
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF MATILDA UNITS, STRATA
SCHEME 33443 and METZGER [2023] WASAT 114

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 23 AUGUST 2023
FINAL SUBMISSIONS FILED 18 OCTOBER 2023

DELIVERED : 30 NOVEMBER 2023

FILE NO/S : CC 162 of 2023

BETWEEN : THE OWNERS OF MATILDA UNITS, STRATA
SCHEME 33443
Applicant

AND

PHILLIP METZGER
Respondent

Catchwords:

Strata Titles Act 1985 (WA) - Jurisdiction of Tribunal - Common property - Scheme dispute - Alleged breach of scheme by-laws - Serious adverse consequence - Declarations - Orders - Exercise of Tribunal's discretion - Monetary penalty - Resolution of scheme dispute

Legislation:

Criminal Code Act Compilation Act 1913 (WA), s 135
State Administrative Tribunal Act 2004 (WA), s 14, s 95

Strata Titles (General) Regulations 2019 (WA), reg 3(3)

Strata Titles Act 1985 (WA), s 10, s 13, s 14, s 44, s 44(2), s 45(1), s 45(2), s 47, s 47(1)(b), s 47(1)(b)(i), s 47(1)(b)(ii), s 47(1)(b)(iii), s 47(2), s 47(5), s 47(6), s 47(7), s 91(1), s 91(1)(b), c 91(1)(c), s 123, s 123(2), s 124(4), s 197, s 197(1)(a)(iv), s 197(2), s 197(2)(a), s 197(4), s 199, s 199(3)(a), s 200, s 200(1), s 200(2)(m), s 200(4), s 200(7), s 202, s 207, s 207(2), s 207(3), s 209, Pt 13

Disposal of Uncollected Goods Act 1970 (WA)

Result:

Declarations made

Orders made

Category: B

Representation:

Counsel:

Applicant : Mr P Monaco

Respondent : In Person

Solicitors:

Applicant : GV Lawyers

Respondent : N/A

Cases referred to in decision(s):

Adder Holdings Pty Ltd and The Owners of Harbour Pines Strata Plan 23297
[2022] WASAT 120

Arasi & Anor and The Owners of Beverley Court [2005] WASAT 197

Aussie Airlines Pty Ltd v Australian Airlines Ltd and Others (1996) 68 FCR 406

Currie v Dempsey [1967] 2 NSW 532

Dickinson v Minister of Pensions [1953] 1 QB 228

Minister for Immigration and Citizenship v Li (2013) 87 ALJR 618

Robins v National Trust Company Ltd [1927] AC 515

Robinson and Stevens [2009] WASAT 207

Seares and The Owners of Matilda Units Strata Plan 33443 [2018] WASAT 75

The Owners of 25, 27, 29, 31 Parry Street Fremantle Strata Plan 6413 and
Efficient Building Team Pty Ltd [2023] WASAT 3

The Owners of 875 Wellington Street, Strata Plan 13599 v Kamil
[2022] WASC 305

The Owners of Ellement 996 Strata Plan 53042 and Tobias [2022] WASAT 49

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 These proceedings concern a dispute at the strata scheme known as
'Matilda Units', located in Crawley with Kings Park within view at one
end and the Swan River at the other.

2 The scheme was created by the registration of Strata Plan 33443 on
4 May 1998 under the *Strata Titles Act 1985 (WA)* (**ST Act**).

3 Matilda Units comprises 12 lots and common property. There is an
undercover parking building and a six-level residential building. Each lot
comprises two part lots. One part lot is a cubic space for vehicle
parking within the undercover parking area on the ground floor and the
other part lot is cubic space within the residential building. Each of
the residential part lots includes a balcony area with a balustrade on the
edge of the balcony.¹ In these reasons, for convenience, I will refer to a
part lot as the lot. For example, I will refer to the cubic space for vehicle
parking for part Lot 9 as the car bay belonging to Lot 9, or Lot 9's car bay.

4 The applicant is The Owners of Matilda Units Strata Scheme 33443
(the **strata company**). The respondent is Mr Phillip Alexander Metzger
(**Mr Metzger**). According to Mr Metzger he has been living at
Matilda Units for the past 30 years.

5 On 3 February 2023, the council of the strata company resolved for
an application to be made to the Tribunal. Subsequently, on 8 February
2023, the strata company commenced proceedings against Mr Metzger
in the Tribunal under s 197(4) of the ST Act seeking the resolution of a
scheme dispute.

6 Under s 14 of the *State Administrative Tribunal Act 2004 (WA)*
(**SAT Act**), the Tribunal has two types of jurisdiction: original
jurisdiction and review jurisdiction. An application under s 197(4) of the
ST Act is within the Tribunal's original jurisdiction (s 209 of the ST Act).

7 The strata company alleges that Mr Metzger, without permission,
deposited personal items, goods, rubbish and other materials (together
the items) on the common property of the strata scheme, including on

¹ Exhibit 1 (Hearing Book) at pages 4 to 14 and *Seares and The Owners of Matilda Units Strata Plan 33443* [2018] WASAT 75 at [2] and [5].

the balcony appurtenant to Lot 9 and in the car bays belonging to Lot 9 and to Lot 2 contrary to the scheme by-laws.

8 The strata company seeks the following amended orders and declarations:²

- 1 A declaration pursuant to Section 199(3)(a) of the *Strata Titles Act (WA) 1985 (the Act)* that [Mr Metzger], the occupant of Lot 9 within the strata scheme, has contravened provisions of some of the scheme by-laws, namely:

Schedule 1 Governance By-Law

1 Duties of proprietors and occupiers

- (2) A proprietor, occupier or tenant of a lot shall –
- (a) use and enjoy the common property in such a manner as not unreasonably interfere with the use and enjoyment thereof by other proprietors, occupiers or tenants, or their visitors;

Schedule 2 Conduct By-Law 2

2 Behaviour of proprietors, occupiers and tenants within the scheme

A proprietor, occupier or tenant of a lot shall not:

- (a) use any lot or part of the common property for any purpose which may be a breach of any Strata Company by-law applying to the scheme, any local government authority regulation or by-law, or any other government and regulating authority law;
- (c) use any part of the common property for any purpose which may be unclean;
- (d) obstruct lawful use of common property by any person or permit to be done anything whereby any obstruction, restriction or hindrance may be caused to the entrances, exits, access roads, pathways, of any lot or any part of the common property to any person lawfully using the same;

² Exhibit 1 at pages 131 to 133. Leave was granted to the strata company to amend the orders sought by order of the Tribunal on 11 July 2023 (see Exhibit 1 at page 324).

- (i) deposit or throw upon the common property any rubbish, dirt, duct or other material likely to interfere with the peaceful enjoyment of the proprietor, occupier or tenant of another lot or of any person lawfully using the common property;

3 Use of common property

Except with the approval of the Strata Company, a proprietor, occupier, or tenant of a lot shall not –

- (b) use any portion of the common property for his or her own purposes.

9 Appearance of the lot

A proprietor, occupier or tenant of a lot shall maintain the appearance of the lot in such a manner that it is in keeping with the appearance of the other lots within the scheme in respect to tidiness and landscaping contained within the lot and shall not –

- (a) display any sign, advertising, placard, banner, pamphlet or like matter on any external part of his or her lot;
- (b) maintain within the lot anything visible from outside the lot that when viewed from outside the lot, is not in keeping with the rest of the building;
- (c) permit any tree, shrub or other plant contained within his or her lot, external to the building exceed a height of 4 metres or grow in a manner such that it restricts the outlook from any other lot or encroaches into any other lot.

23 Storage of large items on common property

No owner shall store items (e.g. sporting equipment, bicycles, windsurfers, boats, trailers, caravans) on any part of the common property otherwise than in accordance with written permission by the Strata Company and the covered area of garages shall only be used for the parking of motor cars and items used either for transport or recreation subject to the motor car and / or the items being wholly within the allocated area allowing adjoining bays comfortable access to their motor cars.

31 Vehicles, parking and visitors parking

31.5 An owner, occupier or other resident of a lot shall not on any part of the parcel intended for use as a car bay:

31.5.2 store any commercial, household or other goods;

2. An Order under Section 200(2)(m) of the *Strata Titles Act* (WA) 1985 (**the Act**) that [Mr Metzger] immediately:

2.1 Remove:

2.1.1 the safe stored in a visitor bay;

2.1.2 the items on common property appurtenant to Lot 9;

2.1.3 the items on common property in front of the emergency exit door of level four of the strata scheme;

2.1.4 the items stored in the garage lot being part Lot 9;

2.1.5 the items stored in the garage lot being part Lot 2.

2.2 Cease:

2.2.1 obstructing, restricting or hindering access to common property;

2.2.2 storing any goods or other material on common property;

2.2.3 using a designated visitors parking bay to store a safe or other goods;

2.2.4 impeding the ingress or egress of other lot owners to and from their lots;

3. Pursuant to Section 47(5) of the *Strata Titles Act* (WA) 1985, [Mr Metzger] pay to the strata company a penalty of \$5,000.00 for contravention of the by-laws, and / or a daily penalty of \$500.00.

9 Nothing in the ST Act requires Mr Metzger to prove that he has complied with the relevant scheme by-laws. This means that it is the for the strata company, who asserts the affirmative of the issue, to prove that

issue: *Robins v National Trust Company Ltd* [1927] AC 515 at [520], *Dickinson v Minster of Pensions* [1953] 1 QB 228 at [232] and *Currie v Dempsey* [1967] 2 NSW 532 at [537]. In other words, in these proceedings, the *onus probandi* (onus of proof) is on the strata company to produce reliable evidence to establish its claim that Mr Metzger has contravened various scheme by-laws as set out in the previous paragraph.

10 Mr Metzger describes Matilda Units as a lovely place to live, and apart from a few disputes between some owners about works to be carried out and a few heated Annual General Meetings (AGM), in general everybody gets along.³ Mr Metzger opposes the declarations and orders sought by the strata company and urges the Tribunal to dismiss the application on the basis that the claims made by the strata company against him are vexatious and spurious.⁴

11 It is Mr Metzger's position that what the strata company is doing is completely unlawful, including that the strata company failed to issue to him a notice of breach of the scheme by-laws which is required under the ST Act.⁵

12 Finally, Mr Metzger contends:⁶

They [the strata company] just came straight to the SAT [the Tribunal] because the whole idea of this application is just to harass and annoy me and [to] drive me out of the building and then – then when all the objectors have gone, then they can do whatever they like. Well, that's what they believe, but I'm not going – not ever[.]

13 While Mr Metzger strongly believes that he is being wronged by the strata company, for the reasons which follow I explain why I do not accept his contentions.

Relevant procedural history and evidence

14 The Tribunal made its usual orders programming the matter through to a final hearing on 23 August 2023. The orders required the strata company to file with the Tribunal and give to Mr Metzger all documents, indexed and paginated upon which it proposed to rely, and for Mr Metzger to file with the Tribunal and to provide a copy to the strata company of all documents, indexed and paginated on which he proposed to rely. Further, both parties were ordered to file with the Tribunal and

³ Mr Metzger's closing written submissions filed on 18 October 2023 at page 2.

⁴ Ibid at page 13.

⁵ ts 6-7, 23 August 2023.

⁶ ts 115, 23 August 2023.

provide a copy to the other party, a list of persons to be called to give evidence at the final hearing along with a short summary of their evidence.

15 As is usual in these types of matters, all documents filed with the Tribunal were taken into evidence (noting that submissions are not evidence). In making my decision for the Tribunal, I have had regard to the documents, which at the final hearing, the Tribunal marked as exhibits as follows:

- Exhibit 1: Hearing book prepared by the Tribunal and provided to the parties on 15 August 2023 pages 1 to 324;
- Exhibit 2: Bundle of documents filed by Mr Metzger on 21 August 2023 pages 1 to 313; and
- Exhibit 3: Certificate of Title of Lot 9 on strata plan 33443.

16 Counsel for the strata company called eleven witnesses. The witnesses are either a current owner or a former owner of a lot at Matilda Units.

17 Ms Mellanie Filler filed a witness statement with the Tribunal. It is dated 26 May 2023.⁷ At hearing, Ms Filler confirmed the contents of her statement. Ms Filler moved to Matilda Units in September 2021. Ms Filler gave evidence that one of Mr Metzger's vehicles was parked in her car bay (Lot 6) without permission and her requests for him to move it were ignored until notices were placed on the front door of Lot 9. Further, Ms Filler gave evidence about household items and rubbish stored in the car bay of Lot 9 as well as bulky items obstructing the fire escape and electrical cupboard on Level 4 which is where Lot 9 is located. Finally, Ms Filler gave evidence that Mr Metzger's rusting old safe that he left in one of the visitor's car bays impacts on the already limited parking available to guests.

18 Ms Diana Forsyth filed a witness statement dated 22 May 2023.⁸ At hearing, Ms Forsyth confirmed the contents of her witness statement. Ms Forsyth has lived at Matilda Units (Lot 4) for about one year. Ms Forsyth gave evidence that she saw a red Alfa Romeo and a silver Mercedes van that belong to Mr Metzger in the visitor car bays blocking at least two of the car bays and often three of the car bays due to poor parking. Further, Ms Forsyth gave evidence that these vehicles were

⁷ Exhibit 1 (Hearing Book) at page 122.

⁸ Ibid at pages 118 to 119.

only moved out of the visitor car bays when the strata company made its recent application to the Tribunal. She also gave evidence that Mr Metzger blocked the car park exit with a large truck when he was moving what appeared to be a large pile of broken furniture and rubbish into car bay belonging to Lot 9. Further, Ms Forsyth gave evidence that she again saw the same truck the following week, this time to deposit a large old blue coloured safe into a visitor car bay. Ms Forsyth said all of this rubbish left by Mr Metzger is a health hazard and she has noticed an increase in rats and other vermin.

19 Ms Margaret Sears filed a witness statement with the Tribunal on 6 June 2023 but is undated.⁹ At hearing, Ms Sears confirmed the contents of her statement. Ms Sears has owned Lot 8 at Matilda Units for the past 17 years and has been a resident for the past nine years. She gave evidence that Mr Metzger parks in car bays belonging to other owners without their permission, he leaves junk in the fire escape, he filled Lot 9's car bay with a pile of stuff, some of which appears to be flammable and a safety risk as well as leaving furniture, goods and other chattels on the common property including on the balcony outside of Lot 9. Ms Sears said that numerous requests have been made Mr Metzger to rectify these issues but without result.

20 Mr David Williams filed a witness statement with the Tribunal on 6 June 2023 but is undated.¹⁰ At hearing, Mr Williams confirmed the contents of his statement. Mr Williams gave evidence that he moved into his Lot 7 at Matilda Units in 2019. Mr Williams gave evidence that Mr Metzger left two of his vehicles in the visitor car bays for many months thereby making it extremely difficult for visitors and friends to visit people in Matilda Units as parking nearby is limited. Mr Williams says Mr Metzger parked his blue Mercedes vehicle in the car bay belonging to Lot 2 and his red Alfa Romeo vehicle in the car bay belonging to Lot 12 without permission. Mr Williams gave evidence that both of these vehicles are unregistered and without third party insurance and are of concern if there is an accident or damage to the undercover parking area of Matilda Units. Further, Mr Williams gave evidence that Mr Metzger has a silver Mercedes van which he has on occasion tried to park in the undercover parking area of Matilda Units. In addition, Mr Williams says that Mr Metzger consistently uses common property to store his huge amount of stuff including furniture, rolls of household insulation, a teddy bear, step ladders, a motor bike

⁹ Ibid at page 111.

¹⁰ Ibid at pages 108 to 110.

under the junk, a car battery and equipment. Finally, Mr Williams says that these items are unsightly and potentially dangerous and the items 'leak' over to adjacent car bays.

21 Ms Catherine Clarke filed a witness statement with the Tribunal on 6 June 2023 but is undated.¹¹ At hearing Ms Clarke confirmed the contents of her statement. Ms Clarke gave evidence that she lived at Matilda Units (Lot 1) for about eight years but moved out about 12 months ago. Further, Ms Clarke gave evidence that Mr Metzger uses the common property including the fire escape and other owners' car bays without permission to store his items. Ms Clarke described these items as unsightly piles, a fire hazard and in some instances encourage vermin. Ms Clarke says that when visitors come to Matilda Units they are appalled when confronted with the unsightly piles which are a 'mess'. Finally, Ms Clarke said the value of the Matilda Units have been negatively impacted because of Mr Metzger storing his items without permission on the common property and elsewhere and she will end up selling her lot at a loss.

22 Ms Patricia Shalala filed a witness statement dated 1 June 2023.¹² At hearing, Ms Shalala confirmed the contents of her witness statement. Ms Shalala gave evidence that Mr Metzger persistently continued to use her car bays from 1 February 2023, despite him agreeing on 12 May 2023 to remove all of his belongings from her car bays. Further, Ms Shalala gave evidence that while Mr Metzger removed his vehicle from her car bays on 17 May 2023, there remained 15 items of Mr Metzger's dismantled wooden furniture in her car bays for which she received a breach notice from the strata manager. Finally, Ms Shalala says that the items present a fire hazard and impact on the aesthetics of Matilda Units.

23 Ms Noelle Armstrong filed a witness statement with the Tribunal. It is dated 28 May 2023.¹³ At hearing Ms Armstrong confirmed the contents of her witness statement. Ms Armstrong gave evidence that Mr Metzger has filled every corner of Lot 9's car bay with his belongings which often overflow into the car bays of Lots 8 and 10. Further, Ms Armstrong gave evidence that Mr Metzger stores old furniture and other items on common property, on the rear balcony/entry walkway of Level 4 and within the adjacent fire escape stairwell and thereby creating a major obstruction in the event of a fire as well as a hazard for the cleaners attending Matilda Units. Further, Ms Armstrong gave evidence

¹¹ Ibid at page 105.

¹² Ibid at page 123.

¹³ Ibid at pages 115 to 117.

that Mr Metzger stored a very large safe in one of the visitor's car bays for nearly eight months thereby reducing the number of bays available for visitors and obstructed residents wanting to wash their vehicles. Ms Armstrong referred to photographs showing Mr Metzger's rubbish visible from the street level. Finally, Ms Armstrong says that Mr Metzger's items (which she described as 'rubbish') is aesthetically unacceptable and is devaluing Matilda Units.

24 Ms Margerie Kahlenberg filed a witness statement with the Tribunal on 6 June 2023 but is undated.¹⁴ At hearing, Mr Kahlenberg confirmed the contents of her witness statement. Ms Kahlenberg gave evidence that she has owned Lot 7 in Matilda Units for the past four years. Ms Kahlenberg says that Mr Metzger stores flammable items in Lot 9's car bay and uses the car parking area as his 'dumping ground'. Ms Kahlenberg gave evidence that Mr Metzger dumped a blue coloured safe in the visitors' car bay area. Finally, Ms Kahlenberg gave evidence that Mr Metzger deliberately trespasses onto other owners' property by using their car bays without permission to park his vehicles and to store or 'dump' his 'junk'.

25 Ms Mary Nenke filed a witness statement with the Tribunal on 6 June 2023 but is undated.¹⁵ At hearing Ms Nenke confirmed the contents of her statement. Ms Nenke has resided at Matilda Units (Lot 10) for about 15 years. She gave evidence that Mr Metzger stores old furniture, cardboard boxes, an old shopping trolley, china, magazines and rubbish on common property, in the entrance to the fire escape blocking access to both the fire escape and the fuse box. Further, Ms Nenke gave evidence that Mr Metzger has filled every corner of Lot 9's car bay with items that overflow into her car bays and the car bay belonging to Lot 8. Ms Nenke stated that often when she returns from the country, Mr Metzger has left his 'junk' in her car bays and in recent times also in the car bay belonging to Lot 2. Ms Nenke also gave evidence that Mr Metzger stored a very large ugly blue coloured safe in one of the visitor car bays which has reduced the number of parking bays available for visitors as well as obstructing access for residents to wash their cars. Finally, Ms Nenke says that Mr Metzger's 'rubbish' is a massive health and safety issue and is devaluing Matilda Units.

26 Mr Luke Hanner filed a witness statement with the Tribunal. It is dated 1 June 2023.¹⁶ At hearing Mr Hanner confirmed the contents of

¹⁴ Ibid at pages 102 to 103.

¹⁵ Ibid at pages 113 to 114.

¹⁶ Ibid at page 104.

his statement. Mr Hanner's family has owned Lot 12 at Matilda Units since 2020. Mr Hanner gave evidence that Mr Metzger parks one of his vehicles in the car bays belonging to Lot 12 despite repeated requests that he move his vehicle. Further, Mr Hanner gave evidence that Mr Metzger persistently parks in the visitor car bays and any open bays he can find in the undercover parking area, none of which belong to him as the bay allocated to Lot 9 is piled to the ceiling with his 'junk'. Finally, Mr Hanner gave evidence that Mr Metzger had a blue coloured safe placed on a pallet in the middle of one of the visitor bays which effectively reduced the amount of visitor parking available by 25%.

27 Mr Richard Clarke filed a witness statement with the Tribunal. It is dated 7 June 2023.¹⁷ At hearing Mr Clarke confirmed the contents of his statement. Mr Clarke gave evidence that he has owned Lot 1 at Matilda Units for the past eight years and has had to endure Mr Metzger parking up to three of his five motor vehicles on the common property as well as seeing large quantities of Mr Metzger's furniture and bric-a-brac stored and/or displayed on the common property. Mr Clarke stated that he and his wife have moved out after five years of Mr Metzger's breaching the by-laws. Mr Clark said that Mr Metzger's items (which he described as 'piles of rubbish') has devalued Matilda Units and he expects to make a loss of the sale of Lot 1.

28 Each of the strata company's witnesses gave their evidence in a straightforward and reasoned manner. However, as I note later in these reasons, I place no weight on the statements made by various witnesses for the strata company, that the lots at Matilda Units have decreased in value and that there is an increase in rats and vermin at Matilda Units because the statements are not supported by any objective evidence.

29 Mr Frank Turner and Ms Sharon Grey also filed a witness statement with the Tribunal. Neither of them attended the final hearing and therefore they were not able to have questions put to them by Mr Metzger. Because of this I have not considered Mr Turner's and Ms Grey's statements.

30 Turning to Mr Metzger. He gave oral evidence at the final hearing. Mr Metzger's filed his witness statement dated 20 June 2023 with the Tribunal.¹⁸ At hearing Mr Metzger confirmed the contents of his statement. Mr Metzger gave evidence that the owners of Lots 1, 4, 5, 6, 7, 8 and 10, whom he says comprises the council, conspired to commit

¹⁷ Ibid at page 129.

¹⁸ Ibid at pages 302 to 314.

two crimes with another entity to prevent all and proper notices being served on the owner of Lot 9 in accordance with the ST Act in order to alter unlawfully the scheme by-laws. Further, Mr Metzger gave evidence that the strata company conspired in calling the AGM in late 2022 without lawful notification to the owner of Lot 9 and therefore that AGM is a nullity. Mr Metzger also gave evidence that he is not in breach of any scheme by-law and in any event Sch 2 by-laws 23 and 31 are unlawful and therefore void. Further, Mr Metzger gave evidence that he claims by adverse possession the balcony appurtenant to Lot 9 and that any property left on the common property is to be dealt with in accordance with the *Disposal of Uncollected Goods Act 1970 (WA)*. Finally, it is Mr Metzger's evidence that he may store any goods of his choosing in Lot 9's car bay in accordance with the ST Act.

31 Mr Metzger called two witnesses.

32 First, Mr Jeffrey Pierce Web who did not file a witness statement. Mr Web is a director of two private companies and has been in the professional rock lobster fishing industry for about 40 years. Previously, Mr Web worked as a licensed electrical contractor for about 45 years. Mr Web gave oral evidence that since about 2014, he and Mr Metzger were neighbours in a strata complex in South Perth and that while they are friendly, they are not close friends. Further, Mr Web said that Mr Metzger was elected to the council of that strata complex and he found Mr Metzger good to talk to about matters regarding the complex as he has a good knowledge of the by-laws. Mr Web also gave evidence that he respected Mr Metzger's opinion as a member of the council. Finally, Mr Web said that he did not know what the subject matter of the dispute between the strata company and Mr Metzger in these proceedings was about.

33 Second, Ms Jasena Hayna Annie Web who did not file a witness statement. Ms Web is married to Mr Web. Ms Web gave oral evidence that she came to know Mr Metzger when he was a member of the council in the strata complex in South Perth. Ms Web gave evidence that Mr Metzger was always polite at meetings and easy to talk with and that he gave her answers to questions asked. Finally, Ms Web said that she did not know the subject matter of the dispute between the strata company and Mr Metzger in these proceedings was about.

34 The evidence of Mr and Mrs Web is of limited assistance. This is because neither of them were aware of the nature of the dispute between the strata company and Mr Metzger before the Tribunal. Both Mr and

Mrs Web focused on how they saw and interacted with Mr Metzger at the strata complex in South Perth. Because of this I attach no weight to Mr and Mrs Web's evidence.

Issues

35 It is common ground that Mr Metzger has items on the common property including in a visitor car bay, in front of the emergency exit door on Level 4, on the balcony appurtenant to Lot 9 and in the car bays belonging to Lot 9 and Lot 2.

36 The strata company submits that this constitutes a breach of the following by-laws by Mr Metzger:

- Schedule 1 Governance by-law 1(2)(a); and
- Schedule 2 Conduct by-laws 2(a), 2(c), 2(d), 2(i), 3(b), 9(b), 23 and 31.5.2.

37 Mr Metzger rejects the strata company's position and says that he is entitled to store the items in the car bay belonging to Lot 9 in accordance with the ST Act.¹⁹ Further, in support of his position, Mr Metzger states:²⁰

... You've got the right to store what you like in the garage, but you have to understand I – my partner died and then my mother died, then I've been subjected to landlords ringing up saying, 'You can't stay here in this warehouse because Mr Thurlow has died. You have to get the stuff out.

It is very hard to get warehousing. I've got a friend that I've put most of it – a bulk of – bulk of the stuff in there, and this is only the residue. I don't intend to keep it there forever because I want to use the car bays, or course, myself. I don't – I don't want to have that stuff, sort of, there, but I've been subjected to something that was beyond my control and – and with the safe – the safe would have been gone a long time ago, but unfortunately – it was only supposed to be there for a few hours, and then the people who were supposed to come and get it didn't come, and then I organised to put it into an auction and then they didn't want it and then – and then – and then since then it has been vandalised[.]

38 The issues that require determination in these proceedings are:

- (1) Whether the Tribunal has jurisdiction to determine the dispute between the strata company and Mr Metzger?

¹⁹ Ibid at page 304.

²⁰ ts 115, 23 August 2023.

- (2) Whether Mr Metzger has items on the common property including on the balcony appurtenant to Lot 9 and/or the car bay belonging to Lot 9 and/or to Lot 2? If so, whether Mr Metzger has contravened Sch 1 by-law 1(2)(a) and Sch 2 by-laws 2(a), 2(c), 2(d), 2(i), 3(b), 9(b), 23 and/or 31.5.2?
- (3) Whether the Tribunal should exercise its discretion to make the declarations sought by the strata company under s 199(3)(a) of the ST Act?
- (4) Whether the Tribunal should exercise its discretion to make the orders sought by the strata company under s 200(2)(m) of the ST Act?
- (5) Whether the Tribunal should impose a monetary penalty sought by the strata company under s 47(5) of the ST Act?

39 I will now set out the legal framework relevant to these proceedings by reference to the ST Act. Next, I will set out relevant provisions of the ST Act in relation to common property, scheme disputes, requirements for resolutions and the exercise of the Tribunal's discretion to make declarations and orders. I will then make relevant findings of fact and set out the parties' main contentions. Finally, I will address each of the issues for determination in turn.

Legal framework

Strata plan

40 On 4 May 1998 the Registrar of Titles registered Strata Plan 33443. The parcel and building is described as:

A six level residential complex of brick and concrete construction comprising twelve units.

41 On 5 October 1998 notification (G917589) was given to the Registrar of Titles for the change of by-laws whereby the by-laws in Sch 1 and Sch 2 to the ST Act were repealed and a new Schedule 1 by-laws numbered 1 to 23 and a new Schedule 2 by-laws 1 to 26 were adopted.

42 Finally, on 7 December 2022 notification (P380717) was given to the Registrar of Titles to register:

- (a) the amendment to the strata titles scheme by registration of a consolidated set of scheme by-laws (first consolidation);
- (b) the addition of governance by-law 24 (costs of recovering unpaid contributions and other amounts);
- (c) the repeal of conduct by-law 12 (air conditioning installation); and
- (d) the addition of conduct by-law 12 (air conditioning installation), 27 (fire control), 28 (electronic surveillance/CCTV), 29 (doors and floor coverings) and 30 (vehicles, parking and visitor parking).

ST Act

43 A strata scheme is the manner of division of a parcel of land into lots, or lots and common property, under a strata plan, and the manner of the allocation of unit entitlements among the lots, and the rights and obligations as conferred or authorised by the ST Act, between themselves, of owners, others having proprietary interests in, or the occupants of, the lots and the strata company.

44 A strata company, relevantly for a strata scheme, is a body corporate constituted under s 14 of the ST Act by the owners of the lots upon the registration of the strata scheme.

Common property

45 The common property of a strata scheme relevantly comprises any lot or lots shown on the survey-strata plan to be common property (s 10 of the ST Act). The common property is held 'as a tenant in common with the other owners of lots in the scheme, proportional to the unit entitlements of their respective lots' (s 13 of the ST Act).

General duty of strata company

46 Section 91(1) of the ST Act sets out the general duty of the strata company. Relevantly, s 91(1)(b) and (c) of the ST Act states as follows:

- (1) A strata company must —
 - ...
 - (b) control and manage the common property for the benefit of all the owners of lots; and

- (c) keep in good and serviceable repair, properly maintain and, if necessary, renew and replace —
 - (i) the common property, including the fittings, fixtures and lifts used in connections with the common property; and
 - (ii) any personal property owned by the strata company,

and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause.

Scheme by-laws

47 The strata company may, subject to the ST Act, by resolution of the strata company, make governance by-laws or conduct by-laws for the strata titles scheme (s 44 of the ST Act). The resolution to make governance by-laws must be by resolution without dissent (s 44(2) of the ST Act).

48 Scheme by-laws may apply to the strata company and a member, for the time being, of the strata company for the strata titles scheme (s 45(1) of the ST Act). Importantly every person to whom the scheme by-laws apply must comply with the by-laws as if the by-laws were a deed containing mutual covenants to observe and perform the matters set out in the by-laws (s 45(2) of the ST Act).

49 Section 123(2) of the ST Act provides that a resolution is a resolution without dissent for a scheme, that is not a 2-lot scheme, if:

- (a) 14 days' notice of the terms of the proposed resolution is given to each member of the strata company before voting on the resolution opens; and
- (b) no vote attached to a lot in the scheme is cast against the resolution.

50 The scheme by-laws relevant for these proceedings are set out above at [8].

Resolution of scheme dispute

51 Section 197 of the ST Act provides for the resolution of certain 'scheme disputes' including a dispute about the performance, or the failure to perform, a function conferred or imposed on a person by the ST Act or the scheme by-laws (s 197(1)(a)(ii) of the ST Act) or a

dispute between scheme participants about the resolution or decision of the strata company (s 197(1)(a)(iv) of the ST Act).

52 Section 197(2) of the ST Act states the following, relevantly, are 'scheme participants':

(a) the strata company for the strata titles scheme;

...

(d) a member of the strata company for the strata titles scheme;

...

53 Section 197(4) of the ST Act provides that an application to the Tribunal may be made by a party to the dispute for the resolution of a scheme dispute.

Tribunal proceedings

54 Part 13 of the ST Act deals with Tribunal proceedings. In proceedings under the ST Act, the Tribunal *may* make any order it considers appropriate to resolve the dispute or proceeding (s 200(1) of the ST Act).

55 The types of orders that the Tribunal *may* make are set out in s 200 of the ST Act and include, for example, an order under s 200(2)(m) of the ST Act requiring a person to take specified action or to refrain from taking specified action to remedy a contravention or prevent further contraventions of the ST Act, scheme by-laws or a strata management contract.

56 In addition, the Tribunal *may* provide that the order is to be taken to have come into effect on a date earlier than the date of the order (s 200(4) of the ST Act, or that the order is remain in force for a specified period, until a specified event or until further order (s 200(7) of the ST Act).

57 Instead of, or in addition to any order that the Tribunal may decide to make to resolve the dispute or proceeding, s 199 of the ST Act provides that the Tribunal *may* make a declaration concerning a matter in the proceeding. An example of a declaration that the Tribunal may make is to declare that a specified person has or has not contravened a specified provision of the ST Act or the scheme by-laws (s 199(3)(a) of the ST Act).

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

Key facts

59 Having regard to the dispute before the Tribunal in these proceedings, the key facts are quite limited and not in any real dispute. Having considered all the evidence before me, I make the following findings of fact which are relevant to the issues to be determined in these proceedings:

- Mr Metzger is an occupier of Lot 9 which is on Level 4 of Matilda Units;
- Mr Metzger has a blue coloured safe on the common property, being a visitor car bay. It has been there for some time and is still there;
- Mr Metzger has items including furniture, goods and other chattels on the common property. The items have been there for some time and are still there;
- Mr Metzger has items including old furniture and cardboard boxes on the balcony appurtenant to Lot 9. The items have been there for some time and are still there;
- Mr Metzger has items including a shopping trolley full of magazines and two large weights on the common property being in front of the emergency exit door of Level 4 of Matilda Units. The items have been there for some time and are still there;
- Mr Metzger has items including furniture, rolls of household insulation, a teddy bear, step ladders and a car batter in the car bay of Lot 9. The items have been there for some time and are still there;
- Mr Metzger has items being dismantled wooden furniture in the car bay of Lot 2. On 21 May 2023, the owner of Lot 2 received a notice of breach of by-laws;
- Mr Metzger parks his vehicles in car bays belonging to other lot owners without their permission;

- The strata company's witnesses are concerned that Mr Metzger's items (see above) are unsightly, a safety and fire hazard and encourage vermin to Matilda Units; and
- The strata company's witnesses have requested Mr Metzger to remove the items, but he has failed to do so.

Parties' contentions

60 In summary, the strata company's position in relation to the items may be summarised as follows:²¹

- (a) Mr Metzger:
- deposits or stores items (a safe) on the common property, being a visitor's car bay;
 - deposits or stores items on the balcony appurtenant to Lot 9;
 - deposits or stores items in the car bays belonging to Lot 9 and Lot 2 which items are visible from the outside the car bays and when viewed from the outside the car bays are not in keeping with the rest of the building;
 - deposits or stores items on the common property in front of the emergency exit door of Level 4 of the strata complex; and
 - parks his motor vehicles in car bays belonging to other owners without permission.
- (b) The storage of items on the common property by Mr Metzger constitutes a safety and health risk, including obstruction of the emergency exit on Level 4 and that the items in the car bays of Lot 9 and Lot 2 constitute a health, safety and fire risk.
- (c) The storage of items on the common property and in the car bays of Lot 9 and Lot 2 is having a significant and detrimental impact on the appearance of the strata scheme and the respective values for individual lots within the strata scheme and the reputation of the strata scheme.

²¹ Mr Metzger's final submissions filed on 18 October 2023 at page 3.

- (d) Owners and occupiers of the strata scheme individually and collectively have been severely and adversely impacted by the deposit or storage of items by Mr Metzger on the common property and in the car bays belonging to Lot 9 and Lot 2.

61 The strata company relies on s 47(1)(b)(i) of the ST Act in its application for an order enforcing scheme by-laws where the contravention has had serious adverse consequences for a person other than Mr Metzger.

62 Mr Metzger's position in relation to the items, may be summarised as follows:

- (a) He denies anything he has stored is rubbish.
- (b) He is entitled to store the items of his choosing in the car bay belonging to Lot 9 in accordance with the ST Act.
- (c) There are no lawful by-laws that indicate what types of items that cannot be reasonably stored upon/within a lot.
- (d) He denies he has breached Sch 1 by-law 1(2)(a) and Sch 2 by-laws 2(c), 2(d), 2(i) and 3(b) in relation to the safe and items of personal property, goods and rubbish on the common property and on the balcony appurtenant to Lot 9.
- (e) He denies he has breached Sch 2 by-laws 3(b), 23 and 31.5.2 in relation to items of personal property, good and rubbish in the car bays belonging to Lot 9 and Lot 2. In any event he says by-laws 23 and 31 are unlawful and therefore void.
- (f) He claims adverse possession of the balcony appurtenant to Lot 9 on the north side of the building. Under Purple Title the balcony was part of Lot 9's apportioned use. The parcel is bound by a wrought iron gate emblazoned with 'Unit 9' and a sign stating 'Keep Out Private Property' for the past 50 years. His occupation of the parcel is brazen, notorious and well documented including yearly photographs. He intends to apply for the transfer of the said parcel at the same time as transferring the title to himself.
- (g) Any items left on the common property may be dealt with under the *Disposal of Uncollected Goods Act 1970* (WA).

63 Mr Metzger urges the Tribunal to dismiss the proceeding on the following grounds:

- (a) the strata company conspired to commit two crimes with another entity to prevent notices being served on the owner of Lot 9;
- (b) the strata company conspired in the calling of an AGM without lawful notification to the owner of Lot 9;
- (c) the strata company and another entity committed the crime of conspiring to defeat the course of justice in breach of s 135 of the *Criminal Code Act Compilation Act 1913 (WA)*; and
- (d) the strata company conspired with another entity to mislead the Tribunal.

Consideration

Jurisdiction of the Tribunal

64 Mr Metzger contends that the Tribunal cannot determine the strata company's application. This is on the basis, according to Mr Metzger, that the strata company has not complied with s 47 of the ST Act.

65 First, Mr Metzger asserts that the strata company failed to give to him written notice of the alleged contravention of the strata scheme by-laws and failed to provide evidence to the Tribunal of any written notice served on him.

66 Second, Mr Metzger says that there is no objective evidence that any person has had serious adverse consequences as a result of his alleged contravention of the by-laws.

67 Third, Mr Metzger's position is that the strata company has failed to provide evidence that he has contravened the particular by-law(s) on at least three separate occasions.

68 In summary, Mr Metzger's position is that it is not the intent of the ST Act to provide an alternative strategy for the strata company to bring a complaint to the Tribunal when under the normal operation of the law it is a requirement to serve a lawful notice or that a member of the scheme has committed the same breach on three separate occasions.²²

69 In my respective view, Mr Metzger's position is misconceived. The reasons for this follow.

²² Mr Metzger's final submissions filed on 18 October 2023 at page 10.

70 Had the strata company made its application to the Tribunal under s 47 of the ST Act then, in my view, it would be necessary for me to deal with each of Mr Metzger's contentions (as set out above at [64] to [67]). This is because s 47 of the ST Act is a specific provision which deals with the enforcement of scheme by-laws. A strata company may make an application to the Tribunal under s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act without given written notice to a person alleged to have contravened the scheme by-laws if the contravention has had serious adverse consequences for a person other than the person alleged to have contravened the scheme by-laws, or alternatively, the person has contravened the particular scheme by-law on at least three separate occasions.

71 In these proceedings, the strata company made its application under s 197(4) of the ST Act, for the resolution of a scheme dispute. I will return to what the 'scheme dispute' is shortly (see below at [74]). There is no requirement under s 197 of the ST Act for written notice (as required by s 47(2) of the ST Act) to be given to Mr Metzger as to the particular by-law(s) the strata company alleges that he has contravened. Further, there is no requirement to satisfy the requirements of s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act concerning serious adverse consequences or that the particular by-law(s) has been contravened on at least three separate occasions in order to enliven s 197(4) of the ST Act. However, I will return to consider s 47(1)(b)(i) of the ST Act when I consider the strata company's application for a monetary penalty (see below at [132]).

72 Consequently, in my view, Mr Metzger's position is misconceived. I have therefore not further considered Mr Metzger's contentions that the strata company has failed to comply with s 47 of the ST Act.

73 Mr Metzger did not challenge the Tribunal's jurisdiction to determine the matter under s 197(4) of the ST Act. In any event, I am satisfied that the Tribunal has jurisdiction under s 197(4) of the ST Act to determine the 'scheme dispute' between the parties.

74 The 'scheme dispute' concerns whether Mr Metzger is permitted to leave items on the common property including on the balcony appurtenant to Lot 9 and/or in the car bays belonging to Lot 9 and Lot 2, and if Mr Metzger is not so entitled, what declarations and or orders should the Tribunal make to resolve the scheme dispute.

75 I am satisfied the scheme dispute (see above at [74]) is a dispute between scheme participants as that term is defined in s 197(2) of the

ST Act. This is because the strata company is listed in s 197(2)(a) of the ST Act as a scheme participant. While there was evidence adduced and submissions made as to whether Mr Metzger is the 'owner' or an 'occupier' of Lot 9, including Mr Metzger referring to a document titled 'Irrevocable Power of Attorney', it is not necessary for me to determine if Mr Metzger is the owner of Lot 9 for these proceedings, because the definition of scheme participant in s 197(2) of the ST Act includes an occupier of the lot. I am satisfied that Mr Metzger, at least, occupies Lot 9 because he states that he has lived at Matilda Units for about 30 years.²³

76 As an occupier, Mr Metzger is subject to the scheme by-laws just as an owner is subject to the scheme by-laws as provided for in s 45(1) of the ST Act, relevantly as follows:

- (1) Scheme by-laws may apply to the following:
 - (a) the strata company for the strata titles scheme;
 - (b) a member, for the time being, of the strata company for the strata titles scheme;
 - (c) an occupier or lessee, for the time being, of a lot, or the common property, in the strata titles scheme;
 - ...
 - (e) in the case of exclusive use by-laws — the owners and occupiers, for the time being, of special lots.

77 Importantly, s 45(2) of the ST Act states that each person to whom scheme by-laws apply must comply with the by-laws as if the by-laws were a deed (signed and sealed by each person to whom they apply) containing mutual covenants to observe and perform the matters set out in the by-laws.

78 I am satisfied that I *may*, in exercising the Tribunal's discretion, make any order that I consider appropriate to resolve the scheme dispute. This is provided for in s 200(1) of the ST Act. Further, under s 200(7) of the ST Act, the order made by the Tribunal may be expressed to remain in force for a specified period, until a specified event or until further order of the Tribunal.

²³ Ibid at page 1.

79 Under s 199 of the ST Act, I *may*, in exercising the Tribunal's discretion, make a declaration concerning a matter in these proceedings instead of any order that the Tribunal can make, or in addition to any order the Tribunal makes, in these proceedings.

80 In exercising the Tribunal's discretion, I *may* make a decision not to make an order or declaration. This is provided for in s 202 of the ST Act.

81 Finally, in exercising the Tribunal's discretionary powers under the ST Act, I must exercise that power reasonably: *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618.

Whether Mr Metzger has items on the common property and/or in the car bays belonging to Lot 9 and to Lot 2?

82 Mr Metzger described the evidence of the witnesses for the strata company as follows:²⁴

The orchestrated perjury committed by the applicants as witnesses is without any doubt the most outrageous and calculated commission in the last 3000 years of law. The applicants as witnesses conspired to mislead the Tribunal and [c]riminally [d]efame the [r]espondent. Falsely and without any evidence accusing the respondent of conduct that they are themselves guilty of as demonstrated in the 300 documents submitted by the respondent[.]

83 I do not accept Mr Metzger's assertion that the evidence of the strata company is:²⁵

... unbelievable and unsupported by any documents, expert witnesses, reports, sales evidence.

84 I accept the various statements made by the witnesses for the strata company about Mr Metzger's items – including the location and quantity of items. This is because the witnesses and/or counsel for the strata company took me to recent and relevant photographs to support their statements.²⁶ Mr Metzger did not challenge any of the photographs and conceded that he is the owner of the items.

85 However, I find the statements made by the witnesses for the strata company that:

²⁴ Ibid at page 12.

²⁵ Ibid at page 13.

²⁶ Exhibit 1 (Hearing book) at pages 80 to 90 and 134 to 154.

- (a) the value of their unit at Matilda Units has decreased; and
- (b) there are rats and vermin,

are subjective statements and are not supported by any objective evidence, for example, an independent real estate agent's report explaining the market for units at Matilda Units including valuation of units is affected or reduced because of Mr Metzger's items on the common property. Consequently, I place no weight on these statements.

86 Mr Metzger asserts that other lot owners have placed items on the common property, but he has not.²⁷ For reasons already explained I do not accept Mr Metzger's assertion that he had not deposited or stored items on the common property.

87 In conclusion, I find Mr Metzger deposited or stored the items on the common property in front of the emergency exit door of Level 4, on the balcony appurtenant to Lot 9, in the visitor car bay and in the car bays belonging to Lot 9 and Lot 2 as evidenced by the photographs which were not challenged by Mr Metzger.²⁸

Whether Mr Metzger is in contravention of Sch 1 by-law 1(2)(a) and Sch 2 by-laws 2(a), 2(c), 2(d), 2(i), 3(b), 9(b), 23 and/or 31.5.2?

88 The strata company urges the Tribunal to make declarations and orders against Mr Metzger with respect to his conduct and behaviour, where Mr Metzger deposited or stored items (which some owners described as 'rubbish') on the common property including a visitor's car bay and on the balcony appurtenant to Lot 9, in front of the emergency exit door on Level 4 and in the car bays belonging to Lot 9 and Lot 2, which they say is having serious and adverse consequences for the other owners and occupiers (apart from Mr Metzger) of Matilda Units.²⁹

89 The strata company relies on five by-laws as follows.

90 Schedule 1 by-law 1 concerns the duties of proprietors (owners) and occupiers. This by-law came into operation by the notification of change of by-laws (G917589) on 5 October 1998.³⁰ Schedule 1 by-law 1(2)(a) provides that an owner, occupier or tenant of a lot shall use and enjoy the common property in such a manner as not unreasonably to interfere with

²⁷ Ibid at page 7.

²⁸ Exhibit 1 (Hearing Book) at pages 124 to 128 and 134 to 142 and 147 to 154.

²⁹ Strata company's final submissions filed on 3 October 2023 at page 5.

³⁰ Exhibit 1 (Hearing Book) at pages 55 to 74.

the use and enjoyment thereof by other owners, occupiers or tenants, or their visitors.

91 Schedule 2 by-law 2 concerns the behaviour of owners, occupiers and tenants within the scheme. This by-law came into operation by the notification of change of by-laws (G917589) on 5 October 1998. Schedule by-law 2(a) provides that an owner, occupier or tenant shall not use any part of a lot or the common property for any purpose which may be a breach of any by-law applying to the scheme or local government regulation or law. Schedule 2 by-law 2(c) provides that an owner, occupier or tenant shall not use any part of the common property for any purpose which may be unclean. Schedule 2 by-law 2(d) provides that an owner, occupier or tenant shall not obstruct lawful use of common property by any person or permit to be done anything whereby any obstruction, restriction or hindrance may be caused to the entrances, exits, access road, pathways, of any lot or any part of the common property to any person lawfully using the same. Finally, Sch 2 by-law 2(i) provides that an owner, occupier, or tenant shall not deposit or throw upon the common property any rubbish, dirt, dust or other material likely to interfere with the peaceful enjoyment of the owner, occupier or tenant of another lot or any person lawfully using the common property.

92 Schedule 2 by-law 3 concerns the use of common property. This by-law came into operation by the notification of change of by-laws (G917589) on 5 October 1998. Schedule 2 by-law 3(b) provides that except with the approval of the strata company, an owner, occupier or tenant of a lot shall not – (b) use any portion of the common property for his or her own purposes.

93 Schedule 2 by-law 9 concerns the appearance of a lot. This by-law came into operation by the notification of change of by-laws (G917589) on 5 October 1998. Schedule 2 by-law 9(b) provides that an owner, occupier or tenant of a lot shall maintain the appearance of the lot in such a manner that is in keeping with the appearance of the other lots within the scheme in respect to tidiness and landscaping contained within the lot and shall not – (b) maintain within the lot anything visible from outside the lot that, when viewed from outside the lot is not in keeping with the rest of the building.

94 Schedule 2 by-law 23 concerns the storage of large items on the common property. This by-law came into operation by notification of change of by-laws (G917589) on 5 October 1998. Schedule 2 by-law 23 provides that no owner shall store items (eg sporting equipment,

bicycles, windsurfers, boats, trailers, caravans) on any part of the common property otherwise than in accordance with written permission by the strata company and the covered area of garages shall only be used for the parking of motor vehicles.

95 Schedule 2 by-law 31 concerns vehicles, parking and visitors parking. This by-law is an amendment to the scheme by-laws as part of the first consolidation (by notification P380717 on 7 December 2022).³¹ Schedule 2 by-law 31.5.2 provides that an owner, occupier, or other resident of a lot shall not on any part of the parcel intended for use as a car bay store any commercial, household or other goods.

96 There have been changes to the by-laws. The strata plan sets out in the document titled 'Record of Strata Titles Scheme Limitations, Interests, Encumbrances and Notifications' that is attached to the strata plan notification of changes to the scheme by-laws. There are two notifications on the strata plan.

97 First, there was a change to the by-laws more than 30 years ago, on 5 October 1998 (by notification G917589).³² Schedule 1 by-law 1 and Sch 2 by-laws 2(a), 2(c), 2(d), 2(i), 3(b), 9(b) and 23 came into operation on 5 October 1998.

98 Finally, on 7 December 2022 (by notification P380717) there was the first consolidation of the by-laws. The index of the by-laws highlights the by-laws deleted on the first consolidation.³³ There were five deletions.

99 There was no change to Sch 1 Schedule 1 by-law 1 and Sch 2 by-laws 2(a), 2(c), 2(d), 2(i), 3(b), 9(b) and 23.

100 There was, however, an addition to the governance by-laws by the addition of by-law 24 which concerns the costs of recovering unpaid contributions and other amounts. The document reflects that the by-law was passed by resolution without dissent where the voting period opened on 24 October 2022 and closed on 22 November 2022.³⁴ Further, the first consolidation repealed conduct by-law 12 concerning air conditioning installation and replacing it with a new by-law 12 for air conditioning installation and a new by-law 27 concerning fire control and, by-law 28 concerning electronic surveillance/CCTV, by-law 29

³¹ Exhibit 1 (Hearing Book) at pages 19 to 54.

³² Exhibit 1 (Hearing Book) at pages 55 to 74.

³³ Exhibit 1 (Hearing Book) at pages 46 to 47.

³⁴ Exhibit 1 (Hearing book) at page 54.

concerning doors and floor coverings and by-law 31 concerns vehicles, parking and visitor parking (although the notification refers to by-law 30 for vehicles, parking and visitor parking).

101 With respect to by-law 31, which concerns vehicle parking and visitor parking, that by-law is a conduct by-law which requires to be passed by way of a special resolution. This is provided for in s 44(2) read with s 124(4) of the ST Act. Whilst the document states a special resolution (as that term is defined in s 123 of the ST Act) was achieved in respect of by-law 31, there are no documents before the Tribunal to confirm this.

102 The allegation made by Mr Metzger that the owner of Lot 9 was not served proper notice of the proposed changes to the scheme by-laws is of a serious nature. However, besides making the assertion, Mr Metzger did not provide evidence to support his position. I therefore cannot deal with Mr Metzger's concern in resolving the scheme dispute. However, I note that it may be open to Mr Metzger to make an application to the Tribunal to challenge the validity of the resolutions made on 7 December 2022.

103 All the witnesses called by the strata company, which are either the owner or occupier of a lot at Matilda Units either in their witness statement and/or in giving oral evidence at the final hearing stated that Mr Metzger uses the common property to deposit or store the items in total disregard of the scheme by-laws. Many of the witnesses described Mr Metzger's items as 'rubbish'.

104 While Mr Metzger protests and states the strata company is harassing him and is improperly using these proceedings to force him out of his home of 30 years,³⁵ I find Mr Metzger's conduct unacceptable and in breach of the scheme by-laws for the following reasons.

105 First, Mr Metzger has by depositing or storing the items on the common property including the safe in a visitors' car bay and in front of the emergency exit door of Level 4, denied the other owners and occupiers at Matilda Units their right to reasonably use and enjoy the common property as well as obstructing the lawful use of common property. In short, Mr Metzger has used common property for his own purposes without authority of the strata company.

³⁵ Mr Metzger's final submissions filed on 18 October 2023 at page 19.

106 Second, the owners and occupiers' access to the common property
being the emergency exit on Level 4 is obstructed, restricted or hindered
due to Mr Metzger's items being deposited, stored or otherwise left in
front of the emergency exit.

107 Third, the safe in the visitor's car bay, which according to a number
of the witnesses for the strata company, has been there for many months,
reduces the number of visitor car bays available, in Mr Hanner's evidence
by 25%, for visitors to use. Mr Metzger does not have the written
permission from the strata company for the safe to be left for any period
of time in the visitors' car bay. Further, by storing the safe in the car bay,
Mr Metzger is using the visitor car bay for a use which it was not
intended to be used for.

108 Fourth, Mr Metzger has by depositing, storing or otherwise leaving
various items in the car bay belonging to Lot 9 and to Lot 2, where the
items are visible from outside the part lot, is not in keeping with the rest
of the building.

109 Fifth, Mr Metzger has by depositing, storing or otherwise leaving
various items including packing boxes on the balcony appurtenant to
Lot 9, which he denies on the basis that the balcony belongs to Lot 9 by
adverse possession (which I do not accept as there has been no
declaration of the adverse possession either by Landgate or by a court]),
where those items are visible from outside Lot 9 is not in keeping with
the rest of the building.

110 By his conduct of depositing, storing or otherwise leaving the items
on the common property and in the car bays belonging to Lot 9 and to
Lot 2, I find Mr Metzger has contravened the scheme by-laws Sch 1
by-law 1(2)(a) and Sch 2 by-laws 2(a), 2(d), 2(i), 3(b), 9(b) and 31.5.2.

111 In relation to Sch 2 by-law 2(c) I find Mr Metzger has not
contravened that by-law because apart from some witnesses for the strata
company stating there are rats and vermin, there is no objective evidence
to support a finding that Mr Metzger's use of the common property, that
is by depositing or storing the items on the common property, is for a
purpose which is not clean.

112 Finally, in relation to Sch 2 by-law 23 as it only applies to owners,
I cannot find that Mr Metzger, as an occupier of Lot 9, has contravened
that by-law.

Whether the Tribunal should exercise its discretion to make the declarations under s 199 of the ST Act?

113 The strata company seeks a declaration under s 199(3)(a) of the ST Act that Mr Metzger has contravened the scheme by-laws.

114 As already explained, Mr Metzger denies he has contravened any of the scheme by-laws and asserts that he is entitled to store the items in the car bay belonging to Lot 9 in accordance with the ST Act and that any items left on the common property should be dealt with in accordance with the *Disposal of Uncollected Goods Act 1970* (WA).

115 In *Adder Holdings Pty Ltd and The Owners of Harbour Pines Strata Plan 23297* [2022] WASAT 120 the Tribunal summarised the rules for granting declaratory relief espoused by Lockhard J in *Aussie Airlines Pty Ltd v Australian Airlines Ltd and Others* (1996) 68 FCR 406 at 415 (*Aussie Airlines*), as follows:

- The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies ... The answer to that question must produce some real consequences for the parties.
- The applicant for declaratory relief will not have sufficient status if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if the Tribunal's declaration will produce no foreseeable consequences to the parties.
- The party seeking declaratory relief must have a real interest to raise it.
- Generally, there must be a proper contradictor.

116 In my view, applying the rules for granting declaratory relief per *Aussie Airlines*, it is appropriate in this case to exercise the Tribunal's discretion to make declarations under s 199(3)(a) of the ST Act against Mr Metzger for the following reasons.

117 First, Mr Metzger's denial that he breached any of the by-laws after conceding that the items including the safe as evidenced by the photographs belong to him and are on the common property is not an abstract or hypothetical issue. Some real consequences must flow for the parties. In my view, a declaration by the Tribunal that Mr Metzger has breached Sch 1 by-law 1(2)(a) and Sch 2 by-law 2(a), 2(d) and 2(i), 3(b),

9(b) and 31.5.2 signals that Mr Metzger's conduct is not acceptable in the strata scheme and must be rectified promptly.

118 Second, the declarations sought, in my view, should produce foreseeable consequences where Mr Metzger complies with the scheme by-laws by removing the items that are on the common property, in the car bays belonging to Lot 9 and to Lot 2, near the exit fire stairwell on Level 4 and on the balcony appurtenant to Lot 9.

119 Third, the strata company, who seeks the declaratory relief has a real interest in this matter. This is because the strata company must under the ST Act control and manage the common property for the benefit of all the owners in the strata scheme (s 91(1)(b) of the ST Act).

120 In conclusion, I am satisfied that it is appropriate to exercise the Tribunal's discretion to make a declaration under s 199(3)(a) that Mr Metzger has contravened the following scheme by-laws: Sch 1 by-law 1(2)(a) and Sch 2 by-laws 2(a), 2(d), 2(i), 3(b), 9(b) and 31.5.2.

Whether the Tribunal should exercise its discretion to make the orders under s 200 of the ST Act?

121 The strata company also seeks orders (see above at [8]) under s 200(2)(m) of the ST Act requiring Mr Metzger to immediately remove the items from the common property, the balcony appurtenant to Lot 9, the exit fire stairwell on Level 4 and the car bays belonging to Lot 9 and Lot 2 and to take specified action to prevent further contravention or breaches of the scheme by-laws.

122 The strata company submits that Mr Metzger failed to remove the items notwithstanding being requested to do so and having been notified of these proceedings in February 2023, that is, more than eight months ago.

123 In *The Owners of Ellement 996 Strata Plan 53042 and Tobias* [2022] WASAT 49, I noted that the ST Act does not give any guidance on the exercise of the Tribunal's discretion to make an order and I referred to *Arasi & Anor and The Owners of Beverley Court* [2005] WASAT 197 (*Arasi*) where the Tribunal set out at [27] to [28] that, when exercising a broad discretion, the Tribunal must act in accordance with:

- (a) the provisions of the ST Act;
- (b) the principles of reasonableness and fairness;

- (c) the interests of the parties;
- (d) equity; and
- (e) due consideration of all the information at its disposal.

124 While the list set out in *Arasi* is not an exhaustive list and it is a list for exercising a 'broad discretion', in my view, it is appropriate in my consideration of whether to exercise the Tribunal's discretion to make an order under s 200(2)(m) of the ST Act (a 'narrow discretion') that I act in accordance with each of the items listed. Further, in my view, using the words of the Tribunal in *Robinson and Stevens* [2009] WASAT 207, I must apply my mind to the facts to determine if I should exercise the Tribunal's discretion to make the orders sought under the ST Act.

125 Acting in accordance with the list set out in *Arasi* (see above at [123]) and in applying my mind to the facts in the context where Mr Metzger conceded he has items on the common property including in the car bays belonging to Lot 9 and to Lot 2, I am satisfied in the circumstances of this case that an order under s 200(2)(m) of the ST Act is required.

126 The order will require that by 15 December 2023 Mr Metzger must remove:

- (1) the safe on the common property (in the visitor car bay);
- (2) all items on the balcony appurtenant to Lot 9;
- (3) all items on common property in front of the emergency exit door of Level 4; and
- (4) all items stored in the car bays belonging to Lot 9 and Lot 2.

127 Further, the order will require Mr Metzger to:

- (1) refrain from obstructing, restricting or hindering access to the common property;
- (2) refrain from storing, depositing or otherwise leaving any items, commercial, household or other goods or other materials on the common property contrary to Sch 1 by-law 1(2)(a) and Sch 2 by-laws 2(a), 2(d), 2(i) and 3(b);

- (3) refrain from impeding the ingress or egress of owners to and from their part lots (eg cubic space for vehicle parking within the undercover parking area on the ground floor for a part lot); and
- (4) refrain from storing, depositing or otherwise leaving any items, commercial, household, or other goods or materials in any car bay contrary to Sch 2 by-law 9(b) and 31.5.2.

128 The reasons for exercising the Tribunal's discretion to make the above order are as follows.

129 First, Mr Metzger conceded that he is the owner of the items identified by photographs shown to him located on the balcony appurtenant to Lot 9 and on the common property being the visitor car bay and the fire emergency exit on Level 4 and in the car bays belonging to Lot 9 and to Lot 2.

130 Second, while Mr Metzger protests that the other lot owners are in contravention of the by-laws including depositing personal items on the common property and parking vehicles without permission on the common property, that the AGM is a nullity and that he is proceeding with a separate application to the Tribunal, besides making the protest, there is no application from Mr Metzger before the Tribunal.

131 Third, it is appropriate for a strata company to make an application to the Tribunal when an owner or occupier or tenant fails to comply with the scheme by-laws. This is because the strata company has a general duty under the ST Act to maintain the common property for the benefit of all the owners (s 91(1)(b) of the ST Act).

Whether the Tribunal should impose a monetary penalty?

132 Finally, the strata company submits that the Tribunal should impose a penalty on Mr Metzger for his 'wilful and disrespectful' use of the common property and for his accumulation of items in the car bays belonging to Lot 9 and to Lot 2. The strata company submits that the penalty should be imposed against Mr Metzger in accordance with s 47(5) of the ST Act.

133 It is the position of the strata company that the rationale for imposing a monetary penalty includes compliance, deterrence or injunction.

134 In these proceedings, the strata company seeks a penalty of \$4,000 and a daily penalty of \$200 for every day that Mr Metzger fails to remove

the items.³⁶ This is different to the penalty of \$5,000 for contravention of the by-law and/or daily penalty of \$500 claimed in the strata company's application (see [8] above).

135 The Tribunal's power to impose a penalty is subject to the limitations set out in s 47(6) of the ST Act as follows:

...

- (b) a penalty may only be imposed if the Tribunal is satisfied of the matters set out in s 47(1)(b) or (4) as the case requires;
- (c) the penalty must not exceed an amount fixed by the regulations;
- (d) a daily penalty may be imposed for a continuing contravention only if that is authorised by the regulations.

136 Further, s 47(7) of the ST Act provides that the *Strata Titles (General) Regulations 2019* (WA) (**Regulations**) may:

- (a) specify a maximum amount that may be imposed by the Tribunal by way of penalty for contravention of scheme by-laws; and
- (b) specify circumstances in which a daily penalty may be imposed for a continuing contravention and a maximum amount that may be imposed as a daily penalty.

137 Regulation 3(3) of the Regulations provides:

- (a) The maximum amount that the Tribunal can impose by way of penalty for the contravention is \$2,000.

138 The Regulations do not specify circumstances in which a daily penalty may be imposed for a continuing contravention and a maximum amount that may be imposed as a daily penalty.

139 Although, Mr Metzger protests that he was not served written notice of the alleged breaches of the scheme by-laws, in these proceedings the strata company does not rely on s 47(1)(b)(iii) of the ST Act as there are no written notices in the evidence before the Tribunal.

140 Rather, the strata company relies on s 47(1)(b)(i) of the ST Act, stating that evidence given by the strata company's various witnesses demonstrate the severe and adverse consequences that the conduct and

³⁶ Ibid at page 10.

behaviour of Mr Metzger has had on them individually and collectively.³⁷ The adverse consequences are stated to be:

- poor aesthetics, amenity significantly diminished;
- decrease in value of lots;
- health hazard; increase in rats and other vermin;
- fire hazard; and
- obstruction/safety hazard.

141 The term 'serious adverse consequence' in s 47(1)(b)(i) of the ST Act is not defined. It therefore takes its ordinary meaning.

142 In *The Owners of 25, 27, 29, 31 Parry Street Fremantle Strata Plan 6413 and Efficient Building Team Pty Ltd* [2023] WASAT 3, a case which concerned the strata company's application for a monetary penalty for the enforcement of scheme by-laws under s 47(1)(b) of the ST Act, I stated the following at [105] to [108] regarding the term 'serious adverse consequence'.

105 The adjective 'serious' means:

2. of grave aspect.
5. weighty or important: *a serious matter*.
6. giving cause for apprehension; critical: *a serious illness*.

106 The adjective 'adverse' means:

4. opposite; confronting.

107 The noun 'consequence' means:

2. that which so follows; an effect or result.

108 Ordinarily therefore, the term 'serious adverse consequences' means a serious unfavourable effect or result.

143 While I am satisfied that Mr Metzger's behaviour and conduct by depositing or storing the items on the common property and in the car bays belonging to Lot 9 and to Lot 2 has caused other owners and occupiers significant inconvenience including causing a potential fire

³⁷ Ibid at page 3.

hazard on Level 4 in front of the emergency exit stairwell and an 'uninviting look' to Matilda Units, I am not satisfied, for reasons previously explained, that lots in Matilda Units have decreased in value or that Mr Metzger's items are a health hazard or attract rats and other vermin.

144 As previously stated, the strata company's application is an application for resolution of a scheme dispute. Allanson J in *The Owners of 875 Wellington Street, Strata Plan 13599 v Kamil* [2022] WASC 305 found the Tribunal had erred when it left unresolved a continuing dispute about whether that use of common property by one owner, for his own benefit (which was admitted) was a permissible use of common property.

145 In my view, on all the evidence before the Tribunal, and in circumstances where I will make declarations and orders (see above at [120] and [126] to [127]), it is *not* appropriate in this case to impose a monetary penalty. The reasons for this are as follows.

146 While the breaches of the by-laws cannot be condoned, if Mr Metzger fails to comply with the orders of the Tribunal, it will be open to the strata company to make an application to the Tribunal under s 207 of the ST Act for the enforcement of an order to act.

147 Under s 207(2) of the ST Act, *if* the Tribunal is satisfied that Mr Metzger has failed to comply with the orders of the Tribunal, or has only complied with the orders of the Tribunal in part only, then the Tribunal may relevantly:

- (a) vary, revoke or substitute the order made; and
- (b) make an order that the person to whom the order to act was given (in this case, Mr Metzger) pay to the applicant (in this case, the strata company) a specified amount by way of compensation for the failure to act or to refrain from acting.

148 The effect of s 207(2) of the ST Act is that if a person is ordered by the Tribunal to do something and they do not comply, then the Tribunal may order that person (in this case, Mr Metzger) to pay money to the other person (in this case, the strata company) equal to what it would cost to carry out the order to act.

149 Importantly, s 207(2) of the ST Act applies whether or not the person to whom the order to act was given has been convicted of an

offence under s 95 of the SAT Act before the revocation of the order. This is provided for in s 207(3) of the ST Act.

Conclusion

150 In conclusion, as I have made findings that Mr Metzger has breached various by-laws (see above at [110]) and the evidence before the Tribunal is that there is continuing dispute about whether Mr Metzger's use of the common property including the balcony appurtenant to Lot 9 and the car bays belonging to Lot 9 and to Lot 2 to deposit, store or otherwise leave items for his own benefit is permissible, I am satisfied that the following declarations and orders are to be made to resolve the scheme dispute.

Orders

The Tribunal declares:

Pursuant to s 199(3)(a) of the *Strata Titles Act 1985* (WA) the respondent has contravened the following scheme by-laws:

- (a) Schedule 1 by-law 1(2)(a); and
- (b) Schedule 2 by-laws 2(a), 2(d), 2(i), 3(b), 9(b) and 31.5.2.

The Tribunal orders:

1. Pursuant to s 200(2)(m) of the *Strata Titles Act 1985* (WA) the respondent shall by 15 December 2023 remove:
 - (a) all items on the balcony appurtenant to Lot 9;
 - (b) the safe on the common property (in or about a visitor car bay);
 - (c) all items on the common property in front of the emergency exit door on Level 4; and
 - (d) all items in car bays belonging to Lot 9 and Lot 2.and make good any damage caused to the common property.
2. Pursuant to s 200(2)(m) of the *Strata Titles Act 1985* (WA) the respondent shall:
 - (a) refrain from obstructing, restricting or hindering access to the common property;

- (b) refrain from storing, depositing or otherwise leaving any items, commercial, household or other goods or other materials on the common property contrary to Sch 1 by-law 1(2)(a) and Sch 2 by-laws 2(a), 2(d), 2(i) and 3(b);
- (c) refrain from impeding the ingress or egress of owners to and from their part lots (eg cubic space for vehicle parking within the undercover parking area on the ground floor for a part lot); and
- (d) refrain from storing, depositing or otherwise leaving any items, commercial, household, or other goods or materials in any car bay contrary to Sch 2 by-law 9(b) and 31.5.2.

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

MS R PETRUCCI, MEMBER

30 NOVEMBER 2023