

NEWSLETTER ISSUE 35 MARCH 2022

IN THIS EDITION

- I) GOVT TO KEEP LEGISLATIVE PROVISIONS INSTIGATED BY THE PANDEMIC – WHAT DOES THAT MEAN TO YOU?**
- II) WHO PAYS – WHEN NCAT FINDS AGAINST A SCHEME FOR FAILURE TO MAINTAIN COMMON PROPERTY**
- III) SURVEY OF OUR CLIENTS ON ELECTRICITY OPTIONS**
- IV) OWNERS HAVE A VETO RIGHT FOR ANY MOTION BEFORE THE STRATA COMMITTEE**

Changes to the strata legislation were brought in during the pandemic to ensure owners could be kept safe and provided a “work around” to allow for the business of running schemes to continue. These changes were expected to be wound back at the end of March 2022, however the NSW Govt has determined there is benefit to keeping these provisions. These ongoing reforms include:

- Allowing strata owners corporations, strata committees and community associations, to meet and vote electronically without passing a resolution to do so;
- owners corporations and community associations to validly execute documents by affixing the common seal electronically or by not affixing the seal at all; and
- service of a document on an owner or occupier of a lot to be by email to an address nominated by the owner or occupier for the service of documents.



In light of this opportunity, we are in the process of conducting a survey of our committees to determine how they would like to see the day to day management of the scheme to be conducted. So far only 10% have indicated they would like to return to face to face meetings – including AGM’s. Thank you to all who have participated with a response. As always we will act as our committees instruct on a case by case basis.

Recent decision by Appeal Panel of NCAT - Who Pays the Compensation when a scheme fails in its duty to repair and maintain under S106?

Author | Adrian Mueller, Partner | B.Com LLB FACCAL.

When an owners corporation is ordered by NCAT to compensate an owner, who pays that compensation? The owners corporation, right? A recent decision by NCAT’s Appeal Panel produced a surprising answer to that question.

Introduction

An owners corporation has a statutory duty to properly maintain and keep in good repair the common property. This duty arises under section 106 of the *Strata Schemes Management Act 2015*. If an owners corporation does not repair defects in the common property, it will breach that duty. Where that occurs, a lot owner who suffers monetary loss arising from that breach is able to sue the owners corporation to recover that loss.

Previous Cases

There have been a number of cases where both NCAT and the Supreme Court have ordered owners corporations to pay compensation to owners to cover their losses arising from failures to repair defects in common property that typically allow water to leak into and cause damage to lots. In those cases, owners have been awarded compensation for rental loss, alternate accommodation expenses, cleaning costs, repair costs, experts’ fees and legal costs. But when an owners corporation is ordered to compensate an owner for those losses, who ends up paying that compensation? The answer to that question should be straightforward, right? Not so.



NCAT Case

On 30 November 2021, NCAT's Appeal Panel handed down its decision in *SP 74698 v Jacinta Investments Pty Ltd* [2021] NSWCATAP 387. In that case, an owner had sued an owners corporation for (among other things) compensation to cover the owner's losses that arose from an owners corporation's breach of its duty to repair common property. The owner was successful and was awarded over \$250,000.00 in compensation. NCAT also ordered that the compensation be paid through a contribution that was levied on all owners except the successful owner who won the case. The owners corporation appealed against that aspect of NCAT's decision (and others). NCAT's Appeal Panel upheld the decision. The Appeal Panel concluded that it would be unjust for the successful owner to have to contribute towards the payment of the compensation the owners corporation had been ordered to pay the owner. This meant that the owners corporation was required to levy a contribution on all owners (apart from the successful owner) to raise the funds needed to pay the compensation it was ordered to pay. The owners corporation was also ordered to pay the owner's costs of the case and those costs were determined to be payable through a contribution to be levied on all of the other owners.

The Wash Up

The *Jacinta Investments* case provides an example of one of the rare circumstances in which an owners corporation is able impose a differential levy on some but not all owners. The case also highlights that individual owners can be made liable to pay compensation that an owners corporation is ordered to pay to another owner to cover any damage or loss the owner suffers where the owners corporation does not fulfill its responsibility to repair common property.

The Future

The *Jacinta Investments* case has broader implications. It opens the door for owners to argue in legal proceedings in NCAT that they should not be required to contribute to the payment of costs an owners corporation will incur repairing common property or consequential damage to lot property. So, for example, where an owner sues an owners corporation in NCAT for an order to force the owners corporation to repair common property defects and water damage to the owner's lot caused by those defects, the owner may now be able to obtain an order from NCAT excusing the owner from having to contribute to a levy that is raised to pay for those repairs. Stay tuned because there is likely to be another chapter to this story.

Electricity survey

During March we are conducting a survey of our committees as to whether their scheme is interested in not just saving money on their electricity costs, but would like options that consider the environment – such as carbon neutral or using green power.

Owners have a veto right on any matter before a committee meeting

We remind owners not on the committee that they have a veto right if 1/3 of the unit entitlement does not agree with any motion before a committee meeting.



Schedule 2 – Clause 9(3) *Decisions to have no effect if opposed by more than specified owners*

A decision of a strata committee has no force or effect if, before the decision is made, notice is given to the secretary of the owners corporation by one or more owners, the sum of whose unit entitlements exceeds one-third of the aggregate unit entitlement, that the making of the decision is opposed by those owners.