Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No. 61285 v Taylor (No.2)
Medium Neutral Citation:	[2022] NSWCATCD 118
Hearing Date(s):	8 June 2022
Date of Orders:	9 September 2022 [amended 8 November 2022]
Decision Date:	9 September 2022
Jurisdiction:	Consumer and Commercial Division
Before:	M Harrowell, Deputy President
Decision:	The Notice of Order issued on 9 September 2022 is amended under s63 of the NSW Civil and Administrative Tribunal Act 2013 and should read as follows: 1. Pursuant to s 247A of the Strata Schemes Management Act 2015 (NSW) the respondent is required to pay a pecuniary penalty of 35 penalty units being an amount of $3850.00. 2. Order 1 is stayed pending determination of the issue of to whom the penalty should be paid (Additional Issue). 3. In connection with the Additional Issue and the question of whether the respondent should be ordered to pay the applicant's costs of these proceedings the following directions are made: a) On or before 12 September 2022 the applicant is to file and serve written submissions in respect of the remaining issues; b) On or before 26 September 2022 the respondent is

to file and serve written submissions in reply;

c) On or before 3 October 2022 the applicant is to file and serve submissions in response;

d) The parties submissions are to include submissions about whether an order should be made dispensing with a further hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).

4. The Tribunal directs the Registrar to give a copy of these orders and reasons to the Commissioner of Fair Trading to consider whether the Minister or Commissioner wishes to intervene and make submissions about to whom a civil penalty imposed under s 247A of the Strata Schemes Management Act 2015 should be paid.

5. Any notice of intention to intervene should be filed and served within 21 days of the date of these orders.

Catchwords:	LAND LAW – Strata title – Civil Penalty – contravention of Tribunal order – s 247A Strata Schemes Management Act 2015 – assessment of penalty – deterrence – relevant considerations – relevance of maximum penalty when assessing appropriate penalty – payment of penalty – whether penalty payable to applicant, the Crown or some other person – power of the Tribunal to direct to whom the penalty is to be paid
Legislation Cited:	Design and Building Practitioners Act 2020 (NSW) Building Practitioners Regulation 2021 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Evidence Act 1995 (NSW) Fair Work Act 2009 (Cth) Home Building Act 1989 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Australian Building and Construction Commissioner v Pattinson [2022] HCA 13 Forster v Hunter New England Area Health Service [2010] NSWCA 106, Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705

	The Owners – Strata Plan No. 61285 v Taylor [2022] NSWCATCD 48 The Owners – Strata Plan No 82306 v Anderson [2017] NSWCATCD 85 Westbury v The Owners – Strata Plan No 64061 [2021] NSWCATEN 3
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners – Strata Plan No. 61285 (Applicant) Cameron Taylor (Respondent)
Representation:	J McGrath, strata agent (Applicant) Respondent (Self-represented)
File Number(s):	SC 21/47527

REASONS FOR DECISION

1 These reasons relate to whether a penalty should be imposed on the respondent under s 247A of the *Strata Schemes Management Act 2015* (NSW) (SSMA). That section entitles the Tribunal to impose a civil penalty of up to 50 penalty units ($5500), where it is established that a person has contravened an order made under the SSMA.

2 On 19 May 2022 the Tribunal determined the applicant had established the respondent had contravened orders of the Tribunal made on 3 June 2021 in proceedings SC 21/04852 (June order). The Tribunal published reasons for its decision: *The Owners – Strata Plan No. 61285 v Taylor* [2022] NSWCATCD 48 (contravention decision). Directions were made to relist these proceedings on the question of whether a penalty should be imposed on the respondent and, if so, how much.

3 A hearing on the issue of penalty occurred on 8 June 2022.

4 At that hearing the applicant was represented by its strata agent, Mr Joel McGrath. The respondent represented himself. The proceedings were heard remotely rather than in person.

Evidence

Applicant's Evidence

5 The applicant relied on its earlier evidence and three further affidavits. One was from Ms Vikki Turnbull affirmed 25 May 2022. The second was from Mr Jeffrey Lay affirmed 26 May 2022. These affidavits were admitted without objection.

6 The third was an affidavit of Mr McGrath affirmed 26 May 2022. Objections were taken by the respondent to this affidavit and the following rulings were made:

(1) Paragraph 3 was rejected except annexure B referred to in that paragraph was admitted.

(2) Paragraph 4 was admitted without objection.

(3) Paragraphs 5 and 6 were rejected, including the annexures.

(4) Paragraphs 7 and 9 were admitted as submissions only.

(5) Paragraph 8 was not pressed.

7 The respondent cross examined Ms Turnbull. Mr Lay and Mr McGrath were initially going to be cross-examined. However, the respondent did not seek to pursue this course.

8 In connection with the cross-examination of Ms Turnbull, this concerned the date various photographs were taken. Ms Turnbull said the photographs referred to on pages 11-15 and the photograph at the bottom of page 19 (of the air conditioning unit) were taken on 25 May 2022. Her evidence was they were taken from a balcony, not with a drone.

Respondent's Evidence

9 The respondent relied on his own affidavit affirmed 31 May 2022 (Taylor affidavit). An affidavit contained the following three paragraphs:

> 1 (Annexure A) engineers report redone as so it complies with Procedural Direction 3, this report was handed to strata in sep 2021
>
> 2 (Annexure B) Photo taken by me of the air conditioner motor moved and order completed in sep 2021

3 (Annexure C) Photo taken by me of the gate removed the order completed in sep 2021

10 Each of the Annexures, A, B and C form part of the affidavit.

11 Initially, the Taylor affidavit could not be located and the applicant's agent said he had not received the document. The affidavit was then sent to the agent by email during the hearing.

12 The applicant indicated that it did not want an adjournment however objected to Annexure A.

13 Annexure A was a letter from Mr Adam Gillet dated 28 May 2022 and annexures thereto. For convenience I will refer to this letter as the Gillett report. The letter and annexures are pp 3-5 of the Taylor affidavit. The letter said (letterhead omitted):

> RE: ENGINEERS INSPECTION OF EXISTING PERGOLA AND TILED AREA ON ROOF TOP AT SP61285 UNIT 14, [Omitted]
>
> We inspected the roof top at the above address on 9 July 2021 with regards to the proposal to remove the roof and screens surrounding the sliding door on the roof level.
>
> From our performance assessment of this proposal we concluded that the work could not be carried out in a way that would comply with the Building Code of Australia (BCA). It would create water ingress issues for Unit 14 and potentially also in common areas.
>
> The tiles appear to be laid on a screed that is on a flat slab. If the tiles are removed, it will create a sump for water to pool in the area within the patio due to the surrounding rooftop waterproofing being 0.015m higher. If the gate and wall are removed and a 3 brick course dwarf wall is installed in its place, there will be no drainage to the patio and water will flood into the adjoining bedroom which is not stepped up at a higher level. Also if no dwarf wall was placed there would still be issues with the water drainage for this area. No step up to a habitable space is only allowable in the Building Code of Australia (BCA) if there is a sufficient roof over the door opening, removing the pergola roof and the screens will mean that the arrangement is not BCA compliant and damage will undoubtedly occur to the floating floor boards when water enters the bedroom.
>
> Flashing between the pergola and the building walls has been recently repaired, this is important to ensure water does not enter into the wall cavities and then into the unit below as my client informed me has been reported. There did not appear to be any water ingress damage to common property at the time of the inspection.
>
> The proposal to remove the roof structure will not comply with the 1 in 100 year storm requirements of Section F of the BCA (NCC) Volume 1 and the relevant Australian Standards.

I acknowledge and have read the experts code of conduct and agree to be binded (sic) by it as per NCAT Procedural Direction 3 - Expert Evidence.

Signed

(Signature)

Adam Gillet B. Eng (Civil) Hons M.I.E. Aust

Director

14 Attached to the letter was an extract from Section F of the Building Code of Australia (BCA) as well as photographs depicting various features of the common property and Lot property subject of this dispute.

15 The applicant objected to the admission of the Gillett report on several bases. First, the applicant said it did not comply with the Tribunal's Procedural Direction 3-Expert Evidence. In this regard the Tribunal noted for the parties the requirements of Procedural Direction 3. In addition, the applicant said that the witness, Mr Gillett, was not registered under the *Design and Building Practitioners Act 2020 (NSW)* (DBP Act) and therefore could not lawfully provide a report in proceedings before the Tribunal. Reliance was placed on s 32 of the DBP Act.

16 16 Having initially indicated he did not have any further evidence, the respondent then said he wished to call Mr Gillett to give oral evidence.

17 17 Before doing so, Mr Taylor was sworn and gave evidence concerning Annexures B and C. He said the photos were taken by him on the 17 and 19 September 2021.

18 18 Mr Gillett was then contacted by telephone, affirmed, adopted his report and was cross-examined by the applicant. His written evidence can be summarised as follows:

(1) Removal of the roof and surrounding screens would create a water ingress problem for the lot and potentially for common property areas;

(2) If tiles near the doorway area were removed there would be created an area where water would pool;

(3) There are not sufficient falls to allow appropriate drainage.

(4) There was a requirement for a 70 mm step up into the lot.

19 However, during his oral evidence Mr Gillett said:

(1) he had not taken any measurements to establish the height of the slab or the height of the existing tile and screed toppings;

(2) by way of concession, the 70 mm step up was not a height specified in BCA or elsewhere; and

(3) in providing his opinions, he had not been provided with the June order or the plans and specifications for the building.

20 Following completion of oral evidence, the parties made submissions concerning whether a penalty should be imposed and, if so, how much.

21 In reserving its decision on 8 June 2022, the Tribunal made orders for the filing and service of further written submissions as follows:

> 2. On or before 10 June 2022 the applicant is to file and serve any submissions on the issue of whether the evidence of the respondent's witness Mr Adam Gillett, should be rejected as Mr Gillett was not registered and was not permitted to provide any report to the Tribunal by reason of s 32 of the Design and Building Practitioners Act 2007 (NSW) and cl 14 of the Design and Building Practitioners Regulation 2021 (NSW).
>
> 3. On or before 15 June 2022 the respondent is to file and serve any submission in reply.

22 Due to issues concerning service of submissions by each party on the other, further directions were made on 20 June and 10 August 2022 extending the time for service of submissions.

23 Further written submissions were received, including on topics not permitted by the leave given. As necessary these matters will be dealt with below.

Submissions

24 The applicant sought the imposition of a penalty of $5500.

25 The applicant said the orders made by the Tribunal were more than twelve months old. The respondent had made no clear attempt to comply with those orders. Therefore the maximum penalty is appropriate.

26 As stated above, the applicant said that the evidence of Mr Gillett should not be admitted on two bases. First, Mr Gillett had not complied with Procedural

Direction 3. Secondly, s 32 of the DBP Act prevented Mr Gillett from providing expert evidence in these proceedings.

27 In any event, the applicant said that there was no evidence before the Tribunal that the work in question could not be done and/or that a suitable design could not be prepared. The evidence provided by Mr Gillett contained vague comments, no measurements were taken in regard to the step down from the patio sliding door and Mr Gillett was not aware of what works are required to be completed in accordance with the June order. The evidence did not prove that the work required by the June order could not be done.

28 Further, any evidence provided by the respondent regarding possible rectification work did not deal with other areas of non-compliance with the Tribunal's orders, namely the relocation of the air-conditioner, removal of the bifold door and reinstatement, removal of the gate and removal of various screening.

29 In relation to the admission of Mr Gillett's evidence and s 32 of the DBP Act the applicant said in its supplementary written submissions:

> Under section 32 of the Act, an engineer must be registered to carry out engineering works for this building. Regulation 14 does not apply to this report by Mr Gillett as it states "work is carried out directly in relation to the design or construction" and construction includes "the making of alterations or additions to a building". This report of Mr Gillett includes engineering works directly in respect of the design of the works to comply with the NCAT Order of 3 June 2021.

30 In those submissions the applicant also said that it had provided an engineer's report from Total Building Engineering Solutions in the original proceedings detailing the work required to enable compliance with the National Construction Code (NCC). Mr Gillett incorrectly referred to the BCA which the applicant submitted was not the current legislation. The current legislation was the NCC.

31 Consequently, the applicant said the Tribunal should "dismiss" Mr Gillett's evidence.

32 In reply, the respondent said there was no evidence to rebut his expert evidence or to respond to the issues which his expert, Mr Gillett had raised. In essence, removal of the roof and screens and the bifold doors, would permit water ingress to his lot.

33 As to the other items of work, these were minor in nature and should be done all at once, not bit by bit.

34 Reference was made by the respondent to the decision of the Tribunal in *Westbury v The Owners – Strata Plan No 64061* [2021] NSWCATEN 3 (Westbury), particularly at [17] (identification of obligation said to have been breached), [19] (relevant considerations concerning reasonable excuse for non-compliance) and [32]-[33] (when the maximum penalty should be imposed). On the question of penalty, the Tribunal had drawn to the attention of the parties the decision of the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 (Pattinson).

35 The respondent submitted that if any penalty is to be imposed it should be minimal.

36 In making these submissions the respondent accepted that the purpose of a penalty was for deterrence and to secure compliance with the orders made. However, compliance in the present case is more difficult due to the need to remove the roof structure and the related works. The respondent said the applicant had failed to engage in a discussion about what works were required.

37 When asked by the Tribunal about why it was for the applicant to find a solution the respondent reiterated that the applicant had failed to engage in discussions about what work should be done and how to resolve relevant engineering issues. The respondent submitted that any works cannot be designed without feedback from the applicant and that the works require the approval of Council.

38 Therefore, a penalty should not be imposed.

39 The respondent then submitted that the works cannot be done now in any event. In making this last submission, he accepted that it amounted to a challenge to the June order.

40 The respondent concluded by saying that he had no authority to proceed with the work.

41 In making their submissions, both parties accepted that the June order should be read in the context of the documents to which the order refers.

Principles applicable in determining what, if any, penalty should be imposed

42 In *The Owners – Strata Plan No 82306 v Anderson* [2017] NSWCATCD 85 this Tribunal considered factors relevant to the imposition of a civil penalty under s 202 of the now repealed *Strata Schemes Management Act 1996* (NSW) (1996 Management Act). That section was in substantially the same terms as s 247A of the SSMA.

43 From *Anderson* can be extracted the following principles:

(1) the use of the expression "may" in s 247A indicates the power to impose a penalty is discretionary: Anderson at [75];

(2) Section 247A does not provide express guidance as to how the discretion is to be exercised. While the discretion is unfettered, it is nonetheless "confined by the subject matter, scope and purpose of the legislation under which it is conferred on the Tribunal must form its view of what the justice of the particular case requires according to reason: *Anderson* at [76];

(3) In connection with civil penalties and their purpose, the Tribunal said at [78]:

> It has been held in the Full Court of the Federal Court that there are at least three purposes of imposing a penalty: punishment; deterrence; and rehabilitation, Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543 at [93]; [2007] FCAFC 65. It should also be noted, however, that the High Court in Commonwealth v Director, Fair Work Building Inspectorate (2015) 258 CLR 482; [2015] HCA 46 observed at [55] that the purpose of civil penalties is primarily protective in promoting the public interest in compliance and punishment and rehabilitation may be of little or no significance.
>
> In Ponzio at [93] and [94], Lander J also observed:
>
> > "93 …The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment…. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend …. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons …. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. ….
> >
> > 94 The individual or personal circumstances of the contravenor must be taken into account as also any relevant matter in mitigation. … Where one act may involve a number of contraventions, as in this

> case, it would be generally inappropriate to impose separate penalties because almost inevitably that would offend against the totality principle as known to the criminal law."

(4) The purpose of 247A is to provide an incentive to comply with orders. Put another way, a penalty is to deter persons from failing to comply with orders: *Anderson* at [83]. This operates by way of a specific deterrent. There might also be a need for general deterrence in the sense of any penalty serving "as a warning to other persons who are or might become subject to an order concerning the operation, administration or management of a strata scheme that failure to comply with such order is likely to be met with significant consequences": at [84];

(5) The penalty should not be so low as to encourage the person subject to orders under the SSMA to ignore the orders and pay the penalty because it involves less trouble or expense in complying with the orders. On the other hand, the order should not be so large "as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat": *Anderson* at [85].

44 At [86], the Tribunal then said:

> Having regard to these matters and without attempting to be exhaustive, in our view the relevant factors to consider when determining whether and in what amount to impose a pecuniary penalty under s 202 of the 1996 Act include, where relevant:
>
> 1) The nature and extent of the contravention;
>
> 2) The circumstances in which the contravention took place;
>
> 3) The effect of the contravention on the operation, administration or management of the strata scheme in question;
>
> 4) The maximum penalty that may be imposed;
>
> 5) The need for deterrence, both specific and general;
>
> 6) The individual or personal circumstances of the contravenor;
>
> 7) Any other relevant mitigating circumstances;
>
> 8) Where there are a number of contraventions:
>
> a) whether it is appropriate to impose separate penalties; and
>
> b) whether the penalty or penalties are appropriate having regard to the totality principle.

45 The second case to consider is *Westbury*.

46 *Westbury* concerned the imposition of a civil penalty under the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act). As noted in the contravention decision, unlike the SSMA, under the NCAT Act the Tribunal's

power to impose a civil penalty under s 77 is only enlivened if an order of the Tribunal has been contravened "without reasonable excuse": *Westbury* at [16].

47 Despite this difference, it should be readily accepted that a person's excuse for not complying with an order under the SSMA is a relevant consideration to determining what if any penalty should be imposed. In this regard, it would ordinarily be expected that the excuse be a reasonable excuse. As stated in *Westbury* at [19] relevant factors in determining whether the excuse is reasonable would include:

> 1) the terms of the Tribunal's order and what was required to be done;
>
> 2) the history and circumstances in which the order was made;
>
> 3) the nature and extent of the contravention;
>
> 4) the reasons for non-compliance;
>
> 5) the effect on the party in whose favour the order was made and the steps taken to ameliorate any adverse effect;
>
> 6) what steps, if any, have been taken to avoid a contravention, including:
>
> > a) any request by the contravener to the person in whose favour an order has been made to seek to vary, stay or extend the time for compliance with the orders; and
> >
> > b) any application to the Tribunal to vary, stay or extend the time for compliance with the orders.

48 The obligation to prove a reasonable excuse is on the person asserted to have contravened the order: *Westbury* at [20].

49 Further, depending on the facts of the particular case, it can be accepted that although there is no prescription in the SSMA, matters of the type set out in s 74(4) of the NCAT Act may also be relevant considerations under s 247A of the SSMA in determining whether a civil penalty should be imposed and, if so, the amount of the penalty.

50 Finally, having referred to various cases identifying that the purpose of a civil penalty is to deter repetition of the conduct in question, the Tribunal noted the courts have applied what has been described as the "instinctive synthesis" approach to determining the quantum of penalty. At [31]-[33] the Tribunal in *Westbury* said:

> 31. The "instinctive synthesis" approach has been applied by courts in a number of cases when assessing the quantum of penalty. Edelman J (then of

the Federal Court) in Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd [2016] FCA 439 commented on the process of "instinctive synthesis" as an "accepted approach" to assessing pecuniary penalties, and observed as follows (emphasis added):

> "75. A **central underlying concern** in the process of instinctive synthesis is deterrence, both specific and general. As I explain below, there is a substantially reduced need for specific deterrence in this case….. **The importance of general deterrence has been constantly emphasised** over the life of pecuniary penalties. Nearly two decades ago, French J said in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152, that although there was no role in regulation for two of the three goals of criminal punishment (retribution and rehabilitation), the principal, and perhaps only objective of a penalty regime (putting to one side desert theories of penalty), is to "put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act"."

32. More recently in *ASIC v Commonwealth Bank* at [78], Beach J said, in the context of the civil penalty regime under consideration in that case:

> "…. ultimately the size of the penalty is a matter of discretion and the process of fixing the quantum is not an exact science. All of the circumstances must be weighed and the approach to be adopted is one of intuitive synthesis. Intuitive synthesis requires a weighing together of all relevant factors, rather than an arithmetical algorithmic process that starts from some pre-determined figure and then makes incremental additions or subtractions for each factor according to a set of pre-determined rules."

33. His Honour said further, "the maximum penalty must be given due attention because it has been legislated for, it invites comparison between the worst possible case and the case before the Court at the relevant time, and it provides a form of yardstick" (at [65]).

51 The final case to consider in the context of whether a penalty should be imposed and, if so, how much, is the recent High Court decision of *Pattinson*. In that case, the High Court reviewed various authorities concerning the approach to be taken and the relevance of the criminal law in the context of civil penalty proceedings. The High Court considered the purpose of civil penalties and the factors relevant to imposing a penalty.

52 At [14]-[19] the plurality in *Pattinson* said (in connection with the imposition of a civil penalty under s 546 of the *Fair Work Act 2009* (Cth) (citations omitted):

> 14 In *The Commonwealth v Director, Fair Work Building Industry Inspectorate* ("*the Agreed Penalties Case*"), French CJ, Kiefel, Bell, Nettle and Gordon JJ said that civil penalty provisions of the kind enacted in s 546 have a "statutory function of securing compliance with provisions of the [statutory] regime". Although it is accepted in the authorities that the courts may adapt principles which govern criminal sentencing to civil penalty regimes, "basic differences"

between criminal prosecutions and civil penalty proceedings mean there are limits to the transplantation of principles from the former context to the latter. Indeed, the Act is emphatic in drawing a distinction between its civil penalty regime and criminal proceedings. For example: a contravention of a civil remedy provision is not an offence; the rules of evidence and procedure for civil matters are applicable to proceedings relating to a contravention of a civil remedy provision; and a court must not make a pecuniary penalty order for a contravention of a civil remedy provision against a person who has already been convicted of an offence for substantially the same conduct.

15 Most importantly, it has long been recognised that, unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence. The plurality in the Agreed Penalties Case said:

> "[W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:
>
> 'Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the *Trade Practices Act*] ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.'"

16 In a similar vein, in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner*, the Full Court of the Federal Court cited the decision of French J in *Trade Practices Commission v CSR Ltd* and the reasons of the plurality in the Agreed Penalties Case as establishing that deterrence is the "principal and indeed only object" of the imposition of a civil penalty: "[r]etribution, denunciation and rehabilitation have no part to play".

17 In explaining the deterrent object of civil penalty regimes such as that found in the Act, the majority of this Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* approved the statement by the Full Court of the Federal Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* that a civil penalty:

> "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business".

18 In CSR, French J listed several factors which informed the assessment under the *Trade Practices Act 1974* (Cth) of a penalty of appropriate deterrent value:

> "The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:
>
> 1. The nature and extent of the contravening conduct.
>
> 2. The amount of loss or damage caused.

> 3. The circumstances in which the conduct took place.
>
> 4. The size of the contravening company.
>
> 5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
>
> 6. The deliberateness of the contravention and the period over which it extended.
>
> 7. Whether the contravention arose out of the conduct of senior management or at a lower level.
>
> 8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
>
> 9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention."

> 19 It may readily be seen that this list of factors includes matters pertaining both to the character of the contravening conduct (such as factors 1 to 3) and to the character of the contravenor (such as factors 4, 5, 8 and 9). It is important, however, not to regard the list of possible relevant considerations as a "rigid catalogue of matters for attention" as if it were a legal checklist. The court's task remains to determine what is an "appropriate" penalty in the circumstances of the particular case.

53 The plurality then said that a civil penalty should be proportionate “where that term is understood to refer to a penalty that strikes a reasonable balance between deterrence and oppressive severity”: *Pattinson* at [41].

54 Further, regard needs to be had to the text of the legislation permitting the imposition of a civil penalty to determine whether there is a constraint on imposing the maximum penalty “exclusively for the worse category of contravening conduct”: *Pattinson* at [49]. Absent such a constraint, the issue is one of effective deterrence in the particular case. The High Court said at [50]:

> 50 This Court's reasoning in the Agreed Penalties Case is distinctly inconsistent with the notion that the maximum penalty may only be imposed in respect of contravening conduct of the most serious kind. Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor's affairs as unattractive as it is open to the court reasonably to do.

55 As to how the maximum penalty is to be taken into account, the plurality said at [53]-[55] (citations omitted):

> 53 In a civil penalty context, the relevance of a prescribed maximum penalty as a yardstick was explained by the Full Court of the Federal Court in *Reckitt Benckiser*, where their Honours, citing *Markarian*, said:
>
> > "The reasoning in *Markarian* about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal. As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.
> >
> > Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed." (citations omitted).
>
> 54 Two aspects of the Full Court's reasoning in this passage from *Reckitt Benckiser* deserve particular emphasis here. The first is their Honours' recognition that the maximum penalty is "but one yardstick that ordinarily must be applied" and must be treated "as one of a number of relevant factors". As has already been seen, other factors relevant for the purposes of the civil penalty regime include those identified by French J in CSR.
>
> 55 The second point is that the maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed". This relationship of "reasonableness" may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.

Consideration

56 It is convenient to deal with this matter under three headings:

(1) Admissibility of Gillett report;

(2) Findings of fact;

(3) Determination of whether a penalty should be imposed and, if so, how much.

Admissibility of Gillett Report:

57 These proceedings concern an application for the imposition of a civil penalty. The Tribunal has power to deal with this application under its general jurisdiction: see NCAT Act s 28. The rules of evidence apply: NCAT Act s 38(3)(ii).

58 The Gillett report purports to contain opinion evidence. It also contains evidence of observations made by Mr Gillett of the area comprising the Lot and common property to which the June order relates.

59 The question of admissibility needs to be determined in the context of the report and having regard to the fact Mr Gillett gave oral evidence adopting the statement made and was cross examined about the content of his statement and oral evidence.

60 Part 3.3 of the *Evidence Act 1995* (NSW) deals with opinion evidence. Sections 76(1) and 79(1) relevantly provide:

> 76 **The opinion rule**
>
> (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
>
> 79 **Exception: opinions based on specialised knowledge**
>
> (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

61 Admissibility of the Gillett report was challenged on two bases.

62 First, the applicant said that the report did not comply with Procedural Direction 3. Relevant to the present challenge Procedural Direction 3 provides:

> 2. The Tribunal is bound by the rules of evidence in proceedings in exercise of its enforcement jurisdiction, proceedings for the imposition of a civil penalty in exercise of its general jurisdiction, proceedings under the Legal Profession Uniform Law (NSW) or Public Notaries Act 1997 concerning a question of professional misconduct and any other proceedings where so required by the relevant enabling legislation ("Evidence Rules Proceedings"), see, for example, s 35, s 38(2) and (3) and Sch 5 cl 20 of the NCAT Act. In Evidence Rules NCAT Procedural Direction 3 | Expert evidence 2 Proceedings, it is appropriate to require expert evidence to be prepared and presented in a matter which seeks to ensure its admissibility and usefulness.
>
> …
>
> 4. For proceedings to which it applies, this Procedural Direction sets out a code of conduct for expert witnesses.

…

6. In Evidence Rules Proceedings, a failure to comply with the code of conduct may, depending on the circumstances, render the report or evidence inadmissible or adversely affect the weight to be attributed to that report or evidence.

…

19. An expert's report must, either in the body of the report or in an annexure, include the following:

(a) an acknowledgement that the expert has read the experts' code of conduct and agrees to be bound by it;

(b) the expert's name, address and qualifications as an expert on the issue the subject of the report;

(c) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed);

(d) the expert's reasons for each opinion expressed;

(e) if applicable, that a particular issue falls outside the expert's field of expertise;

(f) any literature or other materials used in support of the opinions;

(g) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out;

(h) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

63 The applicant said the Gillett report did not comply with the Procedural Direction as the qualifications of the witness were not stated in the report.

64 I reject this submission. The qualifications are stated, albeit briefly. As to whether the qualifications provide sufficient information as to experience goes to the question of weight of any opinion expressed, not admissibility.

65 As to its content, the report records observations made by Mr Gillett during site inspections and his opinions arising from those observations and the reasons therefore. While brief, when read as a whole and in the context of Mr Gillett's oral evidence, it is capable of evaluation as to the expert's conclusions: *Forster v Hunter New England Area Health Service* [2010] NSWCA 106, per Macfarlan JA at [30]-[31], referring to *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705.

66 The second submission concerns s 32 of the DBP Act. That section provides:

32 **Professional engineering work only carried out by professional engineers**

(1) A person must not carry out professional engineering work in a prescribed area of engineering unless—

(a) the person is a registered professional engineer and the person's registration authorises the person to carry out the professional engineering work, or

(b) the person carries out the professional engineering work under the direct supervision of a person referred to in paragraph (a), or

(c) the person is authorised by the regulations to carry out the professional engineering work.

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

(2) If a person carries out professional engineering work in contravention of subsection (1)—

(a) no monetary or other consideration is payable for the carrying out of the professional engineering work, regardless of any contract or arrangement, and

(b) an amount paid for the carrying out of the professional engineering work is recoverable as a debt in a court of competent jurisdiction.

(3) In this section—

prescribed area of engineering means the following—

(a) structural engineering,

(b) civil engineering,

(c) mechanical engineering,

(d) fire safety engineering,

(e) electrical engineering,

(f) an area of engineering prescribed by the regulations.

67 The applicant submits that the Gillett report is inadmissible because it involves the carrying out of professional engineering work and Mr Gillett is not relevantly registered.

68 Professional engineering work is defined by s 31 of the DBP Act. That section provides:

31 **Professional engineering work**

(1) For the purposes of this Act, professional engineering work means engineering work that requires, or is based on, the application of engineering principles and data to—

(a) a design, or

(b) a construction, production, operation or maintenance activity,

relating to engineering.

(2) However, engineering work is not professional engineering work if—

(a) the work is only provided in accordance with a document that states the procedure or criteria for carrying out the work and the work does not require the application of advanced scientifically based calculations, or

(b) the engineering work is prescribed by the regulations as not being professional engineering work.

(3) For the purposes of this section, engineering work includes engineering services provided by a person.

69 Clause 14 of the *Design and Building Practitioners Regulation 2021* (NSW) excludes certain works from being professional engineering work as permitted by s 31(2)(b) of the DBP Act. Clause 14 provides:

> 14 **Certain work is excluded from being professional engineering work**
>
> (1) For the purposes of section 31(2)(b) of the Act, engineering work is not professional engineering work unless the work is carried out directly in relation to the design or construction of a building if the building, or a part of the building, is a class 2 building.
>
> **Example—**
>
> The Act and this Regulation apply to a mixed-use building comprising class 2, class 3 and class 6 buildings, including the building's class 3 and class 6 building parts.
>
> (2) In this clause—
>
> construction includes—
>
> (a) the making of alterations or additions to a building, and
>
> (b) the repair, renovation or protective treatment of a building.

70 While this building is a class 2 building, the work in question, namely the provision of a report in connection with civil penalty proceedings, is not work "carried out directly in relation to the design or construction of the building" and is therefore excluded from the operation of the DBP Act. Consequently, the DBP Act could not in the present case provide a basis for rejecting the evidence because the opinion presently being offered is not for the purpose of carrying out of professional engineering work in contravention of that Act.

71 Further, it is doubtful that any such opinion would, in any event, be inadmissible in proceedings in a court or tribunal even if providing the expert opinion is prohibited by the DBP Act. However, it is presently unnecessary to decide whether, in circumstances where an expert opinion is being offered as a design for the carrying out of works in support of an application for a work order

(for example under the Home Building Act 1989 (NSW)) the opinion is inadmissible and/or should be rejected as evidence of what work order should be made.

72 For these reasons, the Gillett report is admitted as evidence.

Findings of fact

73 The Tribunal concluded in the contravention decision that the respondent had contravened the June order by not carrying the work required by items 1-7 and 9 of Appendix A to that order. Those items were:

> 1 Move the air conditioning unit from its current position on the balcony, being on the second or lower level of the lot, adjacent to the balcony wall (as shown on page 3 of Exhibit C), and reinstate that air conditioning unit it in its former position, adjacent to the door to that balcony (as shown in the diagram on page 2 of Exhibit C).
>
> 2 Remove the bi-fold doors which currently lead to that balcony (as shown in the photo on page 46 of Exhibit A) and reinstate the sliding doors (as shown on the plan a copy of which is at page 50 of Exhibit A).
>
> 3 Remove the screening above the cement rendered wall on the rooftop, being on the third or upper level of the lot, (as shown in the photos on page 57 of Exhibit A and page 12 of Exhibit C).
>
> 4 Remove the cement-rendered wall on the rooftop (as shown in the photos on pages 12 and 13 of Exhibit C) so that it appears as shown on the plan (a copy of which is on page 49 of Exhibit A).
>
> 5 Remove the gate from the rooftop (as shown on pages 55 and 56 of Exhibit A and page 15 of Exhibit C).
>
> 6 Remove the tiles from the rooftop (as shown in the upper photo on page 15 of Exhibit C).
>
> 7 Remove the roofing material from the pergola on both levels of the lot.
>
> 9 Make good any areas affected by the above work so as to restore those areas to their condition prior to that work.

74 The evidence of the parties in respect to the question of what, if any, penalty should be imposed is set out above. This evidence must also be considered in the context of the contravention decision of the findings made.

75 75 In connection with that evidence the following factual findings are made:

(1) The works required by the June order in respect of items 1-7 and 9 above has not been completed.

(2) In respect of the item 1, the air conditioner was moved and then returned to the impermissible location.

(3) In respect of the gate (item 5) it has been detached from the wall but remains in the impermissible location.

(4) No other work has been done.

(5) The respondent has engaged an engineer to review aspects of the lot and common property, that expert attending the site on 9 July 2021. There was no evidence of any inspections after this date.

(6) The expert has provided opinions that the removal of the roof and tiles above and adjacent to the bifold doors (also required to be removed and replaced) will permit water ingress to the respondent's Lot.

(7) While the expert offered views as to drainage of the tiled area and the capacity to provide sufficient falls for drainage purposes, these views were unsupported by any measurements and were made in the context of visual observations only. Certainly, there was no evidence of any measurements being taken concerning relevant levels and falls of the original slab underlying the tiled area.

(8) There was evidence that the expert had not been provided with the relevant plans for the building. There was no evidence that the expert (or any other suitably qualified person) had been engaged by the respondent to:

    (a) review these plans and offer an opinion as to whether reinstatement to that specified in those plans would comply with relevant standards and provide adequate waterproofing; or

    (b) prepare a design and specification to reinstate the balcony and roof area to the original state as required by the June order.

(9) There was evidence that the existing transition between the covered outdoor tiled area and the indoor area through the bifold doors having no step up. However the evidence did not deal with the position if the tiles were removed (other than the possibility of localised pooling), particularly in the context of expert's concession in his oral evidence that the BCA did not require a minimum step up of 70mm and that no measurements had been taken of falls towards drainage points if the tiles were removed as part of the reinstatement work.

(10) To the extent Council and owners corporation approval was required, no design and specifications had been prepared for such work nor had any builder been approached or engaged to carry out such work.

(11) There was no evidence about whether a design could be prepared for the purpose of reinstatement and, if not, why not.

(12) Save as noted above, no work had been carried out to comply with the June order.

Determination of whether a penalty should be imposed and, if so, how much;

76 The respondent suggested he had a reasonable excuse for not complying with the June order. The respondent says the applicant failed to engage in discussions about the carrying out of the work and what work was required.

77 The Tribunal rejects this submission.

78 It is for the respondent to undertake all work to comply with the June order, including engaging consultants to undertake necessary design work and obtain necessary approvals. The evidence establishes this work was not done. The evidence does not establish it is not possible to comply with the June order or that any necessary approvals cannot be obtained. On the other hand, the absence of any evidence to suggest the building as originally constructed did not comply with relevant building standards and Council approvals or that building standards have now changed suggests reinstatement is possible.

79 79 While it might be suggested the applicant has failed to take steps to suggest to the respondent a design or work method that might address the possible problems raised by the expert, in my view there is no basis to conclude the applicant has failed to take steps to ameliorate the effects of non-compliance. Rather, the works involved relate to reinstatement works to lot and common property for which the Tribunal found the respondent responsible. Consequently the obligation is on the respondent to propose what work is required and, at his cost, obtain relevant expert advice and carry out that work.

80 80 As to the amount of the penalty, the maximum penalty under s 247A of the SSMA is 50 penalty units or $5,500. This is a factor to be considered in the manner set out in the cases referred to above. As with Pattinson, there is no statutory constraint that the maximum penalty should be "reserved for the worse case of contravening conduct" or that "contraventions be graded on a scale of increasing seriousness": *Pattinson* at [49].

81 Also relevant are the factors identified in *Anderson* and *Westbury* above.

82 In the present case:

(1) The June order required compliance by 3 October 2021.

(2) No extension of time was sought by the respondent from the Tribunal.

(3) No appropriate report has been prepared and/or submitted to the applicant concerning what can and cannot be done to comply with the June orders.

(4) The time to comply with the order was 11 months ago, the order having been made on 3 June 2021.

(5) The existing Gillett report does little more than point out problems which presently exist but does not provide solutions.

83 The respondent's conduct of removing and then returning the air conditioner to the impermissible location and of detaching but not removing the gate suggest some intentional disobedience of the June order. Further, the respondent's evidence from his expert in these proceedings and the failure of the respondent to engage an expert to prepare a report as to how compliance with the June order might be achieved also supports the view that the respondent is seeking to avoid compliance rather than trying to achieve compliance.

84 The authorities make clear that "civil penalties are imposed primarily, if not solely, for the purpose of deterrence". Deterrence is both specific and general.

85 This is the first occasion on which action has been taken against the respondent for contravention of the June order. There is no evidence that the respondent has previously failed to comply with orders of the Tribunal.

86 While there is a question as to whether a second application could be made for a penalty if contravention continues, this is presently not an issue raised by the parties. In this regard, unlike s 147(2)-(3) of the SSMA (which permits a second penalty to be imposed in the specified circumstances) s 247A is in different terms, including the constraint in s 247A(3) which provides:

> (3) A person is not liable to be punished twice if the person's act or omission constitutes both a contravention for the purposes of this section and—
>
> (a) a contravention for the purposes of a civil penalty provision of the *Civil and Administrative Tribunal Act 2013*, or
>
> (b) a contempt of the Tribunal.

87 There was no evidence to suggest the respondent did not understand the June order. The fact that he has engaged an expert suggests that he is aware of the need to obtain the assistance of qualified people to advise on necessary work to comply with the June order. However, his focus, at least in the expert assistance obtained so far and provided as evidence in these penalty

proceedings, is to challenge the June order and seek to avoid compliance rather than to seek assistance of experts to design and carry out the necessary work.

88 Further, the respondent's actions concerning items 1 (relocate air-conditioning) and 3 (gate removal) lead to the view that he does not intend to adhere to the orders made.

89 Consequently there is a need for a sufficient penalty for the purpose of "securing compliance" and to "deter repetition" of the contravenor.

90 Weighing these matters, it seems to me that the contravention warrants a penalty in the mid to high range but not the maximum.

91 In the absence any evidence concerning the financial circumstances of the respondent and the possibility of "oppressive severity", in my view the appropriate amount of the penalty is 35 penalty units or $3850.00. I will make an order for the respondent to pay a pecuniary penalty in that amount.

92 In doing so, the Tribunal has also considered whether the payment of the penalty should be the subject of a condition of the type made in *Anderson* (see orders 1 and 2). The power to do so is found in s 58 of the NCAT Act: *Westbury* at [167]. Anderson at [95]. Of the use of such a condition the Tribunal in *Anderson* said at [95]:

> In this context, we note that the Tribunal has the power to make conditional orders under s 58 of the NCAT Act. In order to enhance the incentive to comply with the order, it could be appropriate to make the payment of a penalty conditional on the contravenor not having complied with the order by a future date. In this way, the contravenor would be given the option of expending the funds necessary to do the work to comply with the order or paying a penalty and having to expend the funds necessary for the work in any event.

93 The parties did not make submissions on this topic and, in the absence of any submissions and evidence as to when the required works could be completed, considerations as to timing of the type identified in *Westbury* at [168]-[170] make such an order inappropriate.

Costs and other matters

94 The applicant seeks costs of these proceedings.

95 Unlike the position in Anderson (in which the provisions of the 1996 Management Act regulated the question of costs), s 60 of the NCAT Act appears to operate in respect of the present proceedings. Westbury dealt with costs of civil penalty proceedings where s 60 applies. It is appropriate to permit the parties to make submissions on this topic, a matter not dealt with at the hearing.

96 It is also appropriate to require the parties to make submissions concerning to whom the penalty should be paid. This is because, unlike s 147(6) of the SSMA (which relates to civil penalties for breach of bylaws) there is no provision requiring that "[a] monetary penalty is payable to the owners corporation, unless the Tribunal otherwise orders".

97 For this purpose I will also direct the Registrar to give notice of these orders and reasons to the Commissioner of Fair Trading to consider whether the Minister or Commissioner wishes to intervene and make submissions on the questions of to whom any civil penalty should be paid and the powers of the Tribunal in this regard.

98 In doing so, the parties' submissions might deal with the extent of the Tribunal's powers under ss 229 and 232 of the SSMA, the relevance of s 248 of the SSMA in deciding to whom the penalty should be paid, s 29(2)(a) of the NCAT Act (the power to make ancillary orders), s 78(4) of the NCAT Act (concerning recovery of civil penalties ordered to be paid under legislation other than the NCAT Act) and/or the power and appropriateness of the Tribunal making an order for the penalty to be paid in the manner previously prescribed in s 205 the 1996 Management Act.

Orders

99 The Tribunal makes the following orders:

(1) Pursuant to s 247A of the *Strata Schemes Management Act 2015* (NSW) the respondent is required to pay a pecuniary penalty of 35 penalty units being an amount of $3850.00.

(2) Order 1 is stayed pending determination of the issue of to whom the penalty should be paid (Additional Issue).

(3) In connection with the Additional Issue and the question of whether the respondent should be ordered to pay the applicant's costs of these proceedings the following directions are made:

(a) On or before 16 September 2022 the applicant is to file and serve written submissions in respect of the remaining issues;

(b) On or before 30 September 2022 the respondent is to file and serve written submissions in reply;

(c) On or before 7 October 2022 the applicant is to file and serve submissions in response;

(d) The parties submissions are to include submissions about whether an order should be made dispensing with a further hearing pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

(4) The Tribunal directs the Registrar to give a copy of these orders and reasons to the Commissioner of Fair Trading to consider whether the Minister or Commissioner wishes to intervene and make submissions about to whom a civil penalty imposed under s 247A of the *Strata Schemes Management Act 2015* should be paid.

(5) Any notice of intention to intervene should be filed and served within 21 days of the date of these orders.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar