 7 of the SSMA introduces a by-law enforcement process. The maximum penalty imposed for breaches of a by-law will increase from 5 to 10 penalty units, which reflects current community standards. This will provide for a maximum penalty of $1,100.00.

37. The new enforcement process allows OC’s to avoid the need to issue a notice to comply when the NCAT has imposed a penalty for a breach of the same nature in the preceding 12 months. Second or subsequent penalties in that 12 month period may attract a maximum penalty of 20 penalty units, currently $2,200.00.

Maintaining and repairing individual lots:

38. A main reform found in the SSMA is the introduction of a more flexible process for lot owners to undertake renovations on individual lots. The Old Act requires individual lot owners to seek approval of the OC for even minor changes to individual lots. The obvious result of this is many individual changes to lots which do not comply with the strata

scheme. The old process imposed a lengthy and difficult process on individual lot owners to make sometimes even the smallest of changes to their lots, the new changes address this problem.

39. The SSMA introduces a framework that consists of a three-tiered approach. The purpose of these changes is that should the renovation or work not affect other residents and will not interfere with the structural, waterproofing or external appearance of the building then a full special resolution (75% of the OC) will not be required for the individual lot owners to undertake the work.

40. The first tier involves approval not being required for "cosmetic work"[23], cosmetic work including the installation of picture hooks, floor coverings, internal painting repair of minor cracks and holes of internal walls. The second tier focuses on "minor renovations", that requires a general resolution at a meeting (the simple majority)[24]. This will include minor renovations such as kitchens (provided the waterproofing) is not effected, replacement of internal cupboards, the installation of wiring and the installation of timber floors (not floor coverings). To attend to minor rectifications individual lot owners are required to provide scopes of works, work schedules and the individual details of contractors who are on sight. The third tier relates to other works effecting common property in which a by-law and a special resolution are required[25].

Costs:

41. The starting point in relation to costs in the NCAT is that each party is to bear its own costs[26], this starting point reflects one of the key aims of the establishment of the NCAT in that matters would be dealt with

[23] S109, *Strata Schemes Management Act 2015*.
[24] S110, *Strata Schemes Management Act 2015*.
[25] S111, *Strata Schemes Management Act 2015*.
[26] S60(1), *Civil & Administrative Tribunal Act 2013.*

"cheaply"[27]. This starting point is not modified in relation to matters concerning strata schemes.

42. From this point the NCAT may then award costs to a party but only if it is satisfied that there are "special circumstances" which might warrant an award of costs[28]. The special circumstances which might be considered are found in s60(3) and are reproduced as:

> *(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,*
> *(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,*
> *(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,*
> *(d) the nature and complexity of the proceedings,*
> *(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,*
> *(f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),*
> *(g) any other matter that the Tribunal considers relevant.*

43. It is important to note the use of the words "may" in s60(2) and (3). The criteria found in s60(3) are not the only criteria so other factors are relevant when considering the question of "special circumstances", this is reinforced by the words *"or any other matter the Tribunal considers relevant"* at s60(3)(g).

44. NCAT has the power to consider by whom costs are to be paid and to what extent. Further, NCAT may order that costs are assessed in accordance with the *Legal Profession Uniform Law* (NSW)[29].

What amounts to "special circumstances" within the meaning of s60(2)?

45. In *Chester v Prestige Promotions Pty Ltd*[30], in a matter on appeal for residential tenancy and a claim for rental arrears the Appeal Panel found "special circumstances" within the meaning of s60(2) of the Act.

[27] S36, *Civil & Administrative Tribunal Act 2013.*
[28] s60(2), *Civil & Administrative Tribunal Act 2013.*
[29] S60(4) & (5), *Civil & Administrative Tribunal Act 2013*.
[30] *Chester v Prestige Promotions Pty Ltd* [2014] NSWCATAP 34, paras 24 – 36.

The Appeal Panel found that the original decision was “relatively unassailable” and that the special circumstances had to do with the weakness of the appeal against the original decision. That is effectively the appeal as framed, and as argued, had very limited prospects of success. The Appeal Panel stated:

> *29. The question that now arises is the respondent's application for the costs of the proceedings pursuant to s 60 of the NCAT Act. Various matters were put before us by the respondent as to the 'special circumstances' that might justify an order for costs in a tribunal where the usual rule is that each party bears their own costs of proceedings.*
> *30. The terms 'frivolous' and 'abuse of process' have been used. I think that language might be seen to be too strong. Clearly the loss of occupation of a rental property is a very serious issue for tenants.*
> *31. The present case is one where the primary finding that provides the foundation for the termination is based on a relatively small arrears of rent. The case, on the other hand, that Mr Chester has put is a weak one for the reasons I have given. As already stated, it seems to us that the original order was relatively unassailable.*
> *32. The amount of costs that has been incurred to date is already significant. Had this matter gone on to a full appeal, that amount of costs would possibly have doubled.*
> *33. It seems to us that it is desirable to fix the amount of any costs order.*
> *34. The Appeal Panel is satisfied that there are special circumstances in this case. The special circumstances essentially have to do with the weakness of the contest with the original ruling made on 29 January. The Tribunal acted beneficially in making an interim stay order.*
> *35. The Appeal Panel then gave Mr Chester an opportunity to put on relevant material, in particular evidence. That opportunity has not been availed of in a manner that assists the Appeal Panel. Most of the material put before us is really a recitation of legal headings with little or no detail under any of those headings and that does not assist the Appeal Panel in any way.*
> *36. The respondent, the landlord, has been put to a degree of expense in responding to this material, a cost which in our opinion ought not to have been incurred by it. Had the material been brought forward in a concise and orderly way and admitted of relatively direct response we may have had a different view. But it seems to us in the circumstances some order for costs should be made.*

46. In *Draper v Gibbs*[31] the Appeal Panel made an order for costs despite the fact that the monetary amount was relatively low. The nature and complexity of the proceedings and the fact they involved considerations of 2 pieces of legislation in operation with each other, the *Dividing Fences Act 1992* (NSW) and the *Swimming Pools Act 1992* (NSW), warranted such an award pursuant to s60(3)(d).

[31] *Draper v Gibbs* [2014] NSWCATAP 54.

47. In *Mrs Top at Neutral Bay Pty Ltd v Tripodina*[32] the NCAT found that a retail tenancy dispute was a commercial dispute and that it involved persons with business experience. The member found this was a case involving "special circumstances" within the meaning of s60(2) of the Act and made an award of costs.

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[32] *Mrs Top at Neutral Bay Pty Ltd v Tripodina* [2014] NSWCATCD 245.