



# Précis Paper

## NSW Strata Law Reform

An informative discussion about some recent developments in the law governing strata lots in New South Wales and some recent decisions that have considered common issues that arise in strata living.

### Discussion Includes

- Some recent developments in strata law
- Renovations to lots
- Duty of the owners corporation to maintain and repair common property
- Short term stays

# Précis Paper

## NSW Strata Law Reform

1. In this edition of BenchTV, Darren Jenkins (Barrister) and Allison Benson (Principal Kerin Benson Lawyers) discuss the *Strata Schemes Management Act 2015* and the three tiered system that relates renovations to lots, the statutory duty of the owners corporation to maintain and repair common property, and short term stays.

### Some recent developments in strata law

2. The enactment of the *Strata Schemes Management Act 2015* ('the Act') and *Strata Schemes Development Act 2015* reflect more of an "evolution rather than a revolution in strata law". These pieces of legislation are the NSW's fourth generation of strata law and have been enacted as more people move into Strata title properties. In NSW, approximately 850 000 people currently live in strata lots and it is estimated that by 2020, more than 50% of the population will live in strata land community title lots. The Acts have had to expand to cover common issues that arise in strata title properties.
3. A typical strata building is a building with a number of people living in it in their own separate dwellings. In general, a person's "lot" is the air space within their area of the building and everything else is common property.

### Renovations to lots

4. Under the previous Act, renovations to lots would require a by-law to be passed approving the work. Under the new Act, there is now a three-tiered regime:
  - Cosmetic works;
  - Minor renovations; or
  - Major renovations
5. Similarly, any work to common property that affects the common property so that it alters or adds to the common property requires a special resolution. The exceptions to this are contained in sections 109 and 110 of the Act.
6. Cosmetic works do not require the approval of the owners corporation. Cosmetic work is defined in s109 (2) as:  
"Cosmetic work" includes but is not limited to work for the following purposes:
  - (a) installing or replacing hooks, nails or screws for hanging paintings and other things on walls,
  - (b) installing or replacing handrails,
  - (c) painting,
  - (d) filling minor holes and cracks in internal walls,
  - (e) laying carpet,
  - (f) installing or replacing built-in wardrobes,
  - (g) installing or replacing internal blinds and curtains,
  - (h) any other work prescribed by the regulations for the purposes of this subsection.

7. Minor renovations now only require the owners corporation's approval at a general meeting by passing an ordinary resolution. If the owners corporation wishes to delegate permission for minor renovations to the strata committee, it can do so by passing a by-law. The minor renovations category of work is defined in s110(3):
- "Minor renovations" include but are not limited to work for the purposes of the following:
- (a) renovating a kitchen,
  - (b) changing recessed light fittings,
  - (c) installing or replacing wood or other hard floors,
  - (d) installing or replacing wiring or cabling or power or access points,
  - (e) work involving reconfiguring walls,
  - (f) any other work prescribed by the regulations for the purposes of this subsection.
8. Major renovations may affect the common property and require a special resolution to be passed at general meeting of the owners corporation. The lot owner must give the owners corporation written notice at least 14 days before the work starts. This should describe the proposed alteration. The owners corporation cannot delegate approval for major renovations to the strata committee. Major renovations are defined in s110(7) (emphasis added):
- ...
- (b) work involving structural changes,
  - (c) work that changes the external appearance of a lot, including the installation of an external access ramp,
  - (d) work involving waterproofing,
  - (e) work for which consent or another approval is required under any other Act,
  - (f) work that is authorised by a by-law made under this Part or a common property rights by-law,
  - (g) any other work prescribed by the regulations for the purposes of this subsection.
9. An example of where a conflict can potentially arise between these defined works would be the installation of a split system air conditioning unit (minor work pursuant to s110(3)), which involves a condenser unit being placed on an external wall - which would technically be work prohibited by s110(7). It would fall into the category of minor renovations as long as it does not affect the external appearance of the building; does not involve changing the waterproofing; and does not involve structural work.
10. In *Stam v Andrews and Owners Corporation SP 49154* [2017] NSWCATCD 32, the NSW Civil and Administrative Tribunal considered the three-tiered classification scheme. In *Stam*, the owner of a lot commenced proceedings which related to unauthorised works undertaken by another lot owner that affected common property. The unauthorised works included a mixture of minor and major work requiring, by s110(7) of the Act, approval by the owner corporation at a general meeting and a special resolution to be passed. There were other aspects to the case, which is common in strata-related applications.

11. The Tribunal found that the s109 cosmetic works did not require the consent of the owners corporation and were permissible. In relation to the s110(3) minor renovations, the Tribunal found that the lot owner, Mr Andrews, had not provided the relevant material (e.g.: the duration and scope of the works, who would be carrying the works out, and what would happen to any waste) to the owners corporation or gained approval at a general meeting in the form of an ordinary resolution. In relation to the s110(7) major works, similarly the Tribunal found that the required information had not been provided and approval had not been given by a special resolution in a general meeting and that no by-laws relating to maintenance and repairs to the common property existed.
12. Ultimately, the Tribunal made orders allowing Mr Andrews to seek appropriate retrospective approval by way of a general meeting and made orders for the owners corporation to requisition that general meeting and made orders for Mr Andrews to provide the details of the work he had carried out in order to gain approval.

#### Duty of the owners corporation to maintain and repair common property

13. There is a statutory remedy available for lot owners who have suffered damage by way of an owners corporations' failure to properly maintain or keep in a good and serviceable state of repair the common property. It is contained in s106 of the Act:

##### 106 DUTY OF OWNERS CORPORATION TO MAINTAIN AND REPAIR PROPERTY

(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
- (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.

14. Under the previous Act, it was recognised that there was a cause of action for a breach of statutory duty. An owners corporation has an absolute duty to maintain and repair the common property. In *Lubrano v Proprietors of Strata Plan No. 4038* (1993) 6 BPR 97, it was held that a lot owner could bring an action for compensation or damages to recover for loss suffered by reason of an owners corporation's breach.
15. This position was, however, reversed in *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270. The NSWCA found that there was:
  - (1) No obligation to improve common property beyond what was already functioning and serviceable and;
  - (2) There was no cause of action for breach of statutory duty for the owners corporation failing to maintain and repair common property.
16. Section 106(5) now provides that an owner of a lot in a strata scheme may recover damages from the owners corporation for breach of a statutory duty for any reasonably foreseeable loss suffered by the owners corporation as a result of a contravention of this section by the owners corporation.
17. In the *Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15, a lot owner had, at first instance, brought a successful action for retrospective loss of rent and part of the outgoings that were previously payable under the lease, and was also awarded interest on these amounts. It was held that pursuant to s106(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. On appeal, it was held that there is no retrospective effect of the new Act. However, the appeal panel found that a breach of the equivalent provision s62 in the old Act, could be a continuing breach up until the new Act came into affect and any damages from 30 November 2016 onwards could then be claimed. The appeal panel also held that NCAT has jurisdiction to award damages for this statutory breach under s106(5). It determined that it has the power to settle dispute pursuant to s232 of the Act, including disputes relating to the functioning and administration of the owners corporation and, accordingly, the jurisdiction is enlivened as it has a power to settle, including a claim for compensation.
18. *Rosenthal v The Owners SP 20211* [2017] NSWCATCD 80 is another example of where a case has been decided in the lot owner's favour and has been awarded damages.

#### Short term stays

19. In *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 63, an owner of a lot, Ms Estens, had been letting out her apartment for short term stays on Airbnb. There had been

complaints made about this to the owners corporation who convened an extraordinary general meeting, who then purported to pass a by-law restricting her ability to offer her lot for short term stays. Ms Estens brought the case to the Tribunal seeking an order under s150 of the Act seeking that the by-law be declared invalid on account of the fact that the owners corporation did not have the power to make that by-law. Ms Estens relied upon s139(2) which provides that an owners corporation is unable to make a by-law that would interfere with the devolution of a lot. Ms Estens argued that she was providing her property for short term stays by way of a lease or license which was a devolution of the lot and that purporting to curtail that it was in contravention of s139(2).

20. The Tribunal held that providing the lot for short-term stays was either a lease or a license and so the owners corporations purported by-law to restrict that, was an invalid attempt to curtail the devolution of her lot. Short-term letting therefore cannot currently be prohibited by an owners corporation by way of passing by-laws.
21. However, this may be impacted by other legislation for example s28 of the *Environmental Planning and Assessment Act 1979* which states that a regulatory instrument (e.g. a by-law, agreement under seal, an ordinance or another Act) that prohibits (or purports to restrict) the use or development with an environmental planning instrument, it will be suspended to the extent of the conflict. A planning instrument includes a development consent or local environment plan that permits a certain use or construction, or piece of development.
22. A fragmented regime currently exists in this area of the law and the two Acts and their interaction need to be considered.

## **BIOGRAPHY**

### Darren Jenkins

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Darren was admitted to the Bar in 2006. For the past 11 years he has regularly appeared in NSW and ACT courts. Darren represents clients principally in commercial, equity, and property matters, with a specialty in strata scheme disputes.

### Allison Benson

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Allison was admitted as a lawyer in 2007. She is renowned as a strata lawyer, providing general strata advice and acting in strata disputes. Allison has extensive knowledge in a variety of strata scheme matters enabling her to represent her clients both informally and before the courts. She is a member of the Australian College of Community Association Lawyers, the Newcastle Law Society and the Society of Construction Law Australia.

## **BIBLIOGRAPHY**

### Cases

*Stam v Andrews and Owners Corporation SP 49154 [2017] NSWCATCD 32*

*Lubrano v Proprietors of Strata Plan No. 4038 (1993) 6 BPR 97*

*Owners Strata Plan 50276 v Thoo [2013] NSWCA 270*

*Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15*

*Rosenthal v The Owners SP 20211 [2017] NSWCATCD 80*

*Estens v Owners Corporation SP 11825 [2017] NSWCATCD 63*

### Legislation

*Strata Schemes Management Act 2015*

*Strata Schemes Development Act 2015*

*Community Land Development Act 1989*

*Community Land Management Act 1989*

*Environmental and Planning Assessment Act 1979*

*Residential Tenancies Act 2010*

*Strata Schemes Management Act 1996*